Charltons - Hong Kong Law Newsletter - 14 November 2007

[online version](http://www.charltonslaw.com/pilot-scheme-requiring-the-early-posting-of-a-near-final-draft-ipo-prospectus-on-the-hkex-website-to-commence-january-2008/)

# Pilot Scheme Requiring The Early Posting Of A Near Final Draft IPO Prospectus On The HKEx Website To Commence January 2008

## Introduction

The Stock Exchange of Hong Kong Limited (the **Exchange**) and the Securities and Futures Commission (**SFC**) published a Joint Policy Statement on 5 November 2007, announcing that they are launching a pilot scheme requiring the posting of a Web Proof Information Pack (**WPIP**) on the website of Hong Kong Exchanges and Clearing Limited (**HKEx**) or the Growth Enterprise Market (**GEM**), prior to the issue of an initial public offering (**IPO**) prospectus. The scheme will also apply to SFC-authorised collective investment schemes (**CIS**), including SFC-authorised real estate investment trusts (**REITs**).

The pilot scheme will begin on 1 January 2008 and will apply to:

* all applicants whose listing applications are tabled to the Listing Committee on or after 1 January; and
* CIS applicants that receive the SFC's approval-in-principle letter on or after 1 January 2008.

Companies will be required to post a WPIP in the form of a near-final draft prospectus and CIS's must post a near-final draft offering circular. The WPIP will have to be submitted to the Exchange for posting on the HKEx website before information about the listing applicant is provided to institutional investors.

The SFC and Exchange will review the pilot scheme after three months and inform the market of their findings. If no major defect is found, the SFC and Exchange will formally codify the requirement to post WPIP by amending the Listing Rules.

This note is a summary of the Joint Policy Statement issued by the HKEx and SFC with regard to WPIP-posting. A copy of the [joint news release](http://www.hkex.com.hk/news/hkexnews/071105news.htm) ([see archive](071105news.pdf)) issued by the HKEx and the SFC can be found on the HKEx website. Documents attached to this release include:

* The Joint Policy Statement
* Sample Disclaimer Language on the WPIP
* Recommended Contents Layout of a WPIP
* Logistical Arrangements for Posting a WPIP on the HKEx Website
* Frequently Asked Questions

## Background

The current market practice is for underwriters to issue materials to institutional investors as part of the bookbuilding process and management roadshow. Institutional investors will normally receive a "red herring" or "pathfinder", i.e. a near-final prospectus draft, without pricing and related financial and offer size information. The full prospectus is issued later, usually offering a three and a half day period between the issue of the prospectus and the close of offer. Members of the public have first access to the prospectus at this point.

The Exchange has apparently received positive feedback from two cases where it asked new listing applicants to post information packs similar to the WPIP on the HKEx website prior to issuing the prospectus.

## Rationale for WPIP-posting

WPIP-posting at this early stage is aimed at addressing the apparent inequality of information available to institutional and retail investors leading up to an IPO and is intended to create a more level playing field. It is also hoped that posting the WPIP at an earlier stage in the listing process may help reduce media speculation and market rumours and hence the time spent monitoring these by the Exchange, the SFC and applicants.

## Timing of WPIP-posting

The obligation to post a WPIP will arise when the applicant, via its sponsor, receives a "request for posting" from the Exchange. The "request for posting" is expected to be issued at about the same time as the Exchange sends out the letter setting out the Listing Committee's comments and any conditions to the listing approval (the **Post-Hearing Letter**). The applicant will have to submit the WPIP to the Exchange for posting on the HKEx website on a business day at the earliest practicable time, not later than the earlier of:

1. the time at which the applicant first distributes any red herring prospectus to institutional investors; and
2. the time at which the first meeting (whether held physically or by video conference or any other media) with the institutional investors commences for bookbuilding purposes, irrespective of whether any red herring has been distributed.

These criteria determine the "Prescribed Timing Requirement for WPIP-posting". The "request for posting" will be issued to CIS listing applicants by the SFC at around the same time as the SFC issues the approval-in-principle letter.

## Requirement for Sponsor confirmation

The WPIP will be required to be submitted by the sponsor on behalf of the applicant. At the time of submitting the WPIP, the sponsor will also be required to confirm to the Exchange in writing that the Prescribed Timing Requirement for WPIP-posting has been complied with.

## Changes to the WPIP

Whenever the applicant makes any changes to its red herring prospectus and distributes materials reflecting such changes to the institutional investors, the same materials must be submitted for posting on the HKEx website. Where the WPIP is replaced after its initial posting, the revised WPIP must be backlined to reflect the changes made to the previously posted WPIP.

## No pre-vetting or approval of WPIP by Exchange or SFC is required

The WPIP and subsequent changes do not require pre-vetting or clearance from the Exchange or the SFC prior to posting. However, such changes would still need to be cleared by the Exchange or the SFC prior to bulk printing of the final prospectus.

## Language of the WPIP

The WPIP posted on the HKEx website must be issued in English and accompanied by a Chinese translation. The Chinese translation must also be posted within the Prescribed Timing Requirement for WPIP-posting.

