

HKEx LISTING ENFORCEMENT GUIDANCE LETTER
Cite as HKEx-LEGL05-08 (December 2008)

Summary	
Listing Rule	Main Board Listing Rule 2.13(2)
Subject	Guidance on ensuring and achieving accuracy and completeness in disclosure
Contents	Extracts of a No Further Action (Guidance) letter from the authorised signatory of the Stock Exchange of Hong Kong

[*Date]

[Name and Address of Listed Issuer]

Dear Sirs,

[Name of Listed Issuer] (the “Company”)
Announcement dated [*day*month*year]
No Further Action: Guidance

We refer to earlier correspondence concerning the captioned matter resting with the letter of [*name of solicitors*] to the Listing Division (“Division”) dated [*day*month*year*]. Unless otherwise stated, the terms and abbreviations in the Company’s announcement dated [*day*month*year*] (the “Announcement”) are adopted in this letter.

Materials Reviewed

The Division refers to the following materials which have been reviewed:

1. the Company’s announcements dated [*day*month*year*], [*day*month*year*] and the Announcement; and
2. [*name of solicitors*]’ submissions on behalf of the Company and [*name of the Chairman*], one dated [*day*month*year*], one dated [*day*month*year*], one dated [*day*month*year*] and two dated [*day*month*year*] together with the enclosures to these letters.

Thank you for the information and materials provided by the Company which enable the Division to have a clearer understanding of the matter.

Facts

In the Announcement the Company disclosed to shareholders and the market information relating to a substantial acquisition that it was proposing to make. In summary:

1. [*Name of the subsidiary*], a wholly-owned subsidiary of the Company, [*name of the Chairman*] and the Company had entered into an agreement dated [*day*month*year*] (the “Agreement”) under which [*name of the subsidiary*] was to acquire from [*name of the Chairman*] one issued share of [*Company A*] (being 100% issued share capital of [*Company A*] for a consideration of HK\$[*no.*] to be satisfied by the Company’s issuance of [*a specified number of*] new shares of the Company to [*name of the Chairman*] at the [*date of completion*].
2. [*Name of the Chairman*] was at the time the Chairman, an Executive Director and the controlling shareholder of the Company. He was also the sole director and sole ultimate beneficial owner of [*Company A*]. [*Company A*] is an investment holding company incorporated in [*name of the country*] which was intended to be used by [*name of the Chairman*] to hold a [*x*]% equity interest in the [*name of JV*]. The JV was the sole beneficial owner and developer of a residential and commercial property development project in the [*name of country*] as identified in the Announcement.
3. A statement was made in the Announcement dated [*day*month*year*] to the effect that “[*Company A*] did not hold any equity interest in the JV” which was owned at the time as to [*x*]% by [*Company B*] and [*y*]% by [*Company C*] (the “Statement”).
4. The transaction was a very substantial acquisition and a connected transaction for the Company. The Company dispatched a circular in relation to the Agreement on [*day*month*year*]. At the EGM on [*day*month*year*], the Company obtained independent shareholders’ approval of the Agreement which was duly completed on [*day*month*year*].
5. A complaint was subsequently received by the Division concerning the accuracy of the information given in the Announcement as to the ownership of the JV. As a result the Division has undertaken enquiries during the course of which the Company has denied any breach of the Listing Rules concerning the Statement made in the Announcement.

Comment

We have reviewed and carefully considered the materials more particularly described above from which we note the following:

The JV was formed as a [*nature of enterprise*] on [*day*month*year*], and until [*day*month*year*], was owned as to [*x*]% by [*Company B*] and [*y*]% by [*Company C*] (the “Original Shareholding”) and was described as such in the Announcement.

In [*month*year*], various agreements were entered into by the existing shareholders of the JV namely [*Company B*], [*Company C*] with [*Company A*] with a view to joining [*Company A*] as a third shareholder of the JV. However these agreements expressly provided that such new shareholdings were not to be effective until after fulfillment of two

conditions (i) registration and certification of the payment in full of the respective capital contribution towards the JV's increased registered capital of RMB[*no.]; and (ii) the issuing of the revised business licence to the JV (the "Conditions"). It is our understanding that the agreements were entered into so as to facilitate the JV's application to the relevant authority for a change of status to [*nature of enterprise*] paving the path for the deal contemplated at the time and which was subsequently agreed and disclosed in the Announcement.

In [*month*year*], a revised business licence was issued to the JV by the appropriate [*name of country*] Government body. This document records a change of status of the JV with effect from [*day*month*year*]. This document indicates that one if not both of the Conditions referred to above had yet to be fulfilled. Thus it appears that there were some grounds for adopting the position stated in the Announcement as to the status of [*Company A*] in the JV as at the date of publication. However the absence of any narrative as to the important events taking place between [*month*] and [*month*year*] is a matter of concern impacting on the quality of disclosure and information available to shareholders.

