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OFFERINGS LAW
REVIEW

FIFTH EDITION

Editor
Marco Georg Carbonare

THE LAWREVIEWS

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CAYMAN ISLANDS

Suzanne Correy and Finn O'Hegarty¹

I INTRODUCTION

The Cayman Islands Stock Exchange (CSX) was founded in 1996. As at June 2021, the CSX listed more than 6,500 securities and maintained a market capitalisation of more than US\$645 billion, an increase of US\$273 billion since the end of 2019.²

The CSX generally specialises in the listing of corporate and specialist debt securities, and investment funds, rather than traditional equity listings (there are only five such equity listings on the CSX). Over the past couple of decades, however, the use of the Cayman Islands as a jurisdiction of choice for issuers on international exchanges has grown significantly – in part attributable to its success in ensuring that its legal and regulatory regime is at the forefront of international standards.

The following provide an indication of the popularity of the Cayman Islands exempted company as a listing vehicle of choice for international exchanges:

- a* in the five years to the end of 2020, the Cayman Islands was one of the most common jurisdictions for foreign private issuers undertaking US-listed public offerings;
- b* Cayman Islands-incorporated special purpose acquisition vehicles (SPACs) account for the majority of non-US SPACs listed on US exchanges;
- c* as at June 2021, there were 289 Cayman Islands companies listed on Nasdaq and 185 Cayman Islands companies listed on the New York Stock Exchange (NYSE);
- d* as at June 2021, there were seven Cayman Islands companies listed on AIM and 10 Cayman Islands companies listed on the Main Market of the London Stock Exchange (LSE);³ and
- e* as at June 2021, 67 per cent of the 2,190 companies listed on the Main Board of the Hong Kong Stock Exchange (HKSE) were Cayman Islands-exempted companies.⁴

The Cayman Islands offers the significant benefits of a body of laws substantially based upon English common law and a number of 'key' English statutes that are familiar to market participants, combined with a stable political system recognised as a world-class offshore financial centre. This means that a company incorporated in the Cayman Islands and its shares are well recognised and accepted around the world, particularly in New York, London and Hong Kong.

1 Suzanne Correy and Finn O'Hegarty are partners at Maples and Calder, the Maples Group's law firm.

2 See the official website of the Cayman Islands Stock Exchange.

3 See the official website of the London Stock Exchange.

4 www.hkex.com.hk/Mutual-Market/Stock-Connect/Statistics.

In addition, the Cayman Islands offers the following advantages:

- a* a modern and flexible statutory regime for companies, providing a non-intrusive regime on dividends, redemptions and repurchases, and financial assistance for the acquisition of shares and few ongoing filing requirements;
- b* status as a tax-neutral jurisdiction;
- c* reliable and efficient judicial system, which is accustomed to dealing with complex commercial disputes;
- d* familiarity and acceptability to investors, underwriters, rating agencies and regulators around the world;
- e* a sophisticated and reliable professional infrastructure; and
- f* absence of exchange control restrictions or regulations (unlike many other jurisdictions), which means that funds can be freely transferred in and out of the Cayman Islands in unlimited amounts.

II GOVERNING RULES

i Main stock exchanges

The CSX has self-regulatory powers, although it is subject to the supervision and regulation of the Stock Exchange Authority (the Authority). The CSX's council, comprising six senior professionals and the CEO of the CSX, all appointed by the Authority, is responsible for the day-to-day operations of the CSX, a number of which have been delegated to its listing committee (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.

Cayman Islands-incorporated issuers generally do not pursue dual listings on the CSX and international exchanges – any such issuer that is dual listed will be listed on dual international exchanges.

ii Overview of listing requirements

Listing on the CSX

Listing equity securities on the CSX requires the prior approval of the 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.

There must be a sufficiently liquid market for the equity securities being listed, which the CSX considers requires an expected initial market capitalisation for all the securities to be listed of at least US\$5 million; and the minimum percentage of equity securities in public hands to at all times be at least 25 per cent of the class of shares listed, with a minimum of 50 shareholders.

Further, issuers must generally have: an independent auditor acceptable to the CSX; published audited financial statements that cover the three financial years preceding the application for listing; a board of at least three directors, the majority of whom must be independent; and an adequate trading record under substantially the same management (normally at least three financial years). The issuer's constitutional documents must also

include certain governance terms prescribed by the Listing Rules (specifically in relation to capital structure, appointment of and voting by the directors of the issuer, and voting rights of the listed securities).

