

MAYER • BROWN  
JSM

## Capital Markets Quarterly Update

HONG KONG

## AUTHORS

JECKLE CHIU  
Partner

## TOPICAL ISSUES

- 1 Listing of overseas issuers – country guides published
- 3 Guidance – matters which might affect suitability for listing

PROCEDURES AND  
WAIVERS

- 4 Waiver required – profit forecast – a period not being a six- or 12-month period (or quarter period for GEM listing applicants)

DISCLOSURE  
REQUIREMENTS AND  
GUIDANCE

- 4 Simplification series– the “Summary and Highlights” section in listing documents
- 4 Simplification series – White and Yellow Application Forms (AFs) – the “How to Apply for Hong Kong Offer Shares” section in a prospectus (HTA)

## TOPICAL ISSUES

**Listing of overseas issuers – country guides published:** On 20 December 2013, HKEx published country guides (**Guides**) to give guidelines on listing applications from overseas issuers incorporated in 20 jurisdictions. The Guides aim to set out the expectations, practices, procedures and criteria of HKEx when applying the Listing Rules for overseas issuers’ applications in a consolidated and more organised manner. A few points to note from the Guides:

- The Guides should be read in conjunction with the *“Joint policy statement regarding the listing of overseas companies” (JPS)* published on 27 September 2013
- For the 20 jurisdictions, HKEx will only accept (1) primary and secondary Main Board and (2) primary GEM listing applications. It does not accept applications for secondary listing on GEM
- The Guides mainly cover the following matters (if applicable):
  - » subject to the issuers satisfying the conditions set out in the respective Guides, HKEx generally does not consider the shareholder protection standards of the 20 respective jurisdictions to be materially

different to the Hong Kong standards. Having said that, the Guides do specify the differences between the shareholder protection standards of the respective jurisdictions and JPS requirements and the approach in handling them

- » bringing into attention some practical and operational matters such as an overseas issuer’s ability to comply with Hong Kong’s rules and regulations, the eligibility of securities, cross-border clearing and settlement, Hong Kong depositary receipts, taxation and stock name identifications. Listing applicants are encouraged to notify HKEx if they foresee any difficulties in complying with such matters
- » specifying the items required to be included in the constitutional documents of the respective jurisdictions in order for them to satisfy the relevant Hong Kong requirements
- » explaining the accounting and auditing related requirements
- » specifying the disclosure requirements in listing documents in relation to the taxation regime of the respective jurisdictions



- 5 Disclosure in prospectus – material adverse changes in financial, operational and/or trading position after the trading record period

#### LISTING SUITABILITY AND OTHER LISTING DECISIONS

- 5 Engaging in non-compliant financing arrangements – listing application delayed for 12 months – listing applicant was required to prove that it could sustain financially and operate independently
- 5 Further guidelines – VIE structures would not result in unsuitability for listing
- 6 Having businesses/projects in countries on which sanctions are imposed – would not result in unsuitability for listing with appropriate disclosures
- 7 Guidance – spin-off and reverse takeover applications
- 8 Glossary

Please see below a summary of the accounting and auditing requirements contained in the Guides:

