



Initial Public Offerings

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Cayman Islands

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Introduction

The Cayman Islands Stock Exchange (“CSX”) was founded in 1996. The CSX has listed more than 4,600 securities and maintains a market capitalisation of more than US\$240 billion. However, as the CSX generally specialises in the listing of corporate and specialist debt securities and investment funds, rather than traditional equity listings (equity listings account for only five of the listings on the CSX), in this chapter we primarily focus on the popularity of Cayman Islands companies as listing vehicles on international stock exchanges including the New York Stock Exchange, the London Stock Exchange and the Hong Kong Stock Exchange.

Since the 1990s, the Cayman Islands has been a popular jurisdiction for the incorporation of issuers to be listed on international stock exchanges. As the Cayman Islands continues to develop its legal and regulatory regime to be at the forefront of international standards, we anticipate that the use of Cayman Islands companies as internationally listed companies will continue to grow. Reasons for the use of Cayman Islands companies include:

- A stable political system, recognised as a world-class offshore financial centre.
- The laws of the Cayman Islands are substantially based upon English common law, and a number of “key” English statutes. This gives Cayman Islands law and its legal system a common origin with those of many of the jurisdictions of its users, including the United States. It also means that a company incorporated in the Cayman Islands and its shares are well recognised and accepted around the world, and particularly in New York, London and Hong Kong.
- The speed with which companies can be established, usually within one business day, and without the need for any prior governmental approvals.
- The Cayman Islands has a modern and flexible statutory regime for companies, providing a non-intrusive regime on dividends, redemptions/repurchases and financial assistance for the acquisition of shares, and few ongoing filing requirements.
- The Cayman Islands’ status as a tax-neutral jurisdiction: the Cayman Islands has no direct taxes of any kind. There are no income, corporation, capital gains, withholding taxes or death duties.
- The Cayman Islands is recognised by the Organization for Economic Cooperation and Development (OECD), the International Monetary Fund (IMF) and other international bodies for its transparency and standards consistent with those of other major developed countries.
- There are no exchange control restrictions or regulations in the Cayman Islands (unlike

many other jurisdictions). This means that funds can be freely transferred in and out of the Cayman Islands in unlimited amounts.

- There is no requirement that a company incorporated in the Cayman Islands should have any local directors or officers. Nor is there any requirement for local service providers (other than a Cayman Islands registered office). Except in the case of entities regulated by the Cayman Islands Monetary Authority, there is no requirement to appoint a local auditor.

The Cayman Islands exempted company is the Cayman Islands vehicle used for the purpose of acting as the listed vehicle in an international IPO. The key features of an exempted company include:

- Same-day incorporation.
- Low government fees on registration and annually.
- It may register with and apply to the government of the Cayman Islands for a written undertaking that, should any applicable taxation ever be introduced in the Cayman Islands, it will not be subject to various descriptions of direct taxation, for a minimum period of 20 years (and such certificate may be renewed at the end of that period).
- It is not necessary that any of the shareholders, directors or officers be resident in the Cayman Islands.
- The board of directors may comprise such number of persons as desired. Typically, the Board would consist of at least two persons. No officers are required by law, although it is sometimes convenient for a company secretary to be appointed.
- There is no requirement that any meetings of the board of directors be held in the Cayman Islands.

We regularly act for issuers completing initial public offerings on the large international stock exchanges, including:

- New York Stock Exchange.
- NASDAQ Stock Market.
- London Stock Exchange – Main Market and Alternative Investment Market (“AIM”).
- Hong Kong Stock Exchange – Main Board and Growth Enterprise Market.
- Toronto Stock Exchange.
- Taiwan Stock Exchange.

Our work has included acting on the New York Stock Exchange listing of Cayman Islands exempted company Alibaba Group Holding Limited, the largest initial public offering of all time as at the date of its listing.

