

Dated 11 January 2008

CONSULTATION PAPER ON THE PROPOSAL
TO MANDATE ELECTRONIC SUBMISSION OF
DISCLOSURE OF INTERESTS NOTICES

A RESPONSE FROM LINKLATERS
ON BEHALF OF 5 FINANCIAL INSTITUTIONS

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1 Introduction

- 1.1** This is a submission by Linklaters on behalf of the group of 5 financial institutions listed in paragraph 1.2 below (the “**Group**”) in response to the Consultation Paper published by the Securities and Futures Commission (“**SFC**”) on 30 November 2007, regarding its Proposal to Mandate Electronic Submission of Disclosure of Interests Notices (the “**Proposal**”).

Participants

- 1.2** The Group comprises:
- 1.2.1** Citigroup Global Markets Asia Limited;
 - 1.2.2** Goldman Sachs (Asia) L.L.C.;
 - 1.2.3** J.P. Morgan Securities (Asia Pacific) Limited;
 - 1.2.4** Morgan Stanley Asia Limited;
 - 1.2.5** UBS AG.

The Group’s response

- 1.3** The Group’s response is in several parts. Section 2 sets out an executive summary of this response and sections 3, 4 and 5 set out the Group’s comments on the Proposal in more detail.
- 1.4** If you have any questions in relation to this submission, please contact Carl Fernandes of Linklaters by telephone at 2842 4186 or by email at carl.fernandes@linklaters.com.

2 Executive summary

2.1 The Group is highly supportive of a less onerous and more efficient system for filing disclosure of interest notices. It is also in favour of there being frank and transparent disclosure of dealings in listed companies on a timely basis. With that in mind, the Group agrees with the proposals preferred by the SFC in the Consultation Paper. However, the Group would like to highlight the following issues as areas of possible further improvement for the SFC's consideration:

2.1.1 The Group has suggested various changes to the substance and presentation of the DI forms which would make them more readily understandable and help substantial shareholders complete them more quickly.

2.1.2 The Group believes it is essential for the web-based system to provide multiple-user access, save facilities, template functionalities and simultaneous upload of multiple forms to make web-based filing the more viable option and believes that these functionalities could be more easily achieved through the HKEx adopting a File Transfer Protocol ("FTP") or "batch upload" as a means of accepting disclosure of interest notices. The Group is also concerned that responsibilities for filing with the listed corporation be clearly delineated as between the substantial shareholder and the SEHK.

2.1.3 In the event of unforeseen circumstances, the Group believes there should still be the ability to file in hard-copy but strictly as a "last resort" alternative to electronic filing.

2.1.4 The Group agrees that timing of publication of filings should remain at 5pm on a business day after being vetted by the HKEx. The Group would appreciate clarification as to whether filings can be made after 5pm on the due business day, yet still be in compliance with the filing regime.

2.1.5 The Group supports the SFC's proposals to remove the legislative requirements to update to the registers of interests and short positions kept by listed corporations.

3 The Proposal for Mandatory Electronic Filing

3.1 To briefly summarise the Proposal:

- (i) the electronic disclosure of interests ("DI") forms presently available will be retained for the benefit of substantial shareholders who are using them currently; and
- (ii) in addition, a web-based system and web-based forms will be developed by Hong Kong Exchanges and Clearing Limited ("HKEx") to facilitate electronic filing. HKEx has also committed to carry out the necessary enhancements to make the electronic filing system of DI notices more user-friendly.

3.2 Based on feedback already received, the SFC has proposed option B(2) out of 5 possible options relating to possible models for mandatory electronic filing. Option B(2) is as follows:

DI notices will only be required to be filed with one party – the Stock Exchange of Hong Kong Limited ("SEHK"). In so far as the legal obligation on the filer to file with both SEHK and the listed corporation is concerned, the law will be amended to provide that DI notices filed with the specified party will be deemed to have been

filed with the other party. The SEHK has the responsibility to forward the DI notices received to the listed corporation. In other words, electronic submission of DI notices to SEHK will be made mandatory and SEHK will provide electronic copies of the notices to the listed corporations.

