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Securities Regulation & Law Report™

STOCK MARKETS

Listing Options in the Global Capital Markets



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The pace of recovery of the global initial public offering ("IPO") market has continued to accelerate in 2011, driven by a combination of privatizations, an increase in issuers from emerging markets, the lack of m&a exits, a robust pipeline following the financial crisis, and investor demand for financial sector and energy sector issuers. The fourth quarter of 2010 saw record levels of capital raised, with the full year reaching the second highest level of capital raised in the global markets (after 2007). While private equity-backed IPOs drove activity in the first quarter of 2011, overall China has been a key driver both in terms of number of offerings and volumes raised.

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While it is easy to characterize the recent level of activity as a return to a pre-crisis state of affairs, there is an emerging trend that represents a new phenomenon and one that represents a potential challenge to the historically dominant financial centers. The trend is the increasing level of new listings in Asia, with Hong Kong being the destination of choice for more companies two years in a row, and most interestingly, for an increasing number of companies from outside the region. Both the United States and Europe lost significant market share to Hong Kong in 2010, and while an increasing number of non-Asian companies, attracted by potentially higher valuations and liquidity, focused on Hong Kong, a number of Chinese companies listed in the United States. In addition, while private equity-backed IPOs in the United States were resurgent in the first quarter of 2011, more small to mid-size U.S. companies are choosing to list outside the United States. According to recent published data, nearly one in 10 U.S. companies that went public in 2010 did so outside of the United States (including in Australia, the United Kingdom, Taiwan, South Korea and Canada).

If nothing else, the global IPO markets are reflecting to a far greater extent than we have seen before the globalization of the capital markets. While valuation and liquidity may ultimately drive decisions regarding which exchange to list on, the ongoing obligations that flow from any such decision are not insignificant and, not surprisingly given the lack of uniformity in rules, and cultural underpinning of rules, the consequences of listing may vary significantly from market to market.

We explore below the phenomenon of the cross-border listing and, following a discussion of the U.S. listing process as a benchmark, we identify a number of considerations that issuers and sponsors should consider as part of an analysis of alternatives for a cross-border listing.

Listing in Other Markets

For a number of years, companies have chosen to list securities in markets other than their home markets. Companies seeking listings outside of their home markets have typically focused on a limited number of markets, such as the New York Stock Exchange (the ''NYSE'') or the London Stock Exchange (''LSE''). Most often these were secondary (or so-called ''cross'') listings, where an issuer with a strong listing in its home market seeks a secondary listing (or multiple additional listings). Historically, a small number of issuers chose to by-pass their local markets in favor of another listing platform.

Recently, particularly with the growing stature of Asian markets, a growing number of companies outside Asia have announced intentions to list, have announced listings or have been rumored to be considering listings in Asia.

Motivations

There are a variety of motivations for listing outside of a company's home market. A widely cited benefit for companies is the reduction in the cost of capital as a result of their shares becoming more accessible to global investors whose access would otherwise be restricted (and market risk premium thereby increased) because of international investment barriers.

In some cases, companies have sought a listing in a jurisdiction such as the United States that offers greater depth in terms of liquidity, greater research coverage or visibility. Others have sought listings outside of their home markets in order to gain access to shareholders in locations where they do significant amounts of business to increase their visibility and political acceptability to customers and host governments. Some have followed sector leads, and listed to be part of a peer group that has a significant following on a particular exchange (for example, technology companies on Nasdaq). Particularly in the 1990s, certain issuers incorporated in jurisdictions viewed as having deficient investor protection and poor enforcement regimes sought to commit themselves voluntarily to higher standards of corporate governance and transparency by listing in jurisdictions with stricter regulations to enhance their own reputations for corporate governance and transparency and attract more demanding investors.

Yet others have sought flexibility for m&a purposes to obtain acquisition currency through a listing outside of their home country. Registration with the Securities and Exchange Commission (''SEC''), for example, is a prerequisite to offering shares to acquire a U.S. public company.

The Shifting Landscape

Stock exchanges are increasingly focused on new sources of business, including attracting business from outside the local market. This trend comes at a time when efforts to facilitate access on a global basis to the capital markets, through harmonization, mutual recognition and convergence, continue to be largely on hold, having been suspended as global regulators turned their attention to addressing the systemic causes of the financial crisis. It remains unclear which direction reform will take. For example, while facilitating access generally has been embraced, the 2010 reforms in London actually broadened the U.K. regulators' jurisdiction over historically ''local'' corporate governance matters. Similarly, Hong Kong is focused on ensuring minority protection rights in overseas companies, even if it means requiring overseas companies to amend their articles of association (which typically requires shareholder approval).

