

The Hong Kong Exchange Releases Revised Rules and Procedures to Implement New IPO Sponsor Regime

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On 23 July 2013, The Stock Exchange of Hong Kong Limited (the “Exchange”) released a large number of amendments to the Rules Governing the Listing of Securities on the Exchange (“Listing Rules” or “LR”), revised checklists, guidance materials and templates. Subject to certain transitional provisions, these materials will come into effect on the same date, 1 October 2013, as the amendments to various guidelines and codes released by the Securities and Futures Commission (the “SFC”) in December last year. Together, they will implement the new regulatory regime for sponsors in a listing application or initial public offer (“IPO”) conducted in Hong Kong.

In this briefing we will discuss highlights of **the new regime**, focusing on the listing of equity securities on the Main Board of the Exchange. All references to the Listing Rules are to those of the Main Board.

The listing application process

Under the new regime, the sponsor (or in the case of multiple sponsors, the last-appointed) must be formally appointed at least two months before submission of the listing application form (“Form A1”), which officially kick-starts the listing application process. The date of formal appointment is taken to be the effective date of the engagement letter in relation to the listing in question. Each sponsor must notify the Exchange of its appointment by submitting a copy of the engagement letter, regardless of whether a Form A1 has been submitted.

Key new requirements under the reform initiative include:

- the sponsor must have completed all reasonable due diligence on the listing applicant before the submission of Form A1;
- a range of revised confirmations, checklists and other documentation must accompany the Form A1, including a draft prospectus (the Application Proof or “AP”);
- the AP must be a substantially complete document at the time of Form A1 submission (except for information which by its nature can only be finalised at a later stage); and
- subject to the transitional provisions discussed below, the AP will be publicly released at the same time as the submission of Form A1 to the Exchange.

a) Publication of AP and PHIP

The publication of a substantially complete draft prospectus in the form of the AP is a monumental development for the Hong Kong market. The SFC, after extensive consultation and numerous discussions with market stakeholders, has taken the view that public release of the AP and (subject to the suspension discussed below) “naming and shaming” by publishing the names of listing applicants and sponsors whose APs are returned by the regulators as being substantially incomplete will be conducive to upgrading the quality of disclosure in the AP and the due diligence conducted by the sponsors.

The current regime for public release of a web-proof information pack or “WPIP” will be replaced by a new post-hearing information pack (“PHIP”) with similar features in terms of content. As regards timing, the PHIP is required to be published in English and Chinese when, after the listing hearing, the regulators’ material comments have (in the opinion of the listing applicant’s directors)

been satisfactorily addressed and not later than the earlier of distribution of the red herring, commencement of book-building, and any overseas publication of similar information (if the applicant has scheduled a listing on an overseas exchange at or around the time as the Hong Kong listing).

As explained in more detail below, during the 12-month period between 1 October 2013 and 30 September 2014, APs will be released to the public by publication on the Exchange's website in English and Chinese, only if the Exchange decides to accept the application after a three-day initial check. To give both the market and the Exchange time to adapt to the new regime, the SFC has agreed to suspend the electronic publication of the AP (and the publication of the names of the new applicant and the sponsor and the date of the return decision where an AP is returned for not being substantially complete after the three-day check) from 1 October 2013 to 31 March 2014 (the "Six-Month Suspension").

However, despite the suspension of publication of APs, with effect from 1 October 2013, if an AP is returned at any stage as being not substantially complete, a moratorium of eight weeks will be imposed before the listing application can be re-submitted. The eight weeks will start from the date of the returned application, subject to the general requirement for all the sponsors (including any new sponsor joining the team after a returned application) to be appointed at least two months before submission or re-submission of a Form A1.

During the Six-Month Suspension, the listing applicant will submit a version of the AP ("AP-Publication") in English via the Exchange's e-submission system (the public release of which will be subject to the Six-Month Suspension), and another version of the AP ("AP-Vetting") in English (to be submitted physically together with relevant documents) for review by the Exchange. No redactions are allowed in the AP-Vetting, although specific items of information may be omitted or put in square brackets, in accordance with Table A in the new Guidance Letter ("GL") 56-13.

