

~~HKEX~~**HKEX** GUIDANCE LETTER

~~HKEX~~**HKEX-GL43-12 (October 2012)** (Updated in July 2013) and March 2017)

[In view of market feedback and developments, we reviewed our treatment of pre-IPO investments holistically and have streamlined and clarified the requirements.]

The changes simplify our practice and clearly set out special rights that must be terminated at or before listing or may survive listing. Explanations on the major changes are set out below:

- (1) Pre-IPO investments are required, as currently, to be irrevocably settled more than 28 clear days before the date of submission of a listing application. Any breach of this requirement will still result in delay in the listing; however, such delay has now been reduced from 180 days to **120 days** (paragraphs 2.4 and 6.1).*
- (2) Instead of referring specifically to ‘put or exit options’, the guidance now contemplates “Divestment Rights” which include all types of rights that may result in an investor’s divestment (e.g. put or call options, redemption or repurchase rights). All Divestment Rights must either be exercised or terminated **before** submission of a listing application, except as provided in paragraph 3.6(c).*
- (3) Exercise or termination of any unexercised Divestment Right on or after the submission of a listing application will result in a 120-day delay in the listing timetable starting from the date of the exercise or termination (paragraph 3.6).*
- (4) As “unwinding” led to some confusion because it was not defined and, in some cases may be impracticable to implement, it is now no longer a remedy for unpermitted special rights. The term “unwinding” has been removed.*
- (5) We have also clarified that (i) corporate restructuring (paragraph 6.2); (ii) shares awarded to directors or employees (paragraph 6.3); and (iii) private agreements between shareholders (paragraph 3.2), are generally not subject to this guidance letter and related guidance letters.]*

Subject	Guidance on Pre-IPO investments
Listing Rules	Main Board Rules 2.03(2) and (4) GEM Rules 2.06(2) and (4)
Related Publications	HKE HKEX News Release (updated: 13/10/2010), Guidance Letters HKE HKEX -GL29-12 (“Interim Guidance”) and HKE HKEX -GL44-12 (Updated in March 2017) Listing Decisions superseded: 1. HKE HKEX -LD36-1 and 36-2 2. HKE HKEX -LD55-1, 55-2 and 55-3 3. HKE HKEX -LD59-1, 59-2, 59-3, 59-4, 59-5, 59-6 and 59-7
Author	IPO Transactions Department Vetting Team

Important note: *This letter does not override the Listing Rules and is not a substitute for advice from qualified professional advisers. If there is any conflict or inconsistency between this letter and the Listing Rules, the Listing Rules prevail. You may consult the Listing ~~Division~~[Department](#) on a confidential basis for an interpretation of the Listing Rules or this letter.*

1. ~~1.~~ Purpose

1.1 ~~1.1~~—This guidance is a consolidation of listing decisions on pre-IPO investments which the Exchange issued in the past, and only principles applicable after the introduction of the Interim Guidance on 13 October 2010 are included in this Guidance Letter. Past listing decisions have been superseded.

1.2 ~~1.2~~—Listing decisions ~~HKE~~[HKEX](#)-LD12-2011 on whether the Interim Guidance applied to ~~a listing an~~ applicant seeking a secondary listing on the Main Board of the Exchange in June 2011 and ~~HKE~~[HKEX](#)-LD15-2011 on whether the Interim Guidance was applicable to an issue of shares upon exercise of warrants in July 2011 remain effective.

1.3 ~~2.~~—[This letter and the Interim Guidance apply to investments in shares of an unlisted company \(“pre-IPO investment”\)¹. To clarify, an investment in shares refers to the acquisition of shares from an applicant or its shareholder by a new or existing shareholder prior to the applicant’s IPO, except as provided in](#)

¹ [Guidance on pre-IPO investments of convertible or exchangeable securities in an unlisted company are covered in Guidance Letter HKEX-GL44-12.](#)

paragraphs 6.2 and 6.3 herein. A potential applicant is encouraged to consult the Exchange in advance if it believes that special rights granted to a shareholder should not be subject to this Guidance Letter. (Updated in March 2017)

2. Applicable rules, regulations and principles

2.1 2.1—Main Board Listing Rules 2.03(2) and (4) (GEM Rules 2.06(2) and (4)) (the “Rules”) require the issue and marketing of securities to be conducted in a fair and orderly manner and that all holders of listed securities be treated fairly and equally.

