



Linklaters

**Accelerated Bookbuild Offerings:
Suggested techniques to assist with continuous
disclosure obligations and to converge practice
in light of the EU Market Abuse Regulation**

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Summary

ASIFMA recommends market participants follow the protocols set out in this paper for promptly publicly announcing accelerated equity and equity-linked securities offerings, in particular, where the offerings involve primary issuances by listed issuers, or sell-downs by controlling shareholders. Such a practice furthers the objectives of disclosure requirements for publicly-traded companies, promotes compliance with the European Market Abuse Regulation (“MAR”) and promotes transparency that will aid investors participating in such offerings and the public more generally.

Background and context

- 1 Accelerated bookbuild offerings of equity and equity linked securities (including undocumented and delayed settlement offerings) (“ABOs”) in many markets in Asia (including Hong Kong and Singapore) are typically executed within a very short time frame, usually launching shortly after close of market, with pricing occurring overnight (to the extent successful) and (in many cases) crossing of the trade reporting through the relevant bourse at the open of market the following day for ABOs of existing securities (later for ABOs of new shares that are subject to regulatory approval), followed by relevant settlement several days later.
- 2 The launch of an ABO is commonly disclosed, with the authority, and on behalf of, the relevant issuer or seller, through a message being despatched by the relevant placing agent(s) to a number of potential investors, usually institutional or professional investors. Such launch disclosure summarises the key aspects of the proposed transaction; and may result in details of the ABO being picked up more widely in the press and often reported on Bloomberg. This launch disclosure may, from time to time, be preceded by the relevant placing agent(s) conducting wall crossed market soundings with certain investors in advance of launch.
- 3 In terms of formal public announcements communicating the details of such ABOs to all investors (such as on the HKSE in relation to Hong Kong ABOs), rather than just to investors via the launch disclosure, there is usually not any such formal announcement at the time of launch in Asia. This can be contrasted with market practice in the EU and the USA, where it is common for formal launch announcements of an ABO to be made by the relevant issuer or shareholder (as the case may be).
- 4 In relation to ABOs of existing securities, there is usually no formal public announcement throughout the entire transaction (public disclosures for these transactions tend to consist solely of updated shareholding notices, which are often filed on a delayed basis from the relevant event to which they relate¹).
- 5 In relation to ABOs of new securities (whether by a placing and top-up structure, or a straight issue of new securities), it will be customary for the issuer to make an announcement after pricing, if it has been successful, with such formal public announcement customarily being released before opening of the markets on the morning after the launch (and then again a further formal announcement at settlement).
- 6 No formal public announcement is customarily made for any ABO transaction if it aborts after launch, due to a failure to price or settle.

Continuous disclosure

- 7 Listed companies are subject to continuous disclosure obligations. These obligations do not cease merely because the market is no longer trading – indeed, in many Asian markets it is only during the non-trading period that formal disclosures can be made.

¹ For example, in Hong Kong, this is often done through disclosures made pursuant to the regime in Part XV of the Securities and Futures Ordinance relating to interests acquired in listed companies; these disclosures are generally only required to be made within three business days of the relevant event giving rise to the disclosure obligation.

- 8** Where a listed company launches a potential ABO involving the issue of new securities and such launch is not disclosed by a formal public announcement, it may be argued that the disclosure made is not “generally known to the market” from a continuous disclosure perspective (and ASIFMA notes that it is of course still possible for trading in the relevant securities to occur on an OTC basis outside of normal trading hours or on exchanges in other time zones). While the transaction may not yet have completed, it may have lost its confidential nature due to the launch disclosure and media coverage.
- 9** This loss of confidentiality potentially lessens the availability of any safe harbour for the transaction from continuous disclosure obligations in certain markets, such as Hong Kong, to the extent the relevant ABO is more likely than not to affect the price of the listed company’s securities (a question whose answer will differ, deal to deal, as not all ABOs will be price sensitive events), from the time of such launch.
- 10** Issuers from time to time note concern about making a formal public announcement at launch, in case the ABO does not price and is withdrawn. In practice, that same embarrassment concern occurs regardless among the professional and institutional investors as well as the press, who will be aware of the launch disclosure and the fact that the ABO has not proceeded; and in any case, ASIFMA notes that it is only in uncommon cases that an ABO would fail to price or settle after launch, in particular if wall crossed market soundings had been conducted prior to launch.
- 11** The potential for retail investors (who may be unaware of the attempted ABO) to have different information from the professional investors absent a formal launch announcement may also be inconsistent with the principle of continuous disclosure.
- 12** In effect, there is a risk that one body of shareholders (the professional and institutional investors) knows:
- (i) that an ABO was launched, and further, that it then priced, either on original or revised terms, while another body of shareholders (retail) know nothing about the same ABO until the issuer announces the pricing of the trade (usually the morning after launch) and/or the trade crosses through the market and/or shareholder ownership notices are filed; or
 - (ii) that an ABO was launched and aborted, while another body of shareholders (retail) knows nothing about the attempted ABO transaction.

