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The Exchange's Concept Paper on New Board (June 2017)

In relation to the captioned Concept Paper, The Hong Kong Institute of Directors presents its views and comments.

General comments

HKIoD supports the idea of a professional only board, but has reservations about the need for New Board PREMIUM. In our conception, the professional board should accommodate all issuers which have a desire to list in Hong Kong but only want to deal with professional investors. And for companies which would be slotted to the New Board PREMIUM under the proposal, we believe they can be included on the Main Board.

Although there remains some voice among our membership against the idea, HKIoD will not object to companies with WVR / non-standard governance features to list on the Hong Kong market. HKIoD responded to the Concept Paper on Weighted Voting Rights (August 2014). We stand by our views. If companies with non-standard governance features (like weighted voting rights) are accepted by and they generally do not cause chaos in other markets, there must be a way to accommodate them in Hong Kong. And we do not think they need to be segregated just because they have non-standard governance features. They can be included on the Main Board and/or a revamped GEM Board, so long as the non-standard features are disclosed. To make a distinction still, the issuer coding system can be adjusted to require companies with such non-standard features to have a prefix (in a manner similar to the current 8xxx coding scheme to identity a GEM Board company).

The proposal in the Concept Paper has the effect of slotting issuers from the “New Economy” which want to tap retail investors to New Board PREMIUM, but we do not think it is practical or necessary. With the rate of technological advancement that is going on today, what seems “new” today may become the norm (or even obsolete) in no time. What definition or criteria to adopt or devise can itself be a difficulty. The Exchange and the SFC will be well advised to work out some plans to include more people who actually understand technology in committees or other decision bodies to decide if an issuer is to be regarded as New Economy. We actually believe New Economy issuers can be included on the Main Board and/or a revamped GEM Board. And the Exchange and SFC can double down on efforts to ensure that investors will have the information for them to make informed decisions on these issuers.



The proposal in the Concept Paper suggests that certain issuers should only be on certain boards because of the risks of some features or characteristic that they have. Those risks may be “new” to Hong Kong but they may not be so new in other markets around the world. If those features have been properly disclosed, there should be no need to segregate them just because of those features.

The Proposal in the Concept Paper may have the effect of carving up the market to create the sense of a ranking order among them. Under the proposal, Main Board will be seen as the premier board, better than GEM and better (safer) than New Board PREMIUM. To carve up the market this way may inadvertently leave the impression among some investors that because an issuer is on a said-to-be better safer board, bad things will not happen and they should not “lose” their investments. But we know there is no guarantee.

Market quality and investor protection is not always guaranteed by hard rules or mechanical criteria. The ultimate investor protection tool is for investors (retail or professional) to be able to fend for themselves. Investors fending for themselves will need good information to rest investment decisions on. Disclosure is acknowledged as the central part of the Hong Kong regulatory scheme. A disclosure regime is only effective when it provides investors with the information they need to make informed investment and voting decisions, but does not overwhelm them with either extraneous information or with a form of presentation that obscures and detracts investors from what is material. It may be worthwhile to consider what changes, if any, needs to be made to our disclosure regime to help investors (particularly retail investors). Alongside disclosure requirements, the board of directors of any company (listed or not listed) will be well-advised to have a good shareholder engagement strategy and operation in place to help shareholders and stakeholders have better understanding of the company.

As for market quality, it would be a collective quality of the corporate governance of the issuers tapping the market. Here, the role of the board of directors cannot be ignored, regardless of whether a company is Old Economy or New Economy, or of which board it is on.

Technology companies (one easy example of what may be New Economy issuers) often find it necessary to maintain control despite having gone through various rounds of financing to much widen the share ownership. Governance features to help maintain control are often adopted. Such may give certain shareholders superior rights, even some form of “enhanced or exclusive director election rights” to name and install favourites to sit on the board. It does invite arguments that those nominees will only be looking after the master’s interests. We believe that, with proper initial training and continuing development, directors will come to an understanding of their role, including the recognition that the primary loyalty runs to the



company regardless of who nominates them. The perceived and actual independence of directors is an important factor, and there is certainly room to bring up again the debate whether we should further raise the requirement to have a majority of INEDs. There is well-founded postulation that requiring a majority could make INEDs collectively better able to play their director roles. If we do so, there is then the need to find individuals who have the skills, knowledge and qualities to meet corporate governance demands of today to fill INED positions, not just to make up the numbers. Prospective directors should have conscientiously equipped themselves for the role, but they must also be adequately remunerated for their skills and for their time and effort.

