



THE  
**LAW SOCIETY**  
OF HONG KONG  
香港律師會

Our Ref : COM/2515161  
Your Ref :  
Direct Line :

**BY EMAIL & BY POST**

**President**

會長

Stephen W.S. Hung  
熊運信

16 September 2015

**Vice-Presidents**

副會長

Thomas S.T. So  
蘇紹聘  
Melissa K. Pang  
彭韻儀

Corporate Communications Department,  
Hong Kong Exchanges and Clearing Limited,  
12/F, One International Finance Centre,  
1 Harbour View Street,  
Central,  
Hong Kong

**Council Members**  
理事

Dieter Yih

葉禮德

Junius K.Y. Ho

何君堯

Huen Wong

王桂壘

Peter C.L. Lo

羅志力

Michael J. Lintern-Smith

史密夫

Billy W.Y. Ma

馬華潤

Sylvia W.Y. Siu

蕭詠儀

Cecilia K.W. Wong

黃吳潔華

Kenneth S.Y. Ng

伍成業

Joseph C.W. Li

李超華

Amirali B. Nasir

黎雅明

Brian W. Gilchrist

喬柏仁

Gavin P. Nesbitt

倪廣恒

Denis Brock

白樂德

Nick Chan

陳曉峰

Bonita B.Y. Chan

陳寶儀

Mark Daly

帝理遜

Dear Sirs,

**Consultation Paper on Review of the ESG Reporting Guide**

I refer to the captioned Consultation and I enclose the Law Society's Submissions on the subject matter for your consideration.

Yours faithfully,

Kenneth Fok  
Director of Practitioners Affairs

Encl.

**Secretary General**

秘書長

Heidi K.P. Chu

朱潔冰

**Deputy Secretary General**

副秘書長

Christine W.S. Chu

朱穎雪





**CONSULTATION PAPER  
REVIEW OF THE ENVIRONMENTAL,  
SOCIAL AND GOVERNANCE REPORTING GUIDE**

**The Law Society's Submissions**

The following is the Law Society's response to the questions on the Consultation Paper issued by the Stock Exchange of Hong Kong Limited (HKEX) on *the Review of the Environmental, Social and Governance Reporting Guide* on 17 July 2015 ("the Consultation Paper"). The reference to rules, paragraphs, Appendix and the other abbreviations in the submission below follow those adopted in the Consultation Paper.

**Question 1**

*Do you agree with [the] proposal to amend Rule 13.91 to require issuers to disclose in their annual reports or ESG reports whether they have complied with the "comply or explain" provisions in the ESG Guide and if they have not, they must give considered reasons in the ESG reports?*

**Law Society's Response**

Subject to our comments below, particularly with respect to the proposed incorporation of all the KPIs to the "comply or explain" requirement, we agree with the proposal to amend Rule 13.91.

**Question 2**

*Do you agree with [the] proposal to amend Rule 13.91 to require the issuer to report on ESG annually and regarding the same period covered in its annual report as discussed in paragraphs 86 and 90?*

**Law Society's Response**

We agree with the proposal which is in fact in line with our submission dated 27 March 2012 with respect to the consultation leading to the introduction of the ESG

Guide.

### **Question 3**

*Do you agree with [the] proposal to include a Note under Rule 13.91 to clarify that:*

- (i) an ESG report may be presented as information in its annual report, in a separate report, or on the issuer's website as discussed in paragraph 91; and*
- (ii) the issuer should publish the ESG report as close as possible to, and in any event no later than three months after, the publication of the issuer's annual report as discussed in paragraph 92?*

### **Law Society's Response**

We agree with both proposals and with respect to proposal 3(i), we consider it important to allow for flexibility, but such flexibility should not only apply in relation to where the report may be published, it should also relate to the contents of the report, and you will see our further comments in this connection particularly in relation to the KPIs.

### **Question 4**

*Do you agree with [the] proposal to revise the introductory section of the Guide into four areas as discussed in paragraphs 94 and 95, and with the wording set out in Appendix II?*

### **Law Society's Response**

We have no problem with dividing the introductory section of the Guide into four areas as proposed.

We do, however, have the following comments on the wording.

