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Capital Markets Quarterly Update

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PROCEDURES AND WAIVERS

Waiver – company secretary who does not possess the relevant professional qualifications – granted: On 8 April 2013, HKEx published an updated listing decision “[HKEx-LD35-1](#)” to provide guidance on the waiver regarding a company secretary who does not satisfy the relevant academic or professional qualifications or relevant experience requirement under Main Board LR8.17. To qualify for the waiver, the subject company secretary should be assisted by a suitably qualified person

for a period of three years (i.e., a three-year waiver will be granted) or one year (i.e., a one-year waiver will be granted) for the purpose of helping him to gain the relevant experience. At the end of the period, there would be an evaluation of the qualification and experience of the company secretary and the need for further assistance. Whether a three-year or one-year waiver would be granted will be considered on a case-by-case basis depending on a number of factors.

PRACTICAL
TIPS

It seems that HKEx is more willing to relax the qualification requirement for a company secretary as one-year instead of three-year waivers were granted in more recent cases. The important thing to bear in mind is that the company secretary should or otherwise be assisted by a suitably qualified person with appropriate experience.

Waiver – assured entitlement requirement – granted: On 24 May 2013, HKEx published a listing decision “[HKEx-LD72-2013](#)” about granting a waiver of the assured entitlement requirement under paragraph 3(f) of Practice Note 15 of the Main Board LR in relation to the listing applicant’s proposed spin-off of its subsidiary for listing on a PRC stock exchange. The reasons for granting the

waiver are:

- The spin-off was not a material transaction for the applicant and no shareholders’ approval was required
- The provision of assured entitlement of the subsidiary’s shares to the shareholders of the applicant was not allowed under PRC laws

PRACTICAL
TIPS

Generally, it is difficult to obtain such waiver and HKEx will only grant such waiver under exceptional circumstances, e.g., where it is impractical to do so according to applicable laws.

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Procedures to follow – liquidity arrangements for overseas listed issuers seeking to list by way of introduction:

On 23 April 2013, HKEx published a guidance letter [*“HKEx-GL53-13”*](#) to provide guidelines on liquidity arrangements for overseas listed listing applicants seeking to list by way of introduction on HKEx. The guidelines mainly include the following matters:

- The process and arrangements for transferring securities from the overseas register to Hong Kong register and vice versa during and after the Designated Period (the period during which an issuer is required to facilitate liquidity for its securities in the Hong Kong market)
- Appointment of designated securities dealers (**Designated Dealers**) to provide liquidity and their functions
- The arbitrage, bridging and/or trading arrangements conducted by the Designated Dealers and their related benefits
- Investor education to be provided by the issuer and sponsor
- The timing for publishing respective public announcements, their contents and channels of publication

Waiver – requirement to include consolidated results for each of the three financial years – granted:

HKEx published an updated guidance letter [*“HKEx-GL25-11”*](#) on 28 June 2013 to set out the conditions for granting a waiver from strict compliance with Main Board LR 4.04(1) and GEM LR 7.03(1) and 11.10. Main Board LR 4.04(1) requires a Main Board listing applicant to include in its accountants’ report the

consolidated results for each of the three financial years immediately preceding the issue of the prospectus (**Main Board Results Requirement**) (two financial years for a GEM applicant under GEM LR 7.03(1) and 11.10 (**GEM Results Requirement**)).

The updated guidance letter mainly adds the following conditions for granting waivers from strict compliance with the GEM Results Requirement (and supersedes the listing decision [*“HKEx-LD45-3”*](#)):

- The applicant must list on HKEx within two months after the latest financial year end
- The applicant must obtain a certificate of exemption from SFC on compliance with the relevant requirements under the CO
- A profit estimate for the latest financial year (complying with GEM LR 14.29 to 14.31) must be included in the prospectus or the applicant must provide justification as to why a profit estimate cannot be included in the prospectus
- There must be a directors’ statement in the prospectus stating that there is no material adverse change to its financial and trading positions or prospect with specific reference to the trading results from the end of the stub period to the latest financial year end

Such conditions are in line with the conditions for granting waivers from strict compliance with the Main Board Results Requirement.

Please also refer to the article [*“Guidance for granting Rule 4.04\(1\) waivers”*](#) contained in our previous [*Capital Markets Quarterly Update \(October to December 2011\)*](#)

DISCLOSURE REQUIREMENTS AND GUIDANCE

Simplification series – the “Risk Factors” section in listing documents: On 3 May 2013, HKEx published another guidance letter [*“HKEx-GL54-13”*](#) of the simplification series to provide guidelines on the disclosure requirements in the “Risk Factors” section in listing documents. HKEx warns that a listing document which does not comply with this guidance may be regarded as not substantially complete. The major principles include the following:

- Disclose the risks that are relevant to the individual listing applicant and understandable to investors in terms of their significance
- Focus on and explain the risks and avoid unnecessary factual background information
- Make both quantitative and qualitative disclosures
- Disclose each risk factor separately and avoid bundling disclosure
- Disclose risks even if they only have a low probability of occurring
- Use meaningful and appropriate headings and sub-headings
- Make disclosures in order from most to least important
- Ensure consistent disclosures in the listing document

PRACTICAL TIPS

HKEx has been issuing guidance letters from time to time on the manner and details of disclosures which should be made in listing documents and application accompanying documents. When preparing the listing document and application accompanying documents, an applicant should, and the working parties should assist the applicant to, check carefully against these guidance letters as any non-compliance may result in a listing application being returned.

