Israel Securities Authority
Corporate Finance Department

Staff Position Paper

The positions of the ISA staff presented below are professional positions that reflect the staff's decisions and positions on issues related to the implementation of securities law. The information contained in the positions published here guides the ISA and its staff in using their authority, and the public may use this information and apply it in similar circumstances.

Legal Position No. 1991-11: Reporting Requirements of Dual Listed Companies

12 Elul, 5773 / August 18, 2013

Background

Following a settlement agreement recently signed with reference to a class action certification model in the matter of Teva Pharmaceutical Industries Ltd (hereinafter, "Motion to Certify" and "Teva," respectively),[1] a question arises regarding the scope of the disclosure requirements that apply to companies reporting according to Chapter E5 of the Securities Law 1968 (hereinafter, "Dual Listed Companies" and "the Securities Law," respectively).

In the Motion to Certify, it was argued that Teva is required to publish the salaries of the five of its officers who receive the highest salaries, based on the following argument, among others: The disclosure requirements that apply to Dual Listed Companies are disclosure requirements defined by foreign law. The foreign law (in this case – US law) refers to the law of the company's "home country", which is Israel.[2] Regulation 21 of the Securities Regulations (Periodic and Immediate Reports) 1970 provide that reporting corporations are required to disclose the salaries of the five officers in the company who receive the highest compensation. It was therefore argued that the combination of the provisions of the foreign law and the provisions of the Israeli law require Teva to state the salary of each of its five officers who receive the highest compensation.

The Dual Listing Arrangement

The dual listing arrangement entered into force in Israel with the enactment of Amendment 21 to the Securities Law, which added Chapter E3 to the law. Basically, this arrangement permits listing in Israel of securities that are traded on specific foreign exchanges (NASDAQ, NYSE,

[1] Class Action 18040-11-12 Hanas and others v Teva Pharmaceutical Industries Ltd.

[2] Item 6B in Form 20-F provides as follows: "Disclosure of compensation is required on an individual basis unless individual disclosure is not required in the company's home country and is not otherwise publicly disclosed by the company."

London Stock Exchange (Main Market)). In such cases, this arrangement exempts companies listed for trade in Israel from reporting requirements pursuant to the Israeli Securities Law and permits them to continue to report exclusively according to the foreign law that applies to them (US or UK security laws, including the directives of the relevant stock exchanges). Protection of the investor public in Israel based on several rings of regulation, mainly the foreign law, the regulation by the foreign regulator, and the market discipline in those countries.

The dual listing arrangement defines exemptions, in which cases the scope of disclosure may be different, such as companies that issue securities in Israel, in contrast to companies listed for trade, or companies that incorporated outside Israel rather than in Israel. However, with the exception of these limited exemptions, the underlying principle of the arrangement is that dual listed companies are Israeli companies subject to Israeli corporate laws and to disclosure requirements pursuant to foreign securities laws.

By adopting the dual listing arrangement, the legislator accepted the significant differences between the reporting format of companies traded exclusively in Israel and the reporting format of companies traded on another main market, and for which the TASE is a secondary trading arena. By doing so, the legislator effectively expressed its opinion of the significance of the dual listing arrangement and that the financial market and investor public in Israel have an enormous financial need for this arrangement.

For investors, the dual listing arrangement affords direct access to investment opportunities in major Israeli companies, diversifies the investment channels in securities, increases the liquidity of investments in companies, has a positive impact on the value of securities, and reduces investment costs. For companies, the dual listing arrangement provides greater access to capital and increases the investor base, increases their access to local investors who may have special interests in companies, and increases their capacity to overcome fluctuations and weaknesses in either of the two markets. These benefits are in addition to the benefits of marketability mentioned above, and do not entail significant input of resources. Ultimately, the dual listing arrangement is designed to realize the fundamental purpose of the financial market: to connect the investor public with companies that see funding; to create a market with a large turnover that attracts the attention of both foreign investors and Israeli companies operating in the international arena; and to promote growth and employment in Israel.

As we describe below, the underlying principle of the dual listing arrangement, which was also anchored in primary legislation, is that the disclosure requirements that apply to dual listed companies would be mainly the disclosure requirements that apply under the foreign law, and that no additional disclosure requirements would be imposed upon them under Israeli law. This principle was the foundation of companies' decisions to join the dual listing arrangement, and should be upheld in the future.

