



Hong Kong

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HKEX PUBLISHES REVIEW OF LISTED COMPANIES' CORPORATE GOVERNANCE PRACTICES AND PRACTITIONER'S INSIGHTS ON ESG

On 11 December 2020, the Stock Exchange of Hong Kong Limited (the **HKEx**) published findings from its latest Review of Issuers' Corporate Governance Practices¹ and market practitioners' insights entitled "Making inroads into good Corporate Governance and ESG management".² The review of corporate governance report disclosures in 2019 found a general improvement in issuers' compliance with the Corporate Governance Code and Corporate Governance Report (the **Corporate Governance Code**). Going forward, the HKEx seeks to instil an appropriate attitude towards corporate governance and ESG within issuers through the publication of guidance materials.

1. Annual Review of Issuers' Compliance with the HKEx Corporate Governance Code and Corporate Governance Report

The HKEx completed its 2019 Review of Hong Kong Issuers' Compliance with the Corporate Governance Code³ (the **2019 Review**), which analysed a sample of 400 issuers' corporate governance reports for the financial year ended 31 December 2019. The 2019 Review focused on the re-election of long-serving independent non-executive directors (**INEDs**), the election of overboarding INEDs, and board diversity, nomination of and

selection criteria for directors. The 2019 Review also shared the findings and recommendations of the HKEx in relation to issuers' compliance with the Corporate Governance Code, including the five Code Provisions with the lowest compliance rates and the reasons given by issuers for non-compliance. Issuers are required to disclose whether they have complied with the Code Provisions. The HKEx noted a high level of compliance overall with the Corporate Governance Code. All the issuers sampled complied with at least 73 of the 78 Code Provisions, while 41% of them complied with all 78 Code Provisions.

A. Key Findings on the re-election of long-serving Independent Non-Executive Directors (INEDs) and the election of overboarding INEDs

The 2019 Review contains in-depth findings relating to disclosures on the re-election of an INED who has served more than nine years (a **Long-serving INED**), the election of an INED holding their seventh (or more) directorship (an **Overboarding INED**), and the implementation of board diversity.

Re-election of Long-serving INEDs

Principle A.3 of the Corporate Governance Code requires that the boards of HKEx listed companies should have a strong "independent" element, facilitated by the appointment of INEDs. The HKEx considers that serving on the board for an extended period time (i.e., more than nine years) could affect an INED's independence. Code Provision A.4.3 requires issuers to submit a separate resolution for shareholders' approval for the further appointment of a Long-serving INED. A review by the HKEx as of June 2020 found that approximately 20% of 8,170 INED

1 https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Exchanges-Review-of-Issuers-Annual-Disclosure/Review-of-Implementation-of-Code-on-Corporate-Governance-Practices/CG_Practices_2019_e.pdf?la=en

2 https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Corporate-Governance-Practices/Practitioners_insights.pdf?la=en

3 https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Exchanges-Review-of-Issuers-Annual-Disclosure/Review-of-Implementation-of-Code-on-Corporate-Governance-Practices/CG_Practices_2019_e.pdf?la=en

directorships were occupied by Long-serving INEDs. Further, the HKEx found that the board members of 7% of the sample issuers were all Long-serving INEDs.

The HKEx found that most issuers quoted satisfaction of the independence criteria listed in HKEx Main Board Rule 3.13 as confirming the independence of Long-serving INEDs. The HKEx however clarified that satisfaction of the Rule 3.13 independence criteria alone is not equivalent to proving the INED's ability to bring fresh perspectives and independent judgment to the board. The HKEx therefore reminds issuers to balance the Long-serving INED's expertise and experience with the company against the ability to remain independent, the need for board refreshment and succession planning.

Further, the HKEx emphasises that the nomination method for INEDs should be rigorous - from the identification of new potential candidates to the final determination to re-elect a Long-serving INED.

Election of Overboarding INEDs

The revised Code Provision A.5.5 (which came into effect in January 2019) requires issuers to justify why the board considers an individual who will be holding their seventh (or more) listed company directorship (i.e., a proposed Overboarding INED) would have sufficient time to devote to the board.