2.2 2.2—The Pre-IPO investors will often make their investments on more favourable terms than IPO investors (e.g. by being given special rights that do not extend to other shareholders and/or by investing at a lower price than the IPO price). This reflects the significantly different risks assumed by a pre-IPO investor. (Updated in March 2017)

2.3 However, where a pre-IPO investment is made close in time to an IPO, there is a concern that the pre-IPO investor is investing on more favourable terms than IPO investors but is not exposed to risks significantly different from those assumed by IPO investors, which would contravene the Rules. (Updated in March 2017)

Under the Interim Guidance requires pre-IPO investments to be, the Exchange will generally delay, except in very exceptional circumstances, the first day of trading of the applicant’s securities until 120 clear days after the later of the completion or divestment of the last pre-IPO investments (“120 Day Delay”) if (a) the applicant has a pre-IPO investment completed either (a) at least

2.4 within 28 clear days before the date of the first submission of the first listing application form or (b) 180 clear days (the “First Filing”) and the relevant pre-IPO investor remains as a shareholder at the First Filing or (b) the pre-IPO investment is completed on or after the First Filing and before the first day of trading date of the applicant’s securities (“28 Day/180 Day Requirement”), except listing. (Updated in very exceptional circumstances. —March 2017)

2.5 Pre-IPO investments are considered completed when the funds for the underlying shares are irrevocably settled and received by the applicant. (in the case of an issue of shares by the applicant), or existing shareholders (in the case of a transfer or sale of shares by existing shareholders). (Updated in March 2017)

3. Atypical special

3. Special rights/obligations attached to pre-IPO investments (Updated in March 2017)

3.1 3.1—Pre-IPO investors may be offered special rights by the applicant or its shareholders. The range of these special rights is varied and while some rights are typical, atypical varies and generally, special rights or rights which do not extend to all other shareholders, are not permitted to survive after listing to comply with the general principle of even treatment of shareholders under the Rules. Below is a list of common special To clarify, such rights may exist and our guidance on whether they are allowed be exercised up to survive upon listing:

3.2 (a)—Except as otherwise provided in the Interim Guidance, this Guidance Letter and Guidance Letter HKEX-GL44-12 (collectively, the “Pre-IPO Investment Guidance”), rights granted by one shareholder to another or agreements among shareholders (including controlling shareholders) are private arrangements and generally not subject to the Pre-IPO Investment Guidance.

3.3 For the purposes of this paragraph 3, ‘applicant’ shall refer to the applicant, its subsidiaries or anyone acting on its behalf.²

3.4 Below are examples of common special rights and our guidance on whether they are permitted to survive. Our treatment of any specific special right will depend on the facts and circumstance of each listing application:

3.5 Price adjustments

Disallowed:

- Any May survive listing:
- Terms that provide a fixed rate of return to the pre-IPO investor (which effectively reduce the price adjustment provisions (e.g. per share) and settled by a guaranteed shareholder provided that they are not based on (1) a discount to the IPO price; or share price or an adjustment linked (2) a discount to the market capitalisation/capitalization of the shares) which effectively create two different prices for the same securities for pre-IPO investors and other shareholders at the time of listing would potentially create a disruptive effect at the time of listing. They at IPO.

Must terminate upon listing:

- Terms which adjust the purchase price based on a discount to the IPO price or discount to the market capitalization of the shares may not survive listing whether they are settled by the applicant or a shareholder because they are contrary to the principles of the Rules and are not allowed.

(b)—Put or exit options

² To clarify, the controlling shareholder is not presumed to be acting on behalf of the applicant.