JURISDICTION	ACCEPTABLE ACCOUNTING AND AUDITING STANDARDS APART FROM THE HKFRS AND IFRS <sup>1</sup>
Australia	Australian Generally Accepted Accounting Principles and Australian Auditing Standards (for a dual primary or secondary listing)
Brazil	None
British Virgin Islands	None
The Province of Alberta, Canada	Canadian Generally Accepted Accounting Principles and Canadian Generally Accepted Auditing Standards (for a dual primary or secondary listing)
The Province of British Columbia, Canada	Canadian Generally Accepted Accounting Principles and Canadian Generally Accepted Auditing Standards (for a dual primary or secondary listing)
Cyprus	None
England & Wales	United Kingdom Generally Accepted Accounting Standards/EU IFRS and Standards for Investment Reporting issued by the Auditing Practice Board in the United Kingdom (for a dual primary or secondary listing)
France	EU IFRS and professional auditing standards applicable in France
Germany	EU IFRS
Guernsey	None
Isle of Man	None
Italy	EU IFRS and Italian Auditing Standards
Japan	Japanese Generally Accepted Accounting Principles (for a dual primary or secondary listing)
Jersey	None
Korea	None
Labuan	None
Luxembourg	EU-IFRS and the auditing standards issued by the International Auditing and Assurance Standards Board as adopted for Luxembourg by the “Commission de Surveillance du Secteur Financier”
Singapore	Singapore Financial Reporting Standards and Singapore Standards on Auditing (for a dual primary or secondary listing)
The State of California, the USA	United States Generally Accepted Accounting Principles (for a dual primary or secondary listing)
The State of Delaware, the USA	United States Generally Accepted Accounting Principles (for a dual primary or secondary listing)

#### PRACTICAL TIPS

*The Guides are a useful starting point for overseas listing applicants who intend to apply for a listing in Hong Kong and applicants should study them carefully accordingly. Applicants may also consult HKEx on a confidential basis for an interpretation of the Listing Rules or the Guides.*

<sup>1</sup> If HKEx accepts other accounting and auditing standards apart from the HKFRS and IFRS, a statement of the financial effect of the material differences from the HKFRS or IFRS (if any) is required to be included in the issuer's accountants' reports and financial statements.

**Guidance – matters which might affect suitability for listing:** On 6 December 2013, HKEx published a guidance letter “[HKEx-GL68-13](#)” to set out various matters (not an exhaustive list) which might affect suitability for listing of listing applicants including the following:

AREAS OF CONCERN	DETAILS OF INCIDENTS AFFECTING SUITABILITY
Director’s non-compliance or conviction record	Having past non-compliance or conviction record which causes serious concern as to the person’s integrity. Also, the person is likely to exercise substantial influence on the listing applicant after listing (e.g. being a controlling shareholder and director)
Non-compliance of laws and regulations	Systematic, intentional, and/or repeated breaches of laws and regulations after considering the nature, extent, reasons, impact, rectification and precautionary measures of such breaches
Deteriorating financial performance	Although a listing applicant could satisfy the relevant financial listing requirements during track record period, any deteriorating financial performance after the track record period may be a material implication of a fundamental deterioration of commercial or operational viability, which raises serious concerns on the sustainability and suitability for listing
Reliance on parent group/connected persons/major customer	Heavy reliance on the following parties/model: <ul style="list-style-type: none"> <li>• Parent group – factors to consider include whether the functions relied on are important, such as sales and procurement functions, any overlapping directors, whether they are operating in the same industry sector and whether adequate measures are implemented to handle conflicts of interest and delineation of businesses</li> <li>• Connected persons – factors to consider include whether a material part of turnover and profits is generated from transactions with connected persons</li> <li>• Major customer – an extreme case may impact on suitability for listing, and factors to consider in determining whether a case is extreme include ability to find replacement customers, possibility of decreasing future reliance, industry landscape, whether the reliance is mutual and existence of long-term contractual arrangements</li> <li>• Captive business model (meaning the sourcing of the listing applicant’s principal raw materials and its principal customer channel are dominated by the same party) – factors to consider include capability of carrying on business independently of such party</li> </ul>
Gambling	Listing applicants must satisfy the requirements stated in the HKEx’s announcement entitled “ <a href="#">Gambling Activities Undertaken by Listing Applicants and/or Listed Issuers</a> ” and Listing Committee Report 2006
Contractual arrangements (variable interest entity structures)	Listing applicants must satisfy the conditions specified in the Listing Decision “ <a href="#">HKEx-LD43-3</a> ”. Please refer to the article “ <a href="#">Further guidelines – VIE structures would not result in unsuitability for listing</a> ” below for details
Reliance on unrealised fair value gains to meet profit requirement	If after excluding unrealised fair value gains, the listing applicant is making a loss and it did not have a substantive business during its track record period, then it must have a sustainable business (such as the existence of property projects under development or significant recurring income) before HKEx would consider it suitable for listing

