

The Hong Kong Chartered Governance Institute

Online Submission:

Hong Kong Exchanges and Clearing Ltd (HKEX)
Consultation Paper on
Proposed Amendments to Listing Rules relating to Share
Schemes of Listed Issuers

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HKEX Consultation Paper on Proposed Amendments to Listing Rules relating to Share Schemes of Listed Issuers (Consultation Paper)

About The Hong Kong Chartered Governance Institute

The Hong Kong Chartered Governance Institute (HKCGI), formerly known as The Hong Kong Institute of Chartered Secretaries (HKICS), is the only qualifier of the internationally recognised Chartered Secretary and Chartered Governance Professional qualifications in Hong Kong and the Mainland of China.

With over 70 years of history and as the China Division of The Chartered Governance Institute (CGI), the Institute's reach and professional recognition extends to all of CGI's nine divisions, with more than 40,000 members and students worldwide. HKCGI is the fastest growing Division of CGI, with a current membership of over 6,600, 300 graduates and 3,000 students with significant representations within listed companies and other cross industry governance functions.

Believing that better governance leads to a better future, HKCGI's mission is to promote good governance in an increasingly complex world and to advance leadership in the effective governance and efficient administration of commerce, industry and public affairs. As recognised thought leaders in our field, the Institute educates and advocates for the highest standards in governance and promotes an expansive approach which takes account of the interests of all stakeholders.

Q1. Do you agree with the proposal to amend Chapter 17 to also govern share award schemes involving the grant of new shares of listed issuers? Please provide reasons for your views.

We agree.

In relation to the Consultation Paper, from the governance point of view, it is in good governance for Share Schemes to be regulated instead of the current situation where they are unregulated. This will most definitely provide more clarity to issuers, investors, as well as consistent treatment for all Share Schemes. We also note that the proposal to amend Chapter 17 has considered the positions of other jurisdictions, namely Australia, Canada, Malaysia, the PRC, Singapore, the UK and the US. We support the bringing of some of the best practices from these jurisdictions to Hong Kong as part of applied governance.

We also submit that the suggested regulations are overall balanced. We did have Member feedback that in relation to a subsidiary Share Scheme, where the subsidiary is not listed, the shares to fund the scheme, whether new or existing of the subsidiary, will result in dilution of the listed company's interest in the subsidiary and should be regulated. However, if the subsidiary is listed, the existing shares could potentially be bought from the market with no dilution of the interest of the holding company in the subsidiary. Also, the subsidiary itself will be subject to Chapter 17. This issue may need to be considered and addressed under the proposed regulations. There were also concerns that the regulations need to take into account Mainland rules for A+H share companies, which we assume was done under the proposal.

Q2. Do you agree with the proposed definition of eligible participants to include directors and employees of the issuer and its subsidiaries (including persons who are granted shares or options under the scheme

as an inducement to enter into employment contracts with these companies)? Please provide reasons for your views.

We agree.

These are the people who should be incentivised to enter into employment contracts with the listed issuers and its subsidiaries through grants of options or shares under a Share Scheme, where this is commercially deemed appropriate by the listed company. The proposed definition, therefore, does not raise any governance issue and is expected from the applied governance perspective.

Q3. Do you agree with the proposal that eligible participants shall include Service Providers, subject to additional disclosure and approval by the remuneration committee? Please provide reasons for your views.

We agree.

From the governance point of view, it is good to move from an unregulated position to a regulated position where those providing services would be made grants under a Share Scheme because of contributions to the issuer's group on a continuing and recurring basis in its ordinary and usual course of business, which are material to the long-term growth of the issuer group as determined by the remuneration committee. Also, we agree that the issuer must clearly identify the categories of Service Providers and the criteria for determining a person's eligibility in the scheme document. Share Grants to a Service Provider must be approved by the issuer's remuneration committee with the reasons for the grants clearly explained in the grant announcements as the remuneration can exercise the commercial judgment for the listed issuer under the regulations which will have laid down the criteria for authorising a grant to a Service Provider as part of applied governance.

Q4. Do you agree with the proposal that eligible participants shall include Related Entity Participants, subject to additional disclosure and approval by the remuneration committee? Please provide reasons for your views.

We agree.

As set out under the Consultation Paper, the grants of share options or awards would depend on the facts and circumstances which will vary from case to case. It is in good governance to have the additional disclosures to provide transparency to the relevant stakeholders of the listed issuer.