Disallowed:

- ~~All put or exit options granted to pre-IPO investors to put back the investments to the applicant or its controlling shareholder are against the Interim Guidance which requires pre-IPO investments to be irrevocably settled. (Updated in July 2013)~~

3.6 • ~~The only event in which a put or exit option is allowed is Divestments~~

(a) Divestments prior to First Filing

- Pre-IPO investors who divest prior to the First Filing do not disrupt the listing process nor affect the equal treatment of shareholders post listing. Therefore, there will be no penalty to the applicant for pre-IPO investors who divest prior to the First Filing regardless of when the terms of a pre-IPO investment was made or whether divestment is pursuant to a contractual right.
- the divestment must be a bona fide transaction.

(b) Divestments on or after First Filing

- Divestments on or after the First Filing is highly disruptive to the listing process and will be subject to a 120 Day Delay regardless of when the pre-IPO investment ~~clearly states that~~ was made or whether divestment is pursuant to a contractual right.
- the divestment must be a bona fide transaction.

(c) Divestment Rights

- Any divestment right (e.g. ~~put options, redemption or exit option could only be exercised when repurchase rights~~) granted by the applicant or the controlling shareholder to the pre-IPO investor or right (e.g. call options) permitting the applicant or the controlling shareholder to repurchase shares of the pre-IPO investor (together, the “**Divestment Rights**”) must be terminated before the First Filing. Except as provided in the following paragraph, if an applicant fails to comply with the above requirement in respect of the termination of its Divestment Rights, the applicant shall be subject to the 120 Day Delay from the date of exercise or termination of any Divestment Right existing on the date of First Filing³.
- A Divestment Right may exist on or after the First Filing if it is only exercisable if the listing does not take place. ~~The put or exit option should not be exercisable in any other event. (Updated in July 2013)~~⁴ and will terminate upon listing.

³ Unwinding a pre-IPO investment is no longer a remedy.

⁴ Non-exhaustive examples of when listing does not take place include any event which occurs which would render the applicant unable to comply with the listing requirements or a listing application that has been withdrawn/rejected/returned/lapsed.

3.7 ~~(c)~~ — Director nomination/appointment rights

Disallowed:

~~• Any contractual right of a pre-IPO investor to nominate a director should not~~
May survive listing:

- Any agreement among the shareholders to nominate and/or vote for certain candidates as directors are generally not subject to this Guidance on Pre-IPO investments.
- Any rights available to all shareholders subject to certain qualifications stipulated in the applicant's constitutive documents (e.g. holding a certain minimum interest) may survive after listing as such a right is not generally available to other all shareholders. The pre-IPO investors may that fulfil such criteria.

Must terminate upon listing:

- Any right granted by the applicant to nominate or appoint a director to the board before the applicant's listing. That director would be subject to the retirement and re-appointment requirements must terminate upon listing as such a right is not generally available to other shareholders. Any director nominated or appointed by a pre-IPO investor need not resign at listing unless required under the applicant's articles of association after listing.

3.8 ~~(d)~~ — Other nomination rights

May survive listing:

- Rights to nominate senior management and committee representatives (other than directors and board committee members) granted to pre-IPO investors by the applicant or the controlling shareholder are permitted to survive listing provided that all such appointments are subject to the decision of the board.
- In such circumstances, the board of directors must not be contractually obligated to approve pre-IPO investor's nominations without further review as the directors are subject to fiduciary duties to act in the best interest of the applicant and its shareholders as a whole.

3.9 Veto rights

Disallowed:

- ~~• Pre-IPO investors may have a~~ Must terminate upon listing:

Any contractual right to ~~exercise veto power over the~~
applicant's major corporate actions, (e.g. the making of any a petition or
passing of

- ~~any~~ resolution for winding-up, change in the ~~carrying on of any~~ business ~~other than the business being carried on~~ by the applicant group, or the amalgamation or merger by any member of the applicant group with any other company or legal entity, etc. ~~These rights should be terminated upon listing.~~

3.10 (e) — *Anti-dilution rights*

- Under Main Board Rule 10.04 and Paragraph 5 of Appendix 6 to the Main Board Rules, no securities ~~should~~can be offered to existing shareholders of the issuer on a preferential basis and no preferential treatment ~~should~~can be given to them in the allocation of the securities.
- However, some pre-IPO investors are granted preferential rights to purchase additional ~~securities~~shares to be issued by the ~~applicants~~applicant so as to maintain their percentages of shareholding in the ~~applicants~~applicant.

