

Chapter 5

GENERAL

DIRECTORS, SECRETARY AND CORPORATE GOVERNANCE MATTERS

Directors

5.01 The board of directors of an issuer is collectively responsible for the management and operations of the issuer. The Exchange expects the directors, both collectively and individually, to fulfil fiduciary duties and duties of skill, care and diligence to a standard at least commensurate with the standard established by Hong Kong law. This means that every director must, in the performance of his duties as a director:—

- (1) act honestly and in good faith in the interests of the company as a whole;
- (2) act for proper purpose;
- (3) be answerable to the issuer for the application or misapplication of its assets;
- (4) avoid actual and potential conflicts of interest and duty;
- (5) disclose fully and fairly his interests in contracts with the issuer; and
- (6) apply such degree of skill, care and diligence as may reasonably be expected of a person of his knowledge and experience and holding his office within the issuer.

Note: A formal declaration, undertaking and acknowledgement, in the form set out in Appendix 6A or 6B, as applicable, is required to be completed by each director of an issuer. For this purpose, the Exchange requires the Declaration, Undertaking and Acknowledgement to be submitted no later than 14 business days prior to the proposed date of appointment in the case of a new appointee to the board of directors of a listed issuer.

5.02 Every director must satisfy the Exchange that he has the character, experience and integrity and is able to demonstrate a standard of competence commensurate with his position as a director of an issuer. The Exchange may request information regarding the background, experience, other business interests or character of any director or proposed director of an issuer. The Exchange expects every director of an issuer:—

- (1) to be cognisant of the GEM Listing Rules and reasonably familiar with the obligations and duties imposed upon him and the issuer pursuant to the GEM Listing Rules, the Securities Ordinance, the Companies Ordinance, the Protection of Investors Ordinance, the Stock Exchanges Unification Ordinance, the SDI Ordinance, the Securities (Insider Dealing) Ordinance, the Takeover Code and the Code of Share Repurchases. The Exchange reserves a right to require directors to demonstrate their knowledge and understanding of the same; and
- (2) to respond, in a prompt and efficient manner, to all enquiries directed at him by the Exchange.

5.03 The directors of an issuer are collectively and individually responsible for ensuring the issuer's full compliance with the GEM Listing Rules.

5.04 Every director shall comply with rules 5.41 to 5.59 of this Chapter or the issuer's own set of rules in no less exacting terms. The information notified to the Exchange in accordance with rule 5.59 shall be recorded and released by the Exchange in the same manner as other information notified to it in pursuance of the SDI Ordinance.

Independent non-executive directors

5.05 Every issuer must ensure that, at all times, its board of directors includes at least 2 independent non-executive directors. The Exchange may stipulate a minimum number of independent non-executive directors which is higher than 2 if, in the opinion of the Exchange, the size of the board or other circumstances of the issuer justify it.

5.06 In assessing the independence of a non-executive director account must be taken of the following matters:—

- (1) the holding of a shareholding interest in the issuer of not more than 1 per cent of the total issued share capital will not normally be treated by the Exchange as a bar to independence, but where the director has received those shares as a gift from or by means of other financial assistance from a connected person of the issuer, this will tend to indicate that he is not independent;
- (2) as an indication of independence, the director should normally have no past or present financial or other interest in the business of the issuer or its subsidiaries, (other than a shareholding within the parameters set out in sub-paragraph (1) or an interest as a director or professional adviser) and no past or present connection with any connected person of the issuer other than as professional adviser, which, in either case, might affect his exercise of independent judgment;
- (3) an independent non-executive director would not be expected by the Exchange to have any management function in the group.

Note: In circumstances of any doubt, the Exchange should be consulted prior to the relevant appointment. The factors set out in this rule are not intended to be exhaustive. The Exchange may take account of other factors relevant to a particular case in assessing independence.

5.07 If an independent non-executive director resigns or is removed from office, both the issuer and the individual should immediately notify the Exchange, in each case stating the reasons therefor.

