Charltons - Hong Kong Law Newsletter - 13 December 2010

[online version](http://www.charltonslaw.com/sfc-sehk-publish-joint-consultation-conclusions-on-the-proposal-to-allow-the-issue-of-paper-application-forms-with-electronic-listing-documents/)

# SFC/SEHK Publish Joint Consultation Conclusions On The Proposal To Allow The Issue Of Paper Application Forms With Electronic Listing Documents

## Introduction

On 1 April 2008 the Securities and Futures Commission ("**SFC**") and The Stock Exchange of Hong Kong ("**SEHK**") issued a Joint Consultation Paper proposing to allow listing applicants to issue paper application forms for shares and debentures, or interests in an SFC-authorised collective investment scheme ("**CIS**"), without the need to be accompanied by the associated paper listing document, subject to the satisfaction of certain conditions. The conditions are that issuers:

1. must make available an electronic copy of the listing document on the HKEx website and the company's own website;
2. must declare their intention to make a **Mixed Media Offer** (defined as a public offer of shares in or debentures of a company or interests in an SFC-authorised CIS in which the listing document is displayed on certain websites) prior to the offer opening and explain what this means for investors; and
3. are required to make appropriate disclosure in the prospectus and application forms of the Mixed Media Offer and clearly explain how and where investors can obtain a copy of the paper and electronic prospectus.

The proposed scheme is a green initiative and forms part of the SFC and SEHK's efforts to reduce the amount of printed offering documents. The respondents to the consultation were largely supportive of the proposal and the SFC and SEHK are implementing the required regulatory changes. These involve amendments to the Listing Rules and The Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice. The Class Exemption Notice to be inserted into the latter will, subject to negative vetting by the Legislative Council, come into effect on 1 February 2011. The Exchange Listing Rules amendments have been approved by the respective Boards of the SEHK and the SFC subject to the Class Exemption Notice coming into effect following negative vetting. The SFC and SEHK have also stated that the SFC Guidelines on the use of offer awareness and summary disclosure materials in offerings of shares and debentures under the Companies Ordinance issued in March 2003 will be interpreted so as to ensure consistency with the class exemption for a Mixed Media Offer.

## The Current Regulatory Regime

At present the issue of paper application forms without an accompanying printed prospectus is forbidden by Sections 38(3) and 342(3) of the Companies Ordinance (the "**CO**"). This prohibition has been interpreted to mean that companies conducting a public offering of shares and debentures (the "**CO Offeror**") cannot distribute a printed application form unless it is accompanied with a printed prospectus (the "**CO Accompaniment Requirement**"). Chapter 6.4 of the Code on Unit Trusts and Mutual Funds (the "**Unit Trusts Code**") and Paragraph B32 of Appendix B to the Code on Real Estate Investment Trusts (the "**REITs Code**") have similar requirements for SFC-authorised CIS seeking to list interests on the SEHK.

These requirements result in the generation of a large number of paper prospectuses, the majority of which are not taken up by the public. This is inconsistent with the environmental protection goals of the SEHK and SFC.

## The Proposal

The proposal is to allow the public distribution of paper application forms without the associated paper listing documents, subject to the meeting of certain conditions. This will require issuing a class exemption to exempt a CO Offeror conducting a public offer of shares in or debentures of a company to be listed on the SEHK, from compliance with the CO Accompaniment Requirement subject to a number of conditions. CIS offerors are to be granted a similar waiver. The proposed class exemption and waiver is to be inserted as section 9A of The Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice and will permit:

1. a CO Offeror to issue paper application forms ("**CO Paper Application Forms**") with electronic copies of the relevant prospectus ("**e-Prospectus**") in relation to a public offer of shares or debentures of a company that will be listed on the SEHK; and
2. a CIS Offeror to issue paper application forms ("**CIS Paper Application Forms**") with electronic copies of the relevant offering document in a public offer of interests in the CIS that will be listed on the SEHK.

In order to qualify for the class exemption the issuer must comply with a wide ranging set of conditions. The issuer must:

### 1. Publish an announcement about the proposed Mixed Media Offer (the "Announcement") during the five business day period prior to the commencement of the offer period (the "Relevant Period"). The Announcement should:

1. contain information about the proposed public offer of the company's shares or debentures to be listed on the SEHK;
2. state that the CO Offeror will rely on the class exemption to allow it to issue CO Paper Application Forms together with the e-Prospectus;
3. advise where the e-Prospectus will be accessible on the company's and the HKEx websites and provide instructions on how to access and download it throughout the offer period;
4. state that printed copies of the prospectus ("**Paper Prospectus**") will be made available for collection at specified locations, free of charge upon request and that at least three copies of the Paper Prospectus will be available for inspection wherever Paper Application Forms are available; and
5. contain particulars of these specified locations.

### 2. Make available copies of the Paper Prospectus for collection at specified locations free of charge, upon request by any member of the public, throughout the Offer Period and in addition there should be at least three copies of the Paper Prospectus available for inspection wherever CO Paper Application forms are made available during the offer period.

