

## HKEx Issues 7th Listed Issuer Regulation Newsletter

The Hong Kong Stock Exchange (**HKEx**) published its [7th Listed Issuer Regulation Newsletter](#) (the **HKEx Newsletter**) in December 2022 covering the amendments to the HKEx Listing Rules on share option and share award schemes (**Share Schemes**) of listed issuers and their principal subsidiaries, matters and measures that listed issuers may be required to implement and/or address in preparing for their upcoming financial year-end reporting and annual general meetings, and the regulatory and compliance issues a secondary-listed issuer seeking to relocate its primary listing to the HKEx may face.

### Amended HKEx Listing Rules on Share Schemes

Having published the consultation conclusions on the Proposed Amendments to the Hong Kong Listing Rules relating to Share Schemes of Listed Issuers in July 2022 (see [New HKEX Listing Rules on Listed Issuers' Share Schemes](#)), the HKEx reminded listed issuers that the amendments to Chapter 17 of the Main Board Rules and Chapter 23 of the GEM Rules would take effect on 1 January 2023 and reiterated the key changes which are as follows:

- 1) eligible participants – only directors and employees of the issuer group (**Employee Participants**), directors and employees of its holding companies or associated companies and service providers will be considered Eligible Participants. As to who qualifies as a service provider, this will generally mean “persons who provide services to the issuer group on a continuing and recurring basis in its ordinary and usual course of business which are in the interest of the long-term growth of the issuer group”.<sup>1</sup> However, listed issuers must state the specific criteria for qualification as a service provider in their scheme document;
- 2) terms of grants – the minimum vesting period is 12 months, although grants to Employee Participants may have a shorter vesting period if the circumstances for the shortened vesting period are clearly stated in the scheme document. The scheme document should disclose the performance targets attached to the grants and the clawback mechanism, or a negative statement indicating that the listed issuer’s scheme contains neither. For share awards, there is no restriction on the share grant price;
- 3) approval requirements – shareholders must approve the scheme mandate limit (of not exceeding 10% of the issuer’s issued shares for all its Share Schemes) and a service provider sublimit. Shareholders’ approval is also required for grants to: (i) an Eligible Participant exceeding the 1% individual limit or (ii) to a connected person exceeding the following de minimis thresholds:
  - for directors (other than Independent Non-executive Directors (**INEDs**)) – grants of share awards over 0.1% of an issuer’s issued shares over a 12 month period (the **0.1% Limit**);

- for INEDs and substantial shareholders – grants of share awards and share options over the 0.1% Limit.

INEDs' approval will suffice for grants below the 0.1% limit and for grants of share options to directors. However, the Remuneration Committee must provide its views on grants to directors or senior managers where the vesting period is less than 12 months or where there is no performance target and/or clawback mechanism; and

4) requirements for other Share Schemes – for Share Schemes funded by existing shares, issuers will be required to make certain disclosures in their annual reports. The abovementioned Listing Rule amendments only apply to the Share Schemes of a listed issuer's principal subsidiaries (meaning those subsidiaries whose revenue, profit or total assets accounted for 75% or more of that of the issuer under the percentage ratios in any of the latest three financial years). Other subsidiaries' shares or options grants may be notifiable transactions under Chapter 14 of the Main Board Listing Rules (Chapter 19 of the GEM Listing Rules).

The HKEx also noted that a listed issuer can continue to grant shares or options under its existing schemes if, in the case of a share option scheme, there is an unused scheme mandate limit, or, in the case of a share award scheme, there is an unutilised advance shareholders' mandate. In the case of an existing share award scheme where new shares are granted using a general mandate, an issuer may continue to grant new shares under it until its second AGM after 1 January 2023.

