

## **HKEx LISTING DECISION**

**HKEx-LD24-2012**

**Withdrawn, superseded by United States of America - Delaware Country Guide in December 2013**

<b>Issue</b>	Whether the Exchange would consider the State of Delaware an acceptable jurisdiction under Chapter 19 of the Main Board Listing Rules and Chapter 24 of the GEM Listing Rules
<b>Listing Rules and Regulations</b>	<ol style="list-style-type: none"><li>1. Chapter 19 of the Main Board Listing Rules and Chapter 24 of the GEM Listing Rules (<b>Rules</b>)</li><li>2. Joint Policy Statement regarding Listing of Overseas Companies of 7 March 2007 (<b>JPS</b>)</li><li>3. Listing Decisions: HKEx-LD65-1; HKEx-LD65-2, HKEx-LD65-3, HKEx-LD71-1, HKEx-LD80-1, HKEx-LD84-1, HKEx-LD108-1, HKEx-LD109-1, HKEx-LD110-1, HKEx-LD111-1, HKEx-LD1-2011, HKEx-LD4-2011, HKEx-LD10-2011, HKEx-LD11-2011</li><li>4. Guidance Letter HKEx-GL12-09</li></ol>
<b>Decision</b>	<p>The Exchange would consider Delaware an acceptable jurisdiction of an issuer's incorporation, if listing applicants incorporated in Delaware make certain revisions to their constitutive documents or adopt alternative shareholder protection measures to ensure compliance with the JPS and demonstrate a reasonable nexus with Delaware. Listing applicants should give reasons for not changing their constitutive documents which the Exchange will assess on a case by case basis</p> <p>Future applicants incorporated in Delaware may follow the streamlined procedures in Guidance Letter HKEx-GL12-09 and need not complete a detailed line-by-line comparison with the JPS</p>

## **FACTS**

1. The Exchange was requested to consider the State of Delaware an acceptable jurisdiction under the Rules.
2. It was submitted that:
  - a. the legal system of the USA comprises the laws of the federal government of the United States and the laws of an individual state. A business corporation is chartered under the laws of an individual state which generally govern its existence and affairs;
  - b. under Delaware law there is only one type of for-profit corporation and the constitutive documents of a corporation are its certificate of incorporation, or charter, and its bylaws (**Constitutive Documents**). The certificate of incorporation may provide for the board to have power to amend or repeal the bylaws. A corporation's certificate of incorporation and/or bylaws may also contain provisions requiring shareholders' approval for any amendments to the bylaws;

- c. a corporation must comply with the registration and reporting requirements of the Securities and Exchanges Commission (**SEC**) if it is a public company in the USA, i.e., when either (i) its securities are listed on a US securities exchange or (ii) it has assets exceeding US\$1,000,000 and more than 500 shareholders, regardless of whether those shareholders are located in the USA or outside the USA (**Public Company**);
  - d. the SEC is a full signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (**IOSCO MMoU**) and has also entered into a Memorandum of Understanding Concerning Cooperation and the Exchange of Information in the Administration and Enforcement of Securities Laws with the Securities and Futures Commission of Hong Kong.
3. The Exchange was provided with a comparison table comparing the Hong Kong Companies Ordinance (**HKCO**) with the relevant Delaware laws and regulations based on the JPS framework.

## **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 (**SFO**) and, if they apply, the Hong Kong Codes on Takeovers and Mergers and Share Repurchases (**Takeovers Codes**).
- 5. Chapter 19 of the Main Board Rules and Chapter 24 of the GEM Rules provide a general framework for overseas companies to list on the Exchange. The Exchange may refuse a 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 the overseas issuer's jurisdiction of incorporation does not provide shareholder protection standards equivalent to those in Hong Kong, it may approve the listing of the overseas issuer if it varies its constitutive documents to provide the necessary protection (see Notes to Main Board Rules 19.05(1), 19.30(1) and GEM Rule 24.05(1)).
- 7. The JPS formalises 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, HKEEx-LD84-1, HKEEx-LD108-1, HKEEx-LD109-1, HKEEx-LD110-1, HKEEx-LD111-1, HKEEx-LD1-2011, HKEEx-LD4-2011, HKEEx-LD10-2011, HKEEx-LD11-2011.
- 9. Guidance Letter HKEEx-GL12-09 sets out streamlined procedures for listing overseas companies (**Streamlined Procedures**). 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, as long as it ensures that its shareholder protection standards are not lower than those indicated in the relevant Listing Decisions.

