

## 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/consul/paper/cp200907\\_e.pdf](http://www.hkex.com.hk/consul/paper/cp200907_e.pdf).

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

### *Consultation Questions on Notice Period for Book Closure*

1. Do you agree to our proposal to shorten the notice period for book closure for a rights issue or an open offer from 14 calendar days to five business days?

Yes

No

Please provide reasons to support your view.

#### **Shortening the notice period**

We agree with the reasons given in the Consultation Paper in relation to shortening the notice period for book closure, specifically -

- (a) the current window of 10 business days for share re-registration and seven clear business days for trading cum-rights shares appears to be excessive;
- (b) shortening the notice period will reduce market risk for issuers and underwriters and allow issuers to obtain funding earlier; and
- (c) shortening the notice period will bring Hong Kong more in line with comparable jurisdictions (Australia and Singapore).

As noted in the Consultation Paper, the benefit afforded to issuers and underwriters by shortening the time period (reason (b) above) should be weighed against the potential cost to shareholders, which is the shortened timeframe for shareholders to re-register and trade in cum-rights shares if they so choose.

We have reservations as to whether individual shareholders' rights to trade in cum-rights shares should be protected, if by doing so, the issuer is exposed to unacceptable economic and reputational risk. We also note that the costs of increased risk are ultimately borne by the issuer to the detriment of all of its shareholders as a collective body, and not just individual shareholders who choose to trade in cum-rights shares.

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Delay in rights issues and open offers ("**Rights Offers**") can increase risks (and costs) and adversely affect issuers and their shareholders in several ways. Examples include:

- (i) underwriting fees reflect the level of risk undertaken, and the greater the period of time "at risk" the greater are likely to be the fees charged to issuers for underwritten offers;
- (ii) institutional shareholders offered shares are generally less happy to commit to take up securities if receipt of the securities may be significantly delayed, which may reduce the attractiveness of the Rights Offer, placing downward pressure on the share price; and
- (iii) if there are substantial shortfalls in take up due to unacceptable risk, underwriters will have to take up the excess, creating large share overhangs, and placing downward pressure on the share price.

Notwithstanding the above, under the new timeframe, shareholders will still have time to trade in cum-rights shares during the shortened notice period. We consider that the cost to shareholders having less time to trade in cum-rights shares is clearly outweighed by the benefit of lower market risk to issuers and underwriters.

#### **Changing calendar days to business days**

In respect of changing calendar days to business days, we agree with the reasons given for this in the Consultation Paper. Generally, we agree that where a certain period of time, expressed in number of days, is specified in the listing rules, there should be flexibility by way of business days to ensure that investors may rely on, and issuers must ensure, that amount of uninterrupted days being available to investors. Issuers should not be able to 'cherry-pick' when to do certain things in order to shorten the amount of time available for investors (e.g. over long public holidays).

2. In the case of a rights issue or an open offer, do you agree to our proposal to require extension of the notice period by postponing the book closure date, if necessary, to provide the market with a minimum of two uninterrupted trading days for trading in cum-rights securities during the notice period if, for examples, trading on the Exchange is interrupted due to typhoon and/or a black rainstorm warning or trading of the issuer's securities is suspended?

Yes

No

Please provide reasons to support your view.

Consistent with our response to question 1, we agree that there should be flexibility in the listing rules to ensure that investors have the benefit of time periods specified in the listing rules.

However, the automatic postponement of the notice period (which is intended to protect shareholders' rights to trade in cum-rights shares) should be balanced against any potential detriment to issuers and their shareholders caused by the delay of the Rights Offer. We suggest that issuers should be able to apply for a waiver from automatic postponement where the issuer considers that the further delay caused by the automatic postponement would have a material adverse effect on the Rights Offer. Amendments should be made to Note 2 of Rule 13.66 to allow for such waiver in appropriate circumstances.



3. If your answer to question 2 is “Yes”, do you agree that the proposed draft rule amendments in Appendix II will implement our proposal(s)?

Yes

No

Please provide reasons to support your view.

Subject to our suggested amendment to Rule 13.66 in our response to question 2, we agree with the proposed amendments in Appendix II.

