



**ASSOCIATION OF HONG KONG CAPITAL MARKET PRACTITIONERS LIMITED**

**Submission of 16 August 2024 responding to:**

**HKEX Consultation Paper:**

**Review of Corporate Governance Code**

**and Related Listing Rules**

**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?**

Yes

No

**Please provide reasons for your views.**

While we support the Exchange's efforts to promote high standards of corporate governance by Hong Kong-listed companies ("Listcos") to safeguard investors and market integrity, we strongly oppose the proposal for a Lead INED and other INED-related proposals, which will only add to Listcos' already onerous regulatory burden, make little real improvement to actual corporate governance, and risk resulting in a "box-ticking" approach to corporate governance given the "one-size-fits all" approach proposed for large and small Listcos alike. An INED's role is described by the Exchange as follows: "As an independent non-executive director (INED), you are, by definition, an independent member of the board of directors of a company (or an issuer). You are the external "extra pair of eyes" for the company, and your expertise and experience contribute to the company's success. You play a key role in respect of the Board's oversight of the company's risk management and internal controls. Among other areas, your contribution is important to the development of the company's strategy and policies through independent and constructive comments and questions."(1) and "[INEDs] are expected to provide independent judgment to the Board's decision-making and play a key role in the oversight of risk management and internal controls."(2) Since each INED plays the fundamental role of contributing independent judgment to board decisions and objectively reviewing board conduct, there is no need for a Lead INED.

At a time when the Exchange is struggling to attract new listings due to the economic slowdown in Mainland China and global political headwinds, we question whether some of the Exchange's more prescriptive proposals are really conducive to strengthening Hong Kong's role as a leading global finance centre. With just 30 listings raising HK\$13.2 billion in the first 6 months of 2024 ("H1 2024")(3), the

Exchange dropped to the world's eighth largest IPO fund raising platform in H1 2024 (jointly with Germany and South Korea)(4), having consistently ranked among the top 5 global exchanges for IPO fund raising for a decade (2013 to 2022) and as the world's leading IPO exchange in 2015, 2016, 2018 and 2019(5). Despite the Exchange's goal of "developing a listing and capital raising hub for major global and regional companies"(6), Mainland enterprises still account for the vast majority of IPOs on the Exchange, accounting for 89% of IPOs and 95% of IPO funds raised in H1 2024(7). Moreover, H1 2024 saw 14 Listcos announce their intention to voluntarily delist from the Exchange(8). With IPO funds raised quadrupling on European exchanges(9), and nearly doubling on the United States ("US") exchanges(10) in H1 2024, we seriously question the rationale for proposals that would make many of the Exchange's corporate governance requirements more stringent than those of its competitor markets. The proposals are, in our view, more likely to drive the listings of international and regional companies to other exchanges, rather than attract them to list in Hong Kong.

The Consultation Paper does not make a convincing case for higher corporate governance standards; it provides no evidence that the proposed standards have led to improved corporate governance or shareholder value in other jurisdictions. In the absence of a compelling case for stricter requirements, we are concerned that many of the proposals will only increase the costs and administrative burden for Listcos, and particularly for the small and medium-size Listcos that can least afford it. In contrast, the prevailing approach in the world's most successful markets, the NYSE and NASDAQ, is to avoid the imposition of uniform and rigid corporate governance requirements on diverse companies. For the aspects of corporate governance covered by the Exchange's proposals, the US exchanges generally allow listed companies to adopt the provisions they consider most appropriate for their particular company, giving them the flexibility to adopt standards that balance the advantages for stakeholders against the cost to the specific company.

Rather than the Exchange imposing increased corporate governance obligations on Listcos across the board, we consider that a better approach would be to allow Listcos to independently opt for higher corporate governance standards if they perceive that these will have tangible benefits in terms of higher quality shareholders and better liquidity, for example, and/or intangible value in terms of improved staff retention and/or better operational efficiency. Listcos may also raise corporate governance standards in response to shareholder requests. Different Listcos have different needs and constraints. Many of the Exchange's proposals may be inappropriate for some Listcos, particularly smaller ones and those in challenging industries, which would probably prefer to focus their resources on building their businesses. In any event, the choice should lie with Listcos. We disagree generally with the Exchange's proposed "one size fits all" approach and would recommend considering whether a scaled approach would be appropriate for some proposals, for example excluding GEM Listcos from requirements such as the proposed CP B.1.4 on board performance reviews every two years.

