

Practice area	Country	Firm	Title	Summary	Contact person
Capital Markets	China/Hong Kong	Charltons	HKEx Publishes Consultation Paper on Proposed Changes to Requirements for Circulars and Listing Documents of Listed Issuers	The proposals are intended to make the contents of circulars and listing documents more relevant for shareholders, codify existing practices and encourage more timely release of information by eliminating unnecessary restrictions or burdens on issuers.	<a href="mailto:legalink@charltonslaw.com">legalink@charltonslaw.com</a>

## INTRODUCTION

HKEx has published a consultation paper (the "Consultation Paper") on proposed changes to the requirements for circulars and listing documents of listed issuers.

The review and suggested changes arose in response to issuers' and practitioners' comments on certain requirements regarding notifiable transaction and/or connected transaction circulars and listing documents. The proposals are intended to make the contents of these documents more relevant for shareholders, codify existing practices and encourage more timely release of information by eliminating unnecessary restrictions or burdens on issuers.

The Consultation Paper covers proposed changes to the following three areas:

Disclosure of financial information in circulars or listing documents;

Other disclosure requirements for circulars or listing documents; and

Timing requirements for despatch of notifiable transaction or connected transaction circulars and supplementary circulars.

The Consultation Paper is available on the HKEx website at <http://www.hkex.com.hk/consul/marketconsultation.htm>.

Interested parties should return their completed Questionnaire ([http://www.hkex.com.hk/consul/paper/cp200909crq\\_e.doc](http://www.hkex.com.hk/consul/paper/cp200909crq_e.doc)) to HKEx no later than

18 November 2009. The consultation questions are reproduced at Annex A below for your reference.

## A. DISCLOSURE OF FINANCIAL INFORMATION IN CIRCULARS OR LISTING DOCUMENTS

### 1. Accountants' report on the listed group for very substantial disposals

Under Rules 4.06A and 14.68(2)(a)(i), if a very substantial disposal ("VSD") involves a disposal of a company or business (the "Disposal Target") the circular must contain:

- a. an accountants' report on the issuer's group with the company of business being disposed of shown separately as a discontinuing operation (as a note to the financial statements) for the latest three financial years and, if the latest financial year ended more than 6 months from the circular date, for the stub period; and
- b. pro forma financial information on the remaining group for the current or most recent financial period.

The market has commented that an accountants' report on the issuer's group is costly and lengthy to prepare without added benefit to shareholders. The accountants' report requirement is also more stringent than in other markets.

HKEx proposes to remove the current accountants' report requirement but introduce the following financial disclosure requirements for VSD circulars:

- The circular would have to contain the following financial information:
  - (a) financial information of the issuer's group with the Disposal Target shown separately as a disposal group or discontinuing operation (equivalent to the current rules); OR
  - (b) financial information of the Disposal Target.
- The information under (a) or (b) would be required to:
  - (i) be prepared using accounting policies of the listed issuer and cover three financial years with the latest financial year/period having ended not more than 6 months before the circular date (as currently required by the Listing Rules);

(ii) contain information in respect of the balance sheet, income statement and any notes to accounts that the directors consider necessary for a reasonable appreciation of the results for the relevant financial periods (similar to disclosures in results announcements) plus a cash flow statement and a statement of changes in equity; and

(iii) be reviewed by the issuer's auditors or reporting accountants. It is expected that the review would be conducted according to the standards published by HKICPA or IASB on engagements to review financial statements (similar to a review on interim financial information). As an alternative, issuers could include an accountants' report on the financial statements. HKEx considers that this may be preferable for issuers choosing to disclose financial information under (a) above where the reporting period end coincides with the issuer group's financial year end.

- The circular would also be required to contain a statement by the directors to describe any material adverse change in the financial or trading position of the issuer's group since the latest published audited accounts (as currently required for a very substantial acquisition or major acquisition circular).

