

November 2017 Legal and Regulatory Update

Top stories

HKEX consultation: Corporate Governance Code

HKEX published a consultation paper on “Review of the Corporate Governance Code And Related Listing Rules”. (Click: [full report](#), [press release](#)). Its focus is on **independent directors** (“INEDs”), including greater transparency and accountability in the nomination process, strengthening the independence criteria, and promoting board diversity. Transparency in listed company dividend policy is also proposed. Technically, these are to be achieved by revising the CG Code, or upgrading some Code Provisions (“CP”) into Listing Rules (“Rules”).

What you should know:

- **INEDs (over-boarding and time commitment)** (paras 27-39 of report)
 - (Revise CP A.5.5) For electing INED who holds his **7th (or more) listed company directorship**, the circular to shareholders should give reasons why he would still be able to devote sufficient time to the board
 - HKEX will issue Guidance setting out some considerations in assessing whether a nominee may be over-boarded
- **Board diversity** (paras 40-56)
 - Upgrade CP (A.5.6) to a Rule, requiring issuers to have a diversity policy and disclose the policy / a summary in the corporate governance report (“CG Report”)
 - (Revise CP A.5.5) Disclose, in circular to shareholders accompanying the resolution to elect the director:
 - (i) the process used for identifying the nominee
 - (ii) the perspectives, skills and experience he is expected to bring to the board
 - (iii) how he would contribute to diversity of the board
- **INEDs (factors affecting independence)** (paras 57-86)
 - **Cooling off periods:**
 - (i) (Revise Rule 3.13(3)) For **former professional advisors** – extend from 1 to 3 years
 - (ii) (Revise CP C.3.2) For a **former partner of auditor** to become its **audit committee member** – extend from 1 to 3 years
 - (iii) (Revise Rule 3.13(4)) **material interests in its business activities in the past year**: introduce 1-year cooling off period

- (New “Recommended Best Practice”) disclose in CG report, an INED’s **cross directorships** or significant links with other directors
- (New) add a note under the independence criteria rule, that these criteria “should apply” to an INED’s “**immediate family**” (i.e. spouse, his (or spouse’s) child or step-child, natural or adopted, under 18) in assessing independence
- (New) disclose **nomination policy** in **CG Report**, which should set out the board’s consideration of Code Principle (A.3) (i.e. a board should have a balance of skills, experience, and diversity of perspectives) (paras 87-92)
- (Revise CP A.2.7) **INEDs should meet annually with the Chairman**, in the absence of the other directors, giving feedback (paras 100-106)
- (New) disclose **dividend policy** in the **annual report** (paras 107-113)
- (New) whether should allow “**implied consent**”, via an issuer’s articles of association, for **electronic dissemination of corporate communications to shareholders** (paras 114-120)
 - Currently, issuers have to send hard copy requests for consent to shareholders
 - Its implementation would require amendments of the Hong Kong Companies Ordinance
- For a feel as to the extent of the proposed amendments, read Appendix 1 (P. 22) of the report setting out the revised CG Code, CG Report, and other Listing Rules

What you should do/watch out for:

- Important to note the **trend** of corporate governance developments, with INEDs being a focus
- The proposals are not drastic. e.g. The “over-boarding” proposal is along the direction of **voting policies of proxy advisors** (e.g. ISS/Glass Lewis) followed by many institutional investors
- Corporate governance conscious companies can consider refining your **board processes** now (e.g. nomination process, and disclosure (**annual report/CG report, AGM circular** as regards election of directors), in light of the proposals)

Also in this issue

- (i) **HKEX published a consultation paper on [“Proposed changes to documentary requirements relating to listed issuers and other minor Rule amendments”](#)**. It aims to simplify and streamline administrative procedures in the submission of documents, to enhance efficiency. There are no changes in policy direction.

What you should know/watch out for:

- **Company Secretaries** should watch out for the proposed simplified procedures
- Declaration and undertaking by directors (for PRC companies) supervisors (Forms B, H, I of Appendix 5; as “DU Forms”)
 - Abolish the DU Forms; instead, incorporate the relevant undertakings into the Rules
 - Require submission of a personal details form by directors/supervisors
 - Abolish requirements for a solicitor’s certification and a sponsor’s certification
- Issue of securities
 - Abolish listed issuer’s declaration (Form F, Appendix 5) and submission of board resolutions
 - Instead, the issuer to make a confirmation in the relevant next day disclosure return and/or monthly return, as to proper authorization, and satisfaction of applicable conditions

(ii) **HKEX published 3 Listing Decisions**, along the theme of **combating listed “shells”** which are susceptible to speculative activities. The first two reflect its tightened approach in applying Rule 13.24, as regards **“sufficiency of operations/assets of sufficient value” for continued listing**. It would apply the rule in cases with the following characteristics: Firstly, a very low level of operating activities and revenue; secondly, the issuer had been operating at a very small scale and incurring losses for years; and thirdly, the assets do not generate sufficient revenue and profits to support a continued listing. (Click: [LD 115-2017](#); [LD116-2017](#) (existing businesses scaled down; whether new business justifies continued listing).

[LD 117-2017](#) relates to a **rejected spin-off proposal**, for failing to demonstrate that the remaining businesses would be sustainable and suitable for listing. (Rule 8.04)

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