If Listcos' corporate governance obligations are to be increased, it is essential that the perceived benefits for stakeholders outweigh the added burden and cost for Listcos. Even institutional investors, who are typically the most vocal supporters of heightened corporate governance requirements, take a holistic view of the perceived risk/return of particular investments. For Listcos, however, it is imperative that they are not laden with excessive and costly obligations. The observations of the Financial Conduct Authority when proposing its current revamp of the United Kingdom's ("UK") listing regime are instructive: "UK listed companies, or companies considering a UK listing, should not face unduly onerous burdens that increase costs, make them less competitive on the global stage or risk reducing shareholder value through

opportunity cost”(11). We echo this sentiment; higher corporate governance standards are counterproductive if they are so stringent that they deter companies from listing in Hong Kong. Corporate governance standards need to be realistic, appropriate for the different types of companies that list on the Exchange, and align with the requirements of the Exchange’s competitor markets.

### **The rationale for a Lead INED**

We have strong reservations about the claimed benefits of a Lead INED. The concept of a lead or senior INED was developed in the US as an alternative to having different individuals perform the roles of board chair and chief executive officer (“CEO”), which was one of the key corporate governance recommendations of the Cadbury Committee(12), but was “strongly resisted by top management in most US companies”(13). Lipton and Lorsch (1992) came up with the Lead INED concept as a counterweight to an executive chair, noting that:

“if independent directors are to be effective, they need some form of leadership from among their own number... We therefore propose (as does the Cadbury Committee for those British companies that do not have a nonexecutive chairman) that each board select a leader from among the independent directors”(14).

However, neither the NYSE nor NASDAQ require a Lead INED: those US-listed companies that have a Lead INED have appointed them voluntarily, often under pressure from institutional shareholders. The Lead INED role was developed to allow companies unwilling to separate the chair and CEO roles to avoid the conflict of interest inherent in having the same individual perform both roles. Krause, Withers and Semandeni (2017) describe the Lead INED as a “compromise solution [that] joined together the advantages of having a single leader with the advantages of having more independent board leadership”(15). Where the chair is not independent, including where the role is combined with the CEO role, it is argued that the presence of a Lead INED on the board can act as an independent counter-balance to the chair(16). However, before the Exchange determines whether to require a Lead INED, we consider that it should conduct a thorough cost-benefit analysis of the proposal. Krause, Withers and Semandeni noted that appointing a Lead INED made no material difference to company performance(17). They also commented that the usefulness of a Lead INED depends on the relative power between the CEO and the board, with a strong CEO/chair limiting the impact of a Lead INED. Conversely, a Lead INED’s appointment positively impacted performance where companies’ CEOs had a low to moderate level of power(18).

The Lead INED proposal appears to be based on the “comply or explain” provision applicable to UK-listed companies, which requires an INED to act as the senior independent director to provide a sounding board for the chair and serve as an intermediary for the other directors and shareholders(19). However, the shares of UK-listed companies are typically far more widely held than is the case for Hong Kong Listcos, which normally have majority shareholders. While an additional channel for shareholder communications may be warranted for UK-listed companies, we do not consider it necessary in Hong Kong. Many larger Listcos with an extensive shareholder base already have investor relations channels capable of ensuring effective communications between shareholders and the board. For these Listcos, a requirement for the Lead INED to act as a communications link risks creating overlapping communications channels and the potential for contradictory communications between Listcos’ shareholders and their boards. We thus have reservations as to whether the proposal would improve investor relations and consider that the additional costs and more complicated administrative structures involved are inappropriate, particularly for smaller Listcos.

