# Part B Consultation Questions

Please indicate your preference by checking the appropriate boxes. Please make your comments by replying to questions below against proposed changes discussed in the Consultation Paper at the hyperlink:

http://www.hkex.com.hk/eng/newsconsul/mktconsul/Documents/cp2010122.pdf

Where there is insufficient space provided for your comments, please attach additional pages

## A. Presentation

1: Do you prefer the style in Appendix I or in Appendix II?

□ Appendix I

☑ Appendix II

Please explain your reasons.

The references to "issuer" and "guarantor" in Appendix II provide a higher degree of clarity since there are rules that apply to both issuer and guarantor in cases of guaranteed issues.

Just as a simple example, in Rule 37.54, it would be clear that it is (and only) the issuer that needs to appoint two representatives. Since both Appendices are already crafted in substantially plainer language, mere references to nouns instead of pronouns would not detract from the primary purpose of the adoption of plainer language.

2: Do you agree that the expression "debt issues to professional investors only" should replace "selectively marketed securities" to more clearly indicate the intended scope of the Rules?

☑ Yes

□ No

Please explain your reasons.

We generally have no objections to a change of bane to clarify the scope of relevant persons which would fall under listing regime. However, please note our query in Question B3 below.

## B. Eligibility Requirements

3: Do you agree that professional investors should be defined by reference to the SFO as proposed?

□ Yes

☑ No

Please explain your answer.

If Chapter 37 is intended to deal only with the listing of debt issues to professional investors (as defined in the SFO), what listing regime would apply to other debt issues that fall under the categories as identified in the Companies Ordinance as exempt offers?

We note that whilst the professional investor exemption might be a commonly utilised exemption to categorise an offer of debt issue as an exempt offer under the Companies Ordinance (and thereby exempt from the requirement to issue a prospectus) – there are other exempt offers classified under the Companies Ordinance, such as offers to not more than 50 people, offers with a minimum subscription value of HK$500,000 etc. Sometimes a single debt issue can invoke the provisions of 2 exemptions, e.g. offers will be made to both professional investors as well as less than 50 other people in HK. Although the previous definition of "selectively marketed securities" might not have explicitly captured all of the exempt offers under the Companies Ordinance, the generality of the language could be viewed to include most of the exempt offer scenarios.

4: Do you agree with the eligibility standards in proposed Rules 37.03 to 37.25?

☑ Yes

□ No

If not, please explain how you would change them

We agree with the proposed eligibility standards. However, we have some comments and queries on the respective Rules as set out below:-

**Rule 37.15**

The removal of the requirement to maintain a paying agent in Hong Kong is a practical move as many paying agent entities customarily appointed in such transactions have operations based out of London. However, just a note that even

with the removal of the requirement to maintain a register of holders in Hong Kong, section 74A of the Companies Ordinance would still require a company to keep a register within Hong Kong.

**Rule 37.49(c)**

In practice, procedures governing the replacement of trustees or amendments of the trust deed or terms and conditions would be set out explicitly in the original documentation, Generally, amendments that fall outside of a certain scope (e.g. minor modifications or changes that are not prejudicial to debt securityholders) would require either trustee's consent or holders' consent, as stated in the original documentation. The current Rule 28.05 requiring consent has been replaced but Rule 37.49(c) still states that in addition to a notification requirement, the Exchange will consider whether to impose any conditions for such change. Does this mean that the issuer would need to wait for a response from the Exchange (either in the form of a positive confirmation from the Exchange that no additional conditions are required or the absence of a response from the Exchange) to conclude if it can proceed with the amendment? If so, we suggest that this is stated expressly in the Rules so that market participants will know what to expect and are able to plan their transaction timelines accordingly.

5: Should applicants be required to deposit their issues into overseas settlement systems to further ensure that they will not be acquired by retail investors in the secondary market?

□ Yes

☑ No

Please explain your answer.

We query whether imposing such a requirement would exclude the option of a debt issue being cleared through CMU. Although many debt issues are cleared through Euroclear and Clearstream, some deals, including many recent RMB debt issues, are also cleared through only CMU or through CMU/Euroclear/Clearstream.

We note that if the concern is the ease of accessibility by retail investors in the secondary market, perhaps the issue can be largely addressed by other means e.g. through the introduction of a minimum board lot size.

