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.

The Group strongly opposes lowering the threshold for imposing a PII Statement to conduct which, "*in the Exchange's opinion … may cause prejudice*" to investors' interests. A threshold of any conduct which "*may cause prejudice*" would allow a PII statement to sanction conduct involving a *mere possibility* of a prejudicial effect. Making that determination would also involve a significant degree of subjectivity which is unacceptable given the serious consequences of a PII Statement for a director or management member. The proposal, in essence, is that there would be *no* threshold at all for imposing a PII Statement on an issuer's directors or management members once a Listing Rule breach is established, which cannot be right.

The deleted threshold of "*wilful or persistent failure*" in performance of a director's duties needs to be replaced with an alternative threshold which is linked to the individual's responsibility for the breach. This could be framed in terms of the individual having aided, abetted, counselled or procured the breach, or knowing of or consenting to it. To warrant the imposition of the sanction, the Listing Rule breach should additionally be "*likely to adversely affect*" (rather than "*prejudice*") investors' interests.

The Group agrees with the proposal that a PII Statement should be able to be made after an individual has left office.

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.

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.

The Group agrees with the Exchange that there need to be consequences for an issuer which fails to remove a director the subject of a PII Statement, otherwise the statement becomes meaningless. However, the Group has reservations regarding the potentially adverse consequences for issuers' minority shareholders of the Exchange denying issuers the market's facilities, which will give the Exchange carte blanche to withhold approval for any matter requiring its approval under the Listing Rules (according to the definition in Note 4 to Rule 2A.10). The Group does not consider this proposal to be warranted and is concerned that in seeking to penalise the issuer's directors, the Exchange will actually punish its minority shareholders which is unfair given that they are generally not in a position to influence the board's behaviour. For example, the Exchange would be able to deny its approval of a new share issue which might adversely affect minority shareholders. That the minority shareholders should be prejudiced for conduct for which they are not responsible and which they cannot remedy is manifestly unfair. The Group would advocate a more graduated process before the Exchange denies an issuer the market's facilities. For example, the Listing Rules could be revised to require the board of a listed issuer to take steps to remove a director the subject of a PII Statement, or to make an announcement of its reasons for not proceeding with the director's removal. Additional obligations, e.g. to obtain independent shareholders' approval, could be imposed where a board proposes not to remove the director.

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.

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.

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.

The Group is strongly opposed to removing the threshold for denying issuers the facilities of the market. Although the Consultation Paper (at paragraph 68) suggests that the sanction would be reserved for serious Listing Rule breaches or repeated breaches adversely affecting shareholders, this is not reflected in the proposed Listing Rule revisions in Appendix 1. At least on its face, proposed Rule 2A.10(6) would enable the Listing Committee to deny an issuer the facilities of the market for breach of any of the Listing Rules, however insignificant. While it may not be feasible to set out an *exhaustive list* of the circumstances in which the sanction can be imposed (as alleged by the Consultation Paper at paragraph 67), it must be possible to indicate the general degree of severity of Listing Rule breach which would warrant its imposition. If "*wilful or persistent failure*" is too difficult a threshold to establish, it could be replaced by "*serious or persistent breaches of the Listing Rules*" or breaches the effect of which is "*seriously detrimental*" to the listed issuer and its shareholders.

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.

While the Group agrees that denial of the market’s facilities should terminate on the issuer’s fulfilment of any “specified conditions” that are imposed (or a specified date), it would welcome greater clarity as to the type of conditions that could be imposed (other than requiring the Listing Rule breach(es) to be remedied, which is referred to in the Consultation Paper). The Exchange and the Listing and Listing Review Committees will need to be cognizant that the denial of the facilities of the market may, in some circumstances, prejudice the interests of the issuer and its minority shareholders to a greater extent than the interests of the controlling shareholders. Care will therefore need to be taken in formulating the specified conditions to minimise the potential disadvantage to minority shareholders in particular cases.

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.

The Group agrees with the introduction of the Director Unsuitability Statement, subject to a requirement that a director’s failure to discharge his or her Listing Rule responsibilities should have had a material adverse effect on the listed issuer or its shareholders.

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.

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.

The Group is fundamentally opposed to the proposal that the Exchange should be able to sanction financial advisers, solicitors and accountants for causing or knowingly participating in a contravention of the Listing Rules or failure to comply with a Listing Division/Committee requirement.

The scope of the proposed sanction under proposed Rule 2A.10(9) is excessive. In allowing the Listing Committee to ban a professional adviser or any individual employed by it from *representing any party*, albeit for a specified period, the proposed sanction would effectively enable the Listing Committee to put a professional adviser out of business or terminate the career of the individual concerned. The Group has serious concerns about the suitability of the Listing Committee and Listing Review Committee as forums for making judgments which have serious and far-reaching consequences for professional advisers and their employees. Decisions of this gravity should only be made following a vigorous and independent judicial process in an independent judicial forum, and with a higher threshold of wrongdoing. Given the above, the Group does not consider the Listing and Listing Review Committees to provide suitable forums for banning professional advisers and their employees from acting on listing-related matters.