3.3 The Group fully supports option B(2) as the model for mandating electronic filing of DI notices. However, before discussing the implementation of the Proposal in more detail, it may be worthwhile giving some examples of why electronic filing may not always have been the preferred method of filing in the past:

3.3.1 internal review by relevant groups is required before a filing is submitted and it is easier for the reviewers to read and comment on hard copies;

3.3.2 the time needed to upload and preview the form can vary widely depending on the volume of web-traffic, especially in situations where the filer is required to file many forms under the name's of many different entities for the same event;

3.3.3 faxing several hard copies in one package may take less time than individually submitting each as an electronic copy via the HKEx website.

3.4 That said, the Group does not see any significant reasons as to why option B(2) should not be adopted. The Group agrees with the advantages described in the Consultation Paper of option B(2) and the disadvantages of the other options and have not repeated them here. The Group's additional comments are provided in the sections below.

4 Implementation of the Proposal

4.1 The Group understands that effecting the Proposal (i.e. option B(2)) will involve the implementation of items (i) to (v), which are shown on page 6 of the Consultation Paper and also repeated below *in italics*. In commenting on these items for implementation, the Group's responses are arranged under the following broad headings: (a) *substance of the DI forms*; (b) *method and manner of filing*; (c) *alternatives to electronic filing*; and (d) *timing of publication of filings*.

(a) Substance of the DI forms

4.2 Item (i) of the proposals for implementation states:

"(i) Filing of DI notices will be done via the currently available electronic means or a web-based system and web-based forms to be developed by HKEx. The electronic form presently available will be retained for the benefit of those using them currently. HKEx will also carry out the necessary enhancements to make the electronic filing system of DI notices more user-friendly."

4.3 The Group agrees that the existing Excel spreadsheets should continue to be available to substantial shareholders alongside the new web-based forms for an indefinite period, as many substantial shareholders may be more comfortable with this format and their systems may be designed specifically for them.

4.4 The Group would welcome efforts to make the forms more user-friendly, however, the Group would note that making changes to the type of information provided, or the manner in which it is provided, would need to be reflected equally in the web-based forms and the existing Excel forms. Accordingly, the Excel forms would need to be amended as

necessary to ensure that the information to be provided is the same, irrespective of whether the Excel form or web-based form is used.

- 4.5** The Group would also be in favour of a reasonable transitional period before the new forms are introduced to allow firms with systems tailored for the old Excel forms to update their systems to deal with the new forms.
- 4.6** In terms of specific improvements to the forms (both Excel and web-based), the Group would suggest that the changes include the following:
- (a) providing the full meaning of each three-digit code within the form itself;
 - (b) ensuring that the automatic error-detection messages contained in a form would not prevent a form from being submitted (even one which may apparently contain an erroneous entry);
 - (c) allowing both long and short positions to be disclosed in the same box (e.g. Box 17 in Form 2) without triggering an automatic error message stating that both positions cannot be selected (when in fact they can and it may be correct to do so);
 - (d) enabling shareholders to enter unlimited entries in Box 22 (interests of corporations controlled by substantial shareholders) to take account of the complex group structure of Group members (rather than preparing the continuation page in the Excel worksheet).

(b) Method and manner of filing

- 4.7** In terms of specific suggestions to the web-based filing system, the Group would support the following:
- (a) *Uploading forms:* In order for electronic submission to be feasible, the Group feels strongly that the HKEx should enhance the existing interface to enable shareholders to batch upload multiple Excel forms to the HKEx, or to offer a FTP to enable the transfer of completed Excel forms. This is to avoid the time-consuming process of uploading forms one-by-one under the current HKEx web-based system and avoid the need to complete the forms "live" online on a web-based system.

