
Legal Updates & News

Legal Updates

Hong Kong Stock Exchange Listing Rules: Practical Implications of the Recent Amendments

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As listed companies prepare for the Spring reporting and AGM season, they will need to take into account the major Listing Rule amendments which came into force in January 2009, and the developments last week on the blackout period for directors' dealings. This legal briefing discusses the 10 major amendments to the Listing Rules and their practical implications in this context, particularly areas where listed issuers may need to take further action.

These amendments implement the conclusions of the 2008 Combined Consultation Paper on Proposed Changes to the Listing Rules, published by the Stock Exchange of Hong Kong Limited ("**Exchange**") and will significantly affect listed issuers, directors, company secretaries, sponsors, and professional advisors.

The full text of the consultation conclusions and Listing Rule amendments is available on the Exchange's [website](#). If you have any questions on the amendments or required action, please feel free to contact us. Contact details are set out at the end of this briefing.

1. Revised Model Code for Securities Transactions by Directors of Listed Issuers

Proposed extension of blackout period

The blackout period when a director must not deal in any securities of the listed issuer is proposed to be extended. Initially the proposal was for the period to last from the end of the financial period of the listed issuer to the date on which the listed issuer publishes the relevant results announcement.

This proposal caused controversy, and its implementation was deferred until 1 April 2009. It has meanwhile been modified.

The modified proposal is an extension of the blackout period from 30 days to 60 days before the publication of an issuer's annual financial results. The blackout period for half-year and other interim periods would be 30 days, in line with the current requirement. To assist the Exchange in monitoring the revised blackout arrangements, listed issuers would be required to give prior notification to the Listing Division of the imminent commencement of any blackout period relating to the publication of financial results.

Time limit for directors' dealings

A time limit of 5 business days has been imposed for a listed issuer to respond to a director's request for clearance to deal, with a time limit of 5 business days for dealing once clearance is given. Please note that the bar on dealing when in possession of price-sensitive information will still apply in the event that price-sensitive information develops following the grant of clearance.

Definition of price sensitive information

The definition of price-sensitive information in the Model Code has been clarified and aligned with the meaning contained in Main Board Listing Rule 13.09.

Three new exceptions to the definition of dealing:

- dealings where the beneficial ownership does not change;
- dealings to facilitate a top-up placing if the shareholder subscribes for an equal number of shares at the same price; and
- dealings where beneficial ownership is transferred by operation of law (e.g., intestacy).

What do you need to do?

Listed issuers will need to amend their internal codes on directors' dealings to ensure that they comply with the revised Model Code. A listed issuer should ensure that it has appropriate internal compliance systems in place and that its directors and company secretary are familiar with the new requirements.

2. New Directors' and Supervisors' Declaration and Undertaking Forms

The rules on Directors' and Supervisors' Undertakings have been variously streamlined and extended by:

- removing questions concerning the directors'/supervisors' biographical details—instead the undertaking form cross-references the announcement or listing document disclosure regarding the director/supervisor;
- removing the statutory declaration requirement—however, a director or supervisor who provides information to the Exchange which is false or misleading in a material particular may breach s.384 of the SFO and thus be subject to criminal sanctions;
- giving the Exchange express powers to gather information from directors and supervisors for the purposes of protecting investors, ensuring smooth operation of the market, or verifying compliance with the Listing Rules; and
- including detailed provisions for service of disciplinary proceedings.

What do you need to do?

Directors who were appointed by a listed issuer before 1 January 2009 and who continue to hold office must sign and submit a new undertaking in the form set out in Part 2 of Form B or H of Appendix 5 (for Main Board listed issuers) or Part 2 of Form A, B, or H of Appendix 6 (for GEM Board-listed issuers) by 31 March 2009.

Existing supervisors who were appointed by a PRC-listed issuer and have submitted old undertaking forms will not be affected by this change.

Any person appointed as a director by more than one listed issuer must submit a separate undertaking form for each listed issuer.

A PDF version of each type of the undertaking forms for the [Main Board](#) and [GEM](#) is available for downloading on the Exchange's website.

3. Use of Website for Communication with Shareholders

A company listed on the Exchange can now send corporate communications to a shareholder solely by making them available on its website (and also on the website of the Exchange), provided that:

- the listed issuer's constitutional documents so provide or the shareholders have approved this measure by ordinary resolution;
- the listed issuer has asked the relevant shareholder individually for his/her consent (the "Request"); and
- the listed issuer has not received a notice of objection from the relevant shareholder within 28 days from the date of such Request, i.e., silence from the shareholder is deemed to be consent.

Exceptions to deemed consent

The limitations of the deemed consent mechanism are that it does not apply:

- if it contravenes the law of the listed issuer's place of incorporation. Currently, listed companies incorporated in Hong Kong are not eligible because of the provisions of the Companies Ordinance;
- to any medium except website communication. Express, positive consent is still required for other electronic means or electronic format (e.g., emailing a corporate communication or its hyperlink to a shareholder or sealing a CD);
- to a shareholder who notifies the listed issuer that he/she wishes to receive communications in printed form; and
- where a previous Request was made less than 12 months previously for the same class of corporate communication.