## **Need for Lead INED where the Chair is an INED**

As noted above, some US-listed companies with executive chairs have appointed Lead INEDs to deal with concerns that the chair cannot provide effective board oversight if, as board leader, the chair is one of the individuals being evaluated. The Lead INED is there to counter the chair's lack of independence.

The Exchange's proposal, however, goes further, additionally requiring that even companies with an independent chair should have a Lead INED function. Proposed CP C.1.7 requires the appointment of a lead INED where: (i) an issuer has a non-INED chair; and/or (ii) the same individual is both chair and CEO. This implies that issuers with a non-executive chair who is an INED do not need a lead INED. However, this is contradicted by the note to proposed CP C.1.7, which states that: "A chairman who is an independent non-executive director is expected to fulfil the role of the lead independent not-executive director set out above, unless another director has been appointed as the lead independent non-executive director". This means that a Listco will be required to have a lead INED function, even if its chair is an INED. This is contrary both to the express wording of CP C.1.7 and the practice on other major exchanges.

For companies listed on the Singapore stock exchange, a Lead INED is required "to provide leadership in situations where the Chairman is conflicted, and especially when the Chairman is not independent"(20). Appointment of a "senior independent director" is optional for companies listed in Malaysia, although the corporate governance guide stresses the role a senior independent director can play in providing an objective perspective where the chair and CEO are immediate family members(21). In the United States, as noted above, the NYSE and NASDAQ do not require a Lead INED to be appointed.

The need for an INED chair to fulfil the role of Lead INED calls into question the rationale for requiring a lead INED, which in other jurisdictions, is to counter the problem of a chair's lack of independence because, the chair is also the CEO (as in the US) or is a family member of the CEO (as in Malaysia). In Hong Kong, CP C.2.1 already requires the separation of the roles of CEO and board chair. We are not convinced that a Lead INED's appointment will increase board effectiveness: on the contrary, by singling out one INED as Lead INED, the proposal risks creating board disunity and division. The Hong Kong Institute of Directors has commented that a Lead INED's appointment risks sowing division among Listco board members: "Having a number of INEDs on a board helps to widen the opinion base and generate balanced views. The emphasis on a Lead INED risks disrupting this balance"(22).

We also believe that investors prefer to engage directly with the management, the CEO, and/or the chair, as opposed to INEDs, given their lack of involvement in the Listco's daily operations. In Hong Kong, investors generally raise their concerns and enquiries at the Listco's Annual General Meeting. If the proposal for a Lead INED is adopted, the Lead INED would have to respond to enquiries not relating to the Listco's operations. This may cause investors concern as they would normally expect to be answered by management. Accordingly, we are not convinced that a Lead INED will increase investor engagement and relationships.

While we disagree with this proposal in its entirety, if it is adopted, the Note to CP C.1.7 should be deleted so that an INED chair does not need to act as lead INED.

## **Lead INED's proposed duties**

We cannot comment on this proposal without clarity on the full extent of the Lead INED's role and responsibility to enable us to understand the full extent of its potential impact. There is no clear guidance

on the Lead INED's role and functions in the proposed CG Code amendments. Under CP C.1.7, a Lead INED's duties are to act as an intermediary for directors and shareholders and be available to them where normal communication channels with the chair or management are inadequate. The details set out in the Consultation Paper's paragraphs 26 and 27 are not included. The Consultation Paper states that guidance will be given on a Lead INED's role and functions.

Shareholder communications are already covered by CP C.2.8, which requires the chair to ensure appropriate steps to provide effective communication with shareholders and that their views are communicated to the board. However, Paragraph 34 of the Consultation Paper provides: "A Lead INED offers a clear point of contact for potential investors and existing shareholders providing them with independent insight on aspects of an issuer's governance such as the quality of board discussions on matters including corporate strategy and INED performance". Unless CP C.2.8 is deleted or revised, the proposed allocation of shareholder communication responsibilities to the Lead INED risks creating overlapping responsibilities between the chair and Lead INED, which may cause confusion. Further, the lack of clarity on the precise responsibilities of Lead INEDs may mean that qualified individuals are reluctant to be appointed. Listcos may therefore face difficulties in complying with this CP, particularly given the general shortage of qualified INEDs.

