HKEx LISTING DECISION
Cite as HKEx-LD82-1 (Published in December 2009) (Updated in July 2014)

Summary	
Parties	Company X – a Main Board listed company Partners – certain multinational corporations who would set up joint ventures with Company X
Subject	Whether the Exchange would grant Company X a waiver and not require written agreements for the continuing connected transactions with the Partners
Listing Rules	Main Board Listing Rule 14A.51~~14A.35(1)~~
Decision	The Exchange granted Company X a waiver and did not require written agreements for the continuing connected transactions with the Partners

SUMMARY OF FACTS

1. Group X was principally engaged in design, manufacturing and sale of machinery and equipment in some technology intensive industries.

2. Company X would set up joint ventures with the Partners to enhance its competitiveness. As these joint ventures would be Company X's subsidiaries and each Partner would hold more than 10% interest in one or more of the joint ventures, the Partners would be connected persons of Company X.

3. Under the joint venture arrangements, Company X and/or its subsidiaries would enter into various types of transactions with the Partners (the **Transactions**), including transfer of technology for production to the group, and sale and purchase of components and products to and from the group. The Transactions would be continuing connected transactions for Company X.

4. Company X proposed to seek independent shareholder approval of the Transactions and their annual caps for the next 3 years. Company X sought a waiver from Rule 14A.51~~14A.35(1)~~ so that it would not be required to enter into framework agreements for the Transactions with the Partners for the following reasons:

a. Compliance with the Rule would be unduly burdensome. All Partners were well-known multinational enterprises operating independently of Company X. Company X had undergone lengthy negotiation with the Partners and experienced great difficulty in getting the Partners to sign the framework agreements for the Transactions.

b. The Transactions would form an integral part of the business alliance between Company X and the Partners, and were important to Company X's business. If Company X were unable to enter into the Transactions because of the Partners' refusal to sign the framework agreements, this would be detrimental to Company X's interests.

c. The Partners were connected persons of Company X only because of their substantial shareholding in the joint ventures. The business relationship between each Partner and Company X was of an arm's length nature. Given this, there was no concern of the Partners unduly influencing Company X's action to the detriment of its minority shareholders.

d. The circular would contain details of the Transactions including the identities of the counterparties, the nature of the Transactions, the basis for determining the consideration and the annual caps. Company X would re-comply with the connected transaction rules for any transactions with the Partners outside the established framework set out in the circular.

e. There would be a written agreement between Company X (or its subsidiary) and the relevant Partner for each Transaction which would be on normal commercial terms and in the interest of Company X's shareholders as a whole.

f. Company X would comply with all other applicable connected transaction rules for the Transactions.

5. Company X would seek independent shareholder approval of this waiver application together with the Transactions and their annual caps at the general meeting. Details of the waiver application would be disclosed in the circular for the Transactions.

ISSUE

6. Whether the Exchange would grant Company X a waiver and not require written agreements for the Transactions.

APPLICABLE LISTING RULES OR PRINCIPLES

~~7. Rule 14A.35 provides that when an issuer enters into a non-exempt continuing connected transactions, it must:~~

~~(1) in respect of each connected transaction, enter into written agreement(s) with the connected person. The agreement must set out the basis of the calculation of the payments to be made. The period for the agreement must be fixed and reflect normal commercial terms and, except in special circumstances, must not exceed 3 years. Special circumstances are limited to cases where the nature of the transaction requires the contract to be of a duration longer than 3 years. In such cases, the independent financial adviser will need to explain why a longer period for the agreement is required and to confirm that it is normal business practice for contracts of this type to be of such duration;~~

~~*Note: Examples of bases of calculation of the payments to be made include the sharing of costs, price per unit for on-going purchases, annual rental for a lease, and percentage of total construction cost for a management fee.*~~

~~(2) in respect of each connected transaction, set a maximum aggregate annual value ("cap"), the basis of which must be disclosed. This annual cap must be expressed in terms of monetary value rather than a percentage of the issuer's annual revenue as derived from its latest published audited accounts or, where consolidated accounts have been prepared, its latest published audited consolidated accounts. The cap must be determined by reference to previous transactions and figures which are readily ascertainable from published information of the issuer. If there are no previous transactions, the cap must be made based on reasonable assumptions, details of which must be disclosed;~~

~~*Note: Reference to annual revenue and other bases may help to determine the monetary value of the cap.*~~

~~(3) comply with the reporting and announcement requirements described in rules 14A.45 to 14A.47; and~~

~~(4) comply with the independent shareholders' approval requirements described in rule 14A.48 for transactions not falling under rule 14A.34.~~

~~8. Rule 14A.36 provides that:~~

~~the listed issuer must re-comply with rules 14A.35(3) and (4) in the following circumstances:~~

~~(1) if the cap in rule 14A.35(2) is exceeded; or~~

~~(2) when the relevant agreement is renewed or there is a material change to the terms of the agreement.~~

7. Rule 14A.51 provides that:

> A written agreement for a continuing connected transaction must contain the basis for calculating the payments to be made. Examples include sharing of costs incurred by the parties, unit prices for goods or services provided, annual rental for leasing a property, or management fees based on a percentage of the total construction cost.

8. Rule 14A.52 provides that:

> The period for the agreement must be fixed and reflect normal commercial terms or better. It must not exceed three years except in special circumstances where the nature of the transaction requires a longer period. In this case, the listed issuer must appoint an independent financial adviser to explain why the agreement requires a longer period and to confirm that it is normal business practice for agreements of this type to be of such duration.

9. Rule 14A.53 provides that:

> The listed issuer must set an annual cap (the "cap") for the continuing connected transaction. The cap must be:
>
> (1) expressed in monetary terms;
>
> (2) determined by reference to previous transactions and figures in the published information of the listed issuer's group. If there were no previous transactions, the cap must be set based on reasonable assumptions; and

(3) approved by shareholders if the transaction requires shareholders' approval.

10. Rule 14A.54 provides that:

> The listed issuer must re-comply with the announcement and shareholders' approval requirements before:
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> (1) the cap is exceeded; or
>
> (2) it proposes to renew the agreement or to effect a material change to its terms.
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> *Note: The revised or new cap(s) will be used to calculate the percentage ratios for classifying the continuing connected transaction.*

ANALYSIS

~~9.~~11. Continuing connected transactions are connected transactions involving the provision of goods and services or financial assistance, carried out on a continuing or recurring business and expected to extend over a period of time. They are usually transactions in the ordinary and usual course of business.

~~10.~~12. For a continuing connected transaction, Rule 14A.51 ~~14A.35(1)~~ requires an issuer to enter into a written agreement with the connected person for a fixed period, which must set out the basis of determining the consideration for the transaction. This will help shareholders assess the terms of the transaction.

~~11.~~13. The Exchange considered the following factors when assessing Company X's waiver application:

- the Partners' identities and connectedness with Company X, and the practical difficulty in getting them to sign the framework agreements; and

- despite the absence of a framework agreement, Company X had taken reasonable steps to ensure sufficient information about the Transactions would be provided to its shareholders to make an informed assessment, including the framework for determining the terms of the Transactions. The information provided in the circular would be comparable to normal cases where a framework agreement was signed and the terms disclosed in the circular. Company X would need to re-comply with the connected transaction rules for any transactions with the Partners outside the established framework set out in the circular. The granting of the waiver would be unlikely to result in undue risks to its shareholders.

DECISION

~~12.~~14. The Exchange granted Company X a waiver and did not require written agreements for the Transactions.