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 with the proposal to clarify that a PII Statement can be made whether or not an individual continues in office at the time of the making of the PII Statement. Such clarification captures cases where the directors and/or senior management concerned are no longer on the board at the time of the disciplinary action.

We in general agree with the amendment to the existing threshold for imposing a PII Statement, in light of the evidential difficulty with proving the existing element of "wilful or persistent". However, whilst we understand that the Exchange should have certain flexibility when dealing with different types of misconduct by individual directors and/or senior management of listed issuers, the market would desire certainty as to what conduct would be of sufficient seriousness to attract a PII. Given its severity, we welcome the Exchange to set out objective criteria for making a PII Statement and provide guidance as to what would be considered as potentially causing prejudice to the interests of investors.

The Exchange may also consider revising its Enforcement Policy Statement and Statement on Principles and Factors In Determining Sanctions And Directions Imposed By The Disciplinary Committee And The Review Committee if the proposal is adopted, in order to provide clarity and certainty to the market.

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 with the proposal to extend the scope of a PII Statement to include directors and senior management of the relevant listed issuer and any of its subsidiaries as this helps address the concern that individuals who are not suited to continue their roles as directors and/or senior management of a listed issuer may maintain significant influence within that listed issuer by taking up directorship or senior management position at the subsidiary level.

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 with the proposal 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 so as to provide a graduated response to the individual's retention of office (which currently is limited to suspension or cancellation of listing of the issuer's securities).

We consider that the imposition of the proposed follow-on actions would effectively deter the named listed issuer from continuing with the appointment of the subject individual and encourage the issuer to remove the individual so as to avoid disciplinary actions by the Exchange. It would also prompt other listed issuers which have appointed the individual as a director or senior management to review that appointment, notwithstanding that the conduct in question might not be directly related to them.

Given the potential severe consequences to both the individual and the listed issuer concerned, whilst we in principle agree to the proposal, we stress the importance of more clarity and certainty as to the basis of or circumstances in which the Exchange may consider the occupying of the position of a director or senior management by an individual to have the potential of causing prejudice to the interests of investors and that follow-on actions would be directed.

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 (subject to comments under Question 3)

☐ No

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

We agree with the proposal 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. This operates as an effective inducement for the listed issuer concerned to remove the individual in question from directorship or senior management. This also promotes transparency and visibility for shareholders of the listed issuer and the investing public on the state of affairs of the listed issuer.

Please see our response in Question 3 as well.

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 with the proposal 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 by requiring provision of full particulars of any public sanctions made against those individuals. In particular, this makes it more difficult for director or senior management member with questionable conduct or of questionable character to roll onto other listed issuers undetected.

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.

We agree with the proposal to remove the existing threshold for ordering the denial of facilities of market provided that guidance is provided by the Exchange as to the circumstances in which this sanction may be imposed.

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 with the proposal to include fulfilment of specified conditions in respect of the denial of facilities of the market as this would encourage listed issuers to take positive remedial steps in the event of a breach instead of adopting a passive stance.

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.

<table><tr><td>We agree in general that if a director is unsuitable to be a director or senior management of a listed issuer by virtue of his conduct in relation to the affairs of the listed issuer, the market should be alerted and the relevant listed issuers (including listed issuers which are not the subject of the misconduct) should consider whether to retain that individual. We also agree in principle that there should be different degrees of sanctions available to the Exchange depending on the degree of culpability of the impugned conduct. However, we consider there is a potential for confusion as to the consequences and effect of a PII Statement (in particular the proposed enhanced PII Statement) and a Director Unsuitability Statement. There are three potential outcomes relating to the PII Statement and Director Unsuitability Statement - (i) PII Statement; (ii) PII Statement with follow-on action; and (iii) Director Unsuitability Statement with follow-on action. The similarities and overlapping consequences of these sanctions make them difficult for the public and those subject to the Exchange's disciplinary regime to understand and comprehend.

