

## HKEx LISTING DECISION

HKEx-LD110-1 (October 2010)

Withdrawn, superseded by Japan Country Guide in December 2013

<b>Parties</b>	Company X - a company incorporated in Japan proposing to list on the Main Board
<b>Issues</b>	Whether the Exchange would consider Japan an acceptable jurisdiction under Chapter 19 of the Main Board Listing Rules
<b>Listing Rules and Regulations</b>	<ol style="list-style-type: none"><li>1. Chapter 19 of the Main Board Listing Rules (<b>Rules</b>)</li><li>2. Paragraph 14 of Appendix 3 to the Rules</li><li>3. Joint Policy Statement Regarding the Listing of Overseas Companies of 7 March 2007 (<b>JPS</b>)</li><li>4. Listing Decisions HKEx-LD65-1; HKEx-LD65-2, HKEx-LD65-3, HKEx-LD71-1, HKEx-LD80-1 and HKEx-LD84-1</li><li>5. Guidance Letter HKEx-GL12-09</li></ol>
<b>Decision</b>	<p>Japan is an acceptable jurisdiction of an issuer's place of incorporation under Chapter 19 of the Rules if Company X makes certain revisions to its constitutive document</p> <p>Future applicants incorporated in Japan may follow the streamlined procedures set out in Guidance Letter HKEx-GL12-09 and need not complete a detailed line-by-line comparison with the JPS</p>

## FACTS

1. Company X's head office, principal operations, assets and main revenue source were in Japan. Before filing a listing application, Company X enquired whether Japan would be an acceptable jurisdiction under Chapter 19.
2. It submitted that:
  - a. Japan adopts a civil law system, under which all legal matters and relationships are primarily governed by statutory laws rather than court judgments. The civil law system is also adopted in other jurisdictions accepted for listing on the Exchange, e.g., Germany and Luxembourg;
  - b. Financial Services Agency of Japan (**FSA**), the statutory securities regulator in Japan, is a full signatory of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information. In addition, the FSA had signed a Statement of Intent Concerning Cooperation, Consultation and the Exchange of Information with the Securities and Futures Commission of Hong Kong.
3. Company X provided a comparison table (**Comparison Table**) of the Hong Kong Companies Ordinance (**HKCO**) and Japanese laws and regulations, mainly the Japanese Companies Act (**JCA**), on shareholder protection matters based on the JPS framework as supplemented by Guidance Letter HKEx-GL12-09.

## **APPLICABLE RULES, REGULATIONS AND PRINCIPLES**

4. All listing applicants must ensure that they are able to and will comply with the Rules, the Securities and Futures Ordinance and the Hong Kong Codes on Takeovers and Mergers and Share Repurchases (**Takeovers Codes**).
5. Chapter 19 provides a general framework for overseas companies seeking a listing on the Exchange. In particular, under Rule 19.05(1)(b), when considering primary listing of securities of an overseas issuer, the Exchange may refuse the listing if it is not satisfied that the overseas issuer is incorporated in a jurisdiction which offers at least equivalent standards of shareholder protection to Hong Kong.
6. Where the Exchange believes that overseas issuer's jurisdiction of incorporation does not provide shareholder protection standards equivalent to Hong Kong, it may approve the listing of the overseas issuer if it makes the variations to its constitutive document the Exchange requires (see Note to Rule 19.05(1)).
7. The JPS formalised this process by setting out a list of shareholder protection areas the Exchange takes into account.
8. The standards in the JPS were compared against the standards of different overseas jurisdictions in Listing Decisions HKEEx-LD65-1, HKEEx-LD65-2, HKEEx-LD65-3, HKEEx-LD71-1, HKEEx-LD80-1 and HKEEx-LD84-1.
9. Guidance Letter HKEEx-GL12-09 sets out streamlined procedures for listing overseas companies. Under it, a potential applicant can benchmark the shareholder protection standards in its home jurisdiction to any one of the recognised or accepted jurisdictions, instead of benchmarking to Hong Kong.
10. Paragraph 14 of Appendix 3 requires that an issuer's constitutive document must provide that where any shareholder is required under the Rules to abstain from voting on any particular resolution or restricted to vote only for or only against any particular resolution, any votes cast by it or on its behalf in contravention of that requirement or restriction must not be counted.
11. The Rules require shareholders that are interested in the relevant transactions under Chapters 14 and 14A to abstain from voting at the general meeting to consider the transactions. In addition, controlling shareholders must abstain from voting on certain matters in a general meeting.

## **ANALYSIS**

12. Where an applicant proposes to change its corporate practices (e.g., by amending its constitutive document or administrative procedures) to achieve equivalence with Hong Kong shareholder protection standards, there may be more than one acceptable way to do so. The Exchange does not prescribe the method used.
13. Also, an overseas company may need to ensure that its constitutive document caters for the special circumstances of the place of its incorporation that may not apply to

companies incorporated in Hong Kong. The Exchange's view is that shareholder protection is safeguarded if the company discloses those special requirements in its listing document and draws attention to the risk involved to enable investors to make an informed investment decision.