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Consultation Questions

Subject to our general comments above, we state our responses to specific questions as set out in the Concept Paper as follows:-

Question 1

What are your views on the need for Hong Kong to seek to attract a more diverse range of companies and, in particular, those from New Economy industries to list here? Do you agree that the New Board would have a positive impact on Hong Kong's ability to attract additional New Economy issuers to our market?

HKIoD response:

- We will agree that there is all the benefit, at least no harm, for Hong Kong to seek to attract a more diverse range of companies to list on the Hong Kong market. The Concept Paper puts some emphasis on the need to attract companies from New Economy industries. The question then turns on what is considered “New Economy”. See general comments.
- Not all pre-profit companies are from the New Economy (however defined)
 - Some of our members have made the observation that pre-profit mining companies can go under the Mineral Companies Chapter of the Listing Rules and be on the Main Board, but other issuers that are pre-profit cannot. Indeed, not all pre-profit companies must necessarily come from the New Economy (however defined). Should we not want – at least allow for – a good prospect from an old industry (no need for specific definition here) that may now be pre-profit but which may become the next great enterprise, the next household name? How about the next great airlines? Aircraft costs a lot, whether you buy or lease. Landings rights may not be too easy to come by. The outlay investment needed in order to build and grow an airlines business will in some way not be too dissimilar from a mining business. The question



then becomes, why would (and why should) some issuers that are pre-profit be able to access the Main Board, but others that are as good – may be even better – prospect, be denied? The Exchange may explain that there is always discretion to allow certain companies to access the Main Board. This would only reinforce the notion that pre-profit companies need not necessarily be excluded from the Main Board.

Question 2

What are your views on whether the targeted companies should be segregated onto a New Board, rather than being included on the Main Board or GEM?

HKIoD response:

- By and large, the targeted companies need not be segregated onto a New Board.
 - For New Economy firms, the consideration must necessarily turn on the question “what is New Economy?” See response to Question 1 and see general comments.
 - For pre-profit companies, see response to Question 1.
 - For companies with “non-standard governance features”, see the response to Questions 17, 18 and 19 and see also general comments.
- On potential risks associated with Targeted issuers
 - The Concept Paper describes a potential risk being the low success rates of New Economy. Concept Paper para 99-100. The possibility of causing shareholders to lose part or possibly all of their investment is specifically mentioned as the consequence of that risk. HKIoD believes we should all remind ourselves that this is a capitalist economy that the Basic Law seeks to preserve. A capitalist economy predicates on people willing to take a risk for what may be a good return. Entrepreneurs from Old Economy to New Economy are acting out that capitalist ideal. Shareholders and investors are in real taking a risk buying some company’s stock for what may be a good return. But a capital market in a capitalist economy cannot leave the impression that buying stocks or any other investment products will always make you money.
 - The Concept Paper describes certain entrenchment and expropriation risks associated with WVR structures. Concept Paper para 103-104. First, HKIoD believes companies with WVR structures need not be segregated, so long as their governance features are properly disclosed for investors to make an informed decision. Second, the entrenchment feature may exactly be what investors find to be the key to their investment prospect. To enable incumbent managers to continue can in fact promote a long-term perspective which may result in substantial economic value of the firm. Indeed, the Listing Rules cherish the notion of management continuity.
- On market quality concerns:



- The Concept Paper describes a concern that the targeted companies are to carry “new and different” risks. Concept Paper para 118. Some features of the targeted companies may be “new” to the Hong Kong market, but they are not so new to investors in other markets around the world. We do not think we should categorize and rate the risks of a market by mechanical reference to those features. The ultimate risk analysis is, knowing what one knows and should know about the company (or any investment object), what is the prospect for a return looking forward. With proper disclosure, investors should be allowed to make their own decisions.
- The Concept Paper describes a potential risk of “Old Economy” companies listing on the New Board, by taking advantage of the pre-profit entry requirements but have less potential for future growth. Concept Paper para 102. HKIoD believes that, so long as the company’s characteristics, prospect, potential for growth, etc have been properly disclosed for investors to make an informed decision.
- On regulatory expectations
 - The Concept Paper describes a concern that there may be no limit to the extent to which WVR or other non-standard features will “infect” (our word) the Main Board. Concept Paper para 119. HKIoD does not believe companies with WVR or non-standard governance features should be mechanically classified as “ineligible applicants” to the Main Board.
 - Companies that do not meet Main Board criteria right off the bat are not necessarily “crooks”. And it is not the case that Main Board issuers had never been found to have irregularities.
- On index inclusion
 - The Concept Paper describes a concern that, once we permit companies with WVR / non-standard features to list on the Main Board, the larger of them will likely become index components. Index fund managers will therefore be forced to buy and hold their stocks even if they disagree with the structure. Concept Paper para 120. It would seem to us that indices can be calculated on a composite basis covering all companies, covering companies with WVR/non-standard features only, or covering only those companies without WVR/non-standard features, etc. Fund managers would still have information to adjust their portfolio and for their fund customers to pick and choose among their fund portfolio.
- On valuation discount due to non-standard features
 - The Concept Paper describes a concern that there may be a market-wide valuation discount due to the listing of companies with non-standard features. Concept Paper para 121. The Concept Paper admits there may be no factual or analytical basis to this concern. Concept Paper para 122. We believe this is something we can leave to the market to decide. Investors can decide whether to only focus their money on



companies without non-standard features. And even if companies with non-standard features will invariably be priced at a discount, it may still be an attraction for people to buy “low” for what might be a good prospect in the long run. If investors are so abhorrent and money flock to companies without non-standard features, those with WVR can decide whether to stay the way they are, or to make an early change to attract investors.

Question 3

If a New Board is adopted, what are your views on segmenting the New Board into different segments according to the characteristics described in the Concept Paper (e.g., restriction to certain types of investor, financial eligibility etc.)? Should the New Board be specifically restricted to particular industries?

HKIoD response:

- In our conception, the professional board should accommodate all issuers which have a desire to list in Hong Kong but only want to deal with professional investors. A board that is for professional investors only will by definition exclude retail investors.
- More generally, however, we do not believe it is necessary to exclude the “target companies” from the Main Board and/or a revamped GEM Board. Other than for the professional only board, we do not believe it is necessary to restrict certain investors to certain boards, so long as investors (including retail investors) have a good way to understand what they are buying into.
- We do not believe it is practical or productive to restrict the New Board to particular industries because there seems to be no definite connection between the characteristics of target companies referred to in the Concept Paper and the industries to which they belong or the businesses they might engage in.

Question 4

What are your views on the proposed role of GEM and the Main Board in the context of the proposed overall listing framework?

HKIoD response:

- We support the idea of a professional only board. In our conception, the professional only board should accommodate all issuers which have a desire to list in Hong Kong but only want to deal with professional investors. For companies that would be slotted to New Board PREMIUM, we believe they can be included on Main Board and/or a revamped GEM Board.



Question 5

What are your views on the proposed criteria for moving from New Board PRO to the other boards? Should a public offer requirement be imposed for companies moving from New Board PRO to one of the other boards?

HKIoD response:

- Our conception is a New Board PRO that is for professional investors only, and for the other boards not to restrict access according to types of investors. On that basis, a public offer requirement for companies to move from New Board PRO to one of the other boards would be reasonable.
 - As discussed elsewhere in this paper, we have reservations about the need for New Board PREMIUM.

Question 6

What are your views on the proposed financial and track record requirements that would apply to issuers on New Board PRO and New Board PREMIUM? Do you agree that the proposed admission criteria are appropriate in light of the targeted investors for each segment?

HKIoD response:

- See our responses to Questions 7, 8, 9 and 10

Question 7

What are your views on whether the Exchange should reserve the right to refuse an application for listing on New Board PRO if it believes the applicant could meet the eligibility requirements of New Board PREMIUM, GEM or the Main Board?

