

HKE_x LISTING DECISION

Cite as HKE_x-LD76-1 (Published in October 2009) (Updated in July 2014)

| Summary | |
|----------------------|---|
| Parties | Company A - a Main Board listed company The Banks - subsidiaries of a substantial shareholder of Company A |
| Subject | Whether the deposits placed by Company A or its subsidiary with the Banks were connected transactions subject to Chapter 14A of the Listing Rules |
| Listing Rules | Main Board Listing Rules <u>14A.06, 14A.25, 14A.87(1), 14A.88, 14A.10, 14A.13(1)(a), 14A.65(1)</u> |
| Decision | The Transactions were connected transactions subject to Chapter 14A |

SUMMARY OF FACTS

1. Company A and its subsidiaries (the **Group**) were principally engaged in a variety of businesses including property development and investment, hospitality and leisure, and asset management and investment.
2. In its ordinary and usual course of business, the Group from time to time maintained term deposits and bank balances with various financial institutions on normal commercial terms for treasury management purposes.
3. Company A submitted that the Banks were financial institutions licensed to carry on banking business in Hong Kong and certain overseas jurisdictions under the legislation or authority in the respective jurisdictions. As part of its treasury activities, the Group would place deposits with the Banks (the **Transactions**) in a manner similar to comparable transactions which the Group entered into with other independent financial institutions. The Transactions would be conducted on an arm's length basis and on normal commercial terms.
4. The Banks were subsidiaries of a substantial shareholder of Company A and hence connected persons of Company A.
5. Company A sought the Exchange's view on whether the Transactions would be exempt from the connected transaction requirements for the following reasons:

- (a) According to Listing Decision LD53-2, legitimate treasury activities should be treated as bona fide transactions to utilise surplus cash reserves, and the Exchange considered that Rule 14.04(1)(g) should be interpreted to exempt treasury activities where the issuer has a clearly stated and established treasury policy and transactions are conducted in accordance with the treasury policy.

Company A submitted that it had established a treasury policy to utilise the Group's surplus cash reserves. The placing of deposits by the Group with various licensed banks, including the Banks, had been and would continue to be conducted according to the established treasury policy. Following the guidance set out in Listing Decision LD53-2, the Transactions would form part of the legitimate treasury activities of the Group and be exempt from the notifiable transaction requirements under Rule 14.04(1)(g).

There was a question whether the Transactions would also be excluded under Chapter 14A and therefore exempt from the connected transaction requirements on the basis that they were regarded as bona fide transactions in the ordinary and usual course of business of the Group.

- (b) Alternatively, Company A considered that the exemption under Rule ~~14A.87(1)14A.65(1)~~ applied to the Transactions.

Under Rule ~~14A.87(1)14A.65(1)~~, financial assistance provided by a ~~banking company listed issuer~~ in its ordinary and usual course of business ~~to for the benefit of~~ a connected person on normal commercial terms was exempt from the reporting, announcement and independent shareholders' approval requirements under Chapter 14A. ~~Rule 14A.10(9) referred "financial assistance provided in the ordinary and usual course of business" to financial assistance provided by a banking company only.~~

In this case, the Transactions involved the Group placing deposits with connected persons and were regarded as provision of financial assistance by the Group to the connected persons under Chapter 14A. Although Company A and its subsidiaries were not banking companies, Company A considered that Rule ~~14A.87(1)14A.65(1)~~ should provide relief given that the Transactions formed part of the treasury activities of the Group in its ordinary and usual course of business. The Transactions were also in the ordinary and usual course of business of the respective Banks which were "banking companies" as defined in Rule ~~14A.8814A.10(1)~~.

ISSUE

6. Whether the Transactions were connected transactions subject to Chapter 14A of the Listing Rules.

APPLICABLE LISTING RULES OR PRINCIPLES

7. Rule 14.04(1) states that for the purposes of Chapter 14, 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.
 - ...
 - (g) to the extent not expressly provided in rules 14.04(1)(a) to (f), excludes any transaction of a revenue nature in the ordinary and usual course of business (as referred to in rule 14.04(8)) of the listed issuer.
8. Rule ~~14A.06~~~~14A.10~~ provides the meaning of the following terms:
 - ...
 - (~~174~~) “financial assistance” has the meaning in rule 14A.24(4)~~includes granting credit, lending money, providing security for, or guaranteeing a loan;~~
 - ...
 - (~~268~~) “normal commercial terms or better” are terms which a party could obtain if the transaction were on an arm’s length basis or ~~on~~ terms no less favourable to the listed issuer’s group than terms available to or from independent third parties;
 - ...
 - (~~289~~) “ordinary and usual course of business” of an entity means the entity’s existing principal activities ~~of the entity~~ or an activity wholly necessary for its ~~the~~ principal activities ~~of the entity~~. ~~In the context of financial assistance provided in the ordinary and usual course of business, this means financial assistance provided by a banking company only and, in the context of financial assistance not provided in the ordinary and usual course of business, it means financial assistance not provided by a banking company;...~~
 - ...

