

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/cp201009.pdf>

Where there is insufficient space, please attach additional pages as necessary.

A. Exemption for Qualified Property Acquisitions

(1) Scope of the QPA exemption

1 (a). Do you agree with the proposal to expand the QPA exemption to acquisitions of land or property development projects in the Mainland from government through the PRC Government Auction Process?

Yes

No

Please provide reasons.

For all the reasons cited in the Consultation Paper, we agree an expansion of the QPA exemption to acquisitions of land or property development projects in the Mainland should address some of the practical issues and difficulties in this area in complying with the current Rules.

On the proposal itself, we would summarise our comments as follows:

- Relevance of whether the subject land or property development is “state-owned” – it is submitted that the relevant criterion is the *process* through which the property is sold (to which most of the practical issues/difficulties cited relate) and not whether it is “state-owned”, a factor which issuers are not in a position to verify or confirm.
- The “PRC Government Auction Process” – the meaning of this expression will dictate the scope of the exemption. The draft Rules do not include a definition as such. Draft LR14.04(10C) seems to suggest such process can be comprehensively defined as comprising “public auction or tender”. Neither “public auction” nor “tender” is defined in the Rules. As acknowledged in paragraph A.(1)19 of Chapter 2 of the Consultation Paper, “listing-for-sale” is also a common process for acquiring Mainland lands. As the practice in this area evolves, there may be other processes adopted by the PRC bureaux. The Exchange may consider introducing some flexibility in defining what constitutes the “PRC Government *Assignment* Process” as “auction” has a specific meaning under the relevant PRC regulations and that would not include other processes such as “bid invitation” and “quotation” (as such terms are defined in the current PRC regulations). For more detailed suggestions, please see our response to Question 10 below.

1 (b). For the proposed exemption described in 1(a), do you agree with the proposal to exempt government or government entities falling under the current definition of “PRC Governmental Body” in Rule 19A.04?

Yes

No

Please provide reasons.

As the current QPA exemption is structured to apply to acquisition of “land or property development project(s) acquired in Hong Kong from Government or Government controlled entities through public auctions or tender [LR14.04(10D)], the rationale for the proposed amendment to expand the concept to acquisition of “land or property development project in the Mainland from a “PRC Governmental Body”” (as defined in LR19A.04) is understandable.

We would however make the following observations:

- Non-state owned land transactions – individual cities, such as Shenzhen, have promulgated regulations governing land transactions effected in Shenzhen to be subject to auction/tender process. This may apply to land or property projects which are not “state-owned”. Although we do not have official statistics relating to non state-owned land or leaseholds which have been transferred under these regulations, a formulation which is limited to state-owned land/properties by a PRC Governmental Body may be too restrictive.
- “PRC Governmental Body” – the existing definition in LR19A.04 excludes “entities under the PRC Government that are engaging in commercial business or operating another commercial entity”. Recent provisions of the Ministry of Land and Resources on Assignment (promulgated in 2007) are expressed to apply to any assignment of land use right on, above or under “any state-owned construction land within the Mainland territory”. It is also to be noted that issuers are often in no position to ascertain whether any land is owned by a PRC Governmental Body” in order to qualify invoking the QPA exemption.
- Availability of QPA is to be *process* driven – having regard to the combined effect of the above observations, the Exchange may consider adopting an exemption regime for Mainland situated lands or property developments the assignment of which is required by law to be effected via auction, tender, listing for sale or other similar regulated assignment processes.

2. Do you propose other jurisdictions which should qualify for the QPA exemption?

Yes

No

If your answer is “Yes”, please provide details of the legislation and requirements for government land auctions in those jurisdictions and your analysis why they would fit the criteria described in paragraphs 23 and 27 of the Consultation Paper.

