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The Stock Exchange of Hong Kong Limited
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BY EMAIL
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Dear Sirs,

Consultation Paper on Review of the Code on Corporate Governance Practices and Associated Listing Rules

We refer to the Consultation Paper on Review of the Code on Corporate Governance Practices and Associated Listing Rules issued by Hong Kong Exchanges and Clearing Limited in December 2010 ("**Consultation Paper**"). We set out below our comments and suggestions for your consideration.

1. *Proposed changes to the Code on Corporate Governance Practices*

Other than the issues explained below, we support the proposals set out, and the rationale put forward by the Exchange, in the Consultation Paper.

2. *General comment*

We note the Exchange has suggested that various requirements should be upgraded from being a Code Provision to becoming a Listing Rule requirement. If the Exchange decides to adopt this approach for any of its suggestions, we recommend issuers should be allowed a suitable grace/transition period to comply with these new Listing Rule requirements.

3. *Question 1: Do you have any comments on the plainer writing amendments? Do you consider any part(s) of the plainer writing amendments will have unintended consequences? Please give reasons for your views.*

We support the use of plain language in the Listing Rules provided that precision is not compromised. We trust the Exchange will ensure that the rules will reflect its policy intention.

4. *Question 9: Do you agree to upgrading RBP D.1.4 to a CP (re-numbered CP D.1.4) and amending it to state that an NED's letter of appointment should set out the expected time commitment?*

While we agree that RBP D.1.4 be upgraded to a CP, we believe it may be difficult for issuers to set out in the letter of appointment of a non-executive director the actual time commitment expected from each NED. The operations and affairs of a company will affect the actual time required from each NED. It may be difficult to predict accurately at the outset the number of hours each NED is expected to work. Time alone may not be an accurate measure of efficiency – for instance, some people work quicker or more efficiently than others.

We believe it is more beneficial to an issuer if it sets out in the letter of appointment the level of commitment the issuer expects from its NED. For instance, an issuer can request an NED to attend and participate in at least 90% of the board meetings and all the general meetings except where special or unforeseen circumstances forbid him/her to do so.

5. *Questions 11 to 13: Do you consider that there should be a limit on the number of INED positions an individual may hold? What should be the number? Do you think that it should be a Rule or a CP?*

We agree that there should be a limit on the number of INED positions an individual may hold to ensure that an INED can devote sufficient time and attention to the issuer's business. According to the statistics set out in paragraph 39 of the Consultation Paper, only 1.4% of INEDs hold more than 5 INED positions in Hong Kong and 0.8% hold more than 5 directorship positions. Five seems to be a sensible figure as a starting point because the number of individuals being affected are relatively small and this is the same requirement as that imposed by CSRC in the PRC.

We invite the Exchange to consider extending this requirement to limit the number of independent directorships an INED can hold to all directors for all directorships in all listed issuers. The level of commitment and time requirement of an executive director would certainly be greater than that for a non-executive director. It would seem logical that an individual with executive directorships should hold no more directorships than non-executive directors.

If the Exchange adopts the policy of imposing a maximum number of independent directorships an INED can hold, we believe the limit ought to be a Rule requirement.

6. *Questions 15 and 16: Do you agree that the minimum number of hours of directors training should be eight? What training methods do you consider to be acceptable for the requirements stated in the proposed CP (re-numbered RBP A.6.5)?*

In principle we agree that directors should receive continuous professional development ("**CPD**") training. If the market agrees that 8 hours should be the minimum number of CPD hours for a director we do not object to it. We note the new CP A.6.5 says *"... suitable training, placing an appropriate emphasis on the roles, functions and duties of a listed company director."* We trust the Exchange will provide clear guidance how a director may fulfil this 8-hour CPD training requirement (please also refer to our comments in paragraphs 20 and 21). We note various professional organisations in Hong Kong require their members to undertake CPD training and the organisations have detailed and prescribed guidance on what courses and methods of training would satisfy the training requirements.

We suggest that the Exchange should consider whether to introduce this new CPD training requirement in phases, for reasons similar to those put forward by the Exchange for company secretaries.

