Charltons - Hong Kong Law Newsletter - 31 January 2012

[online version](http://www.charltonslaw.com/sehk-recent-publications-on-revised-publication-window-for-issuers-documents-pre-ipo-investments/)

# SEHK Recent Publications On Revised Publication Window For Issuers’ Documents, Pre-IPO Investments, Whether A Fund Manager Is A Connected Person Of Its Investee Company, Disclosure In “Summary And Highlights” Section Of IPO Listing Documents And Issuers’ Financial Reports

The Stock Exchange of Hong Kong (**SEHK** or the **Exchange**) has recently published the following:

* A reminder of the revised publication window for issuers’ documents through the HKEx news website effective 5 March 2012
* Its interim guidance on pre-IPO investments originally issued in October 2010
* A Listing Decision on whether a fund manager was a connected person of its investee company
* Guidance on disclosure in the “Summary and Highlights” section in IPO listing documents
* A report on its review of financial reports of listed issuers.

The following provides a summary of the above publications.

## Revised Publication Window For Issuers’ Documents Through HKExnews Website

Under Phase 2 of the extension of trading hours which will come into effect on Monday 5 March 2012, the afternoon trading session will be lengthened by 30 minutes and, as a result, the lunch time publication window will be shortened by 30 minutes. Under the new arrangements:

* the afternoon trading session will be from 13.00 to 16.00 (instead of 13.30 to 16.00); and
* the lunch time publication window will be from 12.00 to 12.30 (instead of from 12.00 to 13.00).

The [Exchange’s letter of 30 January 2012 to relevant parties](http://www.hkex.com.hk/eng/rulesreg/listrules/listletter/Documents/20120130.pdf) ([see archive](20120130.pdf)) reminds issuers to ensure that there is sufficient time if they need to post price sensitive information during the lunch time publication window. If an issuer has price sensitive information which has not been announced, it may need to suspend trading in its securities pending the publication of an announcement.

## Interim Guidance On Pre-IPO Investments

The Exchange has re-published its interim guidance on pre-IPO investments which was originally published in October 2010 following a review of the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited (the **Listing Rules** or **Rules**) in 2008. The Exchange has re-published this guidance ahead of a possible future consultation on the amendment of the placing guidelines and related Listing Rules.

The Listing Rules do not deal specifically with pre-IPO investments. The Exchange has in the past based its decisions on whether to allow the terms and conditions of particular pre-IPO investments to survive listing on whether they meet the requirements of Rules 2.03(2) and (4) of the Main Board and Rules 2.06(2) and (4) of the Growth Enterprise Market (**GEM**). These Rules require that the issue and marketing of securities is conducted in a fair and orderly manner and that all holders of listed securities are treated fairly and equally. The Listing Committee has published Listing Decision Series 36, 55 and 59 relating to pre-IPO investments. For further information on these decisions, please see our newsletter of 3 November 2010 which is available [here](/newsletters/hklaw/en/2010/97/nl-hklaw-20101103-97.html).

The interim guidance letter on pre-IPO investments stated that, generally and with rare exceptions, pre-IPO investments must be completed either:

1. at least 28 clear days before the date of the first submission of the first listing application form; or
2. 180 clear days before the first day of trading of the applicant’s securities.

Clear days exclude the day the pre-IPO investment is completed, the day the listing application form is submitted and the first day the applicant’s securities are traded. Pre-IPO investments are considered to be completed when the funds involved are irrevocably settled and received by the applicant. Exceptional circumstances may exist where it is acceptable for pre-IPO investments to be offered on terms more favourable than those offered to investors at the IPO stage, but the Exchange retains the discretion in giving exceptions to individual cases based on their own facts and circumstances.

The [Exchange’s guidance letter](http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/Documents/gl29-12.pdf) ([see archive](gl29-12.pdf)) on pre-IPO investments can be accessed on the Exchange’s website.

While the interim guidance provides clarity on the permitted timing for pre-IPO investments, there is still uncertainty as to the pre-IPO investment terms and conditions which will be allowed for investments complying with the timing requirements. The interim guidance encourages potential listing applicants to consult the Listing Division before submission of the listing application. If there are any potential questions as to the acceptability of any pre-IPO investment, the prudent course will be to approach the Exchange early to avoid having to amend the terms and conditions of the investment later in order for the listing to go ahead.

## Listing Decision On Whether A Fund Manager Was A Connected Person Of Its Investee Company

The Stock Exchange of Hong Kong released Listing Decision (HKEx – LD22 – 2011) concerning whether a Fund Manager is a connected person of a company because it holds shares in the company for its clients, subject to the clients’ control over investment decisions and voting powers of the shares. Rules 1.01, 8.24 and 14A.11 of the Listing Rules are concerned. The Exchange decided that such Fund Manager is not a connected person of the company for the purpose of the listing rules.

### Facts

The case before the Exchange involved Company A – a Main Board issuer and the Manager – an international asset management group and a shareholder of Company A.

