Comments on the draft Securities and Futures (Stock Market Listing) Rules

1 General

The group of financial institutions listed below (the "**Group**") welcomes the opportunity to provide comments on the draft Securities and Futures (Stock Market Listing) Rules (the "**draft Rules**").

The draft Rules, which the Securities and Futures Commission (the "**SFC**") proposes to make under Section 36(1) of the Securities and Futures Ordinance (the "**SFO**") set out various requirements in respect of applications for listing, disclosures by listed issuers, suspension of dealings and de-listing. Although most of the provisions are based on the existing Securities (Stock Exchange Listing) Rules and the Securities (Stock Exchange Listing) (Approved Share Registrar) Rules, some of the provisions in those Rules appear somewhat outdated and anomalous.

The main addition to the existing Rules proposed in the draft Rules is a requirement that all documents (drafts as well as final versions) in support of or in connection with a listing application and final copies of all on-going disclosure materials (such as announcements, circulars etc.) must be filed with the SFC. This additional requirement raises a number of significant issues, the main ones being:

- it extends the criminal liability attaching to listing documents and on-going disclosure materials beyond those which exist in the SFO;
- in particular, it extends criminal liability to draft documents;
- does liability attach to sponsors, arrangers or lead managers? We assume that there is no liability on these persons as the listing applicant itself should be ultimately responsible for the contents of the listing application and on-going disclosure materials, not unrelated third parties.

These and the other issues are discussed below in more detail.

2 Copy of listing materials to be filed with SFC

Rule 5 requires a listing applicant to file a copy of the listing application with the SFC.

Under Section 384 of the SFO, any person who intentionally or recklessly provides false or misleading information to the SFC in a situation where that person is required to provide information to, amongst others, the SFC under legislation (including any subsidiary legislation), commits an offence subject to a maximum fine of HK$1 million and 2 years imprisonment. This section would apply to information provided to the SFC as required by the draft Rules.

Section 384 is derived from Section 56A of the Securities and Futures Commission Ordinance and Section 38A of the Stock Exchanges Unification Ordinance. At present, only the Exchange has the power to invoke Section 38A(3) against any listing applicant or listed company that has intentionally or recklessly provided the Exchange with false or misleading information in relation to Listing Rules matters because such persons are only required to submit or "provide" listing applications, announcements, circulars and other listing related documents to the Exchange for vetting or dissemination on its websites. In the prosecution of an offence under Section 38A(3), the prosecution has to prove, amongst

others, that the Exchange has given prior written warning to the person in breach that the provision of false or misleading information to the Exchange would render him liable for prosecution under that section. If the draft Rules are implemented, the SFC would also have the power to prosecute persons for providing false or misleading information in purported compliance with the Listing Rules under Section 384 of the SFO; and in doing so, it appears that the SFC is not obliged to provide any prior written warning to any person as is currently required under Section 38A(3).

The provisions of Rule 5 extend the criminal liability potentially attaching to listing documents and on-going disclosure materials. There exist already various criminal provisions under Parts IV and XIV of the SFO for false and misleading statements. There is also civil liability under Part IV and Part XIII for false and misleading statements, and separately in Part XVI for false or misleading public communications concerning securities and futures contracts. False or misleading prospectuses also attract criminal and civil liability under the Companies Ordinance. From a public policy and investor protection perspective, it is questionable whether the additional criminal sanctions provide any greater protection.

Rule 5 requires a listing applicant to file a copy of its application with the SFC within one business day after the day on which the applicant submits its application to the Exchange. Although the applicant can authorise the Exchange to submit the application to the SFC, this will involve extra copies of documents having to be provided. We fear that there will be unnecessary duplication of effort between the SFC and the Exchange in reviewing the application documents and will add a high degree of uncertainty to the listing process.

It is also unclear at what stage the applicant would need to submit a copy of the listing document to the SFC. For example, in a share offering a listing applicant makes a preliminary application by submitting Form A1 together with a draft of the prospectus. The formal application (Form C1) is not submitted until a later date. It would be objectionable in principle if an applicant could incur criminal liability on the basis of information in a draft document that has not been made available to the investing public, without being given the opportunity to amend the information. If Rule 5 is to remain, it should only apply to the final version of the listing document.

Also, due to the wide definition of “application”, any letter from an issuer in response to an Exchange requisition is a document in support of the application. What about in formal email and fax correspondence between the Exchange and a listing applicant? The Group believes that if Rule 5 is to remain then only the formal listing document in final form should be required to be submitted to the SFC.