Listing on an international exchange

The precise steps and timetable for a listing on an international stock exchange are largely dictated by the requirements of the relevant exchange, and any related share offering timetable. The role of Cayman Islands counsel is to work closely with lead counsel in the relevant listing jurisdiction. They will typically be involved with:

- a* any pre-listing restructuring of the business group that may be required for the purposes of the listing;
- b* preparing the constitutional documents of the company and tailoring the documents to meet the requirements of the relevant securities laws and listing rules (the flexibility of Cayman Islands law results in the ability to accommodate any required constitutional provisions and shareholder protections required by the listing rules of the relevant stock exchanges);
- c* advising on relevant parts of the listing document, such as the descriptions of the listed securities and any relevant corporate laws, as well as any Cayman Islands tax disclosure and regulatory considerations;
- d* advising on the Cayman Islands aspects of any underwriting agreement;
- e* delivering any Cayman Islands legal opinions required by regulators, exchanges, depositories, registrar and transfer agents, or brokers or underwriters; and
- f* drafting any and all corporate approvals necessary for the listing.

iii Overview of law and regulations

Regulation of Cayman Islands companies is primarily found in the Companies Act (as revised) and common law. There are no specific additional statutes or government regulations concerning the conduct of an initial public offering (IPO) on either the CSX or non-Cayman Islands exchanges.

III THE OFFERING PROCESS

i General overview of the IPO process

Listing on the CSX

The Listing Rules, at Chapter 6, set out the requirements for the listing of equity securities on the CSX. A draft of the listing document must be provided to the Listing Committee in reasonable time for comment and amendment prior to the proposed listing date, and the final document is subject to approval by the Listing Committee.

The listing document is required to include a summary of:

- a* the particulars of the issuer (including the issuer's capital structure and the issuer group's activities), the securities to be issued, any listing agent and underwriters, and particulars of other advisers, including legal counsel and auditors;
- b* the offered securities, including the total number offered, the offer price of each security and its nominal value;
- c* material risks relating to the investment in the applicable equity securities;

- d* 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;
- e* consolidated financial information regarding the issuer group; and
- f* the management of the issuer group.

The listing document must also include particulars of any litigation or material claims against the issuer group, and a list of the parties to and dates of any material contracts (being those entered into not in the ordinary course of business).

Securities must have an International Securities Identification Number to be admitted to listing on the CSX and must be eligible for deposit in an acceptable electronic clearing and settlement system (including Clearstream, Euroclear or the Depository Trust Company). The issuer must appoint a share transfer agent or registrar, and paying agent in a financial centre acceptable to the CSX, although if the issuer can demonstrate to the CSX that it is capable of doing so, it may perform these functions itself.

Unless otherwise approved by the CSX, the listing must apply to the entire class of the equity securities to be listed, and such securities must be freely transferable. The CSX will admit convertible securities to listing only if it is satisfied that investors will be able to obtain the information necessary to form a reasonable opinion in respect of the value of the securities into which they are convertible.

Listing on an international exchange

From a Cayman Islands perspective, the key documents applicable to an international IPO are the listing document, the memorandum and articles of association of the company, and associated corporate approvals. Although unlikely, Cayman Islands law-governed key contracts, including any underwriting agreement, or depository or custody agreement, should also be reviewed by Cayman Islands counsel.

During the listing process, Cayman Islands counsel generally prepares disclosures describing Cayman Islands companies and the corporate law framework of the Cayman Islands for inclusion in the listing document. This can include a comparison of the applicable laws governing companies incorporated in the IPO jurisdiction as against Cayman Islands law so that potential investors are provided with sufficient information to assess the consequences of the use of a Cayman Islands company as the listing vehicle compared with an entity formed in the IPO jurisdiction.

While governed by the legal requirements of the Cayman Islands, the constitutional documents of the issuer must also meet the requirements of the applicable stock exchange upon which the company is to be listed. With the guidance of lead counsel on the IPO, to determine the requirements of the relevant stock exchange, Cayman Islands counsel will prepare constitutional documents that are in compliance with such rules.