What do you need to do?

Listed issuers can choose whether or not to adopt website communication.

If a listed issuer incorporated outside Hong Kong, such as in the Cayman Islands and Bermuda, wishes to do so, it should:

- amend its articles of association (or bylaws) or obtain shareholders' approval in a general meeting for corporate communications to be issued via the listed issuer's website;
- request consent from shareholders individually for corporate communications to be issued to them via the listed issuer's website. There is a waiting period of 28 days before consent is deemed given by shareholders who have not refused; and
- when publishing any corporate communication, notify those shareholders who are deemed to have given consent with details of how to access the communication on the website (the notification can be done by email if and only if the shareholder has previously agreed to that mode of communication).

For listed issuers incorporated in the PRC, it is advised that PRC legal advice be sought to ensure compliance with PRC laws.

4. Qualified Accountants

- Listed issuers are no longer required to engage a qualified accountant.
- The revised Code on Corporate Governance Practices requires directors to conduct an annual review on, and the Audit Committee to have oversight of, whether the staffing of the issuer's financial reporting function is sufficient.

What do you need to do?

- Conduct an annual review of adequacy of resources, qualifications and experience of the listed issuer's accounting staff, their training programs, and budget. The Board and the Audit Committee should clearly understand these responsibilities.
- Amend the terms of reference of the Audit Committee before their next meeting.
- Complete records of meetings in a timely manner regarding the dismissing of the Qualified Accountant.

5. General Meetings

- Voting by poll is mandatory on all resolutions at all general meetings.
- Minimum notice periods for shareholders' meetings, of 20 clear business days for AGMs and 10 clear business days for other general meetings, have been set by an amendment to the Code on Corporate Governance Practices.

What do you need to do?

A listed issuer should:

- comply with the new minimum notice requirements for shareholders' meetings, or otherwise be ready to explain the deviation in the next annual or interim report;
- ensure that circulars for general meetings are clear that the voting will be by poll and that scrutineers have been arranged to handle the poll voting procedures; and

- preferably amend its articles of association (or bylaws) if their provisions on voting procedures conflict with the new requirement. Until the amendment is made, the chairman of any general meeting (including the one held to consider the amendment) should use the power usually given to him/her in the articles to call for a poll vote on all resolutions.

6. Moving from Pre-Vetting to Post-Vetting of Public Documents

6.1 Announcements

Under the amended Listing Rules, announcements of a listed issuer do not need to be pre-vetted by the Exchange, except:

- on notifiable transactions or arrangements that require shareholders' approval (i.e., any major transaction, very substantial disposal, very substantial acquisition, or reverse takeover);
- on connected transactions;
- on any transaction or arrangement which would result in a fundamental change in principal activities within 12 months after listing; and
- by a cash company.

What do you need to know?

The removal of the pre-vetting requirement for various announcements will no doubt save time and costs for listed issuers. But note that the Exchange will still post-vet announcements and could require the issue of a clarification announcement if it finds the first announcement inadequate. Sanctions for providing false or misleading information remain, and issuers and their officers will not have the comfort of clearance from the Exchange before publication. The Exchange has also updated and prepared new checklists and forms which should be used by listed issuers.

The Exchange has published the following guidance materials to assist listed issuers in complying with this area of the Listing Rules:

- “*Guide on Practices and Procedures for Post-vetting Announcements of Listed Issuers and Handling Matters Involving Trading Arrangements Prior to Publication of Announcements*”;
- an updated “*Guide on Pre-vetting Requirements and Selection of Headline Categories for Announcements*”;
- “*Guide on Interpretation of Listing Rules and Request for Individual Guidance*”;
- “*Guide on Applications for Waivers and Modifications of the Listing Rules*”;
- a new set of Frequently Asked Questions on specific compliance issues; and
- new Listing Decisions on computation of percentage ratios, deemed connected persons, and aggregation of transactions.

6.2 Amendments of constitutive documents / Share repurchase

There are no pre-vetting requirements with respect to (i) circulars for proposed amendments to listed issuer memoranda and articles of association (or bylaws) or (ii) explanatory statements relating to mandates for listed issuers to purchase their own shares on a stock exchange.

However, there are new requirements for the issuer to submit the following to the Exchange in those two respective cases:

- in relation to (i):
 - (a) a letter from the issuer's legal advisers confirming that the proposed amendments comply with the requirements of the Listing Rules and the laws of the place of its incorporation; and
 - (b) a confirmation from the issuer that there is nothing unusual about the proposed amendments for a company listed in Hong Kong.
- in relation to (ii), a confirmation by the issuer to the Exchange that:

(a) the explanatory statement is in compliance with the disclosure requirements under the Listing Rules; and

(b) neither the explanatory statement nor the proposed share repurchase has unusual features.

What do you need to know?