6: Should there be a minimum board lot size for products?

☑ Yes. The minimum board lot size should be
- □ HK$1,000,000
- □ HK$500,000
- ☑ Other amount *(please specify):* Please see response below

□ No

The amount should reflect the minimum threshold which the Exchange would regard as an amount that retail investors would generally not be able to afford.

We note that for SGX debt listings, the SGX typically requires as a condition under its approval that notes targeted at institutional and sophisticated investors must be traded in a minimum board lot size of S$200,000 or its equivalent in foreign currencies following listing – this requirement is generally understood to apply only if the notes are actually traded on the SGX (which typically is not the case) – so the imposition of a minimum board lot size for listed debt products trading on the Exchange would be one method to limit retail investor's access to such products if they were ever traded locally on the Exchange, without affecting the overall listing process.

For standard international debt issues, the commonly seen minimum denomination to be held by holders is US$100,000 – however, for transactions going forward, as a matter of market practice, many major market participants are likely to adopt a higher amount gradually (most likely US$200,000) to reflect the new minimum denomination of €100,000 to qualify as wholesale debt under the Prospectus Directive (previously it was €50,000) – if so, most of the thresholds would stand above HK$1 million (after conversion).

However, it should be noted that under the Companies Ordinance, an offer with a minimum denomination of not less than HK$500,000, or a minimum principal amount to be subscribed that is not less than HK$500,000 is categorised as an exempt offer which would not require the publication of a prospectus. If HK$500,000 is the threshold under the Companies Ordinance which reflects the level of disclosure required by "the public"/retail investors, then purely as a matter of consistency, the minimum board lot size should probably be taken to be the same.

## C. Listing Approval

7: Do you agree with the proposed listing approval authority discussed in paragraph 31 of the Consultation Paper?

☑ Yes

□ No

If not please explain how you would revise the approval authority.

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## D. Listing Documents

8: Do you agree with the proposed content requirements in proposed Rules 37.26 to 37.33?

☑ Yes

□ No

Please explain your answer.

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| We agree with the proposed content requirements. However, please consider rewording Rule 37.31 to clarify that the limitation to distribution applies not only to "professional investors" as defined in the SFO but also to other scenarios e.g. where the document is not regarded as a "prospectus" as defined in the Companies Ordinance or offers which do not constitute an offer to the public in HK as well as any similar circumstances in other jurisdictions (in accordance with the applicable laws of that relevant jurisdiction). The current way in which Rule 37.31 is worded seems to indicate that the offering document can only be distributed to professional investors as defined by the SFO. |

9: Should we retain any of the current disclosure requirements we propose to delete?

□ Yes

☑ No

If you answered no please provide details.

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## F. Application Vetting

10: Do you agree with our proposal to continue vetting applications for compliance with listing eligibility standards?

☑ Yes

□ No

Please explain your answer.

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| For listing eligibility, the Exchange should continue to assume responsibility for compliance. As pointed out, it is not time-consuming. Furthermore, eligibility requirements are the basic standards which the Exchange has imposed and new Rule 37.55 states that if an applicant or its securities do not comply with requirements, it will not be eligible for listing unless the Exchange agrees to modify such requirements – it might be viewed as counter-intuitive for the Exchange to query an applicant after approving the listing as to why it has not fulfilled basic eligibility requirements.<br><br>In addition, it may not feasible for the Exchange to seek certification from the applicant's external legal advisors on compliance with eligibility standards as legal counsel are generally reluctant to opine on certain factual matters. |

11: Do you agree with our proposal to vet listing documents to ensure they include responsibility and disclaimer statements in prescribed forms, statements limiting distribution to professional investors and any other information required by the Exchange?

☑ Yes

□ No

Please explain your answer.

If these are the new basic provisions which the Exchange has specifically requested that offering documents must contain, the Exchange should be responsible for checking that they are included. It would be ineffectual to request that specific disclaimers and language must be included in the offering document and yet omit to vet the documents to see if they have indeed been included. Furthermore, it should not be time-consuming to carry out such vetting.

12: Do you agree with our proposal not to vet the other detailed contents of listing documents?

☑ Yes

□ No

Please explain your answer.

We agree with the HKEx's proposal as we feel that if the HKEx were to vet other detailed contents of a listing document, it would reduce to a large extent the contemplated benefits that the proposed changes to the Rules are meant to achieve.

