

Client Alert.

November 18, 2011

Hong Kong Stock Exchange Amends the Corporate Governance Code and Listing Rules

By **Stephen S. Birkett and Jun-Min Tang**

The Stock Exchange of Hong Kong Limited (“**Exchange**”) has recently published its Consultation Conclusions on Review of the Corporate Governance Code (“**Code**”) and associated Listing Rules. The Code and Listing Rules amendments aim to promote the development of a higher level of corporate governance among listed issuers and bring Hong Kong in line with international best practices. They will come into force in 3 phases, starting on 1 January 2012.

Highlights to note are as follows:

New Listing Rules

- Independent non-executive directors (“**INEDs**”) must be at least 1/3 of the board by the end of 2012
- Company secretaries require 15 hours of professional training each financial year
- Remuneration committee required
- Publish constitutional documents (with English version) on website
- Publish procedures for election of directors
- Directors’ duties expanded and clarified
- Disclosure of chief executive’s remuneration
- Removal of 5% exemption from bar on directors voting where interested in resolution
- Shareholders’ approval required to appoint and remove an auditor

New Code Provisions (“CP**”)**

- Board to be responsible for corporate governance functions
- Disclosure of senior management remuneration by band
- Provision of monthly information to board members
- Auditor to attend AGMs
- Establishment of communication policy
- New section in Code on company secretary

Client Alert.

Upgraded from Recommended Best Practices (“RBP”) to CP

- Directors’ attendance at board meetings to be disclosed
- Establishment of nomination committee
- Issuer to be responsible for arranging and funding directors’ training
- Roles and responsibilities of the chairman
- Separate shareholder resolution to retain INEDs beyond 9 years’ service
- Directors’ insurance

Further details of the proposals adopted appear below.

The text of the newly proposed Code and Listing Rules amendments may be found at the following [link](#).

To read the Consultation Conclusions, please click [here](#).

EFFECTIVE 1 JANUARY 2012

	Subject	Description of Proposal	Relevant Listing Rules / Code
1.	Directors’ duties	<p>Rule 3.08 on directors’ duties is expanded to require that directors take an active interest in the issuer’s affairs, obtain a general understanding of its business, and follow up on anything untoward that comes to their attention.</p> <p>For best practice, directors are encouraged to refer to the Companies Registry’s “A Guide on Directors’ Duties” and the Hong Kong Institute of Directors’ “Guidelines for Directors.”</p>	Rule 3.08
2.	Disclosure of chief executive’s remuneration	Issuers will be required to disclose the remuneration of a chief executive who is not a director (in addition to the current requirement to disclose directors’ remuneration by name).	Rule 13.51

Client Alert.

3.	Board meetings – removal of 5% exemption from bar on directors voting where interested in resolution	<p>Exemption of 5% shareholding interest in a counterparty, from the bar on voting by a director on a board resolution in which he has an interest, will be removed.</p> <p>As long as the director has a material interest in the transaction, he should abstain from voting, even if he has no beneficial interest in the shares of the other company. However, if the director's interest is the same as all shareholders, such as in the case of approving dividend payments, then he need not abstain from voting.</p>	Rule 13.44
4.	Shareholders' general meetings	<p><u>Voting by poll exception for procedural and administrative matters</u></p> <p>A chairman at a general meeting can exempt certain prescribed procedural and administrative matters (e.g., adjourning a meeting to ensure orderly conduct) from a vote by poll.</p> <p><u>Shareholders' approval to appoint / remove an auditor</u></p> <p>Shareholders' approval at a general meeting will be required for any proposal to appoint auditors or remove them before the expiry of their term.</p> <p>The issuer should send a circular containing any written representation from the auditor to shareholders, and the auditor must be allowed to make a written and/or verbal representation at the general meeting to remove him.</p>	<p>Rule 13.39(4)</p> <p>Rule 13.88</p>
5.	Notifying directorship change and disclosure of directors' information	<p>Issuers are required to disclose information on:</p> <ul style="list-style-type: none"> (i) The retirement or removal of a director or supervisor; (ii) The appointment, resignation, re-designation, retirement or removal of a chief executive; and (iii) Information on <i>all</i> civil judgments of fraud, breach of duty, or other misconduct involving dishonesty by directors. 	Rule 13.51

Client Alert.