We would also like confirmation that the draft Rules will never apply to the sponsor, arranger or lead manager of a transaction, as the definition of “applicant” refers to a corporation that has made an application under Rule 3, and Rule 3 refers to an application made by a corporation to list securities issued or to be issued by that corporation. Therefore any correspondence between those persons and the Exchange should not be regarded as being part of the “application”. To read the draft Rules otherwise would be inappropriate in light of such person’s role vis-a-vis the applicant.

The SFC has 10 business days from the date of submission of the application to object to the listing or ask for further information. If the SFC asks for further information, it has a further 10 business days to object to the listing. If the SFC requires changes to the document, this is likely to lead to delays in the listing process. If an applicant revises any information in the listing document, it must submit that revision to the SFC, which then has

a further 10 business days to object. Also for certain products, such as listed warrants, the whole listing procedure currently takes significantly less than 10 business days. The SFC should agree in Rule 5 to notify the Exchange and the listing applicant of any objection to listing within sufficient time to enable the listing process to be conducted within the usual time frame set out in the Listing Rules.

Under Rule 5(6), the SFC can object to a listing if, amongst other things, “it would not be in the interest of the investing public or in the public interest for the securities to be listed”. The SFC in the Consultation Paper has said that it will not be looking at the merit of the transaction. However, the draft Rules give the SFC extensive scope to conduct a merit-based assessment.

3 Requirements for listing applications

Rule 3 sets out the contents requirements for listing applications. The Group believes these are better set out in the listing rules themselves, especially in light of the different types of products that are now being listed, and the fact the list may not always be relevant and may become out of date. For example, we do not believe the listing documents for derivative warrants include all the matters listed. The Group suggests that only paragraphs (a) and (c) remain. It is unclear what is meant by “comply with any provision of law applicable” in paragraph (b).

Also, the draft Rules say that the "application" must include the various matters listed in Rule 3. It is unclear whether this means they must go in the listing document, or simply be included in the application documents submitted to the Exchange.

4 Copy of on-going disclosure materials to be filed with SFC

Rule 6 requires an issuer to file with the SFC a copy of any announcement, statement, circular or other document that has been issued by it or on its behalf to the public or to its shareholders under the Listing Rules, or under any applicable provision of law, or under any Codes published by the SFC.

As mentioned above, this provision extends the criminal liability attaching to on-going disclosure documents, and the Group believes the SFC should rely on the existing provisions under the SFO.

5 Miscellaneous

In Rules 8 and 9 only the issuer and the Exchange appear to have standing to make representations to the SFC. Although we cannot contemplate the sponsor, arranger or lead manager of a transaction having liability under the draft Rules, there may be situations where such persons should have the ability to make representations to the SFC with respect to a particular listing application.

In Rule 17, the Exchange should be able to permit dealings to recommence following a suspension instigated by the Exchange without the prior approval of the SFC. An inability on the part of the Exchange to do so would create too much uncertainty in the market place.

The definition of “applicant” only refers to a corporation. We believe this should be extended to “or other body whose securities are listed, or proposed to be listed, on a recognized stock exchange”. The listing rules envisage that entities other than corporations may list securities, for example, unit trusts and other collective investment schemes.

6 Approved Share Registrars

The draft Rules also include (with some changes) the provisions on approved share registrars currently set out in the Securities (Stock Exchange Listing) (Approved Share Registrar) Rules. These draft Rules (like the current Rules) do not appear to make sense in the context of an application to list securities other than shares. They say that to list any securities the applicant must appoint an approved share registrar, i.e. a person who maintains in Hong Kong the register of members of a company which has securities listed on the Exchange. In practice, where the company's shares are not listed, we understand that this has been interpreted as requiring the register of holders of the listed securities to be maintained in Hong Kong rather than the register of members. However, the opportunity should be taken to correct the drafting. In the context of certain products it should not be necessary to require the register to be maintained in Hong Kong. It would be better if the provision was redrafted so it only applied in respect of an application to list shares.

If the SFC would like to discuss any of the issues raised in this paper collectively with the Group, please contact Alison Fidler at Linklaters, 10/F Alexandra House, Chater Road, Central, Hong Kong (tel: 2842 4811/email: alison.fidler@linklaters.com).

Listing of financial institutions

Credit Suisse First Boston (Hong Kong) Limited

Goldman Sachs (Asia) L.L.C.

Morgan Stanley Dean Witter Asia Limited

Salomon Smith Barney Hong Kong Limited