In the past few years, listings in the United States have been less prevalent. Reform of the U.S. deregistration rules led to a significant exodus of non-U.S. companies from U.S. stock exchanges (at least 200). Those exiting the U.S. market typically cited costs of compliance and the administrative burden of complying with U.S. securities laws and regulations. Many non-U.S. companies listed in the United States did not use their shares for acquisitions, making the decision to exit easier.

At the same time, there has been an increasing focus on the Asian markets as drivers of business growth, and with that business focus has come an interest in listings on Asian stock exchanges. Motivations range from broadening a presence in, or signaling a commitment to, these markets to perceived benefits in terms of valuations. Non-Asian companies accessing the Hong Kong market include Glencore (which undertook a simultaneous listing on the LSE), Prudential PLC (earlier listed only on the LSE), L'Occitane International S.A. (a French company), Schramm AG (a German company), Rusal (a Russian company that listed via a Jersey holding company) and Prada (an Italian company). Hong Kong has now vetted and approved issuers from Australia, Bermuda, Brazil, British Virgin Islands, Canada (Alberta, British Columbia and Ontario), Cayman Islands, Cyprus, China, France, Germany, Guernsey, Isle of Man, Italy, Japan, Jersey, Luxembourg, Singapore, the United Kingdom and the U.S. State of California.

   ISSN 0037-0665

Threshold Considerations

Companies listing in jurisdictions other than their own need to consider the implications of potentially having to comply with two sets of corporate governance requirements, one under local corporate law and the second by reason of the listing. This is particularly the case in jurisdictions that, in contrast to the U.S. treatment of foreign private issuers, establish their own standards for key corporate governance matters. Companies with listings outside of their home countries also need to be mindful of the potential application of multiple (and potentially conflicting) rules governing tender offers (including offers by an issuer for its own shares). Compliance with multiple sets of rules may be less of a problem in jurisdictions such as Bermuda and the Cayman Islands, which actively seek relocation of corporate headquarters and offer flexible corporate law regimes. Also, it may be difficult or impossible for an overseas company to be included in a market index (for example, only U.S. domiciled companies can be part of the Dow Jones Industrial Average or the S&P 500).

United States

Were a non-U.S. company to list on a U.S. stock exchange, it would become subject to direct SEC oversight and to all of the SEC rules applicable to foreign private issuers with SEC reporting obligations. The company would also become subject to the listing requirements of the applicable exchange, but as a practical matter these would not impose any additional burden (except possibly with respect to the audit committee).

The SEC and the principal U.S. stock exchanges have granted certain accommodations to ''foreign private issuers'' and for this article we have assumed that the company would be a foreign private issuer.[1] A company would lose that status were it to have more than 50% of its shares held by U.S. resident shareholders, and meet one of three other conditions.

Typically foreign private issuers list American Depositary Shares (''ADSs'') (represented by American Depositary Receipts, ''ADRs'') and not the underlying ordinary shares, but in contrast to other markets that have lighter requirements for ADR/GDR programs, the United States does not. The same rules apply whether a company lists ADSs or its shares.

Although the U.S. regime has a reputation for burdensome disclosure, costly internal control procedures and a high risk of private securities litigation and enforcement action, and the SEC does undertake a very detailed examination of corporate disclosure filed with it (as well as press releases, scripts of earnings calls and other disclosure on corporate web sites), as a practical matter, and certainly in contrast to many other jurisdictions, the United States imposes few obligations in terms of corporate governance (for example, board composition, duties and responsibilities, and shareholder approval requirements). A foreign private issuer is generally free to follow its local rules and local stock exchange requirements (if it has a local listing).

The following discussion addresses the implications of listing in the United States, which may be undertaken together with a public offering, or without any concurrent capital raising. Note that there is very little difference in terms of scope of disclosure, and therefore time and effort, between a listing and a listing/public offering. Note too that although the same disclosure requirements will likely apply regardless of the stock exchange selected or whether a capital raising exercise is included, there is an alternative way of raising capital in the United States, which is pursuant to Rule 144A (and is beyond the scope of this article).

Process. To list, a company would need to register its ordinary shares with the SEC.[2] The initial registration with the SEC would require a few months, first to prepare and file the registration statement.[3] It would then take approximately 30 days to obtain preliminary SEC comments, and then a few weeks to clear final SEC comments. If one compares tables of contents of SEC registration statements with prospectuses required in other jurisdictions, the list of required disclosure items would likely be similar. The difference though will be in emphasis, with far more detailed disclosure included, for example, in Management's Discussion and Analysis of Financial Condition and Results of Operations or, for foreign issuers, the Operating and Financial Review section (collectively, for purposes of this memorandum, the ''MD&A'') than would typically be the case for similar sections in other types of prospectuses. Technical historical detail regarding the evolution of a corporate group, including ownership of subsidiaries and relationship with founders, may be less detailed than in Hong Kong, for example. The SEC process will also be impacted by requests from underwriters for U.S. counsel to provide so-called 10b-5 disclosure letters in respect of any registration statement used for capital raising purposes.