## Content requirements of a WPIP

The preparation of the WPIP must follow the principles given below:

1. it should contain essentially the same information about the applicant as the red herring provides to institutional investors, with the exception of information relating only to the placing tranche;
2. it must not contain any information about the proposed offering, price or means to subscribe for shares in the applicant until a prospectus duly registered in accordance with the relevant provisions of the Companies Ordinance (**CO**) is published;
3. it must not contain any information regarding the proposed offering or other information which may result in the WPIP being construed as a prospectus or offering advertisement under the CO regime or falling under the prohibition described in section 103 of the Securities and Futures Ordinance (**SFO**); and
4. there must be an appropriate disclaimer and warning language to advise viewers of the legal status of the WPIP. A sample disclaimer can be found at Attachment 1 to the Joint Policy Statement. Applicants and sponsors can adopt their own disclaimers and warnings, but they must include statements to the effect that;
   1. the WPIP is not an offer to sell or an invitation to induce or solicit an offer to acquire, purchase or subscribe for securities in any jurisdiction;
   2. the WPIP is not an offering document, nor is it in final form and is therefore subject to change;
   3. no investment decision should be based on the information contained in the WPIP;
   4. there is no guarantee that there will be an offering;
   5. any eventual offer will be the subject of a duly registered prospectus, being the only document on which investors should rely.

The WPIP should generally follow the contents layout and format of the prospectus that will be ultimately registered by the Registrar of Companies. The recommended contents layout for WPIP is set out at Attachment 2 to the Joint Policy Statement.

If there is a concern that WPIP posting may violate securities laws in overseas jurisdictions in which the offering is intended to be marketed, the Exchange recommends that the WPIP includes sufficient warning language to make is clear that the WPIP is intended for access by persons in Hong Kong only. A sample web page containing an acceptance statement from viewers is set out in Part 2 of Attachment 1 to the Joint Policy Statement.

The WPIP must be printable and text-searchable, but must be a read-only document and not be capable of being copied or edited electronically.

## Withdrawal of WPIP from HKEx website

In the event that the applicant's offering does not proceed, the WPIP will remain on the HKEx website until the applicant gives notice to the Exchange to withdraw its listing application (and in the case of CIS applicants, the CIS listing applicant gives notice to the SFC to withdraw its authorisation application) or the relevant application lapses. The Exchange will then withdraw the WPIP and any supplemental documents from the HKEx website as soon as is practicable.

Where the applicant's offering proceeds to listing, the applicant must re-submit all the WPIP materials through the HKEx's electronic publication system (**HKEx-EPS**) for publication on the Latest Listed Company Information section of the Main Board website or the Latest Company Announcement section of the GEM website. It is anticipated that eventually the HKEx-EPS system will be enhanced to incorporate WPIP posting so no re-posting of WPIP materials will be required.

During the pilot scheme, WPIP posting will not be made via the HKEx-EPS system. The WPIP will be required to be submitted on a CD ROM to the IPO Transactions Department between 9.00 a.m. and 6.00 p.m. on a business day. The logistical arrangements for posting are set out in full in Attachment 3 to the Joint Policy Statement.

## Regulatory Status of WPIP

The HKEx and SFC have jointly obtained a legal opinion from a London Q.C. advising on the legal status of the WPIP.

Based on the policy rationale for the Exchange requirement regarding WPIP-posting and the legal opinion from Counsel, the SFC is of the view that any WPIP posted on the HKEx website:

1. will not constitute a prospectus under section 2(1) of the CO;
2. will not constitute an "advertisement" or an "extract from or abridged version of a prospectus" (section 38B(1)(a) of the CO); nor will it constitute an "advertisement in relation to a prospectus or proposed prospectus" (section 38B(1)(b) of the CO); and
3. will not constitute a prohibited advertisement under section 103(1) SFO.

## Modification of the Listing Rules

The requirement to post WPIP on the HKEx website constitutes a modification of Main Board Rule 2.07C(1)(b)(ii) and GEM Rule 16.17(2)(b) which is intended to have general effect. The SFC has consented to such modification as is required by the Listing Rules. The Exchange intends to make amendments to the Listing Rules to codify the requirement for WPIP-posting following a review of the operation of the pilot scheme to be completed 3 months after launch.

Appropriate amendments to the statutory regime will be proposed to clarify and address the issues of criminal and civil liability in connection with posting WPIP on the HKEx website. These amendments, subject to public consultation and the legislative process, are expected to be included as part of the package to take forward the proposals set out in the Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance published in August 2005 and in the subsequent conclusions published in September 2006.

## Further Information

[Frequently Asked Questions](http://www.hkex.com.hk/news/hkexnews/071105news.htm) are provided on the HKEx website.

Applicants and their advisers are encouraged to contact the relevant staff of the Exchange IPO Transactions Department or, in the case of CIS listing applicants, the relevant staff of the Investment Products department of the SFC, if they envisage any difficulties in complying fully with the requirements described in the Joint Policy Statement.

The purpose of this note is to provide a summary only of the Joint Policy Statement released by the Exchange and the SFC.

**This newsletter is for information purposes only.**

Its contents do not constitute legal advice and it should not be regarded as a substitute for detailed advice in individual cases.

Transmission of this information is not intended to create and receipt does not constitute a lawyer-client relationship between Charltons and the user or browser.

Charltons is not responsible for any third party content which can be accessed through the website.

If you do not wish to receive this newsletter please let us know by emailing us at [unsubscribe@charltonslaw.com](mailto:unsubscribe@charltonslaw.com?subject=unsubscribe%20-Hong%20Kong%20Law-)

**Charltons - Hong Kong Law Newsletter - Issue 55 - 14 November 2007**