Non-executive directors

5.08 Every non-executive director, whether independent or not, must be appointed for a specific term and that term should be disclosed in the annual report and accounts of the issuer. A person accepting an appointment as a non-executive director must ensure that he can give sufficient time and attention to the affairs of the issuer and should not accept the appointment if he cannot.

Company secretary

5.09 The secretary of the issuer must be a person who has the requisite knowledge and experience to discharge the functions of the secretary of the issuer and who:—

- (1) is a member of The Hong Kong Institute of Company Secretaries, a solicitor or barrister as defined in the Legal Practitioners Ordinance or a professional accountant; or
- (2) is an individual who, by virtue of his academic or professional qualifications or relevant experience, is capable of discharging those functions.

Qualified accountant

- 5.10 Every issuer must ensure that, at all times, it retains an individual, on a full time-basis, whose responsibility it must be to assist the group in connection with its financial reporting procedures and internal controls. The individual must be a qualified accountant and a fellow or associate member of the Hong Kong Society of Accountants or a similar body of accountants recognised by that Society for the purpose of granting exemptions from the examination requirement for membership of that Society.

Note: This rule and rule 5.13 do not apply to an issuer of debt securities, the equity securities of which are not listed on GEM.

- 5.11 The qualified accountant's responsibilities must include, as a minimum, the following matters:—
- (1) advising on and assisting the board of directors of the issuer in developing and implementing financial reporting, internal control and other procedures to provide the board with a reasonable basis for making proper judgments as to the financial position and prospects of the group; and
 - (2) unless he is otherwise a member of the audit committee of the issuer, liaising with the audit committee to assist it in monitoring the development and implementation of such procedures.
- 5.12 The person appointed as the qualified accountant should only terminate his appointment after first notifying the Exchange of such proposed termination and the reasons therefor; and except in exceptional circumstances the issuer should not terminate the appointment of any person as the qualified accountant until it has appointed a replacement. Where a person's appointment as qualified accountant is terminated, both the issuer and the individual concerned should immediately notify the Exchange, in each case stating the reason why such appointment was terminated.
- 5.13 If, at any time, the issuer fails to retain an individual to take on the role of the qualified accountant, the issuer must immediately announce this matter in accordance with the publication requirements set out in Chapter 16, failing which the Exchange reserves the right to announce the same.

Compliance officer

- 5.14 Every issuer must ensure that, at all times, one of its executive directors assumes responsibility for acting as the issuer's compliance officer.

Note: This rule and rule 5.18 do not apply to an issuer of debt securities, the equity securities of which are not listed on GEM.

- 5.15 The compliance officer's responsibilities must include, as a minimum, the following matters:—
- (1) advising on and assisting the board of directors of the issuer in implementing procedures to ensure that the issuer complies with the GEM Listing Rules and other relevant laws and regulations applicable to the issuer; and
 - (2) responding promptly and efficiently to all enquiries directed at him by the Exchange.
- 5.16 A person appointed as the compliance officer should only terminate his appointment after first notifying the Exchange of such proposed termination and the reasons therefor; and except in exceptional circumstances the issuer should not terminate the appointment of any person as the compliance officer until it has appointed a replacement. Where a person's appointment as the compliance officer is terminated, both the issuer and the individual concerned should immediately notify the Exchange of such termination, in each case stating the reason why such appointment was terminated.

- 5.17 If the Exchange is not satisfied that any person appointed as the compliance officer is fulfilling his responsibilities adequately, it may require the issuer to terminate his appointment as compliance officer and appoint or designate a replacement.
- 5.18 If, at any time, the issuer fails to appoint or does not have a compliance officer, the issuer must immediately announce this matter in accordance with the publication requirements set out in Chapter 16, failing which the Exchange reserves the right to announce the same.

Authorised representatives

5.19 Every issuer must ensure that, at all times, it has 2 authorised representatives. The authorised representatives must be 2 individuals from amongst the issuer's executive directors and company secretary (unless the Exchange, in exceptional circumstances, agrees otherwise).