The batch upload/FTP functionality would also address many of the issues the Group currently has with an online/web-based system by enabling multiple-user access, save facilities and template functionality offline. With batch upload/FTP, forms can be prepared offline by multiple users using in-house templates, partially completed, saved and printed without the HKEx needing to provide these functionalities through the HKEx website. Once the forms (which have been prepared offline) are ready to be submitted, the filer should be able to upload/transfer the entire filing to the HKEx in one action. The Group is keen to avoid having to complete web-based forms in their current format.
 - (b) *Authorisation for submission:* The issue of knowing whether a filer is authorised to submit a filing occurs under both the current and the proposed regimes. Clearly, vetting of all filings by the HKEx (as discussed further below) is one way of eliminating spurious, bad faith or obviously false filings. Firms who file reports would also have in place internal procedures specifying which individuals are authorised to submit filings. However, the Group would ask the SFC to consider whether further control mechanisms are appropriate or feasible, for example, the

authorisation of named individuals of a substantial shareholder with the HKEx, who would then be required to log in under a username and password to submit a filing. The Group is aware of the practical difficulties with this given the number of group entities that could be substantial shareholders in a single filing event, etc.

- (c) *Shared access to online forms and security:* Even if a batch upload/FTP functionality is *not* offered, it would still be necessary to have a means of saving a partially completed forms online as it is rare that forms will be completed and submitted within a single sitting. Further, the web-based system would need to allow multiple parties to complete and edit the forms; for instance, in many cases, a substantial shareholder may partially complete a form and then ask an external professional adviser to review, amend and finally submit the form on their behalf. In terms of security and authorisation of individuals, the designation and maintenance of access to each form by authorised persons should reside with the substantial shareholder. Each substantial shareholder should be allowed to have more than one access permission (and, ideally, at least three different access/login IDs). This will allow flexibility and avoid security concerns, as individuals will not have to share access/login IDs and passwords. By comparison, in the recent consultation paper on the filing of Financial Returns, an electronic signature from a senior manager designated by the SFC was required. The Group assumes this will not be the case for the web-based system as this would be unrealistic if daily submission deadlines for disclosures are to be met.
- (d) *Templates and other time-saving measures:* Commonly, a filing will often consist of a number of forms completed by various entities within a group and much of the substantive information contained in each of these forms is, necessarily, the same. As a means of saving time, it is currently possible to copy and paste such information between the forms in the Excel format. The Group would expect the same copy and paste function to be available in online/web-based forms. It would be helpful if firms were able to set up their own preset templates on the web-based system that already contained information about the firm which would be common to every filing (e.g. entity name, address, etc.). The Group is conscious that there could be security issues with such preset templates if third parties are able to view partially completed templates. This is another reason for choosing the batch upload/FTP option described in paragraph (a) above, whereby partially-completed forms can be saved "offline".
- (e) *Capacity issues with templates:* The Group is aware that there could be a potential storage/capacity issue with the web-based system if saved templates and partially-completed forms worked on by all substantial shareholders are to be retained on the web-based system.
- (f) *Print facility:* With a web-based system, there should be the ability to print the completed form before submission, as many substantial shareholders will find it easier to review a hard-copy version before filing it.
- (g) *Processing status:* The Group believes the HKEx should also provide transparent information to the filers on the status of filings submitted (e.g. filers could be allowed to log in to the HKEx website and check the status of their filings; or HKEx could automatically send out emails to filers upon a filing being submitted, being reviewed, pending a request for further information, being uploaded to DI website etc.).

- (h) *Submission receipts:* The Group notes that the submission receipts provide by the HKEx website do not indicate the filename of the form submitted. For record-keeping purposes, it would be helpful for this to be included in the new system.
- (i) *Comments box:* In the event that a filer notices a mistake following a submission and wants to rectify the mistake with a re-filing (or make any other relevant comment), it would be helpful if the filer were able to indicate that that this was the case. For example, the HKEx web-based filing system could offer a comments box (or similar) as standard for the inclusion of any special remarks by the filer.
- (j) *Location of forms:* The web-based forms, Excel forms, accompanying general notes to the forms ("**Guidance Notes**") and Part XV Outline should be housed in a clearly-marked area of the HKEx website. Currently, it is not immediately obvious how to access this information on the HKEx website (as it is listed as a sub-entry under the "Investor" tab) and this may pose particular problems for substantial shareholders overseas who are not as familiar with the Part XV regime.

