

## Part B Consultation Questions

Please indicate your preference by checking the appropriate boxes. Please reply to the questions below on the proposed change discussed in the Consultation Paper downloadable from the HKEx website at: <http://www.hkex.com.hk/eng/newsconsul/mktconsul/documents/cp2010124.pdf>.

Where there is insufficient space provided for your comments, please attach additional pages.

### CHAPTER 1: INTRODUCTION

#### Plain Writing Amendments

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?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal, save to say that unintended consequences may not be easy to spot in advance.

### CHAPTER 2: PROPOSED SUBSTANTIVE AMENDMENTS

#### PART I: DIRECTORS

##### 1. Directors' Duties and Time Commitments

Question 2. Do you agree with our proposed change to Rule 3.08 to clarify the responsibilities the Exchange expects of directors?

Yes

No

Please give reasons for your views.

What the existing LR 3.08 is doing is requiring directors to fulfill duties commensurate with the standards established by law. The existing wording summarises (to the extent sensible) those duties and standards. Going into further detail adds nothing substantive to the rule and in any event might be counter-productive given that directors' duties are not static but evolve over time in line with developments in statutory and case law.

Question 3. Do you agree with our proposed addition of the Note to Rule 3.08 referring to the guidance issued by the Companies Registry and HKIOD?

Yes

No

Please give reasons for your views.

Please see in general our response to question 2. In addition, referring to outside guidance which may change from time to time means that the Rule may become out of line with that guidance.

Question 4. Do you agree to include a new duty (CP A.5.2(e)) in the nomination committee's written terms of reference that it should regularly review the time required from a director to perform his responsibilities to the issuer, and whether he is meeting that requirement?

Yes

No

Please give reasons for your views.

There is no "right" amount of time for INEDs to spend on a listed company's affairs. The appropriate amount of time will vary over time, depending for instance on the number, timing and importance of notifiable and connected transactions entered into by the company. In addition, in order for the committee to perform the suggested review, INEDs would have to keep time sheets showing the number of hours spent on their telephone discussions with the chairman or among themselves, reading board papers and attending meetings and conferences. This would be unduly burdensome.

Question 5. Do you agree to include a new duty (CP A.5.2(f)) in the nomination committee's written terms of reference that it should review NEDs' annual confirmation that they have spent sufficient time on the issuer's business ?

Yes

No

Please give reasons for your views.

Please see the answer to the previous question, in particular that the suggested review would require INEDs to keep time sheets, which would be unduly burdensome.

Question 6. Do you agree to include a disclosure requirement in the Corporate Governance Report (paragraph L(d)(ii) of Appendix 14) that NEDs have made annual confirmation to the nomination committee that they have spent sufficient time on the issuer's business?

Yes

No

Please give reasons for your views.

As a matter of law a director must devote sufficient time to the performance of his duties or he will by definition be in breach of them. Confirming that he has not breached one element of his duties (to devote sufficient time to them) is unnecessary. So is disclosing such confirmation.

Question 7. Do you agree to expanding CP A.5.3(re-numbered CP A.6.3) to state that a director should limit his other professional commitments and acknowledge to the issuer that he will have sufficient time to meet his obligations?

Yes

No

Please give reasons for your views.

As a matter of law a director must devote sufficient time to the performance of his duties or he will by definition be in breach of them. The proposed statement and acknowledgement add nothing.

Question 8. Do you agree to expanding CP A.5.3 (re-numbered CP A.6.3) to state that an NED should confirm annually to the nomination committee that he has spent sufficient time on the issuer's business?

Yes

No

Please give reasons for your views.

As a matter of law a director must devote sufficient time to the performance of his duties or he will by definition be in breach of them. The proposed confirmation adds nothing.

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?

Yes

No

Please give reasons for your views.

We have no views on the upgrading. On the amendment, there is no "right" amount of time for NEDs to spend on a listed company's affairs. The appropriate amount of time will vary over time, depending for instance on the number, timing and importance of notifiable and connected transactions entered into by the company. On a point of detail, we are not sure that the second and proposed third sentences of D.1.4 (if, contrary to our views, the latter sentence is included) are in the right place (in a section headed "Delegation by the Board").

Question 10. Do you agree to upgrading RBP A.5.6 to a CP (re-numbered CP A.6.6) and to amending it to encourage timeliness of disclosure by a director to the issuer on any change to his significant commitments?

Yes

No

Please give reasons for your views.

We see no need for the Code to be prescriptive on this point.

Question 11. Do you consider that there should be a limit on the number of INED positions an individual may hold?

Yes

No

Please give reasons for your views.

We think it best to leave the judgment as to whether an individual can devote sufficient time to an INED position to the individual and to the companies which appoint the individual. We also note, from paragraph 39 of the consultation paper, that multiple directorships of Hong Kong listed companies (with only 1.4% of INEDs holding more than 5 INED positions and 0.8% of directors holding more than 5 directorship positions) do not seem to be common.

Question 12. If your answer to Question 11 is “yes”, what should be the number? Please give reasons for your views.

Not applicable.

Question 13. If your answer to Question 11 is “yes”, do you think that it should be a Rule or a CP?

