

HKE_x LISTING DECISION
HKE_x-LD62-2013 (published in April 2013)

Parties	Company A – a Main Board issuer The Target – a company to be acquired by Company A under a very substantial acquisition
Issue	Whether the Proposed Amendment was a material change to the terms of the Acquisition agreement
Listing Rules	Main Board Rules 14.36 and 14.49
Decision	The Proposed Amendment was a material change to the terms of the Acquisition agreement, and should be made conditional on shareholders' approval

FACTS

Background

1. Company A entered into an agreement to acquire the Target from a third party vendor (the **Acquisition**). It would settle the consideration by cash and by issuing consideration shares, convertible bonds and promissory notes to the vendor. The Acquisition was a very substantial acquisition.
2. While the Target had a limited operating history, it had recently developed its own energy saving system for business operations. Company A considered that the Acquisition would allow it to diversify into a new line of business with significant growth potential.
3. Company A disclosed in its circular details of the business plans and working capital requirements for the Target in the coming years. It also disclosed its proposal to conduct a placing of new shares and the minimum dollar amount to be raised (the **Placing**). About 90% of the proceeds would be used to finance the cash consideration for the Acquisition and part of the Target's working capital requirements. Under the Acquisition agreement, completion of the Acquisition was conditional on the completion of the Placing (the **Condition**). The pro forma financial information on the enlarged group reflected the impact of the Acquisition and the Placing.
4. Company A's shareholders approved the Acquisition.

5. Company A then entered into agreements with placing agents for the Placing. While the Placing was approved by the shareholders, it was not completed due to adverse market conditions.

Proposed amendment to the Acquisition agreement

6. Company A proposed to postpone the Placing after completion of the Acquisition in light of the deteriorating market conditions. It would sign a supplemental agreement with the vendor to waive the Condition (the **Proposed Amendment**).
7. Company A considered that the Proposed Amendment would be in the interests of the company and its shareholders as a whole. It would not change the consideration, the asset to be acquired or other key terms of the Acquisition, and should not be regarded as a material change to the terms of the Acquisition agreement.

APPLICABLE LISTING RULES

8. Rule 14.36 states that

“Where a transaction previously announced pursuant to this Chapter is terminated or there is any material variation of its terms or material delay in the completion of the agreement, the listed issuer must as soon as practicable announce this fact by means of an announcement published in accordance with rule 2.07C. This requirement is without prejudice to the generality of any other provisions of the Exchange Listing Rules and the listed issuer must, where applicable, also comply with such provisions.”

9. Rule 14.49 state that

“A very substantial disposal and a very substantial acquisition must be made conditional on approval by shareholders in general meeting. ...”

ANALYSIS

10. Rule 14.36 ensures that shareholders are notified by the issuer of any material change to the terms of its notifiable transaction. Under Rules 14.36 and 14.49, if the transaction is classified as a major (or above) transaction, the material change should be subject to shareholders’ approval.
11. In this case, the Exchange considered that the Proposed Amendment was a material change to the terms of the Acquisition agreement because:

- The shareholders were informed that the Acquisition was conditional on the completion of the Placing, and the cash consideration and a substantial part of the working capital required for the Target's new business would be funded by the Placing. The circular also disclosed how the Acquisition together with the Placing would affect the financial position of Company A. The financing arrangement was material information for the shareholders to decide on how to vote on the Acquisition.
- The Proposed Amendment would remove the Condition so that Company A could complete the Acquisition without the Placing. This would change the financing arrangement for the Acquisition previously presented in the circular. Shareholders should have the right to reconsider whether it is in the interests of Company A and its shareholders as a whole to complete the Acquisition before raising sufficient funds to finance the Acquisition.

CONCLUSION

12. The Exchange considered that the Proposed Amendment was a material change to the terms of the Acquisition, and should be made conditional on shareholders' approval at general meeting.