The main purpose of replacing existing detailed disclosure requirements with a requirement for information that investors would customarily expect is to phase out the existing documentary procedure that is rather lengthy by comparison to SGX procedures. If Appendix 1 and 4 are no longer required under the new proposed rules, the Exchange would no longer be following a prescribed format in its review and this might in fact add more time and uncertainty to the whole approval/review process.

Besides, as pointed out, the contents of an offering document and whether such contents contain information that investors would customarily expect vary greatly depending on the type of issuer, industry, jurisdiction, target investors, recent similar deals, securities offered and specific circumstances of each transaction – and these are matters that the issuer and its financial advisors would be more familiar with at the first instance, rather than the Exchange. Unless it is a specific requirement that the Exchange wants e.g. disclaimers and statements, we feel that the Exchange would be expending unnecessary time and resources in vetting the general contents of the listing documents.

## F. Application Procedures

13: Do you agree with the proposals in respect of application procedures?

☑ Yes

□ No

If you do not agree please indicate how you would change them.

We agree with the proposals, however, please note our observations and comments below:-

**1. Appendix 5**

We note that the form of Appendix 5 should be altered to reflect any consequential changes to Chapter 37. In addition, we also propose that the form should be altered to take into account the following:

(a) Include the paragraph on irrevocable authorisation to the Exchange to file copies with the SFC – this is in line with market practice and, in our experience, has been requested by the Exchange on most occasions.

(b) The HKEx can consider if it wants to include placeholders for other necessary information relating to the eligibility standards to be fulfilled by the applicant – this would mean that the applicant would need to fill in specified information within the application form and this might save the Exchange time in its review of eligibility standards.

(c) Consider removing paragraph 6 in its entirety or parts thereof relating to substantial shareholding and directors' qualifications unless the Exchange considers such information to be essential to the approval of the listing application. Also, such information is usually present in, and duplicated directly from, the offering document. This would help to streamline the documentation.

(d) Consider removing paragraph 9 as this is typically not applicable. Even if applicable to a specific transaction, we feel that such information should not affect the listing process.

**2. Timing**

Based on the new proposed timeline, this would mean that the listing application would need to be submitted to the Exchange at least 6 business days before the listing date, since listing typically takes place one day after closing and the Listing Eligibility letter would be issued one day before listing.

As per the standard terms of a transaction, the approval from a stock exchange is typically listed as a condition precedent to be fulfilled no later than closing (i.e. one day before listing). Transactions also commonly proceed on T+5 basis, ie commercial pricing of the transaction will take place 5 business days before closing. We of course note that not all transactions occur on a T+5 basis but it is a very common timeline.

In practice, Form C2 and the amount of listing fee can only be finalised/signed after pricing is complete since it is only at such time that the amount and title of securities to be issued will be determined with finality so in effect, the earliest that an issuer can submit the full set of listing documents is upon pricing day. The

final offering document is also usually issued on the same day (and if there is a preliminary offering document, this will be issued before that). If the final offering document cannot be issued until the Exchange has confirmed that it can be issued and also, in the event the Exchange requires additional information in the listing document, in reality, applicants would need to submit the listing documents to the Exchange much more in advance of 5 business days in order for transaction parties to get sufficiently comfortable that listing approval with be forthcoming.

The current practice is that applicants will submit only drafts of all the requested documents (including a draft C2), with latest available information for the Exchange's review (NB: this means drafts will have incomplete information in some respects). In the case where there is a preliminary offering circular, parties will confirm with the relevant officer (verbally or via email) if the Exchange has any further comments on the draft and if the Exchange confirms it has no further comments, parties are usually comfortable to proceed to issue the preliminary offering circular. If the Exchange has no comments on the preliminary offering circular, parties also typically proceed on the understanding that the Exchange should have no comments on the final offering circular since the only amendments to be made to arrive at the final offering circular would be the inclusion of commercial terms and that the Exchange would therefore issue the listing approval before listing date (subject to receipt of a signed C2 and other relevant documents which is usually sent only on or after pricing). Would this practice remain the same going forward or are applicants now required to submit actual final completed documents as part of their initial application?