Rule

CP

Please give reasons for your views.

Not applicable.

## 2. Directors’ Training and Independent Non-executive Directors

Question 14. Do you agree that we should upgrade RBP A.5.5 (requirement for continuous professional development) to a CP (re-numbered CP A.6.5)?

Yes

No

Please give reasons for your views.

We do not think it sensible to be prescriptive about training. Some directors need it. Others (professionals in appropriate fields for example) do not.

Question 15. Do you agree that the minimum number of hours of directors training should be eight?

Yes

No

Please give reasons for your views.

We do not think it sensible to mandate a particular number of hours. What is a sensible amount of training will vary by director (some will not need any – see previous answer), type of company and by what the company is doing in any particular year.

Question 16. What training methods do you consider to be acceptable for the requirements stated in the proposed CP (re-numbered RBP A.6.5)? Please give reasons for your views.

We agree that acceptable training methods should, for the reasons given in paragraph 66 of the consultation paper, include at least the methods described in that paragraph. We also think that receiving advice from, for example legal, investment banking and accounting advisers on specific transactions involving the performance by directors of their duties (for example connected and notifiable transactions) should be an acceptable training method. Directors are likely to pay particular attention to such specific advice and the advice will assist them when they are called upon to perform their duties in similar circumstances after the advice has been received.

Question 17. Do you agree that we should upgrade RBP A.3.2 (at least one-third of an issuer's board should be INEDs) to a Rule (re-numbered Rule 3.10A)?

Yes

No

Please give reasons for your views.

It is the quality of INEDs which counts, not their quantity. High quality INEDs are difficult to find and are likely to become more difficult to find if the proposals in the consultation paper about their time commitments are implemented. Appointing low quality directors simply to make up numbers will achieve nothing. We do not think that the international requirements referred to in paragraph 79 of the consultation paper are relevant. In any event, only two of those jurisdictions embed a particular proportion as a rule. The others require issuers to comply or explain why they do not. As a general matter, we do not think it right that corporate governance should be dealt with by the Listing Rules themselves. It should in our view always be open to a company to explain why it does not follow a particular corporate governance practice which is generally considered to be a good one. It is then open to investors to take into account the fact that the company does not follow the practice (and the adequacy or otherwise of its reasons for not doing so) in deciding whether to be or remain an investor in the company. In the light of this, we think the right compromise is to upgrade the RBP to a CP. We also think that there should be an exception where a particular board structure has been considered and approved by independent shareholders in general meeting.

Question 18. Do you agree that this Rule (at least one-third of an issuer's board should be INEDs) be effective after a transitional period as described in paragraph 87 of the Consultation Paper?

Yes

No

Please give reasons for your views.

We do not (see our answer to the previous question) think that this rule should be implemented at all. Without prejudice to that view, if the rule is implemented, there should be a transitional period of at least two years from the date of implementation of the rule.

Question 19. Do you agree that we should upgrade RBP A.4.3 (shareholder to vote on a separate resolution for the further employment of an INED who has served more than nine years) to a CP (re-numbered CP A.4.3)?

Yes

No

Please give reasons for your views.

We do not consider that longevity in office necessarily results in loss of independence. We think that leaving this point as a RBP strikes the right balance.

Question 20. Do you agree with our proposal to upgrade RBP A.4.8 (issuer should include explanation of its reasons for election and independence of an INED in a circular) to a CP (re-numbered CP A.5.5)?

Yes

No

Please give reasons for your views.

We do not consider that this will give rise to information which is useful to shareholders. Disclosures are likely to be formalistic, for example "Mr. X is an experienced [businessman/lawyer/accountant/banker] who satisfies the requirements for independence in the Listing Rules."

### 3. Board Committees

#### A. Remuneration Committee

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)?

Yes

No

Please give reasons for your views.

As a general matter, we do not think it right that corporate governance should be dealt with by the Listing Rules themselves. It should in our view always be open to a company to explain why it does not follow a particular corporate governance practice which is generally considered to be a good one. It is then open to investors to take into account the fact that the company does not follow the practice (and the adequacy or otherwise of its reasons for not doing so) in deciding whether to be or remain an investor in the company.

Question 22. Do you agree with our proposal that the remuneration committee must be chaired by an INED?

Yes

No

Please give reasons for your views.

This proposal assumes that a non-INED chairman can be expected to influence the committee to make remuneration recommendations which are adverse to the interests of shareholders and therefore also assumes that the INEDs would not be sufficiently their own men to resist such influence. But if this is the case, having one of them as chairman would be unlikely to make much difference. In addition, the first assumption may be reasonable in jurisdictions where shareholders are not typically represented on the boards of listed companies. It is not reasonable in Hong Kong, where listed companies (and accordingly the compositions of their boards) are typically controlled by a single shareholder or a group of related shareholders. Non INED directors appointed by controlling shareholders to the boards of Hong Kong listed companies can be expected to take full account of the interests of shareholders in making remuneration recommendations. We note the point made in paragraph 97 of the consultation paper to the effect that this argument does not apply where the controlling shareholder is himself on the board and his own remuneration is being considered. However, this point could be met by the chair being passed to an INED when such a director's remuneration is being considered and we would support a change to the Code designed to achieve this.