~~Allowed~~May exercise before ~~listing~~and in connection with an IPO:

- Exercise of ~~these~~ anti-dilution rights by the pre-IPO investors in connection with the IPO is ~~considered~~ permissible at if:
the ~~time of listing where~~:

- (i) ~~(i) the~~ allocation is necessary in order to give effect to the pre-existing contractual rights of the pre-IPO investors ~~under the relevant investor rights agreement~~;
- (ii) full disclosure of the pre-existing contractual entitlement of the pre-IPO investors contained in the relevant investor rights agreement and the number of shares to be subscribed by the pre-IPO investors will be made in the listing document and the allotment results announcement; and
- (iii) ~~the~~ proposed subscription additional shares will be ~~conducted~~ subscribed for at the offer price of the IPO ~~offering~~.

~~Disallowed:~~

- ~~Must terminate upon listing:~~

Anti-dilution rights ~~should be extinguished upon~~may not survive after listing to be in line with Main

- ~~Board Rule 13.36 (GEM Rule 17.39) on pre-emptive rights.~~

~~(f)~~ — *Profit guarantee*

- ~~Pre-IPO investors may be entitled to compensation if an applicant's profit does not meet a certain level in the future.~~

Allowed:

3.11 • ~~Profit guarantee where the Financial compensation~~

May survive listing:

- Any financial compensation is⁵ settled by a shareholder as it is seen to be a private arrangement between a shareholder and a pre-IPO investor and the compensation and is not linked to the market price or capitalisation of the shares;

Disallowed:

- ~~Profit guarantee if it Must terminate upon listing:~~
- Any financial compensation that is settled by the applicant; ~~or if the~~
- Any financial compensation is linked to the market price or market capitalization capitalisation of the shares.

~~(g) *Negative Pledges*~~

~~Disallowed unless they are widely accepted provisions in loan agreements:~~

- ~~Negative pledges generally restrict applicants from certain corporate actions such as creating any additional lien, encumbrance or security interest on its assets and revenues, or paying dividends without prior consent of the pre-IPO investor. They are generally provided in debt instruments, such as convertible bonds, in order to protect the bondholder's interests in its capacity as a creditor of the applicant.~~
- ~~Negative pledges should generally be removed before listing unless they are widely accepted provisions in loan agreements, are not egregious and do not contravene the fairness principle in the Rules. Negative pledges which are regarded as widely accepted provisions include:~~
 - ~~(i) not to create or effect any mortgage, charge, pledge, lien or other security interest on an applicant's assets and revenues; and~~
 - ~~(ii) not to dispose of any interest in the economic rights or entitlements of a share the controlling shareholder owns or controls to any person.~~
- ~~We will review all other negative pledges and may require confirmation from the sponsor that the relevant pledges which remain after listing are in line with normal terms of debt issues.~~

~~(h) _____~~

⁵ Includes profit guarantees or compensation for failure to achieve a qualified IPO (i.e., an IPO which satisfies certain conditions agreed with a pre-IPO investor)

3.12 *Prior consent for certain corporate actions/ changes in articles*

~~Disallowed unless the terms are not egregious and do not contravene the Rules:~~

- ~~• A pre-IPO investment agreement may provide~~ Must terminate upon listing:
- Any right that requires the prior consent of the pre-IPO investor ~~is required before~~ for certain corporate actions ~~can proceed~~. Examples of these actions include:
 - ~~(i) (i)~~ (i) a declaration of dividend by any member of the applicant group;
 - ~~(ii) (ii)~~ (ii) the sale, lease or transfer of a substantial part of the applicant's business or assets;
 - ~~(iii) (iii)~~ (iii) any amendments to the applicant's constitutional documents; and
 - ~~(iv) (iv)~~ (iv) any change in executive directors.
- ~~• These terms should be removed before listing unless the applicant can demonstrate that the relevant terms are not egregious and do not contravene fundamental principles to the disadvantage of other shareholders.~~

~~(i)~~

3.13 *Exclusivity rights and no more favourable terms*

~~Disallowed~~ Must terminate upon listing unless the agreement is modified to include an explicit "fiduciary out" clause:

- ~~• A pre-IPO investment agreement may include terms that~~ Any restriction on the applicant ~~is not allowed~~ to issue or offer any shares, options, warrants and rights to any direct competitor ~~of the pre-IPO investor or to other investors on terms more favourable than the terms on which the shares are issued to the pre-IPO investor. These rights could potentially prevent the board of the applicant from considering bona fide alternative proposals that would be in the best interest of the applicant and its shareholders as a whole.~~ and thus must not survive listing except as provided below.
- ~~• However, these~~ The rights discussed above can survive after listing if the terms of the investment agreement is are modified to include an explicit "fiduciary out" clause so that directors are allowed to ignore the terms if complying with ~~the terms~~ them would constitute a breach of their fiduciary duties. ~~The~~ In such case, the directors would not be prevented from exercising their judgment in whether to undertake certain corporate actions in the best interest of the applicant and its shareholders as a whole.

3.14 (j) — *Information rights*

~~Allowed~~May survive listing if the information is made available to the general public at the same time:

- ~~•~~ • Information rights can only survive after listing if the pre-IPO investor is only entitled to receive published information or information which is at the same time made available to the general public, with a view to avoiding unequal dissemination of information. If the issuer provides price sensitive information to the pre-IPO investor, the issuer needs to comply with the ~~disclosure requirement under Main Board Rule 13.09 (GEM Rule 17.10), unless safe harbours in that Rule apply.~~Inside Information Provisions (as defined in the Listing Rules).

~~(k)~~ — *Representation/attendance rights*

~~Allowed:~~

- ~~•~~ • ~~Rights to nominate senior management and committee representative are contractually granted to pre-IPO investors but appointment is subject to the decision of the board. The board of directors are not contractually obligated to approve pre-IPO investor's nominations without further review as they owe fiduciary duties towards all the shareholders.~~

3.15 (l) — *Right of first refusal and tag-along rights*

~~Allowed:~~

- ~~•~~ • ~~The~~May survive listing:
- ~~•~~ • ~~Any right of first refusal granted by the controlling shareholder of an applicant may grant a right of first refusal to a pre-IPO investor so~~such that the controlling shareholder ~~shall~~must first offer to sell shares to the pre-IPO investor at the same price and on the same terms and conditions as a ~~proposed sales of shares to a third party purchaser. If the pre-IPO investor does not exercise its right of first refusal, it shall be permitted to include its shares for sale together (i.e. tag-along) with the shares of the controlling shareholder as part of the sale to the third party purchaser.~~proposed sales of shares to another investor.
- ~~•~~ • ~~We consider that these rights, which intend to protect the pre-IPO investor's interest in the applicant~~Any right granted by ~~prohibiting the controlling shareholder from selling to include the shares of a pre-IPO investor for sale together (i.e. tag-along) with the shares of the controlling shareholder if the controlling shareholder sells any of its shares to other parties,~~another investor.
- ~~•~~ • ~~These rights are purely contractual rights agreements between two shareholders. Therefore, they should be allowed to~~and can survive after listing.

~~4. Qualified IPOs~~

~~4.1 Investment agreements with pre-IPO investors may include a term which states that if an applicant does not achieve a qualified IPO¹ within a specified period of time, the pre-IPO investors are entitled to a certain amount of compensation. We consider that this is allowed if the amount to be compensated is set out in the investment agreement or can be derived from the compensation provisions under the agreement. However, where the amount to be compensated is not set out in the investment agreement or cannot be derived from the compensation provisions under the agreement, it would be viewed as an amendment or variation to the original terms of the agreement and the 28 Day/180 Day Requirement under the Interim Guidance applies.~~

~~5.~~

~~4. Lock-up and Public Float~~

~~4.1~~ ~~5.1~~ Pre-IPO investors are usually requested by the applicant to lock-up their pre-IPO shares for a period of six months or more. These shares are counted as part of the public float so long as Main Board Rule 8.24 (note 3 to GEM Rule 11.23) (shares are not financed directly or indirectly by a connected person of the applicant) is fulfilled.