## 2. Reporting period of accountants' report in major acquisition or very substantial acquisition circulars

Under the current Rules, a circular for a very substantial acquisition or a major acquisition involving the acquisition of a business or a company (the "Target") must contain an accountants' report on the Target. The reporting period must comply with the following rules:

- (a) Rule 4.06 which requires that the accountants' report must include the Target's results for each of the three financial years immediately before the circular date; and
- (b) Rule 14.67(6)(a)(i) or 14.69(4)(a)(i) which require the latest financial period reported on by the reporting accountants to have ended 6 months or less before the circular date. Thus if the Target's latest financial year ended more than 6 months before the circular date, the accountants' report must also include the Target's results for a stub period.

It is felt that an issuer proposing to issue a very substantial acquisition or major acquisition circular shortly after the end of the Target's financial year may have difficulty in producing the Target's audited accounts for the latest financial year. Compliance with Rule 4.06 may therefore delay the publication of the circular, which is not in the best interests of the issuer and its shareholders.

HKEx proposes to remove the requirement in Rule 4.06 that the reporting period of an accountants' report in a major transaction or very substantial acquisition circular must cover the financial year immediately preceding the circular date. The proposed Rule amendment would require the accountants' report to include the

Target's results for at least three financial years (or if shorter, the period since commencement of the Target or its incorporation or establishment), with the latest financial year/period ending no more than 6 months from the circular date.

### 3. Indebtedness statement in a notifiable transaction circular

The current Rules require a circular for a major transaction, a very substantial disposal or a very substantial acquisition to contain information about the liquidity and financial resources of an issuer's group to allow shareholders to assess the impact of the transaction on the group.

The Consultation Paper notes that in the past, some issuers delayed the despatch of their transaction circulars because they needed additional time to prepare indebtedness statements. This statement can take a lot of time to prepare as professional accountants are often engaged to review indebtedness statements and where issuers have a number of bank accounts and facilities with banks in other jurisdictions, the process of obtaining bank confirmations can be time consuming. Nevertheless, the indebtedness statement only shows the issuer's latest indebtedness position. Further, the issuer's directors should have already considered the issuer group's indebtedness position as part of their due diligence work in preparing the working capital statement and statement on material adverse change. The working capital statement is also subject to confirmation by the issuer's financial adviser or auditors as to the existence of facilities provided by third parties to finance the issuer group. HKEx notes that some other jurisdictions do not require the inclusion of indebtedness statements in material transaction circulars. In the UK for example, the listing rules for a class 1 circular require a working capital statement and statement of material adverse change, but do not require an indebtedness statement. The Singapore (Main Board) rules do not require a major transaction circular to include any statement of indebtedness, working capital or material adverse change. There is an argument, however, that the indebtedness statement provides updated quantitative information about the issuer group's indebtedness position and that this information may be useful to shareholders.

HKEx does not hold strong views on relaxing the disclosure requirement for indebtedness statements in notifiable transaction circulars and seeks the market's views on this matter.

### 4. Working capital statement in a notifiable transaction circular

Rule 14.66(10) requires a circular for a major transaction, a very substantial disposal or a very substantial acquisition to contain a working capital statement by the directors as is referred to at paragraph 30 of Appendix 1B to the Rules. When an issuer is proposing a material transaction, the working capital statement in the relevant circular should take into account the effect of the proposed transaction. While this is currently market practice, it is not clear from the wording of the existing Rules.

HKEx proposes to amend Rule 14.66(10) to clarify that the effect of the proposed transaction must be taken into account.

## 5. Reproducing published financial information in circular or listing document

Paragraph 31(3) of Appendix 1B to the Rules requires the disclosure of the latest published audited balance sheet and the notes to the annual accounts for the latest financial year for the issuer's group and any company acquired since the date of the group's latest published audited accounts in respect of which an accountants' report has already been sent to shareholders or which was itself a listed issuer within the previous 12 months. This information is required to be disclosed in;

- (a) circulars for major acquisitions or very substantial acquisitions (Rules 14.67(4) and 14.69(2)); and
- (b) a listing document issued by an issuer other than in connection with a capitalisation issue or an exchange or substitution of securities (e.g. for a rights issue or open offer).

Some issuers find strict compliance with this requirement to be burdensome as it increases the size of the circulars or listing documents resulting in higher printing costs. The information required is extracted from published accounts or an accountants' report in a published circular, which are available at both the Stock Exchange's and the issuer's websites. HKEx therefore considers it acceptable for issuers to simply refer to the published financial information in their circulars or listing documents.