## Preparation for Financial Year-End Reporting and Annual General Meetings for Hong Kong Issuers

### Change of Hong Kong Issuers' Auditors

There was a marked increase in the number of issuers announcing a change of auditors in 2022. The HKEx noted the most common reason for change was the inability to agree on either the audit fee or audit timetable (caused, in some cases, by the increase in cost and duration of the audit process due to the pandemic). It noted that some auditor resignations close to or after an issuer's financial year end caused delays in audits or even trading suspensions. The HKEx thus reiterated its expectations for an audit committee to:

- maintain a dialogue with the auditors throughout the audit process and keep itself apprised of any contentious audit issues;
- have a clear understanding of the underlying reasons for the auditors' resignation, inclusive of:
  - o holding a private meeting with outgoing auditors to discuss any contentious audit issues raised during the course of the audit;
  - o ensuring the auditors' resignation letter clearly reflects the reasons for their resignation; and
  - o procuring the issuer's board to announce, in the auditors' resignation announcement, anything that needs to be brought to the shareholders' attention regarding issues or matters affecting the audit process or fees, or the issuer's relationship with the auditors;
- ensure that the incoming auditors' audit fees are commensurate with the extent of the audit work required and critically review their capabilities and resources;
- assess whether the incoming auditors clearly understand the reasons leading to the outgoing auditors' resignation; and
- discuss with the incoming auditors how their proposed audit procedures can address those prior issues so that they can obtain "sufficient appropriate audit evidence to draw a reasonable conclusion on which the audit opinion is based".

### Compliance with Core Standards by Issuers incorporated in Bermuda and Cayman Islands

The HKEx drew issuers' attention to the requirement to adopt the Core Shareholder Protection Standards (the **Core Standards**) set out in Appendix 3 to the Hong Kong Listing Rules by an issuer's second AGM following 1 January 2022 (See [HKEX's New Listing Regime for Overseas Issuers Effective 1 January 2022](#)).

It noted that Bermuda and the Cayman Islands, where the majority of listed issuers are incorporated, do not have certain Core Standards<sup>2</sup> built into their jurisdictions' company laws. In particular, the laws of Bermuda and the Cayman Islands do not provide for:

- Core Standard 5 – the requirement for listed issuers to provide members with the right to speak at general meetings; and
- Core Standard 14 – the requirement for a listed issuer’s voluntary winding up to be approved by a super-majority vote of its members in a general meeting.

The laws of the Cayman Islands also fail to make provision for:

- Core Standard 7 – the requirement that minority shareholders (for which the qualifying stake must be no more than 10% of the voting rights) should be able to convene an extraordinary general meeting and add resolutions to a meeting agenda; and
- Core Standard 10 – the requirement for the appointment, removal and remuneration of a listed issuer’s auditors to be approved by a majority of its members or another body that is independent of the board.

Responding to issuer enquiries, the HKEx noted that:

- With respect to Core Standard 5, the fact that Cayman and Bermuda laws do not restrict shareholders’ right to speak at general meetings is not sufficient to ensure compliance with the Core Standard. Issuers incorporated in Cayman and Bermuda therefore need to amend their articles to include a right for members to speak at general meetings;
- With respect to Core Standard 10, setting a higher threshold (i.e. by a special resolution) for removing an issuer’s auditors will not comply with the Core Standard since this requires removal by an ordinary resolution.

It also recommended issuers to make clear disclosure in the shareholders’ circular on the reasons for, and the effects of, the proposed amendments and, where necessary, to engage with shareholders prior to the general meeting to avoid shareholders voting down the proposed amendments due to a lack of understanding of their rationale and effects. It also advised issuers to avoid bundling resolutions with unrelated amendments.

## **New Corporate Governance and ESG Requirements under the HKEx Listing Rules**

Following the revisions made to the Corporate Governance Code and the HKEx Listing Rules, which came into effect last year (see [HKEX Corporate Governance Code and Listing Rule Changes Effective 1 Jan 2022](#)), the HKEx reminded issuers to take the following steps, if they have not already done so, to ensure they are in compliance with the new requirements regarding the appointment of directors and publication of reports:

- to appoint a new INED no later than their AGM to be held in 2023 if all their INEDs have served for more than nine years;
- to make the mandatory disclosures on diversity (including the targets and timelines for board gender diversity and workforce gender ratio) and shareholders communication policy (including two-way communication channels and review of their effectiveness) in their Corporate Governance reports for financial years commencing on or after 1 January 2022;
- to appoint a director of a different gender by 31 December 2024 if their board is still a single-gender board; and
- to publish their ESG reports for the financial years commencing on or after 1 January 2022 at the same time as their annual reports.