The 2019 Review found that of the 288 issuers listed in Hong Kong, 42 directors were Overboarding INEDs. The HKEx found that most issuers considered the appointment of an Overboarding INED necessary by referencing the valuable contribution made by the INED and the individual's extensive expertise. However, the HKEx found that most issuers did not disclose how the board could be satisfied with the apparent lack of time devoted by the Overboarding INED.

Board Diversity, Nomination and Selection of Directors

The HKEx Listing Rules (Main Board Rule 13.92 and GEM Rule 17.104) require listed companies to disclose their board diversity policy in their corporate governance reports. Under the Corporate Governance Code, issuers are also required to disclose any measurable objectives that the issuer has set for implementing the policy, and their progress in achieving those objectives (this is a mandatory disclosure requirement under section L(d)(ii) of the Code).

The HKEx found that almost all Sample Issuers disclosed their policy on board diversity and nomination criteria for dictatorship, however only a small number disclosed objectives for enhancing board diversity. The HKEx emphasised the importance of setting measurable objectives to not only demonstrate the board's commitment to diversity but also allow external stakeholders to evaluate the company's progress in this regard.

B. Compliance with CPs in the 2019 Review Compared with the 2017/2018 Review

	2019 Review	2017/2018 Review
Compliance with all 78 CPs	41%	36%
Compliance with 70 or more CPs	100%	100%
Level of full compliance with reference to market capitalisation	Large-cap > Mid-cap > Small-cap	Large-cap > Mid-cap > Small-cap

C. Key Findings on Mandatory Disclosure Requirements (MRD)

The 2019 Review highlighted the common pitfalls in compliance with the mandatory disclosure requirements. In particular, the HKEx found that five MDRs were often overlooked or disclosed incorrectly and require more attention from issuers. These include Section L(d)(i), (ii) and (iii); Section L(d)(iii) and (v); Section I(i); Section M; and Section Q(b). The following table provides details of typical mistakes as identified by the HKEx:

MDR Section	Requirement	Issues Identified by the HKEx in Issuers' Disclosure
Section L(d)(i), (ii) and (iii)	Disclose a summary of work during the year for the remuneration committee, the nomination committee and the audit committee.	Failed to provide a summary of the committee's work performed during the year.
Section L(d)(iii) and (v)	Disclose a summary of work during the year for corporate governance and for the risk committee (if any).	Failed to elaborate on what the body responsible for corporate governance (i.e., the board or a board committee) has done in this regard.
Section I(i)	Explain how each director, by name, has complied with CP A.6.5.	Failed to disclose the training undertaken by each director by name.
Section M	Analyse remuneration regarding audit and non-audit services provided by auditors, including the nature of services and fees paid for each significant non-audit service assignment.	Failed to provide details of the nature of the underlying non-audit service assignments.

MDR Section	Requirement	Issues Identified by the HKEx in Issuers' Disclosure
Section Q(b)	Disclose the frequency and covered period of reviewing risk management and internal control systems. Where an issuer has not conducted a review during the year, explain why not.	Failed to disclose the frequency of reviews (e.g. quarterly, half-yearly or annually).

D. Key Findings on Recommended Disclosure Requirements

Five Code Provisions with the Lowest Compliance Rates

From the 2019 Review, the HKEx identified five CPs with the lowest compliance rates and its comments and recommendations. The CPs with the lowest compliance rates in the 2019 Review were A.2.1, E.1.2, A.4.1, E.1.5, and A.5.1, as further elaborated on in the table below.