In assessing whether there is anything “unusual” for the purposes of giving the confirmation to the Exchange:

- in relation to (i), the directors should consider whether the proposed amendments to the memorandum and articles of association are a usual or common feature of the articles of association of companies listed in Hong Kong.
- in relation to (ii), the directors should consider the specific requirements under the Listing Rules, its own circumstances, and features of share repurchase proposals which by virtue of their very frequent occurrence can be regarded as usual or common features of such proposals.

A listed issuer should consult its legal advisers and the Exchange if in doubt.

6.3 Discloseable transactions

The requirement to publish a circular following the announcement of a discloseable transaction has been removed from the Listing Rules. However, where a profit forecast is made in relation to the discloseable transaction, a listed issuer is required to include in the announcement (or in a further announcement within 21 days) the expert reports in relation to the profit forecast.

6.4 Trading arrangements

A listed issuer must consult the Exchange before publishing any document the subject matter of which involves a change regarding the trading arrangements of the issuer’s listed securities (including a suspension or resumption of dealings, or a cancellation or withdrawal of listing).

What do you need to know?

As many types of announcement are no longer required to be pre-vetted by the Exchange, a listed issuer should check carefully whether a proposed announcement contains any reference to a specific date or timetable which concerns the trading arrangements of its listed securities.

The document must not disclose any such specific date or timetable unless it has been agreed in advance with the Exchange.

A PDF version of each type of checklist and form for the [Main Board](#) and [GEM](#) is available for downloading on the Exchange’s website.

7. Disclosure of Changes in Issued Share Capital

- The amended Listing Rules require a listed issuer to submit a Next Day Disclosure Return to the Exchange with respect to changes in issued share capital by 9:00 a.m. on the next business day where:

(a) the changes are the result of certain specified events (e.g., placing, consideration issue, open offer, rights issue); or

(b) the changes are the result of other specified events (e.g., exercise of an option under a share option scheme other than by a director of the listed issuer or any of its subsidiaries; conversion of convertible securities), and there is a change of 5% or more of the issuer’s issued

share capital resulting from the event (subject to aggregation). Aggregation applies to all (b) type events which have not been previously disclosed in a Next Day Disclosure Return or a Monthly Return (see below).

- A listed issuer is also required to submit a Monthly Return to the Exchange on the listed issuer's share capital and other movements in its securities, including future obligations to issue shares, by 9:00 a.m. on the fifth business day following the end of each calendar month.
- A listed issuer must now also make an announcement as soon as possible upon the grant of any share options pursuant to a share option scheme.

What do you need to do?

A listed issuer should ensure that it has appropriate internal compliance systems in place and that its directors and company secretary are familiar with the new time-sensitive disclosure requirements.

8. Extension of Disclosure Requirements to Any Issue of Securities for Cash and Allocation Basis for Excess Shares in Rights Issue

- A listed issuer must now publish an announcement of any issue of securities for cash, whether or not made under a general mandate.
- The amended Listing Rules codify existing practice regarding disclosure of additional items of information in announcements of issues of securities for cash.
- A listed issuer must now also disclose the basis of allocation of excess shares in the announcement, circular, and listing document for a rights issue or an open offer.

What do you need to know?

This disclosure obligation arises at the time when the listed issuer agrees to issue securities for cash. However, listed issuers are reminded of the disclosure obligations under the amended rules in relation to disclosures of changes in issued share capital and submissions of monthly returns (see above).

The new disclosure requirement regarding to the basis of allocation of excess shares effectively shifts the timing of disclosure to that of the initial announcement. A listed issuer should thus ensure that the basis of allocation is properly prepared and ready for disclosure at an early stage of the transaction.

9. Increased Level of Disclosure of Information about and by Directors

Listed issues must make continuous and immediate disclosure, by way of announcement, of information relating to their directors, in particular information relating to their integrity or suitability for continuing to serve as a director.

Updates of other information relating to a director can still be disclosed only periodically in annual and interim reports.

What do you need to do?

Directors and supervisors have a specific obligation to inform the listed issuer of changes to their details immediately, and are required to procure and/or assist the listed issuer to comply with these disclosure obligations. In addition, directors and supervisors must accept responsibility for the accuracy of the information.

10. Alignment of Consent Requirements for Material Dilution in Major Subsidiary and Deemed Disposal

The Listing Rules have been amended to align the requirements for shareholders' consent on a material dilution in a major subsidiary and on a deemed disposal; in each case the requirement for shareholders' consent is now based on a size test threshold of 25%. A written certificate by major shareholders can be accepted in lieu of a physical shareholders' meeting.

What do you need to know?

A deemed disposal by a listed issuer includes an allotment of shares by a listed subsidiary, as the disposal reduces the percentage equity interest held by the listed parent in such listed subsidiary. As a listed subsidiary can place new shares by the exercise of the general mandate previously granted to its board by its shareholders, the Exchange ordinarily expects the listed parent to maintain control over the matter, e.g., by making the general mandate of the listed subsidiary subject to the condition that any exercise of such mandate would not trigger a major transaction for the listed parent.