

# SLAUGHTER AND MAY

**SUBMISSION BY SLAUGHTER AND MAY**  
**REGARDING THE STOCK EXCHANGE OF HONG KONG LIMITED'S**  
**CONSULTATION PAPER ON REVIEW OF THE CORPORATE GOVERNANCE CODE AND**  
**RELATED LISTING RULES**

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## Consultation Questions

### **PART I: INDEPENDENT NON-EXECUTIVE DIRECTORS**

#### **Overboarding and INED's time commitment**

1. Do you agree with our proposed amendment to Code Provision (“CP”) A.5.5 (on a “comply or explain” basis) so that in addition to the CP’s current requirements, the board should also explain, if the proposed independent non-executive director (“INED”) will be holding his seventh (or more) listed company directorship, why he would still be able to devote sufficient time to the board?

Yes

No

Please give reasons for your views.

We agree with the proposal. In addition, the Exchange could consider the following:

1. amend CP A.6.6. to require (on a comply or explain basis) the other significant commitments of a proposed director and the approximate time involved in respect of those appointments to be disclosed to the issuer "prior to his or her appointment" (rather than the present wording of "at the time of his appointment"); and
2. add a Recommended Best Practice in section A.5. for the nomination committee to assess whether a proposed director is likely to be able to devote sufficient time to the issuer, taking into account factors such as any other significant commitments and timing disclosed to it under CP A.6.6 and the proposed director's familiarity with the issuer's industry. This would be in addition to the existing Code Provision requiring a proposed director to ensure he can give sufficient time to an issuer before accepting an appointment.

#### **Board diversity**

2. Do you agree with our proposals to upgrade CP A.5.6 (on a “comply or explain” basis) to a Rule (Rule 13.92) requiring issuers to have a diversity policy and to disclose the policy or a summary of it in their corporate governance reports?

Yes

No

Please give reasons for your views.

We agree with the proposal.

3. Do you agree with our proposal to amend CP A.5.5 that it requires (on a “comply or explain” basis) the board to state in the circular to shareholders accompanying the resolution to elect the director:

- (i) the process used for identifying the nominee;
- (ii) the perspectives, skills and experience that the person is expected to bring to the board; and
- (iii) how the nominee would contribute to the diversity of the board.

Yes

No

Please give reasons for your views.

We agree with the proposal, but as drafted, CP A.5.5 would only apply to the election of INEDs.

If the intention is to require (on a comply or explain basis) a statement on limbs (i) to (iii) above for the election of all types of directors, the proposed drafting should be amended so as to apply limbs (i) to (iii) to the proposed election of "a director", with a separate paragraph dealing with those statements that are only applicable to an INED.

We propose that limb (iii) above should cross-refer to the note on "board diversity" (i.e. the note that is proposed to be moved to Rule 13.92). The cross-reference will clarify to issuers that a proposed director can contribute to board diversity through a number of factors depending on the circumstances of the issuer.

There is a typo in the revised CP A.5.5(b) - "independent non-executive directorship" should be "independent non-executive director".

4. Do you agree with our proposal to amend Mandatory Disclosure Requirement L.(d)(ii) to reflect the upgrade of CP A.5.6 (on a "comply or explain" basis) to a Rule (Rule 13.92) requiring issuers to have a diversity policy and to disclose the policy or a summary of it in their Corporate Governance Reports?

Yes

No

Please give reasons for your views.

We agree with the proposal. This is a consequential amendment as a result of upgrading CP A.5.6 to a Rule.

## Factors affecting INED's independence

### A. Cooling off periods for former professional advisers

5. Do you agree with our proposal to revise Rule 3.13(3) so that there is a three-year cooling off period for professional advisers before they can be considered independent, instead of the current one year?

Yes, subject to our comments below

No

Please give reasons for your views.

We agree with the concept of extending the cooling-off period, subject to the following comments:

1. although the list of factors at Rule 3.13 is intended to act as a guide and is not conclusive, we would nonetheless propose that an element of materiality be introduced in respect of the professional adviser relationship. For example, we note the Singapore Corporate Governance Code applies a materiality threshold by reference to the amount of fees paid to

the professional adviser entity, whilst the UK Corporate Governance Code assesses whether there is or has been a “material business relationship” with the entity;

2. the consultation paper notes there is some market concern that the proposal may reduce the pool of available INEDs with relevant experience. The Exchange could therefore consider making any additional cooling off period (in excess of one year) a Code Provision. The notes to Rule 3.13(3) could then refer to the relevant Code Provision in order to highlight to issuers the potential relevance of the Code Provision in addition to Rule 3.13(3); and
3. as drafted, the revised Rule 3.13(3) would apply to a person who “*is* a director, partner or principal of a professional adviser which currently provides or has within three years...provided services, or *is* an employee of such professional adviser who is or has been involved in providing such services during the same period”.

A strict reading of the rule would capture only current - but not former – directors, partners, principals or employees of a professional adviser entity, with the cooling off period applying only to the professional adviser entity. It is not entirely clear if this is the Exchange’s intention. Please can the Exchange therefore confirm whether the intention is to apply the cooling-off period to former directors or employees etc. of a professional adviser entity, as well as the professional adviser entity itself. If so, we suggest the drafting should be clarified (for example, it could be drafted along the same lines as paragraph 15(i) of the HKMA’s INED guidance which expressly applies the cooling-off period to both elements).

