

## TAKEOVERS AND MERGERS PANEL

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### Panel Decision

**In relation to a referral to the Takeovers and Mergers Panel (the "Panel") by the Executive for a ruling on whether Husky Energy Inc. ("Husky") should be considered a "public company in Hong Kong" within the meaning of the Codes on Takeovers and Mergers and Share Repurchases ("Codes")**

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### Introduction

1. The Panel met on 13 April 2011 to consider a referral by the Executive under section 10.1 of the Introduction to the Codes, which relates to a particularly novel, important or difficult point at issue.
2. The Panel was asked to rule that Husky should not be considered a "public company in Hong Kong" within the meaning of the Codes and therefore the Codes should not apply to Husky upon completion of its secondary listing on the Main Board of The Stock Exchange of Hong Kong Limited ("Stock Exchange").

### Background and facts

3. Husky was incorporated in Alberta, Canada on 21 June 2000. Husky is one of Canada's largest publicly held integrated international energy and energy-related companies headquartered in Calgary, Alberta, Canada.
4. Husky's history dates back to 1938 when its predecessor was incorporated as Husky Refining Company in Cody, Wyoming, the United States.
5. Operations commenced in Canada in 1946, and since then a great majority of Husky's corporate and business operations has physically taken place in, or centered around, Canada and the United States.
6. Husky's common shares have been listed on the Toronto Stock Exchange ("TSX"), and have been traded solely in that market, since 2000. Husky also issued preferred shares in 2011 which are listed on the TSX.
7. Husky or its predecessor has filed reports with the United States Securities and Exchange Commission since 1998 in accordance with the provisions of its US dollar denominated public debt securities and applicable reporting obligations under United States securities laws.
8. Before Husky's predecessor was privatised in 1987, the shares of its predecessor had been publicly traded in Canada and the United States since 1949 and 1952, respectively.
9. Husky's market capitalisation as of 21 March 2011 was CAD26.7 billion (approximately HK\$213 billion).

10. Husky's financial year end is 31 December. As of 31 December 2010, Husky reported total assets of CAD29.1 billion (approximately HK\$232.2 billion), revenues of CAD18.2 billion (approximately HK\$144.9 billion) and comprehensive income of CAD1.1 billion (approximately HK\$8.9 billion).
11. Husky's main shareholders are L.F. Investments (Barbados) Limited ("L.F. Investments") and Hutchison Whampoa Luxembourg Holdings S.a.r.l. ("HW Luxembourg") which hold an approximate 36.19% and 34.55% interest in Husky respectively. L.F. Investments is 100% indirectly owned by Mr. Li Ka-shing ("Mr. Li") and a trust of which members of Mr. Li's family are discretionary beneficiaries, and is controlled by Mr. Li through ownership of voting rights. HW Luxembourg is 100% indirectly owned by Hutchison Whampoa Limited whose shares are listed on the Stock Exchange. L.F. Investment and HW Luxembourg currently hold, in aggregate, approximately 70.74% interests in Husky.
12. Husky is proposing to seek a secondary listing on the Stock Exchange in conjunction with a global offering. The planned global offering in conjunction with the secondary listing is expected to comprise a public offering to retail investors in Hong Kong and an international placing. At present, it is expected that the global offering will consist only of new shares and will not exceed approximately 10% of Husky's existing issued share capital.

#### **The relevant provisions of the Codes**

13. The relevant sections in the Codes are contained in sections 4.1 and 4.2 of the Introduction to the Codes.
14. Section 4.1 provides that:

*"The Codes apply to takeovers, mergers and share repurchases affecting public companies in Hong Kong, companies with a primary listing of their equity securities in Hong Kong and REITs (as defined in the REIT Guidance Note) with a primary listing of their units in Hong Kong."*
15. Section 4.2 provides that:

*"In order to determine whether a company is a public company in Hong Kong the Executive will consider all the circumstances and will apply an economic or commercial test, taking into account primarily the number of Hong Kong shareholders and the extent of share trading in Hong Kong and other factors including:*

  - (a) the location of its head office and place of central management;*
  - (b) the location of its business and assets, including such factors as registration under companies legislation and tax status; and*
  - (c) the existence or absence of protection available to Hong Kong shareholders given by any statute or code regulating takeovers, mergers and share repurchases outside Hong Kong."*