## **ANALYSIS**

10. An applicant may adopt any method (e.g., by amending its constitutive documents or administrative procedures) to address all shortfalls in shareholder protection identified in the relevant Listing Decisions to achieve equivalence. The Exchange does not prescribe the method used but recommends that the applicant first consider passing a shareholders' resolution amending its constitutive documents to provide for the protection expected under the JPS. The applicant must give reasons for not changing its constitutive documents and the Exchange will assess them on a case by case basis.
11. Based on the comparison table, the Exchange notes certain differences in shareholder protection between the HKCO and Delaware laws and regulations:
  - a. areas where Delaware laws and regulations are considered comparable with or even stricter than the HKCO (Items 1(c), 1(f), 2(d), 2(e), 2(f), 3(b), 3(c), 4(c) and 4(d) of the JPS); and
  - b. areas where the differences in shareholder protection standards under Delaware laws and regulations are considered acceptable even though some differences remain, or where the Exchange considers that a corporation must take action to bridge the differences (Items 1(a), 1(b), 1(d), 1(e), 2(a), 2(b), 2(c), 3(a), 3(d), 3(e), 4(a) and 4(b) of the JPS)(see **Appendix**).
12. Where the JPS merely requires clearly stating the circumstances of a particular shareholder protection matter (e.g., Items 1(g) – buy-out provisions and 4(e) – provision of financial assistance for the acquisition of the corporation's shares), the corporation will make relevant disclosure of any regulatory differences in its listing document.

## **CONCLUSION**

13. The Exchange considered Delaware an acceptable jurisdiction for an issuer's incorporation on the basis that, in an actual application:
  - a. if a corporation cannot ensure that its Constitutive Documents are amended to satisfy a particular shareholder protection requirement, it should provide alternative methods of shareholder protection acceptable to the Exchange;
  - b. a corporation must satisfactorily demonstrate that it meets the nexus requirement of the JPS;
  - c. there are no specific circumstances that render the acceptance of Delaware as an issuer's jurisdiction of incorporation inappropriate;
  - d. a corporation will disclose in its listing document the jurisdictional and regulatory differences between Hong Kong and Delaware, especially on the aspects of the JPS; and

- e. a corporation must duly inform the Exchange and make an announcement under the Rules if there will be major changes in the US or Delaware laws or in its corporate practices which could significantly worsen shareholder protection standards compared to Hong Kong with reference to the standards in the Appendix to this Listing Decision. In such a case, the Exchange would impose appropriate conditions or reconsider Delaware as an acceptable jurisdiction of an issuer's incorporation.
14. The Exchange requires a corporation to submit the following confirmations upon filing its listing application:
- a. a sponsor's confirmation that it has considered and reviewed all material shareholder protection areas in its due diligence review under Practice Notice 21 to the Main Board Rules or Practice Note 2 to the GEM Rules, and that it is independently satisfied that the shareholder protection afforded by the US and Delaware laws to the corporation's shareholders is at least equivalent or broadly commensurate to that in Hong Kong; and
  - b. a legal opinion and sponsor's confirmation that the corporation's Constitutive Documents do not contain provisions which will prevent it from complying with the Rules, the SFO – Disclosure of Interests and, if they apply, the Takeovers Codes.