HKIoD response:

- No, the Exchange should not reserve that right. Companies which want to access the capital market should still have the autonomy to decide whether they want to tap a market with professional investors only. The Exchange need not and should not push companies away from that option of only dealing with professional investors.
 - Viable businesses in Hong Kong and around the world have sought to remain private though they are more than eligible, or businesses have sought to become private again after listing on a major exchange. The Hong Kong market should not be pre-disposed to the notion that the better more successful companies must graduate to a “higher” board, or leave the impression that issuers on Main Board must necessarily be better in all respects all the time.



Question 8

What are your views on the proposed requirements for minimum public float and minimum number of investors at listing? Should additional measures be introduced to ensure sufficient liquidity in the trading of shares listed on New Board PRO? If so, what measures would you suggest?

HKIoD response:

➤ New Board PRO

- The proposal is for applicants to New Board PRO not to be required to have track record or to meet any minimum financial hurdles, except that it should have an expected market capitalisation of at least HK\$200 million at the time of listing. Concept Paper para 135. Applicants for New Board PRO will also be required to have a minimum of 100 investors at the time of listing and a minimum public float at listing of 25%. Concept Paper para 138. HKIoD supports the idea of a professional only board. The proposed requirements are reasonable. Professional investors are better able to fend for themselves. The Concept Paper also recognises the fact that professional investors are better placed to carry out fundamental analysis to determine the intrinsic value of the securities and should have greater holding power than retail investors. Concept Paper para 138. We do not think there is a need for additional measures to be introduced to ensure sufficient liquidity.

➤ New Board PREMIUM

- The proposal is for applicants to New Board PREMIUM to meet financial track record requirements equivalent to those of the Main Board. Concept Paper para 135. To require applicants to New Board PREMIUM to meet financial track record requirements equivalent to those of the Main Board would seem reasonable.
 - ◆ As discussed elsewhere in this paper, HKIoD has reservations about the need for New Board PREMIUM.

Question 9

What are your views on whether companies listed on a Recognised US Exchange that apply to list on the New Board should be exempted from the requirement to demonstrate that they are subject to shareholder protection standards equivalent to those of Hong Kong? Should companies listed elsewhere be similarly exempted?

HKIoD response:

➤ Companies already listing on a Recognised US Exchange



- As to companies listed on a Recognised US Exchange, we believe they should be exempted from the requirement to demonstrate that they are subject to shareholder protection standards equivalent to those of Hong Kong.
- Companies already listing elsewhere
 - As to companies listed elsewhere, we believe they could also be similarly exempted if they have a good compliance record on their respective markets and when those markets have relatively high shareholder/investor protection and enforcement mechanisms. Jurisdictions that have cooperation measures in place with the SFC may be considered a plus.
 - ◆ The current practice requires the first issuer from any market that is not already an Acceptable Jurisdiction under the 2013 JPS to provide analysis to demonstrate its ability to provide shareholder protection standards equivalent to Hong Kong. The Concept Paper concedes that the cost burden for that first applicant (and then the potential of free-riding for those from the jurisdiction that may come after) is a disincentive to listing in Hong Kong. Concept Paper para 54. There may be room to redress that disincentive.
- Companies from Greater China seeking secondary listing in Hong Kong
 - We note that the “center of gravity” test under the 2013 JPS would not apply to New Board PRO (nor New Board PREMIUM). This should enable more companies from Greater China to seek a secondary listing in Hong Kong.
 - ◆ As discussed elsewhere in this paper, we have reservations about the need for New Board PREMIUM
- On cross border enforcement
 - The proposal is also to require applicants to New Board PRO (and New Board PREMIUM) to have the place of incorporation and the place of central management and control (as defined by the 2013 JPS) to be in jurisdictions with regulatory cooperation measures in place with the SFC. Concept Paper para 139. We think this is reasonable.
 - ◆ As discussed elsewhere in this paper, we have reservations about the need for New Board PREMIUM

Question 10

What are your views on whether we should apply a “light touch” suitability assessment to new applicants to New Board PRO? If you are supportive of a “light touch” approach, what relaxations versus the Main Board’s current suitability criteria would you recommend?