This inequality of information is inconsistent with continuous disclosure, particularly if knowledge of the launch (and, where applicable, subsequent abort) can be considered at all material in relation to the securities of the issuer, indicating (as it sometimes will) a potential continuing over-hang in the relevant securities.

- 13** Secondary ABOs by existing shareholders will have certain different considerations. Save for controlling shareholders, it is unlikely that most existing shareholders can compel at short notice an issuer to inform the market by way of a formal public announcement of the launch of an ABO by such shareholder. Such existing shareholder is also not under the same ongoing duty to ensure continuous disclosure that the listed company is subject to. Nevertheless, certain protocols discussed below may in some cases also be adopted and adapted for these transactions, as is seen by practice in the EU and the USA.

Impact of the Market Abuse Regulation

- 14** An additional regulatory change has occurred which may, in certain situations, further support action being taken in this practice area. The European Market Abuse Regulation (EU 596/2014) (“**MAR**”) came into force on 3 July 2016. MAR’s territorial reach is extensive, potentially capturing securities transactions involving Asian listed companies, even where those companies have little to no clear nexus to the EU. While the requirements of MAR are understandably not identical with the requirements of applicable Asia legislation principally regulating transactions such as ABOs, in relation to key matters such as continuous disclosure, inside information, insider dealing and market misconduct, there is sufficient overlap, both in scope and reach, to support possible convergence on certain issues and protocols, such as those set out in this paper.

- 15** Certain buy-side investors in Asia, with footprints back into the EU, are requesting compliance confirmations on ABOs in accordance with MAR requirements.
- 16** This has had several impacts, but of particular note to the present issue is its potential impact on the way in which wall crossed market soundings are conducted in Asia on ABOs.
- 17** We note that not all ABOs will be within the scope of the MAR regime, in which case the MAR requirements will not apply. But this analysis is not straight forward to determine, particularly in the time pressure of an ABO, as it is not merely a question of where the issuer is listed, nor where the placees are based.
- 18** Where such wall crossed market soundings are used on ABOs and the ABO is within MAR scope, a particular challenge under MAR is the obligation² on the person conducting a sounding to inform the soundee when the information disclosed ceases to be inside information. This differs from the historical position of most Asian wall crossings on ABOs, where if the relevant ABO did not materialise, the relevant party disclosing such information (often a placing agent) would inform the soundee of that fact, but then inform that party that it was their obligation to determine whether or not they were cleansed. For those ABOs that are within MAR scope, there is in effect now an obligation for the disclosing party, such as a placing agent, to provide its view on whether the soundee is cleansed or not.
- 19** To safeguard this process, and avoid disclosing parties such as placing agents from abandoning the practice of wall crossed market soundings for fear of having to provide an absolute view on the cleansed (or not) nature of the soundee (with well managed wall crossing generally being accepted as being beneficial to all parties as part of effective price discovery), the formal disclosure protocols outlined below should be considered³.