1. In relation to paragraph 6:
  - (a) we suggest that the reference to "additional ESG issues and KPIs, including recommended disclosures" be replaced by the words "additional information". It is not necessary to categorise such information into whether they are additional ESG issues or KPIs, or whether they are recommended disclosures.
  - (b) we suggest deleting the reference to "or substantially influence the assessment and decisions of stakeholders" at the end of the first sentence. In the second sentence, we suggest deleting the reference to "and better meet their expectations". We suggest the first deletion because what may substantially influence the assessment and decisions

of stakeholders may not be in alignment with the interests of the company and its investors. This also explains our second proposed deletion because while the issuer may consult stakeholders on an on-going basis, it is one thing to understand their views and another thing to “meet their expectations”. For both deletions, we note that these are in fact new concepts not contained in the existing Guide.

- (c) in summary, we therefore propose that paragraph 6 should read as follows:

“In addition to the ‘comply or explain’ matters set out in this Guide, the Exchange encourages an issuer to identify and disclose additional information that reflects the issuer’s significant environmental and social impacts. In assessing these matters, the issuer should engage stakeholders on an on-going basis in order to understand their views.”

2. Paragraph 7 allows issuers to adopt international reporting standards provided that the disclosure level is comparable. We do not have a problem with this principle subject to our comments concerning the KPIs.
3. (a) We believe paragraph 9 introduces yet again a new concept. It is one thing to require the board to have overall responsibility for the issuer’s ESG strategy and reporting, and another thing to state that the board is to be responsible to “ensuring that appropriate and effective ESG risk management and internal control systems are in place”. The further requirement that management should provide confirmation to the board on the effectiveness (how about “appropriateness” then?) of those systems is also new.
- (b) Our issue here is how the management is expected to be able to provide confirmation to the board on the “effectiveness” of those systems and then for the board to “ensure” that the systems are indeed “appropriate and effective”. Leaving aside costs, there could be implementation issues. Bearing in mind that the ESG Guide is supposed to evolve taking into account the situation and circumstances of issuers in Hong Kong, and that the Guide is relatively new, we suggest leaving this requirement aside, at least for the time being. In any event, the Guide basically requires disclosure - why is it then the board should be required to ensure that the ESG risk management is appropriate and effective?
- (c) In addition, under Section S(a)(vi) of the Corporate Governance Code, we note it is only a recommended disclosure for directors to state “whether they consider [internal controls] effective and adequate”. It is

correct that under paragraph C.2 of the Corporate Governance Code, the board is required to “ensure that the issuer maintains sound and effective internal controls” but to extend it in the ESG Guide to ensuring “appropriate and effective ESG risk management and internal control systems [presumably in the context of ESG risk management]” is specific and therefore an additional requirement.

(d) We therefore propose paragraph 9 to read as follows:

“The board is responsible for evaluating and determining the issuer’s ESG-related risks and how they are addressed.”

Separately, we think it may be helpful to repeat something similar (preferably abridged so we need repeat the entire section) to the section in the Corporate Governance Code (“CGC”) about “What is “comply or explain”?”. Specifically, paragraph 3 of the GCC states that “Shareholders should not consider departures from code provisions and recommended good practices as breaches.” Although one may say the position should be clear, the counter argument is that the omission may be intentional.

#### **Question 5**

*Do you agree with the proposed wording of the Reporting Principles in the introductory section of the Guide as discussed in paragraphs 96 and 97, and with the wording set out in Appendix II?*

#### **Law Society’s Response**

With respect to paragraph 11, while the word “underpin” appears innocuous, we suggest that it should be replaced by the word “apply” because the word “underpin” is a very strong expression and may be taken to require issuers to make disclosure against the individual principles.

In this connection, paragraph 97 of the Consultation Paper states that the principles only contain “broad concepts, leaving room for issuers to develop their own policies. Issuers are not required to ‘comply or explain’ each of the individual principles, but should demonstrate in their ESG reports that due consideration has been given to the principles”.

#### **Question 6**

*Do you agree with the proposed wording in the Guide linking it to Appendix 16 as discussed in paragraph 98, and with the wording set out in Appendix II?*

**Law Society's Response**

We have no issue with the wording.

**Question 7**

*Do you agree with the proposal to re-arrange the Guide into two Subject Areas (A. Environmental and B. Social) and re-categorise "Workplace Quality", "Operating Practices" and "Community Involvement" under Subject Area B as discussed in paragraph 99?*

**Law Society's Response**

We agree with the proposal.

**Question 8**

*Do you agree with [the] proposal to change the heading "Workplace Quality" to "Employment and Labour Standards" as discussed in paragraphs 100 and 101?*

**Law Society's Response**

We agree with the proposal.

**Question 9**

*Do you agree with the proposal to upgrade the General Disclosures for each Aspect of the ESG Guide to "comply or explain"?*

**Law Society's Response**

We agree with the proposal, particularly having regard to emphasis placed in paragraph 107 of the Consultation Paper that "If any particular General Disclosure ... is not relevant to the issuer, it should explain ... . The General Disclosures are narrative in nature. They do not require any collection or analysis of data."

