HKGCC

Hong Kong General Chamber of Commerce
香港總商會1861

香港總商會
香港金鐘道統一中心廿二樓
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway, Hong Kong
Tel (852) 2529 9229
Fax (852) 2527 9843
Email chamber@chamber.org.hk
www.chamber.org.hk

Helping Business since 1861

16 August 2024

Ms Bonnie Chan
Chief Executive Officer
Hong Kong Exchanges and Clearing Limited
8/F, Two Exchange Square
8 Connaught Place, Central
Hong Kong

Dear Bonnie,

Re: Consultation Paper on Review of Corporate Governance Code and Related Listing Rules

The Hong Kong General Chamber of Commerce is pleased to put forward our views on the captioned.

We acknowledge the HKEX's objectives of strengthening corporate governance of the city's listed issuers to further cement Hong Kong's appeal as a leading international financial centre through this consultation exercise. Nevertheless, considering the potential impact of the proposed new regulatory initiatives on the business community at large, and with reference to the principles of the globally recognized regulatory impact analysis approach, we respectfully wish to point out that for many of the key proposals – particularly that relating to board effectiveness and independence – consideration should be given to further assessing the necessity, as well as benefits and drawbacks of implementing the new regulations in the local context.

We hope you will give our comments your due consideration.

Yours sincerely,

Patrick Yeung
CEO

Encl.

HKEX Consultation Paper
Review of Corporate Governance Code and Related Listing Rules
(June 2024)

Response by The Hong Kong General Chamber of Commerce

Introduction

1. Before answering the specific consultation questions, we wish to explain our views about how to assess whether proposed new regulatory initiatives like this are justified.

2. Regulatory Impact Analysis (RIA) is now a firmly-embedded and widely-recognised approach to regulation worldwide. The starting point is to assess whether there is a problem that cannot be addressed by the market or existing regulation, and whether regulation is therefore necessary.

3. The main issue we have with most of the Consultation Paper's proposals is that they do not give any evidence of any problems that need to be addressed by new regulation. To this extent, the proposals for new regulation lack a convincing justification. We elaborate on our views in our answers to the specific consultation questions below.

4. The Consultation Paper appears to rely heavily on the position in other jurisdictions (for example the UK, Singapore and Australia) to justify some of its proposals. While it may be informative to look at how other jurisdictions have addressed a particular problem, there needs to be a specific problem identified in Hong Kong in the first place. As noted above, the Consultation Paper does not seem to identify any local issues that require new regulation. This is perhaps unsurprising, as the last amendments to the Corporate Governance Code only took effect as recently as 2022.

Answers to Consultation Questions

Question 1

Do you agree with our proposal to introduce a new CP requiring issuers without an independent board chair to designate one INED as a Lead INED to enhance engagement with investors and shareholders?

5. We cannot see any problem that justifies this proposal, i.e., any benefits that it would achieve, and can see possible disadvantages. Investors can address any question they wish to the company's Board, and it is in the Board's interests to answer them. Many listed issuers even have an investor relations team (headed by a senior manager) to act as a contact point for queries from investors. Thus, we cannot see how the appointment of a Lead INED would enhance engagement with investors or shareholders. On the contrary, we can see definite downsides with this proposal. INEDs should be treated as equal in terms of their input (albeit their experience may be complementary to each other), and it is invidious to single out one INED for special responsibilities: this may create needless divisiveness. Indeed, we are

concerned that the proposal may also deter potential candidates for INED positions, which Hong Kong can ill-afford with an already smaller talent pool than some other major financial centres.

6. It is also not clear how the Lead INED's responsibilities would compare to those of the Chairman - it seems that they may overlap - or how the Lead INED would be selected. In short, it would introduce an unnecessary extra layer of complexity and bureaucracy, with the disadvantages that this would involve, in return for no real benefit. As we believe the concept of a Lead INED is problematic in principle, it would be inappropriate to introduce this concept, even as a Code Principle (CP) on a "comply or explain" basis.

Question 2

Regarding continuous professional development for directors, do you agree with our proposals to:

(a) Make continuous professional development mandatory for all existing directors, without specifying a minimum number of training hours?

7. The existing code principle already states that all directors should participate in continuous professional development to develop and refresh their knowledge and skills. Moreover, directors have duties under the Companies Ordinance to act with due skill, care and diligence regarding the affairs of the company, and (as the Consultation Paper (CP) itself notes)[1] the Listing Rules already requires that the individual has the character, integrity, experience and independence to serve as a director. All of these factors seem to provide sufficient incentive for directors to make sure they are sufficiently informed about relevant matters, without making continuous training a mandatory requirement under the Listing Rules. Furthermore, it should be noted that directors are appointed *because of* their skill sets, so the need for training should not be over-stated, particularly as it is time-consuming and potentially diverts directors' time and attention away from the more important task of running the company. A mandatory requirement could simply lead to unproductive and inefficient "box-ticking" for compliance purposes.

(b) Require First-time Directors to complete a minimum of 24 hours of training within 18 months following their appointment?

