Charltons - Hong Kong Law Newsletter - 23 September 2013

[online version](http://www.charltonslaw.com/exchange-publishes-guidance-on-resumption-of-long-suspended-companies/)

# Exchange Publishes Guidance on Resumption of Long Suspended Companies

The Hong Kong Stock Exchange (the Exchange) has published guidance letter [HKEx-GL66-1](http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl66-13.pdf) ([see archive](gl66-13.pdf)) (**Guidance Letter**) with regard to the criteria for resumption for long suspended companies. “Long suspended companies” refers to companies whose trading has been suspended for over three months. In general, they include:

* companies which are in severe financial difficulties and/or have ceased to maintain sufficient or any operations and are in the delisting stages (commonly known as **PN 17 companies**); and
* companies which are suspended due to material issues including:
	1. identified accounting irregularities;
	2. involvement in possible fraudulent activities (e.g. misappropriation of assets or funds);
	3. company (or any group member) and/or its directors being subject to regulatory investigations for breach of laws and regulations;
	4. failure to publish financial results in a timely manner;
	5. significant internal control weakness of the company; and
	6. failure to announce inside information or other material developments of the company.

## Resumption of trading for PN 17 companies

A PN 17 company which has entered into the Exchange’s three-stage delisting procedure must submit a resumption proposal to the Exchange for its approval in order for its shares to resume trading. Such resumption proposal of PN 17 companies often involve a white knight injecting funds to rescue the company and finance its acquisition of assets or businesses or reactivation of existing businesses.

### Requirements of a resumption proposal

The Guidance Letter states that when examining a resumption proposal for a PN 17 company, the Exchange will assess the nature and size of the restructured/enlarged group’s business, its business model, competitive strengths and future plans as well as its business performance and financial conditions.

The resumption proposal should:

* clearly describe the business model and contain sufficient details to support the viability of the company, including a track record that indicates a meaningful scale of operations and a sustainable level of profitability, and a detailed business plan and credible evidence to support the achievability of its profit forecasts; and
* demonstrate that the group has sufficient assets and funds to achieve its business plans and the expected level of operations, together with a concrete plan for the use of proceeds from the fund raising exercise.

If the resumption proposal involves the acquisitions of new businesses by a PN 17 company to improve its scale of operations and financial positions, the Exchange may apply the relevant reverse takeover rules under the following circumstances:

* when the acquisition triggers the bright line tests under Rule 14.06(6) of the Main Board Listing Rules or Rule 19.06(6) of the GEM Listing Rules; or
* when the acquisition is regarded as extreme cases falling under the definition of reverse takeover [[1]](#footnote-27) (i.e. an attempt to list the assets to be acquired and circumvent the new listing requirements).

Where the acquisitions constitute reverse takeovers, the enlarged group or the business to be acquired must be able to meet the trading record requirements for new listings.

In addition, the Exchange states that it will take into account the benefit of the resumption proposal to the company’s minority shareholders when reviewing a resumption proposal. In cases where there is material dilution in the minority shareholders’ interests in the company, the Exchange may require the company to address the issue by, for example, providing the minority shareholders with the opportunities to subscribe for securities through a pre-emptive offer.

The Exchange may also impose other resumption conditions on PN 17 companies based on individual circumstances; for example, to engage independent advisers to review the restructured/enlarged group’s internal control systems where there appears to be material internal control deficiencies.

### Time frame of a resumption proposal

PN 17 companies should submit resumption proposals to the Exchange as soon as they can and in any event not less than 10 business days before the end of the relevant delisting stage.

Once the resumption proposal is approved, the Exchange will require the company to complete the proposal within a reasonable period determined by the Exchange. If the resumption proposal does not materialise before the stated deadline, the Exchange would place the company in the next delisting stage, or proceed to cancel its listing (if it is in the final stage of delisting).

### Content and documentary requirements for resumption proposals

Resumption proposals should be clear, plausible and coherent with sufficient detail to enable them to be assessed by the Exchange.

Resumption proposals should be submitted to the Exchange in its substantially final form, supported by signed agreements showing major terms of the arrangements contemplated under the proposal. A proposal with terms yet to be finalised evidenced by a memorandum of understanding would generally not be accepted.