#### PRACTICAL TIPS

*This guidance letter contains a wide range of factors which HKEx has considered before for the purposes of determining whether a listing applicant is suitable for listing. It is intended to assist applicants and their advisers by consolidating the factors included in the relevant listing decisions and rejection letters. Accordingly, an issuer and its advisers who intend to apply for a listing should study this letter carefully and use it as a preliminary checklist to ensure that all the relevant matters which may raise concerns in relation to suitability for listing have been properly managed before submitting a listing application in order to minimise any undue delay or hindrance to the application.*

## PROCEDURES AND WAIVERS

**Waiver required – profit forecast – a period not being a six- or 12-month period (or quarter period for GEM listing applicants):** On 8 November 2013, HKEx published an updated [“Frequently Asked Questions Series 23”](#) (the previous version was published in June 2013) to include a waiver requirement regarding the disclosure of profit forecast under Main Board LR 11.18 (GEM LR 14.30)<sup>2</sup>. A listing applicant is required to apply to HKEx for such a waiver if it intends to disclose its unaudited net profits/losses before or after tax after the track record period (which would constitute a profit forecast/estimate) covering a period not being a six- or 12-month period (or quarter period for a GEM applicant) (**Financial Information**) in its listing document. When considering such a waiver application, HKEx may impose the following conditions:

- The Financial Information must be reviewed and reported on by the reporting accountants and sponsor
- The applicant must publish an audited report on the relevant financial period after listing
- The applicant must disclose details of the waiver application in its listing document

Please also refer to our previous article [“Disclosure in listing documents – unaudited net profits after track record period – amounting to profit forecast/estimate”](#) contained in our [“Capital Markets Quarterly Update \(April to June 2013\)”](#) for details of the previous version of “Frequently Asked Questions Series 23”. Please read this article in conjunction with the previous article.

### PRACTICAL TIPS

*As waiver application will incur additional time, in order to avoid any undue delay of the listing application, it is recommended that a listing applicant should avoid disclosing Financial Information covering a period not being a six- or 12-month period (or quarter period for a GEM applicant), if possible.*

## DISCLOSURE REQUIREMENTS AND GUIDANCE

**Simplification series – the “Summary and Highlights” section in listing documents:** On 28 November 2013, HKEx published an updated guidance letter [“HKEx-GL27-12”](#) (the previous version was published in July 2013) of the

simplification series to provide guidelines on the disclosure requirements in the “Summary and Highlights” section in listing documents. In the current version, the key areas updated are “Recent development” and “Listing expenses”.

### PRACTICAL TIPS

*Please refer to our previous article [“Simplification series – the “Summary and Highlights” section in listing documents”](#) contained in our [“Capital Markets Quarterly Update \(April to June 2013\)”](#) for details of the previous version of the guidance letter. Please read this article in conjunction with the previous article. As explained in the previous article, the guidance letter contains a checklist of information which specifies the key areas of disclosure which may be included in the section with guidance on what to disclose and the manner of disclosure.*

**Simplification series – White and Yellow Application Forms (AFs) – the “How to Apply for Hong Kong Offer Shares” section in a prospectus (HTA):** On 18 December 2013, HKEx published an updated guidance letter [“HKEx-GL64-13”](#) (the previous version was published in July 2013) to

provide guidelines on the disclosure requirements in AFs and HTA. In this updated letter, the sample AFs and HTA (which provide guidance on disclosures) attached to the guidance letter for reference are updated.