***Matters under the JPS***

14. Company X submitted that, for the purpose of the JPS, where Hong Kong law appears to provide a higher level of shareholder protection than Japanese law, it would amend its constitutive document to address the differences, except where:
  - a. they were not material (**Immaterial Differences**); and
  - b. amending the constitutive document would be legally impossible (**Legal Restriction**).
15. Where the JPS requires only disclosure of regulatory differences (e.g., Items 1(g) and 4(e) of the JPS), Company X would make the relevant disclosures in its listing document.
16. Company X demonstrated that there was a reasonable nexus between its place of incorporation and its operations.
17. It submitted that Japanese law, as supplemented by the proposed amendments to its constitutive document and the proposed disclosure in the listing document, would provide a shareholder protection level comparable to Hong Kong or any one of our recognised or accepted jurisdictions.
18. Company X did not propose any amendments to its constitutive document to mirror the HKCO standards of shareholder protection for:

***Immaterial Difference 1: Item 2(a) of the JPS – Shareholders' ability to request the court to call a shareholders meeting***

19. Under the HKCO, any shareholder can apply to the court to call or direct the calling of a general meeting. Under the JCA, only shareholders that have held for the last six consecutive months not less than 1% of the votes in the company may petition the court for a shareholders meeting.

***Immaterial Difference 2: Item 2(e) of the JPS – Right of a shareholder to appoint a proxy***

20. Under the JCA, a corporate shareholder, including a clearing house, can appoint multiple corporate representatives or proxies to attend the shareholders' meeting on its behalf. The Company's constitutive document would provide for the right of a shareholder to appoint multiple corporate representatives or proxies. Company X explained that it was common and a recommended practice for Japanese companies to restrict the identity of proxies for orderly conduct of the shareholders' meetings. Accordingly, its constitutive document would provide that a shareholder can only

appoint another shareholder, a lawyer or an accountant to act as a proxy, whereas the HKCO has no such restriction.

***Immaterial Difference 3: Item 4(b) of the JPS – Court confirmation of share capital reduction***

21. Unlike the HKCO, the JCA does not require court confirmation of a share capital reduction. Company X submitted that this requirement does not exist in other recognised or accepted jurisdictions like the PRC, Bermuda, Germany and Luxembourg.

***Legal Restriction: Item 1(f) of JPS – Shareholders list available for inspection***

22. Under the HKCO, the register of a company's members must be open for inspection by members free of charge, or by other persons on payment of an appropriate fee. However, under Japan's Personal Information Protection Law, stock companies may not disclose the shareholders list to non-shareholders.
23. Company X proposed to amend its constitutive document to allow inspection of the register of members by its creditors, governmental authorities and regulatory bodies free of charge, but not by other persons.

***Other matters***

***Paragraph 14 of Appendix 3 to the Rules – Restriction of voting on certain transactions***

24. Company X submitted that the JCA prohibits it from amending its constitutive document to restrain or restrict its shareholders from voting on any particular resolution.
25. It proposed to include new provisions in its board of directors' regulations to ensure that the votes of the shareholders restricted from voting under the Listing Rules would not be counted. The board regulations would provide that if a transaction is required to be approved by shareholders under the Listing Rules, the board of directors would have to submit the matter to the general meeting of shareholders on the basis that Company X would not enter into the transaction unless it is approved in accordance with the relevant requirements of the Listing Rules.
26. It further proposed that any amendments to the board regulations would be subject to the Exchange's and other applicable regulatory authorities' approval. It would also ensure that the board regulations would not conflict with the Takeovers Codes.
27. It would apply for a waiver from Paragraph 14 of Appendix 3 and other relevant Rules upon submitting its listing application.

## **CONCLUSION**

28. Based on the submission, the Exchange considered that Japan is an acceptable overseas jurisdiction subject to Company X making certain revisions to its constitutive document.
29. It would be required to submit at the time of filing its listing application:
  - a. a confirmation from the sponsor that it has considered and reviewed all material shareholder protection areas in its due diligence review under Practice Notice 21 of the Rules and that it is independently satisfied that the shareholder protection offered in Japan is at least equivalent to that in Hong Kong or any one of the recognised or accepted jurisdictions; and
  - b. a legal opinion and the sponsor's confirmation that its constitutive document does not contain provisions which will prevent it from complying with the Rules, the Securities and Futures Ordinance – Part XV and the Takeovers Codes, to the extent they apply.
30. Future applicants incorporated in Japan may follow the streamlined procedures set out in Guidance Letter HKEx-GL12-09 and need not complete a detailed line-by-line comparison with the JPS.

## **NOTES TO ISSUERS AND MARKET PRACTITIONERS**

**For any questions relating to this Listing Decision please feel free to contact the Listing Division.**