Accordingly, the market may desire more clarity as to the circumstances in which the Exchange may impose a Director Unsuitability Statement as opposed to a PII Statement / proposed enhanced PII statement, and their respective effect. While it is noted that a Director Unsuitability Statement would be imposed in egregious or severe cases (as opposed to serious cases in which PII Statement with follow-on action would be more suitable), it is suggested that guidance be given as to what would amount to egregious or severe cases and what would amount to serious cases.</td></tr></table>

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 with the proposal that the follow-on actions and publication requirement in respect of PII Statement also apply to Director Unsuitability Statements, subject to our response in Question 8 on providing guidance to the market on the different thresholds and effects of a PII Statement and Director Unsuitability Statement.

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 agree in general with the proposal 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'. The proposal enhances individual accountability which should improve compliance by listed issuers. This also addresses the regulatory gap caused by the existing lack of Rule obligations in respect of certain Relevant Parties, such as senior management of a listed issuer. In relation to the example of the operation of the proposed secondary liability in paragraph 93(d) in the Exchange's Consultation Paper, we understand that currently the Listing Rules do not specifically require substantial shareholders to take appropriate action to procure the issuer's compliance with the minimum public float requirement. Further, under common law, a shareholder is not obligated to act in the best interest of the company of which they are a shareholder, and can instead act in furtherance of their own interest. Against such background, we doubt whether it is appropriate to impose sanctions on substantial shareholders who refuse to act or approve proposals which would address the issue of minimum public float.

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 (subject to comments under Question 10)

☐ No

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

We agree in general with the proposal 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, subject to our response in Question 10.

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 (subject to comments under Question 10)

☐ No

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

We agree with the proposal 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, subject to our response in Question 10.

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.

We agree with the proposal 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. Stating this explicitly in the Rules would provide the Exchange a separate route (apart from s384 of the Securities and Futures Ordinance ("**SFO**") to penalise the provision of false or misleading information to the Exchange in its enquiries or investigations.

Although not expressly stated in the proposed amended rule, paragraph 107 of the Consultation Paper states that *"The Exchange expects parties subject to its enquiries and investigations to provide all information relevant to its enquiries even if it has not requested the specific information"*. Whilst we agree that all parties subject to an enquiry or investigation by the Exchange should provide complete and accurate information as requested, we note that it could be an onerous burden on them to provide information which has not been specifically asked for. Parties should not be expected to speculate the enquiry / investigation direction of the Exchange and provide documents not specifically requested. It would not be proportionate to penalise parties for not volunteering enough information. Also, if parties are expected to volunteer information not specifically requested, they may, taking a precautionary position, be inclined to submit voluminous information which could increase costs and time required to complete the enquiry or investigation.

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.

We agree with and welcome the proposed definition of 'senior management'. Defining "senior management" would provide more clarity and certainty to the market.

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 (subject to comments below)

☐ No

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

This proposal may subject an employee of a solicitors firm who has advised a listed issuer to disciplinary proceedings. We understand the policy rationale behind this proposal is to give teeth to the existing disciplinary sanction against employees of professional advisers (i.e. banning a named individual employed by a professional adviser from representing a specified party), which cannot be imposed because currently employees of a professional adviser are not a Relevant Party.

We note that professional advisers are already governed by relevant regulatory bodies. In the case of solicitors firms, the Memorandum of Understanding between the Exchange and the Law Society of Hong Kong signed in 1996 ("**MOU**") recognises that *"as solicitors are subject to duties imposed by law and by their own professional body, it would generally be inappropriate for the Exchange to seek to regulate solicitors."* (para 1.2 of MOU)

The MOU provides that the Exchange will not make rules in the Listing Rules or make any public findings, impose any penalty or sanction or take other disciplinary action against a solicitor in private practice save in three circumstances: a solicitor in private practice (a) makes an untrue representation to the Exchange; (b) knowingly or recklessly facilitates or participates in a breach of the Listing Rules; and (c) knowingly or unreasonably fails to advise client in relation to the requirements of the Listing Rules, or incorrectly advises his client in relation to the Listing Rules, knowing such advice to be incorrect or with reckless disregard as to its correctness (the "**Circumstances**"). (paras 2.3 and 3.1 of MOU)

The current proposal appears to have the objective of bringing the Listing Rules in line with the MOU, by providing the Exchange power to penalise solicitors in certain circumstances relating to Rule breaches, while not undermining the position that the Law Society is the primary regulator of solicitors. We agree with this approach and would submit that in light of the wide ranging duties of solicitors under professional body's regulation, common law and statutes, it would be disproportionate for the Exchange to extend its disciplinary powers against solicitors beyond those situations stipulated in the MOU.