### 3. Display the e-Prospectus on the company's and the HKEx websites throughout the Offer Period in a form that is reasonably tamper resistant and not password protected. It should be easily accessible from the company's home page or from a subsequent page directly accessible from the company's homepage. Notice must also be given upon access to the e-Prospectus on the company's website that the offer is made solely on the basis of the information in the prospectus. The e-Prospectus should be viewable, downloadable, printable and capable of being saved in its entirety, whether in one or several files, by the public free of charge, from both the company's and HKEx's website.

### 4. Ensure that the e-Prospectus and Paper Prospectus are identical, as required by Rule 2.07C(2) of the Main Board Listing Rules and Rule 16.18(3)(a) of the GEM Listing Rules.

### 5. Ensure that the e-Prospectus contains, in a prominent place on the face of it, a statement in a clear and legible form:

1. that its contents are identical to those of the Paper Prospectus;
2. that copies of the Paper Prospectus are made available for collection at specified locations, free of charge, upon request by any member of the public throughout the Offer Period and that at least three copies of the Paper Prospectus will be available for inspection wherever CO Paper Application forms are made available during the offer period; and
3. the particulars of the specified locations.

### 6. Ensure that the CO Paper Application Form states in a prominent place:

1. that the e-Prospectus is displayed on the company's and the HKEx websites and is accessible and downloadable from those sites;
2. the addresses of the company's and the HKEx websites and the place on the site where the e-Prospectus is located and instructions on how to access it;
3. that copies of the Paper Prospectus are made available for collection at specified locations, free of charge, upon request by any member of the public throughout the Offer Period and that at least three copies of the Paper Prospectus will be available for inspection wherever CO Paper Application forms are made available during the offer period;
4. the particulars of the specified locations; and
5. that prospective investors should read the prospectus prior to submitting an application.

For CIS Offerors who intend to adopt a Mixed Media Offer, the SFC will impose conditions similar to those in the Class Exemption Notice for CO Offerors adopting a Mixed Media Offer (with necessary changes) in its letter of authorisation.

## The Guidelines For Electronic Public Offerings And Mixed Media Offerings

The SFC issued Guidelines for Electronic Public Offerings ("**ePO Guidelines**") in April 2003 to allow electronic public offerings as an alternative to the traditional paper-based method of conducting public offerings of securities. The key principles relevant to the CO, the Unit Trusts Code and the REITs Code apply uniformly to both the ePO Guidelines and a Mixed Media Offer and are as follows:

1. investors should be given an opportunity to access the listing document before being given access to the application form; and
2. investors should apply for shares in or debentures of a company, or interests in a CIS on the basis of the listing document.

The aim of the both the ePO Guidelines and the Mixed Media Offer is to promote the wider use and acceptance of electronic listing documents. CO Offerors and CIS Offerors (collectively the "**Offerors**") can simultaneously adopt a Mixed Media Offer, by following the conditions outlined above in the Class Exemption Notice (or in the case of CIS Offerors, in the relevant letters of authorisation issued by the SFC) and an electronic public offer, by following the ePO Guidelines.

## The Reits Code And The Unit Trust Code

In their Joint Consultation Paper the SFC and SEHK proposed to waive the CIS Accompaniment Requirement in the Unit Trusts Code and the REITs Code in order to allow a CIS Offeror to distribute printed copies of the application forms for interests in its CIS to be listed on the SEHK with an electronic copy of the offering document subject to conditions similar to those imposed under the Class Exemption Notice. This proposal received unanimous support from the respondents and will be implemented by the SFC and SEHK.

## Amending The Exchange Listing Rules

In order to implement the proposal and give effect to the Class Exemption Notice, the Exchange Listing Rules will need to be amended. The principal amendments will include the following:

1. To enable the publication of Announcements required under the Class Exemption Notice, the SEHK will introduce a new headline category, Mixed Media Offers, under the heading of New Listing (Listed Issuers / New Applicants) in Appendices 24 and 17 to the Main Board and GEM Listing Rules, respectively. This new headline category will come into effect on the effective date of the Class Exemption Notice.
2. To facilitate the timely publication of suspension and resumption announcements connected to a Mixed Media Offer contemplated under the Class Exemption Notice, Main Board Rule 2.07 C4(a) and GEM Rule 16.18 (3)(a) will be amended to allow more flexible e-submission windows during SEHK's trading hours.
3. Main Board Listing Rules 12.11 and 25.19A (GEM Rules 16.04C and 29.21A) will be amended so that it will no longer be a requirement that all listing documents are issued in paper form. It will suffice if the listing documents include paper copies.
4. New Main Board Listing Rules 12.11 A(1) and (2) (GEM Rules 16.04D(1) and (2)) will provide the framework for the application of the new Class Exemption Notice and set out the conditions an issuer must follow in order to offer equity securities under the Class Exemption Notice. They replace the requirements of Rule 12.04(3) (GEM Rule 16.09): and require the following information to be included in the announcement made under the Class Exemption Notice:
   1. that the issuer intends to rely on the Class Exemption Notice and issue a printed application form for its equity securities without it being accompanied by a printed form prospectus relating to the offer;
   2. that throughout the offer period, prospective investors may access and download the electronic form prospectus relating to the offer from either the issuer's website or the Exchange's website;
   3. the address of each of the issuer's website and the Exchange's website, the place on the website where the electronic form prospectus may be accessed and how that prospectus may be accessed;
   4. that throughout the offer period, copies of the printed form prospectus will be available for collection at specified locations, free of charge, upon request by any member of the public;
   5. the particulars of the specified locations; and  
        