To provide an indication of the popularity of the Cayman Islands exempted company as a listing vehicle of choice:

- in 2017, the Cayman Islands was one of the most common jurisdictions for foreign private issuers undertaking U.S. listed public offerings;
- Cayman Islands incorporated special purpose acquisition vehicles (“SPACs”) account for the majority of non-US SPACs listed on US exchanges;
- as of the end of 2018, there were 79 Cayman Islands companies listed on NASDAQ and 58 Cayman Islands companies listed on the NYSE;
- as of the end of 2018, there were 18 Cayman Islands companies listed on AIM and 11

Cayman Islands companies listed on the Main Market of the London Stock Exchange; and

- as of the end of 2018, 54% of the 2,318 companies listed on the Main Board of the Hong Kong Stock Exchange were Cayman Islands exempted companies: an increase of 200 companies since the end of 2017.

The IPO process: Steps, timing and parties and market practice

Listing on the CSX

Listing equity securities on the CSX first requires the approval of the CSX's Listing Committee, and the preparation and approval of a listing document compliant with the CSX's Listing Rules. The listing document must contain all information necessary for an investor to make an informed assessment of the issuer's activities, management, prospects and financial position, and the rights, powers, privileges and obligations attaching to the equity securities to be listed.

The information required to be included in the listing document includes: (i) a summary of the particulars of the issuer, its listing agent and underwriters, other advisers including legal counsel and auditors, and the securities to be issued; (ii) a summary of the provisions of the issuer's constitutional documents relating to, *inter alia*, voting rights of directors, director remuneration, changes in capital and arrangements for the transfer of securities; (iii) a summary of material risk relating to the investment in the applicable equity securities; (iv) a summary of the issuance and distribution of the offered securities, including the total number offered, the offer price of each security and its nominal value; (v) a summary of the issuer's capital structure and issuer group's activities; (vi) consolidated financial information regarding the issuer group; (vii) a brief overview of the management of the issuer group; (viii) a list of the parties to and dates of any material contracts (being those entered into not in the ordinary course of business); and (ix) particulars of any litigation or material claims against the issuer group.

A draft of the listing document must be provided to the CSX in reasonable time for comment and amendment prior to the proposed publication date, and the final document is subject to approval by the Listing Committee.

Listing on an international exchange

The precise steps and timetable for an IPO on an international stock exchange are largely dictated by the requirements of the relevant exchange, and any related share offering timetable.

Cayman Islands counsel work closely with the lead counsel for the IPO in the relevant jurisdiction. The input typically required from a Cayman Islands perspective includes:

- advising in respect of the incorporation of the company;
- drafting the constitutional documents of the company, including any required provisions to comply with applicable listing rules or securities laws – Cayman Islands law is flexible in this regard and can generally accommodate the broader constitutional provisions and shareholder protections required by the listing rules of exchanges such as the Hong Kong Stock Exchange and the Toronto Stock Exchange;
- providing input on the Cayman Islands aspects of the listing document, including the descriptions of the listed securities and the applicable corporate laws, and Cayman Islands tax considerations;

- preparing any formal legal opinions required by regulators, stock exchanges, depositories, registrar and transfer agents and/or brokers/underwriters;
- preparing necessary corporate approvals for the IPO; and
- generally advising on Cayman Islands corporate law.

A Cayman Islands issuer can be incorporated on a same-day basis where necessary. There are no pre-incorporation publishing requirements and registration will be effective on the date of filing. Incorporation is effected by filing a signed memorandum and articles of association of the company, which set forth the objects and powers (which can be unlimited) and the internal governance requirements of the company, along with a statutory declaration that the company will not carry on local business in the Cayman Islands.

Regulatory architecture: Overview of the regulators and key regulations

The key sources of regulation of Cayman Islands companies are the Companies Law (2018 Revision) and common law. There are no specific statutes or government regulations concerning the conduct of IPOs on non-Cayman exchanges, or M&A transactions in the Cayman Islands.

The Companies Law includes provisions permitting mergers and consolidations between one or more companies, provided that at least one constituent company is incorporated under the Companies Law. This provides a flexible regime for common public company transactions, including take-privates.

Listing on the CSX

The CSX was established pursuant to the Cayman Islands Stock Exchange Company Law (2014 Revision) and has self-regulatory powers, although it is subject to the supervision and regulation of the Stock Exchange Authority. The CSX's council, comprising six senior professionals appointed by the Authority, and the CEO of the CSX, is responsible for the day-to-day operations of the CSX, a number of which have been delegated to the Listing Committee.