Question 23. Do you agree with our proposal to move the requirement for issuers to have written terms of reference for the remuneration committee from the Code (CP B.1.1) to the Rules (Rule 3.26)?

Yes

No

Please give reasons for your views.

Our reasons are the same as those given in our answer to question 21.

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?

Yes

No

Please give reasons for your views.

We doubt if the proposal will achieve much. An issuer which breaches a substantive rule is likely to breach a procedural one requiring the issuer to tell the world that it has breached the substantive rule.

Question 25. Do you agree with our proposal that issuers that fail to meet Rules 3.25, 3.26 and 3.27 should have three months to rectify this?

Yes

No

We have no views on this proposal.

Question 26. 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)?

Yes

No

Please give reasons for your views.

We think it sensible that this point should be clarified, having ourselves always read the rule as implicitly requiring that the advice be independent.

Question 27. Do you agree that, in order to accommodate Model B, we should revise CP B.1.3 (re-numbered CP B.1.2) as described in paragraph 117 of the Consultation Paper?

Yes

No

Please give reasons for your views.

Model B provides a sensible and workable alternative to Model A and is followed by a number of other jurisdictions.

Question 28. (i) Do you agree that where the board resolves to approve any remuneration with which the remuneration committee disagrees, the board should disclose the reasons for its resolution in its corporate governance report)? (ii) If your answer is “yes”, do you agree that RBP B.1.8 should be revised and upgraded to a CP (re-numbered CP B.1.6).

(i)  Yes  No

(ii)  Yes  No

Please give reasons for your views.

Such disclosure would be commercially damaging. As a result requiring it may have the unintended consequences of causing (i) the board (against its better judgment as to what is in the best interests of the company) to defer to the views of a minority of its members (that is the members of the remuneration committee) or (ii) the remuneration committee not press its dissenting views, in each case simply to avoid damaging disclosure.

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?

Yes

No

Please give reasons for your views.

We think that the broader language proposed gives appropriate additional flexibility.

B. Nomination Committee

Question 30. Do you agree that RBP A.4.4 (establishment and composition of a nomination committee, re-numbered CP A.5.1) should be upgraded to a CP?

Yes

No

Please give reasons for your views.

This proposal assumes that, without a nomination committee, there is a risk that directors will be appointed who will not have regard to the best interests of shareholders and will have too much regard for their own interests. This may be a risk in jurisdictions where non-INED board members are typically managers without material interests in the shares of the companies of which they are directors. In Hong Kong, listed companies are typically controlled by a single shareholder or a group of related shareholders. Controlling shareholders are usually themselves represented on the board and control the appointment of other directors. Boards composed in this manner do not have any incentive not to act in the best interests of shareholders. It is no answer to this point that directors appointed by controlling shareholders will favour the interests of controlling shareholders at the expense of non-controlling shareholders. Where such interests differ (which will be the exception rather than the rule), the Listing Rules already provide adequate protection to non-controlling shareholders through the connected transaction rules and the requirement for INEDs to be appointed to boards. It is our view that, in a Hong Kong context, it should be open to a board of directors of a listed company to decide that the functions of a nomination committee are best performed by the board as a whole. The strength of the foregoing argument is, in our view, properly reflected in the fact that, as noted in paragraph 124 of the consultation paper, 63% of issuers do not have nomination committees, compared with 98.5% of issuers (see paragraph 96 of the consultation paper) who have remuneration committees.

Question 31. Do you agree that the proposed CP (currently RBP A.4.4) should state that the nomination committee's chairman should be an INED?

Yes

No

Please give reasons for your views.

Please see our response to question 30. In our view, there is no need, in a Hong Kong context, for board appointments to be made or influenced by those who are independent of controlling shareholders. Nor, frankly, is it reasonable that a controlling shareholder of a company should be fettered in this way in its choice of those who comprise the board of the company. Minority shareholders are adequately protected by the requirement for INEDs and the connected transaction rules.

Question 32. Do you agree that RBP A.4.5 (nomination committee’s terms of reference, re-numbered CP A.5.2) should be upgraded to a CP?

Yes

No

Please give reasons for your views.

Without prejudice to our view that the requirement for a nomination committee should not become a CP, we have no views on this proposal.

Question 33. Do you agree that the proposed CP (currently RBP A.4.5(a)) should state that the nomination committee’s review of the structure, size and composition of the board should be performed at least once a year?

Yes

No

Please give reasons for your views.

Without prejudice to our view that the requirement for a nomination committee should not become a CP, we consider this proposal to be unnecessary. Large companies consider these matters regularly in any event. Small companies with businesses which do not change much from year to year may not need to consider them as often as once a year.

Question 34. Do you agree that the proposed CP (currently RBP A.4.5(a)) should state that the nomination committee’s review of the structure, size and composition of the board should implement the issuer’s corporate strategy?

Yes

No

Please give reasons for your views.