4.8 Item (ii) of the proposals for implementation states:

"(ii) SEHK will forward to the listed corporations the DI notices in the state as they have been filed with SEHK i.e. the information sent by SEHK to the listed corporations will be identical to the information received by SEHK from the filers."

4.9 The Group supports this proposal. However, the Group would note that, although this is implied by the proposal above, the Group feels it is important for the legislation or Guidance Notes to expressly state that, once an electronic filing has been submitted to the SEHK, SEHK is wholly responsible for filing with the listed corporation. In other words, the substantial shareholder has no responsibility for whether the filing is received by the listed corporation.

4.10 Item (iii) of the proposals for implementation states:

"(iii) For the purpose of receiving and forwarding DI notices, the listed corporations and SEHK will have to maintain a specific email account dedicated for dealing with DI notices. Having known the SEHK's specifically assigned email address, the listed corporations will be able to set their spam filters (where necessary) accordingly."

4.11 The Group supports this proposal.

4.12 Item (iv) of the proposals for implementation states:

*"(iv) Copies of the information received by listed corporations in pursuance of their power to investigate ownership of interests in its shares and the reports prepared by listed corporations on the conclusion of an investigation will also have to be submitted electronically to SEHK and the SFC, and also the Hong Kong Monetary Authority ("**HKMA**") if appropriate."*

4.13 The Group supports the provision of such information electronically to SEHK, SFC and the HKMA. However, given that there is no prescribed form in which such information must be provided by the listed corporation, the Group assumes that electronic submission in this context merely refers to email or web-based submission of an (editable) electronic text document. It would be helpful if the SFC could clarify its expectations in this regard.

4.14 As noted above, under Division 5 of Part XV, a listed corporation has the right to investigate the interests of its shareholders. This raises a further issue in that, under the Proposal, when the listed corporation sends out inquiries to its shareholders, in many cases, this will be done on the basis of information provided not by the shareholder itself but by SEHK. Accordingly, in the event that the initial filing is not delivered to a listed corporation by SEHK, for any reason, and results in a claim by the listed company against the substantial shareholder for lack of proper notification, the Group would expect that the substantial shareholder would be able to rely on a defence that the delivery obligation fell wholly on SEHK.

4.15 Item (v) of the proposals for implementation states:

“(v) Corporations partially exempted by the SFC from the provisions of Part XV but are required to file with SEHK any disclosure of interests made in another jurisdiction will also be required to file their disclosures of interests electronically.”

4.16 The Group supports this proposal.

(c) Alternative methods to electronic filing: emergencies, etc.

4.17 The Group notes that disclosure of interests forms are often completed in a short period of time with little margin for delay. It is easy to imagine delays occurring in the form of IT disruptions, either to the IT programs of a substantial shareholder or its link to the internet. However unlikely or short-term these disruptions may be, they could clearly have a significant impact on the substantial shareholder's ability to make an electronic filing within the statutory timeframe. For this reason, the Group would urge the SFC to consider permitting hard-copy filing on a strictly exceptional basis.

4.18 The Group would suggest that this exception be expressly stated in the Guidance Notes. The Group is aware that section 328(a) of the SFO contains a “reasonable excuse” defence for failing to file and a serious IT failure may qualify as a reasonable excuse. However, to avoid any uncertainty and given that breaching section 328 has criminal consequences, the Group is strongly in favour of an express provision in the Guidance Notes. It goes without saying that, even though an IT disruption could prevent an electronic filing being made within the timeframe, the substantial shareholder would still be expected to make a hard-copy filing on time; in other words, this exception would not be an excuse for making no filing at all. Furthermore, the Group is conscious of the need to avoid the hard-copy exception being abused and would, therefore, expect hard-copy filers to justify their reasons for any hard-copy filings and for the SFC to take investigative action in the event that repeated hard-copy filings are made by the same individuals.