The Manager managed funds and assets for institutional and private clients around the world. The Manager held about 12 per cent of Company A’s shares (the **Shares**) for two categories of clients:

* 8 per cent were held under certain funds managed by the Manager. Investors of the funds were required to delegate, without recourse, the investment decisions and voting powers of the Shares to the Manager.
* 4 per cent were held under segregated investment accounts and closed-end funds on behalf of a number of clients (the **Segregated Funds**). Investors of the funds retained the power to instruct the Manager on how to exercise investment decisions and voting powers of the Shares. The mandate given by the clients to the Manager contained a proxy arrangement authorising the Manager to vote on behalf of the client according to the clients’ instruction. In the absence of specific voting instruction, the Manager shall exercise the voting rights according to the proxy voting policy endorsed by the clients. The policy sought to assure that proxies were voted in the best interest of each client.

### Submission

Company A submitted that the 4 per cent shares held under the Segregated Funds should be excluded when assessing whether the Manager was a substantial shareholder of Company A. The voting rights of the shares rested with the underlying clients, not with the Manager.

### Applicable Listing Rules

Rule 1.01 defines a “substantial shareholder” in relation to a company as:

a person who is entitled to exercise, or control the exercise of, 10 per cent or more of the voting power at any general meeting of the company.

Rule 14A.11 states that a “connected person” in relation to a company includes:

…a director, chief executive or substantial shareholder of the company…

Rule 8.24 states that:

The Exchange will not regard any connected person of the issuer as a member of the “public” or shares held by a connected person as being “in public hands”…

### The Exchange’s Response

According to the Rules, a connected person includes an issuer’s substantial shareholder for the purpose of the public float and connected transaction requirements. The aim of the requirement is to ensure a sufficient amount of listed securities in public hands so that there is an open market for trading. The requirement also aims to safeguard the interest of the issuer’s minority shareholders against the connected persons taking advantage of their positions.

The Exchange found that the 4 per cent shares under the Segregated Funds could be distinguished from the other 8 per cent shares held by the Manager.

First, the clients, as the beneficial owners of the shares, had ultimate control over the investment portfolios including the purchase and sale of the shares.

Second, the exercise of the voting rights attached to the shares was always subject to the clients’ specific instructions. Even without specific instructions, the Manager must vote in the best interest of the clients, not itself, according to the proxy voting policy endorsed by the clients.

Therefore, the 4 per cent shares under the Segregated Funds are not under the control of the Manager. It only had control over the remaining 8 per cent of the shares, under the 10 per cent threshold under Rule 1.01. It was not therefore a substantial shareholder of Company A.

### Conclusion

The Manager was not Company A’s connected person by virtue of not being a substantial shareholder.

## Guidance On Disclosure In The “Summary And Highlights” Section In IPO Listing Documents

The Exchange has published a new guidance letter in relation to the disclosure of information in the “Summary and Highlights” section of IPO listing documents (the **Summary Section**). The stated aims of the guidance is to help applicants make that section of their listing documents more comprehensible, readable in plain language, concise and useful in enabling investors to decide whether or not they should consider investing. These aims are based on the general duty of disclosure set out in Main Board Rule 11.07 (GEM Rule 14.08(7)) and the requirements set out in Main Board Rule 2.13 (GEM Rule 17.56) that information in the listing document must be:

1. clearly presented in plain language (including forms or formats specified by the Exchange or the Securities and Futures Commission (the SFC)); and
2. accurate and complete in all material respects and not be misleading or deceptive.

The guidance letter recommends that, in general, the Summary Section should not simply be a collage of content cut and pasted from later parts of the listing document. Rather, the Summary Section should be a separately drafted high level overview of the listing document. The applicant must decide what is and is not material in order to determine the contents and presentation of the Summary Section. Attachment 1 to the guidance letter includes a list of general principles in relation to language and presentation in the Summary Section. It also includes a checklist of information that applicants should consider incorporating in the Summary Section of their own listing documents.

The [Exchange’s guidance](http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/Documents/gl27-12.pdf) ([see archive](gl27-12.pdf)) on the Summary Section can be accessed on their website.

## The Exchange’s Review Of Financial Reports Of Listed Issuers

Under the Financial Statements Review Programme, the Exchange has published a [report on its review of 100 financial reports](http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/frm-11.pdf) ([see archive](frm-11.pdf)) released by listed companies between October 2009 and April 2011. The purpose of the Financial Statements Review Programme is to sample annual, interim and quarterly reports from listed issuers and to monitor and report on compliance with the disclosure requirements set out in the Listing Rules and accounting standards. Part of the review process involves the Exchange notifying the listed companies involved of possible non-compliance in their financial reports. The Exchange allows minor omissions to be corrected in future financial reports.

The Exchange made the following key observations:

* discussions in Management Discussion and Analysis should be consistent with the financial statements and should be useful in explaining the company’s performance and financial position;
* more information should be included in financial reports to explain the nature and impact of significant events and material balances and transactions; and
* disclosure in relation to connected and related parties has improved, but can be improved further.

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