**NOTES TO ISSUERS AND MARKET PRACTITIONERS**

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

**Delaware applicants are expected to address the shareholder protection differences as follows**

<b>Item</b>	<b>Shareholder protection matters under HKCO and Delaware laws</b>	<b>Exchange's observation/ Action required</b>
1(a), 1(b), 1(d)	<p><b>The HKCO requirement</b></p> <p>Under the HKCO, any change in the constitutive documents, variation of share class rights or voluntary winding-up must be approved by a three-quarter majority of shareholders present in a general meeting. Under the Streamlined Procedures, the Exchange regards a voting threshold of two-thirds as acceptable though not strictly equivalent.</p> <p><b>Delaware requirement</b></p> <p>Under Delaware law, a shareholder vote representing a simple majority vote of the outstanding shares entitled to vote on the matter is required to amend the Constitutive Documents, vary share class rights or wind the corporation up.</p>	<p><b>Exchange's observation</b></p> <p>The shareholders' voting threshold of a majority of the issued share capital is acceptable.</p> <p><b>Action required</b></p> <p>Where not unduly burdensome to a corporation, the Exchange expects that the corporation's Constitutive Documents provide for a voting threshold of at least two-third majority of shareholders present in the general meeting (<b>GM</b>).</p> <p>Only a corporation's shareholders should have the power to amend its Constitutive Documents (i.e., both the charter and bylaws) but not the board.</p>
1(b)	<p><b>The HKCO requirement</b></p> <p>Shareholders of a concerned class holding not less than 10% of the nominal value of the issued shares of that class may petition the court to cancel the variation of the class rights.</p> <p><b>Delaware requirement</b></p> <p>No equivalent requirement.</p>	<p><b>Exchange's observation</b></p> <p>Any shareholder of a corporation may bring an action before the Delaware Court of Chancery to prevent any corporate action that improperly infringes upon the shareholders' class rights (such as an attempt to vary the rights of any class of stock without shareholder approval). This is comparable to the HKCO requirement.</p> <p><b>Action required</b></p> <p>Where not unduly burdensome to a corporation, the Exchange expects that the corporation's Constitutive Documents provide for a court petition right as under HKCO.</p>
1(e)	<p><b>The HKCO requirement</b></p> <p>Appointment, removal and remuneration of auditors must be approved by shareholders.</p> <p><b>Delaware requirement</b></p> <p>No equivalent requirement.</p>	<p><b>Exchange's observation</b></p> <p>The Exchange does not consider the relevant Delaware laws and regulations comparable.</p> <p><b>Action required</b></p> <p>A corporation must demonstrate that its Constitutive Documents provide for shareholder protection comparable to that under HKCO. Applicants should refer to paragraph 10 of this Listing Decision.</p>
2(a)	<p><b>The HKCO requirement</b></p> <p>Companies must hold a GM each year as its annual GM, and no more than 15 months may elapse between two annual GMs.</p> <p><b>Delaware requirement</b></p> <p>Under Delaware law, an annual meeting of shareholders need not take place if directors are elected by unanimous written consent. No more</p>	