We also note that as per the latest SGX listing procedures, it is proposed that SGX is able to revert with approval in-principle within 2 business days of application which would mean that from a timing perspective, SGX would still remain the more favourable choice among market participants.

**3. Formal Notice**

As a suggestion, we propose to remove in its entirety the requirement to publish a formal notice for "selectively marketed debt securities".

The reason is even though the formal notice is based on a standard form template, transaction parties still have to review the form and sign off on any changes and the finalisation of the form is subject to the insertion of the debt stock code by the Exchange plus, in our experience, issuers (including seasoned equity-listed issuers) frequently experience confusion and difficulty over how to publish this notice properly. We feel that the benefits to market participants of the proposed change to the timing of publication is limited in practice. We note that SGX does not require issuers to publish a similar announcement.

## G. Continuing Obligations

14: Do you agree with the proposed continuing obligations set out in proposed Rules 37.44 to 37.57?

☑ Yes

□ No

Please explain your answer.

We agree with the proposed continuing obligations and we also support the decision to include certain of the continuing obligations in Chapter 37, thereby eliminating the need to sign a Listing Agreement.

However, please also consider our comments and observations set out below:-

**1. Rule 37.48 - Announcements of any redemption or cancellation**

Does "redemption" include buyback/purchases of the debt securities by the Issuer or its affiliates?

If so, does this mean an issuer would need to announce ***any and all*** buybacks conducted, whether via purchases from the open market or a formal tender offer to holders, regardless of the monetary amount? We have had several issuers querying this issue and based on previous informal discussions with some Exchange officers, our understanding is that there is no need to make an announcement of buybacks unless these result in crossing the 10% and 5% (thereafter) threshold. We had further inquired as to whether there was a time period within which the thresholds had to be met (e.g. 5% mark over a period of x months) and one of the Exchange officers we spoke to mentioned that the relevant period would be the aggregate period since the issuer's last public announcement. We were not able to clarify with the officer as to what the last public announcement meant – i.e. whether it meant any general public announcement issued by the issuer unrelated to any buybacks or specifically since the last public announcement made by the issuer on buybacks conducted. We presume it would have to be the former as the latter would literally mean the issuer can continue to purchase bonds every day below 10% without ever triggering a public announcement requirement. We would like the Exchange to confirm if this is the position, or at least, clarify if an issuer must indeed notify the Exchange of ***any*** buybacks conducted. This would provide much clarity to new and existing issuers and could save time both for issuers and the Exchange in having to further consider and clarify these Rules at the time of a buyback.

In addition, we note that most standard international debt documentation will typically require the issuer to cancel notes that are repurchased by the Issuer or its subsidiaries/affiliates. By the same reasoning, is an issuer required to announce

***any and all*** such cancellations? The difficulty is that issuers may conduct open market purchases of the securities with a view to buying them back – however such purchases are done on an ad hoc basis subject to suitable timing and price (as compared to conducting a large-scale formal tender offer announced to all eligible bondholders) and issuers prefer not to disclose such purchases if they don't have to, because the notification usually results in an increase in the bond price - and potentially the loss of an opportunity for them to buy back at a meaningful discount. We also note that even if an issuer is not required to notify the Exchange of any buybacks (see above), if they are required to announce all and any cancellations, then the issuer would largely be in the same position.

We note that under SGX listing rules, based on our understanding and experience, only buybacks of a significant portion of the bonds would need to be disclosed/notified to the SGX. "Significant" isn't defined under the rules, but is generally taken to mean a buy back of more than 5% of the outstanding bonds.

In conjunction therewith, would "redemption" under Rule 37.48 also include a conversion of convertible debt securities? We do not propose that **any** conversions must similarly be announced, however, we do note that a conversion of debt securities would also affect the outstanding size of a debt issue, which is one of the reasons stated for the imposition of the requirement.

**2. Rule 37.49(c)**

Please see our related response on Rule 37.49(c) in Question B4 above.

We also note that the SGX Rule 308 (requirements on trustee and trust deed) actually does not apply to a debt issue that is offered only to sophisticated or institutional investors and is traded in a minimum board lot size of S$200,000 or its equivalent in foreign currencies following listing.

15: Should we retain any of the current continuing obligations that we propose to delete?

□ Yes. Please provide details of the requirements

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☑ No

## H. Other Issues

16: Should eligibility under the GEM Rules be limited to companies already listed on GEM?