8. Listed companies already have an incentive to give induction training to newly-appointed directors to ensure that they have the necessary knowledge about the affairs of the company so that they can perform their duties effectively (see (a) above). Induction training may be better left to the companies' discretion, rather than them being compelled by the Listing Rules to conduct such training, and therefore such a requirement could be unnecessary and unduly intrusive. In particular, defining "First-Time Directors", and requiring them to undergo a minimum number of hours of training within a maximum fixed period, may be

[1] CP para 53.

unduly intrusive and prescriptive. It may even deter potential directors from joining the boards of listed companies.

(c) *Define "First-time Directors" to mean directors who (i) are appointed as a director of an issuer listed on the Exchange for the first time; or (ii) have not served as a director of an issuer listed on the Exchange for a period of three years or more prior to their appointment?*

9. As we are not convinced about the merits of the proposal for mandatory training, this question is not applicable to our submission. However, if HKEX were to go ahead with its proposal for mandatory training, it is important that the definition of "First-time Directors" takes account of overseas directorships. Board experience gained in companies listed in well-respected jurisdictions (even if the director in question has not previously held any directorship in a Hong Kong issuer) should be considered relevant.

(d) *Specify the specific topics that must be covered under the continuous professional development requirement?*

10. As we are not convinced about the merits of the proposal for mandatory training, this question is not applicable to our submission. However, if HKEX were to go ahead with its proposal for mandatory training, individual issuers should be given the flexibility to set their own continuous professional training topics.

Question 3

Do you agree with the proposed consequential changes to Principle C.1 and CP C.1.1 of the CG Code?

11. As we are not convinced about the merits of the proposal for mandatory training, this question is not applicable to our submission. However, if this proposal is to go ahead, the consequential changes should reflect our answers to Question 2 above.

Question 4

Do you agree with our proposal to upgrade the current RBP to a CP requiring issuers to conduct regular board performance reviews at least every two years and make disclosure as set out in CP B.1.4?

12. Regarding the first part of this question, we believe that this should remain an RBP, and that a review every three years (not two) would produce a more meaningful evaluation. Regarding the second part of the question on disclosure, listed issuers should have a discretion on whether to disclose the results of the review and any proposed follow-up actions etc, as these details could be commercially-sensitive.

Question 5

Do you agree with our proposal to introduce a new CP requiring issuers to maintain a board skills matrix and make disclosure set out in CP B.1.5?

13. The CP does not seem to identify any problem to be addressed, or benefits which would be gained by, this proposal. On the contrary, the proposal seems to be rather overly-simplistic and overly-intrusive. Many directors have a complex set of skills, experience, attributes, and values, and these cannot be simply or accurately reflected in a matrix. The matrix could therefore produce misleading results, and impose an unnecessary burden on companies in return for no public benefit.

Question 6

In relation to our proposal to introduce a "hard cap" of six listed issuer directorships that INEDs may hold, do you agree:

(a) With the hard cap to ensure that INEDs are able to devote sufficient time to carry out the work of the listed issuers?

14. We agree that INEDs have to be able to devote sufficient time to carry out the duties they have undertaken. While there is a view within our membership that a hard cap of six directorships would be a useful step forward in this respect, other members are not persuaded that a hard cap is necessary or appropriate to achieve this objective (the premise of the question). The existing code provisions are already aimed at achieving this objective, and there seems to be no evidence that a hard cap would add any value in this respect. The capacity of an individual to take on INED positions depends on their personal circumstances. Many are not in full-time employment and have a relatively large amount of capacity, whilst others do not. Moreover, much depends on the size or complexity of the issuer's business: large, complex conglomerate or international businesses may require more time than smaller local ones. Imposing a mandatory hard cap of six listed issuer directorships may therefore be a blunt instrument which could produce unproductive, unfair and arbitrary results.

(b) With the proposed three-year transition period to implement the hard cap?

15. As most our members are not convinced about the need for a hard cap, this question is not applicable to our submission.

Question 7

Do you agree with the proposal to introduce a new MDR to require the nomination committee to annually assess and disclose its assessment of each director's time commitment and contribution to the board?

16. Given the existing statutory duties of directors and code provisions, which ensure that directors devote sufficient time and attention to the affairs of the company, we believe that the proposal at most should be an RBP, not an MDR.

Question 8

In relation to our proposal to introduce a "hard cap" of nine years on the tenure of INEDs, beyond which an INED will no longer be considered to be independent, do you agree:

(a) With the proposed hard cap to strengthen board independence?

17. We have an issue with the premise of this question, which is that INEDs will be presumed to have lost their independence after spending nine years on the board. We reiterate again the existing obligations of directors under the Companies Ordinance and the code provisions to act in the best interests of the company. In addition, the existing CG Code seems to provide a sufficient check on whether a Long-Serving INED is still independent.[2] To this end, we are not aware of any problem which would justify a hard cap of nine years. On the contrary, it may take a considerable period of time for INEDs to show their value to the company, and to limit their period in office to nine years when they may be adding the best of their value to the company seems to be rather arbitrary. It could also be potentially counter-productive, given that Hong Kong has a limited talent pool from which to draw on potential INEDs.

(b) That a person can be re-considered as an INED of the same issuer after a two-year cooling-off period?