HKIoD response:



- We understand the meaning and extent of a “light touch” approach is to not apply the existing suitability guidance in Guidance Letters GL68-13 and GL68-13A. We think that would be reasonable.
 - New Board PRO is a professionals only board; professional investors are better able to fend for themselves. A “light touch” suitability assessment would seem reasonable.
 - We note that the Exchange intends to retain the right to determine listing or to apply additional or more stringent suitability criteria when there is “cause” (our word). Concept Paper para 140. The example given in Concept Paper is when the applicant operates an illegal business. We cannot argue too much about operating an illegal business, but the Exchange may want to elaborate on what other “causes” might be for additional or more stringent suitability criteria to apply.

Question 11

What are your views on whether the New Board PRO should be restricted to professional investors only? What criteria should we use to define a professional investor for this purpose?

HKIoD response:

- HKIoD supports the idea of a professionals only Board. We agree that the New Board PRO should be restricted to professional investors only. We think the relevant standards mentioned in Concept Paper footnote 57 will be sufficient.

Question 12

Should special measures be imposed on Exchange Participants to ensure that investors in New Board PRO-listed securities meet the eligibility criteria for both the initial placing and secondary trading?

HKIoD response:

- HKIoD supports the idea of a professional only Board. The proposal in the Concept Paper is to expect investors (or investor clients) to meet the standard of professional investor under the SFO. Concept Paper para 143. We believe Exchange Participants should be able to rely on the representation of investors (or investor clients) and/or evidence for having met the relevant SFC standards, assuming a reasonable due diligence or verification has been made. We do not believe it is necessary to have special measures be imposed on Exchange Participants to ensure that investors in New Board PRO meet the eligibility criteria for both the initial placing and secondary trading.

Question 13



What are your views on the proposal for a Financial Adviser to be appointed by an applicant to list on New Board PRO, rather than applying the existing sponsor regime? If you would advocate more prescriptive due diligence requirements, what specific requirements would you recommend be imposed?

HKIoD response:

- HKIoD supports the idea of a professional only Board. Professional investors are better able to fend for themselves. It should be sufficient for an applicant to appoint a Financial Adviser and not have to apply the sponsor regime.

Question 14

What are your views on the proposed role of the Listing Committee in respect of each segment of the New Board?

HKIoD response:

- HKIoD supports the idea of New Board PRO but have reservations about the need for New Board PREMIUM. Companies that are the target for New Board PREMIUM could be included on the Main Board and/or a revamped GEM Board.
- New Board PRO
 - The “straw man” proposal is to have the Listing Department vet and approve listing applications for New Board PRO under delegated authority from the Listing Committee. We, however, believe the Listing Committee should remain the locus for approving applications to list on New Board PRO, following vetting by the Listing Department. In our conception, the professional board should accommodate all issuers which have a desire to list in Hong Kong but only want to deal with professional investors.
 - The “straw man” proposal calls for the Listing Committee to make decisions on cancellation of listings, disciplinary matters and be responsible for hearing appeals for New Board PRO. We agree.
- New Board PREMIUM
 - Should New Board PREMIUM be established, the “straw man” proposal calls for approvals to be made by the Listing Committee, following vetting by the Listing Department. We would agree, although we have reservations about the need for a New Board PREMIUM.
 - Should a New Board PREMIUM be established, the “straw man” proposal calls for the Listing Committee to make decisions on cancellation of listings, disciplinary matters and be responsible for hearing appeals. We would agree, although we have reservations about the need for a New Board PREMIUM.



Question 15

Do you agree that applicants to listing on New Board PRO should only have to produce a Listing Document that provides accurate information sufficient to enable professional investors to make an informed decision, rather than a Prospectus? If you would advocate a more prescriptive approach to disclosure, what specific disclosures would you recommend be required?

HKIoD response:

- We agree applicants to listing on New Board PRO should only have to produce a Listing Document that provides accurate information sufficient to enable professional investors to make an informed decision. Professional investors are more able to fend for themselves. HKIoD does not believe it is necessary to adopt a prescriptive approach to disclosure. On the other hand, issuer boards will be well advised to have a good shareholder engagement strategy and plan in place.

Question 16

What are your views on the proposed continuous listing obligations for the New Board? Do you believe that different standards should apply to the different segments?