When the Six-Month Suspension period expires, the AP-Vetting (in English) and the AP-Publication (in English and Chinese) will be submitted at the same time. The AP-Publication will be released electronically. The content of these versions are basically the same, except that redactions and warnings are required or allowed in the AP-Publication.

The information that is required or allowed to be redacted from the AP-Publication and the PHIP, and the warnings and disclaimers that must be included, are governed by specific guidelines in the new GL56-13 and GL57-13 (see below). Generally speaking, redactions are allowed in the AP-Publication only to prevent the document from constituting a prospectus under Hong Kong law. The Exchange's approval must be obtained prior to submission of the Form A1 for any additional redactions.

b) Streamlined vetting process

The Exchange has pledged to revamp the prospectus vetting process. As mentioned above, for one year from 1 October 2013, there will be a new three-day initial checking process by the Exchange upon receipt of a Form A1 with supporting documentation (which includes the AP). This is intended to be a purely mechanical check of basic disclosures in the AP, with no qualitative assessment of the proposed listing. This initial review will be based on a checklist in Table B in the new GL56-13. Nevertheless, the Exchange stresses that the AP may be returned for not being substantially complete at any stage, either during or after the three-day check and even after the application has been accepted for vetting upon completion of the three-day check.

From 1 April 2014 to 30 September 2014, the AP-Publication will be available on the Exchange's website and detailed vetting will commence only if, after the three-day review, the Exchange decides to accept the application. After 30 September 2014, the three-day delay in publication will be removed and the AP-Publication will be publicly available from the day of submission of the Form A1.

After the three-day review, detailed vetting will commence on the AP and the regulators are aiming to streamline considerably this regulatory review. They plan to focus on high level issues only, such as eligibility and suitability for listing, business sustainability, compliance with the Listing Rules, the Companies Ordinance and the Securities and Futures Ordinance, and material disclosure deficiencies. Both the Exchange and the SFC have pledged to steer away from making verbal and drafting comments, and will work together to avoid duplication of comments. The Exchange anticipates that in a normal case, there will be two rounds of comments and an interval of about 40 business days between the date of Form A1 filing and presentation of the application (assuming it has not been struck out by the Listing Division) for the Listing Committee's consideration. The Exchange has stated that applicants may submit a listing timetable on the basis that it will take around 25 business days from the Form A1 filing to the Listing Committee hearing.

When the Listing Division considers an application is ready to proceed to Listing Committee hearing, it will send a "notice to hearing" letter to the sponsor. The sponsor and applicant must then submit relevant documents promptly in compliance with the rules.

c) Confidential filings

Confidential filings (i.e. exceptions to the AP and PHIP publication requirements) are available but only in very limited circumstances. Basically, confidential filings are only permissible for a company with a minimum market capitalisation of US\$400 million that has been listed on a recognised overseas exchange for not less than five years.

There will not be any automatic or "blanket" waiver from the publication requirements for a spin-off and new listing (whether the parent entity is listed in Hong Kong or overseas). A waiver must be applied for and the Exchange will consider the relevant factors on a case-by-case basis under GL57-13 (see below). For a spin-off from a Hong Kong-listed parent company, a waiver application will be considered mainly in light of the applicable inside information disclosure requirements. The Exchange encourages listing applicants to consult with it at an early stage.

d) Sponsor's declarations

As a corollary to the acceleration in producing a substantially complete prospectus, there will be some amendments to the forms of declarations and undertakings to be given by the sponsor. Notably, under the revised Appendix 17 sponsor's undertaking and statement of independence, a sponsor is required at the time of Form A1 submission to (i) undertake to lodge a Form E public float declaration (being, under the pre-existing LR9.11(36), a form submitted after the issue of the prospectus and before dealing in securities commences), (ii) report any material information concerning non-compliance with the Listing Rules or other legal or regulatory requirements relevant to the listing, or any change to the sponsor's independence, and (iii) if it ceases to act for the listing applicant at any point during the process, report to the Exchange its reasons for ceasing to act.