SEC comments can be extremely detailed and extensive, and the SEC review process is thorough. The staff of the Division of Corporation Finance of the SEC (the ''Staff'') will compare statements made in press releases, presentation slides and in earnings calls with the disclosure filed with them, and can be expected to raise issues if there are discrepancies. The Staff has been known to take issue with segment presentations due to inconsistent statements made in earnings calls. The Staff will be proactive in raising issues, and the process is far from a ''box-ticking'' exercise.

Many of the SEC comments will be on the MD&A, which is the heart of disclosure in an SEC report. One can also expect a significant number of comments on

[1] A foreign private issuer is defined under the securities laws as an issuer organized outside the United States so long as it does not meet both prongs of a two-part test. The first prong of the test calls for a determination of whether more than 50% of the company's voting securities are held, directly or indirectly, of record by U.S. residents. If more than 50% of the voting securities are so held, the company must evaluate the second prong and determine if (a) a majority of its executive officers or directors are U.S. residents or U.S. citizens, (b) a majority of its assets are located in the United States or (c) the company's business is principally administered from the United States.

[2] For issuers listing ADRs, the registration is nonetheless of the ordinary shares. The short form used to register the ADRs is filed separately by the ADR depositary.

[3] The registration statement could be submitted for Staff review on a confidential basis should the issuer be a first-time foreign private issuer registrant.

accounting issues, including on accounting policies and compliance with applicable accounting principles. In terms of accounting issues, the SEC can have its own views as to the proper application of generally accepted accounting principles in the United States (''U.S. GAAP'') or International Financial Reporting Standards (''IFRS'') as published by the International Accounting Standards Board (''IASB''). The areas that the Staff will focus on will shift over time, though the Staff is quite transparent in telegraphing its areas of focus through speeches and presentations at conferences, such as the annual December AICPA conference. From a disclosure perspective, the MD&A is what issuers find the most time-consuming and challenging to prepare.

Financial Statements. A non-U.S. listed company could present its financial statements in U.S. GAAP or IFRS as published by the IASB (companies that use neither must prepare reconciliations to U.S. GAAP). The company would be subject to rules governing the use of non-GAAP financial measures. A material disposition or acquisition at the time of registration could trigger a need for pro forma financial statements and standalone statements of the acquired (or to be acquired) entity. In contrast to jurisdictions such as the EU that have a more principles-based approach to issuers with ''complex financial histories,'' the SEC approach is a rules-based approach with quantitative thresholds. (Note that domestic listed companies have no choice as to financial statement preparation; they may only publish statements in U.S. GAAP (though there is an initiative that may well result in domestic companies ultimately having to shift to IFRS).)

Ongoing Disclosure. Once the listing is effective, a company would be subject, among other things, to: the obligation to prepare and file with the SEC an annual report on Form 20-F[4] within six months after the end of each fiscal year for fiscal years ending before December 15, 2011 and within four months for fiscal years ending thereafter[5]; and the obligation to submit to the SEC on Form 6-K reports and other disclosures that the company is required to prepare under local rules. This would mean, for example, that the company would submit its interim reports and its ''glossy'' annual report, and these would not be subject to U.S. form or other requirements, unless the company sought to raise capital in the U.S. public markets. In contrast, domestic listed companies would also be required to file quarterly reports and to file current reports (typically within two business days) to disclose any one or more of a series of specific developments or events.

The Form 20-F would be subject to the same financial statement requirements that apply to the initial registration, except that following registration, unless a company seeks to raise capital in the United States, it would not be subject to pro forma and target financial statement requirements (although domestic companies are).[6] As the SEC will comment on annual reports, companies may be required to amend disclosure mid-year.

Aside from the annual report and Form 6-K, a foreign private issuer would not be subject to substantive SEC disclosure obligations. There are no SEC requirements regarding timing or content of announcements, and as noted above a foreign private issuer would not be required to issue ''real time'' disclosure to the market upon the occurrence of specified events (in contrast to domestic registrants, which are subject to current reporting obligations, on Form 8-K). The NYSE, however, does expect a listed company to promptly release any information that might reasonably be expected to materially affect the market for a listed company's securities. Companies with local corporate law disclosure requirements or dual listed companies with disclosure mandated by listing rules would obviously comply with those, and submit disclosure under Form 6-K as necessary or appropriate. (Note that with differing approaches to what triggers disclosure outside the United States under ''ad hoc'' or similar disclosure regimes (based, for example in the EU, on what is deemed ''price sensitive''), it is not always the case that the SEC regime drives the timing of disclosure (see ''Liability'' below).)