18. As we are not convinced about the proposal for a hard cap, this question is not applicable to our submission.

(c) With the proposed three-year transition period in respect of the implementation of the hard cap?

19. As we are not convinced about the proposal for a hard cap, this question is not applicable to our submission.

Question 9

Do you agree with the proposal to require all issuers to disclose the length of tenure of each director in the CG Report?

20. Yes. We see no harm, and some possible benefit, in such a provision, if only to enable an investor to question whether the relevant director still has the requisite degree of independence.

[2] CP para 96.

Question 10

Do you agree with our proposal to introduce a CP requiring issuers to have at least one director of a different gender on the nomination committee?

21. We agree that it would be useful for an issuer to have at least one director of a different gender on the nomination committee. However, it must be recognised that there may be a problem recruiting suitable candidates (whatever their gender) to the Board. Hence, this should be an RBP, not a CP.

Question 11

Do you agree with our proposal to introduce a Listing Rule to require issuers to have and disclose a diversity policy for their workforce (including senior management)?

22. This proposal might be easier for bigger companies with a large workforce to achieve. But smaller companies may have lesser scope to achieve workforce diversity as this may depend on availability of potential employees (whatever their gender). Hence, we believe that at most this should be an RBP, not a Listing Rule.

Question 12

Do you agree with our proposal to upgrade from a CP to a MDR the requirement on the annual review of the implementation of an issuer's board diversity policy?

23. We believe that the existing CP is sufficient, and no explanation is given as to why it is considered necessary to turn the CP into an MDR, which may therefore be unduly intrusive and prescriptive.

Question 13

Do you agree with our proposal to require as a revised MDR separate disclosure of the gender ratio of: (i) senior management; and (ii) the workforce (excluding senior management) in the CG Report?

24. Disclosure of gender ratio is already required. While there is a view within our membership that this proposal is unnecessary, another view is that there is no significant burden for issuers in disclosing the ratios for senior management and the workforce separately, and this could be useful information for investors.

Question 14

Do you agree with our proposal to codify the arrangements during temporary deviations from the requirement for issuers to have directors of different genders on the board as set out in draft MB Rule 13.92(2) in Appendix I?

25. As there may be reasons why temporary deviations from this requirement cannot be rectified within three months (for example, due to a lack of suitably-qualified candidates) this proposal should at most be a CP, on a "comply or explain" basis.

Question 15

Do you agree with our proposal to:

(a) emphasise in Principle D.2 the board's responsibility for the issuer's risk management and internal controls and for the (at least) annual reviews of the effectiveness of the risk management and internal control systems; and

26. Yes. This proposal seems reasonable and not unduly-intrusive.

(b) upgrade the requirement to conduct (at least) annual reviews of the effectiveness of the issuer's risk management and internal control systems to mandatory and require the disclosures set out in MDR paragraph H?

27. We believe that such a requirement could be unduly burdensome on issuers, especially smaller ones. It should at most be an RBP, not a requirement.

Question 16

Do you agree with our proposal to refine the existing CPs in section D.2 of the CG Code setting out the scope of the (at least) annual reviews of the risk management and internal control systems?

28. Yes. This proposal seems reasonable and not unduly intrusive. It would be helpful if HKEX were to provide proposed clarification and guidance on the scope of the review and disclosure requirements, in order to ensure consistency of approach in the market. It should also be made clear that the review can be an internal one, and that no external review is necessary.

Question 17

Do you agree with our proposal to introduce a new MDR requiring specific disclosure of the issuer's policy on payment of dividends and the board's dividend decisions during the reporting period?

29. Yes. We believe that these matters are ones which are reasonable for investors to know before they make their investment decisions. It would be helpful if HKEX could issue proposed guidance on the extent of disclosure required.

Question 18

Do you agree with our proposal to introduce a Listing Rule requirement for issuers to set a record date to determine the identity of security holders eligible to attend and vote at a general meeting or to receive entitlements?

30. Yes. This proposal appears to be reasonable.

Question 19

Do you agree with our proposal to codify our recommended disclosures in respect of issuers' modified auditors' opinions into the Listing Rules?

31. Yes. This proposal appears to be reasonable.

Question 20

Do you agree with our proposal to clarify our expectation of the provision of monthly updates in CP D.1.2 and the note thereto?

32. Yes. This proposal appears to be reasonable.

Question 21

Do you agree with our proposal to align requirements for the nomination committee, the audit committee and the remuneration committee on establishing written terms of reference for the committee and the arrangements during temporary deviations from requirements as set out in draft Main Board Listing Rules 3.23, 3.27, 3.27B, 3.27C and 8A.28A in Appendix I?

33. Yes. This proposal appears to be logical and uncontroversial.

Question 22

Do you agree with the proposed implementation date of financial years commencing on or after 1 January 2025, with transitional arrangements as set out in paragraphs 182 to 183 of the Consultation Paper?

34. If the Exchange insists on imposing its proposed hard caps on number of INEDships, tenure of INEDs, and board diversity (in particular), we believe that a longer transitional period is reasonably necessary.

HKGCC Secretariat
August 2024