Proposed protocols

- 20** In light of the above, ASIFMA recommends parties consider adopting the following protocols for Asian ABOs where the offering is price sensitive to the issuer's listed securities, such that wherever practicable (and in particular, where the ABOs involve primary issuances by listed issuers, or sell-downs by controlling shareholders), the listed issuer should issue (or be procured to issue in the case of a sell-down by a controlling shareholder)⁴:
- 20.1.1** a formal public announcement (alongside any launch disclosure made to potential investors) at the time of launch, noting the launch of a possible overnight ABO;
- 20.1.2** a formal public announcement either later that evening or the next morning⁵ before the market reopens (in any case, promptly upon the relevant decision being made), confirming either:
- (i) the essentials of the ABO, to the extent the ABO has successfully priced, or
 - (ii) confirming that the ABO is not proceeding as this time; and
- 20.1.3** a formal public announcement upon settlement of the relevant ABO (assuming it was not withdrawn under paragraph 20.1.2(ii) above).

² See Article 11(6) MAR and Article 5 of Commission Delegated Regulation EU 2016/960.

³ In order to assist with the cleansing process, it would in any case be advantageous if the terms of engagement entered into between the issuer/seller and the relevant placing agent(s) provided for a specified minimum "cooling off" period before a further transaction could be launched.

⁴ Further analysis may be required to time the various announcement correctly when the issuer is listed on multiple bourses (such as dual listings).

⁵ In HK, the opportunity for the listed company to make a formal public announcement overnight, confirming the ABO has either priced or will no longer proceed, is restricted to the hours of 4.30pm to 11pm, and 6am to 8.30am (HK time), when the HKSE's announcement platform is open to receive and disclose announcements by HK listed companies.

- 21** Templates for the above formal public announcements, drafted for a controlling shareholder sell-down ABO but equally adaptable to an issue of new securities by a listed issuer, are set out in Annexures A to D.
- 22** ASIFMA recognises that these protocols and formal public announcements will be easier to arrange where the ABO is a pure primary issuance or a secondary sale by a controlling shareholder. Where it is impractical to obtain the involvement of the relevant issuer in the sale (for example, where the sale is a secondary sell-down by a minority shareholder who may be reluctant to request the assistance of the listed issuer), we would encourage the seller and relevant placing agent(s) to follow existing practice in disseminating information as widely as possible, being mindful of the principles of non-selective disclosure.
- 23** In this regard, ASIFMA notes that private equity sellers in European ABOs are frequently seen making widely disseminated announcements in their own name via various media channels in relation to the commencement, pricing and conclusion of their ABO transactions, while still managing to avoid any risk of such announcements giving rise to a public offering of securities.
- 24** Finally, ASIFMA notes there are some ABOs involving a very limited number of professional/institutional investors who are approached and allocated on a wall-crossed basis, where there is no real “launch disclosure” process. These are sometimes referred to as “club” deals. ASIFMA would not expect the launch announcement protocols set out in this paper to be adopted in those transactions (since the transaction is built and allocated on a non-public, wall crossed basis). That said, many of the recommended protocols set out in the paper, such as encouraging issuer announcements as soon as possible after pricing where possible, taking steps to ensure confidence is maintained by all wall-crossed parties until the transaction becomes public, and the inclusion of a minimum “cooling off” period should such a deal fail to materialize, will remain highly applicable to such transactions.

Annex A

Template announcement on launch of an ABO

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[Name of the Company]

(Incorporated in [●] with limited liability)

(Stock Code: [●])

INSIDE INFORMATION

This announcement is made by *[insert name of the Company]* (the "**Company**") pursuant to Rule 13.09(2)(a) of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the "**Listing Rules**") and the Inside Information Provisions (as defined in the Listing Rules) under Part XIVA of the Securities and Futures Ordinance (Chapter 571 of the Laws of Hong Kong).

The board of directors (the "**Board**") of the Company was informed by *[insert name of vendor]* (the "**Vendor**"), a controlling shareholder of the Company, of its intention to sell up to [●] shares in the Company (the "**Shares**"), representing up to approximately [●]% of the issued share capital of the Company, through a *[insert description of transaction structure, e.g. "secondary share placement"]* at a price ranging from between [●] and [●] (the "**Placing**").

