



By email (response@hkex.com.hk)

9 October 2020

Our Ref.: C/CFAP, M127576

Hong Kong Exchanges and Clearing Limited
8th Floor, Two Exchange Square
8 Connaught Place
Central
Hong Kong

Dear Sirs,

Re: Consultation Paper – Review of Listing Rules relating to Disciplinary Powers and Sanctions

Please find attached a questionnaire response to the above consultation. The consultation paper has been considered by the Hong Kong Institute of Certified Public Accountants' Corporate Finance Advisory Panel.

While, in principle, we are supportive of the introduction of more effective and graduated disciplinary and sanctioning powers by the Exchange, we have concerns about the lowering or removal of thresholds for taking action, including the threshold of "wilful or persistent failure" to discharge responsibilities, under the existing Listing Rules 2A.09(7) and (9). Removing such thresholds could potentially open the door to the imposition of severe sanctions for relatively less significant and inadvertent breaches of the Rules. Even if this not the intention, the wide discretion to initiate action that these changes could give to the Exchange will create uncertainty. While we agree with a number of the specific proposals, as indicated in our response, our agreement is predicated on this fundamental point being addressed.

We also have concerns about the extent to which the "Relevant Parties" subject to disciplinary actions and sanctions will be expanded to cover professional advisers, under a form of "secondary liability", which is not made clear in the proposed detailed wording changes to the Rules. We appreciate that section 23(8) of the Securities and Futures Ordinance (Cap. 571) will continue to apply in relation to arrangements between the Exchange and relevant regulatory bodies, including the Institute, as the consultation paper makes clear. However, there will nevertheless be implications for the kinds of cases that may in future be referred to those bodies and this needs to be considered carefully.

Our detailed comments are contained the questionnaire. We hope that you find these to be helpful and constructive.



Should you have any questions on this submission, please feel free to contact me at the Institute on [REDACTED] or at [REDACTED]

Yours faithfully,

[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]

Encl.

Part B Consultation Questions

Please reply to the questions below that are raised in the Consultation Paper downloadable from the HKEX website at: <https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/August-2020-Disciplinary-Powers/Consultation-Paper/cp202008.pdf>. Please indicate your preference by ticking the appropriate boxes.

Where there is insufficient space provided for your comments, please attach additional pages.

We encourage you to read all of the following questions before responding.

1. We propose to amend the existing threshold for imposing a PII Statement and to make it clear that a PII Statement can be made whether or not an individual continues in office at the time of the PII Statement. Do you agree?

☐ Yes

☒ No

If your answer to the above question is “no”, please provide reasons for your views.

We agree that a PII (prejudicial to the interests of investors) Statement should be able to be made whether or not an affected individual continues in office at the time of the PII Statement. However, we do not agree with removing the threshold of “wilful or persistent failure” by a director to discharge his (or her) responsibilities under the listing rules, without replacing it with something else. This would be too open-ended and, in principle, put a director, or member of the senior management (under the expanded rule) who may make a single inadvertent breach, with a low likelihood of significant consequences for shareholders or other parties (the operative wording being, “may cause prejudice to the interest of investors”), at risk of a severe sanction. In the context of sanctions under the law, generally, for example, “reckless” conduct may be seen as a lower threshold than wilful conduct, while still requiring a mental element to be established. This might be one alternative threshold that the Exchange could consider.

2. We propose to extend the scope of a PII Statement to include directors and senior management of the relevant listed issuer and any of its subsidiaries. Do you agree?

☒ Yes

☐ No

If your answer to the above question is “no”, please provide reasons for your views.

We agree, subject to our response to Question 1.

3. We propose to enhance follow-on actions where an individual continues to be a director or senior management member of the named listed issuer after a PII Statement has been made against him. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

4. We propose that, after a PII Statement with follow-on actions has been made against an individual, the named listed issuer must include a reference to the PII Statement in all its announcements and corporate communications unless and until that individual is no longer its director or senior management member. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

5. We propose to extend the current express scope of disclosure in listing applicants' listing documents and listed issuers' annual reports in respect of their directors and members of senior management (current and/or proposed, as the case may be) by requiring provision of full particulars of any public sanctions made against those individuals. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

6. We propose to remove the existing threshold for ordering the denial of facilities of the market. Do you agree?

☐ Yes

☒ No

If your answer to the above question is "no", please provide reasons for your views.

Please see our response to Question 1

7. We propose to include fulfilment of specified conditions in respect of the denial of facilities of the market. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree, subject to our response to Question 6.

8. We propose to introduce the Director Unsuitability Statement as a new sanction. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

9. We propose that the follow-on actions and publication requirement in respect of PII Statements also apply to Director Unsuitability Statements. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

10. We propose to impose secondary liability on Relevant Parties if they have 'caused by action or omission or knowingly participated in a contravention of the Listing Rules'. Do you agree?

☐ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We note and welcome the commitment, at paragraph 97 of the consultation paper, that section 23(8) of the Securities and Futures Ordinance (Cap. 571) will continue to apply in relation to arrangements between the Exchange and relevant regulatory bodies. At the same time, we observe that the concept of "secondary liability" does not seem to be reflected in the proposed wording changes to the rules, which simply expand the list of parties that may be sanctioned.

Furthermore, paragraph 92 of the consultation paper indicates that the determination as to whether a person is subject to secondary liability for rule breaches lies with the Exchange, and some examples are set out in paragraph 93. We would suggest, however, that additional clarification is needed regarding how a decision would be made. The wording "has caused by... omission or knowingly participated in a contravention," reflects, potentially, a wide scope. There may be, for example, circumstances in which professionals may be responsible for a specific piece of the work only within a project, and may not get access to all the documents in a transaction, or sometimes they may simply be copied in on a mass project email. It is unclear whether, under such circumstances, they may be at risk of "secondary liability."

