

HKE_x LISTING DECISION

HKE_x-LD16-2011 (published in July 2011) (Updated in July 2014)

Parties	Company X – a PRC issuer, listed on the Main Board and on a Mainland stock exchange
Issue	Whether the Exchange would waive certain connected transaction requirements for the possible issue of new A shares by Company X to its connected persons under a proposed public offer in the Mainland
Listing Rules	Main Board Rules <u>14A.36, 14A.39, 14A.46, 14A.92(1)</u> 14A.21, 14A.31(3)(a), 14A.48(2)
Decision	The Exchange waived the requirements

FACTS

1. Company X proposed to issue certain new A shares (“**New A Shares**”) through a public offer in the Mainland.
2. Under the proposed offer, Company X’s existing A-share holders would have preferential rights to subscribe the New A Shares on a pro rata basis. If any A-share holders gave up their pro rata entitlements, the New A Shares not taken up (the “**Excess Shares**”) would be offered to the public by online subscription through the system of the Mainland stock exchange and offline placement.
3. The issue price would be determined with reference to the prevailing market price of the A shares at the time of the proposed offer. It was expected that the New A Shares would represent about 15% of Company X’s existing issued share capital.
4. Company X would use the proceeds for general working capital.
5. Under Company X’s articles of association and Rule 19A.38, the proposed offer required approvals by (i) shareholders at a general meeting and (ii) A-share holders and H-share holders at separate class meetings. It also required approvals of regulatory authorities including the CSRC.
6. Company X had a wide spread of shareholder base and did not have any controlling shareholder. However, as some connected persons were A-share holders, they would be entitled to subscribe the New A Shares on a pro rata basis. They might also apply for the Excess Shares if any.

7. Company X enquired whether the subscriptions of New A Shares by the connected persons set out in paragraph 6 would fall within the exemption under Rule 14A.92(1)-14A.31(3)(a).
8. If the exemption did not apply, Company X sought a waiver from the connected transaction requirements to seek independent shareholders' approval of, and to include an opinion from the independent board committee and the independent financial advisers on, the possible issue of New A Shares to the connected persons under the proposed offer (the **Requirements**). It would be unduly burdensome for Company X to comply with the Requirements because:
 - Any subscription of New A Shares by the connected persons would be subject to the same terms and conditions as those available to the other A-share holders or independent investors. The Excess Shares, if any, would be allocated on a fair and equal basis and in compliance with the Mainland requirements. No preferential treatment would be given to the connected persons; and
 - The proposed offer was subject to shareholders' approval under other requirements described in paragraph 5.

APPLICABLE LISTING RULES

~~9. Rule 13.39 states that:~~

~~...~~

~~(6) In relation to any connected transactions pursuant to Chapter 14A, transactions that are subject to independent shareholders' approval pursuant to the Exchange Listing Rules or spin-off proposals that are subject to approval of the shareholders of the issuer pursuant to paragraph 3 (e) of Practice Note 15 of the Exchange Listing Rules;~~

~~(a) the issuer shall establish an independent board committee (which shall consist only of independent non-executive directors) to advise shareholders as to whether the terms of the relevant transaction or arrangement are fair and reasonable and whether such a transaction or arrangement is in the interests of the issuer and its shareholders as a whole and to advise shareholders on how to vote, taking into account the recommendations of the independent financial adviser appointed under rule 13.39(6)(b);~~

- ~~(b) — the issuer shall appoint an independent financial adviser acceptable to the Exchange to make recommendations to the independent board committee and the shareholders as to whether the terms of the relevant transaction or arrangement are fair and reasonable and whether such a transaction or arrangement is in the interests of the issuer and its shareholders as a whole and to advise shareholders on how to vote; and~~
 - ~~(c) — the independent board committee shall not consist of any independent non executive directors who have a material interest in the relevant transaction or arrangement. The independent board committee may consist of only one independent non executive director if all other independent non executive directors have a material interest in the relevant transaction or arrangement. If all the independent non executive directors have a material interest in the relevant transaction or arrangement, no independent board committee can be formed. In that event, the independent financial adviser shall make its recommendation to the shareholders only in the manner prescribed under rule 13.39(7)(b).~~
- ~~(7) — In relation to any connected transactions pursuant to Chapter 14A, transactions that are subject to independent shareholders' approval pursuant to the Exchange Listing Rules or spin off proposals that are subject to approval of the shareholders of the issuer pursuant to paragraph 3 (e) of Practice Note 15 of the Exchange Listing Rules, the circular to shareholders must contain at least:~~
- ~~(a) — if applicable, a separate letter from the independent board committee advising shareholders as to whether the terms of the relevant transaction or arrangement are fair and reasonable and whether such a transaction or arrangement is in the interests of the issuer and its shareholders as a whole and advising shareholders on how to vote, taking into account the recommendations of the independent financial adviser; and~~
 - ~~(b) — a separate letter from the independent financial adviser containing its recommendation to the independent board committee and shareholders (or, if applicable, to the shareholders only) as to whether~~