## **Arranging Secondary-Listed Issuers’ Conversion to HKEx Primary Listing**

In 2022, a number of secondary-listed issuers converted to a primary listing on the HKEx or expressed an intention to do so. The HKEx singled out the following areas for issuers to plan for and note:

- identifying applicable rules and establishing controls – the disclosure and other requirements under the HKEx Listing Rules for secondary-listed issuers are comparatively ‘light touch’. Therefore, issuers who plan to convert to a primary listing on the HKEx should be aware that some corporate actions commonly undertaken in the capital market of their current primary listing jurisdiction (such as mergers and acquisitions, related party transactions, equity fundraisings and employee incentive programs for US-listed issuers) may be subject to disclosure and other requirements (such as requirements for shareholders’ approval) under the HKEx Listing Rules. Issuers should also establish internal control systems (i.e governance structures and relevant procedures) to ensure the identification of those corporate actions and timely compliance with the HKEx Listing Rules before their conversion; and

- dispensation of rule requirements – the HKEx understands that secondary-listed issuers may have adopted arrangements in their primary listing jurisdictions that would be unduly burdensome to remove. So long as those arrangements do not pose undue risk to shareholders, the HKEx may consider granting dispensation from the HKEx Listing Rules. Examples of such arrangements include:
  - o the continued use of US GAAP as the accounting standard for an issuer with a dual listing in the US provided the relevant key differences between US GAAP and IFRS and a reconciliation statement are included in its interim and annual reports;
  - o the continuation by an issuer with a dual listing in the US of non-discretionary share repurchase plans and directors' trading plans for securities dealings during black-out periods since US regulations provide equivalent safeguards to prevent the use of inside information when dealing in an issuer's securities; and
  - o the continuation of variable interest entity structures by a PRC-based technology issuer and the waiver of certain connected transactions requirements due to the perceived low risk of abuse; and
- seeking shareholders' advance mandate on corporate actions – given the differences between the regulatory requirements of issuers' jurisdictions of primary listing and those of Hong Kong, the HKEx advises converting issuers to plan for their future corporate actions and where necessary, seek shareholders' approval in a general meeting. For example, the HKEx Listing Rules require all issues of securities to be made either on a pre-emptive basis or with shareholders' approval. The HKEx suggests that converting issuers seek a general mandate for share issuance in the upcoming year.

## Release of new e-Forms

The HKEx also reminded issuers that updated versions of its e-Forms can be downloaded on its E-submission System. The previous version of its e-Forms ceased to be acceptable on 7 January 2023.

## Other recent publications

In the latter half of 2022 the HKEx published:

- two listing decisions – one relating to whether an acquisition constituting a disclosable transaction amounted to a reverse takeover ([LD136-2022](#)) and the other relating to whether an issuer could proceed with a proposed share issue that was highly dilutive ([LD137-2022](#));
- an FAQ on Special Purpose Acquisition Companies (**SPACS**) ([FAQ No. 102-2022 to 117-2022](#));
- a revised guidance letter on matters relating to long suspension and delisting ([GL95-18](#)); and
- a consultation paper on Specialist Technology Companies in Hong Kong (see [HKEX Consults on New Listing Regime for Specialist Technology Companies](#)).

---

[1] All further quotations are taken from the HKEx Newsletter

[2] Hong Kong Listing Rules Appendix 3 at: [https://en-rules.hkex.com.hk/sites/default/files/net\\_file\\_store/HKEX4476\\_3753\\_VER18435.pdf](https://en-rules.hkex.com.hk/sites/default/files/net_file_store/HKEX4476_3753_VER18435.pdf)

### This newsletter is for information purposes only

Its contents do not constitute legal advice and it should not be regarded as a substitute for detailed advice in individual cases. Transmission of this information is not intended to create and receipt does not constitute a lawyer-client relationship between Charltons and the user or browser. Charltons is not responsible for any third party content which can be accessed through the website.

If you do not wish to receive this newsletter please let us know by emailing us at [unsubscribe@charltonslaw.com](mailto:unsubscribe@charltonslaw.com)

CHARLTONS  
易周律師行

Hong Kong Office

Dominion Centre 12th Floor  
43-59 Queen's Road East Hong Kong

[enquiries@charltonslaw.com](mailto:enquiries@charltonslaw.com)

[www.charltonslaw.com](http://www.charltonslaw.com)  
Tel: + (852) 2905 7888  
Fax: + (852) 2854 9596