The Consultation Paper's paragraphs 28 and 29 provide that: (i) the appointment of a Lead INED does not "create a separate or higher level of responsibility or liability relative to other INEDs on the board"; and (ii) a Lead INED is not expected to discuss the issuer's results or operational matters with shareholders, and its role does not duplicate other board roles. These statements should be included in the CG Code revisions to ensure clarity on these points. However, CP C.1.7 will impose additional responsibilities on the Lead INED, which will likely lead to individuals expecting higher compensation for performing the role.

A fundamental premise of the Listing Rules is that directors are "collectively responsible for [an issuer's] management and operations" (Listing Rule 3.08). It is difficult to conceive that a Lead INED's additional responsibilities under CP C.1.7 will not result in additional liability for individuals performing the role and the Exchange's clarification on this issue would be welcome. The issue of liability is fundamental: Lead INEDs must not be allowed to become scapegoats or a single point of failure, potentially subject to disproportionate scrutiny and blame, given the Listing Rules' emphasis on the collective nature of board responsibility. It is already extremely challenging to find suitably qualified INEDs: the additional responsibilities and potential liability for Lead INEDs, coupled with the proposed six-directorship and nine-year tenure hard caps, is likely to further reduce the ever-shrinking pool of those willing to act as INEDs. This can only reduce, not improve, good corporate governance.

In conclusion, we strongly oppose this proposal. However, if a Lead INED role is to be introduced, it would be better achieved through a new RBP, rather than a CP. Listcos with an INED non-executive chair should be excluded from the requirement since the chair's independence is already achieved by through the appointment of an INED as chair. We also suggest that Listcos should be able to define the precise scope of the Lead INED's role in a separate "Lead Independent Director Charter", as is common in the US<sup>(23)</sup>.

## Notes

1. Exchange (2023). "A Snapshot of INEDs' Roles and Responsibilities"
2. Exchange website. "The Role of INEDs"

3. Exchange. HKEX Monthly Market Highlights June 2024
4. EY Global IPO Trends Q2 2024, p. 48
5. Exchange. Annual Market Statistics 2013 to 2022
6. Exchange. "Strategic Plan 2019-2021", p. 7
7. EY Global IPO Trends Q2 2024, p. 28
8. Nikkei Asia. (2024). "Delistings outnumber IPOs by value in Hong Kong so far this year"
9. PWC. "Global IPO Watch H1 2024", p. 3.
10. Ibid., p. 5
11. UK FCA. (2023). "Consultation Paper CP23/31 Primary Markets Effectiveness Review", para 2.18
12. Cadbury Committee. (1992). "Report of the Committee on the Financial Aspects of Corporate Governance", para 4.9
13. Lipton, M. and Lorsch, J.W. (1992). Business Lawyer, 48(1), p. 70
14. Ibid.
15. Krause, R., Withers. M., and Semadini, M. (2017). "Sharing the Lead: Examining the Causes and Consequences of Lead Independent Director Appointment"
16. Plouhinec, M. (2018). "The Role of the Lead Independent Director"
17. Supra at Note 13
18. Ibid.
19. UK Corporate Governance Code, Provision 12
20. Provision 3.3 of the Singapore Corporate Governance Code
21. Bursa Malaysia. Governance Guide: Pull-out I, p. 37
22. HKIoD. (2020). "HKIoD Voices Reservations about "Lead INED" but Affirms Room for Improving Effectiveness of INEDs"
23. E.g. US Securities and Exchange Commission's "Lead Independent Director Charter"

**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?**

Yes

No

**Please provide reasons for your views.**

We agree that mandatory continuous professional training for directors should assist directors in ensuring Listcos' compliance with their regulatory obligations. We also agree that there should be no set number of hours for directors' ongoing training since this will allow Listcos to tailor training to the actual knowledge and experience of their directors and the extent of changes in relevant regulatory requirements.