**Question 10**

*Do you agree with the proposed amendments to the wording of paragraph (b) under current Aspects A1, A2, A4, B1, C2 and C3, re-numbered Aspects A1, B1, B2, B4, B6 and B7, as discussed in paragraphs 103 to 104?*

**Law Society's Response**

We do not have any issue with the proposed amendments.

We welcome the amendment from "material non-compliance" to compliance that have a "significant impact" on the issuer, which puts the meaning of "material non-

compliance” in context.

### **Question 11**

*Do you agree with [the] proposal to revise Aspect A1 by upgrading to “comply or explain” the current KPIs, B1.1, B1.2, B1.4 and B1.5, re-numbered KPIs A1.1, A1.2, A1.4 and A1.5, as discussed in paragraphs 109 to 114, and 117 to 118?*

### **Law Society’s Response**

1. We would set out some general comments which also apply to other KPIs.
2. As stated in our previous submission, the ESG report should be a succinct and relevant document that helps investors to assess the performance of a company. The KPIs should not therefore be overly prescriptive, and they should only be included where the impact is significant and relevant to investors.
3. Issuers should be encouraged to make relevant disclosures, and the “comply or explain” approach should not result in extensive disclosures as to why a particular requirement is not applicable where such information is not relevant.
4. We have also commented that certain KPIs should best be addressed by way of general disclosures i.e. they are more in the nature of narrative and qualitative description than quantitative numbers. The examples we gave include matters such as measures to mitigate emissions and results (currently revised to be KPI A1.5) and description of how hazardous and non-hazardous waste are handled etc. (currently revised to be KPI A1.6).
5. The approach currently adopted in the Review is to make all quantitative KPIs effectively mandatory so that issuers have to comply or explain. We accept that some quantitative assessment and data will definitely be required but how this should be done must depend to a significant extent on the circumstances of the issuer in question, taking into account international trends and requirements as well as the particular circumstances of issuers or potential issuers in Hong Kong.
6. We therefore strongly recommend that the Guide should contain a prominent statement that disclosure of KPIs should only apply to the extent where they are “material and relevant” in the sense of having a “significant impact” on the issuer so that the KPIs will not become overly prescriptive, resulting in issuers being required to explain at length why they are not relevant or not material. In addition, where international standards, as envisaged in paragraph 7 of the Guide, is followed by an issuer, for example, because it is

more consistent with the disclosures already made by an issuer in its domestic markets, the Guide should make it clear that the KPIs set out in the revised Guide should not trigger a “comply or explain” requirement as the disclosures already followed international standards.

7. In short, we do not agree with adopting a “one size fits all” approach by effectively making all KPIs mandatory, thus subjecting issuers to a “comply or explain” requirement, and the Guide itself should expressly set out the flexibility as suggested above.

#### **Question 12**

*Do you agree with [the] proposal to upgrade to “comply or explain” the current KPIs B1.3 and B1.6, re-numbered KPIs A1.3 and A1.6, as discussed in paragraph 119?*

#### **Law Society’s Response**

Please see our response to Question 11.

#### **Question 13**

*Do you agree with [the] proposal to upgrade to “comply or explain” the KPIs under the current Aspect B2, re-numbered Aspect A2 as discussed in paragraphs 120 to 122?*

#### **Law Society’s Response**

Please see our comments under Question 11.

#### **Question 14**

*Do you agree with [the] proposal to upgrade to “comply or explain” the current KPI B3.1, re-numbered KPI A3.1, as discussed in paragraphs 123 to 125?*

#### **Law Society’s Response**

Please see our comments under Question 11.

#### **Question 15**

*Do you agree with [the] proposal to incorporate gender disclosure in Subject Area B under the sub-heading “Employment and Labour Standards”?*

#### **Law Society’s Response**

We support the change in principle but have two comments:



- (a) Please clarify whether the information by gender is also required to be broken down into each employee category.
- (b) It may also be worthwhile to examine whether the disclosure by gender requirement has been the subject of contention overseas from the perspective of how gender should be classified. In Hong Kong, the situation of a person receiving a full sex-reassignment surgery has been addressed by the Court of Final Appeal's decision in 2012 in the case of *W v. Registrar of Marriages* (FACV 4/2012) and the Marriage (Amendment) Bill 2014.

**The Law Society of Hong Kong**  
**15 September 2015**