5.20 The responsibilities of an authorised representative are as follows:—

- (1) supplying the Exchange with details in writing of how he can be contacted including home, office and mobile telephone numbers and, where available, facsimile numbers and electronic mail addresses;
- (2) for so long as the issuer continues to have a Sponsor, assisting the Sponsor in its role as the principal channel of communication with the Exchange concerning the affairs of the issuer;

Notes: 1 In this regard, the authorised representatives shall provide the Sponsor with the information necessary to enable the Sponsor to fulfil its duty of communicating on the issuer's behalf with the Exchange.

2 In the event that the Exchange, for whatever reason, is unable to contact or liaise with the Sponsor concerning any particular matter relevant to the issuer, the authorised representatives will be expected to assume full responsibility for contacting or responding to the Exchange concerning that matter.

- (3) from such time as the issuer is no longer required to have (or does not otherwise retain) a Sponsor, acting as the principal channel of communication between the Exchange and the listed issuer (in particular, as regards any communication required prior to commencement of trading in the morning); and
- (4) ensuring that whenever he is away, a suitable alternate is appointed (and authorised to speak on behalf of the issuer), available and known to the Exchange and supplying the Exchange with details in writing of how such alternate may be contacted including home, office and mobile telephone numbers and, where available, facsimile numbers and electronic mail addresses.

Note: If the authorised representatives and, or their alternates are based outside Hong Kong (or are otherwise expected to be frequently outside Hong Kong), they must ensure that they can be readily contactable by the Exchange on the contact details provided to the Exchange under this rule.

5.21 A person appointed as an authorised representative should only terminate his appointment after first notifying the Exchange of such proposed termination and the reasons therefor; and except in exceptional circumstances, the issuer should not terminate the appointment of the authorised representative until it has appointed a replacement. Where a person's appointment as an authorised representative is terminated, both the issuer and the individual concerned should immediately notify the Exchange of such termination in each case stating the reason why such appointment was terminated.

- 5.22 If the Exchange is not satisfied that any person appointed as an authorised representative is fulfilling his responsibilities adequately, it may require the issuer to terminate his appointment and appoint or designate a replacement.

Audit committee

- 5.23 Every issuer must establish an audit committee comprising a minimum of 2 members. The majority of the committee must be independent non-executive directors of the issuer (and, in the case of a committee of 2, both must be independent non-executive directors of the issuer). The audit committee must be chaired by an independent non-executive director.

Note: This rule and rules 5.24 to 5.27 do not apply to an issuer of debt securities, the equity securities of which are not listed on GEM.

- 5.24 The board of directors of the issuer must provide and approve written terms of reference for the audit committee which clearly establish the committee's authority and duties.

Note: For further guidance on establishing an audit committee, issuers may refer to "A Guide For The Formation Of An Audit Committee" published by the Hong Kong Society of Accountants in December, 1997. Issuers may adopt the terms of reference set out in that guide, except that the committee may have a minimum of 2 members, or they may adopt any other comparable terms of reference for the establishment of an audit committee.

- 5.25 The duties of the audit committee must comprise at least the following matters:—

- (1) reviewing, in draft form, the issuer's annual report and accounts, half-year report and quarterly reports and providing advice and comments thereon to the issuer's board of directors. In this regard:—
 - (a) members of the committee must liaise with the issuer's board of directors, senior management and the person appointed as the issuer's qualified accountant and the committee must meet, at least once a year, with the issuer's auditors; and
 - (b) the committee should consider any significant or unusual items that are, or may need to be, reflected in such reports and accounts and must give due consideration to any matters that have been raised by the issuer's qualified accountant, compliance officer or auditors; and
- (2) reviewing and supervising the issuer's financial reporting and internal control procedures.

- 5.26 The issuer must ensure that full minutes are kept of all meetings of the audit committee.

- 5.27 The executive directors of the issuer must ensure that members of the audit committee are provided full and unlimited access to all books and accounts of the issuer and any employees, consultants and advisers they may, from time to time, wish to consult.