Issues for Discussion

The issue for discussion is whether there is a difference between the scope of disclosure requirements that apply to Israeli companies to which Chapter E3 applies, and the scope of disclosure requirements that apply to Israeli companies that are listed exclusively on foreign stock exchanges.

ISA Staff Position

In view of the rationale underlying the dual listing arrangement, and without delving into the interpretative issues of US law (including the scope of reporting required under US law in various matters), it is the position of the ISA staff that there should be no difference between the reporting requirements that apply to Israeli companies to which Chapter E3 applies, and the reporting requirements that apply to Israeli companies that are traded exclusively on foreign stock exchanges. This conclusion emerges clearly from the purpose of the dual listing arrangement and the provisions of Israeli law related to the reporting requirements of dual listed companies.[3] The dual listing arrangement is designed to encourage companies listed on foreign stock exchanges to also list their securities on the TASE, without such a step creating additional disclosure requirements for them. Insofar as Israeli companies listed on foreign exchanges are subject to additional disclosure requirements, such disclosures should apply equally to dual listed companies and to Israeli companies listed exclusively on foreign exchanges.

We note that at the time the dual listing arrangement was enacted, it was known that Israeli companies overseas receive exemptions on certain disclosure requirements compared to the disclosure requirements that apply to US companies, but it was ultimately decided not to demand that they meet the more stringent requirements.[4] This decision reflects the approach that a distinction between Israeli companies traded exclusively on foreign exchanges and Israeli companies listed both on foreign exchanges and on the TASE is not warranted. This approach is justified by the rings of regulation mentioned above, and the desire to avoid regulatory arbitrage that would lead Israeli companies overseas to delist or avoid listing for trade in Israel, and would force Israeli investors to invest in those firms exclusively through foreign exchanges. Such regulatory arbitrage would have an adverse impact on both investors and companies.

Section 35EE of the Securities Law provides that dual listing companies will file reports to the ISA and to the TASE according to Chapter E3 of the Law. Section 35EE(d) of the Law confers authority to the ISA to order a dual listed company to file the immediate reports that it is required to file under the foreign law. Similarly, Section 35EE(e) of the Law confers upon the ISA the authority to order a dual listed company, after having been given an opportunity to express its arguments, to file a corrective report, if it is convinced that the company filed a report that was not consistent with the requirements of the foreign law. Furthermore, the ISA may contact the

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[3] The explanatory note to Amendment 21 of the Securities Law expressly states as follows: "The Bill supports a special format for listing on the TASE and for reporting by companies listed for trade on foreign exchanges, where it is found that the securities laws that apply to the companies listed on these exchanges provide adequate protection for investors. The exemptions will mainly include the option of listing securities for trade in Israel based on a disclosure that is similar in essence and format to the disclosure required by the foreign exchange. Listing will be based on a listing document that differs from a prospective in both content and the liability in respect thereof. This method will also save the company the direct and indirect costs involved in preparing documents and reports according to two different legal systems." Securities Bill (Amendment No. 21)(Dual Listing) 2000, Bill 2887, p. 440. Also see Section 35EE(b) of the Law and the Securities Regulations (Periodic and Immediate Reports of Foreign Corporations) 2000, which do not require the disclosure of additional material details, and instead rely on the reports that dual listed companies are required to file according to the foreign law.

[4] Contrary to the recommendations of the Securities Dual Listing Committee ("Brodet Committee")(September 1998). See page 25 of the Committee's Report.

agency in charge of the foreign law's regulation or enforcement. The ISA staff has already clarified that these powers are to be used with restraint, taking into consideration the fact that dual listed companies are subject to the regulation of the foreign regulator. With respect to this point, and to the purpose of the dual listing arrangements and its directives, the ISA staff wishes to clarify that it does not intend to use its authority in a manner that requires dual listed companies to provide disclosures that are not made by other Israeli companies traded on the same foreign exchanges.

It should be clarified that nothing in this position constitutes an opinion regarding the settlement agreement in the matter of Teva or the specific arguments raised in that proceeding (which were broader than the argument presented above). The ISA appreciates the great significance of disclosures concerning executive compensation, and this position does not constitute an opinion on the significance of disclosures concerning this or any other issue (including officer compensation); this position constitutes an opinion solely on the principle that there should be no difference between the disclosure requirements imposed on dual listed companies and on corresponding companies listed on foreign exchanges.