7. *Question 21: Do you agree with our proposal to move the requirement for issuers to establish a remuneration committee with a majority of INED members from the Code (CP B.1.1) to the Rules (Rule 3.25)? Please give reasons for your views.*

We support the proposal to change the requirement to a Listing Rule provision. However, we suggest for any issuer which does not already have the necessary arrangement in place to be given a suitable grace period (say 6 months) to comply.

8. *Question 24: Do you agree with our proposal to add a new Rule (Rule 3.27) requiring an issuer to make an announcement if it fails to meet the requirements of proposed Rules 3.25, 3.26 and 3.27?*

While we agree that an issuer should disclose its failure to meet the requirements of the proposed Rules 3.25 to 3.27, we believe that disclosure should be made in periodic financial reports of the issuer rather than through announcements, reserving the latter for more sensitive information or important developments pertaining to the issuer.

A failure to maintain a majority of INED members in the remuneration committee or the committee is not chaired by an INED for whatever reason does not seem to fall within the realm of sensitive information.

9. *Questions 26 and 38: Do you agree that we should add "independent" to the professional advice made available to a remuneration committee (CP B.1.2, re-numbered CP B.1.1)?*

We agree and suggest that the Exchange provides guidance on what "independent" means in this context. For instance, would the current auditors, external legal counsel or external recruitment agent retained by an issuer be considered independent?

10. *Question 29: Do you agree that the term "performance-based" should be deleted from CP B.1.2(c) (re-numbered CP B.1.2(b)) and revised as described in paragraph 118 of the Consultation Paper?*

We disagree with the amendment. What is needed to eliminate the apparent inconsistency identified in paragraph 118 of the Consultation Paper is to make the proposed new RBP B.18 a CP instead.

11. *Questions 39 to 45: Corporate Governance Committee*

We disagree that issuers should be required to set up a corporate governance committee because corporate governance is a matter for the entire board of directors. This duty cannot and should not be delegated to a committee. The duties of corporate governance set out in paragraph 141 of the Consultation Paper may be included as general responsibilities of the board of directors as a whole.

12. *Question 51: Do you agree with our proposal to amend Appendix 16 to require an issuer to disclose the CEO's remuneration in its annual report and by name?*

We agree but we suggest that the Exchange should refer to the "chief executive" as defined in Rule 1.01 rather than referring to the "Chief Executive Officer".

13. *Question 59: Do you agree with our proposal to revise Rule 13.44 to remove the exemption described in paragraph 199 (transactions where a director has an interest)?*

We disagree with the proposed change because a director should not automatically be assumed to have a material interest in a proposed transaction if the director has no more than a 5% interest in the counterparty company. In particular, this proposed amendment would cause inconvenience or hardship if the counterparty company is also a listed company or a licensed bank in Hong Kong or elsewhere.

14. *Question 65: Do you agree with our proposal to upgrade RBP A.2.7 to a CP and amend it to state that the chairman should hold separate meetings with only INEDs and only NEDs at least once a year?*

We generally agree with the proposal, but suggest that the Exchange should clarify whether the reference to "only the non-executive directors" in paragraph (2) of the new CP A.2.7 include or exclude INEDs.

15. *Question 74: Do you agree that we should add CP C.1.2 stating issuers should provide board members with monthly updates as described in paragraph 240 of the Consultation Paper?*

While we agree that management should keep the board of directors abreast of developments in the business and affairs of the issuer, we think that requiring an issuer to provide monthly updates to the board of directors, in particular monthly management accounts, would pose heavy administrative burden on issuers for providing them. We would suggest a more flexible approach by replacing "monthly updates" with "timely and regular updates".

16. *Question 77: Do you agree that we should introduce the proposed CP (CP C.1.4) as described in paragraph 250? Please give reasons for your views.*

While an issuer should give its shareholders an overview of its business model and development plans and strategies in ways the board considers appropriate and comprehensible by investors and shareholders, we disagree that the issuer must provide a justification for them as envisaged by the proposed CP C.1.4.