The pre-existing statement of independence (Appendix 18 to the Listing Rules, currently under Rule 3A.08 also given no later than the date of Form A1 submission) will be subsumed under the revised Appendix 17.

The current sponsor's declaration (Appendix 19 to the Listing Rules, currently given under Rule 3A.13) giving various assurances on its own due diligence work and the quality of the prospectus will be retained with substantively the same content. The timing for giving this declaration will remain unchanged, i.e. as soon as practicable after the listing hearing but on or before the date of issue of the listing document.

On the broader issue of prospectus liability for sponsors, the SFC has previously indicated that it would recommend legislative amendments to clarify the existence of sponsor's statutory liability for misstatements in a Hong Kong prospectus. However, this will be the subject of a separate consultation and law reform process.

e) Accelerated reviews of returned applications

A Form A1 with accompanying documents may be returned at any time during or after the three-day checking process, or after the documents have been accepted by the Exchange and substantive vetting has commenced. Under the new LR9.03(1)(b) note 2, if an application is returned, the initial listing fee will be refunded only if the Exchange returns the application before its first comment letter has been issued.

Under the new LR2B.05(2) there will be a special review process for decisions by the Listing Division to return a listing application at any stage. This is distinct from the existing LR2B.05(1) and LR2B.07 review of decisions by the Listing Division or Listing Committee to reject a listing application.

Review of a return decision can be requested by either the sponsor or the listing applicant, and will be conducted by the Listing Committee in the first instance and the Listing (Review) Committee upon request for a second review (i.e. review of the Listing Committee's decision to uphold the return decision).

The review process is governed by a new GL61-13 "Guidance on accelerated procedures for reviewing a Listing Division's decision to return a Main Board or GEM new listing application to the sponsor(s)", which sets out detailed requirements as to timing, documentation, legal representation and other logistics of the review hearing.

If upon final review the return decision is upheld (or if the time for requesting a review has lapsed), the AP will be removed from the Exchange's website, and the names of the applicant and the sponsor and the date of the return decision will be published. The eight-week moratorium will be imposed as from the date of the return letter, so that the applicant and sponsor may not re-submit a listing application until the moratorium has expired. As noted above, this is subject to the general requirement for all the sponsors (including any new sponsor) to be appointed at least two months before re-submission.

Exchange guidance letters and checklists

a) Logistics

To help the listing applicant and its advisers prepare for listing, a number of new guidelines, checklists and templates have been issued, including:

- GL55-13 Guidance on documentary requirements and administrative matters for new listing application (equity);
- GL56-13 Guidance on (i) disclosure requirements for substantially complete APs; (ii) a three-day checklist for disclosure matters that the Exchange will check in APs for vetting prior to acceptance; and (iii) publication of APs and PHIPs on the Exchange's website;
- GL57-13 Guidance on logistical arrangements for publication of APs, PHIPs and related materials on the Exchange's website for listing applicants; and
- GL60-13 Guidance on confirmations required on expert opinions in APs and subsequent draft listing documents (excluding any report, opinion or statement issued by the reporting accountant which is covered by GL58-13).

The current regime under Chapter 9 of the Listing Rules for submission of documents after the Form A1 (e.g. the 15-day document and 4-day document lists) will be replaced by a new list for document submissions set out in GL55-13. A number of the Exchange's checklists and document lists have been revamped.

Confirmations by the reporting accountants and experts will have to be issued in accordance with templates provided by the Exchange and appended to relevant guidance letters.

The Exchange has made numerous amendments to 17 existing guidance letters. Some of these amendments relate to processes and logistics:

- GL7-09 Guidance on documents required for re-filing a listing application (a) more than six months after the date of the original listing application; or (b) where a sponsor has changed – *the Exchange clarifies that a replacement sponsor shall not be regarded as having satisfied any of the obligations of a sponsor by virtue of work performed by a predecessor sponsor*
- GL13-09 Listing document covers – *before noon on the day when the sponsor seeks the Exchange's clearance for bulk-printing the prospectus, the listing applicant or sponsor must confirm that the prospectus covers meet the guidelines*
- GL53-13 Liquidity arrangements for issuers seeking to list by introduction where the securities to be listed are already listed on another stock exchange – *wording is added emphasising the listing applicant's and sponsor's obligation to ensure compliance with the requirements imposed by the SFC when conducting investor education activities in relation to liquidity arrangements*

b) Prospectus disclosure

Besides logistical issues, a large amount of amendments have been made to existing guidance that are, in effect, enhanced prospectus disclosure requirements to be introduced with the new AP regime. These changes are potentially important, as failure to comply may render the AP substantially incomplete and expose the sponsors and applicant to the risk of having their listing application returned:

- GL59-13 Simplification series: "Business" section – *enhanced disclosure in various aspects including production and sub-contracting, sales and marketing, product returns and warranty, health, safety, social and environmental matters, litigation and claims, hedging positions and exposure under derivative instruments, licences and permits etc.*
- GL49-13 Simplification series: "History and Development" section – *requirements for additional disclosure including the incorporation and commencement of business of each member of the listing applicant's group that made material contribution to the track record results; date of completion of registration under Circular No.75 of the PRC State Administration of Foreign Exchange; whether each acquisition, disposal and merger has been legally completed and the transferor's / transferee's relationship with the applicant, shareholders, or connected persons; pre-IPO investments; outstanding options, warrants and convertibles, etc.*
- GL43-12 Guidance on pre-IPO investments – *detailed disclosure is required for pre-IPO investments, including beneficial owner and background of each of the pre-IPO investors and their relationship with the listing applicant group and/or connected persons of the applicant; basis of determining the consideration paid by each investor, whether the investment is in the form of share-based payments, etc.*
- GL38-12 Guidance on the latest practicable date and the latest date for liquidity disclosure in listing documents – *the latest practicable date in an AP should be no more than 10 calendar days before the date of the AP; the latest date for liquidity disclosure in an AP is a date no more than two calendar months before the date of the AP*
- GL33-12 Disclosure in listing documents for IPO cases: use of proceeds – *new requirement for detailed breakdown of the use of process, and disclosure of the amount of net proceeds received by selling shareholders from sale shares (if any)*
- GL37-12 Guidance on indebtedness, liquidity, financial resources and capital structure disclosure in the listing document – *enhanced disclosure for listing applicants with net*

current liabilities, negative operative cash flows during most of the track record period, significant capital commitments, high gearing ratios and/or significant reclassification of long-term debt to short-term debt

- GL27-12 Simplification series: “Summary and Highlights” section – *requirements added for disclosure of competitive strength and business strategies, recent development (operations and financial positions since latest audited financial period) and listing expenses (the impact of the listing expenses on the applicant’s financial performance)*
- GL19-10 Guidance on the disclosure of land use right certificates etc. – *enhanced disclosure on numerous property issues, including properties with defective titles (e.g. the reasons for defects, usage of such properties, whether such properties are collectively crucial to the applicant’s operations, the legal consequences of such defects), idle land in the PRC (e.g. whether the applicant has failed to comply with relevant laws, any remedial actions, etc.), properties involving PRC civil defence projects and land settlement operations*

The Exchange has followed this up with a number of new guidance letters with special emphasis on financial disclosure, including:

- GL58-13 Guidance on confirmations required on the accountants’ report, pro forma financial information and profit forecast in Applications Proofs and subsequent draft listing documents;
- GL59-13 Guidance on management discussion and analysis on the historical financial information in listing documents;
- GL62-13 Disclosure of directors, supervisors and senior management section in listing documents; and
- GL63-13 Guidance on disclosure of material non-compliance incidents in listing documents.

Lastly, a new GL6-09A (Guidance on the financial information for the trading record period expected in the first draft listing document for listing applications) will replace the current GL6-09 governing early submission of Form A1 with stub financial information for vetting purposes.

A full list of the new and revised GLs issued by the Exchange in connection with the new regime is set out in the Appendix to this briefing.