4.19 The Group expects a hard-copy alternative may be necessary in the even more unlikely event that the HKEx's systems are disrupted, although the Group accepts that this eventuality may not merit express mention in the Guidance Notes.

4.20 There is also the possibility that a small number of substantial shareholders – particularly those who are based overseas and may not keep themselves as well-informed about changes to the Hong Kong regulatory system as they should – may inadvertently continue to make hard-copy filings, simply on the basis of existing practice. Again, although this may not mention specific coverage in the Guidance Notes, the Group would support the SFC not taking action against “first time offenders” who make a hard-copy filing under the new regime. Clearly, such substantial shareholders would only be permitted to make this

mistake once as the Group would expect the HKEx to have contacted them after such a filing and to have referred them to the new regime for future filings.

(d) Timing of publication of DI forms on HKEx's website

- 4.21** The Group supports the proposal to retain the HKEx's existing practice of updating the DI pages on its website only once a day at approximately 5pm on a business day (the "Existing Approach") and share the same concerns as the SFC over the "Straight-through Approach", whereby DI notices would be published straight through upon receipt by SEHK. The Group has the following additional comments.
- 4.22** The Group would appreciate future clarification on the submission deadline for a filing on a given business day. The Group understands that the HKEx's practice is to update the DI pages at 5pm, however, the Group assumes that this is not meant to be a cut-off time for submitting filings which are due on that same business day, even though filings received after 5pm would, presumably, not be published until the next business day. Since this time is not set out in the SFO or Guidance Notes, the Group would be grateful if the SFC could confirm that filings due on a certain business day but after 5pm on that same day would not breach the Part XV regime.
- 4.23** Although this is suggested by paragraphs 24(i), 25(i) and 27 of the Consultation Paper, the Group assumes that is the HKEx's intention to continue to vet filings that it receives before publication on its DI pages. This acts as a vital safety net against releasing potentially misleading information to the market in the event of an erroneous filing and the Group would warn against a system of unvetted real-time publication in the future, as described in paragraph 27 of the Consultation Paper. The Group feels strongly that HKEx should continue to vet the filings to avoid erroneous filings which may mislead or cause confusion in the market.
- 4.24** Furthermore, the Group would urge the HKEx not to put excessive weight on the transparency benefits of the Straight-through Approach, on the basis that substantial shareholders will have a window of 3-10 days (and at various times within each of those days) in which they are permitted to submit Part XV filings, and the timing of a filing could be used, intentionally or not, to cause a certain reaction in the market. The Existing Approach would standardise this problem by only releasing information at the same time each day.
- 4.25** The Group notes that under the current DI filing mechanism, the listed company will often receive a copy of the DI filing simultaneously with the substantial shareholder filing the DI notice with the HKEx, however, the HKEx will only publish the DI notice publicly a day or two later. Although this is a short time gap, it still gives the listed companies and the individuals receiving the DI notice at the listed company an unfair advantage over the public. The Group would, therefore, suggest that under the proposed regime, the HKEx should only provide electronic copies of the DI notice to the listed companies once the notice has been vetted and is disclosed publicly on the HKEx website, thereby providing information to the market and the listed companies at the same time.

5 Requirements relating to Registers of Interests and Short Positions kept by listed corporations

- 5.1** The Group understands that the SFC is of the view that so long as listed corporations keep their registers up-to-date and maintain them in proper order, it may not necessary to

impose strict requirements on the timing and how they are being kept nor to impose the right of inspection by the public.

- 5.2** The Group fully supports this proposal and agrees with the comments made in the Consultation Paper that the legislative requirements should be removed.