Code Provisions		
	2019 Review	2017/2018 Review
CPs with the lowest compliance rates in 2019, in ascending order	A.2.1 (64%): Separation of the roles of chairman and chief executive	A.2.1 (64%): Separation of the roles of chairman and chief executive
	E.1.2 (91%): Chairman's attendance at general meetings	E.1.2 (90%): Chairman's attendance at general meetings
	A.4.1 (92%): Non-executive directors (NEDs) being appointed for a specific term	A.4.1 (85%): Non-executive directors (NEDs) being appointed for a specific term
	E.1.5 (94%): Disclosure of Dividend Policy	N/A
	A.5.1 (95%): Establishment of a nomination committee which comprises a majority of independent non-executive directors (INEDs)	A.5.1 (95%): Establishment of a nomination committee which comprises a majority of independent non-executive directors (INEDs)

HKEx Code Provision A.2.1: Separation of the Roles of Chairman and Chief Executive

CP A.2.1 provides that the roles of the chairman and chief executive should be separate and should not be performed by the same individual due to concerns relating to concentrating power in one individual. Further to the findings of the 2019 Review, the HKEx outlined its concerns with respect to the lack of checks and balances on the board. The HKEx found that the most common reason for non-compliance was that if the same individual acts

concurrently as the chairman and the chief executive, consistent leadership is achieved. The HKEx noted that in these cases, the company should address how the lack of separation of the roles is either overseen or addressed by alternative arrangements. Others relied on the competence of its board members to argue that there was no imbalance of power. In these cases, the HKEx considered that issuers should explain how the presence of certain board members effectively addresses the potential governance issue. For example, issuers could discuss the internal control framework and address the role of other board members or INEDs in scrutinising important decisions and/or monitoring the chairman cum chief executive's power.

HKEx Code Provision E.1.2: Chairmen's Attendance at the Annual General Meeting

CP E.1.2 provides that the chairman of the board should attend the annual general meeting (AGM) and should invite the chairmen of the audit, remuneration, nomination and any other committees (where appropriate) to attend. The HKEx found that in most cases where companies did not comply with the Code Provision, it was the chairman of the board who failed to attend the AGM. The reasons given included: other business engagements (84%); other reasons such as overseas engagement, resignation or retirement (11%); and health or other personal reasons (5%). The HKEx reiterated the importance of the chairman of the board attending the AGM to answer shareholders' questions and receive feedback. It recommends the use of electronic means to participate in AGMs if physical attendance is not feasible.

HKEx Code Provision A.4.1: NEDs being Appointed for a Specific Term

CP A.4.1 provides that directors should be subject to re-election at regular intervals. Consistent with previous findings, the HKEx found that almost all Sample Issuers in the 2019 Review justified their deviation from CP A.4.1 by asserting that the NEDs are subject to retirement by rotation in accordance with constitutional documents. The HKEx notes that retirement by rotation is a measure required under another Code Provision (CP A.4.2), aimed at limiting a director's tenure. Accordingly, the HKEx states that deviation should be supported by a clear rationale for the alternative arrangement.

HKEx Code Provision E.1.5: Disclosure of Dividend Policy

A new CP E.1.5 was introduced on 1 January 2019, providing that issuers should have a policy on payment of dividends and disclose this policy in the annual report. The 2019 Review found

that some issuers were unaware of the new CP and therefore had neither made the disclosure nor explained why a dividend policy had not been adopted. The HKEx suggests that issuers include the following information in their CP E.1.5 disclosures: (a) expected dividend pay-out ratio, significant distributions and material matters that should be drawn to investors' attention; and (b) where future dividends are subject to the discretion of the board, factors to be considered by the board.

The HKEx also reminded issuers who opt to deviate from this Code Provision that their explanations for non-compliance should set out the unique circumstances underlying the decision not to adopt a dividend policy.

HKEx Code Provision A.5.1: Establishment of a Nomination Committee which comprises a majority of INEDs

CP A.5.1 provides that issuers should establish a nomination committee that is chaired by the chairman of the board or an INED and comprises a majority of INEDs in order to ensure independent oversight of matters in relation to board recruitment, board diversity and succession planning. The HKEx found there to be two main deviations from CP A.5.1. Firstly, the HKEx found that in some cases no nomination committee was established, with around half of the non-complying issuers considering it sufficient for the board or other committees to approve the appointment of new directors and therefore finding the establishment of a nomination committee unnecessary. In these cases, the HKEx found that no reasons were given for why this arrangement was more desirable than establishing a nomination committee. The second main deviation from CP A.5.1 was the failure to ensure the nomination committee comprised a majority of INEDs. The HKEx found that one third of deviations involved the nomination committee failing to comprise a majority of INEDs due to the recent resignation of an INED from the board, in which case the deviation could not be rectified as the INED vacancy was not yet filled.