Sponsor’s appointment and ceasing to act

The rules of the SFC and the Exchange will be closely aligned:

- All sponsors in the team must be appointed not less than two months before submission of the Form A1. (LR3A.02B)
- All sponsors must be appointed by an engagement agreement in writing, a copy of which must be submitted to the Exchange by way of notification whether or not a Form A1 has been submitted. (LR3A.02A(1))
- When a sponsor ceases to act for a listing applicant at any time after its appointment (whether or not a Form A1 has been submitted), it must inform the Exchange in writing, as soon as possible, of its reasons for ceasing to act. (LR3A.02A(2))

The new LR3A.05 will provide for certain mandatory provisions in a sponsor’s engagement agreement, aimed at putting the listing applicant under an obligation to assist and facilitate the sponsor in the discharge of its duties.

Sponsors' eligibility criteria and internal compliance matters

The new regulatory regime also comprises enhanced conduct requirements imposed by the SFC on firms carrying out sponsor's work in Hong Kong. The following is a recap of key features of the new regime released by the SFC in December 2012, to be effective on 1 October 2013. Readers will bear in mind that the Exchange's amendments are complementary to the SFC's initiative.

a) Sponsor's duties

A key aspect is the revised Chapter 17 of the Code of Conduct for Persons Licensed by or Registered with the SFC (the "Code of Conduct"), which imposes a number of new or enhanced duties on an IPO sponsor, including:

- duty to advise and guide the listing applicant in preparation for the listing;
- duty to take reasonable due diligence steps in respect of a listing application and to complete all reasonable due diligence on a listing applicant by the time of submitting the Form A1;
- duty to take reasonable steps to ensure that true, accurate and complete disclosure about a listing applicant is made to the public;
- duty to deal with the regulators in a truthful, cooperative and prompt manner; and
- duty to maintain proper records and systems and controls for all sponsor's assignments.

Some of these requirements are now fleshed out in the revised Listing Rules, so that the sponsor will have to comply with both the Code of Conduct requirements and the Listing Rules on the same subject matter. For example:

- The Code of Conduct sets out a number of requirements on seeking assistance from third parties (including expert advisers) in carrying out due diligence. The Exchange complement these by various Listing Rules (including declarations by the sponsors as to checking third parties' work) and guidance on opinions and confirmations to be obtained from experts.
- Both the SFC and the Exchange have produced guidance on how to conduct management discussion and analysis of financial information, and how to disclose it in the prospectus.
- The Code of Conduct requires that a sponsor (or, in the case of multiple sponsors, the last appointed in the team) must be formally appointed at least two months prior to Form A1 submission. The Listing Rules have been revised to echo this and the revised GL7-09 clarifies that this requirement applies also to re-submission of a Form A1 due to a change of sponsor.
- The Code of Conduct sets out certain matters (e.g. obligation for the listing applicant to assist the sponsor, and to procure other parties to cooperate with the sponsor, in carrying out due diligence) as mandatory terms in a sponsor's engagement letter. The Listing Rules have been revised to incorporate these.

b) Sponsor's eligibility, record keeping and notification requirements

Of equal importance to sponsor firms and their legal and compliance officers are the new SFC requirements relating to eligibility criteria, internal management and systems and controls specifically applicable to IPO sponsor work. Under the new Code of Conduct Paragraph 17.10(d), firms must keep complete records (including transaction team information and due diligence plans and other related materials) for sponsor's assignments for at least seven years in Hong Kong after completion or termination of the assignment. Under Paragraphs 17.11 and 17.12, the

SFC also imposes specific requirements on resourcing and supervisory structures of deal teams, annual assessment of systems and controls, and overall management of an IPO transaction.

Paragraph 17.10(b) requires a sponsor to provide, on request by the SFC, an up-to-date list of sponsor work undertaken, with the names of issuers, composition of the transaction teams (including any variations) and the names, titles and roles of staff in each listing assignment. Under Paragraph 17.11(f), upon completion of a listing, the sponsor must submit to the SFC, within two weeks after the first day of dealing, a team structure chart countersigned by a Principal who supervised the transaction and showing the reporting line of each of the licensed or registered staff within the team, together with their names, business titles and responsibilities.

