



# Capital Markets Quarterly Update

This quarterly update (July to September 2012) highlights recent developments in Hong Kong capital markets practices:

## TOPICAL ISSUES

- ***Guidance on listing of business trusts and stapled securities:*** On 17 August 2012, HKEx published a guidance letter to explain its approaches in relation to the listing of business trusts and stapled securities. For more details, please refer to "[\*Guidance on listing of business trusts and stapled securities\*](#)" below.
- ***SFC explains areas of concern in relation to listing applications:*** In the latest "Dual Filing Update" issued on 4 July 2012, SFC highlights various areas of concern in relation to the listing applications which it had reviewed during the relevant period. Areas of concern include failures to (a) support assertions of critical importance with objective analyses; (b) provide complete listing application materials for review; and (c) make useful disclosures on risks, historical financial performances and future plans. For more details, please refer to "[\*SFC explains areas of concern in relation to listing applications\*](#)" below.

## PROCEDURES AND WAIVERS

- ***Revised guidance on typhoon and rainstorm warning arrangements:*** On 16 August 2012, HKEx published a revised guidance letter on arrangements in relation to dealings with HKEx about listing matters in the event that a typhoon signal no. 8 or above is hoisted and/or black rainstorm warning is issued. This guidance letter supersedes the previous version published on 5 March 2012. For more details, please refer to "[\*Revised guidance on typhoon and rainstorm warning arrangements\*](#)" below.

- ***Guidance on granting a waiver from strict compliance with Rule 9.09(b) in relation to prohibition of dealing in shares by connected persons:*** On 30 August 2012, HKEx published a guidance letter to explain the circumstances under which a waiver from strict compliance with Rule 9.09(b) of the Main Board Listing Rules may be granted to a new listing applicant. Rule 9.09(b) prohibits dealing in shares by any connected person of the issuer from four clear business days before the Listing Committee hearing until listing is granted. For more details, please refer to “[Guidance on granting a waiver from strict compliance with Rule 9.09\(b\) in relation to prohibition of dealing in shares by connected persons](#)” below.
- ***Revised guidance on filing first draft listing document:*** On 27 August 2012, HKEx published a revised guidance letter to explain its existing administrative practices on accepting early filings of listing applications to facilitate IPO filings at different times of the year. Guidance is provided for listing applicants filing their applications (a) within 45 days after the end of the trading record period; (b) within 230 days of their latest audited financial statements; and (c) after 230 days of their latest audited financial statements. This guidance letter supersedes the previous version published on 2 December 2011. For more details, please refer to “[Revised guidance on filing first draft listing document](#)” below.

## DISCLOSURE REQUIREMENTS AND GUIDANCE

- ***Disclosure requirements for listing applicants engaging in pawn loan business:*** On 13 July 2012, HKEx published a listing decision in which it explains the disclosure requirements for two listing applicants engaging in pawn loan business in the PRC. For more details, please refer to “[Disclosure requirements for listing applicants engaging in pawn loan business](#)” below.
- ***Guidance on disclosures of material changes in financial, operational and/or trading position after trading record period:*** On 22 August 2012, HKEx published a guidance letter on IPO prospectus disclosure requirements in relation to material changes in financial, operational and/or trading position after the trading record period. For more details, please refer to “[Guidance on disclosures of material changes in financial, operational and/or trading position after trading record period](#)” below.

## LISTING SUITABILITY AND OTHER LISTING DECISIONS

- ***The conduct of two proposed directors resulting in substantial losses in another company has rendered them unsuitable to act as directors of listed companies:*** On 20 July 2012, HKEx published a listing decision in which it determines that the conduct of two proposed directors of a company (which held the business of the proposed listing group prior to its disposal to the listing applicant) resulting in substantial losses to the company has rendered them unsuitable to act as directors of listed companies. For more details, please refer to “[The conduct of two proposed directors resulting in substantial losses in another company has rendered them unsuitable to act as directors of listed companies](#)” below.
- ***Contractual arrangements would not result in unsuitability for listing (further guidelines):*** On 27 August 2012, HKEx published a revised listing decision to set out further guidelines in relation to the previous version of the listing decision published on 25 November 2011 in which it determines

that the legal questions relating to certain contract-based structures arrangements would not render the listing applicant unsuitable for listing. For more details, please refer to “[Contractual arrangements would not result in unsuitability for listing \(further guidelines\)](#)” below.

- ***Deteriorating financial performance and uncertain business prospects have rendered the listing applicant unsuitable for listing:*** On 28 September 2012, HKEx published a listing decision in which it determines that the listing applicant’s deteriorating financial performance and uncertain business prospects have rendered it unsuitable for listing. For more details, please refer to “[Deteriorating financial performance and uncertain business prospects have rendered the listing applicant unsuitable for listing](#)” below.

## OVERSEAS JURISDICTION

- ***South Korea is an acceptable jurisdiction for listing:*** On 30 August 2012, HKEx published a listing decision to confirm that South Korea is an acceptable jurisdiction for an issuer’s incorporation for listing. For more details, please refer to “[South Korea is an acceptable jurisdiction for listing](#)” below.

In this Update, the following terms have the following meanings:

<b>CO</b>	Companies Ordinance (Cap 32 of the Laws of Hong Kong)
<b>GEM</b>	Growth Enterprise Market operated by SEHK
<b>HK</b>	Hong Kong Special Administrative Region of the PRC
<b>HK\$</b>	Hong Kong Dollars
<b>HKEx</b>	Hong Kong Exchanges and Clearing Limited (also referring to its subsidiaries, including SEHK, as appropriate)
<b>IPOs</b>	Initial public offerings
<b>JPS</b>	Joint Policy Statement Regarding the Listing of Overseas Companies issued on 7 March 2007
<b>Listing Rules</b>	Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (Main Board Listing Rules) or Rules Governing the Listing of Securities on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited (GEM Listing Rules) or both, as the case may be
<b>PRC</b>	People's Republic of China
<b>SEHK</b>	The Stock Exchange of Hong Kong Limited
<b>SFC</b>	Securities and Futures Commission
<b>SFO</b>	Securities and Futures Ordinance (Cap 571 of the Laws of Hong Kong)
<b>Takeovers Code</b>	Code on Takeovers and Mergers

# Guidance on Listing of Business Trusts and Stapled Securities

## QUICK READ

On 17 August 2012, HKEx published a guidance letter “*HKEx-GL40-12*” to explain its approaches in relation to the listing of business trusts and stapled securities.

