

Corporate & Commercial

New Guidance Letter on Issues Related to “Controlling Shareholder”

Introduction

The Stock Exchange of Hong Kong (the “**Exchange**”) published a new guidance letter (HKEX-GL89-16) (“**Guidance Letter**”) on issues related to “controlling shareholder” and related Listing Rules implications on 11 November 2016.

The Guidance Letter intends to:

1. provide guidance on the Exchange’s interpretation of the definition of “controlling shareholder” as set out in the Main Board Rules and the GEM Rules; and
2. clarify the Exchange’s practice regarding the key obligations of controlling shareholders under the Main Board Rules and GEM Rules.

Definition and the Exchange’s interpretation

Controlling Shareholder

Pursuant to Main Board Rule 1.01 (*c.f.* GEM Rule 1.01), “controlling shareholder” is defined as any person who is or group of persons who are together:

1. entitled to exercise or control the exercise of 30% (or such other amount as may from time to time be specified in the Code on Takeovers and Mergers as being the level for triggering a mandatory general offer) or more of the voting power at general meetings of the issuer; or
2. in a position to control the composition of a majority of the board of directors of the issuer.

The Exchange’s Interpretation

According to the Guidance Letter, the process of identifying the “controlling shareholder(s)” of a listing applicant is a case-specific exercise and depends on the facts and circumstances of each case, as such, the Exchange has the power to deem any shareholder to be a “controlling shareholder” or a group of “controlling shareholders” of an issuer based on the facts and circumstances of that case.

Below are the key examples of ownership structures of a listing applicant that were indicated in the Guidance Letter, along with the Exchange’s interpretation on the definition of controlling shareholder in each case:

Example 1: Shareholders directly holding the listing applicant

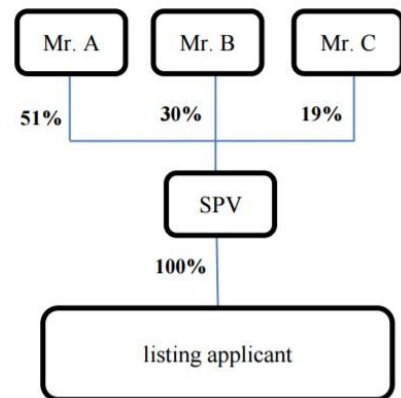
The Exchange considers each of Mr. A and Mr. B to be a controlling shareholder of the listing applicant given that each of Mr. A and Mr. B is entitled to exercise 30% or more of the voting power at the general meetings of the listing applicant; whereas Mr. C would not be considered as a controlling shareholder because he is neither entitled to exercise, nor has control the exercise of 30% or more of the voting power at the listing applicant’s general meeting.



Example 2: Shareholders holding their interests indirectly through a common investment company

The Exchange considers:

- Special-purpose vehicle (“**SPV**”) as the controlling shareholder of the listing applicant because it is entitled to exercise 30% or more of the voting power at the listing applicant’s general meeting;
- Mr. A as a controlling shareholder because he controls SPV by holding over 50% of SPV’s voting interest, and such voting interest also vest in the listing applicant based on SPV as the sole shareholder of the listing applicant.

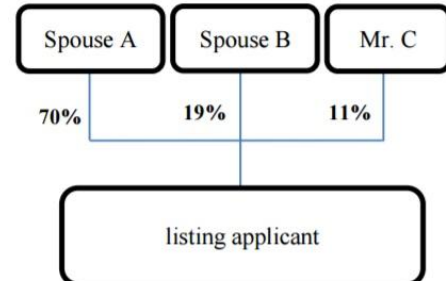


On the other hand, the Exchange will presume Mr. A, Mr. B and Mr. C as a group of controlling shareholders of the listing applicant because:

- Mr. A, Mr. B and Mr. C have decided to restrict their ability to exercise direct control over the listing applicant by holding their interest through a common investment holding company. Unless Mr. B and Mr. C rebut such presumption by way of detailed submission with reasons, the listing document should disclose both Mr. B and Mr. C as controlling shareholders.

Example 3: Shareholders who are close associates of each other

In this example, the Exchange will presume Spouse A and Spouse B to be a group of controlling shareholders by virtue of their relationship of being spouses and the listing document shall disclose Spouse B as a controlling shareholder, unless Spouse B or the listing applicant rebut by way of detailed submission with reasons.



Key requirements on “controlling shareholder” at pre-listing stage

Ownership continuity and control requirement

The Exchange requires listing applicants to demonstrate “ownership continuity and control” for at least the most recent financial year up until the time immediately before offering and/or placing becomes unconditional (the “**Relevant Period**”).

In compliance with the ownership continuity and control requirement, for at least the Relevant Period,

1. the shareholders constituting the group of controlling shareholders **must not change** (i.e. no addition or departure of shareholders);
2. there must be **no material changes** in the voting interests in the listing applicant held by each shareholder constituting the group of controlling shareholders/ SPV; and
3. such group of controlling shareholders together/SPV remains a group of controlling shareholders of the listing applicant and there are **no new** controlling shareholders.

Disclosure Requirement

Listing applicant is required to disclose the details of any controlling shareholders and their interests in any competing businesses in the listing document. In respect of determining the controlling shareholder(s) that need to satisfy the disclosure requirement:

- The above definition and interpretation of “controlling shareholders” applies; and
- It means the controlling shareholders of the listing applicant immediately upon completion of the offering and/or placing.

Key requirements on “controlling shareholder” at post-listing stage

Lock-up Requirements

According to Main Board Rule 10.07(1) (c.f. GEM rule 13.16A(1)), if a person/persons is/are listed as the controlling shareholder(s) of the issuer on its listing application shall not, apart from any offer of shares for sale contained in the listing document:

1. dispose of shares in a period commencing on the date by reference to which disclosure of the shareholding of the controlling shareholder is made in the listing document and ending on the date which is 6 months from the date of listing (the “**First Six-month Period**”); and
2. dispose of shares in the period of 6 months commencing on the date on which the First Six-month Period expires if immediately following such disposal that person or group of persons would cease to be a controlling shareholder (the “**Second Six-month Period**”).

To comply with the lock-up requirements, a group of controlling shareholders holding their interests directly or indirectly (such as through SPV) in the listed issuer shall:

in the First Six-month Period:

- the shareholders constituting the group of controlling shareholders **must not change** (i.e. no addition or departure of shareholders);
- there must be **no material changes** in the voting interests held by each shareholder constituting the group of controlling shareholders in the listed issuer (or among the shareholders of SPV as the case may be); and
- such group of controlling shareholders (or SPV as the case may be) **must maintain** the same aggregate voting interests in the listed issuer; and

in the Second Six-month Period:

- the shareholders constituting the group of controlling shareholders **must not change** (i.e. no addition or departure of shareholders);
- there must be **no material changes** in the voting interests held by each shareholder constituting the group of controlling shareholders in the listed issuer (or by each shareholder of SPV as the case may be); and

- such group of controlling shareholders (or SPV as the case may be) **must maintain** an aggregate voting interests of at least 30% in the listed issuer.

Note

The Exchange has made a clear statement that the Guidance Letter does not override the Listing Rules. As the Exchange will assess each of the ownership structure of a listing applicant on case-by-case bases, the Exchange welcomes potential listing applicant to consult with the Exchange in advance on any plans to transfer any voting interest in the listing applicant (or SPV as the case may be).

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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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