~~5. 6. Disclosure requirements (Updated in July 2013)~~

~~5.1~~ ~~6.1~~ The listing document ~~should usually~~must include the following information:

~~(a)~~ ~~(a)~~ in table format, details of the pre-IPO investments, including the name of each pre-IPO investor, date of investment, amount of consideration paid, payment date of the consideration, cost per share paid by each pre-IPO investor and the respective discount to the IPO price, use of proceeds from the pre-IPO ~~investment~~investments and whether they have been fully utilized, strategic benefits they will bring to the applicant, and shareholding in the applicant held by each pre-IPO investor upon listing;

~~(b)~~ ~~(b)~~ the beneficial owner and background of each of the pre-IPO investors and their relationship with the applicant group and/ or any connected persons of the applicant;

~~(c)~~ ~~(c)~~ basis of determining the consideration paid by each pre-IPO investor;

~~(d)~~ ~~(d)~~ details of any material special rights granted to the pre-IPO investors ~~and that all special rights will be discontinued upon~~survive after the applicant's listing. ~~If not, and how the applicant could they~~ comply with Main Board Rule 2.03(4) (GEM Rule 2.06(4)) and the principles set out in paragraph 3 of this Guidance Letter; or a statement that no special rights shall survive listing; (Updated in March 2017)

~~(e)~~ ~~(e)~~ whether the shares held by each pre-IPO investor will be subject to any lock-up after listing (as part of the terms of the pre-IPO investment) and, with basis, whether the shares held by the pre-IPO investors are considered as part of the public float for the purposes of Main Board Rule

8.08 (GEM Rule 11.23);

~~(f) (f)~~ if the pre-IPO investment is in the form of share-based payments:

~~⁺A public offering of securities valued at or above a total amount specified in an investment agreement. This amount is usually specified to be sufficiently large to guarantee that the IPO shares will trade in a major exchange.~~

~~(i) (i)~~ the accounting treatment of the pre-IPO investments;

~~(ii) (ii)~~ the basis of the reporting accountants' view on the accounting treatment;

~~and~~

~~(iii) (iii)~~ a risk factor, if applicable, on the future impact on the applicant's profit and loss; and

~~(g) (g)~~ the sponsor's confirmation, with basis, that the pre-IPO investments are in compliance with the Interim Guidance, this Guidance Letter and Guidance Letter ~~HKEx~~HKEX-GL44-12.

~~7. — Application of the Pre-IPO investments not in accordance with the Interim Investment Guidance, this~~
~~6. — Guidance Letter and Guidance Letter HKEx GL44-12 (Updated in July 2013) and March 2017)~~

~~7.1 — If An applicant with a pre-IPO investment is not in accordance with the Interim Guidance (i.e. the made within (1) 28 Day/180 Day Requirement clear days of the First Filing or (2) after submission of an applicant's the First Filing and before its listing application, the applicant is expected to:~~

~~(a) defer the listing date; or~~

~~6.1 (b) unwind themay not list until 120 days from the later of completion of such pre-IPO investment. or subsequent divestment.~~

~~6.2 7.2 — If a preThe Pre-IPO investment doesInvestment Guidance do not followapply to shares of the applicant acquired in an exchange of shares of a predecessor in interest company⁶ or an operating subsidiary of the applicant or otherwise as part of a corporate restructuring of the applicant in connection with the listing.~~

~~6.3 Shares awarded to directors or employees of the applicant as part of a defined share award scheme are not subject to the Pre-IPO Investment~~

⁶ Refers to a company operating the applicant's business prior to the formation of the applicant.

Guidance.

6.4 All special rights, which do not comply with this Guidance Letter and/or Guidance Letter HKEX-GL44-12 must be amended or terminated prior to listing.

Letter HKEx GL44-12, the applicant has to:

~~(a) amend the terms of the pre-IPO investment (e.g. amend the conversion price to be at IPO price or remove a put or exit option) and follow the 180-day requirement set out in the Interim Guidance unless there is a legal opinion that the amendment to the terms of the pre-IPO investment will not constitute a new agreement (otherwise it will fall under the 28-Day/180-Day Requirement of the Interim Guidance); or~~

~~(b) unwind the pre-IPO investment.~~

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