

HKEX LISTING DECISION
HKEX-LD104-2017 (published in January 2017)

Parties	Company A – a Main Board issuer Company B – Company A’s subsidiary proposed to be listed on a PRC stock exchange
Issue	Whether the Exchange would waive the assured entitlement requirement for Company A’s spin-off proposal
Listing Rules	Main Board Rule 2.04 and Paragraph 3(f) of Practice Note 15 (GEM Rule 2.07 and Paragraph 3(f) of Practice Note 3)
Decision	The Exchange waived the requirement

FACTS

1. Company A proposed to spin-off Company B for listing on a PRC stock exchange. This would involve Company B offering new A shares in the Mainland under the PRC laws and regulations. The deemed disposal of interest in Company B would be a major transaction for Company A subject to the shareholders’ approval.
2. Company A would be able to comply with all the spin-off requirements except the requirement to provide its shareholders with an assured entitlement to the A shares of Company B. It submitted a waiver application from strict compliance with the assured entitlement requirement for the following reasons:
 - Based on its PRC counsel’s advice, non-PRC investors (other than certain qualified investors) were not permitted to acquire the A shares in Company B under the PRC laws and regulations. As many of its existing shareholders were not qualified investors, there was a legal impediment for it to provide these shareholders with an assured entitlement to the A shares of Company B under the proposed spin-off; and
 - It would be burdensome for it to seek minority shareholders’ approval to waive the assured entitlement at a general meeting as the legal restriction could not be overridden even if the resolution was voted down by its shareholders.

APPLICABLE LISTING RULES

3. Paragraph 3(f) of Practice Note 15 states that:

“The Listing Committee expects the Parent to have due regard to the interests of its existing shareholders by providing them with an assured entitlement to shares in Newco, either by way of a distribution in specie of existing shares in Newco or by way of preferred application in any offering of existing or new shares in Newco. The percentage of shares in Newco allocated to the assured entitlement tranche would be determined by the directors of the Parent and by its advisers, and all shareholders of the Parent would be treated equally. There would be no bar to the controlling shareholder receiving his proportion of shares under such entitlement. Where Newco is proposed to be listed elsewhere than in Hong Kong, and where shares in Newco under the assured entitlement can only be made available to existing shareholders of the Parent by way of a public offering in Hong Kong, the Listing Committee would consider submissions as to why the assured entitlement requirement would not be for the benefit of the Parent or its shareholders. Further, the minority shareholders of the Parent may by resolution in general meeting resolve to waive the assured entitlement, even where Newco is to be listed in Hong Kong.

Note: In case where Newco is made subject to this Practice Note by virtue of the Note to paragraph 2, the Parent should use its best endeavours to provide its shareholders an assured entitlement to the shares in Newco. Whether such assured entitlement is available will be taken into account by the Exchange when considering whether to approve the spin-off proposal.”

ANALYSIS

4. Practice Note 15 sets out the Exchange’s principles when considering proposals of issuers to effect separate listings on the Exchange or elsewhere of assets or businesses wholly or partly within their existing groups.
5. The purpose of Paragraph 3(f) of Practice Note 15 is to ensure that the issuer would give due regard to the interests of its shareholders by providing them with an assured entitlement to shares in the entity to be spun. Paragraph 3(f) further provides that if the issuer does not propose to offer such entitlement to its shareholders, it would need to obtain its minority shareholders’ approval in general meeting.

6. When considering Company A's waiver application, the Exchange noted that Company B was proposed to be listed in the PRC and would need to comply with the PRC laws and regulation. It would be impractical for Company A to provide its shareholders with an assured entitlement to the A shares of Company B under the proposed spin-off.

CONCLUSION

7. The Exchange granted the waiver on the condition that Company A would disclose in its announcement for the proposed spin-off details of the waiver including the legal restrictions in providing the assured entitlement.

GENERAL WAIVER FOR THE ASSURED ENTITLEMENT REQUIREMENT

8. On 20 December 2016, the Exchange obtained the SFC's consent for granting waivers from Paragraph 3(f) of Practice Note 15 to the Main Board Rules (or Paragraph 3(f) of Practice Note 3 to the GEM Rules) to issuers who propose to spin-off their businesses for listing on the Shanghai Stock Exchange, the Shenzhen Stock Exchange or the National Equities Exchange and Quotations in the PRC. Such waiver will be granted on the conditions that:
 - (i) the issuer has obtained a letter from its legal advisers to demonstrate that there are legal restrictions in providing its shareholders with assured entitlements to the spun-off entity's shares under the PRC laws and regulation;
 - (ii) the board of directors of the issuer has provided a written confirmation to the issuer that the proposed spin-off and the waiver in respect of the assured entitlement requirement are fair and reasonable and in the interests of the issuer and its shareholders as a whole; and
 - (iii) it will disclose in its announcement for the proposed spin-off details of the waiver including the reasons for not providing assured entitlement and the legal restrictions in providing the assured entitlement and the board of directors' confirmation as set out in paragraph 8(ii) above.
9. In respect of spin-off proposals for listing in other jurisdictions where there are legal restrictions in providing assured entitlements, the Exchange will consider any waiver applications for the assured entitlement requirement based on the specific facts and circumstances of individual cases.