The CSX has developed (and continues to refine) rules, policies and procedures for listing (the "Listing Rules"), and such Listing Rules are subject to the written approval of the Authority.

Chapter 6 of the Listing Rules sets out the requirements for the listing of equity securities. To be eligible for admission to listing on the CSX, there must be a sufficiently liquid market for the equity securities to be listed, which the CSX considers requires:

- an expected initial market capitalisation for all the securities to be listed of at least US\$5,000,000; and
- the minimum percentage of equity securities in public hands to be at least 25% of the class of shares listed at all times, with a minimum of 50 shareholders.

In addition, issuers must generally have: (i) an adequate trading record under substantially the same management (normally at least three financial years); (ii) a board of at least three directors, the majority of whom must be independent; (iii) published audited financial statements which cover the three financial years preceding the application for listing; and (iv) an independent auditor acceptable to the CSX. The equity securities to be listed must be freely transferable (unless otherwise approved by the CSX), and the listing must apply to the entire class of the applicable securities. Convertible securities will be admitted to listing only if the CSX is satisfied that investors will be able to obtain the information necessary to form

a reasonable opinion as to the value of the securities into which they are convertible. To be admitted to listing on the CSX, securities must have an ISIN and be eligible for deposit in an acceptable electronic clearing and settlement system including Clearstream, Euroclear or DTC. The issuer must maintain a share transfer agent or registrar and paying agent in a financial centre acceptable to the CSX. The issuer itself may perform these functions if it can demonstrate to the CSX that it is capable of doing so.

The issuer's constitutional documents must include the governance provisions prescribed by the Listing Rules in relation to capital structure, voting rights of the listed securities, and appointment of and voting by the directors of the issuer.

Listing on an international exchange

The key legal documents applicable to an international IPO process from a Cayman Islands perspective are the listing document, the memorandum and articles of association of the company and requisite corporate approvals. Applicable underwriting agreements and depository or custody agreements should also be reviewed by Cayman Islands counsel, notwithstanding they are not likely to be Cayman Islands law-governed.

Typically, Cayman Islands counsel would assist with preparing the necessary disclosures for inclusion in the listing document to describe Cayman Islands companies and the corporate law framework of the Cayman Islands. Such disclosure often includes a comparison of Cayman Islands law with the equivalent law governing companies incorporated in the IPO jurisdiction – in order that potential investors are able to assess the impact of the use of a Cayman Islands company as the listing vehicle as compared to a vehicle formed in the IPO jurisdiction.

The memorandum and articles of association of the company will need to follow a form which meets the requirements of the applicable stock exchange upon which the company is to be listed, as well as the legal requirements of the Cayman Islands. Cayman Islands counsel work with the lead counsel on the IPO to determine the requirements of the relevant stock exchange, and then draft the constitutional documents accordingly to ensure they are in compliance with such rules.

Cayman Islands companies intending to list on the main US exchanges may be able to take advantage of “foreign private issuer” status, which provides certain advantages, including: (i) reduced reporting requirements; (ii) reduced disclosure requirements; (iii) certain exemptions from US proxy rules; (iv) the ability to apply accounting standards other than US GAAP; (v) flexibility in choice of reporting currency; and (vi) the ability to apply certain “home country” standards in respect of corporate governance practices, publication of interim and annual reports, and the composition, election and classification of directors.

Many Cayman Islands companies listing on NYSE or NASDAQ choose to list American Depositary Receipts (“ADRs”) rather than making a direct equity listing, which allows the company's equity to continue to be denominated in a currency other than US dollars, whilst permitting the listed security to be US dollar-denominated and to clear through US settlement systems. Each ADR is a negotiable certificate that evidences an ownership interest in American Depositary Shares (“ADSs”) which, in turn, represent an interest in the shares of the issuer, which are held by the applicable depository.

Cayman Islands issuers listed on the London Stock Exchange (whether on the Main Market or the London Stock Exchange's junior market AIM) are not automatically subject to the United Kingdom Takeover Code and the jurisdiction of the Panel on Takeovers and Mergers of the United Kingdom. The Takeover Code regulates takeovers of, among others, public

companies listed on the London Stock Exchange with a registered office in the United Kingdom, the Channel Islands and the Isle of Man.

