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6 September 2019

Corporate Communications Department
Hong Kong Exchanges and Clearing Limited
8th Floor, Two Exchange Square
8 Connaught Place, Central
Hong Kong

Dear Sirs:

Consultation paper on Codification of General Waivers and Principles Relating to IPOs and Listed Issuers and Minor Rule Amendments

We are writing in response to the captioned consultation paper ("Consultation Paper"). Terms used in this letter have the meaning attributed thereto in the Consultation Paper.

A. General

In our view, the codification proposals set out in the Consultation Paper are largely uncontroversial. Subject to the matters stated below, we are generally in support of the proposals.

B. Clarifying different waiver practices

In our reading of the proposed rule amendments, the precise meaning of "codifying" existing waiver practice appears somewhat unclear. The concept of codification covers a number of possible approaches:

(a) ***No waiver required***: The Exchange may state that a waiver from a particular rule will no longer be required if the relevant conditions are met.

(b) ***Automatic waiver (technical waiver)***: The Exchange may still require relevant parties to apply for a waiver, but provides clarity by setting out the conditions which, if met, will automatically result in the Exchange exercising its discretion to grant the waiver.

(c) ***Quasi-automatic waiver***: The Exchange may still require relevant parties to apply for a waiver, but provides clarity by setting out the conditions which, if met, will normally result in the Exchange exercising its discretion to grant the waiver.

(d) ***Clarification of waiver considerations***: The Exchange may require relevant parties to apply for a waiver and indicate in a rule that a waiver from that rule is possible, and sets out some of the relevant considerations to be taken into account when considering a waiver application.

Owing to the different ways in which the draft rule amendments are framed, some or potentially all of these possible approaches seem to be indicated without sufficient clarity. For instance:

- The following proposed change apparently falls under category (a) above:
    - Rule 19A.38 (bonus / capitalisation issue by PRC company)
- It is not abundantly clear whether the proposed changes to the following rules fall below category (a) or category (b) above:
    - Rule 4.04 (financials post-track record period acquisition)
    - Rule 4.10 (banking information disclosure)
    - Rule 8.21 (change of year-end date)
    - Rules 11.09A and 14.66 (working capital statement for banking company)
    - Rules 13.46, 13.48 and 13.49 (annual / interim report; annual / interim results announcement)
    - Rule 13.51A (stock code)
- The following proposed changes apparently fall under category (d) (or potentially category (c)) above:
    - Rule 3.28 (company secretary qualification)
    - Rule 14.58 (aircraft acquisition)
    - Rule 19A.39C (share option scheme of PRC issuer)

In view of the above uncertainty, we believe it would be helpful to the market if the Exchange could provide further clarity as to when a waiver application is or is not required (i.e. whether category (a) applies as opposed to any of the other categories), and whether the conditions set out in the rules are exhaustive (i.e. crossing over from categories (b) to (c) and from (c) to (d) above).

C. Rule 4.04 – financial information for acquired business

We are in support of the proposal to codify the existing waiver practice for this rule. However, the main difficulty with the practical application of this rule is the concept of "proposed to be acquired" which seems to cover arrangements that fall short of a signed agreement.

In practice, practitioners have considerable difficulty determining the parameters of this rule. We respectfully urge the Exchange to provide more clarity in this respect, even though it is not expressly covered in the Consultation Paper.

D. Rule 8.21 – change of financial year-end date

One of the stated conditions for waiver is for the applicant to show that it would be able to satisfy the "relevant requirements under Rule 8.05" both before and after the proposed change. We believe this expresses the Exchange's concern that the change in year-end date must not be an attempt to circumvent the listing qualifications.

More clarity may be given on what "the relevant requirements under Rule 8.05" refer to. In our experience, the key motive for switching the year-end date without a technical reason may be to get around the ownership continuity requirement when the company applies for a listing.

E. Further suggestions for codifying waiver practice

There are other Listing Rule requirements in respect of which the Exchange may consider codifying existing waiver practice:

- Management presence

For a number of years it has been very common for listing applicants with a China- or overseas-based business to apply for and obtain a waiver from the Rule 8.12 requirement for management presence in Hong Kong. Upon a review of market precedents, we believe that the main grounds for granting a waiver do not vary hugely from case to case.

We believe this may be an additional area where the Exchange may consider codifying existing waiver practice.