Without prejudice to our view that the requirement for a nomination committee should not become a CP, we consider this proposal confusing as presently worded in the new A.5.2. A proposed change to the board cannot of itself implement a strategy. Only the board itself can implement a strategy. We suggest amending “to implement” in A.5.2(a) to “in the light of”.

Question 35. Do you agree that RBP A.4.6 (availability of nomination committee’s terms of reference) should be upgraded to a CP?

Yes

No

Please give reasons for your views.

Without prejudice to our view that the requirement for a nomination committee should not become a CP, we have no particular views on this proposal.

Question 36. Do you agree that the proposed CP (currently RBP A.4.6, re-numbered CP A.5.3) should state that issuers should include their nomination committee's terms of reference on the HKEx website?

Yes

No

Please give reasons for your views.

Without prejudice to our view that the requirement for a nomination committee should not become a CP, we have no particular views on this proposal.

Question 37. Do you agree that RBP A.4.7 (sufficient resources for the nomination committee, re-numbered CP A.5.4) should be upgraded to a CP?

Yes

No

Please give reasons for your views.

Without prejudice to our view that the requirement for a nomination committee should not become a CP, we have no particular views on this proposal.

Question 38. Do you agree that the proposed CP (currently RBP A.4.7, re-numbered CP A.5.4) should clarify that a nomination committee should be able to seek independent professional advice at the issuer's expense?

Yes

No

Please give reasons for your views.

Without prejudice to our view that the requirement for a nomination committee should not become a CP, we have no particular views on this proposal.

C. Corporate Governance Committee

Question 39. Do you agree with the proposed terms of reference listed in paragraph 141 of the Consultation Paper?

Yes

No

Please give reasons and alternative suggestions.

We think that corporate governance is a matter for the board as a whole and accordingly that responsibility for it should not be delegated. We therefore do not support the compulsory formation of a corporate governance committee (or the expansion of the terms of reference of an existing committee to include corporate governance matters). We note in this connection that most international jurisdictions do not require corporate governance committees. We think incidentally that the consultation paper should specifically have asked whether respondents support the formation of a committee (or the expansion of the terms of reference of an existing committee to include corporate governance matters) becoming a CP, not just whether they agree with the proposed terms of reference. The absence of such a question means that the Exchange will not be able to judge the degree of support for such a CP. It follows from our objection to the formation of a corporate governance committee that we object to its terms of reference.

Question 40. Do you consider that the committee(s) performing the proposed duties listed in paragraph 141 of the Consultation Paper should submit to the board a written report on its work annually?

Yes

No

Please give reasons for your views.

It follows from our objection to the formation of a corporate governance committee that we object to its having any duties.

Question 41. Do you consider that this report (as described in paragraph 140 of the Consultation Paper) should be published as part of the issuer's corporate governance report?

Yes

No

Please give reasons for your views.

It follows from our objection to the formation of a corporate governance committee that we object to its making reports.

Question 42. Do you agree with introducing RBP D.3.3 stating that an issuer should establish a corporate governance committee?

Yes

No

Please give reasons for your views.

Please see the answer to question 39.

Question 43. Do you agree the duties of an existing committee or committees can be expanded to include those of a corporate governance committee?

Yes

No

Please give reasons for your views.

Please see the answer to question 39. That said, if the Code is changed to require corporate governance matters to be considered by a committee, we would prefer them to be capable of being considered by an existing committee and would have thought that the logical committee would be the audit committee.

Question 44. Do you agree with the addition of CP D.3.2 stating that the committee performing the proposed duties listed in paragraph 141 of the Consultation Paper should comprise a majority of INEDs?

Yes

No

Please give reasons for your views.

For the reasons given in the answer to question 39, we do not think that particular categories of directors have special roles to play in corporate governance matters.

Question 45. Do you agree with the proposal to add a note to CP D.3.2 stating that the committee should include one member who is an executive director or non-executive director with sufficient knowledge of the issuer's day-to-day operations?

Yes

No

Please give reasons for your views.

For the reasons given in the answer to question 39, we do not think that particular categories of directors have special roles to play in corporate governance matters.

#### D. Audit committee

Question 46. Do you agree with our proposal to upgrade RBP C.3.7 (audit committee's terms of reference should include arrangements for employees to raise concerns about improprieties in financial reporting) to a CP?

Yes

No

Please give reasons for your views.

While we agree that listed companies should have arrangements for employees to raise such concerns, we do not think it sensible to be prescriptive about the way in which this is achieved.

Question 47. Do you agree with our proposal to amend CP C.3.3(e)(i) to state that the audit committee should meet the external auditor at least twice a year?

Yes

No

Please give reasons for your views.

We think that such meetings are helpful to the audit committee in performing its duties.



Question 48. Do you agree that a new RBP should be introduced to encourage audit committees to establish a whistleblowing policy?

Yes

No

Please give reasons for your views.

We consider this to be an inappropriate broadening of the responsibilities of an audit committee. It also runs the risk of burdening the committee with frivolous and unjustified complaints from outside parties, who often disguise ordinary commercial disagreements as matters relating to propriety.