## **The Executive's case in summary**

16. Section 4.1 of the Introduction to the Codes applies to every company that obtains a primary listing in Hong Kong irrespective of its country of incorporation, location of management or place of business and assets. The Codes do not, however, apply to a company with a secondary listing on the Stock Exchange unless it is a "public company in Hong Kong" within the meaning of the Codes.
17. Factors (a) and (b) in section 4.2 are often referred to as the "centre of gravity" of a company. The "centre of gravity" test considers whether a company has sufficient connection with Hong Kong such that it is appropriate to apply the protection of the Codes to its shareholders. The general principle is that the closer the proximity of the management and the business/assets to Hong Kong, the more likely that protection under the Codes should be afforded.
18. The term "secondary listing" is not defined in the Listing Rules (or in the Codes). In general, a secondary listing enables an overseas issuer with a primary listing elsewhere to list its securities in Hong Kong whilst principally being regulated by the securities rules and regulator of the market of the primary listing. Thus in principle a secondary listing does not require full compliance with the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited ("Listing Rules").
19. Listing Rules 19.29 to 19.57 deal with overseas issuers seeking secondary listings in Hong Kong. The most fundamental issue is that the Stock Exchange will only grant a listing to an overseas issuer if it is satisfied that the overseas issuer's primary listing is or is to be on an exchange where the standards of shareholder protection are at least equivalent to those provided in Hong Kong (Listing Rule 19.30(1)(b)). Where the jurisdiction in which the overseas issuer is incorporated is unable to provide appropriate standards of shareholder protection the Stock Exchange may approve the listing subject to the overseas issuer making such variations to its constitutive documents as the Stock Exchange may require.

In recent years, the Listing Committee of the Stock Exchange has approved a number of overseas jurisdictions as being acceptable as an issuer's place of incorporation. A table setting out the list of such acceptable overseas jurisdiction is available on the Stock Exchange's website.

20. The Executive considers the current case to be distinguishable from the others dealt with thus far and to pose novel, difficult or important issues as it involves an overseas company with controlling shareholders (namely, L.F. Investments and HW Luxembourg) that are based in Hong Kong.

### *Analysis of factors in section 4.2*

21. Shareholder base and extent of share trading in Hong Kong - the starting point under section 4.2 is to consider the number of public shareholders and extent of share trading in Hong Kong. The Executive noted Latham & Watkins' submission on behalf of Husky that:
  - (i) the remaining 29% interest in Husky (after disregarding the interests of L.F. Investments and HW Luxembourg) is held, to the best of Husky's knowledge

based on the information available to it, by over 65,000 beneficial shareholders as at 28 January 2011, most of whom Husky understands are United States and Canadian funds, entities and individuals;

- (ii) to the best of Husky's knowledge based on the information available to it, as at 28 January 2011, there were approximately 90 identified Hong Kong based beneficial shareholders who hold approximately 0.05% shares in Husky through nominees. It is Husky's belief that the number of such shareholders, and the number of shares which they may be beneficially interested in, are insignificant in light of Husky's broad shareholder base. As at 18 March 2011, none of the registered shareholders of Husky recorded an address in Hong Kong;
  - (iii) although the majority of Husky's shares are indirectly held or controlled by two Hong Kong-based entities (namely L.F. Investments and HW Luxembourg), Husky expects that the substantial majority of its public shareholders will remain in North America and that its shareholding base in Hong Kong will be small compared to the remainder of its minority shareholder base;
  - (iv) Husky's planned global offering in conjunction with the secondary listing is expected to comprise a public offering to retail investors in Hong Kong and an international placing. It is expected that the global offering will consist only of new shares and will not exceed approximately 10% of Husky's existing issued share capital; and
  - (v) Husky also expects that following completion of the secondary listing, the TSX will remain the primary market for trading in the common shares of Husky.
22. Location of head office and place of central management - the Executive noted Latham & Watkins' submission that:
- (i) Husky's head office and place of central management are both located in Calgary, Alberta, Canada;
  - (ii) Husky's board of directors has 15 members ("Board"). Of the 15 directors, seven directors are ordinary residents of Hong Kong and in six instances, hold directorships in Hong Kong listed companies. Four other directors are not ordinary residents of Hong Kong but do hold non-executive or independent non-executive directorships in Hong Kong listed companies. The President and Chief Executive Officer of Husky is ordinarily resident in Canada. In accordance with Husky's Board Mandate, the day-to-day management of the business and affairs of Husky is delegated by the Board to the President and Chief Executive Officer, including the making of all decisions regarding Husky's operations, subject to certain limitations such as spending authority limitations. The Board gives direction and guidance, through the President and Chief Executive Officer, to senior management for the achievement of corporate objectives. The Board's stewardship responsibilities include: the oversight of the conduct of the business; the provision of supervising leadership and direction to the President and Chief Executive Officer and senior management; and the approval of corporate strategies and goals. None of the Hong Kong

