

## RESPONSE TO HKEX CONSULTATION PAPER – A LISTING REGIME FOR COMPANIES FROM EMERGING AND INNOVATIVE SECTORS

### INTRODUCTION

We refer to the consultation paper (the "**Consultation Paper**") published by the HKEX on 23 February 2018 seeking comments on the proposals and proposed amended Listing Rules to allow (i) the listing of biotech companies; (ii) the listing of high growth and innovative companies with WVR structures and (iii) the secondary listing of Qualifying Issuers.

This is a joint response by BOCI Asia Limited and ICBC International Holdings Limited (the "**Responding Group**") which has been prepared principally by our respective Hong Kong equity capital markets and corporate finance teams advising issuer clients. Herbert Smith Freehills have coordinated this response, and if you have any queries on it, you should contact their [REDACTED] in the first instance.

Unless otherwise defined, all capitalized terms used herein shall have the same meaning as defined in the Consultation Paper.

### COMMENTS ON THE CONSULTATION PAPER FROM THE RESPONDING GROUP

#### 1. BIOTECH COMPANIES

- 1.1 We generally support and welcome the proposals to permit the listing of biotech companies as proposed in the Consultation Paper, subject to the comments below.

#### Suitability to List

- 1.2 Paragraph 74 of the Consultation Paper sets out the features that a Biotech Company will need to demonstrate to establish that it is suitable to list under the new Chapter 18A. Paragraph 74(a) provides that the Biotech Company must have developed at least one Core Product beyond the concept state, being where it has met development milestones set out in paragraph 75 of the Consultation Paper.
- 1.3 Paragraph 75 sets out, by product type, the requirements for a company to have developed its regulated product beyond the concept stage. Whilst the specific requirement for each product type is different, in each case the Consultation Paper and the draft Chapter 18A propose that approval by a single Competent Authority is sufficient. The currently recognised Competent Authorities are the US Food and Drug Administration, the China Food and Drug Administration and the European Medicines Agency. We note that the HKEX envisages that it may recognise further national or supranational authorities, with the SFC's consent, in the future.
- 1.4 We would encourage the HKEX to revise Chapter 18A to require the approval of at least two Competent Authorities. Requiring broader regulatory approval will ensure that the Regulated Products meet international standards. Given the higher risk nature of pre-profit companies, it will be important for investors to have as much confidence as possible in the viability of the products under development. Their marketability will be key to ensure the commercial success of the listing applicant. Having an additional regulatory endorsement will provide investors with greater comfort and help ensure the quality of companies listing in Hong Kong.

#### Restrictions on Cornerstones

- 1.5 We do not support the proposal in the Consultation Paper to not count shares subscribed by cornerstone investors towards the public float for Biotech Companies. We note that the Consultation Paper and the FAQs explain the reason for this as being to reduce the influence of pre-arranged deals on the book-building process and will help ensure that the pricing process of the IPOs of such companies is as market-driven as possible.

- 1.6 Cornerstone investors can play an important role in achieving a successful IPO by providing confidence to the market. Restricting shares held by cornerstone investors from being treated as part of the public float may mean that seeking cornerstone investors is not viable for some IPOs which may be detrimental to their successful outcome.
- 1.7 Eliminating cornerstone investors from an IPO will not, in our view, necessarily reduce pre-arranged deals, but rather encourage a more informal practice of securing anchor investors, which we believe will be less beneficial to the market and the price discovery process.
- 1.8 In addition, removing cornerstone investors from the IPO process seems to encourage greater marketing by the syndicate to retail investors. This seems at odds with the greater risk profile of these companies. We note that in the Concept Paper issued by the HKEX in June 2017, the HKEX was considering listing pre-profit and higher risk companies on a separate, professional investors- only board given the higher risk potential of such companies. We consider that restricting cornerstone investors as proposed may have the effect of increasing retail participation in these listings, which may not be the intended outcome.
- 1.9 As an alternative, we would invite the HKEX to modify the restriction to permit cornerstone investors to still count towards the public float provided that the cornerstone investors are independent from the issuer, its core connected persons and their respective associates and the underwriters and the investment complies with guidance letter GL51-13.

## **2. ISSUERS WITH WVR STRUCTURES**

- 2.1 We generally support and welcome the proposals to permit the listing of companies with WVR structures as proposed in the Consultation Paper, subject to the comments below.