17. *Question 83: Do you agree that our proposed amendments to Rule 13.39(5) clarify disclosure in poll results?*

We agree with the Exchange's proposal to clarify the disclosure requirements. We note the proposal set out in paragraph 277 of the Consultation Paper seeks to codify the current practice recommended by the Exchange in its *Guide to General Meeting* (paragraph 6.7 of the Guide).

(a) shares entitling the holder to attend and vote on a resolution at the meeting (Guide para.6.7(a));

(b) shares entitling the holder to attend and abstain from voting in favour as set out in Rule 13.40 (Guide para.6.7(b));

(c) shares of holders that are required under the Listing Rules to abstain from voting (Guide para.6.7(c)); *and*

(d) shares represented by actual votes for or against a resolution (Guide para.6.7(c)).

We recommend the Exchange to consider whether the disclosure requirement could be further refined to split (c) into two further sub-categories whereby an issuer will disclose (1) shares represented by holders who are required under the Listing Rules to abstain from voting and (2) shares represented by holders who can freely vote on the resolution but voluntarily abstain from voting (弃权票), that is in both cases where the shareholder has so expressed in the proxy form or who has attended the general meeting in person.

18. *Question 95: Do you agree with our proposal to add a new Rule 13.90 requiring issuers to publish an updated and consolidated version of their M & A or constitutional documents on their own website and the HKEx website?*

We acknowledge the intended benefit of allowing the general public to gain easy access, free of charge, to an issuer's constitutional documents from its website and the HKEx website, yet we do not know if the more important legal concerns in adopting this proposal have been considered. In Hong Kong, under the Companies Ordinance, the Registrar of Companies performs the role of the central repository of all constitutional documents of Hong Kong incorporated and Part XI registered companies. There are legal requirements to file any change to an issuer's constitutional documents within a clearly defined timeframe, with clear legal consequences of failing to comply with the requirements. For instance, what would be the position of a company and a reader of the M & A if, for any reason, different versions of the M & A appear at the Companies Registry and the websites at the same time?

If the Exchange decides to adopt its proposal, please clarify the languages in which an issuer must post its constitutional documents. Presumably the requirement of the Exchange would be no more strenuous than that of the Companies Ordinance.

19. *Question 97: Do you agree with our proposal to upgrade the recommended disclosure of any significant change in the issuer's articles of association under paragraph 3(c)(i) of Appendix 23 to mandatory disclosure (re-numbered paragraph P(a) of Appendix 14)?*

Any change to the articles of association of an issuer would require shareholders' approval at general meeting. Shareholders would have received numerous corporate communications from the issuer in respect to any proposed change to its articles of association. We question the purpose of a repeat disclosure in the annual report in terms of providing information to shareholders.

20. *Question 103: Do you agree with our proposal to add a Rule 3.29 requiring company secretaries to attend 15 hours of professional training per financial year?*

We agree that company secretaries should be required to receive CPD training. For both company secretaries and directors, CPD hours should be counted on a calendar year basis as these individuals may hold offices in different companies with different financial year end dates.

21. *Question 104: Do you agree with the proposed transitional arrangement on compliance with Rule 3.29 in paragraph 350 of the Consultation Paper?*

While we agree that there should be a transitional arrangement on company secretary CPD training, we believe that the schedule proposed is perhaps too lenient because keeping himself abreast of the latest development is the minimum expected of every professional and the sooner this is achieved the better it will be for the market in general.

In any event, guidance is needed on interpreting and implementing this new rule, on questions such as:

a. When is a person first considered to be a company secretary? Presumably it is when that person was first appointed a company secretary of a listed issuer and that experience of being a company secretary of a private company is irrelevant.

b. Regarding the phased approach, if there were gaps in the track record of a person as a company secretary, which band would that person fall under?

Similar to our comment in paragraph 6 above, we hope the Exchange will also provide clear guidance on how a company secretary may fulfil this 15-hour CPD training requirement.

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Please contact [redacted] if you have any queries regarding our comments or suggestions.

Yours faithfully,

Baker & McKenzie

Baker & McKenzie