A business trust is established and governed by a trust deed. It is operated and managed by a trustee-manager who also holds legal title to the assets for the benefit of the unitholders of the business trust.

Stapled securities refer to stapling different securities together, such as units of a business trust and shares of a holding company/operating company, and the same are listed on the basis that they are legally bound together and cannot be transferred or traded separately.

## OVERRIDING PRINCIPLE

The major concern for the listing of business trusts is that, unlike companies, they are not subject to the shareholder protection provisions under the CO (or equivalent company laws of the jurisdiction where a company is incorporated), the SFO and other laws and regulations applicable to listed companies. Also, at present, the Listing Rules do not have any express provisions dealing with the listing of business trusts directly.

When reviewing the listing application of a business trust, the regulators will consider the following core principles:

- It must be ensured that the unitholders of the business trust are subject to investor protection standard comparable to those required of a Hong Kong listed company. Accordingly, the unitholders must be given the same level of shareholder protection and the key relevant SFO provisions must be applicable.
- The existing regulatory framework for listed companies under the Listing Rules will be modified on a case-by-case basis to apply to the business trust for the purpose of fully preserving all the Listing Rules requirements for investor protection, disclosure and corporate governance.

## ISSUES TO CONSIDER FOR LISTING OF BUSINESS TRUSTS

### *Application of the SFO*

As mentioned above, the regulators consider that it is important for unitholders of listed business trusts to be subject to the same level of shareholder protection standard as shareholders of listed companies. They consider that the following key SFO provisions must apply to business trusts as they apply to listed companies:

- Market manipulation
- Insider dealing

- Disclosure of interests in shares
- Powers of SFC to apply court orders if the business or affairs of a listed company have been conducted in a manner that is oppressive to its members
- Powers of SFC to require production of documents by a listed company
- Powers for shareholders of a listed company to require the listed company to investigate those interested in its shares

Please see below some common issues and suggestions to deal with the issues when applying the key SFO provisions to business trusts:

Issues	Suggestions for dealing with the issues
SFO provisions apply to listed companies but listed business trusts are not listed companies and unitholders are not shareholders of listed companies	<p>A listing applicant should consider using a structure that will result in the key relevant SFO provisions being applicable to the business trust and its unitholders. Suggested structures which may be used:</p> <ul style="list-style-type: none"> <li>• a form of “stapled securities” structure</li> <li>• a HKT Trust structure (stock code: 6823)</li> <li>• listing of a corporate trust or a company that owns a business trust</li> </ul>
Directors or employees of the trustee-manager are not persons connected with the company under the SFO for insider dealing as a business trust is not a company	<p>The trustee-manager and its directors/employees should have day-to-day management or business relationships with the business subsidiaries or related companies of the holding company or operating company and these individuals could be persons connected with the company under the SFO</p> <p>The business trust and the holding company/listed company could also have the same board of directors</p>
Relevant information for the business trust may not be relevant information for the company under the SFO for insider dealing	<p>The business trust could have a duty to account for a percentage of earnings (plus all assets on wind-up) to the holding company/operating company so that relevant information for the business trust could become relevant information for the company. Also, the listing applicant could also list the company that operates the trust assets. Accordingly, both the business trust and the operating company will be “listed issuers” under the Listing Rules and subject to the provisions of the Listing Rules and the SFO</p>
The affairs of the business trust are not the affairs of the company under the SFO which can be the subject of a complaint conducted in an oppressive or unfairly prejudicial manner	<p>The trust deed could provide that the holding company/operating company has the right and duty to enforce a deed covenant in favour of its members (who are also unitholders under the stapled securities arrangement) so that the affairs of the business trust could be the affairs of the holding company/operating company</p>

### *Application of the Takeovers Code*

A listing applicant should adopt a structure that can ensure compliance with and application of the Takeovers Code. An example of such is the HKT Trust (stock code 6823).

### *Application of the Listing Rules*

As mentioned above, one of the core principles of the regulators is to modify the regulatory regime of the Listing Rules so as to apply to business trusts for the purpose of fully preserving the investor protection, disclosure and corporate governance requirements.

Please see below some common issues and suggestions to deal with the issues when applying the Listing Rules provisions to business trusts:

Issues	Suggestions for dealing with the issues
<p>There is a potential conflict between the duties of the trustee-manager to its controller (usually its shareholder which established the business trust) and those to the trust's unitholders. The role of the trustee-manager in the business trust is to act as the legal owner of the trust property and it is also responsible for managing the property for the benefit of the unitholders. The conflict arises as both the trustee-manager and its controller can control or exercise significant influence over the trust</p>	<p>HKEx will apply all the requirements relating to a listed company's directors under the Listing Rules to the trustee-manager's directors, including provisions for unitholders to elect or remove these directors by ordinary resolution</p> <p>Additional requirements include:</p> <ul style="list-style-type: none"> <li>• the trustee-manager must be acceptable to HKEx</li> <li>• the trustee-manager must prepare accounts under the Listing Rules requirements applicable to listed companies</li> <li>• the trust deed must provide that the unitholders can remove the trustee-manager by ordinary resolution</li> <li>• the trustee-manager's directors must prioritise the interests of the unitholders as a whole if there are conflicts with the trustee-manager's own interests</li> <li>• extending the definition of connected person to include the trustee-manager, its directors and controlling shareholder and any of their associates</li> </ul>
<p>A business trust is allowed to make distributions to unitholders in excess of its net profits. The company law restrictions on the amount of dividends that can be paid do not apply to business trusts</p>	<p>The trustee-manager's board of directors must confirm that, immediately after making the distribution, the trust property will be able to meet the liabilities of the trust as they fall due</p> <p>Each listing applicant will be required to sign a listing agreement with HKEx specifying the relevant principles and requirements before it can commence dealing of its units</p>

## ISSUES TO CONSIDER FOR LISTING OF STAPLED SECURITIES

Some matters to note for listing of stapled securities (not an exhaustive list):

- The listing applicant must satisfy SFC on the applicability of the relevant SFO requirements to its stapled securities structure.
- The approach taken by HKEx is to treat the stapled securities as a “combined security” for the purpose of the Listing Rules. A condition for listing is to ensure that the securities remain “stapled” always. The Listing Rules will apply to them as if they were one issuer.
- The issuer’s constitutive documents must contain adequate arrangements to maintain the stapled structure after listing.
- In a stapled securities structure, it is possible for units of the business trust to be stapled to shares of the trustee-manager or shares of the holding company of the trustee manager.

