

HKEx LISTING DECISION

Cite as HKEx-LD86-1 (December 2009) (Updated in April 2014)

Summary	
Party	Company A - a Main Board applicant and its subsidiaries
Subject	How Company A should deal with material changes of circumstances after the issue of the prospectus
Listing Rules	Rules 2.03(2); 11.07; 11.13; Paragraphs 2 and 3(2) of Practice Note 6; HKEx-LD61-1
Decision	<p>Company A must:</p> <ul style="list-style-type: none">a. issue a supplemental prospectus to update investors of the material change made to the prospectus;b. give applicants who had applied for its shares a right to withdraw their subscriptions. Unless Company A received positive confirmations from these applicants to proceed with their subscriptions, their applications must be rejected (opt-in approach);c. make every possible effort to contact the applicants so that they had an opportunity to make an actual choice rather than a 'choice' by default;d. ensure that the revised listing timetable would not unduly delay the listing process; ande. apply to the Securities and Futures Commission (SFC) for all necessary exemptions under the Companies Ordinance <u>the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)</u> for the issue of the supplemental prospectus <u>(Updated in April 2014)</u>.

SUMMARY OF FACTS

1. Company A issued a prospectus on Day 1¹ for its public offer of shares which comprised a public offer tranche and a placing tranche.
2. The original listing timetable in the prospectus was:

¹ The reference to days is to business days.

Table 1: Original Listing Timetable

Event	Timeline
Application lists opened	Before noon, Day 15
Application lists closed	Noon, Day 15
Announcement of the allotment results	Day 21
Dispatch of share certificates to wholly or partially successful applications in the public offer tranche	Day 21
Dispatch of refund cheques to wholly or partially unsuccessful applications in the public offer tranche	Day 21
Dealings in shares of Company A on the Exchange	Day 22

3. Shortly after the subscription lists closed, Company A decided to reduce the offer price by approximately 10 per cent. It received about 450 valid applications under the public offer tranche.
4. Company A applied to the Exchange for consent to issue a supplemental prospectus which would include :
 - a. the revised offer price;
 - b. information about the withdrawal of share applications - applicants who had made valid applications would be deemed to withdraw them if no positive confirmations to continue with the applications were received within a specified period. Only those eligible applicants who confirmed their applications in a prescribed manner would receive share allocations;
 - c. the arrangements for notifying applicants of the arrangements to confirm their applications;
 - d. consequential amendments to the prospectus as a result of the revised offer price, eg. revised market capitalisation, revised price/earnings multiple; revised unaudited pro forma adjusted net tangible assets; revised disclosure on use of proceeds; a statement relating to Company A's working capital adequacy; revised underwriting obligations; etc.
 - e. the revised listing timetable:

Table 2: Revised Listing Timetable

Event	Timeline
Disclosure of allotment results	Day 21 (no change)
Issue of supplemental prospectus	Day 21 to Day 23
Refund of subscription monies for valid or invalid applications (Note)	Day 21
The period during which eligible applicants could, if they wished, confirm their applications	Day 21 to Day 23
Announcement of the allotment results taking into account confirmed applications	Day 25
Dispatch of share certificates	Day 25
Dispatch of refund cheques to unconfirmed valid applications	Day 26
Dealings in shares of Company A on the Exchange	Day 26

Note: *Full refund for invalid applications; for valid applications, refund would be the difference between the price payable on application and the revised share offer price.*

THE ISSUE RAISED FOR CONSIDERATION

5. How Company A should deal with material changes of circumstances after issue of the prospectus.

APPLICABLE LISTING RULES OR PRINCIPLE

General Principles

6. Rule 2.03(2) sets out the general principles:

The Exchange Listing Rules reflect currently acceptable standards in the market place and are designed to ensure that investors have and can maintain confidence in the market and in particular that:-

...

- (2) the issue and marketing of securities is conducted in a fair and orderly manner and that potential investors are given sufficient information to enable them to make a properly informed assessment of an issuer and, in the case of a guaranteed issue, the guarantor and of the securities for which listing is sought;

Supplementary listing document

7. Rule 11.07 states that all listing documents must:

as an overriding principle, contain such particulars and information which, according to the particular nature of the issuer and the securities for which listing is sought, is necessary to enable an investor to make an informed assessment of the activities, assets and liabilities, financial position, management and prospects of the issuer and its profits and losses and of the rights attaching to such securities.

8. Rule 11.13 requires that:

If at any time after the issue of the listing document or a supplementary listing document as provided for by this rule and before the commencement of dealings in any securities, the issuer becomes aware that:-

(1) there has been a significant change affecting any matter contained in the listing document; or

(2) a significant new matter has arisen, the inclusion of information in respect of which would have been required to be in the listing document if it had arisen before the listing document was issued,

the issuer shall, as soon as practicable, submit to the Exchange for its review and, once the Exchange has confirmed that it has no further comments thereon, issue a supplementary listing document giving details of the change or new matter, unless the Exchange agrees otherwise.

For the purpose “significant” means significant for the purpose of making an informed assessment of the matters mentioned in Rule 11.07 above.

Certainty of Offer Periods

9. Paragraph 2 of Practice Note 6 of the Listing Rules states that:

...the Exchange places particular importance on the details relating to an offer period set out in listing documents issued in support of an offer of securities. The Exchange considers the details of an offer period to be a material term of the listing document which must be relied upon by all investors and which should remain the same for all investors. Furthermore, in order to ensure that all investors are treated fairly and equally, and so that there is no confusion or uncertainty surrounding the offer period, the offer period set out in the listing document should not normally be revised or extended.