The Takeover Code is designed to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover, and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror. It also provides an orderly framework within which takeovers are conducted. As Cayman Islands issuers are not subject to the Takeover Code, where a Cayman Islands issuer is listing in London, it is common for the issuer's articles of association to include provisions that seek to provide shareholders with some or all of the protections that they would have under the Takeover Code. We work closely with the lead IPO counsel for the listing to ensure the appropriate protections required by investors are incorporated.

Under legislation enacted in July 2017, certain Cayman Islands companies (and Cayman Islands limited liability companies) are required to maintain a beneficial ownership register that records details of the individuals who ultimately own or control more than 25% of the equity interests, voting rights or have rights to appoint or remove a majority of the company directors, or LLC managers, together with details of certain intermediate holding companies through which such interests are held. However, companies listed on the Cayman Islands Stock Exchange or the main international stock exchanges (including the New York Stock Exchange, NASDAQ, London Stock Exchange and Hong Kong Stock Exchange) are exempt from this regime.

Public company responsibilities

The listing of a Cayman Islands company on an international stock exchange does not result in the imposition of any additional Cayman Islands obligations for the company to satisfy.

Companies with equity securities listed on the CSX are subject to the usual ongoing disclosure and compliance obligations, key aspects of which are summarised below.

Listing of equity securities on the CSX requires that the issuer prepare and make available to every member annual financial statements in accordance with International Accounting Standards or such other standards as may be acceptable to the CSX. The issuer must include with its annual financial statements a report by the directors on the operations of the issuer and such directors' report must include, *inter alia*: (i) a description of the principal activities of the group; (ii) a geographical analysis of consolidated turnover; (iii) the name of every subsidiary, its principal country of operation, its country of incorporation and its main business, and (subject to certain exceptions) particulars of the issued share capital and debt securities of every subsidiary; (iv) a statement as at the end of the relevant financial year showing the interests of each director of the issuer in the equity or debt securities of the group and details of any right to subscribe for equity or debt securities of the group granted to any director of the issuer, and of the exercise of any such right; (v) statement as at the end of the financial year showing a summary of bank loans, overdrafts and other borrowings of the group; (vi) particulars of material contracts between the issuer and any interested party (including directors or associates of directors and controlling shareholders of subsidiaries); and (vii) a summary, in the form of a comparative table, of the results and of the assets and liabilities of the group, for the last five financial years or since establishment, if later.

The issuer must also prepare and issue to members (and to the CSX) an interim financial report with respect to the first six months of its financial year, and in addition, as soon as practicable after its approval by or on behalf of the directors, and in any event within two months of the end of the period to which it relates, the issuer must deliver a preliminary

announcement of the six-month interim results to the CSX, for dissemination by the CSX. The issuer must also notify the CSX, for release, of any new developments or changes which are not public knowledge, which may reasonably be expected to materially affect the market activity in, or the price of, the listed securities. In addition, an issuer must notify the CSX of certain other matters, including: transactions constituting a fundamental change in the issuer's business; certain transactions with related parties; any changes in the composition of the board of directors or significant changes to the senior management personnel of the issuer; changes in the issuer's constitutional documents, its capital structure or auditor; and changes in the rights of any class of listed securities.

The issuer must also notify the CSX of any significant changes in the holdings or identity of those holders of equity securities holding in aggregate more than 5% of the issuer's shares, so far as the directors are aware, and of any decision to call, repurchase, draw, redeem or offer to buy any of the issuer's securities.

Potential risks, liabilities and pitfalls

Under Cayman Islands law, subscribers for shares in an IPO offering could potentially bring certain claims against the company and other parties, such as its directors, its auditors and its advisers. The following considers only the position which would apply in respect of proceedings before a Cayman Islands court applying Cayman Islands law. With respect to Cayman Islands companies with equity listed on international exchanges, it is perhaps more likely that proceedings will be brought in another jurisdiction, such as the jurisdiction from which an applicant subscribed for shares and in which a copy of the listing document was made available to them.