### PRACTICAL TIPS

*Please refer to our previous article [“Simplification series – White and Yellow Application Forms \(AFs\) – the “How to Apply for Hong Kong Offer Shares” section in a prospectus \(HTA\)”](#) contained in our [“Capital Markets Quarterly Update \(July to September 2013\)”](#) for details of the previous version of the guidance letter. Please read this article in conjunction with the previous article.*

<sup>2</sup> Main Board LR 11.18 (GEM LR 14.30) states that a profit forecast appearing in a listing document should normally cover a period which is coterminous with the issuer’s financial year end. If, exceptionally the profit forecast period ends at a half-year end (or half- or quarter-year end for GEM issuers), the interim report should be audited. Profit forecast periods not ending on the financial year end or half-year end (or financial year end, half- or quarter-year end for GEM issuers) will not be permitted.



**Disclosure in prospectus – material adverse changes in financial, operational and/or trading position after the trading record period:** On 8 November 2013, HKEx published an updated guidance letter “[HKEx-GL41-12](#)” (the previous version was published in August 2012) to provide guidelines on disclosures of material adverse changes in financial, operational and/or trading position after the trading record period. This updated version specifies an additional requirement for a listing applicant to disclose selected figures of updated key financials and/or operating data (e.g. revenue, gross profit/loss, gross profit/loss margin, sales volume,

average selling price, production volume, etc.) in relation to deterioration of financial performance in its prospectus.

Please refer to our previous article “[Guidance on Disclosures of Material Changes in Financial, Operational and/or Trading Position After Trading Record Period](#)” contained in our “[Capital Markets Quarterly Update \(July to September 2012\)](#)” for details of the previous version of the guidance letter. Please read this article in conjunction with the previous article. As explained in the previous article, non-exhaustive examples of adverse changes are included in the letter.

#### PRACTICAL TIPS

“Material adverse change” is not an absolute concept and sponsors and listing applicants are required to exercise a certain degree of professional judgment in deciding whether there is any. In considering whether a piece of information amounts to a material adverse change, they are expected to consider at least whether there is any adverse change which has taken place or is expected to take place in the near future, in the technological, market, economic, legal or operating environment in which the applicants operate.

## 💡 LISTING SUITABILITY AND OTHER LISTING DECISIONS

**Engaging in non-compliant financing arrangements – listing application delayed for 12 months – listing applicant was required to prove that it could sustain financially and operate independently:** On 31 October 2013, HKEx published a listing decision “[HKEx-LD19-2011](#)” in which it decided to delay the listing application of a listing applicant that had obtained bill financing from PRC banks by issuing invoices to suppliers which were not supported by genuine underlying transactions. The delay was for 12 months from the cessation of the material non-compliant activities.

The applicant was required to prove that it could sustain financially and operate independently without relying on the non-compliant financing arrangements. The applicant was also required to implement effective internal controls (e.g. engaging independent consultant and professional adviser) to avoid future non-compliance and include the audited financial statements of that 12-month period in its prospectus. HKEx explains that it will adopt a similar approach for PRC applicants who have obtained overseas loans under domestic guarantee which are not backed up by underlying trades.

#### PRACTICAL TIPS

Similar to the current case, in precedent cases, HKEx has also requested the listing applicants to show for a reasonable period of time (usually not more than 12 months) that it would be financially healthy and could operate independently without relying on the non-compliant bill financing arrangement. Accordingly, in order to avoid any undue delay and minimise any complication in the listing application, an applicant should seriously consider ceasing all its material non-compliant financing activities at least 12 months before submission of the application.

**Further guidelines – VIE structures would not result in unsuitability for listing:** On 15 November 2013, HKEx published a revised listing decision “[HKEx-LD43-3](#)” to set out further guidelines in relation to the previous version of the listing decision published in December 2012 in which it determined that the legal questions relating to certain contract-based structures (variable interest entity structures) (**VIE Structures**) would not render the listing applicant unsuitable for listing.

