



## SGX Listing Decision

LD-2018-02

<b>Summary</b>	
<b>Concern</b>	<p>Whether an issuer's use of a business/ownership structure to comply with foreign ownership restrictions ("<b>Structure</b>") in its principal place of operations ("<b>Relevant Jurisdiction</b>") affects Singapore Exchange's ("<b>SGX</b>") assessment of the Issuer's suitability to list in view of concerns on:</p> <p>(i) the compliance of such Structure with, and not being in contrary to, all relevant laws and regulations ("<b>Relevant Laws</b>"); and</p> <p>(ii) contract-related risks, particularly where contractual arrangements are present to confer control and economic rights (such as the legality, proper operation and enforceability of such arrangements).</p>
<b>Relevant Guidelines</b>	Listing Rules 103(1), 104 and 203 / Catalist Rules 103(2) and 225(1)
<b>Decision</b>	<p>SGX is of the view that an issuer with principal business operations adopting the Structure is generally suitable for listing, subject to the provision of adequate safeguards and disclosures in the prospectus / offer document / offer circular ("<b>Listing Document</b>") on the use of the Structure.</p>

### 1. SGX'S CONCERN

- 1.1 To comply with foreign ownership restrictions in the Relevant Jurisdiction, issuers have proposed the use of various Structures, including the use of contractual arrangements, which confer operational control as well as economic rights. A key concern would be the legality of the Structures as any clampdown by the authorities (e.g. such Structures being deemed illegal and/or viewed to be contrary to the Relevant Laws) could have a material adverse impact on issuers and their minority shareholders.
- 1.2 Where such Structures involve the use of contractual arrangements to confer control and economic rights to the issuers, there would be dependence on the relevant counterparties to fulfil their contractual obligations, amplifying concerns on the legality, proper operation and enforceability of such arrangements. Such contract-related risks could in turn materially affect issuers and their minority shareholders.
- 1.3 Arising from the above key concerns, SGX requires adequate safeguards to be in place to protect the interests of the issuer and its minority shareholders. In addition, SGX expects Issue Managers / Full Sponsors to demonstrate that the issuer is suitable for listing, notwithstanding the use of the Structure.



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### 2. **SUMMARY OF CASE**

- 2.1 In past submissions, SGX observed that various forms of Structures have been utilised to conduct the issuer's business, such as through the use of contractual arrangements<sup>1</sup>, corporate shareholding arrangements and constitutional provisions.

### 3. **RELEVANT LISTING RULES / GUIDELINES**

3.1 **Listing Rule 103(1) / Catalyst Rule 103(2)**

Issuers shall have minimum standards of quality, operations, management experience and expertise.

3.2 **Listing Rule 104**

Suitability for listing depends on many factors. Applicants should appreciate that compliance with the SGX listing rules may not in itself ensure an applicant's suitability for listing. SGX retains the discretion to accept or reject applications and in reaching its decision will have regard to the general principles outlined in Listing Rule 103.

3.3 **Listing Rule 203**

An issuer seeking listing for its equity securities must be a going concern or be the successor of a going concern. In reviewing a listing application, SGX will consider a number of factors, including the specific numerical standards and qualitative factors set out in the Listing Manual. While the size of an issuer is important, greater emphasis is placed on factors such as the integrity of the management and controlling shareholders, an issuer's market position and relative stability, and the disclosure provided in the prospectus, offering memorandum or introductory document.

3.4 **Catalist Rule 225(1)**

A full sponsor, in preparing a listing applicant for admission or advising an issuer in a very substantial acquisition or reverse takeover, must be satisfied that, having made reasonable due diligence enquiries and having considered all relevant matters, the listing applicant, or in the case of a very substantial acquisition or reverse takeover, the enlarged group, is suitable to be listed. This includes, among others, having regard to the guidance in Practice Notes 2B and 4A.

### 4. **SGX'S COMMENTS ON CONCERNS**

- 4.1 SGX undertakes a holistic approach in assessing the listing suitability of an issuer. When assessing the Structures adopted by issuers to comply with foreign ownership restrictions in the Relevant Jurisdictions, SGX takes into consideration, among others, the following factors.

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<sup>1</sup> Contractual arrangements may be utilised as part of a variable-interest entity structure, wherein the issuer controls an entity that is not based on the majority of voting rights but through contract-based arrangements to indirectly own or obtain control of a restricted business.