10. Paragraph 3(2) of Practice Note 6 states that:

subject to any such qualifications acceptable to the Exchange, the closing date of the offer period and the period during which the subscription list is open, as stated in the listing document, may not be revised or extended and may not be subject to any unilateral right on the part of the issuer, the underwriter or any other person to revise or extend such date or period or to open the subscription list.

Prospectus Requirements under ~~Companies Ordinance~~ the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (Updated in April 2014)

11. Section 44A(1) of ~~Companies Ordinance~~ the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) provides that no allotment shall be made of any shares in or debentures of a company in pursuance of a prospectus issued generally and no proceedings shall be taken on applications made in pursuance of a prospectus issued generally until the beginning of the 3rd day after that on which the prospectus is first so issued or such later time (if any) as may be specified in the prospectus. The Ordinance refers to ‘the beginning of the said 3rd day or such later time’ as ‘the time of the opening of the subscription lists’. This requirement applies to the issue of a supplemental prospectus or a replacement prospectus.
12. An issuer may supplement or amend information contained in a prospectus which has already been registered under the ~~Companies Ordinance~~ Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) under the Twentieth Schedule to the Ordinance. Prospectus provisions in Part II or XII of the ~~Companies Ordinance~~ Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), including the content requirements in the Third Schedule, will apply, unless those provisions are not applicable or fall within the exemption power of the SFC and are exempted under section 38A(1) (for Hong Kong companies)/ section 342(1) (for overseas companies).

THE ANALYSIS

General

13. In line with the Exchange’s decision in HKEx-LD61-1 published in July 2008, the Exchange considers a downward revision of the IPO share offer price a material change of circumstances requiring the issue of a supplemental prospectus.
14. The financial industry as a whole has not adopted any fixed procedures for handling matters resulting from the issue of a supplemental prospectus. As a general rule, the Exchange’s practice is to require the issuer, where appropriate, to extend the offer period and/or grant a right of withdrawal to applicants who have submitted applications under the original prospectus. Further, the issuer must satisfy the Exchange that it has in place arrangements to ensure that the issue and marketing of securities is conducted in a fair and orderly manner.

15. In determining what withdrawal mechanism arrangements are appropriate, the Exchange expects the issuer to take into account:
 - a. the number of applicants, under the public offer tranche, who have submitted valid applications;
 - b. the arrangements for notifying the successful applicants subscribing through various subscription methods of their withdrawal right and related information. The issuer must use best endeavours to contact each individual successful applicant, either directly or indirectly through brokers, banks or other intermediaries, to inform them of the relevant information; and
 - c. giving investors sufficient time to digest new information in the supplemental prospectus to enable them to make an informed decision whether to continue with or withdraw their investments.

Precedent cases

16. Withdrawal mechanism was considered in two previous cases:

Case 1

17. Issuer 1 issued a supplemental prospectus because new material information relating to a judicial review on the issuer's listing emerged after publication of the prospectus. Issuer 1 provided options to the applicants to withdraw their share subscription applications. An opt-out approach was adopted under which applicants who wanted to withdraw were asked to submit withdrawal forms within three business days after the issue of the supplemental prospectus. If applicants did not submit their withdrawal forms, their applications remained valid. The number of applications received under the public offer prior to the issue of the supplemental prospectus was over 11,000 and over 20 per cent of the applicants opted to withdraw.

Case 2

18. Issuer 2 proposed a reduction in offer price after the prospectus date as a result of deterioration of market conditions. Issuer 2 provided options to applicants to withdraw. The Exchange decided that Issuer 2 must obtain positive confirmations from applicants before it could bind them to their subscriptions (ie. opt-in to continue). If applicants did not reconfirm their applications, their applications would be rejected. Applicants were given three business days to reconsider whether to confirm their applications. The number of valid applications received under the public offer was over 800 and over 80 per cent of the applicants opted to confirm their applications.
19. Although both opt-out and opt-in approaches have been accepted in withdrawal arrangements, the Exchange considers that the opt-in arrangement is better for investor protection because:
 - a. the requirement for positive confirmation avoids deeming inaction an affirmation where the terms of the original offer have changed materially; and

- b. at worst, an applicant wrongly rejected under an opt-in arrangement (ie. where the default position applies) loses an opportunity to make money if the share price rises in the aftermarket. By contrast, the loss of a wrongly accepted applicant under an opt-out arrangement could be an out-of-pocket loss if the shares perform badly after listing.
20. However, if the number of share applications is large, the withdrawal arrangements adopted in the precedent cases may not be practicable. In those cases, the offering may have to be terminated and relaunched.

Factual Application

21. The Exchange noted that:
- a. like the precedent cases, the eligible applicants were given reasonable time (three business days) to reconsider their investment in Company A;
 - b. there were fewer applications in the public offer than in the precedent cases;
 - c. Company A agreed to make every possible effort to contact applicants to enable them to make an actual choice whether to confirm their subscriptions.
22. Based on the revised timetable and the disclosures in the supplemental prospectus, the Exchange was satisfied that Company A should be able to handle the potential administrative implications of the opt-in approach.

THE DECISION

23. The Exchange decided that Company A must:
- a. issue a supplemental prospectus to update investors of the material change made to the prospectus;
 - b. give applicants who had applied for its shares a right to withdraw. Company A had to receive positive confirmations from these applicants to proceed, failing which their applications would be rejected;
 - c. make every possible effort to contact applicants so that they would have an opportunity to make an actual choice rather than a 'choice' by default;
 - d. ensure that the revised listing timetable for listing would not unduly delay the listing process; and
 - e. apply to the SFC for all necessary exemptions under ~~the Companies Ordinance~~ the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) for the supplemental prospectus (eg. exemptions from Section 38(1) and Section 44A of ~~Companies Ordinance~~ the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)) (*Updated in April 2014*).