4. Do you agree to our proposal to amend the notice period for book closure (in cases other than a rights issue or an open offer) from 14 calendar days to 10 business days?

Yes

No

Please provide reasons to support your view.

We agree with this proposal for the same reasons provided in our response to question 1 under the heading ‘Changing calendar days to business days’.

5. Do you agree to our proposal to amend the notice period for alteration of book closure date from six calendar days to five business days?

Yes

No

Please provide reasons to support your view.

We consider that this is a reasonable proposal, given:

- (a) the reasons provided in our response to question 1 under the heading ‘Changing calendar days to business days’;
- (b) under the ‘six calendar days’ drafting, the maximum number of business days available to investors was five business days in any case; and
- (c) the requirement for five business days notice where there is an alteration of book closure will be consistent with the (newly proposed) requirement for five business days notice before book closure generally.

6. Do you agree to our proposal to clarify the rule that if an issuer changes the book closure date, it must give notice at least five business days before the originally announced closure or the newly proposed closure, whichever is earlier?

Yes

No

Please provide reasons to support your views.

We consider that the proposal should include the following changes set out below.

Under the current proposal, if the obligation to notify the exchange before book closure (in the case of a Rights Offer) is 5 business days, then an issuer can never alter the book closure date because under the new amendments, the issuer must give at least five business days notice to the Exchange either before the originally announced closure or the new proposed closure, **whichever is earlier**.

We understand that if an issuer wants to have the shortest possible timetable for a Rights Offer, it will elect to give notice 5 business days before book closure. This means that if the issuer ever wanted to alter the book closure date (which we assume would be to make the date later and not bring it forward, which we note would not be possible in any case under the current proposal), it would have to give notice of the alteration 5 business days before book closure (i.e. the same day of the original announcement) since this will always be the earlier date compared to the new proposed closure date.

We think the following drafting would be more appropriate (black text is the current wording of listing rule 13.66):

In cases where there is an alteration of book closing dates, the issuer shall, at least six **five** business days before the announced closure (or in the case of a rights issue or an open offer, as soon as practicable before the announced closure) or five business days before the new closure, whichever is earlier, notify the Exchange in writing and give further notice by publishing it in accordance with rule 2.07C.



7. Are there any other comments you would like to make?

Yes

No

If your answer is “Yes”, please state below.

We note that the overarching purpose of the proposals is to expedite fund raisings by accelerating Rights Offers, and to ensure that investors’ interests are not prejudiced at the same time.

In addition to the proposals put forward in the Consultation Paper, the Exchange could consider other ways in which Rights Offers could be accelerated. We have briefly set out some suggestions below.

**Undocumented offers and ‘cleansing notices’**

In 2007, the law in Australia changed so that listed issuers can conduct a rights issue without a prospectus or a Product Disclosure Statement provided certain conditions are met and provided that the entity issues a ‘cleansing notice’ before the offer is made. The cleansing notice:

- (a) must disclose the potential effect that the issue of the relevant securities will have on control of the entity and the consequences of that effect;
- (b) must disclose information that has been excluded from the entity’s continuous disclosure in accordance with the Australian Securities Exchange listing rules and which investors and their professional advisers would reasonably require for making an informed assessment of (i) the assets and liabilities, financial position and performance, profits and losses and prospects of the issuer; or (ii) the rights and liabilities attaching to the securities or interests being offered; and
- (c) confirms that the issuer has complied with all financial reporting and continuous disclosure obligations up until the date of the notice.

In effect, the cleansing notice confirms that nothing has been withheld by the entity from continuous disclosure, including under an allowable exception.

In Hong Kong, no such exemption exists. Rights issues must be supported by a prospectus which must comply with the relevant requirements of Chapter 11 of the listing rules. The requirement to produce a prospectus is an obvious deterrent for issuers considering whether to conduct a rights issue, and may be a reason for such issuers to opt for other forms of fundraising which do not require a prospectus, and which effectively exclude retail investors (for example, institutional or exempt placements).

