

## MIXED MEDIA OFFER

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As part of The Stock Exchange of Hong Kong Limited's (the "**Stock Exchange**") environmental friendly initiative to reduce the requirement for printed materials within the confines of the existing regulatory framework, on 25 November 2010 the Stock Exchange and the Securities and Futures Commission (the "**SFC**") jointly published their consultation conclusions to allow, among other things, issuers of equity securities and debentures to issue paper application forms in public offers without being accompanied by paper listing documents if they comply with the relevant class exemption conditions under the Companies Ordinance (Cap. 32 of the Laws of Hong Kong) ("**CO**"), otherwise known as the "**Mixed Media Offer**" or "**MMO**".

Although the use of MMOs in public offers is not mandatory, according to a survey conducted by the SFC in 2007, at least one-third of the paper prospectuses that were made available to the public were not taken up in general and retail investors in Hong Kong, on average, only took one paper prospectus for every 10 paper application forms distributed. In order to cooperate with the regulators' good intentions and reduce the cost involved in the publication of unused prospectuses, the first MMO in the Hong Kong capital markets was adopted in the initial public offering of Top Spring International Holdings Limited (stock code 3688) ("**Top Spring**"), whose shares were listed on the Main Board of the Stock Exchange on 23 March 2011. Paul Hastings acted as underwriters' legal counsel as to Hong Kong and U.S. laws in the initial public offering of Top Spring.

### **Who may adopt MMO in its public offer?**

MMOs may be adopted in the public offer of shares and debentures of a company, including an investment company under Chapter 21 of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the "**Listing Rules**"), as well as interests in SFC-authorized collective investment schemes listed or to be listed, on the Stock Exchange.

This paper discusses the use of an MMO for companies conducting a public offering of shares and debentures under the CO (a "**CO Offeror**").

### **Class Exemption Conditions**

Before the relevant exemptions relating to MMOs came into effect, sections 38(3) and 342(3) of the CO prohibit the issue of an application form by an issuer unless it is issued together with a prospectus. After 1 February 2011, a CO Offeror may issue paper application forms accompanied with electronic copies of the relevant prospectus through the class exemption provided under new section 9A of the Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice (Cap. 32L of the Laws of Hong Kong) (the "**Notice**"), the details of which are further reflected in the new Rule 12.11A of the Listing Rules.

A CO Offeror must do the following in order to qualify for a class exemption:

- A. An MMO announcement (the “**MMO announcement**”) must be made during the period of five business days prior to the commencement of the offer period containing the following information:
- (i) the offeror proposes to offer shares in or debentures by a prospectus issued generally;
  - (ii) the shares or debentures are the subject of an application to the Stock Exchange for listing;
  - (iii) the offeror intends to rely on section 9A of the Notice and issue a printed application form without it being accompanied by a printed form prospectus;
  - (iv) throughout the offer period, prospective investors may access and download the electronic form prospectus (which should be reasonably tamper-resistant) from either the offeror’s website or the Stock Exchange’s website;
  - (v) the address of each of the websites, the place on the website where the electronic form prospectus may be accessed, and how the prospectus may be accessed. The prospectus on the offeror’s website should be directly linked from (1) the homepage of that website or (2) another webpage within that website that is directly linked from the homepage of that website. The webpage (other than the homepage) displaying the link to prospectus, or the electronic form prospectus, should not contain any promotional information about the offeror or the offer, and a notice is to be displayed stating that the securities are being offered solely on the basis of the information provided in the prospectus;
  - (vi) throughout the offer period, copies of the printed form prospectus will be available for collection at specified locations<sup>1</sup>, free of charge, upon request by any member of the public;
  - (vii) the particulars of the specified locations<sup>1</sup>; and
  - (viii) throughout the offer period, at least 3 copies of the printed form prospectus will be available for inspection only at every location (i.e., not to be taken away by applicants) where the printed application forms are distributed.
- B. Each of A(vi) to A(viii) above are to be made available during the offer period.
- C. Each of the electronic form prospectus and the printed form prospectus must contain, in a prominent place on the face of the prospectus, a statement in a clear and legible form and each of the printed application forms must state in a prominent place the details set out in paragraphs A(i) to A(viii) above.
- D. In addition, each of the printed application forms must state in a prominent place the details set out in paragraphs A(i) and A(viii) above, and that prospective investors should read the prospectus prior to submitting an application.
- E. Each of the electronic form prospectus and the printed form prospectus must also state that the contents of the two forms are identical. The two forms must be identical not just in their content, but also in their typeface and format.