## 6. Combined financial information of the enlarged group under paragraph 31(3)(b) of Appendix 1B to the Rules

Paragraph 31(3)(b) of Appendix 1B to the Rules refers to the disclosure of a pro forma statement combining the assets and liabilities and profits or losses of the issuer and any companies acquired by it since the date of its last published accounts for the latest financial years. This combined statement conflicts with the new pro forma Rule 4.29, introduced in March 2004. In particular, the combined statement required under paragraph 31(3)(b) of Appendix 1B covers adjustments attributable to any company previously acquired by the issuer (and not only the subject transaction as required by Rule 4.29). It is therefore proposed that the requirement for the disclosure of a combined statement be removed from paragraph 31(3)(b) of Appendix 1B to the Rules.

## B. OTHER DISCLOSURE REQUIREMENTS FOR CIRCULARS AND LISTING DOCUMENTS

### 1. Directors' statement on the accuracy and completeness of information in notifiable or connected transaction circulars and listing documents

The current Rules require notifiable or connected transaction circulars or listing documents to contain a directors' responsibility statement, as specified in paragraph 2 of Appendix 1B to the Rules. Rule 2.13 was introduced in 2004 and

sets out the general principles as to content or responsibility for documents required under the Rules, and includes a requirement that the information be accurate and complete in all material respects and not be misleading or deceptive.

HKEx proposes to align the responsibility statement with the disclosure principle in Rule 2.13 and therefore proposes to modify paragraph 2 of Appendix 1B to the Rules to include the statement that "the information contained in this document is accurate and complete in all material respects and not misleading or deceptive". Similar changes are proposed for the responsibility statements set out in paragraph 2 of Appendices 1 A, C, E and F and paragraph 1(b) of Appendix 1 D.

## 2. Information in board minutes for connected transactions

Rule 14A.55 requires a listed issuer to submit to the Exchange a copy of the minutes of board meetings approving non-exempt connected transactions. The board minutes are required to state: (i) whether or not the directors consider the transaction to be on normal commercial terms and in the ordinary and usual course of business of the issuer; (ii) the views of the independent non-executive directors; and (iii) whether any directors have a material interest in the transaction and have abstained from voting. The views of the directors and independent directors on the terms of the transaction are already required to be disclosed in the issuer's announcement of the transaction. HKEx believes that the information as to whether any director has a material interest in the transaction should also be disclosed to shareholders. This is in line with disclosure requirements for related party transactions under the UK listing rules.

HKEx proposes to remove the filing requirement for board minutes approving connected transactions. Instead, issuers will be required to disclose in their connected transaction circulars whether any director has a material interest in the transaction and has abstained from voting. If no circular is required under the Rules, this information must be included in the issuer's announcement.

## 3. Circular content requirements for a notifiable transaction involving an acquisition and a disposal

Under Rule 14.24, where a transaction involves both an acquisition and a disposal, the Exchange applies the percentage ratios to both the acquisition and disposal and classifies the transaction by reference to the larger of the two transactions. However, in terms of the content of the notifiable transaction circular, there are views that it is unduly burdensome to require both the acquisition and the disposal to comply with the more stringent disclosure requirements by reference to the larger transaction. It is proposed that the circular content requirements for each of the acquisition and the disposal under a transaction should be determined by their respective transaction classification.

## 4. Disclosure in listing documents of listed overseas or PRC issuers regarding provisions in constitutional documents and regulatory provisions in the relevant jurisdiction

The current Rules require overseas or PRC issuers to include in their listing documents certain information in relation to the provisions of their constitutive documents and the laws and regulations of their home jurisdictions. There are also requirements for overseas and PRC issuers to make available for inspection copies of any laws or regulations relevant to the summary included in the listing document.