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

Yes

No

**Please provide reasons for your views.**

Twenty-four hours of induction training for First-time Directors on top of the Listco's induction training for all directors under proposed CP C.1.1(24) is excessive. The number of CPD hours required for solicitors and accountants are 15 and 20, respectively. This onerous training obligation is likely to add yet another reason for regional and international companies to list elsewhere. We therefore suggest a more balanced and pragmatic approach to the duration of the proposed induction training so that it does not impose an undue burden on prospective Listcos relative to Hong Kong's competitor exchanges.

Further, it should be made clear that the 24-hour training for First-time Directors under Listing Rule 3.09H would be additional to the general induction training that Listcos are required to provide to all new directors under proposed CP C.1.1(a) by adding a Note to CP C.1.1(a).

Notes

24. Paragraph 57 of the Consultation Paper

**(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?**

Yes

No

**Please provide reasons for your views.**

We do not agree with the proposed inclusion in the definition of directors who are appointed after a three-year break from being a Listco director. Directors who have previously acted as Listco directors will normally have a good understanding of the regulatory obligations of Listco directors and may have sufficient knowledge of changes to those obligations since they last acted as a director. If, however, the Exchange insists on these directors participating in training, it should be restricted to relevant changes to Listcos' obligations and its length should be appropriate to the information to be covered. An onerous 24-hour induction training obligation, which experienced directors may consider to be unnecessary, is likely

to deter them from accepting new Listco directorships. None of the Exchange's competitor exchanges require individuals accepting a Listco directorship after a period of absence to undertake induction training.

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

- Yes  
 No

**Please provide reasons for your views.**

We agree that directors' ongoing continuous professional training and the induction training for directors who have never previously acted as Listco directors should cover the specific topics set out in proposed Listing Rule 3.09G. However, as indicated in our response to Question 2(b), if there is to be a training obligation on directors who have not been a Listco director for three years, which we oppose, this should be limited to relevant changes to the regulatory framework.

**Question 3: Do you agree with the proposed consequential changes to Principle C.1 and CP C.1.1 of the CG Code?**

- Yes  
 No

The proposed changes reflect the proposed Listing Rule amendments, with which we agree.

**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?**

- Yes  
 No

**Please provide reasons for your views.**

We consider that board performance reviews should continue to be framed as an RBP in the form of existing RBP B.1.5 rather than a CP.

The NYSE requires boards to conduct a self-evaluation of their effectiveness at least annually,(25) while NASDAQ has no requirement for board performance reviews. External performance reviews are expensive. Since the degree of detail afforded by external performance reviews is typically only required by institutional investors who generally invest in larger Listcos, we agree that Listcos should be able to determine the format of reviews so that Listcos without the requisite resources can conduct self-evaluation of their boards.



We consider a requirement to conduct board performance reviews every two years to be excessive, except perhaps for the very largest Listcos. If the Exchange is intent on specifying the timing for board performance reviews, we would suggest aligning the proposed performance review requirement with directors' rotation sequence, that is every three years. We believe this would help reduce the administrative burden on Listcos and the associated costs. Again, framing this requirement as an RBP would be preferred to allow Listcos to perform board performance reviews less frequently if they consider this more appropriate given their size, investor base and resources.

We would much prefer to retain current RBP B.1.5 which allows Listcos to conduct the type of board performance review and the frequency of these reviews that are most appropriate to their size, investor type and resources. If however, the Exchange proceeds with its proposal, we suggest that this should be for Main Board Listcos only. Existing RBP B.1.5 is sufficient for GEM Listcos.

#### Notes

25. NYSE Listed Company Manual, Corporate Governance Guideline 303A.09

**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? Please provide reasons for your views.**

- Yes
- No

**Please provide reasons for your views.**

The overarching requirement that a board should have a diverse range of skills and experience appropriate to the particular Listco is already incorporated in Principle B.1. The nomination committee is required to have regard to that principle in performing its duties under CP B.3.1. We consider these provisions to be sufficient to ensure an appropriate mix of skills and experience on Listco boards and fail to see how the proposed board matrix requirement would improve the current position.