In view of the findings, the HKEx reminds issuers of the importance of establishing a nomination committee given the significance of having a high-performance board and ensuring the adequacy of oversight of matters relating to board recruitment, diversity and succession planning. It emphasised that non-complying issuers should include explanations of measures taken to ensure that the spirit of this CP is adhered to.

Where no Nomination Committee is established

The HKEx reminds issuers of the importance of ensuring oversight

of matters relating to board recruitment, diversity and succession planning and the need to include the following disclosures in the Corporate Governance Report:

- the composition of the body that is responsible for oversight of the above matters;
- the rationale for the arrangement (i.e. why it is considered more desirable than establishing a Nomination Committee); and
- a discussion of how the responsible body implements the issuer's policies on board nomination and board diversity (e.g. measures to ensure adequate consideration by the responsible body of the board's independence and diversity).

Where the Nomination Committee does not comprise a majority of INEDs

Where non-compliance with the Code Provision is due to an INED's resignation, issuers state this as the reason for deviation and disclose the measures taken to ensure the independence of the Nomination Committee during the relevant period.

2. Practitioners' Insights on ESG and Corporate Governance

In addition to the 2019 Review, the HKEx (in partnership with the Hong Kong Securities and Investment Institute (the **HKSI**)) also published "Making inroads into good Corporate Governance and ESG management"⁴ which includes market practitioners' experiences on the subject. The publication is aimed at helping directors of listing applicants and newly listed companies to think holistically about incorporating corporate governance and ESG considerations into their business strategy and is part of the HKEx's effort to support and educate the market on corporate governance and ESG. The key takeaways from the publication are outlined below.

Why Corporate Governance and ESG Matter

The publication emphasises that delivering good corporate governance and ESG measures is not merely a "box-ticking exercise" but is significant and necessary given the value of integrating corporate governance and ESG into a company's

⁴ HKEx. "Making inroads into good Corporate Governance and ESG management – Perspectives from industry practitioners". December 2020. Available at: https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Corporate-Governance-Practices/Practitioners_insights.pdf?la=en

strategy and operations, a fact which is true both pre-IPO and post-IPO. This value is firstly derived from the value investors place on companies having a strong ESG focus, which coupled with other factors, has led to the evaluation of ESG risks being a critical aspect of corporate governance practices. Secondly, corporate governance and ESG risk management leads to companies being more resilient in an increasingly changing environment.

The publication therefore encourages a concerted effort by stakeholders, such as the board, company secretary and the risk committee coupled with effective investor relations in order to ensure proper communication with investors. Engaging with external stakeholders is also noted to be an important practice which can bring additional ESG considerations that the board may not have considered.

Essential Considerations during IPO Preparation

The authors outline the importance of corporate governance and ESG factors for boards planning an IPO and encourage these elements to be integrated into the IPO preparation process.

Board Diversity

The first key consideration is board diversity, which promotes board effectiveness and enables better decision making. In particular, the importance of gender diversity is given emphasis. Where IPO applicants have a single gender board, additional disclosures are required regarding how gender diversity can be achieved. The HKEx has noted that most newly listed single gender board companies have committed to appointing at least one female director within two to three years following IPO.

INEDs also play a crucial role in board diversity and well-selected choices can increase sponsors' and investors' confidence in the strategy of the company. The HKEx Listing Rules require at least one INED to have a financial background and companies are encouraged to appoint INEDs who are knowledgeable about the relevant industry. INEDs with experience of good administrative practices (such as former civil servants or academics) may also make valuable contributions, as will recently retired CEOs in similar industries and executives of international standing owing to their potential ability to help open doors to new markets.

Board Committees

Board committees comprise the audit committee, nomination committee and remuneration committee, with INEDs performing an important role within each, normally as the committee chair. The HKEx encourages listed companies to appoint a diverse range

of directors early on in the IPO preparation process in order to improve corporate governance and attract pre-IPO investment.