#### **4. Remuneration of Directors, CEO and Senior Management**

Question 49. Do you agree with our proposal that issuers should disclose senior management remuneration by band (Appendix 16, new paragraph 25A)?

Yes

No

Please give reasons for your views.

We have no views on this proposal.

Question 50. If your answer to Question 49 is yes, do you agree with our proposal that senior management remuneration disclosure should include sales commission?

Yes

No

Please give reasons for your views.

We have no views on this proposal.

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?

Yes

No

Please give reasons for your views.

We think it reasonable to be transparent on this point.

Question 52. Do you agree with our proposal to upgrade RBP B.1.6 to a CP (a significant proportion of executive directors' remuneration should be structured so as to link rewards to corporate and individual performance, re-numbered CP B.1.5)?

Yes

No

Please give reasons for your views.

Since the financial crisis, the extent to which employees should be rewarded by reference to individual performance has become increasingly controversial. We do not think that the Code should be prescriptive in this area.

## 5. Board Evaluation

Question 53. Do you agree with our proposal to add new RBP B.1.8 that issuers should conduct a regular evaluation of its own and individual directors' performance?

Yes

No

Please give reasons for your views.

We do not think that this proposal will have a material impact on the quality of governance. Boards are in practice unlikely (if only to avoid exposing themselves to liability) to find defects in their own performance.

## 6. Board Meetings

- A. Considering a matter where there is a conflict of interest by a physical board meeting rather than a written board resolution

Question 54. Do you agree that, except for plain language amendments, the wording of CP A.1.8 (re-numbered CP A.1.7) should be retained (issuers to hold a board meeting to discuss resolutions on a material matter where a substantial directors or a director has a conflict of interest)?

Yes

No

Please give reasons for your views.

We think this CP should be deleted. It rests on the assumption (for which we are not aware of any evidence and which is certainly incorrect in the case of this respondent) that the non-conflicted directors will not pay proper attention to a proposal which they are asked to consider simply because they are asked to consider it on paper rather than at a meeting. High quality directors will pay proper attention however the proposal is to be considered. The CP in its present form can have unintended consequences. Written resolutions must usually be passed by all directors, or at least all those present in Hong Kong. Resolutions passed at physical meetings can be passed by a majority of (a usually very small) quorum, three for example. This means that resolutions caught by the CP (and therefore passed at a physical meeting) can have considerably less scrutiny than written resolutions. Whether or not a resolution should be discussed at a physical board meeting is properly a matter for the chairman of the company to decide in the light of all relevant circumstances, including any request for a physical meeting by individual INEDs or other directors, any likelihood of disagreement on the resolution and the likely number of directors who will consider the resolution depending on whether it is proposed as a written resolution or at a physical board meeting.

Question 55. Do you agree with our proposals to add a note to CP A.1.8 (re-numbered CP A.1.7) stating that attendance at board meetings can be achieved by telephonic or video conferencing?

Yes

No

Please give reasons for your views.

This is a sensible proposal which avoids any doubt on the point. Indeed we would have thought that the words “for all purposes under this Code and the Listing Rules” or something similar should be added to the note, to avoid a possible implication that the note only applies to physical board meetings required by CP A.1.7.

B. Directors' Attendance at Board Meetings

Question 56. Do you agree with our proposal to add the notes to paragraph I(c) of Appendix 14 (on attendance at board meetings) as described in paragraph 195 of the Consultation Paper?

Yes

No

Please give reasons for your views.

We think the proposal properly reflects the intention of the existing provisions.

Question 57. Do you agree with our proposal to introduce a new requirement (paragraph I(d) to Appendix 14) that attendance by an alternate should not be counted as attendance by the director himself?

Yes

No

Please give reasons for your views.

We think the proposal properly reflects the intention of the existing provisions.

Question 58. Do you agree with our proposal that an issuer disclose, for each named director, the number of board or committee meetings he attended and separately the number of board or committee meetings attended by his alternate?

Yes

No

Please give reasons for your views.

We think the proposal properly reflects the intention of the existing provisions.

C. Removing Five Percent Threshold for Voting on a Resolution in which a Director has an Interest

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)?

Yes

No

Please give reasons for your views.

For many years, holdings of less than 5% in the shares of contract counterparties have been disregarded in considering whether a director has a conflict of interest. This is sensible. Directors are unlikely to be influenced by minor shareholdings in contractual counterparties. We are not aware of any evidence that the exception has led to listed companies being influenced to make decisions to enter into contracts which should not have been entered into. Having no percentage based safe harbour means that cautiously advised boards will regard any holding in the shares of a contractual counterparty as precluding a director from voting on the contract. This could give rise to material practical problems. If, as may well be the case with some listed companies, all the directors hold shares in HSBC, the company will be precluded from banking with Hong Kong's largest bank. This cannot be in the interests of shareholders. Without prejudice to our views that no change is required, a lower percentage safe harbour could perhaps be considered.