The proposal should be accompanied by a draft circular or draft announcement (where applicable) containing the following information:

* a detailed description of the business, including the products and services provided, the business model, market competition, the group’s competitive strength and business strategies, major customers and suppliers, licences and permits required for the business;
* a clear and detailed plan for the future development of the restructured/enlarged group’s business, and how the company would achieve it;
* the intended use of proceeds from any proposed fund raising exercises;
* the historical financial information of the restructured/enlarged group’s business, with the management discussion and analysis of the business performance and financial conditions. Where applicable, the draft accountants’ report or management accounts on the target to be acquired should include figures in final or advanced form;
* the restructured/enlarged group’s profit forecast for at least the period up to the forthcoming financial year end, with all principal assumptions and the management discussion and analysis of any material fluctuations compared to the historical track record of the business;
* a statement of sufficient working capital by the directors for at least 12 months from the expected date of trading resumption;
* pro forma financial information of the restructured/enlarged group;
* where applicable, an expert report (e.g. property valuation report, competent person’s report on mineral assets) required by the Listing Rules in final or advanced form. If the expert has not yet signed off his report, the draft circular should be submitted together with the expert’s confirmation that no material change is expected to be made to the draft report, subject to unforeseen subsequent events which are out the expert’s control;
* information showing the changes in the company’s shareholding structure as a result of the implementation of the resumption proposal; and
* information and documents that demonstrates the company’s fulfillment of other resumption conditions before trading resumption.

## Resumption of trading for companies suspended for material issues

Companies suspended for material issues may generally apply for resumption once the matter giving rise to the suspension is addressed and announced to the market. The procedures for lifting the suspension will depend on the particular circumstances of each case.

A company suspended for material issues should generally observe the following:

* its board of directors, including its independent non-executive directors, should review the matter as soon as practicable and determine what remedial actions the company needs to take;
* if any director of the company is, or is suspected to be, involved in the matter, its board should consider setting up a special committee to review the matter to avoid any conflict of interests which may arise during the review process;
* independent experts (such as forensic accountants) with relevant qualifications, resources and experience should be engaged where appropriate; for example, where the matter involves or indicates fraudulent activities such as false accounting or misappropriation of assets;
* where accounting irregularities have been identified, fraudulent activities have been discovered or where there are concerns as to whether published accounts and other disclosures in the public domain remain accurate, the company should demonstrate that:
	1. any material misstatements or errors in its accounts has been rectified and published information remains accurate and not misleading; and
	2. it has made necessary changes to the company’s board of directors to ensure that they have the required level of skill, care, diligence and integrity to act in the best interests of the company as a whole; and
* in each of the circumstances in the preceding paragraph, and where the company cannot timely published its audited accounts due to failure to keep proper books and records for the group, the company should demonstrate that:
	1. it has put in place an adequate and effective internal control system;
	2. it has published all outstanding financial results and addressed any audit qualifications; and
	3. it has disclosed any other inside information required under the SFO and the Listing Rules

The Exchange expects companies to, as soon as they can after the trading suspension, submit concrete plans to the Exchange to demonstrate how they would resolve identified issues and fulfill the resumption conditions, together with an expected timetable for the major milestones.

Where suspension continues for a prolonged period without the company taking adequate action to resume trading, the Exchange may proceed to delist the relevant company.

**This newsletter is for information purposes only.**

Its contents do not constitute legal advice and it should not be regarded as a substitute for detailed advice in individual cases.

Transmission of this information is not intended to create and receipt does not constitute a lawyer-client relationship between Charltons and the user or browser.

Charltons is not responsible for any third party content which can be accessed through the website.

If you do not wish to receive this newsletter please let us know by emailing us at unsubscribe@charltonslaw.com

**Charltons - Hong Kong Law Newsletter - Issue 207 - 23 September 2013**

1. Rule 14.06(6) of the Main Board Listing Rules or Rule 19.06(6) of the GEM Listing Rules defines “reverse takeover” as an acquisition or a series of acquisitions which represents, in the Exchange’s opinion, an attempt to list the assets to be acquired and circumvent the new listing requirements. [↑](#footnote-ref-27)