HKoD response:

- The proposal is to have companies listing on New Board PRO (and New Board PREMIUM) to comply with the standards applicable to Main Board-listed companies. Concept Paper para 151. For New Board PRO, we believe the requirements can be appropriately relaxed. Professional investors are better able to fend for themselves.
 - As discussed elsewhere in this paper, we have reservations about the need for New Board PREMIUM.

Question 17

For companies that list on the New Board with a WVR structure, should the Exchange take a disclosure-based approach as described in paragraph 153 of the Concept Paper? Should this approach apply to both segments of the New Board?

HKIoD response:

- HKIoD believes a disclosure-based approach as described in Concept Paper para 153 is sufficient.
 - As discussed elsewhere, we have reservations about the need for a New Board PREMIUM.



Question 18

If, in addition, you believe that the Exchange should impose mandatory safeguards for companies that list on the New Board with a WVR structure, what safeguards should we apply?

HKIoD response:

- See response to Q17.

Question 19

Do you agree that the SEHK should allow companies with unconventional governance features (including those with a WVR structure) to list on PREMIUM or PRO under the “disclosure only” regime described in paragraph 153 of the Concept Paper, if they have a good compliance record as listed companies on NYSE and NASDAQ? Should companies listed elsewhere be similarly exempted?

HKIoD response:

- HKIoD believes the Exchange should allow companies with unconventional governance features (including those with a WVR structure) to come to the Hong Kong market.
 - They should be allowed in New Board PRO. HKIoD supports the idea of a professional only board.
 - In our view, they should also be allowed on the Main Board and/or a revamped GEM Board. As discussed elsewhere in this paper, we have reservations about the need for New Board PREMIUM.
- Some governance features, though unconventional by the look of it, could in fact be the best selling point for an investor to buy in. The essential point is for those features to have been made known to the investor. A “disclosure only” regime described in Concept Paper para 153 should be sufficient, if those companies have a good compliance record as listed companies in the U.S.
 - The U.S. capital market has seen its share of scandals, but we cannot say the HK market is immune or necessarily better. By and large, the U.S. market has good mechanism for private enforcement. Issuers listing on a U.S. market will also have rather stringent requirements to disclose material information via reports that are made periodically or on a more current basis upon the occurrence of significant events. Companies listed on NYSE or NASDAQ and which have good compliance records should provide investors a good basis to put their investments into them.

Question 20

What are your views on the suspension and delisting proposals put forward for the New Board?



HKIoD response:

- We generally agree with the suspension and delisting proposal described in Concept Paper para 159.

Question 21

Should New Board-listed companies have to meet quantitative performance criteria to maintain a listing? If so, what criteria should we apply? Do you agree that companies that fail to meet these criteria should be placed on a “watchlist” and delisted if they fail to meet the criteria within a set period of time?

HKIoD response:

- New Board PRO
 - HKIoD can agree to some quantitative performance criteria to maintain a listing on New Board PRO. But to the extent it is a professional only Board, we can put faith in the fact that professional investors are able to fend for themselves and will have better holding power. For that reason, we surmise a more relaxed set of quantitative performance criteria will be sufficient. It is reasonable to put companies that fail to meet the quantitative criteria for certain prescribed period of time on a “watchlist” or even delisted if the delinquency continues for some extended period of time. For New Board PRO, we think a move to delist after 90 days of suspension is too short.
- New Board PREMIUM
 - Should New Board PREMIUM be established, it is reasonable to maintain some form of quantitative performance criteria. The proposal is for a move to delist if a company listing on New Board PREMIUM to have been in suspension for longer than 6 months. We think a move to delist after 6 months of suspension is still too short.
 - ◆ As discussed elsewhere in this paper, we have reservations about the need for New Board PREMIUM. Issuers that are meant to be slotted onto New Board PREMIUM can well be included onto the Main Board and/or a revamped GEM Board.

Question 22

Do you consider that an even “lighter touch” approach enforcement regime should apply to the New Board (e.g., an exchange-regulated platform)?

HKIoD response:

- New Board PRO

- In our conception, the professional only board should accommodate all issuers which have a desire to list in Hong Kong but only want to deal with professional investors. Even so, an even “lighter touch” approach enforcement regime could be sufficient.
- New Board PREMIUM
 - As discussed elsewhere in this paper, we have reservations about the need for New Board PREMIUM.

Ends