In the current version, the newly added guidelines in relation to the VIE Structures are as follows:

- Clarify that the VIE Structures are allowed only to deal with the foreign ownership restriction. For requirements not regarding foreign ownership restriction, the listing applicant should make reasonable assessment based on the relevant rules and take all reasonable steps to comply with them before listing
- If foreign investors are not allowed to gain control of or operate a foreign restricted business by using agreements or contractual arrangements under the relevant laws and regulations, there must be a legal opinion to confirm positively

that the VIE Structures do not constitute a breach of those laws and regulations or that the VIE Structures will not be deemed invalid or ineffective under those laws and regulations. Also, if possible, it must be supported by appropriate regulatory assurance to prove the legality of the VIE Structures

- The following additional matters should be disclosed in the listing document:
  - » a separate disclosure of revenue from the VIE Structures generated from other subsidiaries apart from the OPCO (companies owned by the registered owners and controlled by the listing applicant through the VIE Structures)

- » if the OPCO's operations are in the PRC, a positive confirmation from the PRC legal advisers that the VIE Structures would not be deemed as "concealing illegal intentions with a lawful form" and void under the PRC contract law

Please refer to the article entitled "[\*Contractual Arrangements Would Not Result in Unsuitability for Listing \(Further Guidelines\)\*](#)" contained in our previous "[\*Capital Markets Quarterly Update \(October to December 2012\)\*](#)" for details of the previous version of the listing decision. Please read this article in conjunction with the previous version.

#### PRACTICAL TIPS

*When considering listing applications involving the VIE Structures, HKEx continues to adopt a disclosure-based approach. Under this approach, the sponsor and the directors are required to demonstrate that the listing applicant has complied in fact and in good faith with all the relevant PRC laws and regulations. If this burden is met, the applicant would not be considered unsuitable for listing because of the VIE Structures. When tailoring the VIE Structures, applicants may consider the following which might assist them in meeting the burden:*

- *The VIE Structures should be structured as narrowly as possible to satisfy the applicant's business purposes. Potential conflicts of interest with the relevant PRC laws and regulations should be minimised*
- *Appropriate regulatory assurance should be obtained from the relevant regulatory authorities, if feasible, as it seems that this would provide a certain degree of comfort to HKEx*

#### Having businesses/projects in countries on which sanctions are imposed – would not result in unsuitability for listing with appropriate disclosures:

On 13 December 2013, HKEx published a listing decision "[\*HKEx-LD76-2013\*](#)" in which it decided that the listing applicants which had businesses/operations in countries on which trade or economic sanctions were imposed by overseas governments (**Sanctioned Countries**) before and during the track record period would not be rendered unsuitable for listing if appropriate measures were taken and the issue could be addressed by relevant disclosures. Such appropriate measures taken by the applicants included the following:

- Termination or transfer of projects/businesses in the Sanctioned Countries before listing
- Providing confirmation that advice obtained or analysis conducted confirmed that the sanctions risk would be very low
- Implementation of internal control measures to control or minimise sanctions risk exposure
- Providing undertakings to HKEx to confirm that the applicants would not:
  - » engage in any activity at all in the Sanctioned Countries after listing, or they would not engage in any activity in the Sanctioned Countries after listing if doing so would expose them to any sanctions risk
  - » use the IPO proceeds or any other funds raised through HKEx to fund any projects/businesses in connection with any sanctioned related activities or compensation

#### PRACTICAL TIPS

*It appears that the general approach adopted by HKEx for listing applicants which have businesses/projects in overseas countries which are subject to trade or economic sanctions imposed by overseas governments is to require them to terminate the relevant sanctionable activities or transfer the contracts in the Sanctioned Countries before listing. Accordingly, applicants should at least assess carefully before submitting applications (a) the financial and operational impact that would result from the termination/transfer to ensure that they can still satisfy the relevant Listing Rules requirements, and (b) the legal consequences and maximum penalties (if any) for terminating or transferring these businesses/contracts in order to minimise any undue delay or hindrance to the listing applications.*

**Guidance – spin-off and reverse takeover**

**applications:** On 13 December 2013, HKEx published a guidance letter “[HKEx-GL69-13](#)” in which it sets out guidelines to issuers seeking (1) a spin-off and separate listing of businesses or assets or (2) a reverse takeover.

