August 2022 Legal and Regulatory Update

Top stories

HKEX Enforcement Bulletin: record keeping

HKEX published its latest **Enforcement Bulletin**, with a theme of the **significance of good record keeping** by **issuers** as well as **directors**.

In addition to corporate governance and audit purposes *(e.g. lack of documentation on valuation of assets may lead to modified audit opinion),* good record keeping also impacts **HKEX enforcement investigations**.

HKEX typically asks issuers and directors for **contemporaneous documentary evidence** relating to the matter. Absence of records can call into question an issuer's **culture**. It is an immediate **signal** that the **control framework and approach to Listing Rules compliance may be lacking**. This also leads HKEX **to look more closely** at whether **individual directors** have discharged their duties. There are **useful examples** of records expected for various areas (summarised below).

Directors have individual responsibility for Listing Rule compliance. HKEX has encountered situations whereby individual directors submit that they have taken steps to discharge their duties *(e.g. challenged the proposed course of action)*, but are unable to produce any evidence.

HKEX reminds directors that **sole reliance on the issuer's record-keeping re: steps taken by an individual director can be at his/her's own peril**. Whatever the **form of communication** *(e.g. personal email, messaging app like WhatsApp/Wechat)*, **directors** should ensure that they **preserve a record** both during as well as after their term. **Oral** communications should be followed up with some **contemporaneous written** communication.

The bulletin also summarises **enforcement cases** during 1H *(e.g. internal control deficiencies, repeated breaches, lack of staff training)*. *(Read our previous legal updates)*

What you should know:

HKEX EXAMPLES of records expected *(P.3)*

- **Acquisitions/transactions**
  - **Due diligence** assessment
  - Basis of **valuation**
  - Analysis of **advantages/disadvantages** for the company
  - Consideration if **Listing Rules** applicable

- **Prepayments / loans**
  - **Credit analysis** *(e.g. due diligence on counterparty)*
  - Assessment of availability/need for **security**
  - **Documentary proof of security** provided
  - Full consideration of **risk of default**
- **Professional advice**
  - **Recommendation/outcome**
  - **Instructions** to the adviser
  - **Assumptions** made, methodology adopted, **reasoning** behind recommendations
- **Communications**
  - **Internal** and **external**
  - Evidence of **board/committee discussions, comments** and **decisions; intra-group** *(e.g. between parent and subsidiaries)*

What you should do:

- **Note** the significance of good record keeping and **examples**
- **Review your company systems**
- **Update your board**

Also in this issue

Legislation

(i) The **Companies Registry** issued an **External Circular** on **phase 2 of the new inspection regime** commencing **24 October 2022**. It also updated its website's thematic section on the new inspection system. Separate External Circulars have also been issued addressing changes in filing requirements and public search services respectively.

For Phase 2 *(from **24 Oct 2022 to 26 Dec 2023**)*, the **usual residential addresses** ("URAs") and **full identification numbers** ("IDNs") of **directors** on the **Index of Directors on the Register will be replaced** with correspondence addresses and partial IDNs of directors for public inspection.

The **URAs of directors** and **full IDNs of directors, company secretaries** and some other individuals *(e.g. liquidators)* ("Protected Information") in **documents delivered to the Registry for registration** on or after the effective date will **NOT** be provided for **public inspection.**

"Specified persons" could apply to the Registrar of Companies for disclosure of Protected Information.

(i.e. data subjects and their authorised persons; members of the company; public officers, public bodies and persons/organisations who need to use such information for statutory functions; lawyers practising in law firms and practising accountants; banks; and financial institutions and designated non-financial businesses and professions regulated under the Anti-Money Laundering and Counter-Terrorist Financing Ordinance)

(Read our previous updates: (overview) June 2021 legal update, (Phase 1) August 21 update)

(ii) **Privacy Commissioner ("PCPD"):** "Guidance Note on Data Security Measures for Information and Communications Technology" (**Press Release**, **Guidance Note**)

In light of the increase in cybersecurity incidents, PCPD issued the Guidance Note to provide **data users** *(particularly small and medium size enterprises)* with **recommended data security measures** for their **information and communications technology (ICT) systems**, facilitating compliance with the requirements of the Personal Data (Privacy) Ordinance. There are useful case studies. Broad areas include:

- **Data governance and organisational measures**
  - A **suitable personnel in a leadership role** to **bear specific responsibility** for data security
  - Sufficient **staff training**
- **Risk assessments**
  - For **new** systems/applications before launch
  - **Periodically thereafter**
- Recommended **technical** and **operational security measures**
- *(Outsourced)* **data processor management**
  - Contractual/other means
  - Prevent unauthorized/accidental access, processing, erasure, loss or use of the data transferred
- **Remedial actions in the event of data security incidents**

- **Regularly monitoring, evaluating, improving compliance with data security policies**
- **Recommended data security measures for cloud services, "Bring Your Own Devices" and portable storage devices**

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