Comments have been made by some overseas and PRC issuers that it is unduly burdensome for them to disclose the information in their listing documents for subsequent issues of securities. The disclosure and document inspection requirements regarding provisions in constitutional documents and regulatory provisions will therefore be removed for listing documents for subsequent issues of securities by PRC and overseas issuers. HKEx considers this to be appropriate for subsequent issues given that the information is publicly available, is not related to the subject matter and is not required to be disclosed by the Hong Kong Companies Ordinance.

#### 5. Additional disclosure requirements for listing documents of PRC issuers

Where listing for equity securities of a PRC issuer is sought, Rule 19A.44 expands the disclosure requirements in Appendix 1B to the Rules to include:

- a. The quorum and voting requirements for shareholders meetings;
- b. A statement of sufficiency of foreign exchange to pay dividend on H shares and to meet foreign exchange liabilities;
- c. Risk factors relating to investments in PRC-incorporated business and the differences in legal, economic and financial systems between the PRC and Hong Kong and a warning statement thereof.

Some PRC issuers have commented that the disclosure of this information in listing documents for subsequent issues of securities is unduly burdensome. They consider that the information is widely available and should not be required for each subsequent issue of securities.

HKEx proposes to remove the disclosure requirements under paragraphs 45, 46, 48 and 49 of Appendix 1B to the Rules for subsequent issues of securities by PRC issuers. However, a listing document issued by an issuer in connection with an introduction or a deemed new listing will still need to comply with the disclosure requirements under Appendix 1A to the Rules and Rule 19A.42.

#### TIMING REQUIREMENTS FOR DESPATCH OF CIRCULARS

##### 1. Timing for despatch of notifiable or connected transaction circulars

Rules 14.38A and 14A.49, and Rules 13.73 and 14.41 set out timing requirements for the despatch of notifiable and connected transaction circulars. Rules 14.38A and 14A.49 require an issuer which has entered into a notifiable transaction (major or above) or a connected transaction to publish a circular and send it to shareholders within 21 days after publication of the relevant announcement. Rules 13.73 and 14.41 require the circular to be sent on or before the issuer gives notice of the general meeting to approve the transaction.

HKEx considers that Rules 13.73 and 14.41 provide adequate time for shareholders to consider the information in the circular before the general meeting. However, more than 21 days is often required for issuers to prepare their circular, particularly if an accountants' report or other expert's report is required and issuers often apply for a waiver from the 21-day requirement.

HKEx proposes to remove the requirement for notifiable and connected transaction circulars to be dispatched within 21 days of the announcement date (except in the case of an information circular, where 21 days, equivalent to 15 business days, is appropriate). Instead, an issuer will be required to:

- a. disclose the expected despatch date of the circular in the initial announcement of the transaction, and if it is more than 15 business days from the initial announcement, the reasons for this must be given; and
- b. publish further announcement(s) when there is a delay in the despatch of the circular with reasons for the delay.

However, the issuer will still have to dispatch the circulars on or before it gives notice of the general meeting to approve the transaction.

In the case of information circulars, where the issuer has obtained written shareholders' approval for the transaction, the timing requirement for despatch will be changed from 21 calendar days to 15 business days, after publication of the relevant announcement.

## 2. Timing for despatch of supplementary circulars

The current Rules require issuers to despatch any supplementary circular or announcement to shareholders after the issue of the circular on a transaction at least 14 days before the date of the general meeting at which the transaction will be considered. It is proposed to change the time limit from 14 calendar days to 10 business days, the equivalent assuming there are no public holidays.

## APPENDIX A: LIST OF CONSULTATION QUESTIONS

Q1 Do you agree with our proposal to remove the current accountants' report requirements for VSD? Please provide reasons for your views.

Q2 If your answer to question 1 is "Yes", do you agree with our proposal to require a VSD circular to disclose financial information described in paragraph 15 above? Please provide reasons for your views.

Q3 If your answers to questions 1 and 2 are "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposal? If your answer is "No", please provide reasons and alternative views.

Q4 Do you agree with our proposal to remove the requirement in Rule 4.06 that the reporting period of an accountants' report in a major transaction or very substantial acquisition circular must cover the financial year immediately before the circular date? Please provide reasons for your views.

Q5 If your answer to question 4 is "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposal? If your answer is "No", please provide reasons and alternative views.

