



18 June 2021

BY FAX [REDACTED] & BY HAND

Corporate and Investor Communications Department  
Hong Kong Exchanges and Clearing Limited  
8<sup>th</sup> Floor, Two Exchange Square  
8 Connaught Place  
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Hong Kong

Dear Sirs,

**Review of Corporate Governance Code and Related Listing Rules**

We refer to the Consultation Paper on Review of Corporate Governance Code and Related Listing Rules issued in April 2021 (the “Consultation Paper”), and would like to respond to questions 4(a) and 6(a) as follows:-

**Consultation Question 4(a)** *Do you agree with our proposal regarding re-election of Long Serving INEDs to revise an existing CP to require (i) independent shareholders’ approval; and (ii) Additional Disclosure?*

1. In respect of the re-election of a Long Serving INED, the proposal in paragraph 73 of the Consultation Paper is to revise the existing CP A.4.3 to require (i) such re-election be subject to independent shareholders’ approval, and (ii) Additional Disclosure in the explanation on why such INED is still independent and should be re-elected (i.e. the factors considered, the process and the board or NC’s discussion in arriving at the determination).
2. We assume that the expression “*independent shareholders*” is intended to have the same meaning as used in Rule 13.39 viz. any shareholders other than controlling shareholders of the issuer and their associates, or, where there are no controlling shareholders, any shareholders other than directors (excluding independent non-executive directors) and the chief executive of the issuer and their respective associates.
3. While we agree with the proposed Additional Disclosure requirement for a Long Serving INED who stands for re-election, it is our submission that, if the assumption in paragraph 2 is correct, it would be wrong for controlling shareholders to be disenfranchised and denied the right to vote regarding re-election of Long Serving INEDs.
4. While the Consultation Paper stresses the importance of director’s independence, no reason has been put forward as to why it is considered that controlling shareholders should not be entitled to vote in the re-election of a Long Serving INED.
5. Under the current Listing Rules, controlling shareholders who have a material interest in a transaction or arrangement are required to abstain from voting on a resolution approving



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that transaction or arrangement at the general meeting. In light of the comprehensive provisions in the current Rule 3.13 for assessing the independence of a non-executive director, coupled with the requirement for all INEDs to submit to the Exchange a written confirmation of their independence, it would be rash to suggest that a Long Serving INED serves the interest of the controlling shareholders, or would owe his allegiance to the controlling shareholders.

6. We submit that in the election of INEDs, whether long serving or otherwise, the interests of all shareholders are aligned and all shareholders, irrespective of whether they are controlling shareholders or not, should be entitled to vote.

7. We believe that, for the Hong Kong SAR to maintain its attraction for public listing of companies, regard must be had to the practices and requirements of the stock exchanges of the world's other major financial centres.

8. In the United States, neither the New York Stock Exchange, nor Nasdaq, has any requirement on the length of directorship for INEDs.

9. Similarly, the Tokyo Stock Exchange in Japan does not have any requirement on the length of directorship for INEDs.

10. In the United Kingdom, while a dual-voting structure is required under the listing rules for premium-listed controlled companies, the structure is very different from what is now proposed under the Consultation Paper. Under the UK Rules, a dual-voting structure is required for the election and re-election of INEDs of premium-listed controlled companies, in that the election, or re-election, of INEDs under this regime would require approval by both shareholders as a whole and by the independent shareholders. Importantly, the controlling shareholders still retain the right to vote. Should there be a conflict in the results of the two voting, then approval for the election of the director in question shall be decided by way of another, single (ordinary) majority vote at a further meeting to be held after the original vote, at which all shareholders, including controlling shareholders, shall be entitled to vote.

11. It is our submission that Regulators should be slow to promulgate rules that might undermine the ability of controlling shareholders to determine the strategic and business path of the company, which on one view is accepted, or may even be preferred, by minority shareholders. The proposal to disenfranchise the controlling shareholders in the election, or re-election, of the company's directors, even when no conflict is involved, clearly entails a real risk of such undermining.

**Consultation Question 6(a)** *Do you agree with our proposal to highlight that diversity is not considered to be achieved by a single gender board in the note of the Rule?*

12. The proposal in paragraph 87(a) of the Consultation Paper is to highlight that single gender board is not acceptable.