Assuming Rule 3.13(3) is intended to capture former employees / directors, we note that would result in the cooling off period for former employees / directors of a professional adviser entity being one year longer than the cooling off period for former executives or directors of the listed group. Accordingly, a senior executive who may have worked for the listed group for many years would be subject to a shorter cooling-off period than a former employee of a professional adviser. This difference does not appear to be warranted.

6. Do you agree with our proposal to revise CP C.3.2 (on a “comply or explain” basis) so that there is a three-year cooling off period for a former partner of the issuer’s existing audit firm before he can be a member of the issuer’s audit committee?

Yes, subject to our comments below

No

Please give reasons for your views.

We agree with the concept of extending the cooling off period for a former partner of an existing auditor, but would note the discrepancy mentioned above in respect of the shorter cooling off period for a former executive or director of the listed group.

## **B. Cooling off period in respect of material interests in business activities**

7. Do you agree with our proposal to revise Rule 3.13(4) to introduce a one-year cooling off period for a proposed INED who has had material interests in the issuer’s principal business activities in the past year?

Yes

No

Please give reasons for your views.

We agree with the proposal.

**C. Cross-directorships or Significant Links with other Directors**

8. Do you agree with our proposal to introduce a new Recommended Best Practice A.3.3 (i.e. voluntary) to recommend disclosure of INED's cross-directorships in the Corporate Governance Report?

Yes

No

Please give reasons for your views.

We agree with the proposal and note the Recommended Best Practice involves not only voluntary disclosure of cross-directorships but also stating reasons why the board believes an INED is independent notwithstanding any cross-directorships.

However, we would suggest: (A) further guidance be given on the meaning of "cross-directorship". For example, we would like to seek clarification on whether the Recommended Best Practice is aimed at cross-directorships which involve executive or non-independent NEDs acting as INEDs on each other's boards (and not cross-directorships which involve only INEDs); and (B) expressly carving out intra-listco group cross-directorships as they do not raise similar concerns.

**D. Family ties**

9. Do you agree with our proposal to introduce a Note under Rule 3.13 to encourage inclusion of an INED's immediate family members in the assessment of the director's independence?

Yes

No

Please give reasons for your views.

We agree with the proposal, subject to our comments at question 5 above in relation to Rule 3.13(3).

10. Do you agree with our proposal to adopt the same definition for "immediate family member" as Rule 14.12(1)(a) which defines an "immediate family member" as "his spouse, his (or his spouse's) child or step-child, natural or adopted, under the age of 18 years"?

Yes

No

Please give reasons for your views.

We agree with the proposal.

**PART II: NOMINATION POLICY**

11. Do you agree with our proposal to amend Mandatory Disclosure Requirement L.(d)(ii) of Appendix 14 to require an issuer to disclose its nomination policy adopted during the year?

Yes

No

Please give reasons for your views.

We agree with the proposal.

**PART III: DIRECTORS' ATTENDANCE AT MEETINGS**

**Directors' attendance at general meetings**

12. Do you agree with our proposal to amend CP A.6.7 (on a "comply or explain" basis) by removing the last sentence of the current wording (i.e. they should also attend general meetings and develop a balanced understanding of the views of shareholders)?

Yes

No

Please give reasons for your views.

We agree with the proposal.

We would suggest that attendance at general meetings be included as a Recommended Best Practice for all categories of directors.

**Chairman's annual meetings with INEDs**

13. Do you agree with our proposal to revise CP A.2.7 (on a "comply or explain" basis) to state that INEDs should meet at least annually with the chairman?

Yes, subject to our comments below

No

Please give reasons for your views.

We agree with the proposal where the chairman is not an executive director. Where the chairman is an executive director, we suggest the INEDs may meet annually without the presence of the chairman – this may better reflect the rationale behind the code provision.

**PART IV: DIVIDEND POLICY**

14. Do you agree with our proposal to introduce CP E.1.5 requiring (on a "comply or explain" basis) the issuer to disclose its dividend policy in the annual report?

Yes

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No

Please give reasons for your views.

We agree with the proposal.

We note the Consultation Paper quotes an extract from the Exchange's Guidance Letter GL86-16, in the context of disclosures in listing documents, that "where there is currently no intent to pay any dividends, specially state that the company does not have any dividend policy". We would submit that a lack of current intention to pay dividends does not necessarily mean the company does not have a dividend policy – it may in fact be a reflection of its dividend policy. We would like to seek the Exchange's clarification on this point.

If a lack of current intention to pay dividends equates to a company not having a dividend policy, that company would arguably be deviating from the proposed CP E.1.5 for not having a policy in place.

**PART V: ELECTRONIC DISSEMINATION OF CORPORATE COMMUNICATIONS – IMPLIED CONSENT**

15. Do you think that the Rules should be amended to allow shareholder' consent to be implied for electronic dissemination of corporate communications by issuers?

Please give reasons for your views.

Whilst we support the use of implied consent for this purpose in principle (not least for environmental reasons), we submit it should wait until such consent is permitted under Hong Kong law to avoid confusion in the market as to why Hong Kong incorporated issuers are not able to utilise implied consent when it is permitted under the Listing Rules.