You may download copies of the guidance letter via the link below:

<http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl40-12.pdf>



# SFC Explains Areas of Concern in Relation to Listing Applications

## QUICK READ

In the latest “Dual Filing Update” issued on 4 July 2012, SFC highlights various areas of concern in relation to the listing applications which it had reviewed during the relevant period. Areas of concern include failures to (a) support assertions of critical importance with objective analyses; (b) provide complete listing application materials for review; and (c) make useful disclosures on risks, historical financial performances and future plans.

### FAILURE TO SUPPORT ASSERTIONS OF CRITICAL IMPORTANCE WITH OBJECTIVE ANALYSES

It is generally expected that a listing applicant should explain in its listing document how it can sustain its business when facing material risks of business discontinuation. It was noted that in two cases where the listing applicants were facing material risks of business discontinuation, they had made various positive assertions to try to support the sustainability of their businesses. However, the assumptions which the assertions were based on were obviously at odds in view of the facts and industry environments of the respective cases.

### FAILURE TO PROVIDE COMPLETE LISTING APPLICATION MATERIALS FOR REVIEW

It was noted that in some cases, the initial listing application materials were apparently incomplete and did not even contain the minimum information and documents expressly required under the relevant Listing Rules. Accordingly, they were considered not ready for review by the regulators.

The regulators reminded that if incomplete listing applications were submitted, it would inevitably prolong the vetting process to the detriment of the listing applicants. Accordingly, in order to avoid any undesirable delay, a listing applicant should submit a set of substantially complete draft listing document together with all necessary supporting documents required under the relevant Listing Rules.

### FAILURE TO MAKE USEFUL DISCLOSURES ON RISKS, HISTORICAL FINANCIAL PERFORMANCES AND FUTURE PLANS

It was also noted that many draft listing documents failed to provide useful disclosures on the listing applicants’ risks, historical financial performances and future plans for investors to make informed assessment of the listing applicants’ businesses and prospects.

- **Risks** – Some initial draft listing documents contained only boiler-plate risk factors, which failed to explain clearly the relevance, significance and likelihood of the risks disclosed. Also, many draft listing documents contained as a risk factor that the listing applicants might not be able to obtain the necessary government approvals for their development projects. However, it was a common phenomenon that the risk disclosed often failed to explain the risk in the context of the listing applicants’ businesses, such as the materiality and nature of the listing applicants’ projects that were pending government approvals at the time of listing.

- ***Historical financial performances*** – In many draft listing documents, the management discussion and analysis (MD&A) sections only reproduced figures from the financial statements in narrative form with limited or no meaningful explanation as to the underlying reasons for the fluctuations in the listing applicants’ financial performance. This issue was particularly obvious in the discussion of changes in gross profit margins and fair value gains.
- ***Future plans*** – Some initial draft listing documents provided very limited disclosures on the listing applicants’ future plans, making it hard for investors to understand the justifications for and the feasibility of the plans. This issue was important because a significant part of the listing proceeds might be used on such plans.

*“Submission of sub-standard listing application materials inevitably prolongs the vetting process and could, in some cases, result in eventual suspension of the applications,”* said the SFC’s Chief Executive Officer Mr. Ashley Alder. *“It is to the benefit of both investors and applicants that listing application materials are prepared with due care and skill and that they are submitted only after applicants and their advisers have taken reasonable steps to ensure accuracy, completeness and clarity.”*

You may download copies of the Dual Filing Update via the link below:

<http://www.sfc.hk/sfcPressRelease/EN/sfcOpenDocServlet?docno=12PR70>

# Revised Guidance on Typhoon and Rainstorm Warning Arrangements

## QUICK READ

On 16 August 2012, HKEx published a revised guidance letter “*HKEx-GL31-12*” on arrangements in relation to dealings with HKEx about listing matters in the event that a typhoon signal no. 8 or above is hoisted and/or black rainstorm warning is issued. This guidance letter supersedes the previous version published on 5 March 2012.

For a summary of the previous guidance letter, please refer to the article entitled “*Guidance on typhoon and rainstorm warning arrangements*” contained in our previous *Capital Markets Quarterly Update (January to March 2012)*.

## NEW GUIDANCE

The new guidelines added are in relation to publication of prospectus which are summarised as follows:

- If a typhoon signal no. 8 or above and/or a black rainstorm warning is in force in Hong Kong at 9:00 a.m. on the day of publication of the prospectus, the listing applicant must take appropriate action to comply with Section 44A(1)<sup>1</sup> of the CO.
- If as a result of complying with Section 44A(1) of the CO, the listing timetable of the public offer set out in the prospectus is amended, the issuer is required to publish an announcement on the new timetable on the business day after the bad weather. The announcement is not required to be pre-vetted by HKEx. No supplemental prospectus is required to be published by the issuer.

The guidelines contained in the previous guidance letter are reproduced in the current version and are still valid and effective.

You may download copies of the revised guidance letter via the link below:

<http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl31-12.pdf>

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<sup>1</sup> Section 44A(1) of the CO states that “*No allotment shall be made of any shares in or debentures of a company in pursuance of a prospectus issued generally and no proceedings shall be taken on applications made in pursuance of a prospectus so issued, until the beginning of the 3rd day after that on which the prospectus is first so issued or such later time (if any) as may be specified in the prospectus. The beginning of the said 3rd day or such later time as aforesaid is hereafter in this Ordinance referred to as the time of the opening of the subscription lists.*”

## Guidance on Granting a Waiver from Strict Compliance with Rule 9.09(b) in Relation to Prohibition of Dealing in Shares by Connected Persons

### QUICK READ

On 30 August 2012, HKEx published a guidance letter “*HKEx-GL42-12*” to explain the circumstances under which a waiver from strict compliance with Rule 9.09(b) of the Main Board Listing Rules may be granted to a new listing applicant.