We agree it is important to analyse the legislation and requirements for land auctions (not necessarily government or state-owned ones only) in each subject jurisdiction to determine if the local criteria or considerations for that jurisdiction are the same as or similar to those described in paragraphs 23 and 27 of the Consultation Paper to justify an expansion of the QPA exemption to such jurisdiction. It is submitted that once such criteria are proven to exist, the qualification for the QPA exemption should be expanded to such jurisdiction automatically.

3. Do you agree with the proposal to grant similar waivers to government land acquisitions in other jurisdictions on an individual case basis?

Yes

No

Please provide reasons.

As an alternative to the waiver proposal on an individual case basis, the Exchange may consider adopting an approach which is similar to that taken for approving an overseas jurisdiction as acceptable under Chapter 19 of the Rules.

Once an issuer has satisfied the Exchange that the auction or tender regime for acquiring lands or property developments in a particular jurisdiction gives rise to practical difficulties, issues or criteria similar to those identified in paragraphs 23 and 27 of the Consultation Paper (which framework the Exchange may wish to outline and formalise in a Guidance Letter to be issued on this subject), future issuers seeking to invoke the QPA exemption with respect to land or property development proposed to be acquired pursuant to auction/tender in that jurisdiction may automatically avail themselves of such exemption without undergoing any further submission or waiver application process to the Exchange.

4. Do you agree with the factors for granting individual waivers described in paragraph 27 of the Consultation Paper?

Yes

No

Please provide reasons.

For reasons stated in our responses to Qs 2 and 3 above, the Exchange may issue a Guidance Letter similar to HKEx-GL 12-09 setting out a framework of the factors which an issuer will have to demonstrate as arising from the subject jurisdiction before the Exchange will find as acceptable the expansion of the QPA exemption to such jurisdiction.

Regarding the factors which are to comprise the “framework” in the Guidance Letter, we agree those set out in paragraph 27 of the Consultation Paper are the principal ones subject to adapting them into a “process” driven regime and not a governmental ownership based regime. See our response to Qs 2 and 3 above for our reasoning on this issue.

(2) Conditions for QPA exemption

5. Do you agree with the proposed change to the exemption conditions described in paragraph 34 of the Consultation Paper for property joint ventures with independent third parties?

Yes

No

Please provide reasons.

We support the proposal to remove the restrictions on the joint venture's financing and profit distribution arrangements as conditions to the QPA exemption being available.

It is noted that financing and profit distribution arrangements will ordinarily comprise material terms of property joint ventures with independent third parties, and statement that the directors believe that the terms of a Chapter 14 transaction are fair and reasonable and in the interests of the shareholders as a whole is an existing disclosure requirement under LR14.58. The proposed imposition of the new requirement therefore should be unnecessary. It is also noted that draft LR14.33B(2)(d) is unclear what proof, if any, of the proposed board confirmation is required. For the same rationale as that used to repeal the requirement of supplying copy board minutes to the Exchange under the then LR14A.55, it is submitted that the existing disclosure requirement in LR14.58 will suffice and serve the purpose.

6. Do you agree with the proposed change to the exemption conditions described in paragraph 34 of the Consultation Paper for property joint ventures with Qualified Connected Persons?

Yes

No

Please provide reasons.

Our response to Q5 above applies equally here. In addition, for property joint ventures with Qualified Connected Persons requiring independent financial advisers' opinions, the assessment of the fairness and reasonableness of all the terms of the joint venture (not just the financing and profit distribution arrangements) is adequately regulated and addressed by the existing requirements of LRs14A.21 and 14A.22. The introduction of the new condition in LR14A.72(2) seems to add limited value and is accordingly unnecessary.

(3) General Property Acquisition Mandate

7. Do you agree with the proposal to remove the requirements relating to the General

Property Acquisition Mandate currently applying to the formation of joint ventures with Qualified Connected Persons?

Yes

No

Please provide reasons.