The examples in paragraph 93 include a company secretary. However, in some cases, the company secretary's role may be primarily to assist on the preparation of public announcements and authorisation for publication, and they may not be given full access of all the information relating to the transactions. This may well be the case where the company secretary's role is outsourced to an external service provider.

In circumstances where "secondary liability" for rule breaches is extended to company secretaries, purported breaches should be referred by the Exchange to the relevant professional bodies in Hong Kong for follow up and possible disciplinary action.

11. We propose to include an explicit provision permitting the imposition of a sanction in circumstances where there has been a failure to comply with a requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee of the Exchange. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

12. We propose that sanctions may be imposed on all Relevant Parties through secondary liability where a party has failed to comply with a requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee. Do you agree?

☒ Yes

☐ No

If your answer to the above question is “no”, please provide reasons for your views.

We agree.

13. We propose to explicitly provide in the Rules the obligation to provide complete, accurate and up-to-date information when interacting with the Exchange in respect of its enquiries or investigations. Do you agree?

☐ Yes

☐ No

If your answer to the above question is “no”, please provide reasons for your views.

Generally, we agree that parties responding to enquiries or investigations by the Exchange should provide information that is accurate, complete and up to date, i.e., not inaccurate, false or misleading, including by deliberate omission. However, we have some concern about the statement in paragraph 107 of the consultation paper that parties should provide “all information relevant to [the Exchange’s] enquiries even if it has not requested the specific information.” This would appear to suggest that the Exchange could embark on a “fishing expedition” and potentially penalise parties for not voluntarily providing information that the Exchange subsequently deemed to be relevant. This would be going too far.

We would refer you the “Report on Improving Corporate Governance in Hong Kong” (December 2017) issued by the Hong Kong Institute of Certified Public Accountants (co-authored by Syren Johnstone and Say H. Goo). In order to strengthen corporate governance and avenues for enforcement, Recommendation C4.5.2 therein proposed that listed issuers and their directors be subject to (1) a continuing obligation to promptly report breaches of the listing rules and (2) an annual obligation to certify compliance with the listing rules, subject to any disclosure under (1). It was also proposed that these disclosures be brought within the ambit of section 384(3) of the Securities and Futures Ordinance. This is an approach that could be considered further to enhance disclosures by listed companies and their boards.

Recommendation C4.6.1 in the above report notes that the Exchange already has ostensibly broad disciplinary powers, e.g., under the existing Rule 2A.09 (6) and (10) (2A.10 (11) and (12) of the proposed revised rules) that could be used to better effect.

14. Do you agree with the proposed definition of ‘senior management’?

☐ Yes

☒ No

If your answer to the above question is “no”, please provide reasons for your views.

The definition of "senior management", at paragraph 115 of the consultation paper, includes a company secretary generally. However, in some cases, as indicated in our response to Question10, company secretaries' role may, in practice, be limited and they may not be given full access of all the information on the transactions, especially where the company secretary function is outsourced to an external service provider. A distinction may need to be drawn between in-house company secretaries and external providers.

We would also query whether arm (b) of the definition is sufficiently clear to target only senior-level management staff. In this regard, we note that European Union Regulation 596/2014 refers specifically to "a member of the administrative, management or supervisory body of that entity" or "a senior executive", while the listing rules or requirements of the Shanghai Stock Exchange and Bursa Malaysia also seem to adopt a more targeted approach than the definition proposed in paragraph 115, in terms of the seniority of the persons included.

15. We propose to include employees of professional advisers of listed issuers and their subsidiaries as a Relevant Party under the Rules. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

Yes, but generally this should be limited to senior management staff, as for "Relevant Parties" within listed issuers and their subsidiaries.

16. We propose to include guarantors of structured products as a Relevant Party under the Rules. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

17. We propose to include guarantors for an issue of debt securities as a Relevant Party under the MB Rules. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

18. We propose to include parties who give an undertaking to, or enter into an agreement with, the Exchange as Relevant Parties under the Rules. Do you agree?

☐ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

The implications of this proposal are unclear and the scope seems vague. Is it proposed, for example, that a breach of any undertaking given to, or agreement with the Exchange will, in future, be regarded as tantamount to a breach of the listing rules?

19. We propose to extend the ban on professional advisers to cover banning of representation of any or a specified party. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

20. We propose to include express obligations on professional advisers when acting in connection with Rule matters. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We note and welcome the commitment, at paragraph 142 of the consultation paper, that section 23(8) of the Securities and Futures Ordinance (Cap. 571) will continue to apply in relation to arrangements between the Exchange and relevant regulatory bodies.

Our agreement with this proposal is also subject to clarifying in the rules that the obligation under (a) of paragraph 141, i.e., that a professional adviser's obligation is to use all reasonable efforts to ensure that their clients understand and are advised as to the scope of, and their obligations under, the rule(s), is limited to those rules on which the professional adviser is advising and related rules, not the whole of the listing rules.

21. We propose that 'business day' be used as the benchmark for counting the periods for filing review applications, and for requesting or providing written reasons for decisions. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

22. We propose that all review applications must be served on the Secretary. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

23. We propose that the counting of the period for filing review applications be from the date of issue of the decision or the written reasons. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

24. We propose that the counting of the period for requesting written reasons be from the date of issue of the decision. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

25. We propose that the counting of the period for providing written reasons be from the date of receipt of the request. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

We agree.

- End -