**7. Chairman and Chief Executive Officer**

Question 60. Do you agree with our proposal to remove the words "at the board level" from Code Principle A.2 to clarify the division between management of the board and day-to-day management of an issuer's business?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 61. Do you agree with our proposal to amend CP A.2.3 to add "accurate" and "clear" to describe the information that the chairman should ensure directors receive?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 62. Do you agree with our proposal to upgrade RBP A.2.4 to a CP to give greater emphasis to the chairman's duty to provide leadership for the board, to ensure that the board works effectively and discharges its responsibilities, etc.?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 63. Do you agree with our proposal to upgrade RBP A.2.5 to a CP and amend it to state: "The chairman should take primary responsibility for ensuring that good corporate governance practices and procedures are established"?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 64. Do you agree with our proposal to upgrade RBP A.2.6 to a CP to emphasise the chairman's responsibility to encourage directors with different views to voice their concerns, allow sufficient time for discussion of issues and build consensus?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

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?

Yes

No

Please give reasons for your views.

Meetings with directors who are not executives provide a forum for discussion of the company's affairs in the absence of management. As neither INEDs nor other NEDs participate in management, it would be otiose to require separate meetings. We disagree with the statement in paragraph 215 of the consultation paper that INEDs and NEDs represent different shareholder interests. All directors owe a duty to all shareholders.

Question 66. Do you agree with our proposal to upgrade RBP A.2.8 to a CP to highlight the chairman's role to ensure effective communication between the board and shareholders?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 67. Do you agree with our proposal to upgrade RBP A.2.9 to a CP to emphasise the chairman's role to enable NED contributions and constructive relations between EDs and NEDs?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

**8. Notifying directorship change and disclosure of directors' information**

Question 68. Do you agree that we should amend Rule 13.51(2) to require issuers to disclose the retirement or removal of a director or supervisor?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 69. Do you agree that we should amend Rule 13.51(2) to apply to the appointment, resignation, re-designation, retirement or removal of a CEO (and not only to a director or supervisor)?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 70. Do you agree that we should amend Rule 13.51(2)(o) to cover all civil judgments of fraud, breach of duty or other misconduct involving dishonesty?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 71. Do you agree that we should amend Rule 13.51B(3)(c) to clarify that the sanctions referred to in that Rule are those made against the issuer (and not those of other issuers)?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.



Question 72. Do you agree with our proposal to upgrade RBP A.3.3 to a CP to ensure that directors' information is published on an issuer's website?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 73. Do you agree with our proposed amendment to the CP (RBP A.3.3 upgraded) that directors' information should also be published on the HKEx website?

Yes

No

Please give reasons for your views.

We agree with the reasons in paragraph 230 of the consultation paper. A consequential amendment should be made to repeal Listing Rule 13.51B(1) to dispense with the requirement to disclose changes in directors' information in interim reports because such information will be posted on the HKEx website and updated from time to time.

## **9. Providing Management Accounts or Management Updates to the Board**

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?

Yes

No

Please give reasons for your views.

We agree with the reasons in paragraph 236 of the consultation paper.

**10. Next Day Disclosure for a Director Exercising an Option in the Issuer or the Issuer's Subsidiaries**

Question 75. Do you agree with the proposed amendment to Rule 13.25A(2)(a)(viii) and (ix) removing the need for issuers to publish a Next Day Disclosure Return following the exercise of options for shares in the issuer by a director of a subsidiary?

Yes

No

Please give reasons for your views.

We agree with the reasons in paragraph 243 of the consultation paper.

Question 76. Do you agree with the proposed amendment to Rule 13.25A(2)(b)(i) and (ii) to require issuers to publish a Next Day Disclosure only if options for shares in the issuer exercised by a director of its subsidiary or subsidiaries results in a change of 5% or more (individually or when aggregated with other events) of the issuer's share capital since its last Monthly Return?

Yes

No

Please give reasons for your views.

We agree with the reasons in paragraph 243 of the consultation paper.

**11. Disclosing Long Term Basis on which an Issuer Generates or Preserves Business Value**

Question 77. Do you agree that we should introduce the proposed CP (CP C.1.4) as described in paragraph 250 of the Consultation Paper?

Yes

No

Please give reasons for your views.

We do not think that this proposal will provide useful information for shareholders. Disclosures are likely to combine platitudinous statements of the obvious and impenetrable business school style jargon in about equal proportions.

## 12. Directors' Insurance

Question 78. Do you agree with our proposal to upgrade RBP A.1.9 (issuers should arrange appropriate insurance for directors) to a CP (re-numbered CP A.1.8)?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 79. Do you agree with our proposal to add the words “adequate and general” to RBP A.1.9 (upgraded and re-numbered CP A.1.8)?

Yes

No

Please give reasons for your views.

We think the correct expression should be “adequate directors and officers liability insurance”. Shareholders funds should not be spent on a wider category of insurance than that necessary to indemnify directors in respect of what they do in their capacity as directors.

## PART II: SHAREHOLDERS

### 1. Shareholders' General Meetings

#### A. Notice of Meeting and Bundling of Resolutions

Question 80. Do you agree with our proposal to amend CP E.1.1 to state that issuers should avoid “bundling” of resolutions and where they are “bundled” explain the reasons and material implications in the notice of meeting?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

#### B. Voting by Poll

Question 81. Do you agree with our proposal to amend Rule 13.39(4) to allow a chairman at a general meeting to exempt procedural and administrative matters described in paragraph 274 of the Consultation Paper from voting by poll?