connected directors are involved in the day-to-day operations and management of the Company;

- (iii) Husky's senior management team (save for one member who is responsible for Husky's Asian operations and who is based in Hong Kong), as well as its sole executive director (i.e. the President and Chief Executive Officer), are residents of Canada; and
- (iv) Husky has a small presence in Hong Kong through a small regional office.

In view of the above, the Executive accepted that the location of Husky's head office and place of central management are in Canada and not in Hong Kong.

23. Location of business and assets - the Executive noted Latham & Watkins' submission that:

- (i) Husky's main businesses and assets are located in Canada with operations in the upstream, midstream and downstream segments. Husky also has operations in the United States and a small presence in China, Indonesia and Greenland. Husky does not, other than a small regional office, have any business operations or assets in Hong Kong;
- (ii) the majority of Husky's oil and gas exploration and development programs take place in Canada and all of Husky's infrastructure pipeline systems for the processing and transportation of heavy crude oil are physically situated in Canada;
- (iii) as at 31 December 2010, Husky reported 1,081 million barrels of oil equivalent of gross proven oil and gas reserves, producing approximately 287.1 thousand barrels of oil equivalent per day through 18,829 gross producing wells. Of these, 95.3% of the proven oil and gas reserves, and 99.8% of the gross producing wells, are located in Canada;
- (iv) all of Husky's owned branded retail outlets that sell products to, and provide services to, the retail market and end users are located in Canada;
- (v) Husky's financial figures clearly show that its results from operations are primarily dependent on its business operations based in Canada and the United States, with limited contribution from its operations in China and none from Hong Kong;
- (vi) approximately 98% of Husky's employees are located in North America; and
- (vii) as of and for the financial year ended 31 December 2010:
  - (a) China accounted for only 3.7% of total gross proved and probable light crude oil reserves and 0.3% of total gross proved and probable natural gas liquids reserves, and had no contribution to other reserves;
  - (b) China accounted for only 5.2% and 7.3% of total gross crude oil produced by Husky and total gross crude oil revenue respectively, and had no contribution to natural gas production;
  - (c) China accounted for only 0.3% of total gross producing oil wells and had no natural gas wells;

- (d) China accounted for only 0.3% of total gross developed landholdings of Husky;
- (e) less than 2% of total operating costs were attributable to Husky's international operations outside North America (which include two exploration programs in Indonesia); and
- (f) only 13.5% of upstream capital expenditure were attributable to China.

In view of the above, the Executive accepted that the primary location of Husky's business and assets is in Canada and not in Hong Kong.

24. Alternative shareholder protection - the Executive:

- (i) adopts a practical approach to determine whether the protection available to Hong Kong investors under the overseas jurisdiction regulating takeovers, mergers and share repurchases is broadly comparable to the Codes. In particular, there is no qualitative test or a test of equivalence as the application of such tests to takeover regimes of different jurisdictions is in practice problematic and cumbersome.
- (ii) noted that a table containing a detailed comparison of the standards of shareholder protection in takeovers and share repurchases in Canada with those provided under the Codes had been provided by Husky's Canadian counsel. Whilst there are differences between the Canadian and the Hong Kong regime, the Canadian regime, like the Hong Kong regime, is designed to establish a clear and predictable framework for the conduct of takeovers, mergers and share repurchases. In general, the Executive accepted that the Canadian regime offers, albeit different, protection to shareholders in relation to takeover, merger and share repurchase activities.

In view of the above, the Executive accepted that alternative protection under the Canadian regime to which Husky is subject will be available to Hong Kong shareholders following the completion of Husky's secondary listing on the Stock Exchange.