We agree with the proposal to remove the General Property Acquisition Mandate requirement for the following reasons:

- Not meaningful – shareholders of a property developer issuer who trust [and have faith in] their directors should have discretion in planning for business development for the issuer will assume the decision of whether a project should be carried out in a form of joint venture, with which partner(s) and on what terms to be within the board's expertise, judgment and role like any other aspects of managing the issuer's core business. Imposing additional costly procedural hurdle for the issuer to seek approval on matters which the board (and not the shareholders) has greater expertise and vision serves little purpose. Whether the proposed joint venture partner is a Qualified Connected Person or any connected person whose core business is also property development should have little bearing on the matter.
- Impracticality – seeking prospective approval on a subject the parameters of which are driven by a combination of extraneous factors (e.g. land supply, market demand, pricing, issuer's business requirements/performance, etc) which cannot be predicted with any certainty is impractical. Requiring the issue of an IFA opinion commenting on the fairness and reasonableness of the terms of the mandate is also unrealistic.

(4) Disclosure requirements

8. Do you agree with the proposal to accelerate the disclosure of information relating to the joint ventures for Qualified Property Acquisitions (which is currently required to be made in the annual report) to the announcement/circular stage?

Yes

No

Please provide reasons.

We agree certain (but not all) of the information relating to the joint ventures for Qualified Property Acquisitions should be disclosed at the announcement/circular stage.

It is premature (and not meaningful) to require inclusion of information in the nature of confirmation (e.g. that the transaction has been carried out according to the initial purpose of the joint venture) at the announcement/circular stage. The scope of disclosure in the announcement/circular will inevitably have to differ from that of the annual report. Otherwise, *to the extent the information is available* at time of announcement/circular, it is appropriate for it to be made available to the shareholders earlier than its annual report.

In this context, it would be helpful for the Exchange to clarify whether there is an expectation that the information so included in the announcement/circular is treated as *material* terms such that any variations thereof after their announcement will warrant a further announcement. Alternatively, the Exchange may stipulate that inclusion of a description of the variations in the annual report immediately following any such variations will suffice.

(5) Property valuation

9. Do you agree with the proposal to exempt property valuation requirement for acquisitions falling under the QPA exemption?

Yes

No

Please provide reasons.

For the reasons succinctly set out in paragraphs 47 and 50 of the Consultation Paper, we agree with the proposal to dispense with the requirement to provide a property valuation report in the information circular for acquisitions falling under the QPA exemption.

(6) Changes to the Rules

10. Do you have any comments on the draft Rule amendments relating to the QPA exemption in Part A of Appendix I of the Consultation Paper?

Yes

No

If you answer is “Yes”, please state.

The reasons for the following comments on the draft Rule amendments are set out in our respective responses to the relevant Qs above/below.

LR14.04(10C)

- the benchmark for determining whether a property acquisition is a QPA should be driven by the location of the property and the process via which it is assigned and not who the property owner is.
- under Provisions of the Ministry of Land and Resources on Assignment of State-owned Construction Land Use Right (promulgated on 28 September 2007), the recognised channels for effecting an assignment are: “bid invitation”(招標), “auction”(拍賣) and “quotation”(掛牌) each with its own specific meanings and prescribed procedure. The proposed use of the expression “public auction or tender” may not be clear and specific enough

LR14.33A - please see our response to Q11 below on the appropriateness of imposing “sole” basis here as a relevant criterion

LRs14.04(1)(f)(i)/14.33A(2) – please see our response to Q11 below on the appropriateness of imposing “single purpose” here as a relevant criterion

LRs14.33B(1)/14A.73(1) – please see our response to Q13 below on (i) the appropriateness of using “upon notification of the success of a bid” as the relevant trigger for timing to publish an announcement, and (ii) our proposal to adopt a Commitment Date concept (either by reference to the date of signing the land use contract or by describing the event at which the legal commitment to proceed with the QPA arises)

LRs14.33B(2)(c)/14A.73(2) – please see our response to Q8 above on the premature nature or appropriateness of including the information referred to here

LR14A.10(13)(f) – please see our responses to Q7 above and Q13 below on the appropriateness of not amending this subsection in the same way as LR14.04(1) excluding therefrom the formation of joint venture

B. Formation of joint ventures

11. Do you agree with the proposal to exempt “revenue joint venture projects” described in paragraph 61 of the Consultation Paper?