Q5. Do you agree with the proposal to allow the scheme mandate to be refreshed once every three years by obtaining shareholders' approval? Please provide reasons for your views.

We agree.

In view of the fact that the grant of share award is dilutive, there need to be mechanisms to limit the grants under the Share Scheme. From the governance point of view find merits in the rationale under paragraph 44 of the Consultation Paper. That is, assuming that there is no refreshment within the three-year period at 10%, the issuance will be at an average of about 3.3% annually of the listed issuer's share base.

Q6. Do you agree with the proposal to allow the scheme mandate to be refreshed within three years from the date of the last shareholders' approval by obtaining independent shareholders' approval? Please provide reasons for your views.

We agree.

The approval processes for independent shareholders' approval will mean that there will be considered reasons for the further dilution which makes commercial sense in the interest of minority shareholders. We see no governance issues to further dilution with independent shareholders' approval.

Q7. Do you agree with the proposal to remove the 30% limit on outstanding options? Please provide reasons for your views.

We agree.

As stated under paragraph 47 of the Consultation Paper this is to reflect the practical situation and we do not have any concern as part of applied governance in being practical.

Q8. Do you agree with the proposal to require a sublimit on Share Grants to Service Providers? Please provide reasons for your views.

We agree.

From the governance perspective, we have no issue with there being a Service Provider Sublimit that requires a shareholders' vote. We support the disclosure of information by the remuneration committee as to the basis for the sub-limit under the circular to the shareholders. This will facilitate the information flow for transparency and the making of an informed decision by the shareholders which is in good governance.

Q9. Do you agree with the proposal to require a minimum of 12-month vesting period? Please provide reasons for your views.

We agree.

The Share Grants should be a reward for contributing to the listed issuer from a longer-term perspective, and a 12-month period is relatively not a long period, and in line with the practices of some of the other major listing jurisdictions and acceptable to us.

Q10. Do you agree with the proposal that Share Grants to Employee Participants specifically identified by the issuer may vest within a shorter period or immediately if they are approved by the remuneration committee with the reasons and details disclosed? Please provide reasons for your views.

Unanswered.

We believe that a 12-month period is already not long, and the Employee Participants can be rewarded by other forms of remuneration if shorter term remuneration is required for them to become employees of the listed issuer group.

Q11. Do you agree with the proposed disclosure requirements relating to (a) performance targets; and (b) clawback mechanism? Please provide reasons for your views.

We agree.

The proposal is in line with the governance practices of a number of major listing jurisdictions. The listed issuer should think about the commercial benefit to the listed issuer, and in appropriate cases, there should be clawback, which are part of applied governance.

Q12. Do you agree that it is not necessary to impose a restriction on the grant price of shares under share award schemes? Please provide reasons for your views.

We agree.

This is a position consistent with international practice, and hence appropriate as part of applied governance in the context of international practices for Hong Kong's competitiveness in sourcing and retaining talents and support by Service Providers in appropriate cases.

Q13. Do you agree with the proposal to apply the 1% Individual Limit to Share Grants (including grants of shares awards and share options) to an individual participant? Please provide reasons for your views.

Unanswered

A 1% dilution is not an insignificant one, and we submit it is appropriate for the approval by the remuneration committee to be required for any individual grant.

Q14. Do you agree with the proposal to require approval from the remuneration committee instead of INEDs for all Share Grants to Connected Persons? Please provide reasons for your views.

We agree.

The proposal limits this to 0.1% and the relative size of the grant makes this acceptable because of the more limited dilutive effect of the grant. There needs to be some flexibility to the listed issuer and independent shareholders' approval should only be sought where this position is exceeded in aggregation for a specific grantee during a 12-month period as set out under the proposal.

Q15. Do you agree with the proposal to relax the current shareholder approval requirement for grants of share awards to a director (who is not an INED) or a chief executive set out in paragraph 65 above? Please provide reasons for your views.

We agree.

As set out under paragraphs 66 and 67 of the Consultation Paper we have no significant governance concerns to allow for some flexibility to listed issuers.

Q16. Do you agree with the proposal to also relax the current shareholder approval requirement for grants of share awards to an INED or substantial shareholder of the issuer set out in paragraph 68 above? Please provide reasons for your views.

Unanswered.

Please consider if there should be an overall monetary limit for grants to INEDs under the proposal which can be increased from the current \$5M to some multiples of this. This is in the context that alternative forms of remuneration to INED is being discouraged under imminent changes to the CG Code. For substantial shareholders, we do not see why it should be easier to obtain grants of shares that should be left for shareholders' approval.