### RELEVANT LISTING RULES

In the event of a new listing applicant, Rule 9.09(b) prohibits dealing in shares by any connected person of the issuer from four clear business days before the Listing Committee hearing until listing is granted (Prohibited Period). This rule is not applicable to cases under Rule 7.11 where the share dealing is to satisfy the public float requirement.

The share dealing prohibition under Rule 9.09(b) will no longer be applicable after a listing application has lapsed i.e., 6 months after submitting Form A1.

### CIRCUMSTANCES FOR GRANTING A WAIVER

The guidance letter specifies five circumstances under which HKEx may grant a waiver from strict compliance with Rule 9.09(b) (not an exhaustive list and applications will be considered on a case-by-case basis):

Circumstances	Details
<b><i>The listing applicant is an overseas listed company</i></b>	<p>The listing applicant’s shares are already listed overseas (excluding trading-only status or over the-counter-trading status). Its existing shareholders include independent and public investors and the listing applicant cannot control their investment decisions. A public investor may become a substantial shareholder before the listing applicant is listed on HKEx</p> <p>The following conditions should be satisfied before a waiver may be granted. The listing applicant:</p> <ul style="list-style-type: none"> <li>• cannot control the investment decisions of the public investors who may become its substantial shareholders before its listing on HKEx</li> <li>• will release price sensitive information to the public in its home jurisdiction on a timely basis</li> <li>• can ensure that the existing connected persons (including substantial and controlling shareholders, directors and chief executive and their respective associates) will not deal in its shares during the Prohibited Period</li> <li>• will notify HKEx of any breach of the dealing restriction by its connected persons</li> </ul>

Circumstances	Details
<b><i>No change in the ultimate beneficial owners</i></b>	The share dealing would not result in any change in the ultimate beneficial owners e.g., a distribution in specie by the legal holder of the shares to the ultimate controlling shareholders on a pro-rata basis
<b><i>Corporate reorganisation</i></b>	The share dealing is resulting from a corporate reorganisation
<b><i>Presence of a pre-existing shareholder agreement</i></b>	It was agreed in a pre-existing shareholder agreement that there would be a distribution of the listing applicant's shares in a way so as to avoid any dilution of the original shareholders' shareholdings
<b><i>For the purpose of complying with the Listing Rules</i></b>	The share dealing is conducted for the purpose of complying with the Listing Rules, for example: <ul style="list-style-type: none"> <li>• to unwind a pre-IPO investment that does not comply with the relevant guidance</li> <li>• to amend the listing applicant's corporate structure which involves issuing additional shares to the controlling shareholder as consideration for injecting its business into the listing applicant to address the issue of conflicts of interest resulting from the controlling shareholder's business</li> </ul>

## OTHER REQUIREMENTS

For a Rule 9.09(b) waiver to be granted, a listing applicant is required to:

- prove that compliance would be irrelevant or unduly burdensome; and
- disclose in the listing document the reasons for applying the waiver and the relevant waiver conditions.

You may download copies of the guidance letter via the link below:

<http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl42-12.pdf>

# Revised Guidance on Filing First Draft Listing Document

## QUICK READ

On 27 August 2012, HKEx published a revised guidance letter “*HKEx-GL6-09*” to explain its existing administrative practices on accepting early filings of listing applications to facilitate IPO filings at different times of the year. Guidance is provided for listing applicants filing their applications (a) within 45 days after the end of the trading record period; (b) within 230 days of their latest audited financial statements; and (c) after 230 days of their latest audited financial statements. This guidance letter supersedes the previous version published on 2 December 2011.

For a summary of the previous guidance letter, please refer to the article entitled “*Guidance for Filing First Draft Listing Document*” contained in our *Capital Markets Quarterly Update (October to December 2011)*.

## RELEVANT LISTING RULES

Rule 8.06 of the Main Board Listing Rules states that in the case of a new listing applicant, the latest financial period reported on by the reporting accountants must not have ended more than six months from the date of the listing document.

Rule 9.03(3) of the Main Board Listing Rules states that, among other things, if HKEx considers the draft listing document submitted with the listing application form is not in an advanced form, HKEx will not commence review of any documents relating to the listing application.

## REVISED GUIDELINES

There are several updates being made in this guidance letter when compared to the previous version. In order to provide a clearer overview of the existing administrative practices, the entire revised guidance letter (for Main Board listing applicants) is summarised as follows:

Situations	Guidelines (for Main Board listing applicants)
<b><i>Listing applicants filing within 45 days after the end of the trading record period</i></b>	<p>In general, HKEx will accept a listing application for vetting only if the first draft listing document includes at least figures for three financial years (for listing applicants whose trading record is three years or more) in audited or advanced draft form (<i>Updated in August 2012</i>)</p> <p>If the listing applicant cannot include the last financial year figures in audited or advanced draft form in its first draft listing document, the listing applicant must include the following with its Form A1 before HKEx will accept the listing application for vetting:</p> <ul style="list-style-type: none"><li>• a sponsor’s confirmation stating that (Sponsor Confirmation):<ul style="list-style-type: none"><li>▪ the listing applicant and sponsor have made a demonstrable effort in good faith to produce an advanced draft listing document</li></ul></li></ul>