UK exchanges

Unlike public companies listed on the LSE with a registered office in the United Kingdom, the Channel Islands or the Isle of Man, Cayman Islands issuers listed on the LSE (whether on the Main Market or AIM) are not automatically subject to the UK Takeover Code and the jurisdiction of its Panel on Takeovers and Mergers.

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.

However, the constitutional documents of a Cayman Islands issuer listing in London will commonly include provisions that seek to mirror some or all the protections that shareholders would enjoy under the Takeover Code.

US exchanges

The advantages of 'foreign private issuer' status may be available to Cayman Islands companies intending to list on the main US exchanges, including: reduced reporting and disclosure requirements; certain exemptions from US proxy rules; flexibility to elect to apply accounting standards other than US generally accepted accounting principles, as well as in choice of reporting currency; and the ability to apply certain 'home country' standards in respect of the composition, election and classification of directors and key corporate governance practices.

Rather than making a direct equity listing, Cayman Islands companies listing on key US exchanges may instead choose to list American depositary receipts (ADRs), which permits the listed security to be US-dollar denominated and to clear through US settlement systems, but allows the company's equity to continue to be denominated in a currency other than US dollars. Each ADR is a negotiable certificate that evidences an ownership interest in American depositary shares. This, in turn, represents an interest in the shares of the issuer, which are held by the applicable depository.

HKSE

The requirements of the HKSE listing rules and ongoing requirements can easily be met within the Cayman Islands framework, and the constitutional documents of the listing vehicle can be prepared accordingly. Importantly, there is no relevant Cayman Islands law relating to the holding of an annual general meeting or the auditing of accounts, and generally Cayman Islands counsel will assist to conform the issuer's constitutional documents to the required HKSE standards.

Shanghai Stock Exchange Science and Technology Innovation Board

Cayman Islands companies are also able to list Chinese depositary receipts on the Star Market of the Shanghai Stock Exchange. The first non-Chinese company to apply for registration on that exchange was a Cayman Islands company.

As with listing on other exchanges, generally Cayman Islands counsel will assist to conform the issuer's constitutional documents to the required listing standards.

ii Pitfalls and considerations

One of the key advantages of using a Cayman Islands company as a listing vehicle of choice is the high level of flexibility that Cayman Islands law provides. Issuers do not need, for example, to hold annual general meetings or to produce audited accounts, although such matters are generally provided for to address investor expectations. As a result, issuers tend to find that this flexibility results in fewer pitfalls than might perhaps otherwise be expected.

Potential claims may be available to subscribers for shares in an IPO offering under Cayman Islands law against the company and other parties, such as its directors, its auditors

and its advisers. While for a Cayman Islands issuer with equity listed on an international exchange it is 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, the position that would apply in respect of proceedings before a Cayman Islands court applying Cayman Islands law is considered below.

In addition, although proceedings may be brought before a Cayman Islands court, it may be asked to apply, in accordance with Cayman Islands conflicts of laws rules, the laws of another 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 the company is listed on the CSX.

Misstatements

There may be civil liability in tort for misstatements in a listing document: either negligent misstatements (under the rule in *Hedley Byrne v. Heller*) or fraudulent misstatement of fact.

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 content), in favour of persons who subscribe or apply for shares in the company on the faith of the content of the listing document. Breach of this duty would give rise to a claim against those persons for any loss attributable to statements in the parts of the listing document for which responsibility was expressly or impliedly accepted by those persons. Reliance on the listing document must be proved by the relevant subscriber.

Liability for a fraudulent misstatement of fact does not extend to 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. 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 a material misstatement was fraudulently made, and he or she was induced to subscribe for shares as a result of the misstatement.

To found an action for deceit, it is not necessary to show either an intent to defraud or that the fraudulent statement was the sole cause that induced the investor to take up the shares.

Pursuant to the Contracts Act (as revised) of the Cayman Islands, 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 he or she had reasonable grounds to believe, and did believe up to the time the contract itself was made, that the facts represented were true. Generally, this gives a statutory right to damages in respect of negligent misstatements and, where a misrepresentation has been made, the court may award damages in lieu of rescission.

Given that the relevant contract (the offering of shares on the terms of the listing document) is with the issuer itself, the subscriber's claim would be against the issuer, although it might, in turn, be able to claim against its directors, promoters or advisers.