- Disclosure on share option grantees

Another area where we believe waivers are commonly obtained (from both the Exchange and the SFC) is the requirement under Rule 17.02(1)(b), Appendix 1A para. 27 and para 10 of Part 1 of Third Schedule to the Companies (Winding Up and Miscellaneous Provisions) Ordinance ("C(WUMP)O") to disclose any capital of any group member which is under options and relevant information (including for example the relevant strike price(s) and the names and addresses of grantees of share options).

We note that share-based incentive schemes are typically an important part of the remuneration packages for high-tech or new economy companies. In the current drive to attract these issuers to our IPO market, we believe more can be done to simplify disclosure and facilitate these types of listings.

Again, based on market precedents, we believe that the key grounds for granting the relevant waivers and exemptions do not vary hugely from case to case. We respectfully invite the Exchange (in consultation with the SFC) to consider codifying at least part of the current waiver process with a view to streamlining the listing process, as well as ensuring that only relevant and useful information is provided to investors.

- Public float in dual listings

Under the current Rule 8.08, a listed company is normally required to maintain a public float of at least 25% of total issued share capital. Where the company has another class of shares listed on another market, the Hong Kong-listed class must constitute at last 15% of total issued share capital.

In addition, a listed company with a large market capitalisation may in some circumstances obtain a public float waiver, so that the 25% is reduced to a lower percentage that is not less than 15%.

In our experience, a company often obtains a waiver to the effect that its public float ("Public Float Figure") shall be the higher of (a) 15%; (b) such other percentage as the relevant class of shares may represent upon listing assuming no exercise of the over-allotment option; or (c) such other percentage as the relevant class of shares may represent upon listing after any exercise of the over-allotment option.

The Exchange's practice is that once the Public Float Figure is reached at the completion of listing, there is normally no mechanism for it to be further reduced. In other words, the public float waiver will be granted only once, which is at the time of the company's listing in Hong Kong.

We believe there may be some scope for this practice to be revisited, in light of the following practical difficulties:

(a) After a company is listed in Hong Kong, any subsequent issue and listing of another class of shares on an overseas market will necessarily increase the total number of shares in issue, and thereby dilute the Hong Kong-listed class of shares, resulting in a breach of the Public Float Figure. That is, unless the subsequent listing had been contemplated and already worked into the Public Float Figure at the time of agreeing this figure with the Exchange.

    In this regard, the Exchange's policy of granting the public float waiver only once in the company's life as a listed company may be unnecessarily restrictive. Some flexibility may be introduced here to cater for subsequent overseas listings by way of new issue.

(b) Where an company dual-listed in Hong Kong and the PRC is proposing to issue new shares to raise funds, regard must naturally be had to the difference between the company's A share and H share trading prices. Where the company is trading at a higher price on the A share market (which is not infrequently the case), it would be in the best interest of the company as well as shareholders' interest as a whole to issue more shares on the A share market since an equal amount of funds can be raised with less overall dilutive impact. This will, however, breach the 15% floor required by 8.08(1)(b) (or as that figure may be modified by agreement with the Exchange at the time of listing) and the company may be unnecessarily restricted if it is not possible for it to negotiate a reduction in the Public Float Figure.

It seems to us that scenario (a) above is a technical problem that will arise for any Hong Kong-listed companies seeking to list another class of shares overseas by way of new issue, while scenario (b) may arise for any company dual-listed in Hong Kong and China (regardless of the order of the listings). We respectfully ask the Exchange to consider providing more flexibility as well as more formal guidance on these issues.

F. Rule 9.10B – change of sponsors

The proposed new Rule 9.10B is substantially the same as relevant guidance already in GL7-09 and we have no objections to the reform.

We take this opportunity to bring to the Exchange's attention the fact that when there is change of sponsor, the outgoing sponsor firm is not technically bound to cooperate with any investigation that the incoming firm may wish to conduct in relation to the required assurance and clearance. The outgoing firm may or may not have legitimate reasons to decline to provide all the information requested, and in practice problems and delays may arise in the negotiation.

While under relevant SFC codes and guidelines a licensed intermediary owes a range of duties to the client, it is less clear what (if any) duty it has vis-a-vis another firm serving the same client as the successor to that intermediary. This is an aspect on which the Exchange may wish to discuss with the SFC.

We take this opportunity to stress that, in practice, without a specific duty for the outgoing sponsor firm to cooperate, there is and will continue to be a regulatory gap in requiring the incoming sponsor firm to provide assurances on the work done by the outgoing one.

G. Davis Polk Contacts

If you have any questions in relation to this submission, please contact Bonnie Chan ([redacted]) or Helena Chung ([redacted]).

Very truly yours,

[redacted]

Davis Polk & Wardwell