

HKEX LISTING DECISION
HKEX-LD96-2016 (published in March 2016)

Party	Company A – a Main Board issuer Target – a company that Company A proposed to acquire from Company B Company B – the vendor of the Target
Issue	Whether Company A's proposed acquisition of the Target would be a reverse takeover
Listing Rules	Main Board Rule 14.06(6)
Decision	The acquisition was a reverse takeover

FACTS

1. Company A was principally engaged in trading of food and beverage products.
2. Company A proposed to acquire the Target from Company B. It would settle the consideration by issuing convertible bonds to Company B (with a conversion restriction that prevented Company B from holding a 30% interest or higher). Assuming full conversion of the convertible bonds, Company B would be holding over 50% of issued shares of Company A as enlarged by the conversion shares.
3. The Target was engaged in production and sale of certain types of organic fertilizers. It sold its products to end users through its own sale team and a number of distributors. It recorded profits of about HK\$15 million to HK\$20 million in the last three years.
4. Company B was the Target's sole supplier of a major raw material (**Material**) necessary for producing the Target's products. Company B produced the Material using a unique technology developed and owned by it (**Technology**).
5. The Target intended to produce the Material itself in the coming years. Company B would authorize the Target to use the Technology for producing the Material. It was expected that the Target could master the Technology and achieve full scale production of the Material within three years.

6. The revenue, consideration and equity ratios of the proposed transaction were between 110% and 150%. The asset ratio was about 90%.
7. Company A submitted that the Target was able to meet the minimum profit requirement under Rule 8.05 and the size of the acquisition was not extreme. It sought the Exchange's confirmation that the proposed acquisition would not constitute a reverse takeover.

APPLICABLE LISTING RULES

8. Rule 8.04 requires that both the issuer and its business "*must, in the opinion of the Exchange, be suitable for listing*".
9. Rule 14.06(6) defines a "reverse takeover" as "*an acquisition or a series of acquisitions of assets by an issuer which, in the opinion of the Exchange, constitutes, or is part of a transaction or arrangement or series of transactions or arrangements which constitute, an attempt to achieve a listing of the assets to be acquired and a means to circumvent the requirements for new applicants set out in Chapter 8 of the Exchange Listing Rules...*". This is a principle based test.
10. The Exchange Guidance Letter (HKEX-GL78-14) on reverse takeovers (**RTOS**) explains that Rule 14.06(6) is an anti-avoidance provision designed to prevent circumvention of the new listing requirements. Paragraph 7 of the guidance letter states that:-

"If a transaction falls outside the bright line tests, the Exchange will apply the principle based test to assess whether the acquisition constitutes an attempt to achieve a listing of the assets to be acquired and a means to circumvent the requirements for new listing. The transaction would be treated as a RTO under the principle based test if the Exchange considers it is an 'extreme' case taking into account the following criteria:

- *the size of transaction relative to the size of the issuer;*
- *the quality of the business to be acquired—whether it can meet the trading record requirements for listings, or whether it is unsuitable for listing (e.g. an early stage exploration company);*
- *the nature and scale of the issuer's business before the acquisition (e.g. whether it is a listed shell);*
- *any fundamental change in the issuer's principal business (e.g. the existing business would be discontinued or very immaterial to the*

enlarged group's operations after the acquisition);

- *other events and transactions (historical, proposed or intended) which, together with the acquisition, form a series of arrangements to circumvent the RTO Rules (e.g. a disposal of the issuer's original business simultaneously with a very substantial acquisition); and*
- *any issue of Restricted Convertible Securities¹ to the vendor which would provide it with de facto control of the issuer.”*

ANALYSIS

11. While the proposed acquisition fell outside the bright line tests, the Exchange applied the principle based test with reference to the criteria set out in Guidance Letter GL78-14 to assess whether, taking the criteria together, the acquisition would constitute an attempt to achieve a listing of the assets to be acquired and a means to circumvent the new listing requirements.
12. The Exchange considered that the proposed acquisition would be a reverse takeover under Rule 14.06(6) because:-
 - a. The proposed acquisition was a means to circumvent the new listing requirements.
 - The Target was unsuitable for listing. It relied on Company B's supply of the Material which was critical to its business operations. There were no other suppliers or substitutes for the Material, and the Target did not have the Technology and expertise to produce the Material itself. Company A could not demonstrate that the Target was, or would upon completion of the proposed acquisition be, capable of carrying on its business independently from Company B.
 - The proposal involved Company A in acquiring part, and not the whole, of an integrated business from Company B. While the Target had planned to manufacture the Material itself, it was uncertain as to whether and when the Target would be able to do so, and the impact of any such change in business model on its financial results. The Target's track record could not reflect its performance under the new business model.

¹ **Restricted Convertible Securities** are highly dilutive convertible securities with a conversion restriction mechanism (e.g. restriction from conversion that would cause the securities holder to hold 30% interest or higher) avoid triggering a change of control under the Code on Takeovers and Mergers.

- b. As set out in the RTO guidance letter, the Exchange does not prescribe an absolute threshold in determining whether the size of a transaction is extreme. When assessing the impact of an acquisition on an issuer, the Exchange would take into account the nature and scale of the issuer's existing business after the acquisition, and whether the acquisition would result in a fundamental change in the issuer's business.
- In this case, Company A was loss making in recent years. It only operated a trading business that had a low level of activities and generated minimal gross profit. The Target's business would be significant to Company A after the acquisition.
 - The Target's business in manufacturing and sale of fertilizers was completely different from Company A's existing businesses. The acquisition would result in a fundamental change in Company A's principal business.
- c. The acquisition would be a means for Company B (who would acquire a de facto control of Company A using restricted convertible securities) to list the Target by injecting it into Company A.

CONCLUSION

13. The acquisition constituted a reverse takeover for Company A under Rule 14.06(6).