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### **(A) Rationale of the Structure**

- 4.2 Issue Managers / Full Sponsors are expected to provide reasonable justification for the Structures. SGX would consider as reasonable justification for the use of Structures by issuers on a case-by-case basis, solely for the purposes of complying with foreign ownership restrictions and subject to compliance with the safeguards / disclosures as set out in this listing decision.

### **(B) Significance of the business conducted through the Structure**

- 4.3 In assessing the significance of the business conducted through the Structure adopted by the relevant operating entity (the “Entity”), SGX considers factors such as the level of dependence on the Entity for generation of the issuer’s revenue, and profits, as well as the contribution of the Entity’s assets to the issuer group. SGX generally considers an Entity to be significant to the listing group if it is considered as a principal subsidiary (as defined under the Listing Manual)<sup>2</sup> or an associated company which contributes to at least 20% of the listing group’s latest audited consolidated pre-tax profits.

### **(C) Legality of the Structure**

- 4.4 Issue Managers / Full Sponsors are expected to demonstrate that the Structure (i) is legal and valid; and (ii) complies in fact and in good faith with, and is not contrary to, all Relevant Laws.
- 4.5 Where the Structure involves the use of contractual arrangements to confer control and economic rights to the issuer, Issue Managers / Full Sponsors are expected to, in addition to the matters in Paragraph 4.4, demonstrate the ability to ensure proper operation and enforceability of the contractual arrangements. The contractual arrangements should be tailored specifically to address foreign ownership restrictions and minimise the potential conflict with the Relevant Laws.
- 4.6 Actions taken by the authorities in the Relevant Jurisdiction against entities adopting the use of similar Structures would be an important consideration to SGX. In Relevant Jurisdictions which do not appear to display signs of official disapproval<sup>3</sup>, an issuer with a significant Entity may adopt the Structure, subject to the fulfilment of the relevant safeguards and disclosures in the Listing Document as elaborated below, as well as

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<sup>2</sup> A principal subsidiary is defined in the Listing Manual as a subsidiary whose latest audited consolidated pre-tax profits (excluding the minority interest relating to that subsidiary) as compared with the latest audited consolidated pre-tax profits of the group (excluding the minority interest relating to that subsidiary) accounts for 20% or more of such pre-tax profits of the group. In determining profits, exception and extraordinary items are to be excluded.

<sup>3</sup> Examples of such official disapproval may include the presence of laws and regulations (whether draft or implemented) prohibiting and/or restricting the use of Structures to comply with foreign ownership restrictions, or the presence of court rulings that such Structures are deemed to be illegal and/or contrary to the Relevant Laws.



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the listing admission criteria / conditions in Chapter 2 of the Listing Manual and/or Chapter 4 of the Catalist Rules (where applicable).

### 5. **SGX'S DECISION**

5.1 SGX requires issuers to provide adequate safeguards and disclosures in the Listing Documents on the Structures proposed. The following safeguards are non-exhaustive and may vary depending on the circumstances of each issuer, and the regulatory climate in the Relevant Jurisdiction. Issue Managers / Full Sponsors should engage SGX on alternative safeguards to be provided.

#### (A) **Safeguards**

5.2 Issue Managers / Full Sponsors would be required to provide the following safeguards (where applicable and/or practicable):

- (i) The issuer should obtain the support of appropriate regulatory assurance to demonstrate the legality of the Structures;
- (ii) A clean opinion from the legal adviser confirming (a) that the Structure is in compliance with and not contrary to, the Relevant Laws; (b) to the effect that all possible actions or steps taken to enable it to reach its legal conclusions had been taken; and (c) the Entity's constituent documents are in compliance with the Relevant Laws;
- (iii) Effective measures and internal controls procedures to be in place to safeguard the issuer's assets which are held through the Structure. Such measures and procedures should be reviewed by the issuer's audit committee and independent internal auditor on a regular basis. Where there are deviations from the established measures and procedures and/or concerns on the effectiveness of these measures and procedures, the internal auditor would be expected to highlight such matters to the issuer's audit committee on a timely basis; and
- (iv) Opinions from Issue Managers / Full Sponsors, including bases, on the adequacy of the measures and internal control procedures in place to safeguard the issuer's assets which are held through the Structure.