Internal Control. A company would be subject to most of the provisions of the Sarbanes-Oxley Act, including Section 404, which requires, among other things, a company to maintain internal control over its financial reporting and management to produce a report containing its assessment of the effectiveness of such controls (though the company would have a one-year grace period before having to comply with the management report and auditor attestation requirements) (see ''Management Responsibilities'' below) and auditor independence requirements.

A company would also be subject to requirements to maintain disclosure controls and procedures designed to provide reasonable assurance regarding the integrity of its public disclosure.

Companies that have terminated their SEC registrations often have cited the high cost of compliance with the internal control rules as the principal reason for deregistration.

Management Responsibilities. Pursuant to CEO and CFO certification requirements, a listed company's CEO and CFO would be required to state in certifications filed as part of the annual report on Form 20-F that:

- the report complies with applicable SEC disclosure rules;
- he or she has reviewed the report;

[4] The annual report on Form 20-F is in effect an update of the initial registration statement. Note too that the annual report that companies typically use in jurisdictions outside the United States is not a substitute for the annual report on Form 20-F; however, some companies ''wrap'' their annual reports, which means that the core disclosure is the local annual report. This, however, then requires the full annual report to comply with U.S. rules and local rules.

[5] An SEC reporting company must comply with a detailed set of requirements for its Form 20-F, and the SEC is under an obligation to review (and typically comments on) Form 20-F annual reports (and any other SEC filings) at least once every three years.

[6] Once the company has been subject to SEC reporting obligations for at least 12 months and has filed its first annual report, it can take advantage of shelf registration procedures, allowing it to access the market on a real time basis. (Note that once shares are listed in the United States, the company cannot place newly issued shares relying on Rule 144A.) This system is more accommodating than the EU Prospectus Directive regime, as it allows for forward incorporation by reference.

■ based on his or her knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by the report;

■ based on his or her knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition, results of operations and cash flows of the company as of, and for, the periods presented in the report;

■ he or she and the other certifying officer are responsible for establishing and maintaining ''disclosure controls and procedures'' and ''internal control over financial reporting''; and

■ he or she and the other certifying officer have disclosed, based on the most recent evaluation of internal control over financial reporting, to the company's auditors and to the audit committee of the board of directors all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the company's ability to record, process, summarize and report financial information; *and* any fraud, whether or not material, that involves management or other employees who have a significant role in the company's internal control over financial reporting.

Listed companies typically establish back-up internal certification and other diligence processes to provide comfort to the CEO and CFO on the quality of disclosure. However, embedded in the certifications are also affirmations by the CEO and CFO of their responsibility to establish and maintain internal control over financial reporting and disclosure controls and procedures. These tie to ongoing obligations to disclose in the Form 20-F management's responsibilities to establish and maintain internal control, the framework used to evaluate the effectiveness of internal control, management's assessment of effectiveness (including disclosure of material weaknesses) and material changes to internal control.

The certification requirements do not apply to quarterly or semi-annual financial statements submitted to the SEC under a Form 6-K by foreign private issuers. Also in the United States, directors do not make responsibility statements in annual reports.

Corporate Governance. A listed company would be subject to a ban on loans to directors and executive officers, and its audit committee would be subject to Sarbanes-Oxley Act requirements relating to independence of its members. The company would also be subject to the provisions of the Sarbanes-Oxley Act (and potentially the Dodd-Frank Act) regarding reimbursement by CEOs and CFOs of bonuses, other incentive-based compensation and stock sale profits following an accounting restatement due to misconduct. The company would also be required to report in its Form 20-F whether it has adopted a written code of ethics that applies to its CEO, CFO, CAO and controller (or persons performing similar functions), and if not, the reasons why not. It would also have to state whether or not it has (and if not, why it does not have) an audit committee financial expert.

Otherwise, a listed company would not be subject to U.S. requirements in respect of corporate governance matters. Its board structure, the responsibilities of directors and officers, remuneration practices and levels, shareholder approval requirements (including for significant transactions) would all be subject only to local law and local stock exchange requirements.

Liability. A company listed in the United States (whether U.S. or non-U.S.) would be subject to the anti-fraud provisions of the U.S. securities laws, which impose liability for material misstatements and omissions in SEC filings and other public statements, and the anti-bribery provisions of the U.S. Foreign Corrupt Practices Act. The SEC (now in contrast to courts in private actions) has an expansive view of jurisdiction to include not only conduct in the United States but also conduct outside the United States that has an effect in the United States. Although not a common occurrence, one example of the extraterritorial application of the anti-fraud rules was the SEC enforcement action in 2000 against Veba AG for false statements made in denying merger discussions.