For a spin-off, the issuer must comply with Practice Note 15 of the Main Board LR. HKEx will approve the proposal after the relevant compliance issues have been properly dealt with. However, if the company to be spun-off (**Newco**) is to be listed on HKEx, it must satisfy all the relevant new listing requirements and Newco’s new listing application will be subject to a separate approval from HKEx. For a reverse takeover, the issuer will be deemed to be a new applicant. The enlarged group or the assets to be acquired must be able to meet the track record

requirements for a new listing and the enlarged group must be able to meet all the other new listing requirements.

For such listing applications, issuers are expected to resolve any conflict issues in relation to the parent company before submission of the Application Proof including the following:

- Competition including the degree of overlapping business
- Reasons for exclusion of overlapping business
- Extent of future potential/actual competition
- Corporate governance measures to manage future potential/actual conflicts
- How the listing applicant can function independently in areas such as management, operation and financial

**PRACTICAL  
TIPS**

*Since under the new sponsor regime which became effective on 1 October 2013, the Application Proof must be substantially complete, issuers are urged to make pre-IPO enquiries on any issues relating to its compliance with the new listing requirements before submission of the Application Proof.*

## Glossary

IN THIS UPDATE, THE FOLLOWING TERMS HAVE THE FOLLOWING MEANINGS

<b>EU- IFRS</b>	International Financial Reporting Standards as endorsed by the European Union	<b>IFRS</b>	International Financial Reporting Standards
<b>GEM</b>	The Growth Enterprise Market operated by SEHK	<b>IPOs</b>	Initial public offerings
<b>GEM LR</b>	Rules Governing the Listing of Securities on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited	<b>Listing Rules</b>	Main Board LR and/or GEM LR, as the case may be
<b>HK</b>	Hong Kong Special Administrative Region of the PRC	<b>Main Board LR</b>	Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited
<b>HKEx</b>	Hong Kong Exchanges and Clearing Limited (also referring to its subsidiaries, including SEHK, as appropriate)	<b>PRC</b>	People's Republic of China
<b>HKFRS</b>	Hong Kong Financial Reporting Standards	<b>SEHK</b>	The Stock Exchange of Hong Kong Limited
		<b>SFC</b>	Securities and Futures Commission
		<b>USA</b>	United States of America



## Contact Us



**BILLY AU**  
Partner, Mayer Brown JSM  
+852 2843 2254  
billy.au@mayerbrownjsm.com



**JACQUELINE CHIU**  
Partner, Mayer Brown JSM  
+852 2843 2447  
jacqueline.chiu@mayerbrownjsm.com



**JECKLE CHIU**  
Partner, Mayer Brown JSM  
+852 2843 2245  
jeckle.chiu@mayerbrownjsm.com



**JASON T. ELDER**  
Partner, Mayer Brown LLP  
+852 2843 2394  
jason.elder@mayerbrownjsm.com



**JAMES FONG**  
Partner, Mayer Brown JSM  
+852 2843 2299  
james.fong@mayerbrownjsm.com



**DEREK TSANG**  
Partner, Mayer Brown JSM  
+852 2843 2591  
derek.tsang@mayerbrownjsm.com



**MARK UHRYNUK**  
Partner, Mayer Brown LLP  
+852 2843 4307  
mark.uhrynuik@mayerbrownjsm.com



**PATRICK C.K. WONG**  
Partner, Mayer Brown JSM  
+852 2843 4528  
patrick.wong@mayerbrownjsm.com

---

Mayer Brown JSM is part of Mayer Brown, a global legal services organisation advising clients across the Americas, Asia and Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit [www.mayerbrownjsm.com](http://www.mayerbrownjsm.com) for comprehensive contact information for all our offices.

Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe – Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown JSM, a Hong Kong partnership and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

This publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is intended to provide a general guide to the subject matter and is not intended to provide legal advice or be a substitute for specific advice concerning individual situations. Readers should seek legal advice before taking any action with respect to the matters discussed herein. Please also read the Mayer Brown JSM legal publications Disclaimer.