

Corporate & Commercial

Waivers from Compliance with Disclosure Requirements under the Listing Rules

In May 2013, the Stock Exchange of Hong Kong Limited (the “**HKEx**”) issued three listing decisions concerning the grant of waivers from compliance with certain disclosure requirements under Chapter 14 of the Main Board Listing Rules (the “**Listing Rules**”). These listing decisions show that the HKEx continues to adhere closely to the Guide on Applications for Waivers and Modifications of the Listing Rules (the “**Guide**”) when determining waiver applications.

Introduction

To protect the interests of shareholders of a listed issuer and the public as a whole, Chapter 14 of the Listing Rules prescribes the particulars of certain transactions which a listed issuer is required to disclose. On the other hand, in order to suit the circumstances of a particular case, the HKEx may waive, modify or not require compliance with the Listing Rules pursuant to Rule 2.04 of the Listing Rules and upon application by the listed issuer.

The Guide

In November 2008, the HKEx published the Guide to provide details of considerations which the HKEx would take into account when assessing waiver applications and guidance to listed issuers in making waiver applications. The Guide sets out some general principles and a non-exhaustive list of factors which the HKEx would consider. When determining waiver applications, the HKEx would take into account the circumstances, reasons and all relevant information, which include whether compliance with the Listing Rules would be unduly burdensome or impractical for the listed issuer or prejudicial to the interests of the listed issuer. The HKEx would also have regard to whether a waiver would result in undue risks to shareholders and investors. As such, when considering a disclosure relief application, the HKEx would, in particular, take in account the importance of the information in question, whether omission of such information is likely to mislead investors and whether alternative disclosure by the listed issuer would provide sufficient information to shareholders and investors to properly assess the listed issuer’s securities or the proposed transactions. The HKEx would only grant a waiver where the Listing Rules already contemplate a waiver or in exceptional and justifiable circumstances.

The Listing Decisions

In May 2013, the HKEx issued three listing decisions concerning the waiver applications by the listed issuers, which illustrate how the Guide is applied in practice.

HKEx-LD67-2013

In this listing decision, the listed issuer is a financing service provider and proposed to provide a loan to a borrower on normal commercial terms (the “**Proposed Loan**”). The Proposed Loan was classified as a discloseable transaction under Chapter 14 of the Listing Rules. Pursuant to Rules 14.58(4) and (8), the listed issuer was required to issue an announcement disclosing, amongst other things, the value of the consideration and the expected benefits from the Proposed Loan. As such, the listed issuer applied for a waiver from disclosing the interest rate and the amount of interest and service fee it charges the borrower as this may undermine its competitiveness in the market. Further, it would be unduly burdensome and impractical to strictly comply with the disclosure requirement.

The listed issuer proposed to provide alternative disclosure in the announcement by setting out details of the borrower’s principal activity, its business relationship with the listed issuer, its credit history, the range of interest rates and services fees payable by the borrower, the collateral and other terms of the Proposed Loan and the listed issuer’s credit risk assessment in relation to the Proposed Loan.

In this case, the HKEx granted the waiver as the Proposed Loan was a discloseable transaction only and thus was not significant to the company. Further, the Proposed Loan was collateralised and the HKEx viewed that the proposed alternative disclosure would be sufficient to allow investors to assess the borrower and the risks and exposure of the Proposed Loan.

HKEx-LD68-2013

This listing decision concerned a listed issuer which was principally engaged in hotel investment and operation and it intended to acquire a building situated in Hong Kong (the “**Target Property**”) for redevelopment. The Target Property comprised of a number of units owned by various vendors. The listed issuer had entered into provisional sale and purchase agreements with some vendors (the “**Acquisitions**”), which in aggregate constituted a discloseable transaction. Pursuant to Rules 14.58(2), 14.60(1) and 14.60(2) of the Listing Rules, the listed issuer was required to disclose, among others, the principal business of the vendors which are companies, the general nature of transaction and details of the assets being acquired.

The listed issuer considered that the Acquisitions were arm’s length transactions and the information required to be disclosed was commercially sensitive as it was still negotiating

with other vendors for acquiring the remaining units of the Target Property. As such, it applied for a waiver from the HKEx from disclosing the principal business activities of the vendors which are companies, the name and address of the Target Property, the units subject to the Acquisitions and the conditions precedents for completion of the Acquisitions (the “**Relevant Information**”). It proposed to disclose in the announcement the district where the Target Property is located and the gross area of units it proposed to acquire. It proposed to further disclose that the vendors are independent third parties and the completion of the Acquisitions are subject to the satisfaction of certain conditions.

The HKEx granted a waiver. It took into account that the Acquisitions constituted a discloseable transaction only and disclosure of the Relevant Information at that time might be prejudicial to the listed issuer’s interest. Further, the HKEx viewed that the alternative disclosure would allow investors to understand the nature of the Acquisitions and the waiver would not result in an omission of material information in the initial announcement for the Acquisitions.

HKEx-LD69-2013

In this case, the listed issuer announced a disposal (the “**Disposal**”) of its entire interests in its subsidiary. The subsidiary then proposed to acquire a target company from an independent third party (the “**Acquisition**”), which would be classified as a very substantial acquisition for the subsidiary and a major transaction for the company. Under Rule 14.38A of the Listing Rules, the listed issuer was required to issue a circular upon entering into a major transaction. Since the completion of the Disposal was expected to take place before the subsidiary issued its circular and notice of general meeting for the approval of the Acquisition, the listed issuer sought a waiver from complying with Rule 14.38A.

The HKEx was of the view that it would be unduly burdensome for the listed issuer to issue a circular for the Acquisition if at that time the listed issuer ceased to be interested in the subsidiary. As such, it granted a waiver on condition that the Disposal would be completed before the subsidiary issued its circular for the Acquisition.

Conclusion

In the Guide, the HKEx set out the principles and factors in determining whether a waiver should be granted. Though the factors therein are not exhaustive, the listed issuer could at least have a basic understanding of the circumstances that the HKEx may grant waiver from strict compliance with the disclosure requirements under the Listing Rules. The listing decisions mentioned above demonstrate that that the HKEx continues to adhere closely to the Guide. As such, before making the waiver applications, the listed issuer is strongly recommended to review the Guide and the relevant listing decisions.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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