Although there are similarities between the U.S. concept of ''material,'' nonpublic information and the European concept of ''inside'' information, there are practical differences in terms of disclosure obligations. The U.S. regime does not create an independent obligation to disclose material, nonpublic information; rather, it governs the content of such disclosure and addresses selective disclosure (by domestic registrants). Ad hoc publicity rules and the EU Market Abuse Directive define ''inside information'' based on price-sensitivity, and create an affirmative obligation to disclose that inside information, while also setting forth exceptions to this general rule for delay and selective disclosure. The difference between the two regimes is driven by a distinctive feature of the U.S. securities laws; that is, the absence of a single source of obligations to make public disclosures. The obligation on the part of companies to disclose material information derives from a combination of SEC disclosure rules, anti-fraud rules and court cases applying the anti-fraud rules to specific circumstances. As a result, in the United States, there is more flexibility as to when disclosure needs to be made.[7]

Domestic Provisions that do not apply to Non-U.S. Issuers. A foreign private issuer would not be subject to Regulation FD on selective disclosure, the U.S. proxy rules (which require the publication of proxy statements used for annual meetings and otherwise when proxies are solicited for a shareholder vote), or extensive disclosure on executive compensation – all of which only apply to domestic SEC reporting companies. In contrast to the approaches in London and Hong Kong, in the United States, a company would not be subject to a range of corporate governance provisions that apply to domestic listed companies.

Undertaking a Comparative Analysis

Are there benefits to different market segments within a particular market?

[7] Once they have spoken, companies with SEC reporting obligations have a duty to speak without material misstatements or material omissions.

LSE. While the United States essentially has a single set of obligations for non-U.S. listed companies (only slight variations apply as between the NYSE and Nasdaq), in the United Kingdom, for example, issuers have a choice of two listing segments that comprise the Official List: the premium segment, for issuers that follow the ''super-equivalent'' standards set out in the Listing Rules; and the standard segment, for issuers that follow the EU minimum standards for securities admitted to trading on an EU regulated market. Both segments are EU regulated markets and as such the EU Prospectus Directive, EU Transparency Directive and EU Market Abuse Directive apply. As noted above, while the standard segment follows EU standards, the premium segment imposes ''super-equivalent'' requirements, including stricter eligibility standards and various corporate governance standards (discussed below). Most of the rules apply equally to U.K. and overseas companies (the requirements regarding audit committees, however, do not apply to overseas companies). There is also the possibility of a listing on the Alternative Investment Market (which is beyond the scope of this article).

HKSE. The HKSE Main Board does not have any segments, though there is the possibility of a listing on the Growth Enterprise Market (GEM) (which is beyond the scope of this article).

Are there listing criteria that may be difficult to meet?

Prospective registrants, especially those that have shorter operating histories, will need to consider whether there are constraints by reason of minimum listing criteria. In contrast to the U.S. requirements (which have no minimum operating history requirements), companies listing on the LSE or the HKSE need a three-year track record.

Are the listing processes different?

LSE. When listing on the LSE, a company must determine whether it will obtain a premium listing or a standard listing (as discussed above). To obtain a premium listing, a company must comply with not only the listing requirements imposed by EU legislation but also with the more onerous ''super-equivalent'' standards set by the Financial Services Authority. These super-equivalent standards aim to provide additional investor protection and thus are considered to promote shareholder confidence. To demonstrate that a company meets the eligibility criteria, it must submit an eligibility letter to the U.K. Listing Authority, which will assess and confirm the eligibility of the company.

In connection with a listing on the LSE, a company would prepare a prospectus, which would contain three years of audited financial statements and interim financial statements if the annual statements are more than nine months old. At least two years would need to be stated on, or restated to, the basis to be applied in a company's next annual financial statements. The financial information to be included in the prospectus must be prepared in accordance with IFRS as adopted by the EU. In the case of non-EU issuers, financial information may also be prepared in accordance with national accounting standards (where such standards have been deemed equivalent to IFRS[8]). The prospectus would also include an Operating and Financial Review (''OFR'') (similar to its equivalent in the United States, but less detailed), a working capital statement (and a report thereon) and a capitalization and indebtedness table (within 90 days of the prospectus), and, to the extent applicable, reports on any profit forecasts, pro forma financial information (to reflect significant changes) and a report on the pro forma financial information.[9] The prospectus would also include disclosure on compensation paid and benefits provided to directors and management, information of director conflict of interest, board practices and terms of reference of board committees, summaries of material contracts and related party transactions.