In the Additional Fit and Proper Guidelines for Corporations and Authorised Financial Institutions Applying or Continuing to Act as Sponsor and Compliance Advisers (Appendix I to the Fit and Proper Guidelines), the SFC has revised the eligibility for Principals and Type 6 licensed representatives engaged in IPO sponsor work. New provisions include recognising, for Principals' qualifications, overseas experience in certain specified countries, and the introduction of a new examination on ethics, sponsor work and IPO transactions in Hong Kong. The SFC is expected to announce details of the new sponsor's professional examination in due course.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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Appendix

List of new and revised guidance letters issued by the Exchange relating to the new sponsor regulation regime

New Guidance Letters

Guidance on disclosure of material non-compliance incidents in listing documents ([GL63-13](#))

Disclosure of directors, supervisors and senior management section in listing documents ([GL62-13](#))

Guidance on accelerated procedures for reviewing a Listing Division and Listing Committee's decision to return a listing application ([GL61-13](#))

Guidance on confirmations required on expert opinions in application proofs and subsequent draft listing documents (excluding any report, opinion or statement issued by the reporting accountant which is covered by Guidance Letter HKEx-GL58-13) ([GL60-13](#))

Guidance on management discussion and analysis on the historical financial information in listing documents ([GL59-13](#))

Guidance on confirmations required on the accountants' report, pro forma financial information and profit forecast in Application Proofs and subsequent draft listing documents ([GL58-13](#))

Guidance on logistical arrangements for publication of Application Proofs, Post Hearing Information Packs and related materials on the Exchange's Website for listing applicants ([GL57-13](#))

Guidance on (i) disclosure requirements for substantially complete Application Proofs; (ii) a 3-day checklist for disclosure matters that the Exchange will check in Application Proofs prior to acceptance; and (iii) publication of Application Proofs and Post Hearing Information Packs on the Exchange's website ([GL56-13](#))

Guidance on documentary requirements and administrative matters for new Listing application (Equity) ([GL55-13](#))

Guidance on the financial information for the trading record period expected in the first draft listing document for listing applications ([GL6-09A](#))

Revised Guidance Letters

Liquidity arrangements for issuers seeking to list by introduction where the securities to be listed are already listed on another stock exchange ([GL53-13](#))

Disclosure in listing documents for applicant mineral companies that the Exchange normally expects and to address comments raised by the Exchange and the SFC in the vetting of previous listing applications ([GL52-13](#))

Simplification Series – disclosure in listing documents for IPO cases – the “Business” section ([GL50-13](#))

Simplification Series – disclosure in listing documents for IPO cases – the “History and Development” section ([GL49-13](#))

Simplification Series – disclosure in listing documents for IPO cases – the “Industry Overview” section ([GL48-13](#))

Guidance on the latest practicable date and the latest date for liquidity disclosure in listing documents ([GL38-12](#))

Guidance on indebtedness, liquidity, financial resources and capital structure disclosure in listing documents([GL37-12](#))

Guidance on profit forecast under Main Board Rules 9.11(10)(b) and 11.17, GEM Rules 12.22(14b) and 14.29 ([GL35-12](#))

Disclosure in listing documents for IPO cases – use of proceeds ([GL33-12](#))

Simplification Series – disclosure in listing documents for IPO cases – the "Summary and Highlights" section ([GL27-12](#))

Documentation requirements for IPO cases – facilitative procedures ([GL23-10](#))

Sponsor's due diligence on non-disclosure of confidential information in the listing document ([GL21-10](#))

Guidance on publicity materials and e-IPO advertisements ([GL18-10](#))

Listing document covers ([GL13-09](#))

Statistics and data quoted in prospectuses ([GL8-09](#))

Documentary requirements for re-filing a listing application (a) more than six months after the date of the original listing application; or (b) where a sponsor has changed ([GL7-09](#))

Guidance on assessment of a sponsor's independence ([GL4-06](#))

Other relevant Guidance Letter updates issued on 23 July 2013

Guidance on disclosure of (1) land use right certificates and/or building ownership certificates for properties in the PRC; (2) properties with defective titles in the PRC and Hong Kong; (3) idle land in the PRC; (4) civil defense projects in the PRC; and (5) land resettlement operations in the PRC ([GL19-10](#))

Guidance on pre-IPO investments ([GL43-12](#))

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