Situations	Guidelines (for Main Board listing applicants)
	<ul style="list-style-type: none"> <li>▪ HKEx will have sufficient information to commence substantive review of the listing application</li> <li>▪ the sponsor considers it to be beyond reasonable doubt that the listing applicant will satisfy Rule 8.05 (the tests for listing) or other financial standards requirement following its due diligence review under Chapter 3A and Practice Note 21 of the Main Board Listing Rules (<i>Updated in August 2012</i>)</li> <li>• the following information in its first draft listing document: <ul style="list-style-type: none"> <li>▪ the audited figures for the two financial years before the most recent audited balance sheet date and related management discussions</li> <li>▪ the stub period figures as of a date within 230 days of the filing of Form A1 in audited or advanced draft form (<i>Updated in August 2012</i>)</li> </ul> </li> </ul>
<p><b><i>Listing applicants filing within 230 days of their latest audited financial statements (refer to the audited financial statements covering the listing applicant's last of the three financial years of trading record as required under Rule 8.05(1))</i></b></p>	<p>In general, HKEx will refuse to accept a listing application for vetting if the latest financial period reported on in the first draft listing document is more than six months old at the date of the Form A1 filing</p> <p>For HKEx to accept the listing application for vetting, the listing applicant must include the following with its Form A1:</p> <ul style="list-style-type: none"> <li>• a Sponsor Confirmation</li> <li>• in the first draft listing document the audited figures for the three financial years preceding the most recent audited balance sheet date and related management discussions provided that the latest audited financial statements are of a date within 230 days of the Form A1 filing (<i>Updated in August 2012</i>)</li> </ul>
<p><b><i>Listing applicants filing after 230 days of their latest audited financial statements</i></b></p>	<p>For HKEx to accept the listing application for vetting, the listing applicant must include the following in the first draft listing document filed with Form A1:</p> <ul style="list-style-type: none"> <li>• the audited figures for the three financial years preceding the most recent audited balance sheet date and related management discussions</li> <li>• stub period figures in audited or advanced draft form that are not more than six months old at the time of the Form A1 filing and the prior year stub period comparative figures and related management discussions (<i>Updated in August 2012</i>)</li> </ul>

Situations	Guidelines (for Main Board listing applicants)
<p><b><i>Inclusion of pro forma information of the enlarged group</i></b></p>	<p>The first draft listing document must include pro forma information of the enlarged group required under Rule 4.29 where the listing applicant has acquired or intend to acquire a company or business since the latest audited (or advanced draft) accounts have been made up</p> <p>Such pro forma information will not be required if the financial information in the hearing proof of the listing document will be updated to include the pre-acquisition financial information relating to the acquired company or business (<i>Updated in August 2012</i>)</p>

## OTHER MATTERS TO NOTE

Other general points to note:

- Sponsor is not required to apply to HKEx separately for an early filing of listing application if this guidance is being duly complied with.
- The administrative practices contained in this guidance letter also apply to a listing applicant whose trading record is less than three years and who intends to apply for listing under Rules 8.05A and 8.05B of the Main Board Listing Rules based on a shorter trading record. In such case, the audited financial information which must be included in the listing applicant's first draft listing document will be for the period since the commencement of the shorter trading record period. (*Updated in August 2012*)
- Listing applicants should allow sufficient time for HKEx to review the final year-end financials or latest stub period financials. Otherwise, the listing hearing timetable may be delayed.
- This guidance letter only applies to the filing of listing applications after the end of the trading record period. Listing applications filed before the trading record period end will be returned. (*Updated in August 2012*)

You may download copies of the guidance letter via the link below:

<http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl6-09.pdf>



# Disclosure Requirements for Listing Applicants Engaging in Pawn Loan Business

## QUICK READ

On 13 July 2012, HKEx published a listing decision “*HKEx-LD33-2012*” in which it explains the disclosure requirements for two listing applicants engaging in pawn loan business in the PRC.

## BACKGROUND

The listing applicants were engaging in pawn loan business in the PRC as short-term financing service providers.

The pawn loan industry was strictly regulated in the PRC. As there were various restrictions on licensing matters, the listing applicants operated their business through several contract-based arrangements, usually referred to as structured contracts (**Structured Contracts**). Also, the listing applicants were required to observe and comply with some regulatory requirements and thresholds in their ordinary course of business.

## DISCLOSURES REQUIRED

The listing applicants should make the following disclosures specific to their PRC pawn loan business in their listing documents for the purpose of providing sufficient information to investors to form an informed investment decision.

Disclosure items	Detailed disclosures required
<i>Use of Structured Contracts</i>	Should follow the guidelines set out in another Listing Decision “ <i>LD43-3</i> ” <sup>2</sup>
<i>Compliance with laws applicable to pawn loan industry</i>	<ul style="list-style-type: none"><li>• the minimum registered capital and working capital requirements</li><li>• how the value of pawned property was appraised</li><li>• the maximum loan amount provided on individual loans</li><li>• the maximum interest rate and administration fee charged</li><li>• the sources of funding and any related restrictions</li><li>• any restrictions on the business activities</li><li>• any requirement for the safe operation of pawn loan business</li><li>• details of any non-compliance such as the reasons, rectifying actions</li></ul>

<sup>2</sup> Please refer to our article entitled “*Contractual Arrangements would not result in Unsuitability for Listing (Further Guidelines)*” below

Disclosure items	Detailed disclosures required
	<p>taken, potential impact and sponsors' views on whether it might affect director's suitability and suitability of listing</p>
<b><i>Loan and customer profiles and major income streams</i></b>	<ul style="list-style-type: none"> <li>• an analysis of loans by category and the number, type of customers, proportion and detailed profiles for each loan category</li> <li>• the channels of introducing customers to the listing applicants and number of repeat customers</li> <li>• an analysis of the major revenue streams with appropriate commentaries on their fluctuations</li> <li>• the revenue model and pricing policy for each type of product and service</li> <li>• ageing analysis of loan receivables and the value of pledged assets for each ageing category</li> </ul>
<b><i>Risk management and internal controls</i></b>	<ul style="list-style-type: none"> <li>• the loan approval procedures</li> <li>• risk factors including credit and market risks</li> <li>• the legal and compliance procedures</li> <li>• the anti-money laundering policies</li> <li>• collateral valuation</li> <li>• storage of physical collateral and the related risks</li> <li>• related experience of the responsible management and working teams and external professionals (if any)</li> <li>• relevant training provided to management and employees</li> </ul>
<b><i>Collateral valuation</i></b>	<ul style="list-style-type: none"> <li>• the methods used to determine the values of different types of collaterals</li> <li>• the target loan-to-value ratio for each category of loan</li> <li>• the frequency of collateral value review and how subsequent changes in collateral value are accounted for</li> <li>• the procedures adopted to ensure the borrowers had the legal right to offer the collateral</li> <li>• the details of engagement of third party appraisers</li> </ul>