Yes

No

Please give reasons for your views.

We agree with the reasons in paragraph 268 of the consultation paper.

Question 82. Do you agree with the examples of procedural and administrative resolutions in paragraph 275 of the Consultation paper? Do you have any other examples to add?

Yes

No

Please give reasons for your views.

The examples given are clearly procedural or administrative.

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

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 84. Do you agree with our proposal to amend CP E.2.1 to remove the words "at the commencement of the meeting" so that an issuer's chairman can explain the procedures for conducting a poll later during a general meeting?

Yes

No

Please give reasons for your views.

We agree with the reasons in paragraph 273 of the consultation paper.

### C. Shareholders' Approval to Appoint and Remove an Auditor

Question 85. Do you agree with our proposal to add new Rule 13.88 to require shareholder approval to appoint the issuer's auditor?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal. As a company incorporated in Hong Kong, we are in any event bound by comparable provisions in the Companies Ordinance.

Question 86. Do you agree with our proposal to add, in new Rule 13.88, a requirement for shareholder approval to remove the issuer's auditor before the end of his term of office?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal. As a company incorporated in Hong Kong, we are in any event bound by comparable provisions in the Companies Ordinance.

Question 87. Do you agree that the new Rule 13.88 should require a circular for the removal of the auditor to shareholders containing any written representation from the auditor and allow the auditor to make written and/or verbal representation at the general meeting to remove him?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal. As a company incorporated in Hong Kong, we are in any event bound by comparable provisions in the Companies Ordinance.

D. Directors' Attendance at Meetings

Question 88. Do you agree with our proposal to upgrade RBP A.5.7 (NEDs' attendance at meetings) to a CP (re-numbered CP A.6.7)?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 89. Do you agree with our proposal to upgrade RBP A.5.8 (NEDs should make a positive contribution to the development of the issuer's strategy and policies) to a CP (re-numbered CP A.6.8)?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal (save for commenting that the requirement is a statement of the obvious).

Question 90. Do you agree with our proposal to introduce a new mandatory disclosure provision in Appendix 23 (re-numbered paragraph I(c) of Appendix 14) stating that issuer must disclose details of attendance at general meetings of each director by name?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 91. Do you agree with our proposal that CP E.1.2 state the issuer's chairman should arrange for the chairman of "any other committees" to attend the annual general meeting?

Yes

No

Please give reasons for your views.

We think this proposal could be uncertain in its operation, for example when a board committee has been formed for a specific and temporary purpose (to consider the merits of a general offer for example) and that purpose has been discharged when the general meeting is held. We also think that the proposal may well discourage the formation of other committees which might be beneficial (for example to look at future business opportunities) but information about the deliberations of which it would not necessarily be appropriate to provide in answers to questions at general meetings.

#### E. Auditor's Attendance at Annual General Meetings

Question 92. Do you agree with our proposal that CP E.1.2 state that the chairman should arrange for the auditor to attend the issuer's annual general meeting to answer questions about the conduct of the audit, the preparation and content of the auditors' report, the accounting policies and auditor independence?

Yes

No

Please give reasons for your views.

A company has no power to require its auditor to attend a meeting. This proposal should only be implemented with the agreement of the Hong Kong Institute of Certified Public Accountants.

## 2. Shareholders' Rights

Question 93. Do you agree with our proposal to upgrade the recommended disclosure of "shareholders' rights" under paragraph 3 (b) of Appendix 23 to mandatory disclosure (re-numbered paragraph O of Appendix 14)?

Yes

No

Please give reasons for your views.

We are not aware of any evidence that shareholders want disclosure of this material.

## 3. Communication with Shareholders

### A. Establishing a Communication Policy

Question 94. Do you agree with our proposed new CP E.1.4 stating that issuers should establish a shareholder communication policy?

Yes

No

Please give reasons for your views.

Companies will communicate effectively with their shareholders if they comply with the relevant provisions of the Listing Rules (including the Code). There is no need for a policy of compliance with particular Listing Rules or particular provisions of the Code. In any event, the Code should not be prescriptive as to how listed companies organise themselves in order to comply with their communications obligations under the Listing Rules.

### B. Publishing Constitutional Documents on Website

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?

Yes

No

Please give reasons for your views.



Constitutional documents are already in the public domain since they can be searched at the Companies Registry. In any event, we doubt (given that constitutional documents are, in order to comply with the Listing Rules, essentially in standard form) whether they will be viewed much if placed on listed companies' websites or the HKEx website.

C. Publishing Procedures for Election of Directors

Question 96. Do you agree with our proposal to add a new Rule 13.51D requiring an issuer to publish the procedures for shareholders to propose a person for election as a director on its website?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

D. Disclosing Significant Changes to Constitutional Documents

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) ?

Yes

No

Please give reasons for your views.

As shareholders will have had to vote on any change in the listed issuer's articles of association and therefore will already have been informed about it, there is no need for additional disclosure after the event.