In respect of legal professional privilege, it is unclear whether the proposal will result in the Exchange requesting for contents of advice given by a solicitor and/or other privileged materials, and if so, whether such content and materials are protected by legal advice privilege, or would the Exchange expect a waiver of privilege. Para 3.3 of MOU expressly recognises the relevance of the strict duty of confidentiality owed by a solicitor to its client (i.e. solicitors must not divulge information concerning the business and affairs of their clients acquired in the course of professional relationship *"unless such disclosure is expressly or impliedly authorised by the relevant client or required by law or unless the relevant client has expressly or impliedly waived the duty of confidentiality."*)

In short, we agree with the proposal so long as the MOU is not undermined by this rule amendment, and that the Exchange continues to acknowledge a solicitor's duty of confidentiality to its client and the fundamental right of legal professional privilege which a client enjoys and which can only be waived by the client.

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.

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.

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.

We agree with the proposal to include parties who give an undertaking to, or enter into an agreement with, the Exchange as Relevant Parties. This would provide the Exchange with more avenues to pursue those who are in breach of such undertakings / agreements, and would widen the scope of remedies / sanctions available to the Exchange in response to such breach.

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 understand the proposal to be that a professional adviser could be banned from representing any party (and not just the party in respect of which the disciplinary proceeding is being brought) in any matter coming before the Listing Division or the Listing Committee. The consequences of this proposal is draconian for the professional adviser concerned. We doubt the need for such sweeping and draconian disciplinary power given the wide ranging duties which professional advisers are under, and the sanctions which could potentially be imposed on professional advisers by their regulatory bodies and under common law and statute.

Also, professional advisers function in teams led by different principals of the firm. It does not appear proportionate that the whole firm of professional advisers should be banned from representing any party (and therefore denied business) in all matters relating to the Exchange because of select principal / employee's conduct. We respectfully submit that the existing sanction of banning representation of a specified party is already of sufficient deterrent effect.

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

☑ Yes (subject to comments under Question 15)

☐ No

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

Please see our response in Question 15.

In addition, we would add that the formulation of the professional advisers' duty in the proposed amended rule - *"shall use all reasonable efforts to ensure that their clients understand and are advised as to the scope of and their obligations under the Listing Rules"* is not entirely consistent with para 3.1(c) of the MOU, which states that the Exchange should only make rules / impose sanctions in respect of solicitors if the solicitor *"when acting for a client in relation to a listing matter, knowingly or unreasonably fails to advise his client in relation to relevant requirements of the Listing Rules, or incorrectly advises his client in relation to such requirements of the Listing Rules, knowing such advice to be incorrect or with reckless disregard to its correctness"*.

For situations where a professional adviser incorrectly advises his client as to the requirements of the Listing Rules, while the proposed amended rule set the standard of "reasonableness" (such that if the solicitors advised unreasonably / negligently, he would be caught), para 3.1(c) of the MOU is less onerous as it requires the mental state of "knowledge" or "recklessness" (such that only if the solicitor knowingly / recklessly gave wrong advice would he be caught). Therefore, the current proposed amended rule appears to be more stringent than that envisaged under the MOU. We reiterate our comment under Question 15 that the rule amendment should not deviate from / impose a standard more stringent than the MOU, given the Law Society is the primary regulator of solicitors.

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.

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.

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 with the proposal that the counting of the period for filing review applications be from the date of issue of the decision or the written reasons, whichever is later.

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.

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.

- End -