Disclosure items	Detailed disclosures required
<b><i>Loan collection</i></b>	<ul style="list-style-type: none"> <li>• the loan default rates</li> <li>• the loan collection policies and procedures</li> <li>• the details of collection agents engaged (if any)</li> <li>• whether there were any loan default cases and if there were, the procedures used for seizing the underlying collateral</li> </ul>
<b><i>Sources of funding</i></b>	<ul style="list-style-type: none"> <li>• a breakdown of the sources of funds</li> <li>• a discussion on the availability of each source</li> <li>• the unutilised banking facilities available for drawdown</li> <li>• any non-standard loan covenants</li> </ul>
<b><i>Advance to entities and notifiable transactions</i></b>	<ul style="list-style-type: none"> <li>• a confirmation that there were procedures to ensure their compliance with the relevant Listing Rules requirements after listing</li> <li>• the relevant details if their existing loan profile had already exceeded the thresholds stipulated under the relevant Listing Rules</li> </ul>

You may download copies of the listing decision via the link below:

<http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld33-2012.pdf>

## Guidance on Disclosures of Material Changes in Financial, Operational and/or Trading Position After Trading Record Period

### QUICK READ

On 22 August 2012, HKEx published a guidance letter “*HKEx-GL41-12*” on IPO prospectus disclosure requirements in relation to material changes in financial, operational and/or trading position after the trading record period.

### RELEVANT LISTING RULES

Paragraph 38 of Appendix 1-A to the Main Board Listing Rules requires disclosure of a statement by the directors of any material adverse change in the financial or trading position of the group since the end of the period reported on in the accountants’ report, or an appropriate negative statement.

### MATERIAL ADVERSE CHANGE

Sponsors and listing applicants should be responsible for deciding whether a piece of information constitutes a material adverse change in light of the facts and circumstances of the individual listing applications. In making the decision, the sponsor and listing applicant should at least consider whether there is any adverse change which has taken place or is expected to take place in the near future especially in the areas of technological, market, economic, legal or operating environment in which the listing applicant operates.

If disclosure is required, the following matters should be noted:

- Qualitative and quantitative disclosures should be made in a separate section in the “Summary” and other relevant sections of the prospectus to provide sufficient highlights of material information to investors.
- If the subject matter is about deterioration of financial performance of the listing applicant, relevant and updated key operating data (e.g., sales volume, average selling price, production volume, etc.) should be disclosed in the prospectus.
- Mitigating factors may exist to decrease the potential impact of financial or operational loss to the listing applicant. This does not reduce the necessity to disclose the adverse change.

## MATTERS REQUIRING DISCLOSURE

The guidance letter sets out the following list of non-exhaustive examples of adverse changes, which will require disclosure if material:

Categories	Examples of adverse changes requiring disclosure (if material)
<b><i>Financial position</i></b>	<p>Adverse changes in:</p> <ul style="list-style-type: none"> <li>• the trend of financial performance e.g., revenue, gross profit and/or net profit</li> <li>• market interest rates, prices of key products sold or services provided and/or major raw materials</li> </ul>
<b><i>Operational position</i></b>	<ul style="list-style-type: none"> <li>• Loss of permits, licences or intellectual property rights</li> <li>• Changes in laws and regulations (e.g., prohibiting the adoption of structured contracts) affecting the listing applicant's business</li> <li>• Changes in government subsidizing policies such as government grants or preferential tax arrangements</li> <li>• Obsolescence of or physical damage to the listing applicant's key production units, assets or inventories</li> <li>• Adverse developments in existing material litigation or threatened claims</li> <li>• Loss of key personnel</li> <li>• Labour disputes or strikes</li> <li>• Other material matters adversely affecting the listing applicant's operation</li> </ul>
<b><i>Trading position</i></b>	<ul style="list-style-type: none"> <li>• Loss of major customers or suppliers or proof of their worsening financial condition</li> <li>• Matters affecting acceptance of the listing applicant's products or services by customers</li> <li>• Material product returns or recall requests from customers</li> <li>• Legal actions from suppliers, customers or other stakeholders</li> <li>• International sanctions on countries or companies with which the listing applicant has conducted business</li> </ul>

You may download copies of the guidance letter via the link below:

<http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl41-12.pdf>

# The Conduct of Two Proposed Directors Resulting in Substantial Losses in Another Company Has Rendered Them Unsuitable to Act as Directors of Listed Companies

## QUICK READ

On 20 July 2012, HKEx published a listing decision “*HKEx-LD34-2012*” in which it determines that the conduct of two proposed directors of a company (Predecessor) (which held the business of the proposed listing group prior to its disposal to the listing applicant) resulting in substantial losses to the company has rendered them unsuitable to act as directors of listed companies.

## BACKGROUND

The Predecessor was an overseas listed company and Mr. A and Mr. B were its only executive directors at the relevant time.

The listing applicant acquired the entire business from the Predecessor and applied for listing on HKEx. Mr. A and Mr. B were also the only executive directors of the listing applicant when its listing application was submitted.

Mr. X was a member of the Predecessor’s senior management at the relevant time. The Predecessor had conducted certain transactions unrelated to its core business (Transactions) for years. The Transactions had brought moderate profits to the Predecessor in Year 1 and Year 2 but material losses in Year 3. It was alleged that the material losses in Year 3 were caused by Mr. X not complying with the internal stop-loss policy.

Mr. X was responsible for executing the Transactions. He did not inform the board of directors of the Predecessor about the losses on a timely basis and had subsequently resigned.

Although Mr. B and Mr. X conducted monthly meetings to monitor the Transactions, there were no follow-ups between the monthly meetings. Also, the Predecessor’s directors had not sought any external professional advice in relation to the Transactions.

## RELEVANT LISTING RULES

Rule 3.09 of the Main Board Listing Rules states that every director of a listed company must satisfy HKEx that he has the character, experience and integrity and is able to demonstrate a standard of competence commensurate with his position as a director of a listed company.

