

HKEx LISTING DECISION

Cite as HKEx-LD75-3 (**Published in** October 2009) (**Updated in July 2014**)

Summary	
Parties	Company X – a Main Board listed company, and the controlling shareholder of Company Y Company Y – another Main Board listed company
Subject	1. Whether Company X should apply the percentage ratios to both the Placing and the Top-up Subscription to determine the transaction classification under Chapter 14 of the Listing Rules 2. Whether the Exchange would grant a waiver to Company X from the major transaction requirements in respect of the Placing and the Top-up Subscription
Listing Rules	Main Board Listing Rules 14.04(1)(a), 14A.92(4) 14A.31(3)(d)
Decision	1. Each of the Placing and the Top-up Subscription was a transaction for Company X. Company X should apply the percentage ratios to each transaction to determine the transaction classification under Chapter 14 2. The Exchange granted a waiver to Company X from the major transaction requirements in respect of the Placing and the Top-up Subscription

SUMMARY OF FACTS

1. Company X, Company Y and a placing agent entered into a placing and subscription agreement (the **Agreement**) under which Company X agreed to place a certain number of its existing shares in Company Y to independent investors at a fixed price (the **Placing**) and to subscribe for the same number of new shares to be issued by Company Y at the placing price (the **Top-up Subscription**).
2. The Placing was unconditional. Completion of the Placing would take place a few days after the execution of the Agreement.
3. Completion of the Top-up Subscription was subject to various conditions, including completion of the Placing, Exchange approval for listing the new shares to be issued by Company Y under the Top-up Subscription, and a whitewash

waiver being granted to Company X by the Executive Director of the Corporate Finance Division of the Securities and Futures Commission (SFC) under the Takeovers Code.

4. The Top-up Subscription constituted a connected transaction for Company Y under Chapter 14A. The Top-up Subscription would be exempt from all connected transaction requirements under Rule ~~14A.92(4)~~14A.33 if it could be completed within 14 days after the execution of the Agreement.
5. Company X's shareholding in Company Y would decrease from 46% to 36% as a result of the Placing, but would be increased to 42% upon completion of the Top-up Subscription. When applying the percentage ratios to each of the Placing and Top-up Subscription, the transaction would constitute a major transaction for Company X under Chapter 14.
6. Company X submitted that the purpose of the Placing was to facilitate Company Y's funding raising, and Company Y would issue its new shares to Company X shortly after the Placing. When considering the Placing and the Top-up Subscription as a whole, there would be a net disposal of a 4% interest in Company Y. Company X was of the view that the net effect of the Placing and the Top-up Subscription should be considered in applying the percentage ratios for transaction classification.
7. Company X also requested that, if the Exchange disagreed with its view on the application of the classification rules, the Exchange grant a waiver from the major transaction requirements in respect of the Placing and the Top-up Subscription.

ISSUE

8. Whether Company X should apply the percentage ratios to both the Placing and the Top-up Subscription to determine the transaction classification under Chapter 14.
9. Whether the Exchange would grant a waiver to Company X from the major transaction requirements in respect of the Placing and the Top-up Subscription.

APPLICABLE LISTING RULE OR PRINCIPLE

10. Rule 14.04 provides that for the purposes of Chapter 14:
 - (1) any reference to a "transaction" by a listed issuer:
 - (a) includes the acquisition or disposal of assets, including deemed disposals as referred to in rule 14.29;

...

11. Rule ~~14A.9214A.31(3)(d)~~ provides that:

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

...

(4) the securities are issued under a “top-up placing and subscription” that meets the following conditions:

(a) the new securities are issued to the connected person:

(i) after it has reduced its holding in the same class of securities by placing them to third parties who are not its associates under a placing agreement; and

(ii) within 14 days from the date of the placing agreement;

(b) the number of new securities issued to the connected person does not exceed the number of securities placed by it; and

(c) the new securities are issued at a price not less than the placing price. The placing price may be adjusted for the expenses of the placing.

...

~~Securities are issued to a connected person within 14 days after such connected person has executed an agreement to reduce its holding in that class of securities by placing securities to a third person who is not its associate. The securities must be issued at a price not less than the placing price. The placing price may be adjusted for the expenses of the placing. The number of securities issued to the connected person must not exceed the number of securities placed by it;~~

~~Note: Under rule 13.28, the listed issuer is required to make an announcement containing details of the placing and subscription of shares by the connected person.~~

ANALYSIS

12. Under the notifiable transaction rules, when an issuer proposes a transaction, it must consider whether it falls into one of the classifications in the rules. A transaction includes an acquisition or disposal of assets.

13. In this case, although the fund raising by Company Y through a placing and top-up subscription would, if completed, have the same effect upon Company X as a straight placing by Company Y, it was necessary to have regard to the terms of the Placing and the Top-up Subscription in applying the notifiable transaction rules.
14. The Placing was unconditional while the Top-up Subscription was subject to certain conditions. One possible scenario was that after Company X's disposal of its 10% equity interest in Company Y under the Placing, the Top-up Subscription could not be completed. As the Placing and the Top-up Subscription were two transactions for Company X, being a disposal of existing shares in Company Y to third parties followed by a subscription of new shares in the same company, the Listing Rules required Company X to apply the percentage ratios to each of the Placing and the Top-up Subscription to determine the transaction classification.
15. In considering Company X's waiver application, the Exchange took into account the following factors:
 - The Placing had not been completed when the waiver application was being considered by the Exchange.
 - The parties to the Agreement had taken reasonable steps to ensure completion of the Top-up Subscription. In particular, before completion of the Placing, details of the places had been submitted to the Exchange as required and Company X had applied to the SFC for, and had been granted, a whitewash waiver under the Takeovers Code. The only outstanding conditions precedent to the completion of the Top-up Subscription were (i) completion of the Placing and (ii) the Exchange's approval of the listing of shares in Company Y to be issued under the Top-up Subscription. Accordingly, the Exchange was satisfied that the concern about the Top-up Subscription failing to complete after the Placing had been addressed.
 - If both the Placing and the Top-up Subscription were completed, there would be a net disposal of a 4% equity interest in Company Y and its impact on Company X would not be material. The size of the net disposal would not trigger the notifiable transaction requirements.
 - Company X would disclose information relating to the Agreement in a joint announcement with Company Y.
16. Given the steps taken by the parties to the Agreement, it was unlikely that the Top-up Subscription would fail to complete after the Placing. The Exchange accepted that it would be unduly burdensome for Company X to comply with the major transaction requirements having regard to the overall impact on it. Granting the waiver would be unlikely to result in undue risks to Company X's shareholders.

DECISION

17. Each of the Placing and the Top-up Subscription was a transaction for Company X. Company X should apply the percentage ratios to each transaction to determine the transaction classification under Chapter 14.
18. The Exchange granted a waiver to Company X from the major transaction requirements in respect of the Placing and the Top-up Subscription.