5.3 In cases where the Structures involve the use of contractual arrangements, SGX would require, apart from the safeguards in Paragraph 5.2, the following additional safeguards to be implemented (where applicable and/or practicable):

- (i) The clean legal opinion should include a confirmation that the contractual arrangements constitute valid, legal and binding obligations of the parties, and are enforceable against the parties;



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- (ii) Where the Entity's accounts would be consolidated at the issuer-group level as a result of the contractual arrangements, a written confirmation from the reporting accountant on the basis of consolidation;
- (iii) Written undertakings from the issuer that it will:
  - (a) Provide an annual confirmation in its full year financial results announcement, that there is no change in the Relevant Laws which would affect the external auditor's basis of consolidation of the Entity's accounts at the issuer-group level. Where there are changes to the Relevant Laws, (A) the issuer would be required to obtain a legal opinion from an established law firm and assess whether such changes would affect the external auditor's basis of consolidation of the Entity's accounts at the issuer-group level. Any material impact to its business / operations arising from the changes in Relevant Laws would be announced; and (B) which result in the contractual arrangements being invalid, the issuer would announce the changes in the Relevant Laws, the implications and the proposed actions to be taken by the issuer in a timely manner;
  - (b) Ensure that the contractual arrangements would be unwound as soon as practicable and without undue delay when the Relevant Laws allow the business to be operated without them. Subject to the Relevant Laws, the Entity's registered shareholders, registered owners, directors and/or legal representatives should undertake to (A) facilitate the unwinding of the contractual arrangements; and (B) return to the issuer any consideration they receive in the event that the issuer acquires all of the Entity's shares when unwinding the contractual arrangements;
  - (c) Establish appropriate arrangements to protect the issuer's interests in the event of any change of the Entity's registered shareholders, registered owners or legal representatives to ensure continuity and avoid practical difficulties in enforcing the contractual arrangements;
  - (d) Ensure that the issuer would increase its shareholding interests in the Entity as soon as practicable and without undue delay to the corresponding foreign ownership limit, when the Relevant Laws allow for an increased foreign ownership proportion limit for the restricted business<sup>4</sup>. Where the issuer would be required to acquire the legal interests with the payment of consideration, such matters may be considered as an interested person transaction and subject to the requirements under Chapter 9 of the Listing Rules and Catalist Rules (where applicable);

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<sup>4</sup> Particularly in a case which allows the issuer to increase from a non-controlling stake to a majority controlling stake (i.e. 50%) and where the issuer had acquired the economic interests (and therefore no payment of further consideration is necessary to be paid for the increase in legal interests), but was not able to hold the legal interests due to the foreign ownership restrictions imposed.



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- (e) Include provisions in the contractual arrangements and/or constituent documents to ensure material changes to the terms of the contractual arrangements, where such changes would not be considered interested person transactions under Chapter 9 of the Listing Rules and Catalist Rules (where applicable), would be subject to the issuer's shareholders' approval; and
- (f) Exclude entrenchment provisions in the contractual arrangements and/or constituent documents;
- (iv) Written confirmation from the Issue Manager (for Mainboard listing applications) on the undertaking to be provided in paragraphs 5.3(iii)(c) and 5.3(iii)(f);
- (v) Written confirmation from the Full Sponsor (for Catalist listing applications) on the undertaking to be provided in paragraphs 5.3(iii)(c) to 5.3(iii)(f);
- (vi) Include the following provisions in the contractual arrangements, and where permitted under the Relevant Laws, in the constituent documents:
  - (a) A power of attorney<sup>5</sup> to grant the issuer's directors and their successors (including a liquidator) the power to (A) exercise all rights of the Entity's shareholders; and (B) change / remove directors or senior management of the Entity and its subsidiaries; and
  - (b) Dispute resolution clauses, including to provide courts of competent jurisdictions with the power to grant interim remedies and encompass dealing with the Entity's assets including the rights to manage its business and revenue;
- (vii) Ensure the management of funds of the Entity would be performed and/or controlled by the issuer; and
- (viii) With respect to the effective measures and internal controls procedures required to be in place as set out in paragraph 5.2 (iii), such measures and procedures should extend to the management of funds. Such internal control procedures (including the unwinding of the contractual arrangements as soon as the Relevant Laws allow the business to be operated without them) should be reviewed by the audit committee and independent internal auditor on a regular basis.