The Australian Securities and Investments Commission (ASIC) (in its Regulatory Guide 189 - RG 189.8 and RG 198.9) takes the view that rights issues should be encouraged over other forms of fundraisings which exclude retail investors because:

- (a) they give existing members an equal opportunity to acquire new securities or interests at the same offer price and in proportion to their holdings (referred to as the “**equal opportunity principle**”); and



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- (b) rights issues are one of the few forms of fundraising that allow retail investors to acquire securities or interests at a discount to the market price. The disclosure exemption under the Australian system is intended to facilitate retail investors' access to a discounted form of fundraising, while ensuring they have adequate information about the securities being offered.

We consider that the introduction of a disclosure exemption in Hong Kong similar to that in Australia for rights issues, could be effective in encouraging Hong Kong listed entities to make greater use of rights issues as opposed to other forms of fundraisings which exclude retail investors. Such an exemption would also need to apply to relevant prospectus provisions in the Companies Ordinance (Cap 32), including the restriction on resale under section 41.

The effectiveness of the disclosure exemption, if introduced, could be enhanced if it is extended to both traditional and non-traditional rights issues discussed further below.

#### **Non-traditional rights issues (JUMBO, RAPIDS or AREA structures)**

The introduction of the Australian disclosure exemption outlined above in 2007 only applied to rights issues made to all existing holders in the offer class, in proportion to the offeree's holding at the time of the offer, and where the terms of each offer were the same ("**traditional rights issues**"). The exemption did not apply to rights issues which adapted and modified the traditional rights issue structure to meet different fundraising needs ("**non-traditional rights issues**").

In non traditional rights issues, institutional holders are typically required to deal with their rights before other holders and are generally allotted their securities first. The offer proceeds in two tranches: institutional and retail. This allows issuers to receive a significant proportion of the offer proceeds from their institutional holders in a very short timeframe. Examples of such accelerated non-traditional rights issue structures are known colloquially as JUMBO, RAPIDS or AREO structures.

Since the disclosure exemption did not apply to non-traditional rights issues, this limited its effectiveness because listed issuers wanting to use these structures could not rely on the exemption and were likely to raise funds by institutional placements instead (excluding retail investors from participating).

Consequently, in 2008, amendments were introduced to extend the disclosure exemption to both traditional and non-traditional rights issues. The exemption was extended on the basis that non-traditional rights issues falling within the exemption would not contravene the equal opportunity principle, and therefore would not prejudice investors' interests.

As mentioned above, in Hong Kong, rights issues must be supported by a prospectus regardless of whether they are traditional rights issues or non-traditional rights issues (the threshold question being whether there is an issue of securities "to the public"). If a disclosure exemption is introduced in Hong Kong, we consider the effectiveness of such an exemption could be enhanced if it is extended to both traditional and non-traditional rights issues.

### *Consultation Questions on Subscription Period*

8. Do you agree to our proposal to amend the minimum subscription period for rights issues and open offers from 14 calendar days to 10 business days?

Yes

No

Please provide reasons to support your view.

We agree with this proposal for the same reasons provided in our response to question 1 under the heading 'Changing calendar days to business days'.

9. Do you agree to our proposal to amend the maximum subscription period for rights issues and open offers (over which the issuer must consult the Exchange) from 21 calendar days to 15 business days?

Yes

No

Please provide reasons to support your view.

We agree with this proposal for the same reasons provided in our response to question 1 under the heading 'Changing calendar days to business days'.

10. Are there any other comments you would like to make?

Yes

No

If your answer is "Yes", please state below.

The Exchange may wish to reconsider the requirement that rights issues must be fully underwritten in normal circumstances (listing rule 7.19). We note that in Australia, Singapore and the UK, rights issues may be made without underwriting. We consider that it should be a commercial question for the issuer to decide whether its rights issue will be underwritten. In jurisdictions where underwriting is not mandatory, issuers may, for example, instead choose to issue shares at a deep discount to the existing market price.

The mandatory underwriting requirement may not be beneficial to the issuer and its shareholders in all cases, especially where market conditions are such that underwriters are generally reluctant to underwrite new issues resulting in excessive underwriting fees to the detriment of issuers and their shareholders.

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