Contractual liability

The listing document will form the basis of a contract between the issuer and the successful applicants for shares. If it is inaccurate or misleading, applicants may be able to rescind the contract or sue, or both, the company, the promoters or the directors for damages. Given that the relevant contract is with the issuer itself, the subscriber's claim would be against the issuer.

Under Cayman Islands conflicts of laws principles, these questions would be determined according to the governing law of the contract for subscription. Where the documentation makes no express choice of governing law (as is common in a listing document), it is likely that a Cayman Islands court would consider Cayman Islands law as the governing law, on the basis that the issuer is incorporated in the Cayman Islands and the subject matter of the contract is shares in a Cayman Islands company.

Criminal liability

Criminal liability may arise under Section 257 of the Penal Code (as revised), which provides that an officer of a company (or person purporting to act as such) 'with intent to deceive members or creditors of the body corporate or association about its affairs, publishes or concurs in publishing a written statement or account that, to his or her knowledge, is or may be misleading, false or deceptive in a material particular commits an offence and is liable to imprisonment for seven years'. This section would extend to false statements contained in a listing document.

Further, this section also provides that:

- a* 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; and
- b* any person who by any deception dishonestly obtains for himself or herself or another any pecuniary advantage is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

A person is treated as obtaining property if he or she obtains ownership, possession or control of it. 'Obtain' includes obtaining for another or enabling another to obtain or retain.

For the purposes of this section, 'deception' means any deception (whether reckless or deliberate) by words or conduct in respect of fact or law, including deception regarding the present intentions of the person using the deception or any other person.

iii Considerations for foreign issuers

The CSX is not usually an exchange of choice for foreign issuers, and such listings are uncommon in the Cayman Islands.

IV POST-IPO REQUIREMENTS

i CSX requirements

Listing of equity securities on the CSX requires that the issuer prepare and issue to members (and to the CSX) an interim financial report in respect of the first six months of its financial year. Additionally, 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.

Further, a CSX-listed issuer must make available to every member annual financial statements in accordance with International Accounting Standards or other standards as may be acceptable to the CSX. The issuer's annual financial statements must also include a report by the directors on the operations of the issuer covering:

- a* a description of the principal activities of the group and a geographical analysis of consolidated turnover;
- b* 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;
- c* 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;
- d* statement as at the end of the financial year showing a summary of bank loans, overdrafts and other borrowings of the group;
- e* particulars of material contracts between the issuer and any interested party (including directors or associates of directors, and controlling shareholders of subsidiaries); and
- f* a summary, in the form of a comparative table, of the results and of the assets and liabilities of the group, for the past five financial years or since establishment, if later.

On an ongoing basis, the issuer must also notify the CSX for release of:

- a* any new developments or changes that are not public knowledge, which may reasonably be expected to materially affect the market activity in, or the price of, the listed securities; and
- b* certain other matters, including any matter constituting a fundamental change in the issuer's business, certain transactions with related parties, any changes in the composition of the board of directors, significant changes to the senior management personnel of the issuer, changes in the issuer's constitutional documents, its capital structure and 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 the holders of equity securities holding in aggregate more than 5 per cent 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.

ii International exchanges

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.

V OUTLOOK AND CONCLUSION

The year 2020 was a standout for IPOs of Cayman Islands companies on foreign exchanges, owing to strong equity markets, high corporate earnings and significant investor confidence. This was led by the unprecedented activity of SPACs in the US market: 248 SPACs closed

in 2020, up from 59 in 2019, and a significant proportion of those were Cayman Islands incorporated issuers. While a number of factors, including the US Securities and Exchange Commission's focus on warrant accounting, did result in a slowdown of US SPAC listings during the second quarter of 2021 as issuers grappled with appropriate accounting treatment, the pace of transactions increased towards the middle of 2021.

A number of significant non-SPAC IPO transactions with Cayman Islands-incorporated issuers took place globally in 2020, including two of the largest IPOs worldwide – the US\$1.92 billion IPO of Li Auto on Nasdaq and the US\$1.5 billion IPO of XPeng on the NYSE.

IPO transaction volumes for 2021 will exceed even unprecedented 2020 levels, with 330 US SPAC listings closing in the first half of 2021. Business combination activity is driving further market activity, with 87 SPACs announcing merger transactions in the same period.⁵

5 <https://stockmarketmba.com/listofshellcompanies.php>.

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