Yes

No

Please provide reasons.

We agree with the proposal to exempt formation of a joint venture from being treated as a notifiable transaction but would make the following comments on the terms of the proposal:

- Single purpose – it is acknowledged in the Consultation Paper that different industries have developed their unique business practices over time and joint venture has become a mechanism through which companies conduct their normal business. The Consultation Paper does not however provide any reasons for introducing the “single-purpose” requirement of the proposal. In our experience, it is not necessarily a uniform business practice to set up a new joint venture for each project. There are various factors to be taken into account, and sometimes the analysis will only be undertaken after the project has been successfully awarded, before a considered view as to whether to set up a new joint venture or deploy an existing joint venture for a particular project. Such requirement seems unnecessarily restrictive, and unsupported by good commercial and regulatory reasons or international practice.

- Revenue projects – the question of whether a property project contains a capital element or is of a revenue nature is different from whether property development or investment is a core business of an issuer. Further, a property project may change its nature (from one to another) over time as a result of changes in market conditions, supply and demand, etc as perceived by the issuer’s management and board. Proof of issuer’s intention at the time the joint venture is formed could be an issue. It is submitted that the more meaningful test is whether it is a core business of the issuer and its proposed joint venture to engage in property development or investment.

12. Do you agree that the proposed draft Rule amendments in Part B of Appendix I of the Consultation Paper will implement our proposal?

Yes

No

If your answer is “No”, please provide reasons and alternative views.

For the reasons stated in our response to Q11, amendments in Part B of Appendix I of the Consultation Paper should be made on a different basis, which is proposed in our response.

13. Do you have other comments on this consultation paper?

Yes

No

If your answer is “Yes”, please state.

We have the following additional comments on this Consultation Paper:

- Timing of announcement – LRs14.33B and 14A.73 provide that the obligation to announce is triggered “upon notification of the success of a bid by it or the joint venture for a QPA”. This requirement highlights a number of practical issues:
 - depending on the route via which the Mainland land or property project is acquired, i.e. tender, auction or listing-for-sale, the timing at which an issuer or the joint venture is “notified” of the result may vary, be incapable of being ascertained with precision in advance as to allow for proper planning in the timing for release of the announcement
 - the point in time at which the issuer or the joint venture for a QPA is notified of the success of a bid does not necessarily coincide with that at which it incurs the legal obligation or commitment to proceed with the QPA (the “Commitment Date”) . It is submitted that the Commitment Date is a more appropriate trigger for the obligation to announce to arise as this will be consistent with timing trigger under LRs14.34s and 14A.47. It is to be noted that the rules for determining when the Commitment Date arise may vary from case to case and may be subject to different interpretations. It should however be indisputable that the Commitment Date will not occur beyond the date on which the buyer signs the contract for assignment of right to use the subject land or property (土地使用權出讓合同). The Exchange may consider defining the trigger either by specifying this contract signing date or by stipulating it is the date on which the commitment to proceed with the QPA is incurred according to the applicable laws and regulations at the time.
- Qualified Connected Person – it is submitted that for the reasons outlined in our response to Q7 above, shareholders of an issuer whose core business includes property development or investment will not be in any better position than the management or board in deciding whether or not to undertake a QPA in a form of joint venture, and if so, with which joint venture partner (whether or not connected as a Qualified Connected Person or otherwise) and on what terms which are normal and commercial and in the interests of the issuer as a whole. The proposal to expand the QPA exemption contemplated in this Consultation Paper and to exempt the formation of a joint venture from being treated as a notifiable transaction should not be confined to Qualified Connected Persons or Chapter 14 “transactions” only but to all “connected persons” and to Chapter 14A joint ventures either generally or at least those formed for exempt QPAs.

- End -