

Davis Polk & Wardwell 852 2533 3300 tel
Hong Kong Solicitors
The Hong Kong Club Building
3A Chater Road
Hong Kong

Resident Hong Kong Partners

Karen Chan † Martin Rogers †
Yang Chu † Patrick S. Sinclair*
James C. Lin* Miranda So*
Gerhard Radtke* James Wadham†

Hong Kong Solicitors
* Also Admitted in New York
† Also Admitted in England and Wales

10 September 2020

Re: Paperless Listing and Documents on Display CP

Hong Kong Exchanges and Clearing Limited
8th Floor, Two Exchange Square
8 Connaught Place
Central
Hong Kong

Dear Sirs:

We are writing in response to the Consultation Paper on Proposals to Introduce a Paperless Listing & Subscription Regime, Online Display of Documents and Reduction of the Types of Documents on Display (“*Consultation Paper*”) issued by the Hong Kong Stock Exchange (“*Exchange*”). Terms used in this letter have the meaning attributed thereto in the Consultation Paper.

Generally, we are in support of the Exchange’s initiative. We believe that gradually steering some of the IPO and listed market processes towards a paperless environment is the right way forward.

There are, however, a few areas in the proposals where we believe further consideration may be required. Our responses to the consultation questions are set out below.

Question	Our response
1.	We agree. With the current level of technology usage, we believe the abolition of printed prospectuses will cause minimum hardship and that whatever minor inconvenience may be caused should be amply compensated by gains in environmental protection, of which this firm is a strong supporter.
2.	We agree. The present prospectus distribution process will be rendered obsolete when printing prospectuses are no longer required.
3.	We agree with the abolition of the current physical inspection regime.
4.	We agree in principle with the Exchange’s proposal as to timing requirements. However, we note that the practical relevance of these requirements will be reduced in the

	<p>electronic environment, given that it is virtually impossible to prevent documents from being in some way or form copied or forwarded once they are put on electronic display (at the very least, taking a computer screenshot or a photo of a document will always be possible, despite whatever limits the Exchange may decide to put on downloading and printing).</p> <p>Similar to what happens with APs which are withdrawn from the HKEx webpage once an application is returned or rejected, there is nothing preventing any person (including information service providers) from saving a copy of the document and thus making it available, in theory, permanently.</p> <p>The above, however, is already the position with categories of documents that are currently required to be electronically disclosed with SOME authority under SOME rule (e.g. material contracts that are currently required to be filed with the Companies Registry). There should not be any problems with these documents. The Exchange has said (in paragraph 21 of the Consultation Paper) that it does not intend to require disclosure of any additional documents that are not currently required by the listing rules to be disclosed (either physically or electronically). What this means is that any teething problems regarding documents being put on de facto permanent display should therefore arise only in relation to documents that are not currently required by any rule to be disclosed electronically.</p> <p>Based on Appendix I, these would appear to include items 5 (outside the merger environment) and 8 – 21 in Appendix I. Broadly speaking, therefore, about 15 out of 21 existing items of disclosure will be newly exposed to the problem of de facto permanent display.</p> <p>As a law firm, our position is basically neutral about de facto permanent display being an unintended (though perfectly expected) consequence of introducing a paperless environment. However, we are aware of the heightened privacy concerns this may cause for the entities that own the documents. We believe that a balance should be struck by making appropriate adjustments to the redaction regime, which we shall address below.</p>
5.	<p>We would strongly urge the Exchange to consider introducing more flexibility to the redaction policy, namely, to be open to allowing redactions on a case-by-case basis.</p> <p>The proposed recipe – comprising (a) a loose definition of “material contracts”, (b) severely restricted scope for redaction and (c) electronic display (with the attendant privacy concerns highlighted in Question 4 above) – appears to us to lean towards enhanced disclosure, but incidentally also to the potential detriment of protection of private and sensitive information.</p> <p>In our view, each of the three elements above must be thoughtfully considered not just individually but all together, and the requirements applying for each should be set to the right “calibre” so as to achieve the best balance among all three elements combined.</p>
6.	<p>Although the current definition of “material contracts” in the laws and regulations set out in the Consultation Paper has been in use for many years and the market is accustomed to it, we do not fully agree with the statement (in paragraph 107 of the Consultation Paper) that the does not cause any practical difficulties for issuers. Besides the perennial problem that there is absolutely no guidance as to “materiality”, whether something is in</p>

	<p>the “ordinary course of business” or not is far from an easily settled question. From time to time issues may also arise as to the treatment of completed, lapsed or even void contracts, as well as the relevance of M&A agreements to acquisitive companies.</p> <p>The Exchange states in paragraph 107 of the Consultation Paper that it does not propose to change the current Listing Rule definition of material contract, as it is aligned with the definitions under the C(WUMP)O and the Takeovers Code. We observe that, for that precise reason, simply changing the definition of material contracts in the Listing Rules will not cure all the issues, since it is an equally undefined concept under the other two sets of rules. However, we believe that the market will be greatly assisted with:</p> <ul style="list-style-type: none"> • more guidance on the concepts of “materiality” and “ordinary course of business” • adjusting the other components in the document display equation (elements (b) and (c) set out in Question 5 above) so as to achieve a better balance
7.	<p>We agree with the proposal not to restrict printing and downloading, to be consistent with the approach taken in the other document disclosure regimes set out in paragraphs 109-110 of the Consultation Paper. Besides, if printing is downloading is allowed under the other regimes, restrictions on the Exchange’s regime only is unlikely to make a significant difference.</p> <p>However, we reiterate that the availability of printing and downloading is element (c) set out in Question 5 above, and that the interaction among all the elements (a) – (c) should be considered as a whole.</p>
8.	<p>We do not have any strong views on the proposal not to put in place a system that would enable issuers to record and verify the identity of a person who accesses documents on display online.</p> <p>In our view, even if such a system is practically possible, it is not necessarily the identity of persons but the use they make of the downloaded information that will be crucial. This latter aspect cannot realistically be regulated or policed.</p> <p>We also note that even though (as the Exchange has stated in paragraphs 112-113 of the Consultation Paper) it is in practice possible to request and record the identities of persons inspecting documents on display, this may in turn throw up concerns of personal privacy which may be hard to resolve.</p> <p>Again, not having identity checks will be consistent with the other document disclosure regimes set out in paragraphs 109-110 of the Consultation Paper.</p>
9.	<p>We agree with the proposal, for notifiable transactions, to require the issuer to display the contracts pertaining to the transaction only, not all material contracts entered into by the issuer within the last two years before the issue of the circular.</p>
10.	<p>We agree with the proposal, for connected transactions, to require the issuer to display the contracts pertaining to the transaction only, not all material contracts entered into by the issuer within the last two years before the issue of the circular.</p>

We have strong reservations about the proposal (paragraph 28 of the Consultation Paper) no longer to print hard copy version of the Listing Rules and to discontinue all annual subscription of hard copy from 1 Jan 2021. Although the Rules will be available online for free, it is not realistic for lawyers and other market practitioners to use online rules. In practice they are highly likely to continue to make print-outs, and if it is difficult to identify correctly the pages that will be affected / replaced each time a rule is amended, users may feel safer to print out an unnecessarily large portion of the rules (or, in an exceptional case, even the entire rulebook), which will be counter-productive to the goal of environmental protection.

If you have any questions in relation to this submission, please contact [REDACTED]

[REDACTED] or [REDACTED]

Yours faithfully

[REDACTED]

Davis Polk & Wardwell