## LISTING DECISION

HKEx decides that the behaviour of Mr. A and Mr. B at the Predecessor have not demonstrated that they could satisfy the standard of competence expected of directors of listed companies under the Listing Rules in view of the following:

- the situations leading to the losses resulting from the Transactions were a very significant issue for potential investors to consider. Given that Mr. A and Mr. B were the only executive directors at the Predecessor at the relevant time, it was important to assess whether their conduct would affect their suitability as directors of listed companies and the suitability for listing of the listing applicant;
- as executive directors of the Predecessor, Mr. A and Mr. B should be responsible for the significant losses arising from the Transactions; and
- Mr. A and Mr. B had in essence delegated all the undertaking of the Transactions to Mr. X without proper supervision and monitoring. They had not exercised good judgment in their oversight of Mr. X and the Transactions he had entered into. If they had fulfilled their role as executive directors properly, the Transactions would have been noticed and queried and the losses incurred in Year 3 could have been prevented.

HKEx also decides that the listing applicant should implement an effective policy to monitor transactions before it would further review its listing application.

You may download copies of the listing decision via the link below:

<http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld34-2012.pdf>

## Contractual Arrangements Would Not Result in Unsuitability for Listing (Further Guidelines)

### QUICK READ

On 27 August 2012, HKEx published a revised listing decision “*HKEx-LD43-3*” to set out further guidelines in relation to the previous version of the listing decision published on 25 November 2011 in which it determines that the legal questions relating to certain contract-based structures arrangements (Structured Contracts) would not render the listing applicant unsuitable for listing.

For a summary of the previous version of the listing decision, please refer to the article entitled “*Contractual Arrangements Would Not Result in Unsuitability for Listing*” contained in our previous *Capital Markets Quarterly Update (October to December 2011)*. Please read this article in conjunction with the previous version of the listing decision.

### FURTHER GUIDELINES

The further guidelines set out in the revised listing decision for considering listing applications involving arrangements similar to the Structured Contracts are summarised as follows:

#### *Disclosures in prospectus*

The following information should be disclosed in the prospectus for a listing applicant using Structured Contracts for the entire or part of its business:

- ***Discussion on OPCO’s registered shareholders*** - A detailed discussion about the OPCO’s registered shareholders.
- ***Confirmation on enforcement of contracts*** - A confirmation that there are appropriate arrangements to facilitate the enforcement of the Structured Contracts in the event of death, bankruptcy or divorce of the OPCO’s registered shareholders.
- ***Policies to address potential conflicts of interest*** - The policies to address the potential conflicts of interest between the listing applicant and the OPCO’s registered shareholders, especially if these shareholders are also officers or directors of the listing applicant.
- ***Enforceability of agreements under the PRC law*** - The rationale behind why the directors believe that each of the agreements conferring significant control and economic benefits from the OPCO to the listing applicant is enforceable under the PRC and local law.
- ***Economic risks*** - As the primary beneficiary of the OPCO, what are the economic risks borne by the listing applicant.
- ***Interference from PRC authorities*** - A discussion on whether the listing applicant has experienced any interference or hindrance from PRC governing authorities in adopting the business model of conducting its business through the OPCO under the Structured Contracts.
- ***Limitations in exercising option*** - What are the limitations in exercising the option to acquire ownership in the OPCO, including a separate risk factor specifying these limitations and clarifying that ownership transfer may be subject to substantial costs.



- ***Including as material contracts*** - The Structured Contracts should be included as material contracts in the “Statutory and General Information” section and they should be made available on the listing applicant’s website (an explanation should be given for not doing so).
- ***Illustrating in table format*** - The Structured Contracts should be illustrated in a corporate structure table in the “Summary” section so that investors can better understand the arrangements.

#### *Principles for disclosures*

The following guiding principles should be followed for making relevant disclosures on Structured Contracts in prospectus:

- ***Avoiding duplicate disclosures*** - Duplicate disclosures (such as those relating to connected transactions arising from the Structured Contracts, the basis of consolidation of the OPCO and the terms of the Structured Contracts) in various sections should be avoided by using appropriate cross references.
- ***Including appropriate risk factors*** - To include all related risk factors under an appropriate heading such as “Risks relating to Corporate Structure”. Also, as a minimum requirement, the prospectus should include the following risk factors relating to Structured Contracts:
  - The PRC government authorities may decide that the Structured Contracts fail to comply with the relevant regulations.
  - The Structured Contracts may not provide control as effective as direct ownership.
  - There may be potential conflicts of interest between the domestic shareholders and the listing applicant.
  - The Structured Contracts may be subject to scrutiny of the PRC tax authorities and PRC tax.

You may download copies of the listing decision via the link below:

<http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/LD43-3.pdf>

# Deteriorating Financial Performance and Uncertain Business Prospects Have Rendered the Listing Applicant Unsuitable for Listing

## QUICK READ

On 28 September 2012, HKEx published a listing decision “*HKEx-LD37-2012*” in which it determines that the listing applicant’s deteriorating financial performance and uncertain business prospects have rendered it unsuitable for listing.

## BACKGROUND

The listing applicant was principally engaged in a processing business in the PRC with ancillary trading in raw materials. The draft prospectus it submitted included its financial results from Year 1 to Year 3. It had also submitted its forecast results for Year 4 to HKEx for vetting.

The listing applicant’s products were available in packaged and bulk form. During the track record period, its products were mainly sold in bulk form. In light of the industry trend moving towards packaged products at the relevant time, it had commenced to produce packaged products since Year 1 and intended to substantially expand the production scale in the future.