### **Protecting Non-WVR Shareholders Rights to Vote**

- 2.2 We note that paragraph 128 of the Consultation Paper and proposed Rule 8A.25 contain a limited number of matters where weighted voting rights should be disregarded and the matter must be voted on applying the one-share-one-vote principle.
- 2.3 We consider that the list of matters requiring one-share-one-vote should be expanded to cover other significant areas where the interests of minority shareholders should be protected. For instance, we consider that reverse takeovers should be added to the list. In addition, subject to any more stringent requirements which the SFC may consider imposing on companies with WVR structures in any review of the application of the Takeovers Code, takeover-related matters should also be added to the list.
- 2.4 We note that the proposed new Rule 8A.21 deems holders of WVRs to be connected persons and core connected persons. We consider it important to also understand, and for the HKEX to clarify, how the definition of "controlling shareholder" will be applied to companies with WVR structures. In particular, we are concerned about the application in the context of matters where the Listing Rules require controlling shareholders to abstain from voting (for example the approval of delistings, and rights issues or open offers which increase the number of shares or market capitalisation by over 50%). The requirement for controlling shareholders to abstain provides an important safeguard to minority shareholders. If an individual holder of WVRs falls outside the definition of controlling shareholder, that shareholder being able to exercise WVRs on matters where the controlling shareholder is required to abstain could unduly influence the vote on these matters.
- 2.5 We invite the HKEX to consider whether the Listing Rules should reflect that a holder of WVRs will be deemed to be a controlling shareholder. An alternative approach could be for any matter that requires shareholders (excluding any controlling shareholders) to vote on a matter, that this should be added to the list of matters that require the vote to be taken on the basis of one-share-one-vote. This will ensure that any person who is holding WVRs but does not fall within the definition of "controlling shareholder" in the Listing Rules will not be able to unduly influence the vote on these important matters.

### 3. SECONDARY LISTINGS OF QUALIFYING ISSUERS

- 3.1 We very much welcome the proposals to facilitate the secondary listing of innovative companies on the Main Board.
- 3.2 We expect there to a number of companies listed on NASDAQ (and other Qualifying Exchanges) which will fulfil the qualifications for listing set out in the proposed new chapter 19C of the Listing Rules. We note that to qualify for listing, a Qualified Issuer must have a track record and good regulatory compliance of at least two financial years on a Qualifying Exchange under the proposed new Rule 19C.04.
- 3.3 In order to facilitate companies which comply with Rule 19C.04 to achieve a secondary listing in Hong Kong, we invite the HKEX to consider relaxing the requirements for confidential filings in paragraph 18 of PN22. Currently, in order to be able to be exempt from the requirement to publish an Application Proof at the time of A1 filing, a listing applicant must have been listed for not less than five years on a recognised overseas exchange. We foresee applicants looking to take advantage of the new Chapter 19C may have been listed on a Qualifying Exchange for less than five years, but would, nonetheless wish to keep the listing plans and the draft prospectus confidential until after the listing committee hearing. We would also invite the HKEX to relax the requirements in paragraph 18 of PN22 where a company is seeking a dual primary listing in Hong Kong.

### 4. DRAFT AMENDMENTS TO THE RULES

#### Chapter 8A

We would suggest adding a new sub-paragraph to 8A.25:

"8A.25 Any weighted voting rights carried by any class of shares in a listed issuer must be disregarded and must not entitle the beneficiary to more than one vote per share on any resolution to approve the following matters:

- (1) changes to the listed issuer's constitutional documents, however framed;
- (2) variation of rights attached to any class of shares;
- (3) the appointment or removal of an independent non-executive director;
- (4) the appointment or removal of auditors; and
- (5) the voluntary winding-up of the listed issuer;
- (6) a reverse takeover under Chapter 14;
- (7) any transaction to which the Takeovers Code applies; and
- (8) any matter where the Listing Rules require the controlling shareholder (to the extent there is one) to abstain from voting."

#### Chapter 18A

Rule 18A.01 defines "Approved Product" to be one that has been "approved from commercialisation by a Competent Authority". As mentioned in paragraph 1 of this response, we would propose that this requirement be extended to require approval by at least two competent authorities. We propose that the definition be amended as follows:

""Approved Product" – a Biotech Product which has been approved for commercialisation by a at least two Competent Authority Authorities."

Rule 18A.04(2)(c) should also be amended as follows:

"(c) summary of material communications with the relevant Competent Authority Authorities in relation to the its Core Product(s) (unless such disclosure is not permitted under applicable laws or regulations, or the directions of the such Competent Authority Authorities);"

We would suggest deleting 18A.06.