

Issued on: 18 October 2018

**The Exchange's Consultation Paper on
Review Structure in Relation to Listing Committee Decisions (August 2018)**

In relation to the captioned Consultation Paper, we at The Hong Kong Institute of Directors present our views and comments.

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General comments

HKIoD supports the establishment of an independent review committee to replace the LRC, LD(R)C and the LAC, but we continue to believe there should be two levels of review for decisions of Material Significance.

We recommend a larger size of the new committee, say at least 30 members. The larger size should enhance the new committee's capacity to handle the potential number of cases that may come before it, and to have diverse views and expertise at the new committee's disposal. Members of the new independent review committee should not be limited to former LC members. There should be a broader effort to recruit persons with experience and expertise in Listing Rule matters or are familiar with the work of the Listing Committee. We believe seasoned public company directors with the right credentials should also be considered as a distinct category of suitable candidates.

To routinely publish decisions of the new independent review committee should promote consistency in decision-making and better understanding of the interpretation and application of the relevant rules. To encourage dissenting views to be included could give better clarity to the new review committee's overall reasoning.

We note that there will be safeguard measures, for example, by publishing a decision (of non-disciplinary matter) on a no-names basis or on a delayed basis, if the disclosure of the review applicant's identity would be unduly prejudicial to the interests of the applicant or that the decision would be price-sensitive.

For disciplinary matters, where the final review body modifies the decision under review and decides not to impose any public sanction, we believe there is good reason for that fact to be published in a news release. Consultation Paper para 43 refers.

SFC's power to request review of decisions

The Consultation Paper includes a section on the SFC's power to request a consideration or review of any matter or decision of the Listing Committee and the Listing Appeals Committee. The intent is to make Listing Rule changes to codify the power under paragraph 10.6 of the 2003 SFC-Exchange MOU, with necessary ancillary amendments to reflect the changes to the review structure that is the subject of the present Consultation Paper. Consultation Paper para 108-109.

The Consultation Paper reports that, per the Conclusions (issued September 2017) to the Joint Consultation on Proposed Enhancements to the Exchange's Decision-Making and Governance

Structure for Listing Regulation, no formal consultation on this aspect would be required, but that the Exchange would be pleased to receive comments on this aspect. See, e.g., Consultation Paper para 19 and the note that appears after Consultation Paper para 119.

In our view, The SFC already has wide and substantial enforcement power under the SFO. Irregular acts and activities by issuers and market participants can be pursued under that route. Decisions of the Listing Committee (and the new review committee) should remain market-driven. Such decisions are already subject to judicial review. To give the SFC the power to request review of decisions of the Listing Committee (and if to be so, the new review committee) may invite too early an interference on that market-driven decision process.

We note that, for the reasons: (i) the new Listing Review Committee will serve as the final review body; (ii) the new Listing Review Committee is a separate and independent committee from the Listing Committee; and (iii) all non-disciplinary decisions of the new Listing Review Committee will be routinely published, the SFC has determined that it will not request a consideration or review of any decisions of the new Listing Review Committee. Consultation Paper para 112.

Specific consultation questions

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

Question 1 Do you agree to revise the current review structure so that decisions of Material Significance made by the Listing Committee will be subject to only one level of review?

HKIoD response:

➤ **DISAGREE**

- We continue to believe there should be two levels of review for decisions of Material Significance.
- To the extent the decisions are not “binding precedents”, it is actually less easy for issuers and their directors to know what will be given a go at a Listing Committee hearing (or appeal). That uncertainty can be more costly to issuers and their directors than if they were otherwise to spend effort to understand what could be a body of “case law” that underpins the interpretation or construction of the Listing Rules. We are not particularly convinced by the arguments laid out in Consultation Paper para 100. At least, we can postulate that a precedent system may be the better alternative to achieve consistency and more able to let issuers and directors understand their obligations and comply with them.
- To adopt a precedent system may involve too much a change, however. To keep closer to the current regime then, two rights to review decisions of Material Significance is to give review applicants the necessary leeway to justify their case.



- Question 2 Do you agree with:
- (a) the proposal to establish a new independent review committee to replace the LRC and the LD(R)C respectively and to hear reviews currently conducted by them.
 - (b) the size and composition of the new independent review committee (including the mix of members' representation)?

HKIoD response:

- As to (a), AGREE
 - We agree with the proposal to establish a new independent review committee to replace the LRC and the LD(R)C respectively and to hear reviews currently conducted by them. We also agree that the new independent review committee will be a committee of the Exchange.
- As to (b), we have the following comments
 - The new independent review committee is said to comprise “at least 15 members”. We believe there should be an effort to increase the size of the new committee to, say, at least 30 members. The larger size should enhance the new committee’s capacity to handle the potential number of cases that may come before it, and to have diverse views and expertise at the committee’s disposal.
 - Members of the new independent review committee should not be limited to former LC members. There should be a broader effort to recruit persons with experience and expertise in Listing Rule matters or are familiar with the work of the Listing Committee. The Consultation Paper mentioned that (for the 15-member size proposed), there will be at least four investor representatives, with the remaining members representing a suitable balance of representatives of listed issuers and market practitioners including lawyers, accountants, corporate finance advisers and Exchange participants (or their officers).
 - We recommend a size of at least 30 members, and we also believe seasoned public company directors with the right credentials should also be considered as a distinct category of suitable candidates.
 - We expect the selection process to be handled solely by the Exchange (see Consultation Paper para 85), but the Exchange may want to reiterate this aspect when the Consultation Conclusions are published.

- Question 3 If the Exchange decides to retain two levels of review for decisions of Material Significance made by the Listing Committee, do you agree that the LAC is to be replaced by a review committee with members being drawn from the proposed new independent review committee and chaired by a member of a separate chairperson panel? Are there any additional process or safeguards that you would suggest to enhance this aspect of the review structure for such decisions of Material Significance?

HKIoD response:

- AGREE
 - We agree with the concept of an independent review committee to replace the LDC, LD(R)C and LAC. See also our response to Question 2 on the size and composition of the committee.

Question 4 Do you agree with the proposal to routinely publish decisions of the new Listing Review Committee for non-disciplinary matters on the basis described in paragraphs 102 to 105?

HKIoD response:

➤ AGREE

- To routinely publish decisions of the new independent review committee should promote consistency in decision-making and better understanding of the interpretation and application of the relevant rules.
- We note that there will be safeguard measures, for example, by publishing a decision on a no-names basis or on a delayed basis, if the disclosure of the review applicant's identity would be unduly prejudicial to the interests of the applicant or that the decision would be price-sensitive. Consultation Paper para 103.
- The Exchange may want to encourage dissenting views to be included in the decisions. Such could give better clarity to the review committee's overall reasoning, and such should allow the market to have better understanding of the scope and limit of those decisions. Consultation Paper para 105 refers.
- For disciplinary matters, when the final review body modifies the decision under review and decides not to impose any public sanction, we believe there is a strong reason for that fact to be published in a news release. Consultation Paper para 43 refers.

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