Disclosure in listing documents – unaudited net profits after track record period – amounting to profit forecast/estimate: On 21 June 2013, HKEx published its [*“Frequently Asked Questions Series 23”*](#) to explain whether the disclosure of unaudited net profits before or after tax and/or other financial data after the track record period in listing documents will constitute a profit forecast/estimate under the Listing Rules.

PRACTICAL TIPS

Although HKEx may require an applicant to disclose updated financial information since the latest audited period end in its listing document (in particular when there is a downward trend of revenue or profit), the applicant should be very careful in selecting what financial information it should disclose and the extent of disclosure. It is advised that if the applicant doesn't intend such financial information to amount to a profit forecast/estimate, it should consult with its sponsor and reporting accountant first before making any disclosure.

- Do not disclose (a) risks which can be mitigated, (b) mitigating facts or (c) outdated risk factors

Simplification series – the “Summary and Highlights” section in listing documents: On 7 June 2013, HKEx published an updated guidance letter [*“HKEx-GL27-12”*](#) of the simplification series to provide guidelines on the disclosure requirements in the “Summary and Highlights” section in listing documents.

In particular, the guidance letter explains the following:

- What is meant by plain language
- How to deal with technical issues
- What should not be included
- How to make the section concise and easy to read

Also, the letter contains a checklist of information which may be included in the section with guidance on what to disclose and the manner of disclosure. The key areas of disclosure include business model, shareholder information, key operational and financial data, future plans and prospects and offer related information and profit forecast.

The answer is affirmative. Where an applicant discloses such financial information which can result in an investor ascertaining the applicant's estimated level of profits or losses since the latest audited period end (e.g., disclosure of both revenue figure and net profit margin percentage), this will amount to a profit forecast/estimate and the applicant should comply with the relevant requirements under the Listing Rules.

💡 LISTING SUITABILITY AND OTHER LISTING DECISIONS

Labuan Malaysia – acceptable jurisdiction: On 29 April 2013, HKEx published a listing decision [*“HKEx-LD64-2013”*](#) to confirm that Labuan Malaysia is an acceptable jurisdiction of an issuer’s incorporation under the Listing Rules provided that a Labuan listing applicant:

- Amends its articles to address shareholder protection requirements to the satisfaction of HKEx
- Demonstrates that there is a reasonable nexus between its operations and Labuan

PRACTICAL TIPS

HKEx has accepted more than 20 overseas jurisdictions (other than PRC, Bermuda and Cayman Islands) so far as an issuer’s place of incorporation. The list of overseas jurisdictions which have been formally ruled by HKEx to be acceptable as an issuer’s place of incorporation can be downloaded via the link below:

http://www.hkex.com.hk/eng/rulesreg/listrules/listsptop/listoc/list_of_aoj.htm

Accumulative effect of non-compliances – resulting in unsuitability for listing: On 31 May 2013, HKEx published a listing decision [*“HKEx-LD73-2013”*](#) in which it decided that the listing applicant (a retailer) was not suitable for listing after assessing the accumulative effect of the following non-compliances and uncertainties:

- There were unauthorised building works in one of the material stores and the using of a substantial part of the store premises was not allowed under the occupation permit

- The lease renewal of another material store had not yet commenced
- There was a substantial decline in the most recent financial results submitted

Such matters collectively cast serious doubt on the applicant’s sustainability and future performance after listing and they could not be sufficiently addressed by including a profit forecast or making disclosure in the prospectus.

PRACTICAL TIPS

When assessing the suitability for the listing of an applicant, each case will turn on its own facts. The accumulative effect of all non-compliances and irregularities will obviously be relevant.

Also, HKEx may not be satisfied with the actions taken by directors if the irregularities are identified or addressed only shortly before or after the application is submitted or after HKEx has raised concerns.

Mining companies – no clear path to commercial production shown in listing application – minimum profits requirement not satisfied – factors to consider: On 31 May 2013, HKEx published a listing decision [*“HKEx-LD74-2013”*](#) in which it decided that the listing applicant (who was engaged in the exploration and development of metal properties) had not demonstrated that its project had a clear path to commercial production and thus failed to comply with the minimum profits requirement under the Listing Rules. The factors which were taken into consideration include:

- The project payback period was subject to a high risk
- The serious concerns on whether there would be sufficient funding to finance the applicant’s project to the stage of commercial production
- The high uncertainty on whether the applicant would be able to obtain the relevant permits and licences

Glossary

IN THIS UPDATE, THE FOLLOWING TERMS HAVE THE FOLLOWING MEANINGS

| | |
|----------------------|----------------------------------------------------------------------------------------------------------------------|
| CO | Companies Ordinance (Cap 32 of the Laws of Hong Kong) |
| GEM | Growth Enterprise Market operated by SEHK |
| GEM LR | Rules Governing the Listing of Securities on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited |
| HK | Hong Kong Special Administrative Region of the PRC |
| HKEx | Hong Kong Exchanges and Clearing Limited (also referring to its subsidiaries, including SEHK, as appropriate) |
| Listing Rules | Main Board LR and/or GEM LR, as the case may be |
| Main Board LR | Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited |
| PRC | People's Republic of China |
| SEHK | The Stock Exchange of Hong Kong Limited |
| SFC | Securities and Futures Commission |

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