□ Yes

☑ No

Please explain your answer.

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| We propose that it is not necessary to require that companies must be equity-listed in order to seek a listing for their debt securities as this would mean that a company must be able to meet the equity listing eligibility requirements and actually complete their equity listing before they can list debt, which seems to be quite a high standard to meet. Perhaps the Exchange can consider imposing eligibility requirements similar to the Main Board Rules, subject to suitable tailoring for GEM. |

17: Should any other provisions in the Listing Rules be included in Chapter 37?

□ Yes. Please provide details of the requirements

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☑ No

18: Should any other consequential changes be made to the Rules?

☑ Yes. Please provide details of the requirements

□ No

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| We have set out below for the HKEx's consideration some minor editorial changes that should be effected: |

1. We propose to include a statement at the start of the Chapter or under the eligibility standards that applicants can be both Hong Kong companies and foreign companies for clarity. This statement is present in the current Rules

2. Chapter 36 should be renamed (similar to other Chapters) to specify that it is not applicable to “selectively marketed securities”.

3. We had mentioned some other consequential changes to be made in other parts of our response – please refer to the respective portions.

19: Are there are any other comments you would like to make?

☑ Yes

□ No

If your answer is "Yes" please elaborate your views.

We have set out below a few observations and suggestions for the HKEx's consideration.

**1. New Rule 37.54**

We would like to confirm that in order to satisfy new Rule 37.54, the issuer only needs to inform the Exchange of the details of such 2 authorised representatives, either via email or letter. Historically, issuers used to submit a Form A which required signatures of the authorised representatives. From our understanding in recent deals, it does not appear to be necessary to actually submit a signed Form A.

**2.** We would also like to confirm the following points. We do note that the new Rules do appear to imply the scenarios as we considered but would like to further confirm for clarity:

(a) Whether the removal of Rule 37.23 extends to pre-listing publicity materials, such as press releases and announcements which are issued by the issuer (via the Exchange or other media) before the actual issue and listing of the debt securities and publication of the formal notice. This would mean that the Exchange no longer needs to be informed that the issuer is intending to make such releases nor will it require to receive or vet such announcements before the issuer can publish them.

(b) Although the new Rules state respectively that the formal notice can be in English or Chinese, it is stated in new Rule 37.45 that announcements must be made under Rule 2.07C. Rule 2.07C(4)(b) requires that the announcements must be in English **and** Chinese unless otherwise stated. Historically, issuers used to apply for waivers in respect of this requirement for the formal notice. Since new Rule 37.45 states that *formal notices* now can either be in English or Chinese, what about other announcements? Would an issuer need to separately apply to the Exchange for a waiver from the Chinese requirement for all other announcements?

(c) Would Chapter 30 (and consequently parts of Chapter 18) still apply to certain mineral companies issuing "selectively marketed" debt securities? If so, we propose that Chapter 37 should include a rule to this effect so that attention is drawn to Chapter 30. Also, we note that the references in Chapter 30 to certain rules under Chapter 18 appear to be inaccurate.

(d) Would Chapters 27, 28 and 29 still remain in the Listing Rules even though portions thereof as applicable to "selectively marketed securities" would be incorporated into Chapter 37 itself? If so, presumably these Chapters would continue apply to debt securities that are not issued as "selectively marketed securities". We would be grateful if the HKEx could let us know if our understanding is correct.

**3. Programme updates**

Do Rules 37.34 to 37.39 apply equally to an update of a Programme that does not involve an upsize of the maximum amount that can be issued under a Programme. Essentially, when a debt Programme is updated (without an upsize or a drawdown), do applicants need to go through substantially the same listing application procedure by submitting a Form C2 and other relevant documents at least 5 days beforehand for a Listing Eligibility Letter?

We note that under SGX practice, technical updates of Programmes which do not involve an upsize of the issue limit or a drawdown are not required to go through the initial listing approval process again. All applicants need to do is to submit a letter to SGX notifying that the Programme is due to be updated and make reference to the last approval in-principle issued by the SGX. The first approval in-principle issued for a Programme is taken to be valid going forward so long as notification is made to SGX and new programme documents (as updated) and certain other undertaking letters are sent to them for record. SGX does not even issue a response or an acknowledgement, which makes the process short and simple.