Moreover, the skills required by a board are diverse and are not easily summarised in the form of a matrix. Specific skills such as professional qualifications or accounting or financial management expertise are required for at least one INED,(26) but otherwise, the required skill sets can vary widely. Directors' personalities are also a relevant consideration – do directors voice concerns on contentious issues and challenge management effectively? A rigid rules-based approach in the form of a board skills matrix would not, in our view, add value and could result in meaningless box ticking.

#### Notes

26. Listing Rule 3.10(2)

**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?**

Yes

No

**Please provide reasons for your views.**

We strongly disagree with the proposed introduction of a Listing Rule imposing a universal hard cap of six listed issuer directorships on INEDs. According to the Consultation Paper, only 7% of Listco INEDs are Overboarding INEDs, a percentage that we do not consider sufficient to justify the proposed change, particularly given the shortage of qualified INEDs in Hong Kong. Further, there is no analysis showing that the 181 Listcos with Overboarding INEDs have below average corporate governance. There is also no analysis of the trend on the number of Listcos with Overboarding INEDs; this may be a decreasing trend and therefore may not require the introduction of a hard cap in the Listing Rules. We are concerned that this proposal, taken together with the proposed hard cap of nine years' service for INEDs, will further restrict the pool of qualified INEDs available to Listcos and also restrict Listcos' ability to choose an INED it believes can create the best value for stakeholders.

The proposal is more stringent than the requirements for INEDs on comparable exchanges. There is no cap on the number of directorships that can be held by INEDs of companies listed in Australia, Singapore and Malaysia, where the issue of multiple directorships is dealt with by way of disclosure. In Australia, details of a director's other material directorships must be provided to shareholders when the director stands for election or re-election.<sup>(27)</sup> In Singapore, listed companies must disclose in their annual reports the listed company directorships and principal commitments of each director, and if a director holds a significant number (which is not specified) of directorships and commitments, the company must disclose the nomination committee's and the board's reasoned assessment of the director's ability to discharge diligently their duties.<sup>(28)</sup>

CP B.2.1 already requires Listco directors to ensure that they can give sufficient time and attention to the Listco's affairs and not accept a directorship if they cannot devote sufficient time to it. We consider that this should be sufficient since it requires INEDs to determine that the number of their directorships will not negatively impact their participation in a Listco's affairs given their particular circumstances. This is preferable to imposing a universal cap which ignores the significant variation in the amount of time that individual INEDs can commit and the complexity of the particular Listco's business. It may be, for example, that some individuals who have retired from full-time employment are able to devote sufficient time to more than six Listco directorships.

#### Notes

27. ASX Corporate Governance Principles and Recommendations, Recommendation 1.2

28. SGX Code of Corporate Governance, Provision 4.5

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

Yes

No

**Please provide reasons for your views.**

While we disagree with applying the proposed mandatory cap to all INEDs and Listcos without consideration of their specific circumstances, we do not in principle object to the proposed three-year transition period for existing issuers to comply with the new requirement.

**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?**

Yes

No

**Please provide reasons for your views.**

We generally agree with the proposed annual assessment of individual directors' time commitment and contribution and disclosure of that assessment.

**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?**

Yes

No

**Please provide reasons for your views.**

We strongly oppose the proposed hard cap of nine years on INEDs' tenure, which is unlikely to make any significant difference to board independence and will instead weaken boards by forcing Listcos to remove experienced INEDs with valuable knowledge and understanding of their businesses and applicable regulatory frameworks. We disagree in particular with the views of various institutional investors quoted in the Consultation Paper that directors' independence is somehow correlated with years of service. The fact that a person has served more than nine years as a Listco INED does not in any way impede their ability to exercise independent judgment in relation to its affairs. On the contrary, more than nine years' experience on a Listco board generally gives directors the in-depth knowledge of its business and the industry in which it operates that is necessary to make informed decisions in the best interests of the Listco and its shareholders. For example, the Lead Independent Director of JPMorgan Chase & Co., Mr. Stephen B. Burke, has served as a director of the company for more than 20 years.<sup>(29)</sup> Listcos have particular difficulty in recruiting INEDs with the qualifications and experience necessary to sit on their audit committees. In fact, for these INEDs, length of service is particularly advantageous given the experience they gain in dealing with complex transactions and audit issues.