Item	Shareholder protection matters under HKCO and Delaware laws	Exchange's observation/ Action required
	than 13 months may elapse between a corporation's annual GMs or actions by written consent to elect directors in lieu of an annual GM.	
2(b)	<p><u>The HKCO requirement</u></p> <p>Members holding not less than 5% of the paid up capital may require the company to convene an extraordinary general meeting and may request the company to circulate a resolution proposed by the requisitionists.</p> <p><u>Delaware requirement</u></p> <p>Under Delaware law, special shareholders' meetings may be called by the board or by any other persons authorised by the Constitutive Documents. There is no equivalent requirement under Delaware law to the shareholders' right to request circulating a proposed resolution. The proxy rules of the SEC applicable to a Public Company provide qualified shareholders with the right to include a proposal in a proxy statement for an annual or special GM.</p>	<p><u>Exchange's observation</u></p> <p>Without considering the specific circumstances of an actual Delaware listing applicant the Exchange generally considers that the SEC proxy rules do not provide a comparable standard to that under HKCO.</p> <p><u>Action required</u></p> <p>A corporation must demonstrate that its Constitutive Documents provide for shareholder protection comparable to that under HKCO. Applicants should refer to paragraph 10 of this Listing Decision.</p>
2(c)	<p><u>The HKCO requirement</u></p> <p>The notice period for a meeting approving a special resolution must be at least 21 days, and for any other shareholders' meeting at least 14 days.</p> <p><u>Delaware requirement</u></p> <p>Delaware law provides for a notice period from 10 to 60 calendar days independent of the nature of the meeting, unless otherwise provided by law.</p>	<p><u>Exchange's observation</u></p> <p>The Exchange does not consider the relevant Delaware laws and regulations comparable.</p> <p><u>Action required</u></p> <p>A corporation must demonstrate that its Constitutive Documents provide for shareholder protection comparable to that under HKCO. Applicants should refer to paragraph 10 of this Listing Decision.</p>
3(a)	<p><u>The HKCO requirement</u></p> <p>Appointment of a director is required to be voted on individually. Unanimous approval of members is required to pass a resolution permitting appointment of two or more directors by a single resolution.</p> <p><u>Delaware requirement</u></p> <p>No equivalent requirement.</p>	
3(d)	<p><u>The HKCO requirement</u></p> <p>Subject to certain exceptions, a public company generally shall not make loans, including quasi loans and credit transactions, to its directors and their associates.</p> <p><u>Delaware requirement</u></p> <p>There is no equivalent requirement under Delaware law. US federal laws (e.g., Sarbanes-Oxley-Act) generally prohibit a corporation that is</p>	<p><u>Exchange's observation</u></p> <p>With regards to prohibiting loans to directors, the Sarbanes-Oxley-Act provides a shareholder protection standard comparable to that under Hong Kong law.</p> <p><u>Action required</u></p> <p>A corporation that is not subject to the Sarbanes-Oxley-Act on the prohibition of loans to directors must demonstrate that its</p>

Item	Shareholder protection matters under HKCO and Delaware laws	Exchange's observation/ Action required
	a Public Company from making personal loans to any of its directors or executive officers, directly or indirectly.	Constitutive Documents provide for a shareholder protection standard comparable to that under Hong Kong law. Applicants should refer to paragraph 10 of this Listing Decision.
3(e)	<p><u>The HKCO requirement</u> Any payment to a director or a past director as a compensation for loss of office or retirement from office requires shareholder approval.</p> <p><u>Delaware requirement</u> No equivalent requirement.</p>	<u>Exchange's observation</u> The Exchange does not consider the relevant Delaware laws and regulations comparable.  <u>Action required</u> A corporation must demonstrate that its Constitutive Documents provide for shareholder protection comparable to that under HKCO. Applicants should refer to paragraph 10 of this Listing Decision.
4(a)	<p><u>The HKCO requirement</u> Any alteration of share capital must be approved by a majority vote in general meeting.</p> <p><u>Delaware requirement</u> No equivalent requirement.</p>	<u>Exchange's observation</u> The Exchange does not consider the relevant Delaware laws and regulations comparable.  <u>Action required</u> A corporation must demonstrate that its Constitutive Documents provide for shareholder approval of any share capital alteration. A majority vote of the outstanding share capital is sufficient to pass a resolution. Applicants should refer to paragraph 10 of this Listing Decision.
4(b)	<p><u>The HKCO requirement</u> Any reduction of share capital must be approved by a three-quarter majority vote in general meeting.</p> <p><u>Delaware requirement</u> No equivalent requirement.</p>	<u>Exchange's observation</u> A corporation must demonstrate that its Constitutive Documents provide for shareholder approval of any share capital alteration. A majority vote of the outstanding share capital is sufficient to pass a resolution. Applicants should refer to paragraph 10 of this Listing Decision.
4(b)	<p><u>The HKCO requirement</u> Any reduction of share capital in a company must be subject to confirmation by the court.</p> <p><u>Delaware requirement</u> No equivalent requirement.</p>	<u>Exchange's observation</u> Although Delaware law does not require a court confirmation of the share capital reduction, in view of alternative court remedies the Exchange considers the overall shareholder protection under Delaware law comparable to that under HKCO.  <u>Action required</u> Where not unduly burdensome to a corporation, the Exchange expects that the corporation's Constitutive Documents provide for a court confirmation of the share capital reduction.