~~(3813) a “transaction” has the meaning in rule 14A.24 by an issuer, whether or not it is a revenue nature in the ordinary and usual course of business as defined in rule 14.04(1)(g), includes:~~

~~...~~

~~(e) granting an indemnity or a guarantee or providing financial assistance;~~

~~...~~

9. Rule 14A.24 provides that

“Transactions” include both capital and revenue nature transactions, whether or not conducted in the ordinary and usual course of business of the listed issuer’s group. This includes the following types of transactions:

(1) ...

...

(4) granting an indemnity or providing or receiving financial assistance. “Financial assistance” includes granting credit, lending money, or providing an indemnity against obligations under a loan, or guaranteeing or providing security for a loan;...

9.10. Rule 14A.25 14A.13(1)(a) provides that:

Any transaction between a listed issuer’s group and a connected person is a connected transaction;...

10.11. Rule 14A.87 14A.65 provides that:

For any financial assistance provided by a banking company in its ordinary and usual course of business to a connected person or a commonly held entity; the following connected transactions are exempt from the reporting, announcement and independent shareholders’ approval requirements of Chapter 14A:

(1) the transaction is fully exempt if it is conducted financial assistance provided by a listed issuer in its ordinary and usual course of business for the benefit of a connected person, or any company falling under rule 14A.13(2)(1)(ii), on normal commercial terms (or better to the listed issuer);

...

12. Rule 14A.88 provides that:

A “banking company” is a listed issuer or its subsidiary which is a bank, a restricted licence bank or a deposit taking company as defined in the Banking Ordinance, or a bank constituted under appropriate overseas legislation or authority.

11.13. Listing Decision LD53-2 provides that:

The Exchange takes the view that legitimate short-term investments for treasury management purposes are not intended to fall within the ambit of the Chapter 14 rules. The Exchange also notes that given this position transactions could be devised to appear to be for treasury purposes in an attempt to defeat or circumvent the purpose of the notification and shareholder approval requirements in Chapter 14. Therefore an analysis would be required on a case by case basis to differentiate transactions and arrangements caught by the scope of Chapter 14 of the Listing Rules from those exempt.

The Exchange considered that legitimate treasury activities should be treated as bona fide transactions for the purpose of utilizing surplus cash reserves. In general, investments for treasury purposes should be in liquid stocks and short-term in nature. Listing Rule 14.04(1)(g) excludes any transaction of a revenue nature in the ordinary and usual course of business from the scope of Chapter 14 of the Listing Rules. The Exchange considered that Listing Rule 14.04(1)(g) should be interpreted to exempt treasury activities where the listed issuer has a clearly stated and established a treasury policy and transactions contemplated are conducted in accordance with such treasury policy.

ANALYSIS

12.14. Each of Chapter 14 and Chapter 14A provides specific guidance on the “transactions” subject to the notifiable transaction rules and connected transaction rules respectively. Unlike Chapter 14, Chapter 14A includes transactions of a revenue nature in the ordinary and usual course of business. This difference in the definition of “transactions” is clearly stated in Rule 14A.2414A.10(13).

13.15. In this case, the Transactions would be entered into between the Group and the Banks which were connected persons of Company A. The Transactions therefore constituted connected transactions for Company A. Under Rule 14A.2414A.13(10), whether or not the Transactions were of a revenue nature in the ordinary and usual course of business is irrelevant to the applicability of Chapter 14A to the Transactions. Company A had to comply with the connected transaction rules in Chapter 14A.

14.16. Under Rules ~~14A.87(1) and 14A.8814A.10(9) and 14A.65(1)~~, financial assistance provided by a banking company in its ordinary and usual course of business ~~for the benefit of to~~ a connected person on normal commercial terms is exempt from the connected transaction requirements. The exemption caters for a banking company whose principal business is subject to prudential supervision by a regulatory body. The Transactions did not fall into the exemption as Company A and its subsidiaries were not banking companies.

DECISION

15.17. The Transactions were connected transactions subject to Chapter 14A of the Listing Rules.