Board practices and procedures

- 5.28 Rules 5.29 to 5.39 set out the minimum standards of good practice concerning the general management responsibilities of the board of directors (and related matters) with which issuers and their directors must comply. All issuers are encouraged to devise their own minimum standards on no less exacting terms, in the interests not only of their independent non-executive directors, but of the board of directors as a whole.

- 5.29 Full board meetings should be held no less frequently than every 3 months. "Full" board meetings means meetings at which directors are physically present and not "paper" meetings or meetings by circulation.
- 5.30 The directors' fees and any other reimbursement or emolument payable to an independent non-executive director must be disclosed in full in the annual report and accounts of the issuer (see rules 18.27 and 18.28).
- 5.31 Except in emergencies an agenda and accompanying board papers should be sent in full to all directors at least 2 clear days before the intended date of a board meeting (or such other period as the board agrees).
- 5.32 Except in emergencies adequate notice should be given of a board meeting to give all directors an opportunity to attend.
- 5.33 All directors, executive and non-executive, are entitled to have access to board papers and materials. Where queries are raised by non-executive directors, steps should be taken to respond as promptly and fully as possible.
- 5.34 Full minutes should be kept by a duly appointed secretary of the meeting and such minutes should be open for inspection at any time in office hours on reasonable notice by any director.
- 5.35 If, in respect of any matter discussed at a board meeting, the independent non-executive directors hold views contrary to those of the executive directors, the minutes should clearly reflect this.
- 5.36 Arrangements should be made in appropriate circumstances to enable the independent non-executive directors of the board, at their request, to seek separate professional advice at the expense of the issuer.
- 5.37 If a matter to be considered by the board involves a conflict of interest for a director, a full board meeting should be held and the matter should not be dealt with by circulation or by committee and any director to whom the conflict relates may not form part of the quorum, nor participate in any discussion nor vote at such meeting in respect of such matter.
- 5.38 Every director on the board is required to keep abreast of his responsibilities as a director of a listed issuer. Newly appointed board members should receive an appropriate briefing on the issuer's affairs and be provided with relevant corporate governance materials on an ongoing basis.
- 5.39 The board of directors should give due consideration to all recommendations made to it, from time to time, by the issuer's company secretary, qualified accountant, compliance officer and audit committee.

Securities transactions by directors

- 5.40 Rules 5.41 to 5.59 set out the minimum standard of good practice against which issuers and their directors must measure their own conduct with respect to securities transactions by the directors (the "minimum standard of dealings"). A director must seek to secure that all transactions in which he is or is deemed to be interested are conducted in accordance with the minimum standard of dealings.
- 5.41 The Exchange regards it as desirable that directors of listed issuers should hold securities in their own companies.