As at the date of this announcement, the Vendor is *[directly/indirectly]* interested in [●] shares in the Company, representing approximately [●]% of the issued share capital of the Company. *[The Vendor has further advised the Company that it intends to remain a controlling shareholder of the Company immediately following completion of the Placing.]*

As the Placing may or may not proceed, shareholders of and potential investors in the Company are advised to exercise caution when dealing in the Company's securities.

By Order of the Board
[Name of the Company]

[Name of the Authorised Representative
of the Company]
[Position of the Authorised
Representative of the Company]

[Date]

Annex B
Template announcement on successful pricing of an ABO

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[Name of the Company]
(Incorporated in [●] with limited liability)
(Stock Code: [●])

INSIDE INFORMATION

Reference is made to the announcement (the "**Announcement**") by *[insert name of issuer]* (the "**Company**") dated [●] in relation to the intention of *[insert name of vendor]* (the "**Vendor**")*[, a controlling shareholder of the Company,]* to sell up to approximately [●] Shares. Unless otherwise defined, terms used herein shall have the same meanings as in the Announcement.

PLACING OF SHARES BY THE VENDOR

The Board has been informed by the Vendor that it has entered into a placing agreement for the placing of [●] Shares (the "**Sale Shares**"), representing approximately [●]% of the issued share capital of the Company, through a *[insert description of transaction structure, e.g. "secondary share placing"]* at the price of HK\$[●] per share (the "**Placing**") on *[insert date]*. [The Vendor has agreed, and has agreed to procure its nominees and any person controlled by it, to a lock-up period of [●] days after the date of closing of the Placing.] The Placing is expected to close on or about *[insert date]*, subject to certain customary conditions as provided in the placing agreement.

EFFECTS ON SHAREHOLDING STRUCTURE

Immediately after completion of the Placing, the Vendor will be *[directly/indirectly]* interested in [●] Shares, representing approximately [●]% of the issued share capital of the Company. [The Vendor will therefore continue to be a "controlling shareholder" of the Company (as defined under the Listing Rules) after the Placing.]

As the Placing may or may not complete, shareholders of and potential investors in the Company are advised to exercise caution when dealing in the Company's securities.

By Order of the Board

[Name of the Company]
[Name of the Authorised Representative
of the Company]
[Position of the Authorised
Representative of the Company]

[Date]

Annex C

Template announcement on withdrawal of an ABO

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[Name of the Company]

(Incorporated in [●] with limited liability)

(Stock Code: [●])

INSIDE INFORMATION

Reference is made to the announcement (the "**Announcement**") of the Company dated *[insert date]* in relation to the intention of *[insert name of vendor]* (the "**Vendor**") to sell up to approximately [●] shares in the Company. Unless otherwise defined, terms used herein shall have the same meaning as in the Announcement.

The Board has been informed by the Vendor that the Placing did not materialise and the Vendor has not disposed of any of the Shares held by it.

By Order of the Board
[Name of the Company]

[Name of the Authorised Representative
of the Company]
[Position of the Authorised
Representative of the Company]

[Date]

Annex D

Template announcement on completion of an ABO

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[Name of the Company]

(Incorporated in [●] with limited liability)

(Stock Code: [●])

[INSIDE INFORMATION]

Reference is made to the two announcements (the "**Announcements**") of the Company dated *[insert date]* and *[insert date]* in relation to the placing (the "**Placing**") of [●] shares of the Company by *[insert name of vendor]* (the "**Vendor**"), a controlling shareholder of the Company]. Unless otherwise defined, terms used herein shall have the same meaning as in the Announcements.

COMPLETION OF PLACING OF SHARES BY THE VENDOR

The Board has been informed by the Vendor that completion of the Placing took place on *[insert date]* in accordance with the terms and conditions of the placing agreement. Pursuant to the Placing, an aggregate of [●] Shares, representing approximately [●]% of the issued share capital of the Company, were sold by the Vendor at the price of [●] per Share.

[As at the date of this announcement, the Vendor [remains a controlling shareholder of the Company and] is [directly/indirectly] interested in [●] Shares, representing approximately [●]% of the issued share capital of the Company.]

By Order of the Board
[Name of the Company]

[Name of the Authorised Representative
of the Company]
[Position of the Authorised
Representative of the Company]

[Date]