In the case of the audit committee, it must be chaired by an INED with relevant experience. The HKEx recognises that due to the need to have an experienced and capable chairman, there can be pressure on the pool of candidates available in Hong Kong, which can lead to Overboarding INEDs. The Nomination Committee, being responsible for succession planning, which is a challenging area, benefit from the input of INEDs who can assist with easing tensions in times of transition. The Remuneration Committee also has a "sensitive" job, involving consideration of the pay levels of senior management. Remuneration consultants can be a helpful aid in providing industry comparisons and establishing benchmarks to be achieved.

Chairman and CEO

The separation of the roles of the chairman and CEO are required by the Corporate Governance Code and are fundamental to board functionality. The HKEx however recognises that in private groups it is unlikely that the role of chairman and CEO will be separate and that founders may be reluctant to change this practice upon listing.

Nevertheless, an experienced and independent chairman can be valuable in bringing together disparate views and increasing investor confidence that board discussions will be objective. It is however recognised that, at the time of an IPO, the separation of the roles may not be as important to investors as growth and cash flow, although concerns may arise further down the line.

Company Secretary and Compliance Adviser

Both the company secretary and compliance adviser play key roles in maintaining good corporate governance. Company secretaries are required to have appropriate professional qualifications and experience. An outside appointment may lack knowledge of the company and its culture. Accordingly, issuers are reminded that two joint company secretaries may be appointed for the first three years (one being an external professional and one an internal administrator). Once the internal appointee has gained the necessary experience, it may be appointed as the sole company secretary.

A compliance adviser is a requirement under the HKEx Listing Rules. The terms of appointment must be agreed and signed before the submission of the formal listing application, with the formal role beginning when trading starts and continuing until the publication of the accounts for the first full year after flotation.

It is noted that some companies terminate the role as soon as the required period expires, considering the role to be “largely superfluous” given that directors undergo training on the HKEx Listing Rules. However, the publication notes that compliance advisers’ appointment is increasingly being extended beyond the initial term. The HKEx Listing Rules and their implications are complex and directors can often be pre-occupied with delivering on post-IPO performance. The compliance adviser can therefore provide a valuable second opinion.

The Role of INEDs and What to Expect

Broadly speaking, INEDs play a key role in enhancing the standards of corporate governance and, among other core duties, INEDs are responsible for guarding against conflicts of interest, assisting with oversight of internal controls, managing risks and acting as a catalyst for ESG adoption.

The HKEx Listing Rules prescribe that listed companies must appoint INEDs to at least one third of board seats, with a minimum of three INEDs required. Prior to appointments, INED candidates are encouraged to learn about the organisational and operational aspects of the board, the major challenges and issues faced by the company and the expectations for INEDs. Ultimately, however, all directors (INEDs, NEDs and EDs) are collectively and individually responsible for the company’s management and operations.

In order to perform their function effectively, INEDs must be able to afford to devote sufficient time to the company, the board and relevant matters. Where INEDs are appointed to more than six boards, they must explain how they have the necessary time to devote to each board. This may also be the case where INEDs are on fewer boards. INEDs should also undertake continuing education and training to keep up to date on evolving governance issues.

What is “Independence”?

The publication notes that the independence of INEDs is defined in relation to material interests in business activities or significant links. Independence is also an attitude in handling the company’s business affairs objectively and with independent judgment, free from the influence of interests. INEDs must disclose any relevant external interests to the board and must not vote on any matters involving an actual or potential conflict of interest.

In order to ensure checks and balance are exercised, INEDs must ensure the interests of all shareholders are represented and considered by the board, other than in the case of certain transactions where INEDs serve on an independent board

committee responsible for protecting the interests of independent shareholders.

How can INEDs add Value?

INEDs are well-positioned to add value in a variety of ways including through questioning assumptions and motivating the board, providing input via specialist knowledge at their disposal, addressing enterprise risk management from an insider and outsider perspective, scrutinising internal controls and facilitating shareholder relations. From an ESG perspective, INEDs can promote ESG adoption by bringing key drivers for ESG adoption to the board’s attention and, where a company has an ESG committee, INEDs can take an active role.