### **PART III: COMPANY SECRETARY**

#### **1. Company Secretary's Qualifications, Experience and Training**

Question 98. Do you agree with our proposal to introduce a new Rule 3.28 on requirements for company secretaries' qualifications and experience?

Yes

No

Please give reasons for your views.

The wording of the new Rule 3.28 is to the effect that a person who is a member of one of the recognised bodies will be automatically acceptable to the Exchange but that a person who is not such a member will have to demonstrate that he has relevant experience in order to be acceptable to the Exchange. This seems to us to strike an acceptable balance. Listed issuers should be free to appoint as secretaries those who meet acceptable objective criteria. We believe that those who are members of the recognised bodies meet such criteria. It is not unreasonable for the Exchange to police the relevant experience of those who do not meet acceptable criteria.

Question 99. Do you agree that the Exchange should consider as acceptable the list of qualifications for company secretaries set out in paragraph 345 of the Consultation Paper?

Yes

No

Please give reasons for your views.

Please see our response to question 98.

Question 100. Do you agree that the Exchange should consider the list of items set out in paragraph 346 of the Consultation Paper when deciding whether a person has the relevant experience to perform company secretary functions?

Yes

No

Please give reasons for your views.

The items seem to be sensible indicators of appropriate experience.

Question 101. Do you agree with our proposal to remove the requirement for company secretaries to be ordinarily resident in Hong Kong?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 102. Do you agree with our proposal to repeal Rule 19A.16 so that Mainland issuers' company secretaries would need to meet the same requirements as for other countries?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

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?

Yes

No

Please give reasons for your views.

This is in line with the annual requirements for attaining/maintaining Practitioner's Endorsement under the Enhanced Continuing Professional Development Programme of the Hong Kong Institute of Chartered Secretaries.

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

Yes

No

Please give reasons for your views.

The proposed transitional arrangement is a pragmatic approach.

## 2. New Section in Code on Company Secretary

Question 105. Do you agree with our proposal to include a new section of the Code on company secretary?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 106. Do you agree with the proposed principle as described in paragraph 362 of the Consultation Paper and set out in full in page 27 of Appendix II?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 107. Do you agree with our proposed CP F.1.1 stating the company secretary should be an employee of the issuer and have knowledge of the issuer's day-to-day affairs?

Yes

No

Please give reasons for your views.

We think the important point is that the company secretary should have sufficient knowledge of the company's affairs to perform his duties. It does not follow from this that he should be an employee of the company or that he should be familiar with the minutiae of the company's day to day affairs. We would agree with the proposal if the first sentence of CP F.1.1 were replaced by the following two sentences. "The company secretary should have sufficient knowledge of the company's affairs to enable him to perform his duties, including those under this Code. It is the responsibility of the board to facilitate the company secretary's having such knowledge." If, contrary to our views, the exchange decides to require an employment relationship, we suggest that an employee of a company closely related to the listed issuer should qualify.

Question 108. Do you agree with our proposal described in paragraph 364 of the Consultation Paper, that if an issuer employs an external service provider, it should disclose the identity of its issuer contact person?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 109. Do you agree with our proposed CP F.1.2 stating that the selection, appointment or dismissal of the company secretary should be the subject of a board decision?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 110. Do you agree with our proposed note to CP F.1.2 stating that the board decision to select, appoint or dismiss the company secretary should be made at a physical board meeting and not dealt with by written board resolution?

Yes

No

Please give reasons for your views.

Please see our response to question 54.

Question 111. Do you agree with our proposal to add CP F.1.3 stating that the company secretary should report to the Chairman or CEO?

Yes

No

Please give reasons for your views.

It may be sensible for the company secretary to report to different members of the board (including for instance the chief financial officer in relation to the preparation of annual reports and accounts) for different purposes.

Question 112. Do you agree with our proposal to add CP F.1.5 stating that the company secretary should maintain a record of directors training?

Yes

No

Please give reasons for your views.

Please see our response to question 14.

## CHAPTER 3: PROPOSED NON-SUBSTANTIVE AMENDMENTS

### 1. Definition of “Announcement” and “Announce”

Question 113. Do you agree with our proposal to include a definition in the Rules for the terms “announcement” and “announce” as described in paragraph 371 of the Consultation Paper?

Yes

No

Please give reasons for your views.

We agree with the reasons in paragraph 370 of the consultation paper.

### 2. Authorised Representatives’ Contact Details

Question 114. Do you agree with our proposal to amend Rule 3.06(1) to add a reference to authorised representatives “mobile and other telephone numbers, email and correspondence addresses” and “any other contract details prescribed by the Exchange may prescribe from time to time”?

Yes

No

Please give reasons for your views.

We agree with the reasons in paragraph 373 of the consultation paper.

### 3. Merging Corporate Governance Report Requirements into Appendix 14

Question 115. Do you agree with our proposal to merge Appendix 23 into Appendix 14 for ease of reference?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

Question 116. Do you agree with our proposal to streamline Appendix 23 and to make plain language amendments to it?

Yes

No

Please give reasons for your views.

We have no particular views on this proposal.

- End -