~~the terms of the relevant transaction or arrangement are fair and reasonable and whether such a transaction or arrangement is in the interests of the issuer and its shareholders as a whole and advising shareholders on how to vote. Such letter must set out the reasons for and the key assumptions made and factors taken into consideration in forming that opinion.~~

~~10. Rule 14A.21 states that:~~

~~In relation to a connected transaction that is subject to independent shareholders' approval under this Chapter, the listed issuer must comply with the requirements set out in rules 13.39(6) and 13.39(7).~~

9. Rule 14A.36 states that:

The connected transaction must be conditional on shareholders' approval at a general meeting held by the listed issuer. Any shareholder who has a material interest in the transaction must abstain from voting on the resolution.

10. Rule 14A.39 states that:

If the connected transaction requires shareholders' approval, the listed issuer must (1) set up an independent board committee; and (2) appoint an independent financial adviser.

11. Rule 14A.46 states that:

The listed issuer must send a circular to its shareholders...

12. Rule 14A.92 states that:

An issue of new securities by a listed issuer or its subsidiary to a connected person is fully exempt if:

(1) the connected person receives a pro rata entitlement to the issue as a shareholder; ...

~~11. Rule 14A.31 states that:~~

~~The following connected transactions will be exempt from all the reporting, announcement and independent shareholders' approval requirements contained in this Chapter:~~

~~...~~

~~(3) where a listed issuer issues new securities to a connected person and:~~

~~(a) the connected person receives a pro rata entitlement to securities in its capacity as shareholder; or~~

~~...~~

~~12. Rule 14A.48 states that:~~

~~Listed issuers proposing to enter into a connected transaction or a continuing connected transaction which is subject to independent shareholders' approval must:~~

~~(1) comply with rules 14A.45 or 14A.46 (the reporting requirements) and 14A.47 (the announcement requirements); and~~

~~(2) comply with the requirements set out in rules 14A.49 to 14A.54 (the circular and independent shareholders' approval requirements).~~

13. Rule 19A.38 modifies Rule 13.36(1)(a) for PRC issuers:

... the directors of the PRC issuer shall obtain the approval by a special resolution of shareholders in general meeting, and the approvals by special resolutions of holders of domestic shares and overseas listed foreign shares (and, if applicable, H shares) (each being otherwise entitled to vote at general meetings) at separate class meetings conducted in accordance with the PRC issuer's articles of association, prior to:—

(i) authorising, allotting, issuing or granting:—

(A) shares;

.....

ANALYSIS

14. The exemption under Rule ~~14A.92(1)~~~~14A.31(3)(a)~~ did not apply to the issue of New A Shares to the connected persons under the proposed offer because some existing shareholders of Company X (i.e. H-share holders) would not have pro rata entitlements to the shares.
15. The Exchange agreed to waive the Requirements having considered the following:
 - This case involved a public offer of New A Shares in the Mainland and must comply with the Mainland law and regulations.
 - Any issue of New A Shares to the connected persons would be made on the same terms and conditions as other A-share holders or independent investors. There would be no preferential treatment to the connected persons.
 - As Company X had a wide spread of shareholder base, most of the New A Shares would be offered to the existing A-share holders who were not connected persons. The offer was not made with a view to providing benefits to the connected persons.
 - The proposed offer required approval of H-share holders at a separate class meeting. H-share holders could veto the offer, hence their shareholders' rights were protected.

CONCLUSION

16. The Exchange waived the Requirements.