

HKE_x LISTING DECISION
HKE_x-LD96-1 (July 2010)

Parties	Company A – a Main Board listing applicant and its subsidiaries
Issue	Whether persons with past SFC disciplinary records would be suitable to be Company A’s directors
Listing Rules	Rules 3.08 and 3.09
Decision	<ul style="list-style-type: none">• Director X would only be accepted as a director of Company A on condition that he was licensed by the SFC to act as a fit and proper person to carry out regulated activities; and• Director Y would be accepted as a director of Company A provided that the listing document clearly disclosed the non-compliance incidents, remedial actions taken and corporate governance measures.

FACTS

1. Company A operated a securities related business which required licences issued by the Securities & Futures Commission (**SFC**).
2. Two of its directors had been reprimanded by the SFC before the track record period:
 - a. Director X, as the then financial controller, had failed to implement written procedures and diligently review Company A’s capital requirement under Financial Resources Rules (**FRR**). SFC had then concluded that Director X was not “fit and proper” to carry out regulated activities.
 - b. Director Y had recklessly misrepresented that he witnessed clients signing account opening documents and inspected their original identity documents.
3. The sponsor submitted that both directors would be suitable to act as directors under Rules 3.08 and 3.09 because:
 - a. the non-compliance incidents did not involve fraudulent acts; and

- b. both directors had carried out rectification measures since the incidents:
 - (i) Director X had enhanced Company A's internal control system to prevent further FRR breaches. His licence to carry out regulated activities had not been revoked by the SFC. Instead he gave up his licence voluntarily as his current role as the Company's financial controller did not require him to be licensed.
 - (ii) Director Y had enhanced the procedures for witnessing client signatures and since then there had been no further breach. Director Y was considered a "fit and proper" person to carry out regulated activities and acted as Company A's responsible officer.

APPLICABLE LISTING RULES

- 4. Rule 3.08 states that the Exchange expects the directors to fulfill fiduciary duties and to have duties of skill, care and diligence to a standard at least commensurate with the standard under Hong Kong law.
- 5. Rule 3.09 provides that every director of a listed issuer 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 a listed issuer.

ANALYSIS

- 6. The SFO does not require every director of a licensed corporation to be a licensed person¹.
- 7. However, the Exchange may adopt a different eligibility standard for directors of an issuer engaging in a SFC-regulated business.
- 8. Given the past non-compliance record of Director X and his current role in Company A, it would be important that if Director X applied for a SFC licence he would be granted one.

¹ SFO requires a licensed corporation to appoint at least 2 responsible officers for each type of regulated activities. One of them must be an "executive officer" under the SFO meaning who must be responsible for directly supervising the business of regulated activities of the licensed corporation.

9. The Exchange does not consider that having a past non-compliance record necessarily means that a person could not be accepted as the issuer's director. Suitability of that person to act as director of a listed issuer will be assessed by considering a number of factors:
- whether the non-compliance incidents raise serious concern on an individual's integrity;
 - whether the issuer can demonstrate and the sponsor can confirm that the proposed director has carried out rectification measures to avoid recurrence;
 - whether the issuer's internal control is sufficient to ensure due compliance with all laws and regulations going forward and is not susceptible to undue influence of any one director; and
 - whether adequate disclosure has been made to enable investors to appreciate that person's character.
10. A director must perform his duties to a standard reasonably expected of directors and is answerable to shareholders and other stakeholders. Where a person is likely to exert influence over the issuer as a director, investors are better protected by requiring him to take full responsibility as a director.
11. Where a person is likely to exert substantial influence on the issuer after listing and has had a past record of serious dishonest misconduct or criminal conviction, there would be concern about the issuer's suitability for listing which could not be solved by the person refraining from acting as the issuer's director.

CONCLUSION

12. The Exchange concluded that:
- a. Director X would only be accepted as a director of Company A on condition that he was licensed by the SFC to act as a fit and proper person to carry out regulated activities; and
 - b. Director Y would be accepted as a director of Company A provided that the listing document clearly disclosed the non-compliance incidents, remedial actions taken and corporate governance measures.