25. A further difference between the Canadian and Hong Kong regimes governing takeovers and share repurchases which was raised by the Executive is that technically, Canadian laws do not automatically require a takeovers bid to be extended to shareholders outside Canada. In this regard, the Executive noted that Husky had agreed with the Executive to provide undertakings (the "Undertakings") that: (i) in friendly bids, Husky will ensure that the offeror makes the takeovers bid to all the shareholders of Husky on the same or substantially the same terms; and (ii) in a hostile bid that is not made to all shareholders, Husky will seek from the applicable Canadian securities regulatory authorities an order to require the offeror to make a bid to all the shareholders of Husky on the same or substantially the same terms. In the event that the Panel rules that Husky is not a "public company in Hong Kong", the Executive recommended that the Undertakings should be included in Husky's prospectus. The Executive further noted that it is exploring obtaining similar undertakings from the controlling shareholders of Husky.

### **The company's case in summary**

26. Husky fully agreed with the points which were made by the Executive (as summarised above in the section headed "Executive's case in summary") which had accepted many of the written submissions made by Latham & Watkins on behalf of Husky.
27. Husky further submitted that the present case is clearly not one of seeking to migrate a listing away from Hong Kong in order to circumvent the requirements of the Codes, and that there is no pre-existing legitimate expectation of compliance with the Codes on behalf of any existing or future shareholder.
28. The vast majority of Husky's business is carried on in North America. 90 per cent. of its physical assets are in North America and are clearly incapable of being moved to Hong Kong. Husky's management team is also fully based in Canada.
29. In relation to the section 4.2 issue of the number of Hong Kong shareholders and the extent of share trading in Hong Kong, Husky foresees that the majority of its public float will be in Canada on the TSX immediately following the global offering.
30. Husky also submitted that, in respect of section 4.2(c) of the Introduction to the Codes (which concerns the existence or absence of protection available to Hong Kong shareholders under statutes or codes regulating takeovers, mergers and share repurchases outside Hong Kong), protection will be available to Hong Kong shareholders under the Canadian regulatory regime. In addition, as described above in the section headed "Executive's case in summary", Husky has agreed to enter into the Undertakings.

Accordingly, Husky submitted that it is not a public company in Hong Kong for the purposes of the Codes and fully endorsed the points made by the Executive.

### **The decision and the reasons for it**

31. Following consideration of all the submissions by the Executive and the parties present, and the materials presented, the Panel accepted the recommendation of the Executive on the basis of the Undertakings referred to in paragraph 25 above.
32. Based on the facts and representations of Husky and its advisers, the Panel ruled that Husky should not at the time of its secondary listing on the Stock Exchange be treated as a public company in Hong Kong under section 4.2 of the Introduction to the Codes.
33. However, if there is any material change to any of the information provided or representations made, the Executive must be advised immediately so that it may determine whether this ruling remains valid.
34. With regard to the primary factors set out in section 4.2 of the Introduction to the Codes, which are the number of Hong Kong shareholders and the extent of share trading in Hong Kong, the status of Husky under section 4.2 should be kept under review on an on-going basis by the Executive following the listing when trading volumes on the TSX and the Stock Exchange have been established.

35. Husky is required to make full disclosure in its Hong Kong prospectus of the regulatory position and in particular, of the fact that the Codes do not apply to Husky. It is further required to disclose in its Hong Kong prospectus (i) the fact that the Canadian takeovers regime does not automatically require a takeovers bid to be extended to shareholders outside Canada; and (ii) the terms of the undertakings to be given by Husky (as referred to at paragraph 25 above) and, if applicable, by its controlling shareholders.
36. If Husky's listing in Hong Kong were to become a primary listing (this would be a matter to be determined by the Stock Exchange) then the Codes would apply to Husky in accordance with section 4.1 of the Introduction to the Codes.

**Publication of the Panel decision**

37. Husky also made an application to the Panel to defer publication of this Panel decision until such time as the matter is no longer price sensitive.

The Panel was prepared to defer the announcement of this decision until the earliest of (i) the date on which Husky has made an official announcement regarding its intention to seek a secondary listing on the Stock Exchange; (ii) the date on which Husky withdraws the application for secondary listing, and (iii) 15 June 2011. Husky may apply to the Panel for further extension if this is justifiable.

17 May 2011

Parties present at the hearing:

The Takeovers Executive

Husky Energy Inc., advised by Latham & Watkins

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