Q6. Do you consider that the requirement for disclosing an indebtedness statement in a notifiable transaction circular should be retained? Please provide reasons for your views.

Q7 Do you agree with our proposal to amend Rule 14.66(10) to clarify that the working capital statement in a notifiable transaction circular must take into account the effect of the proposed transaction? Please provide reasons for your views.

Q8 If your answer to question 7 is "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposal? If your answer is "No", please provide reasons and alternative views.

Q9 Do you agree with our proposal to allow issuers to make references in their circulars or listing documents to published documents set out in paragraph 31(3) of Appendix 1B, instead of reproducing the same information? Please provide reasons for your views.

Q10 If your answer to question 9 is "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposal? If your answer is "No", please provide reasons and alternative views.

Q11 Do you agree with our proposal to remove the requirement for disclosure of a combined statement from paragraph 31(3)(b) of Appendix 1B to the Rules? Please provide reasons for your views.

Q12 If your answer to question 11 is "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposal? If your answer is "No", please provide reasons and alternative views.

Q13 Do you agree with our proposal to modify the directors' responsibility statement to include a confirmation that the information in the document is accurate and complete in all material respects and not misleading or deceptive? Please provide reasons for your views.

Q14 If your answer to question 13 is "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposal? If your answer is "No", please provide reasons and alternative views.

Q15 Do you agree with our proposal to remove the filing requirement for the board minutes approving connected transactions and instead, require issuers to disclose information contained therein (i.e. whether any directors have a material interest in the transaction and have abstained from voting) in their connected transaction circulars (or if no circular is required under the Rules, their announcements)? Please provide reasons for your views.

Q16 If your answer to question 15 is "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposal? If your answer is "No", please provide reasons and alternative views.

Q17 Do you agree with our proposal that the circular content requirements for each of the acquisition and the disposal under a transaction should be determined by their respective transaction classification? Please provide reasons for your views.

Q18 If your answer to question 17 is "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposal? If your answer is "No", please provide reasons and alternative views.

Q19 Do you agree with our proposal to remove the disclosure and document inspection requirements regarding provisions in constitutional documents and regulatory provisions for listing documents for subsequent issues of securities by PRC issuers and overseas issuers (other than in connection with an introduction or a deemed new listing under the Rules)? Please provide reasons for your views.

Q20 If your answer to question 19 is "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposal? If your answer is "No", please provide reasons and alternative views.

Q21 Do you agree with our proposal to remove the disclosure requirements under paragraphs 45, 46, 48 and 49 of Appendix 1B to the Rules for listing documents for subsequent issue of securities by PRC issuers? If your answer is "No", please set out the disclosure requirement(s) that you think should be retained. Please provide reasons for your views.

Q22 If your answer to question 21 is "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposal? If your answer is "No", please provide reasons and alternative views.

Q23 Do you agree with our proposal to remove the 21-day requirement for publication of a notifiable or connected transaction circular (other than information circular) and instead, require disclosure of the expected timing for despatch of circular and the reasons for any delay? Please provide reasons for your views.

Q24 Do you agree with our proposal to amend the timing requirement for despatch of information circulars from 21 calendar days to 15 business days? Please provide reasons for your views.

Q25 If your answers to questions 23 and 24 are "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposals? If your answer is "No", please provide reasons and alternative views.

Q26 Do you agree with our proposal to amend the timing for despatch of supplementary circulars from 14 calendar days to 10 business days? Please provide reasons for your views.

Q27 If your answer to question 26 is "Yes", do you agree that the proposed draft Rule amendments in Appendix I will implement our proposal? If your answer is "No", please provide reasons and alternative views.

Q28 Are there any other comments you would like to make? If your answer is "Yes", please elaborate your views.

*The purpose of this note is to provide a summary only of information included in the Hong Kong Stock Exchange's "Consultation Paper on Proposed Changes to Requirements for Circulars and Listing Documents of Listed Issuers (September 2009)". Its contents do not constitute legal advice and specific advice should be sought in relation to any particular situation.*

*For further information on this topic please contact Julia Charlton at [legalink@charltonslaw.com](mailto:legalink@charltonslaw.com).*