HKSE. The HKSE is focused on corporate governance rules, and before a company can list it must go through a detailed vetting process. Where a company is organized in a jurisdiction whose rules have yet to be vetted,[10] the HKSE will need to be comfortable that local law mandates protections for minority shareholders and imposes requirements on directors that essentially are equivalent to those in Hong Kong.

A listing on the HKSE requires a sponsor, and the sponsor will have significant and detailed obligations to ensure that the company and its directors comply with applicable HKSE rules. This will include, for example, a detailed training session with the directors of the company where all of the applicable requirements are read and explained. The company should expect extensive document requests from the sponsor. Generally, all facts and even some of the company's beliefs in the application will need to be supported by documentation. The sponsor will also expect to interview the company's major customers and suppliers.

The company should review its capital structure prior to listing. The HKSE rules do not permit a listed company's share capital to include shares that have voting rights that do not have a reasonable relationship with the equity interests of the shares. Thus, the HKSE probably would not accept a dual class structure that provides super voting power to pre-IPO controlling shareholders. In addition, the HKSE is unlikely to accept blank check preferred stock which could deter change of control transactions because it may not be in the best interest of minority shareholders.

The process to list on the HKSE involves the following:

- prior to the formal listing application, the company will likely be advised to hold informal discussions with the staff of the listing division regarding any potential material issues that could arise in its application and any waivers that may be required (this is known as the ''pre-A1 submission'' process);
- at least 25 business days prior to the listing committee hearing, submission of an application for listing, which includes a listing application form (Form A1), ad-

[8] The European Commission has confirmed that Japanese GAAP and U.S. GAAP are considered equivalent to IFRS for purposes of the EU Prospectus Directive. Transitional relief has also been granted to Chinese, Canadian, Korean and Indian GAAP for financial years starting before January 1, 2012.

[9] SEC rules do not require working capital statements (or reports thereon) or reports on pro forma financial statements.

[10] Jurisdictions other than China, Hong Kong, Australia, Bermuda, Brazil, British Virgin Islands, Canada (Alberta, British Columbia and Ontario), Cayman Islands, Cyprus, France, Germany, Guernsey, Isle of Man, Italy, Japan, Jersey, Luxembourg, Singapore, the United Kingdom and the U.S. State of California.

vanced drafts of the prospectus, drafts of all requests for waivers (derogations) from the listing requirements, and a draft timetable, which needs to be agreed with the HKSE;

- at least 15 business days prior to the listing committee hearing, a draft of the profit forecast memorandum and the cash flow forecast memorandum;
- obtaining approval of the listing application from the staff of the listing division;
- completion of a hearing process on the application by the listing committee; and
- submission of final documents before printing of prospectus.

Under certain circumstances, if a company acquired any material subsidiary or business[11] during the three financial years preceding the listing application (known as the ''track record period'' or ''TRP''), it must present pre-acquisition financial information of that subsidiary or business in accordance with the company's accounting policies. In addition, if a company acquired or proposes to acquire any businesses or companies that may be a ''major company''[12] at the date of the application (or date of acquisition, if later), it must include in its listing document pro forma financial information for the current fiscal year, the most recent fiscal year and/or the most recent interim period.

The HKSE will closely review related party transactions (called ''connected party transactions'') as part of its approval process. Generally, the HKSE views related party transactions as a disclosure issue (*i.e.*, as long as such transactions are disclosed to investors, it will not prohibit listing). Nevertheless, if the HKSE believes the arrangements to manage conflicts of interest with respect to these related party transactions are inadequate, it may withhold its approval for listing until its concerns are addressed appropriately. In addition, although it is not specifically required in the HKSE rules, it is common practice for controlling shareholders of the company to enter into a non-compete agreement with the company.

The HKSE listing process will require information about director remuneration paid by the company or any of its subsidiaries in the three fiscal years and any interim period preceding the listing.

As part of the application process, the company will be expected to include a valuation report that values the company's interests in land and buildings. This report must be prepared by an independent, qualified appraiser. If the company owns significant interests in land and buildings, this could be a time-consuming and expensive exercise. If the land and buildings are leased and not owned, then the requirements are more limited. Generally, the company will only need to summarize its interests in leased lands and buildings in the listing document.

The process to list on the HKSE can take at least three months from, and including, the preparation of the documents until the dealing in the shares commence, though this timetable can be longer depending on the circumstances of the company, particularly when the issuer is a company organized in a jurisdiction that has yet to be vetted by the HKSE.

What are the ongoing disclosure requirements?