We are extremely concerned that this proposal will force one third of Listcos to remove 1,500(30) highly experienced INEDs and require them to recruit replacement INEDs at a time when the shortage of qualified INEDs in Hong Kong is acute. More concerning still is that this will only aggravate the current shortage.

The proposed hard cap is also at odds with the requirements of other international exchanges. None of the NYSE, NASDAQ, the London Stock Exchange or the Australian Stock Exchange impose a cap on INEDs' tenure. In our view, the Exchange should be aligning its position with these international exchanges rather than with the regional exchanges, such as the Singapore and Malaysian stock exchanges which impose nine(31) and twelve-year caps, respectively, on INEDs' tenure.

If, however the Exchange is intent on limiting the number of years served by INEDs, this would be better achieved through an RBP on refreshing the board rather than a Listing Rule imposing a nine-year hard cap, or by requiring a proportion (no more than one third) of INEDs to have served less than nine years.

#### Notes

29. JP Morgan Chase. (2020). "JPMorgan Chase appoints Stephen B. Burke as Lead Independent Director". At: <https://www.jpmorganchase.com/ir/news/2020/burke-lead-independent-director-091520>

30. Consultation Paper at paragraph 100

31. SGX. (2023). "SGX RegCo Caps Independent Directors' Tenure, Enhances Remuneration Disclosures"

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

Yes

No

**Please provide reasons for your views.**

We disagree with this proposal. As noted in our response to part (a) of this question above, we do not consider that an INED's independence, in the sense of being able to review Listco matters objectively and in the best interests of the Listco and its shareholders, bears any relationship to the number of years served. On the contrary, the ability to make reasoned and informed judgments should increase with the length of service. In any event, a two-year gap is hardly likely to increase the independence of an INED who previously served in excess of nine years.

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

Yes

No

**Please provide reasons for your views.**

If the Exchange proceeds with this proposal, a longer transition period will be required given the large number of INEDs that will need to be found to replace the 1,500 Long-Serving INEDs (based on the position at the end of 2023).

**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?**

- Yes  
 No

**Please provide reasons for your views**

We agree with the proposed requirement for disclosure of each director's length of tenure in the CG report. We consider that investors will find this information useful and that they will likely view longer tenure positively, given the depth of experience Long-Serving INEDs bring to the board and its audit and other committees.

**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?**

- Yes  
 No

**Please provide reasons for your views.**

We agree with this proposal as we believe that having one different gender nomination committee member is likely to assist in ensuring the diversity of Listco boards.

The Exchange might also consider clarifying the meaning of "gender". Hong Kong's Sex Discrimination Ordinance (Cap. 480) uses the terms "sex", "men" and "women", although under the Interpretation and General Clauses Ordinance (Cap. 1), terms using "the masculine gender include the feminine and neutral genders". The London Stock Exchange, on the other hand, refers to "gender identity or sex"<sup>(32)</sup> in setting out listed companies' diversity disclosure obligations. Its disclosure form includes categories for "men", "women" and an optional "other" category.

Notes

32. FCA Handbook, Listing Rule 9.8.6R(10)

**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)?**

- Yes  
 No

**Please provide reasons for your views.**

We object to this proposal. There is no need for a gender diversity policy for the workforce of a corporation. A capable person is not defined by their gender and recruitment should not be constrained

by a gender ratio requirement, which risks resulting in unfair or unequal treatment. We believe that individual Listcos are in the best position to, and should be allowed to, decide who they employ based on the individual's characteristics and the Listco's unique working environment and industry type.

**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?**

- Yes  
 No

**Please provide reasons for your views**

We agree that this proposal would provide useful information for investors on a Listco's progress in achieving board diversity.