The Relationship with INEDs

Working with INEDs is described as a “two-way” relationship, which requires EDs, NEDs and management to ensure INEDs are included, integrated, motivated, empowered and able to work, with the board chairman taking the lead in this regard. The board chairman should also meet with INEDs in private sessions to discuss any issues and concerns.

INED rewards are also important in realising the value of INEDs. These can take the form of, for example, a reasonable remuneration package and the facilitation of continuing education and training. INEDs should also be included in major events and stakeholder engagements.

The Role of Reporting Accountants

The primary role of reporting accounts in a listing application is determining whether the financial statements of the applicant give a true and fair view of its results and financial position over the reporting period, in addition to reporting on the listing applicant’s profit forecast, statement of sufficiency of working capital and statement of indebtedness, whichever is reported by the applicant. External auditors will also review the corporate governance and internal controls of the listing applicant to ensure sufficient management controls are in place to enable the preparation of true and fair financial statements.

In view of the fact that ESG matters are increasingly being considered in the context of financial implications, there is an increased risk of new regulations being introduced, which may impact the financial statements of listing applicants. As it stands, the HKEx’s revised guidance letter GL86-16 requires ESG-related matters to be considered in the business section of the prospectus. Listing applicants should also consider whether to

include these ESG matters in other sections of the prospectus. In any event, it is important to understand the potential financial impacts of ESG matters and these should be taken into account by the board of directors when preparing the financial statements. In turn, reporting accountants will need to assess whether the impacts have been fully considered in the financial statements. Where ESG matters are included in the business section, this may also give rise to disclosures in the industry and regulatory overview section.

The Role and Value of External Advisers

A wide range of professionals can contribute to corporate governance and ESG efforts. These include the company secretary, internal controls consultants, compliance advisers, solicitors, PR&IR companies, ESG consultants and quality assurance professionals. Digital boardrooms can also be beneficial to listed companies in terms of streamlining workflows, security and organisational concerns, improving efficiency and accountability and compliance.

Communication with Shareholders

Communication Channels

One of the five principal areas of corporate governance covered by the Corporate Governance Code is communication with shareholders. Communication may be affected through various channels such as the listed company's website, the HKEx website, newsletters and circulars and social media. It is however suggested that social media should be used as a supplementary means of communication and should not replace the legal and traditional channels.

Communication Strategies

In formulating communication strategies, boards are encouraged to consider the following:

- Price-sensitive information – the board and investor relations team must ensure that the legal and the HKEx Listing Rules' requirements relating to disclosure of information are observed and that a balance is struck between shareholder communication obligations and legal obligations
- Meeting log – records of shareholder communications and events should be maintained to ensure that the board is able to review and develop its communication strategies

- Consistent message – the board should ensure that communication is consistent, transparent and clear in order to build confidence in the listed company and its future plans
- Contents – the board must be prepared to discuss the listed company's operating results and the environment within which the company operates (i.e., the market and competitors)

Types of Disclosure

Disclosure falls into two categories: (1) regular cycle disclosures (i.e., results announcements and regular general meetings) and (2) event-driven communications (i.e., information in relation to fund raising activities and significant transactions or in the event of unexpected/crisis events). While regular cycle disclosures may be planned and prepared for, event-driven disclosures are inherently more unpredictable and these may be stressful and time-sensitive. Accordingly, it is important for listed companies to establish a small group of key personnel to coordinate disclosure.

PR Consultants

Listed companies may also wish to seek the advice of external parties in managing shareholder communication. A good PR consultant can complement and provide valuable assistance to the listed company's investor relations team.

Reporting on ESG and Corporate Governance

Board Responsibilities

The board of a listed company is responsible for corporate governance and ESG issues as set out in the HKEx Listing Rules. The board may however delegate its corporate governance and/or ESG matters to management but must maintain oversight, guide the management team, and review key corporate governance and ESG issues. The board must also keep up to date with regulatory developments and investor expectations in relation to corporate governance and ESG issues and request briefings from management where necessary. Where there are any compliance questions, the HKEx will make enquiries with listed companies and may take follow up actions in the case of non-compliance as necessary.

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