LSE. A listed company is required (based on the Listing Rules and Disclosure and Transparency Rules) to publish annual financial reports (containing audited financial statements, a management report, a responsibility statement and an audit report) within four months of the end of the financial year; semi-annual financial reports (containing condensed financial statements, an interim management report and a responsibility statement) within two months after the end of the first half of the financial year; and interim management statements (containing an explanation of material events and transactions and their impact on financial position, and a general description of financial position and performance) during the first half and second half of the financial year (between 10 weeks after the beginning, and six weeks before the end, of the period). Companies that publish quarterly financial reports under local law are not required to publish separate interim management statements. There is no audit or assurance requirement for these statements.

As noted above, the ongoing obligation for annual reporting does not include an OFR (which is a Prospectus Rule concept). Instead, the annual report is to include, based on Listing Rules and Disclosure and Transparency Rules, a management report, which sets forth a fair view of the business and the principal risks and uncertainties. This report includes, among other things, an analysis using key performance indicators and discussions of future developments, risk management objectives and exposures to price, credit, liquidity and cash flow risks.

The U.K. has a Financial Reporting Review Panel (''FRRP''), which is one of the operating bodies of the Financial Reporting Council (''FRC''). The FRC is an independent regulator responsible for promoting confidence in corporate reporting and governance. The FRRP reviews accounts for compliance with the law and accounting standards and, in connection therewith, reviews annual accounts of public companies and reviews interim and final reports of certain other listed companies. It selects reports for review based on an assessment of risk of non-compliance and risk of significant consequence if there is non-compliance. This process can be less onerous than the SEC review process. Also, it is not clear that this review would extend to overseas companies.

Note to Readers

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[11] Acquired subsidiary or business accounting for 25% or more of the company's total assets, profits or revenues.

[12] Acquisitions or proposed acquisitions of businesses or companies accounting for 5% or more of the company's total assets, profits or revenues.

HKSE. Listed companies are required to send an annual report and accounts (or, if applicable, a summary report) to all shareholders (i) not more than four months after the relevant financial year end; and (ii) not less than 21 days before the annual general meeting. Annual general meetings of listed companies must be held not more than six months after the relevant financial year end. The annual report must be prepared in Hong Kong Financial Reporting Standards (''HKFRS''), IFRS or U.S. GAAP (only if a secondary listing). (IFRS filers are required to also disclose and explain material differences between IFRS and HKFRS.) The HKSE also has rules regarding the timing of the release of preliminary results. Listed companies must also send an interim report (or, if applicable, a summary report) to all shareholders within two months after the first six months of each financial year.

Moreover, the Code on Corporate Governance Practices (the ''Governance Code'') recommends that listed companies publish quarterly financial results within 45 days after the end of the relevant quarter, disclosing such information as would enable shareholders to assess the performance, financial position and prospects of the companies. Any such quarterly financial report needs to be prepared using the accounting policies applied to a company's half-year and annual accounts.

Public disclosure requirements and the related duty to inform the HKSE are based on obligations to disclose price-sensitive information. The HKSE rules set forth general principles, and also call for disclosure in certain enumerated circumstances. These enumerated circumstances include disclosure triggered by:

- major market upheaval in the industry, countries or regions where the group has significant operations or transactions, or significant changes in exchange rates of currencies significant to the group's operations;
- a change in the group's financial condition or in, or that could affect, the performance of its business or the price of the listed securities;
- commitment of significant resources to an activity that is a non-core business of the group;
- any breach of the terms of loan agreements if such loans are significant to the operations of the group; or
- a decision to grant options.

Certain categories of announcements must be submitted to the HKSE prior to release.

Listed companies are not required to disclose profit forecasts, although should they do so specific requirements apply.

Listed companies are also required to respond promptly to any enquiries made by the HKSE, for example, in relation to unusual movements in the price or trading volume of their listed securities.

Disclosure obligations can be satisfied by issuing a formal announcement, which must be made in English and Chinese.

To what extent will listing rules impact corporate governance practices?

LSE. The U.K. Corporate Governance Code (the ''Code'') is the key source of corporate governance recommendations for companies with a premium listing. The Code consists of 18 Main Principles of good governance. The Listing Rules require a company with a premium listing to provide a disclosure statement on corporate governance and the Code in its annual report, which includes a statement on how the company has applied the Main Principles in the Code and whether the company has complied or not complied (including reasons for non-compliance) with all relevant provisions of the Code. The Code's main sections deal with (i) Leadership, (ii) Effectiveness, (iii) Accountability, (iv) Remuneration and (v) Relations with Shareholders.