13. We accept that an issuer's board should have a balance of skills, experience and diversity of perspectives appropriate for the business of the issuer. We also agree that gender diversity, where practical, is to be encouraged.



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14. Nevertheless, we are firmly of the view that the criteria for making appointments to the board must be based on merit, and not gender. We submit that it would be wrong for any mandatory gender quota to be set.

15. Perhaps even more significantly, gender quotas for company boards will probably amount to unlawful discrimination against men or women, under section 6(1) or section 5(1) of the Sex Discrimination Ordinance. [Note 1]

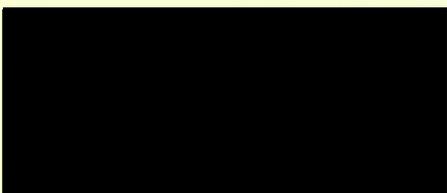
16. In *Equal Opportunities Commission v Director of Education* HCAL 1555/2000, the Equal Opportunities Commission challenged the legality of the Government's Secondary School Places Allocation System, under which there was, among other things, a gender quota in co-educational secondary schools to ensure that a fixed ratio of boys and girls would be admitted to each school. The Court held that the System amounted to unlawful direct discrimination against individual students on the basis of sex. [Note (2)]

17. In *Secretary of Justice v Chan Wah* FACV 11 and 13/2000, the Court of Final Appeal restated the following general legal principles which are relevant to all sex discrimination cases:-

- (i) in considering whether a particular arrangement is discriminatory or not, the Court will adopt the "but for" test, to look at whether there is a less favourable treatment on the ground of a person's sex;
- (ii) the intention or motive to discriminate is not a necessary condition to liability. A prima facie case of discrimination will arise when a particular arrangement has the effect of favouring some person because of his or her sex;
- (iii) in the case where a male candidate and a female candidate are equally qualified for appointment but the female candidate is preferred by reason of the gender quota, then there may be an unlawful discrimination which is contrary to the Sex Discrimination Ordinance.

18. In view of the judicial authorities on sex discrimination, we submit that instead of implementing mandatory gender quotas, improvement in board gender diversity should always be realized through voluntary principles of good governance.

Yours sincerely,  
For and on behalf of  
Sun Hung Kai Properties Limited



Group General Counsel and Company Secretary



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**Note (1)**

**Section 5(1) of the Sex Discrimination Ordinance (the “SDO”) provides as follows:-**

- “(1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Ordinance if—
- (a) on the ground of her sex he treats her less favourably than he treats or would treat a man; or
  - (b) he applies to her a requirement or condition which he applies or would apply equally to a man but—
    - (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it;
    - (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and
    - (iii) which is to her detriment because she cannot comply with it.”

**Section 6(1) of the SDO provides as follows:-**

- “(1) Section 5, and the provisions of Parts 3 and 4 relating to sex discrimination against women, shall be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are necessary.”

**Note (2)**

The Court held that the operation of the System amounted to unlawful direct discrimination against individual pupils on the basis of sex under s. 5(1) of the SDO. The three discriminatory elements of the System were briefly summarized as follows:

First, there was a scaling mechanism which adjusted the scores of students from different schools so as to enable comparison between them. Boys and girls were treated separately in the scaling process with different scaling curves. This meant that the eventual priority in school placement depended in part on gender.

Second, there was a banding mechanism which put all students into bands based on their adjusted scores. Different band cutting scores were used for boys and girls, so that, for example, girls needed a higher score for the top band than boys. This again meant that priority for placement depended in part on gender.

Third, there was a gender quota in co-educational secondary schools to ensure that a fixed ratio of boys and girls would be admitted to each school. This meant that admission might depend on gender.

The Government tried to rely on the special measure exception (s. 48 of the SDO) in defence. It argued that the discriminatory elements of the System were not unlawful because they were reasonably intended to ensure that boys have equal opportunities with girls by reducing the advantage girls enjoyed through their better academic performance. The Court rejected this argument because first, there was no firm evidence of any developmental difference inherent in gender, and second, the discriminatory elements were disproportional to the objective of ensuring equal opportunities for the boys.