

**HKEx LISTING DECISION**  
**HKEx-LD68 – 1 (July 2009)**

<b>Summary</b>	
<b>Name of Party</b>	Company A - a Main Board applicant whose shares were listed on a foreign exchange
<b>Subject</b>	Whether Company A could issue further shares within six months of its listing on the Exchange?
<b>Listing Rules</b>	Rule 10.08; HKEx-LD41-3
<b>Decision</b>	The Exchange granted a waiver of Rule 10.08 so that Company A would not be restricted from issuing shares during the first six months of its listing on the Exchange subject to the conditions in paragraph 3e.

**SUMMARY OF FACTS**

1. Company A's shares were listed on a foreign exchange and it sought a dual primary listing by way of introduction on the Main Board.
2. Company A applied for a waiver of Rule 10.08 which restricts an issuer from issuing further shares within six months after listing.
3. In support of the application, Company A submitted that:
  - a. **No funds raised, no new investor and no dilution** – As Company A was not issuing new shares or raising new funds, its listing on the Exchange would not result in dilution of shareholders' interests.
  - b. **Flexibility conducive to business expansion** - The existing shareholders would be prejudiced if Company A were restricted from fund raising activities. The restriction would affect its business development.
  - c. **Shareholders' protection** - The interests of the shareholders would be safeguarded by the shareholders approval mechanism under Rule 13.36. For example, its shareholders had approved a general mandate within the ambit of Rule 13.36 for the issue of new shares.
  - d. **Analogy with transfer from GEM to Main Board** - Rule 10.08(5) provides that the restriction in Rule 10.08 does not apply to issue of securities on Main Board by a listed issuer successfully transferred from the Growth Enterprise Market ('GEM') to the Main Board. The relaxation provided under Rule 10.08(5) should also be extended to companies already listed on an overseas

stock exchange which are seeking to list on the Exchange by way of introduction; and

- e. **Voluntary waiver conditions** – the applicant agreed to the following conditions:
- (i) any issue of shares (or convertible securities) by Company A during the first six months of listing must be either for cash to fund a specific acquisition or as part or full consideration for acquisitions;
  - (ii) any acquisitions mentioned in (i) above must be for asset or business that would contribute to the growth of Company A's operation; and
  - (iii) Company A would not apply for a waiver of Rule 10.07. Company A's controlling shareholder would not cease to be the controlling shareholder upon the issue of any shares within the first twelve months of listing.

#### **THE ISSUE RAISED FOR CONSIDERATION**

4. Whether Company A could issue further shares within six months of its listing on the Exchange?

#### **APPLICABLE LISTING RULE OR PRINCIPLE**

5. Rule 10.08 provides that no further shares of a listed issuer may be issued or form the subject of any agreement to such issue within 6 months from the date on which securities of the listed issuer first commence dealing on the Exchange.

#### **THE ANALYSIS**

6. The Exchange noted that Rule 10.08 waivers had been previously granted to applicants seeking to transfer from GEM which were not raising new funds and considered whether an analogous waiver could be extended to Company A, an issuer whose shares were listed on a foreign exchange and was not raising new funds at its listing on the Exchange.

#### ***Precedent Case***

7. Listing Decision HKEx-LD41-3 illustrates a typical Rule 10.08 waiver granted to a GEM transfer applicant not seeking to raise new funds at its listing on the Main Board.
8. HKEx-LD41-3 states that the rationale of Rule 10.08 is to protect public investors by preventing dilution of their interests and changes in the shareholding structure within six months of listing and by ensuring that controlling shareholders demonstrate to potential investors their commitment to the issuer. The rule effectively protects shareholders from being called upon to contribute additional funding or see their

interests diluted by fund raising within the restrictive period.

9. For a waiver of Rule 10.08 to be granted, the applicant must demonstrate to the Exchange:
  - a. the commitment of the controlling shareholders to the issuer; and
  - b. that the interests of shareholders of the issuer are well protected.

***Codification of practices for GEM transfer applicants***

10. With effect from July 2008, the practice of granting waivers to issuers transferred from GEM from compliance with Rule 10.08 and consequently Rule 10.07(1) has been codified with the making of Rule 10.08(5) and Rule 10.07(4).

***Factors in favour of a grant of waiver***

11. The Exchange noted that Company A was not raising new funds at its listing on the Exchange and was willing to subject itself to the conditions set out in paragraph 3e above.
12. The Exchange was satisfied that Company A was able to address the concern which give rise to the restriction under Rule 10.08 in that:
  - a. Company A's controlling shareholder had demonstrated its commitment to the company by the fact that it had not disposed of any of Company A's shares since its first listing on a foreign exchange in 2006; and it would remain a controlling shareholder of Company A for the first twelve months of its listing on the Exchange in accordance with Rule 10.07(see paragraph 3e(iii));
  - b. any issue of shares after Company A's listing on the Exchange would be governed by the pre-emptive rights provisions in Rule 13.36. Disclosure of the approval of the general mandate by Company A's existing shareholders would be disclosed in the listing document; and
  - c. as Company A was not raising new funds for its IPO on the Exchange, strict compliance with Rule 10.08 would limit its right to access the capital markets which it could otherwise do as a foreign listed issuer on its primary exchange. This might prejudice its business development and therefore might not be in the best interests of its public shareholders.

***Factors against a grant of waiver***

13. However, the Exchange noted that, if the requested waiver were granted, Company A would be in a better position than other new applicants. This is because, unlike a typical applicant which raises funds by a new issue of shares, Company A would not be subject to the rules governing allocation of IPO shares (e.g. clawback mechanism under Practice Note 18 and placing guidelines for IPO shares under Appendix 6) in any issue of shares shortly after listing.

14. While an analogy may be drawn to the exemption from Rule 10.08 in GEM transfer cases, the considerations for allowing a Rule 10.08 exemption to a GEM transfer applicant which is seeking a seamless change in trading platforms on the Exchange are not entirely applicable to an issuer which is completely new to Hong Kong investors. It is still important to examine, on a case specific basis, the issuer's fund raising intent at and shortly after its listing on the Exchange when considering whether a Rule 10.08 waiver should be granted.
15. On balance, the Exchange considered it appropriate to grant Company A the requested waiver.

## **THE DECISION**

16. The Exchange granted a waiver of Rule 10.08 so that Company A would not be restricted from issuing shares during the first six months of its listing on the Exchange subject to the conditions in paragraph 3e.