- 5.42 Directors wishing to buy or sell such securities must first have regard to the statutory provisions of the SDI Ordinance. However, there are occasions where, even though they would not be expressly culpable under the statutory provisions, directors should not be free to deal in their companies' securities.
- 5.43 The purpose of the minimum standard of dealings is to provide guidance to directors on when those occasions arise. Rules 5.53 and 5.54, which require notification, complement a Hong Kong issuer's obligations under section 29 of the SDI Ordinance to maintain a register of directors' interests in the securities of the issuer and should assist the issuer to meet its statutory duties.
- 5.44 The single most important thrust of the minimum standard of dealings is that directors who are aware of or privy to any negotiations or agreements related to intended acquisitions or disposals which are notifiable transactions under Chapter 19 or connected transactions under Chapter 20 of the GEM Listing Rules or which are or may be price-sensitive should refrain from dealing in the issuer's securities as soon as they become aware of them or privy to them up to the formal announcement of them by the issuer in accordance with the requirements of Chapter 16. Those directors who are not so privy should be cautioned that there may be price-sensitive information and that they should not deal in the issuer's securities for a similar period.
- 5.45 In addition, a director should not make any unauthorised disclosure of confidential information, whether to co-trustees or to any other person (even those to whom he owes a fiduciary duty) or make any use of such information for the advantage of himself or others.
- 5.46 For the purpose of the minimum standard of dealings, the grant to a director of an option to subscribe or purchase his company's securities shall be regarded as a dealing by him, if the price at which such option may be exercised is fixed at the time of such grant. If, however, an option is granted to a director on terms whereby the price at which such option may be exercised is to be fixed at the time of exercise, the dealing is to be regarded as taking place at the time of exercise.
- 5.47 When a director places investment funds under professional management, even where discretion is given, the managers should nonetheless be made subject to the same restrictions and procedures as the director himself in respect of proposed dealings in the issuer's securities.
- 5.48 For the purpose of the minimum standard of dealings, any dealing by a director in derivative warrants (of the type referred to in the Main Board Listing Rules) issued in respect of the listed securities of the issuer shall be treated as a dealing in the securities of the issuer.
- 5.49 A director should not deal in any of the securities of the issuer at any time when he is in possession of unpublished price-sensitive information in relation to those securities.
- 5.50 A director should not deal in the securities of any other issuer listed on GEM or on the Main Board when by virtue of his position as a director of his own company, he is in possession of unpublished price-sensitive information in relation to those securities.
- 5.51 During the period commencing 1 month immediately preceding the earlier of:
- (i) the date of the board meeting (as such date is first notified to the Exchange in accordance with rule 17.48) for the approval of the issuer's results for any year, half-year or quarter-year period; and
 - (ii) the deadline for the issuer to publish announcement of its results for any year, half-year or quarter-year period under rules 18.49 or 18.53,

and ending on the date of the results announcement, a director should not deal in any securities of the issuer unless the circumstances are exceptional, for example, where a pressing financial commitment has to be met. In any event he must comply with the procedure in rules 5.53 and 5.54.

Note: Directors should note that the period during which they are not allowed to deal under rule 5.51 will cover any period of delay in the publication of a results announcement.

- 5.52 The minimum standard of dealings will be regarded as equally applicable to any dealings by the director's spouse or by or on behalf of any infant child and any other dealings in which for the purposes of the SDI Ordinance he is or is to be treated as interested. It is the duty of the director, therefore, to seek to avoid any such dealing at a time when he himself is not free to deal.

Notification

- 5.53 A director should not deal in any securities of the listed issuer without first notifying the chairman (or other director(s) appointed for the specific purpose), and receiving a dated written acknowledgement. In his own case the chairman should first notify the board at a board meeting, or alternatively notify the other director(s) appointed for the purpose and receive a dated written acknowledgement.
- 5.54 The procedure established within the issuer should, as a minimum, provide for there to be a written record maintained by the issuer that the appropriate notification was given and acknowledged, and for the director concerned to have written confirmation to that effect.
- 5.55 Any director of the issuer who acts as trustee of a trust should ensure that his co-trustees are aware of the identity of any company of which he is a director so as to enable them to anticipate possible difficulties. A director having funds under management should likewise advise the investment manager.
- 5.56 Any director who is a beneficiary, but not a trustee, of a trust which deals in securities of the issuer should endeavour to ensure that the trustees notify him after they have dealt in such securities on behalf of the trust, in order that he in turn may notify the issuer. For this purpose he should ensure that the trustees are aware of the companies of which he is a director.
- 5.57 The register maintained in accordance with section 29 of the SDI Ordinance should be made available for inspection at every meeting of the board.
- 5.58 The directors of the issuer should as a board and individually endeavour to ensure that any employee of the issuer or director or employee of a subsidiary company who, because of his office or employment in the company or a subsidiary, is likely to be in possession of unpublished price-sensitive information in relation to the securities of any listed issuer on GEM or the Main Board does not deal in those securities at a time when he would be prohibited from dealing if he were a director.
- 5.59 Every director shall notify the Exchange and the issuer his interests in and dealings in warrants to subscribe for equity securities of the issuer at the same time and in the same manner as if the provisions of the SDI Ordinance relating to interests in shares were extended to include interests in rights to subscribe for shares.