The Division takes the view that disclosure of the events from [*month*year*] to [*month*year*] which directly concerned and resulted in the shareholdings in the JV at the time of the Announcement could be material information directly relevant to the then existing shareholdings in the JV. This is particularly so, given the Company's ultimate target under the Agreement was the acquisition through [*Company A*] of [*x*]% effective interest in the JV. Any inaccuracy or incompleteness of information provided to shareholders could have serious and far-reaching implications as to (a) the existence of proper title and interest in the JV of the proposed vendor from whom [*Company A*] was to acquire the [*x*]% shareholdings in the JV; and (b) in turn the Company's acquisition of valid and proper title to [*x*]% effective interest in the JV; and consequently on the decisions made by shareholders as to the resolutions placed before them.

Action

The Company has acknowledged in its submissions to the Division that having reviewed the relevant documents in responding to the Division's enquiries, "*the Company agrees that more disclosure of shareholdings in [*the JV*] (in particular the arrangement joining [*Company A*] as a shareholder to facilitate the regulatory application procedures) could have been made in the Announcement provided it was carefully worded so as not to mislead the public that [*Company A*] already had at the time, any lawful rights as a shareholder of [*the JV*]."*

We have considered all of the foregoing information. We have concluded that no further regulatory action is appropriate or necessary. In coming to this decision we have noted the concession made by the Company as to the completeness of the disclosure made in the Announcement. We have also noted that, as disclosed in the Announcement, completion of the transaction was subject to conditions including the provision of a legal opinion by the [*name of country*] legal adviser to [*name of the subsidiary*] that [*Company A*] is the lawful owner of [*x*]% of the registered capital of the JV free and clear of encumbrances; and further that this condition and all other conditions have been fulfilled leading to completion on [*day*month*year*].

We do believe however that the circumstances of this case do require that we comment on the process adopted by the Company and the following guidance be offered in order to inform the future performance of the Company in relation to matters relating to corporate governance.

Guidance

1. We would remind the Company and its directors that under Rule 2.13 of the Listing Rules, information contained in announcements, circulars and other disclosure made by listed issuers pursuant to the Listing Rules must be accurate and complete in all material respects and not be misleading or deceptive. It is the responsibility of the directors to ensure that the issuer's regulatory announcements and other disclosures comply with Rule 2.13. This is particularly so for those directors who are actively involved in their preparation and had knowledge of the relevant matters which are the subject of the relevant disclosure.
2. Timely disclosure of information by listed issuers to the investing public and the market is of utmost importance towards ensuring a fair, orderly and efficient securities market in Hong Kong. Shareholders and investors base their investment decisions on information available in the market. In the case where a proposed transaction is subject to shareholders' approval, shareholders have to rely on information provided by the listed issuer and its management about the proposed transaction in their consideration of whether to approve the transaction and the quality of such information thereby underpins their investment decisions.
3. We note that the directors did not seek professional advice for example from [**name of country*] lawyers to confirm the accuracy of this view they had reached or from Hong Kong lawyers from the perspective of Rule 2.13 compliance as regards the Announcement. The Division wishes to remind the Directors that in appropriate cases, it is advisable that they take professional advice with a view to ensuring Listing Rule compliance. In this case, the Division believes it would have been prudent and necessary that Directors of the Company sought professional advice before acting on the view they had reached.
4. We accept that an assessment of materiality will depend on the facts of a given case. However where issues of materiality arise, the Division considers management should and would urge management again to seek independent and professional advice to ensure that the Company's Listing Rule obligations are complied with in a timely manner.
 - (i) The Division would also stress the need for the Company to have in place an effective internal control system to embed its disclosure and other compliance obligations under the Listing Rules and to provide appropriate guidance for senior management as to how such obligations could properly be fulfilled.
 - (ii) Directors of the Company should be aware of their responsibilities towards the Company's shareholders and the market in procuring the Company's due and timely compliance with its Listing Rule obligations. In this regard, the Division would urge the Directors of the Company to undergo training on compliance and corporate governance matters, so as to increase and refresh their knowledge on these matters. Compliance and corporate governance best practices are being constantly revised to reflect changing market expectations, and in consequence it is vital that management engage in a regular programme of continuing education as to their duties and responsibilities.

Invitation to Comment

We invite the board of directors of the Company to comment on this letter if they wish. Your submission, together with this letter, will be placed on the Company's compliance file. No further action will be taken in respect of this matter which is now considered closed.

Publicity

We wish to inform you that, at an appropriate time, the Division may, in the discharge of its regulatory function, publicize certain facts and guidance given in this letter. This would be done on an anonymous and redacted basis, to explain our views on the issues raised by this case for the benefit of the market as a whole. If such disclosure is made it may be published on our website and in our quarterly publication "Exchange".

Yours faithfully,
For and on behalf of
The Stock Exchange of Hong Kong Limited

[Signed]

[Authorised Signatory]