Q17. Do you agree with the proposal to relax the current shareholder approval requirement for grants of share awards to a controlling shareholder of the issuer set out in paragraph 69 above? Please provide reasons for your views.

Unanswered.

Subject to a *de minimis* proposal, we do not see why it should be easier to obtain grants of shares that should be left for shareholders' approval.

Q18. Do you agree with the proposal to remove the HK\$5 million *de minimis* threshold for grants of options to an INED or substantial shareholder of the issuer? Please provide reasons for your views.

Unanswered.

It may be that there should be a limit which could be multiples of this figure. The position should also be applicable for controlling shareholders' grants.

Q19. Do you agree with the proposals to require disclosure of Share Grants to Related Entity Participants or Service Providers on an individual basis if the grants to an individual Related Entity Participant or Service Provider exceed 0.1% of the issuer's issued shares over any 12-month period? Please provide reasons for your views.

We agree.

This is in good governance as it provides transparency of information to shareholders and investors.

Q20. Do you agree with the proposed disclosure requirement for the grant announcement? Please provide reasons for your views.

We agree.

This is in good governance as it provides transparency of information to shareholders and investors.

Q21. Do you agree with the proposed disclosure requirements for Share Grants in an issuer's interim reports and annual reports? Please provide reasons for your views.

We agree.

This is in good governance as it provides transparency of information to shareholders and investors.

Q22. Do you agree with the proposal to require disclosure of matters reviewed by the remuneration committee during the reporting period in the Corporate Governance Report? Please provide reasons for your views.

We agree.

This is in good governance as it provides transparency of information to shareholders and investors.

Q23. Do you agree with the proposal to require changes to the terms of share award or option granted be approved by the remuneration committee and/or shareholders of the issuer if the initial grant of the award or option requires such approval? Please provide reasons for your views.

We agree.

It is in good governance to reduce the regulatory arbitrage in having two different sources of approval procedures.

Q24. Do you agree with the proposal to provide a waiver for a transfer of share awards or options granted under Share Schemes as described in paragraph 86? Please provide reasons for your views.

We agree.

We submit that the regulatory flexibility is appropriate.

Q25. Do you agree with the proposal to restrict the voting rights of unvested shares held by the trustee of a Share Scheme and require disclosure of the number of such unvested shares in monthly returns? Please provide reasons for your views.

We agree.

The trustee should not take up the exercise of the voting rights, as their role should be a passive administrator and not an active business participant. The proposal is also in good governance as it provides transparency of information to shareholders and investors.

Q26. Do you agree with the proposed disclosure requirements for Share Schemes funded by existing shares of listed issuers? Please provide reasons for your views.

We agree.

This is in good governance as it provides transparency of information to shareholders and investors.

Q27. Do you agree with the proposal to restrict the voting rights of unvested shares held by the trustee of a Share Scheme and require disclosure of the number of such unvested shares in monthly returns? Please provide reasons for your views.

We agree.

The proposal is also in good governance as it provides transparency of information to shareholders and investors.

Q28. Do you agree with our proposal to amend Chapter 17 to also govern share award schemes funded by new or existing shares of subsidiaries of listed issuers? Please provide reasons for your views.

We agree.

It is in good governance to reduce the regulatory arbitrage. Please also consider our overall submission under Question 1 in relation to where a subsidiary is listed and subject to Chapter 17.

Q29. Do you agree with the proposed exemption for Share Schemes of Insignificant Subsidiaries? Please provide reasons for your views.

Unanswered.

The Insignificant Subsidiaries can in fact be commercially significant. We have no issue if there is some de minimis threshold. In any event, we defer to industry consensus, if any.

Q30. Do you agree with our proposal to amend Chapter 17 to also govern Share Schemes involving grants of shares or options through trust or similar arrangements for the benefit of specified participants? Please provide reasons for your views.

We agree.

It is in good governance to reduce the regulatory arbitrage.

Q31. Do you agree with our proposal to remove the recommended disclosure requirement for the fair value of options as if they have been granted prior to the approval of the scheme? Please provide reasons for your views.

We agree.

The disclosure in line with HKFRS2 under the annual and interim reports are sufficient.

Q32. Do you agree with our proposals to amend the Rules described in paragraph 100? Please provide reasons for your views.

We agree.

We have no issue as to incidental and housekeeping amendments.