**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?**

- Yes  
 No

**Please provide reasons for your views.**

For the reasons set out in our response to question 11, we oppose the proposed requirement for a policy on workforce (including senior management) gender ratio. With respect to the meaning of "gender", please see our comments in our response to Question 10 above.

**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?**

- Yes  
 No

**Please provide reasons for your views.**

We agree with this proposal since it will give Listcos time to replace a sole female director who resigns.

**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;

Yes

No

**Please provide reasons for your views.**

We generally agree with the proposal to add emphasis to the board's responsibility for risk management and internal controls reviews in revised draft Principle D2 and with the proposed mandatory disclosure of annual reviews. However, we would appreciate confirmation that Listcos can conduct these reviews internally and do not have to appoint accountants to conduct an internal controls review under AATB 1, as seems to be suggested by proposed paragraph D.2.1(g).

The board's role regarding Listcos' internal controls and risk management is, however, one of oversight. Although the board is ultimately responsible for ensuring that a Listco has effective internal control and risk management systems, it is the Listco's audit committee that is required to review those systems and discuss their effectiveness with management (CPs D.3.3(f) and D.3.3(g)).

**(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?**

Yes

No

**Please provide reasons for your views.**

We do not object to this proposal. However, we consider that revised MDR H should continue to refer to the obligation to conduct an annual internal controls and risk management review under CP D.2.1. This will clarify that while D.2.1's requirement to perform the annual review is technically a "comply or explain" provision, in practice, it will be a mandatory obligation since failure to disclose its conduct under MDR H will amount to a breach of the Listing Rules.(33)

We therefore suggest that the opening paragraph of Mandatory Disclosure Requirement H be revised as follows:

"Details of the review conducted (at least annually) of the effectiveness of the issuer's and its subsidiaries' risk management and internal control systems under code provision D.2.1, including:"

Notes

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**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?**

Yes

No

**Please provide reasons for your views.**

We agree with the proposal to add more details regarding the required scope of internal controls reviews which will provide useful guidance for Listcos.

**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?**

Yes

No

**Please provide reasons for your views.**

We agree with the Exchange's proposals on disclosure of Listcos' dividend payment policy and board dividend decisions which is valuable information for investors and potential investors.

We also suggest that the Exchange require Listcos to disclose details of share buy backs conducted to return capital to shareholders.

**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?**

Yes

No

**Please provide reasons for your views.**

We have no objection to this proposal since Listcos have to set a record date in any event. However, we do not see a real need to include this in the Listing Rules since, in practice, company secretaries and share registrars will always set a record date when needed.

**Question 19: Do you agree with our proposal to codify our recommended disclosures in respect of issuers' modified auditors' opinions into the Listing Rules?**

Yes

No

**Please provide reasons for your views.**



We agree with this proposal. As the recommended disclosures on modified auditors' opinions have generally been complied with, we do not consider that their codification will cause any undue difficulties for Listcos.

**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?**

- Yes  
 No

**Please provide reasons for your views.**

We are in agreement with this proposal. The provision of monthly management information to the board is important to allow directors to determine whether there is any change in the Listco's performance which needs to be announced.

**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?**

- Yes  
 No

**Please provide reasons for your views.**

We generally agree with these proposals. However, we would suggest that more details are given as to the required contents of the nomination and remuneration committees' terms of reference along the lines of audit committees' required terms of reference under CP D.3.3.

**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? Please provide reasons for your views.**

- Yes  
 No

**Please provide reasons for your views.**

While we agree with the proposed 1 January 2025 implementation, we do not consider that the proposed three-year transitional period for question 8's proposed nine-year hard cap for INEDs would be sufficient given the large number of Long-Serving INEDs who would need to be replaced and the shortage of qualified INEDs in Hong Kong. As noted in our responses to Questions 8 and 6, we oppose the proposed

nine-year and six-directorship hard caps for INEDs, which will further shrink the available pool of qualified INEDs and risk resulting in issuers' appointment of less experienced INEDs. If, however, these proposals are adopted, we suggest a far longer phasing-in period than three years for the proposed nine-year hard cap.