### **(B) Listing Document Disclosures**

5.4 Issue Managers / Full Sponsors would be required to provide adequate disclosures in the Listing Document, including, but not limited to, the following:

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<sup>5</sup> Such power of attorney should not give rise to any potential conflicts of interest. Where the Entity's shareholders are directors or officers of the issuer, the power of attorney should be granted in favour of other unrelated directors or officers of the issuer.



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- (i) Summary of the foreign ownership restriction under the Relevant Laws, and the issuer's compliance with the Relevant Laws including the implications to the issuer;
- (ii) Details of and rationale for the use of the Structure;
- (iii) Legal opinion as set out in paragraph 5.2(ii) above;
- (iv) Board's views, including bases, on the legality of the Structure under the Relevant Laws;
- (v) Revenue derived from the Structure if the issuer generates revenue from subsidiaries in other business segments apart from those operating under the Structure;
- (vi) Discussion, including a separate risk factor, on whether the issuer has, to date, encountered any interference or encumbrance from any governing bodies in operating their business through the Structure;
- (vii) Details of any insurance purchased to cover the risks related to the Structure, or a prominent disclosure that such risks are not covered by any insurance;
- (viii) Related risk factors including the Structure may not provide control as effective as direct ownership; and
- (ix) Where the Structure poses a significant risk<sup>6</sup> to the issuer group, prominent disclosure is required on the front cover of the Listing Document of the (a) description of the Structure; (b) associated risks of the Structure; and (c) contribution of the Entity under the Structure to the issuer's financial performance.

5.5 In cases where contractual arrangements are used, SGX would require additional disclosures (apart from those in paragraph 5.4) in the Listing Document (where applicable and/or practicable):

- (i) Details of and rationale for the use of contractual arrangements, including the rights and obligations of the parties to the arrangements and termination provisions;
- (ii) Legal opinion as set out in paragraph 5.3(i) above;
- (iii) Board's views, including bases, as to how the contractual arrangement confers control and economic benefits from the Entity to the issuer and is enforceable under the Relevant Laws;

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<sup>6</sup> Where the Entity contributes to at least 50% of the latest audited consolidated pre-tax profits of the listing group.



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- (iv) Basis of consolidation of the Entity's accounts with the issuer group from the reporting accountant;
- (v) Information on the Entity's registered shareholders, registered owners and/or legal representatives;
- (vi) The issuer's undertakings as set out in paragraphs 5.3(iii)(a) to 5.3(iii)(f);
- (vii) Details of the arrangements in place to address the potential conflicts of interest between the issuer and the Entity's registered shareholders, registered owners and/or legal representatives;
- (viii) Details of the limitations in exercising any option to acquire ownership in the Entity, including a separate risk factor on such limitations and that any ownership transfer may be subjected to substantial costs;
- (ix) The contractual arrangements would be considered as material contracts and be made available for inspection; and
- (x) Related risk factors including (a) the Entity's shareholders may have potential conflicts of interest with the issuer; (b) the contractual arrangements may be subject to scrutiny of the tax authorities and additional tax may be imposed; and (c) economic risks that the issuer bears as the primary beneficiary of the Entity (including how the issuer shares the losses of the Entity, the circumstances that could require the issuer to provide financial support to the Entity, or other events or circumstances that could expose the issuer to losses).

### **(C) Continuing Disclosures**

5.6 In cases where the Structure involves contractual arrangements, SGX would require the issuer to keep shareholders informed of, including, but not limited to, the following:

- (i) Changes to the Entity's registered shareholders, registered owners and/or legal representatives;
- (ii) Changes to the shareholding interests in the Entity arising from changes in Relevant Laws;
- (iii) Any material change in the contractual arrangements and/or the circumstances under which they were adopted, and its impact on the issuer group;
- (iv) Any unwinding of the contractual arrangements or failure to unwind when the legal and/or regulatory restrictions that led to the adoption of contractual arrangements are no longer in place; and
- (v) Information to be included in the issuer's annual report and/or financial results announcement to include:





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(a) Quarterly / Half Yearly Financial Results Announcement

Appropriate quantitative information including the revenue and assets derived from the contractual arrangements.

(b) Annual Report

(A) Where there has been any material change to the terms of the contractual arrangements within the relevant financial year, summary of the major terms of the contractual arrangement; and

(B) Rationale for the use of contractual arrangements, the associated risks and the actions taken by the issuer to mitigate such risks.

## 6. GUIDANCE

6.1 Where appropriate, Issue Managers / Full Sponsors are encouraged to consult the Exchange early to seek confidential guidance.

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