      Note: "Specified locations" means:
      1. In the case of a listed issuer, the depository counter of HKSCC, the designated branches of the receiving banks specified in the prospectus, if any, and the place of business of the issuer's approved share registrar in Hong Kong.
      2. In the case of a new applicant, the depository counter of HKSCC, the designated branches of the receiving banks specified in the prospectus, if any, and the principal place of business of the sponsors acting in respect of the application for listing of the equity/debt securities.
   6. that throughout the offer period, at least 3 copies of the printed form prospectus will be available for inspection at every location where the printed application forms are distributed.
5. Main Board Listing Rules 25.19 B (1) and (2) and GEM Rules 29.21B (1) and (2) provide the framework for the application of the Class Exemption Notice and set out the conditions an issuer must follow in order to offer debt securities under the Class Exemption Notice. They replace the requirements of Rule 25.17 (4) and GEM Rule 29.19 (4) and require the following information to be included in the announcement made under the Class Exemption Notice:
   1. that the issuer intends to rely on the Class Exemption Notice and issue a printed application form for its debt securities without it being accompanied by a printed form prospectus relating to the offer;
   2. that throughout the offer period, prospective investors may access and download the electronic form prospectus relating to the offer from either the issuer's website or HKEx's website;
   3. the address of each of the issuer's website and the HKEx's website, the place on the website where the electronic form prospectus may be accessed and how that prospectus may be accessed;
   4. that throughout the offer period, copies of the printed form prospectus will be available for collection at specified locations, free of charge, upon request by any member of the public;
   5. the particulars of the specified locations; and  
        
      Note: "Specified locations" means the depository counter of HKSCC, the designated branches of the placing banks specified in the prospectus and the principal place of business of the co-ordinator for the offer specified in the prospectus.
   6. that throughout the offer period, at least 3 copies of the printed form prospectus will be available for inspection at every location where the printed application forms are distributed.

## Inaccessibility Of Electronic Listing Documents For Downloading

Following the consultation process, the SFC and SEHK devised the following procedures, to be inserted into the Class Exemption Notice, to deal with circumstances where the electronic listing documents are unavailable for download from the websites of the Company and HKEx:

1. If the electronic listing documents are available on either the HKEx website or the company website the Mixed Media Offer need not be suspended. However should the documents be unavailable from both websites for four consecutive hours or more during the offer period, the Mixed Media Offer must be suspended until access is restored to the e-Prospectus on one of the websites. In relation to the HKEx website this four hour rule does not apply to routine maintenance windows currently adopted by HKEx which occur on Saturdays, Sundays, public holidays and between 0.00am-6am Monday to Friday.
2. CO Offerors must promptly publish a statement informing investors of the suspension and resumption of the Mixed Media Offer.
3. Should the Mixed Media Offer be suspended, the Public Offer may continue as long as Paper Application Forms and Paper Prospectuses are available.
4. The Mixed Media Offer may only resume when the CO Offeror can re-comply with the conditions in the class exemption notice (except that the Offeror need not re-issue the Announcement and that the e-Prospectus need only be accessible on either the HKEx website or the company's website)

The SFC and SEHK do not specify minimum website or system requirements, nor will they vet contingency plans for website failures. They note however that offerors are expected to be able to deal with the scenario of a Mixed Media Offer being suspended through the use of existing procedures for paper and, if applicable, electronic listing documents and application forms. This may seem an arduous logistical burden but the chance of a prolonged problem on both the company's and the HKEx's websites during the offer period is considered slight.

## Sponsors' Responsibilities

Sponsors, as part of their wider responsibilities in relation to a public offer under the Corporate Finance Adviser Code of Conduct, should assess whether the issuer's website has the capacity to handle the likely volume of interest in the offer and appropriate backup facilities, check the company's website during the offer period to ensure that the e-Prospectus is available and, should the e-Prospectus become unavailable on both the HKEx and company websites, ensure that appropriate steps are taken to suspend the Mixed Media Offer. The SFC and SEHK consider it appropriate to give Sponsors the flexibility to determine how best to fulfil their duties under the Code of Conduct in light of the new proposal and therefore additional measures for sponsors to implement will not be expressly imposed with regard to Mixed Media Offers.

*This newsletter is intended as a summary only of the proposals set out in the SFC/SEHK Joint Consultation Conclusions on the Proposal to Allow a Companies Ordinance Offeror to Issue a Companies Ordinance Paper Application Form for Shares in or Debentures of a Company to be Listed on the SEHK, and a Collective Investment Scheme Offeror to Supply a CIS Paper Application Form for Interests in an SFC-authorised CIS to be Listed on the SEHK, with a Listing Document Displayed on Certain Websites*

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**Charltons - Hong Kong Law Newsletter - Issue 102 - 13 December 2010**