6.	Next day disclosure for a director of the issuer's subsidiaries exercising an option for shares in the issuer	<p>Removed the requirement for issuers to publish a Next Day Disclosure Form following the exercise of an option for shares in the issuer by a director of its subsidiaries.</p> <p>An announcement is only required if the change in share capital, individually or when aggregated with other events, is 5% or more since the last monthly return.</p>	Rule 13.25A										
7.	Company secretary's qualifications, experience, and training	<p>Removed the requirement for a company secretary to be ordinarily resident in Hong Kong, and Rule 19A.16 is repealed to make the requirements for company secretaries of Mainland issuers the same as for other issuers.</p> <p>Company secretaries are required to have 15 hours of professional training in a financial year. The compliance dates are staggered according to when a person became the company secretary of an issuer:</p> <table border="1" data-bbox="524 1062 1195 1507"> <thead> <tr> <th data-bbox="524 1062 841 1125">Date of Appointment</th> <th data-bbox="841 1062 1195 1125">Latest Compliance Date</th> </tr> </thead> <tbody> <tr> <td data-bbox="524 1125 841 1224">On or after 1 January 2005</td> <td data-bbox="841 1125 1195 1224">1 January 2012</td> </tr> <tr> <td data-bbox="524 1224 841 1323">1 January 2000 to 31 December 2004</td> <td data-bbox="841 1224 1195 1323">1 January 2013</td> </tr> <tr> <td data-bbox="524 1323 841 1421">1 January 1995 to 31 December 1999</td> <td data-bbox="841 1323 1195 1421">1 January 2015</td> </tr> <tr> <td data-bbox="524 1421 841 1507">On or before 31 December 1994</td> <td data-bbox="841 1421 1195 1507">1 January 2017</td> </tr> </tbody> </table>	Date of Appointment	Latest Compliance Date	On or after 1 January 2005	1 January 2012	1 January 2000 to 31 December 2004	1 January 2013	1 January 1995 to 31 December 1999	1 January 2015	On or before 31 December 1994	1 January 2017	Rules 3.28, 3.29, and 19A.16
Date of Appointment	Latest Compliance Date												
On or after 1 January 2005	1 January 2012												
1 January 2000 to 31 December 2004	1 January 2013												
1 January 1995 to 31 December 1999	1 January 2015												
On or before 31 December 1994	1 January 2017												

EFFECTIVE 1 APRIL 2012

	Subject	Description of Proposal	Relevant Listing Rules / Code
1.	Directors' time commitments and training	<p>New Code Principle:</p> <ul style="list-style-type: none"> The board should regularly review the contribution required from a director to perform his responsibilities to the issuer, and whether he is spending sufficient time performing them. 	CP A.1

Client Alert.

	Subject	Description of Proposal	Relevant Listing Rules / Code
		<p>New Code Provisions:</p> <ul style="list-style-type: none"> • Directors to inform the issuer of any change to their significant commitments in a timely manner. • The issuer to be responsible for arranging and funding suitable training for directors <p>An issuer will be required to disclose in its corporate governance report how directors complied with the Code Provision on training.</p>	<p>CP A.6.6</p> <p>CP A.6.5</p>
2.	An INED who has served nine years	<p>New Code Provision:</p> <ul style="list-style-type: none"> • Shareholders to vote on a separate resolution to retain such an INED • A issuer to include the reasons why the board considers the INED independent. 	CP A.4.3
3.	Board committees	<p><u>Remuneration committee</u></p> <p>Issuers are required to establish a remuneration committee with a majority of INEDs. The relevant Code Provisions are amended accordingly.</p> <p>The remuneration committee’s terms of reference should be available on both the issuer’s and the Exchange’s websites.</p> <p><u>Nomination committee</u></p> <p>The establishment of a nomination committee is now a Code Provision.</p> <p><u>Audit committee</u></p> <p>New Code Provisions on certain terms of reference and a new Recommended Best Practice will recommend that the audit committee establish a whistle-blowing policy and system.</p> <p><u>Corporate governance functions</u></p> <p>New Code Provision states that the board (which may delegate its responsibility to a committee) should be responsible for corporate governance.</p>	<p>Rules 3.25 to 3.27, CPs B.1.1 to B.1.4</p> <p>CPs A.5.1 to A.5.5</p> <p>CPs C.3.7, C.3.3(e)(i), and RBP C.3.8</p> <p>CPs D.3.1 and D.3.2</p>

Client Alert.