## FACTORS CONSIDERED

When considering the listing application, HKEx has taken into account the following factors:

- Deteriorating financial performance
- Uncertainty over the prospects of the listing applicant’s bulk sales and packaged sales businesses

### *Deteriorating financial performance*

Factual situations	Concerns
<ul style="list-style-type: none"> <li>• Continuously declining gross profit margin from more than 6% to less than 2.5% from Year 1 to Year 3, with a net loss of over HK\$2 million in Year 3</li> <li>• A projected loss of HK\$5 million in Year 4</li> <li>• A decreasing trend of net profit margin from 1.5% in Year 1 to 0.2% in Year 3 and a projection of 0.1% in Year 4</li> </ul>	<p>Deteriorating financial performance during the track record period with no sign of improvement in the Year 4 forecast</p>

Factual situations	Concerns
<p>The raw materials costs had fluctuated substantially during the track record period (with a year-on-year increase of 40% and 25% between Year 1 and Year 3). The listing applicant had not been able to fully transfer such increase to customers</p>	<p>The listing applicant could not show any effective measures to manage its exposure to raw materials price fluctuation during the track record period and going forward</p>
<p>The gross profit margin from selling its finished goods had been even lower than that from trading of its excess raw materials during the track record period (e.g., 2% compared to 4% in Year 3)</p>	<p>Doubtful as to whether the listing applicant could sustain itself at such a gross profit margin</p>
<p>Substantial net foreign exchange gains were recorded on financing activities in Year 2 and Year 3. Excluding such gains, an even slimmer net profit in Year 2 and a more substantial loss in Year 3 would have been seen</p>	<p>Foreign exchange rates could fluctuate substantially. Excluding the foreign exchange gains, the track record results would be much worse than disclosed</p>
<p>Interest expenses had continued to increase during the track record period. Substantial interest-free loans had also been obtained from its controlling shareholder</p>	<ul style="list-style-type: none"> <li>• Relying on loans to support its daily working capital</li> <li>• Had been subject to increasingly high borrowing costs during the track record period</li> <li>• In view of the low profit margin, any increase in borrowing costs in the future could easily cause decline in its net profit</li> </ul>
<p>Based on the breakeven analysis, the listing applicant could only return to profit in Year 4 if it could achieve a 20% or more increase in selling price or sales quantity. However, according to its forecast, it only expected a 2% increase in revenue in Year 4</p>	<p>Unlikely to return to a breakeven position based on the forecast increase in revenue</p>

### *Uncertainty over the prospects of the listing applicant's bulk sales and packaged sales businesses*

Factual situations	Concerns
<ul style="list-style-type: none"><li>• Certain local governments had imposed restrictions on sales in bulk form since Year 2 and some of the listing applicant's sales during the track record period were affected by these restrictions</li><li>• Packaged sales accounted for 1%, 1% and 2% of revenue in Year 1 to Year 3, respectively and were forecast to increase to about 3% in Year 4. They contributed less than HK\$1 million gross profit in each of Year 1 and Year 2 and recorded a gross loss in Year 3 and a forecast loss in Year 4</li></ul>	<ul style="list-style-type: none"><li>• According to the management accounts for Q1 of Year 4, revenue had decreased substantially. The decrease in bulk sales had not been compensated by an increase in packaged sales as it had expected</li><li>• The past and projected performance of packaged sales was even worse than bulk sales</li><li>• It was doubtful as to how packaged sales could reverse the listing applicant's overall financial performance or bring sufficient income going forward</li></ul>

#### ISSUE

Would the listing applicant's deteriorating financial performance and uncertain business prospects render it unsuitable for listing?

#### LISTING DECISION

In view of the concerns in relation to the listing applicant's sustainability resulting from the deteriorating financial performance, uncertainty about its business prospects and, to a lesser extent, the competition and reliance on its controlling shareholder, HKEx decides that these concerns cannot be appropriately addressed by way of disclosure alone and therefore rejects the listing application.

You may download copies of the listing decision via the link below:

<http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld37-2012.pdf>

## South Korea is an Acceptable Jurisdiction for Listing

### QUICK READ

On 30 August 2012, HKEx published a listing decision “*HKEx-LD36-2012*” to confirm that South Korea is an acceptable jurisdiction for an issuer’s incorporation for listing.

### BACKGROUND

South Korea adopts a civil law system. This means that all legal matters and relationships are primarily governed by statutory laws rather than court judgments.

Under South Korean law, the corporate form that can issue shares to the public is a stock company (Company) known as “chusik hoesa”. Its constitutive document is articles of incorporation (AoI).

The Financial Services Commission (FSC) and the Financial Supervisory Service, the statutory financial and securities regulators in South Korea, are full signatories to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.

A Company is allowed to maintain a share register in Hong Kong in its Hong Kong branch office or engage an “eligible transfer agent” recognised by FSC to maintain a share register in Hong Kong.

### JPS FRAMEWORK

The Listing Rules set out a general regime for overseas listing applicants to list on HKEx. HKEx may reject a listing application if it is not satisfied that the overseas listing applicant is incorporated in a jurisdiction which offers at least equivalent standards of shareholder protection in Hong Kong. Having said that, HKEx may still approve a listing application if the overseas listing applicant makes amendments to its constitutive documents to provide the necessary protection as requested by HKEx.

The JPS formalises this process by setting out a list of shareholder protection areas which HKEx takes into consideration.

### COMPARISON

When comparing the CO with the relevant South Korea laws and regulations based on the JPS framework, HKEx noted that there are areas where:

- South Korean laws and regulations are considered comparable with or even stricter than the CO;
- the differences in shareholder protection standards under South Korean laws and regulations are considered acceptable even though some discrepancies remain; and
- the differences require a Company to take appropriate actions to reconcile them as specified.

## LISTING DECISION

In general, HKEx considers that South Korea is an acceptable jurisdiction for an issuer's incorporation for listing subject to the following consideration:

- A Company should address any shareholder protection differences and, if a Company is not amending its AoI to satisfy a particular shareholder protection requirement, an alternative way to provide shareholder protection acceptable to HKEx should be suggested.
- A Company should make specific disclosure in its listing document for each relevant topic by reference to its AoI, the law of South Korea or any applicable regulations. The major differences from the Hong Kong requirements should be highlighted and the ways to address them should be explained.
- A Company should duly inform HKEx and make appropriate announcement if there are any subsequent material changes in South Korean laws and regulations which would significantly worsen the shareholder protection standards in South Korea when compared to those in Hong Kong.
- There are no specific matters that would suggest the acceptance of South Korea as an issuer's jurisdiction of incorporation not suitable.
- A Company should demonstrate that it meets the nexus requirement of the JPS.
- A Company, once listed on HKEx, should duly comply with the Listing Rules (apart from areas where waivers have been granted) and submit to the non-exclusive jurisdiction of the courts of Hong Kong.

You may download copies of the listing decision via the link below:

<http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld36-2012.pdf>

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