Under the Code, among others things:

- the board should have the appropriate balance of skills, experience, independence and knowledge of the company to enable it to discharge its duties and responsibilities effectively;
- the board is responsible for determining the nature and extent of the significant risks it is willing to take in achieving its strategic objectives;
- the board should, at least annually, conduct a review of the effectiveness of the company's risk management and internal control systems and should report to shareholders that they have done so;
- the board should consider board diversity, including gender mix, when making new appointments;
- the performance-related elements of executive directors' remuneration should be designed to promote the long-term success of the company;
- remuneration for non-executive directors should not include share options or other performance-related elements;
- at least half the board, excluding the chairman, should be comprised of non-executive directors determined by the board to be independent (or at least two independent directors in the case of smaller companies);
- the board should appoint one of the independent non-executive directors to be the senior independent director to provide a sounding board for the chairman and to service as an intermediary for the other directors when necessary;
- the board should establish an audit committee of at least three independent non-executive directors (or at least two independent directors in the case of smaller companies); and
- the board should satisfy itself that at least one member of the audit committee has recent or relevant financial experience.

HKSE. Directors have ultimate responsibility for ensuring that a company listed on the HKSE comply with all of its obligations. Companies must comply with the Governance Code, and must disclose in interim and annual reports whether they have in fact complied. Companies must also issue an annual Corporate Governance report.

There are a number of disclosure and substantive requirements, including shareholder approval requirements, directed at avoiding conflicts of interests. New directors are to undergo training, including in respect of obligations arising under HKSE Listing Rules.

Other corporate governance considerations include the following:

- the board is subject to independence requirements, and directors are required to submit certifications to the HKSE regarding independence;
- at least three independent non-executive directors should be appointed;
- the chairman and CEO should not be the same person;
- board meetings must comply with procedural requirements of the Governance Code;

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- compensation of directors is subject to certain requirements;
- companies must have an audit committee comprised of at least three non-executive directors (a majority being independent);
- executive share option plans are subject to detailed disclosure requirements, require shareholder approval and certain substantive thresholds;
- directors must provide the HKSE with personal declarations and undertakings;
- companies are subject to notification requirements with respect to changes affecting directors and executive officers;
- loans by companies to its directors are generally prohibited, subject to certain limited exemptions including housing loans;
- two of the company's executive directors must normally reside in Hong Kong (a waiver is generally available for this requirement) and the company must appoint two authorized representatives to act as the principal interface with the HKSE; the company's secretary must reside in Hong Kong, though the company may appoint an agent to accept service of process; and
- during its first year as a listed company, the company must have a compliance advisor (usually a local investment bank).[13]

Counsel will need to review the articles of association and local corporate law and local stock exchange requirements to ensure consistency with the rather strict HKSE requirements. Typically, the sponsor will undertake a separate and more detailed review of the company's corporate governance structure and liaise with the HKSE directly. Conflicts would have to be resolved, possibly through amendments to the articles (if not illegal under local requirements) (*e.g.*, to ensure minority protections are afforded) or through derogation requests (*e.g.*, for waiver of the director residency requirement).

To what extent will listing apply to business combinations and similar transactions?

LSE. In major acquisitions or disposals, a listed company is subject to U.K. substantive rules, which may require obtaining shareholder approval, and may also require disclosure under the general obligation to disclose inside information. Transactions are categorized according to specified size tests by reference to percentage ratios, and the consequences of the transaction depend upon the category into which it falls. For example, generally for a company with a premium listing, a transaction or series of transactions where any percentage ratio is 25% or more is classified as a Class 1 transaction that requires prior shareholder approval and disclosure to the market.

HKSE. Certain transactions of a listed company, including acquisitions and disposals of assets and securities, are subject to HKSE substantive rules, and may also require disclosure under the general duty of disclosure. Transactions are categorized according to specified size tests by reference to percentage ratios, and the consequences of a transaction depend upon the category into which it falls. For example, a ''major'' transaction (*i.e.*, a transaction or a series of transactions where any percentage ratio is 25% or more, but less than 100% for an acquisition or 75% for a disposal) must be made conditional upon shareholder approval, and disclosed to the market.

Changing Landscape

Listing in the United States, the United Kingdom or Hong Kong will involve compliance with complex sets of rules. The foregoing is intended as a summary only, and any decision to seek a listing should be based on a full review of the then current requirements. Note that in view of the significant efforts to reform the financial markets, there is a certain risk of basing decisions on the current state of regulation or a legal regime. Laws, rules and regulations can, and do, change. We also note that there would be a range of other considerations, including tax issues for the company, tax issues for its shareholders, investor and market perception of the jurisdiction, political stability and predictability, financial markets infrastructure, offering currency, residency requirements for managers and directors, and regulatory considerations that are beyond the scope of this memorandum.

[13] Compliance advisors provide useful assistance to newly listed companies. The company must seek advice from the compliance advisor before the publication of, among other things, regulatory announcements, shareholder circulars and financial reports.