	Subject	Description of Proposal	Relevant Listing Rules / Code
		Issuers are required to disclose the corporate governance policy and duties performed in the corporate governance report.	
4.	Disclosure of certain information on directors and senior management	<p>New Code Provisions:</p> <ul style="list-style-type: none"> A list of directors should be published on the issuer's and the Exchange's websites Senior management remuneration should be disclosed by band 	<p>CPs B.1.5</p> <p>CPs A.3.2</p>
5.	Board matters	<p><u>Chairman and chief executive</u></p> <p>The current Recommended Best Practices are all upgraded to Code Provisions to place greater emphasis on the roles and responsibilities of the chairman.</p> <p><u>Monthly information to directors</u></p> <p>Management should provide monthly updates to board members giving a balanced and understandable assessment of the issuer's performance, position, and prospects in sufficient detail to enable them to discharge their duties.</p> <p><u>Directors' insurance</u></p> <p>An issuer should arrange appropriate insurance cover for directors.</p> <p><u>Disclosure of long term basis on which an issuer generates or preserves business value</u></p> <p>The annual report should include an explanation of the basis on which the company generates or preserves value over the longer term and the strategy for delivering the objectives of the company.</p> <p><u>Board evaluation</u></p> <p>A new RBP will recommend that the board conduct a regular evaluation of its performance.</p>	<p>CPs A.2.4 to A.2.9</p> <p>CP C.1.2</p> <p>CP A.1.8</p> <p>CP C.1.4</p> <p>CP B.1.9</p>

Client Alert.

6.	Shareholders' general meetings – new Code Provisions	<p><u>Bundling of resolutions</u></p> <p>Issuers to avoid “bundling” resolutions, and where they are “bundled,” explain the reasons and material implications in the notice of meeting.</p> <p><u>Directors' attendance at meetings</u></p> <p>Non-executive directors, including INEDs, should attend board, committee, and general meetings and contribute to the issuer's strategy and policies.</p> <p>Issuers will be required to disclose details of the attendance at general meetings of each director by name in its corporate governance report.</p> <p><u>Auditor's attendance at AGMs</u></p> <p>Auditor to answer questions about the conduct of the audit, the preparation and content of the auditor's report, accounting policies, and auditor independence.</p>	<p>CP E.1.1</p> <p>CPs A.6.7 and A.6.8</p> <p>CP E.1.2</p>
7.	Communication with shareholders	<p>An issuer must publish the following:</p> <ul style="list-style-type: none"> an updated and consolidated version (with an English version) of its constitutional documents on its own and the Exchange's websites; and the procedures shareholders can use to propose a person for election as a director. <p>New Code Provision:</p> <ul style="list-style-type: none"> establish a shareholder communication policy 	<p>Rule 13.90</p> <p>Rule 13.51D</p> <p>CP E.1.4</p>
8.	New section in Code on company secretary	<p>The new Section F sets out the role and responsibilities of a company secretary.</p>	<p>Section F of the Code</p>

EFFECTIVE 31 DECEMBER 2012

	Subject	Description of proposal	Relevant Listing Rules / Code
	INEDs to form one-third of board	<p>At least one-third of the board must be INEDs.</p> <p>An issuer has a three-month period to appoint a sufficient number of INEDs after failing to meet the requirement.</p>	<p>Rules 3.10A and 3.11</p>

Client Alert.

For more information about Morrison & Foerster's capital markets practice in China, please contact:

Ven Tan

Hong Kong
+852 2585 0836
vtan@mofo.com

John Moore

Hong Kong
+852 2585 0869
john.moore@mofo.com

Tony Grundy

Hong Kong
+852 2585 0758
tgrundy@mofo.com

Sherry Yin

Beijing
+86 10 5909 3566
syin@mofo.com

Charles Chau

Hong Kong
+852 2585 0828
cchau@mofo.com

Stephen Birkett

Hong Kong
+852 2585 0818
sbirkett@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.