### Suspension and Resumption

If, after the MMO Announcement is published, the offeror is aware that any of the class exemption conditions specified above are not or will not be satisfied, it must:

- (i) as soon as practicable, publish a suspension announcement in accordance with the Listing Rules; and
- (ii) rescind the MMO and not issue the printed application form during the offer period without it being accompanied by a printed form prospectus.

After the suspension announcement is published, the offeror may, during the offer period, re-adopt the MMO again if:

- (iii) each of the class exemption conditions specified in paragraph (A) above is or has been satisfied; and
- (iv) it has published an MMO resumption announcement in accordance with the Listing Rules.

### Key Concerns

In an initial public offering, sponsors and listing agents must ensure that a public offer is conducted in a "fair, timely, and orderly manner." Despite the fact that the MMO permits an offeror to print less copies of printed form prospectuses than before, a sponsor should continue to ensure that:

- (i) there are sufficient printed form prospectuses and application forms for distribution;
- (ii) the distribution of printed form prospectuses and application forms can be made in a timely and orderly fashion; and
- (iii) appropriate contingency plans have been drawn up to deal with any events of disorder or failure, or unforeseeable circumstances which may arise during the offer period.

To properly implement and execute a public offer with the MMO, the sponsors of the offer should coordinate and liaise with the receiving banks, financial printers, the issuer's Hong Kong share registrar, both legal advisors as to Hong Kong law, as well as other related intermediaries such as Hong Kong Securities Clearing Company Limited, sufficiently ahead of the offer period so as to reduce execution uncertainties and enhance the likelihood of the success of the MMO.

The underwriting agreements should also include a representation and warranty from the issuer that the MMO Announcement is true, accurate, complies with all relevant class exemption conditions, and is not misleading.

As a best practice recommendation, issuers and sponsors may consider stating in the MMO Announcement details about how a member of the public may pre-register with the sponsors to obtain a printed prospectus during the offer period, such as by way of a hotline service, as well as where the prospectus may be obtained.

Although it is not necessary to pre-vet the MMO Announcement by the Stock Exchange, given the nascent state of MMOs it is recommended that the draft MMO Announcement be submitted to the Stock Exchange for its review before publication.

It is inevitable that an increasing proportion of issuers will be attracted by the potential cost savings of printing fewer prospectuses. However, it remains to be seen how market practice

develops with respect to the implementation of MMOs, particularly as they becomes tested by multiple large-scale offerings during periods of intense public investor interest in new listings.



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<sup>1</sup> Specified locations means:

- (a) for an offer of shares in a company by a prospectus:
  - (i) if any of the shares in the company are already listed on the relevant stock market, the depository counter of Hong Kong Securities Clearing Company Limited, the designated branches of the receiving banks specified in the prospectus, if any, and the place of business of the company's approved share registrar in Hong Kong; or
  - (ii) if none of the shares in the company are listed on the relevant stock market, the depository counter of Hong Kong Securities Clearing Company Limited, the designated branches of the receiving banks specified in the prospectus, if any, and the principal place of business of the sponsors acting in respect of the application for listing of the shares; or
- (b) for an offer of debentures of a company by a prospectus, the depository counter of Hong Kong Securities Clearing Company Limited, the designated branches of the placing banks specified in the prospectus, and the principal place of business of the coordinator for the offer specified in the prospectus.