Also, while proceedings might be brought before a Cayman Islands court, the court may be asked to apply, in accordance with Cayman Islands conflicts of laws rules, the laws of some other jurisdiction as the appropriate system of law to the relevant action. These conflicts of laws aspects are particularly important in the case of exempted companies, because they are prohibited from offering their shares to the public in the Cayman Islands, unless such company is listed on the CSX.

The types of claims that could potentially be brought include:

- *Negligent misstatement*

There may be civil liability in tort (under what is usually termed the rule in *Hedley Byrne v Heller*) for misstatements in a listing document. The terms of the listing document place a duty of care on the company, and may be argued to place a duty of care on the directors, the promoters and even professional advisers named or referred to in the listing document (or otherwise responsible for its contents), in favour of persons who subscribe or apply for shares in the company on the faith of the contents of the listing document. Breach of this duty would give rise to a claim against such persons for any loss attributable to statements in those parts of the listing document for which responsibility was expressly or impliedly accepted by such person. Reliance on the listing document would have to be proved by the relevant subscriber.

- *Fraudulent misrepresentation*

Civil liability in tort may also arise in respect of a fraudulent misstatement of fact (although not a promise, forecast or expression of opinion). "Fraudulent" in this context is widely interpreted to mean made either with knowledge that the statement was false, or not caring whether the statement was true or false.

- *Contracts Law (1996 Revision)*

Damages may be recovered for any pre-contractual misrepresentation if liability would have arisen had the representation been fraudulently made, unless the person making the representation proved that they had reasonable grounds to believe, and did believe up to the time the contract itself was made, that the facts represented were true. In general terms, this section gives a statutory right to damages in respect of negligent misstatements. The court is permitted to award damages in lieu of rescission where a misrepresentation has been made.

As a general matter, since the relevant contract is with the company itself, the relevant person against whom the subscriber would claim would be the company, although the company might be able in turn to claim against its directors, promoters or advisers.

- *Action for deceit*

An aggrieved investor may, by bringing an action for deceit (a civil claim in tort rather than contract), obtain damages for deceit if it can be shown that:

- (i) a material misstatement was made fraudulently; and
- (ii) they were induced to subscribe for shares as a result of such a misstatement.

“Fraudulently” again means made either with knowledge that the statement was false, or not caring whether the statement was true or false. It is not necessary to show either an intent to defraud, or that the fraudulent statement was the sole cause which induced the investor to take up the shares.

- *Contractual liability*

The listing document will also form the basis of a contract between the company and the successful applicants for shares. If it is inaccurate or misleading, applicants may be able to rescind the contract and/or sue the company and/or the promoters and/or the directors for damages.

Again, as a general matter, since the relevant contract is with the company itself, the relevant person against whom the subscriber would claim would be the company, although the company might be able in turn to claim against its directors, promoters or advisers.

So far as Cayman Islands conflicts of laws aspects are concerned, these questions would be determined according to the governing law of the contract for subscription. Where there is an express choice of Cayman Islands law as the governing law, this is likely to be conclusive to determine the governing law. Where the documentation makes no express choice of governing law at all, it is likely that a Cayman Islands court would still consider Cayman Islands law to be the governing law, since the offeror is incorporated in the Cayman Islands and the subject matter of the contract is shares in a Cayman Islands company.

There may also be a risk of criminal liability:

7.1 Section 257 of the Penal Code (2013 Revision)

An officer of a company (or person purporting to act as such) with intent to deceive members or creditors (which may include subscribers) of the company about its affairs, who publishes or concurs in publishing a written statement or account which to their knowledge is or may be misleading, false or deceptive in a material particular, is guilty of an offence and is liable to, on conviction, imprisonment for seven years.

Any person who by any deception dishonestly obtains for themselves or another any

pecuniary advantage is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

Any person who dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an offence and is liable on conviction to imprisonment for 10 years. For these purposes a person is treated as obtaining property if they obtain ownership, possession or control of it, and “obtain” includes obtaining for another or enabling another to obtain or retain.

For the purposes of Section 257, “deception” means any deception (whether reckless or deliberate) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.

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