

Listing in Hong Kong: The Process for Delaware Companies

by Woon-Wah Siu and Joseph J. Kaufman

Delaware companies now have a roadmap to apply for a listing on the Hong Kong Stock Exchange.

In February 2012, the Hong Kong Stock Exchange (HKEx) issued Listing Decision HKEx-LD24-2012, which permits companies incorporated in Delaware to list on HKEx if they comply with certain special requirements. These special requirements are in addition to HKEx's basic quantitative and other listing requirements, and are generally applicable to companies in "acceptable" jurisdictions but not incorporated in Hong Kong or a "recognized jurisdiction" (currently mainland China, Bermuda and the Cayman Islands). This advisory discusses HKEx's special listing requirements applicable to Delaware companies.¹

Stockholder Protection Measures

The listing decision sets forth a number of stockholder protection measures that a Delaware company must generally adopt in its certificate of incorporation and bylaws (or in the HKEx's terminology, "constitutive documents"), other measures that must be adopted if not unduly burdensome, or that need to be disclosed in the listing prospectus.

The following are the stockholder protection measures that a Delaware company must generally adopt:

- At least a simple majority of the outstanding shares entitled to vote is required for any change to the constitutive documents, variation of share class rights, voluntary winding-up, or reduction or alteration of share capital. Only stockholders should have the power to amend the constitutive documents.
- The company must hold an annual general meeting of stockholders each year no later than 15 months after the last annual meeting. Written consent may not be used in lieu of an annual meeting.

¹ HKEx has also designated California as an "acceptable jurisdiction," provided that California applicants make certain revisions to their constitutive documents, demonstrate a reasonable nexus with California, and meet other conditions. HKEx's guidance for California applicants does not specify the required revisions to the constitutive documents, unlike its detailed guidance for Delaware companies. It does indicate that a reasonable nexus may be demonstrated if a California applicant's headquarters are in California, it "maintains certain key offices in the United States and has a long operating history there." HKEx Listing Decision HKEx-LD111-1 (November 2010).

- The stockholders must approve the appointment, removal and compensation of auditors, and any payment to a director or past director as a compensation for loss of office or retirement from office.
- Stockholders holding at least 5% of the outstanding shares entitled to vote can require the company to hold an extraordinary general meeting and circulate a proposed resolution.
- The notice period must be at least 21 days for a meeting approving a special resolution and at least 14 days for any other stockholders' meeting.
- The election of a director is required to be voted on individually, provided a single resolution electing two or more directors is permitted if there is unanimous stockholder approval.
- Loans to directors and associates, including quasi-loans and credit transactions, are generally prohibited except where otherwise permitted under Hong Kong law. Companies subject to the U.S. Sarbanes-Oxley Act of 2002 prohibition from making personal loans to officers and directors are considered to be subject to an equivalent requirement.

The following are the stockholder protection measures to adopt if not unduly burdensome to the company:

- At least a two-thirds majority stockholder approval is required for any change in constitutive documents, variation of share class rights or voluntary winding-up.
- Stockholders holding at least 10% of the nominal value of the issued shares, i.e., the total par value of the issued shares, may petition the court to cancel the variation of class rights.
- Any reduction of share capital will be subject to court confirmation.

In addition, certain special disclosures in the prospectus will be required, including the following:

- The circumstances under which the company may give financial assistance to a person for the acquisition of the company's own shares or the minority stockholders of the company may be bought out or require an offeror to buy out their interests after a successful takeover or share repurchase.
- A stockholder approval threshold lower than three-quarters for a change in constitutive documents, variation of share class rights, voluntary winding-up, or reduction in share capital.
- Any other differences between the stockholder protections that the company will provide and those required under Hong Kong law, and any measures that are expected to be adopted if not unduly burdensome to the company but are not adopted.
- All jurisdictional and regulatory differences between Delaware and Hong Kong, especially on aspects described in the 2007 Joint Policy Statement (JPS) issued by HKEx and the Hong Kong Securities and Futures Commission.

In addition, the applicant's listing application must include confirmation that the applicant's stockholder protections are at least equivalent to those applicable to Hong Kong companies. It must also include a legal opinion and confirmation that the constitutive documents do not conflict with HKEx's listing rules, the Securities and Futures Ordinance – Disclosure of Interests and, if they apply, the Hong Kong Codes on Takeovers and Mergers and Share Repurchases.

HKEx does not prescribe a method to adopt the expected stockholder protections, but recommends that the applicant first consider passing a stockholders' resolution to amend its constitutive documents. If any shortfalls in meeting the expected stockholder protections are not addressed by amendment of the constitutive documents, the application must explain this. HKEx will assess the reasons on a case-by-case basis. Under its streamlined procedures for acceptable overseas jurisdictions, HKEx will not rigidly require an applicant to change its constitutive documents if doing so would conflict with Delaware law or be

burdensome, or where alternative means are shown to be sufficient, e.g., if the company is listed on a local stock exchange, and it shows that that exchange requires similar investor protection.

Nexus

The JPS stated that it is HKEx's policy objective to ensure that applicants incorporate in jurisdictions that are reasonably related to their principal business operations absent other substantive concerns. Jurisdictions of incorporation which demonstrate only a distant nexus between the applicant's place of incorporation and its business operations may be subject to greater scrutiny by HKEx. In certain circumstances, a jurisdiction of incorporation which is totally unrelated to an applicant's place of principal business operations, including the location of its trading activities, assets and executive offices, may lead listing applicants to be considered unsuitable for listing.

In view of successful listings on HKEx by companies incorporated in other acceptable jurisdictions such as the British Virgin Islands and Jersey that had no obvious connection to their principal business operations, HKEx officials appear to be flexible in their interpretation of this requirement.

Further Observations

Hong Kong has become an increasingly attractive market for issuers to list their shares. Among other things, being listed in Hong Kong gives an issuer exposure to the fast-growing Chinese market and better access to capital in China and in other parts of Asia. Companies that prefer to become or remain incorporated in Delaware now have a framework to follow to become listed or dual-listed in Hong Kong. We believe this is a significant improvement over the options Delaware companies previously had to list on HKEx, which involved lengthy and uncertain negotiations with HKEx about necessary stockholder protection measures, or redomestication to a "recognized jurisdiction," which may be delayed or even blocked if minority stockholders or the SEC has concerns about the effect on minority investor interests. While the Delaware company must address a number of stockholder protection measures and prepare special documentation and disclosure in connection with a Hong Kong listing, absent unusual circumstances, it is not expected that this process would encounter resistance from either minority stockholders or the SEC. Applicant companies should be able to adopt the changes fairly easily as part of their regular annual meeting or as part of a special meeting.

If you have questions, please contact the Pillsbury attorney with whom you regularly work or the authors:

Woon-Wah Siu (bio)
Shanghai
+86.21.61377924
woonwah.siu@pillsburylaw.com

Joseph J. Kaufman (bio)
Shanghai
+86.21.61377921
joseph.kaufman@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice. Our attorneys are admitted to practice in the jurisdictions listed on their individual resumes. By publishing this memorandum, we do not solicit, target, or advertise for legal employment in any jurisdiction other than where each attorney is admitted to practice.
© 2012 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.