In addition, the Group is particularly opposed to the proposed duplication of the disciplinary regime to which financial advisers are already subject which risks exposing financial advisers and their employees to double jeopardy where their role in a listed issuer’s Listing Rule breach renders them subject to disciplinary sanctions being imposed by both the Exchange and the Securities and Futures Commission (“SFC”). The SFC is the primary regulator of financial advisers and has wide powers to discipline financial advisers and their licensed or registered employees under the Securities and Futures Ordinance (the “SFO”). The SFC has broad powers to suspend or revoke the licence of a firm or individual and/or to ban them from re-applying to be licensed for conduct which the SFC considers to render them no longer “fit and proper” to be licensed (Section 194 of the SFO). The situations in which the Listing Committee could ban a financial adviser or its employee under proposed Rule 2A.10(9) are likely already covered by section 194. The SFC could thus revoke or suspend a financial adviser’s licence and/or impose a ban on any future licensing applications to achieve the same result sought by the Exchange under proposed Rule 2A.10(9). The Group considers it essential that there is a clear demarcation of disciplinary authority between the Exchange and the SFC. As the primary regulator of licensed entities, the SFC should be solely responsible for disciplining financial advisers in the same way as it is responsible for sanctioning sponsors and compliance advisers who are carved out of the definition of “professional advisers”.

Similar arguments apply to the Exchange’s proposed ability to ban lawyers and accountants and their staff members from working on listing-related matters. As noted in the Consultation Paper, the Exchange is bound by Section 23(8) of the SFO to refer breaches of the Listing Rules by solicitors or accountants to the Law Society of Hong Kong or the Hong Kong Institute of Certified Public Accountants

("HKICPA") for determination and sanction in accordance with the arrangements entered into between the Exchange and those professional bodies. Paragraph 142 of the Consultation Paper provides that disciplinary actions against professional advisers covered by Section 23(8) SFO "*will be limited to matters governed by or arising out of the Rules and accord with the arrangements agreed from time to time between the Exchange and the relevant regulatory body*". That principle, which is not reflected in the proposed Listing Rule amendments, needs to be explicitly provided for in the Listing Rules by ensuring that the Exchange is only able to discipline solicitors and accountants in the circumstances which the Law Society and the HKICPA have agreed that the Exchange may discipline their members. The Memorandum of Understanding entered into between the Exchange and the Law Society, for example, only allows the Exchange to impose a penalty or sanction on a solicitor in three circumstances: (1) if the solicitor makes an untrue representation to the Exchange: (a) made on instructions of his client and which the solicitor knows to be untrue or made with reckless disregard as to its truthfulness or (b) made otherwise than on the instructions of a client by a solicitor who knows it to be untrue or without making reasonable inquiries as to its truthfulness; (2) if the solicitor knowingly or recklessly facilitates or participates in a Listing Rule breach; and (3) where acting for a client on a listing matter, a solicitor 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, knowing such advice to be incorrect or with reckless disregard as to its correctness (Memorandum of Understanding Between the Law Society of Hong Kong and the Stock Exchange of Hong Kong). The circumstances in which the Exchange may sanction solicitors as set out in the Memorandum of Understanding are far narrower than proposed by the Consultation Paper. Proposed Listing Rule 2A.10(9) would allow the Exchange to ban a firm of solicitors or accountants where there has been a Listing Rule breach. The Exchange's proposals to be able to impose a ban on a solicitors' or accountants' firm should therefore be re-written in line with the agreements already reached with the Law Society and the HKICPA as to the situations in which the Exchange may exercise disciplinary powers. Alternatively, relevant matters should be referred to the relevant professional body for determination.

The Group is concerned that the Exchange's proposed extension of its regulatory remit to cover persons who are already supervised and regulated for the same conduct by other bodies (the SFC in the case of financial advisers, the Law Society in the case of solicitors and the HKICPA in the case of accountants) will lead to overlapping regulatory regimes, over-regulation, confusion and the potentially inconsistent exercise of regulatory powers by the different regulatory bodies. It is also unclear whether the Exchange and the Listing and Listing Review Committees possess the appropriate investigative powers, resources and expertise as a finder of all facts. This would again suggest that the disciplining of SFC-regulated financial advisers, solicitors and accountants is best left to the SFC and the professional bodies. The Exchange is the regulator of listed issuers and their directors, parties who have entered into a contractual relationship with the Exchange. There is no contractual relationship between professional advisers and the Exchange and their conduct should be regulated solely by the appropriate regulatory or professional body, except to the extent that body has agreed circumstances in which the Exchange may impose penalties or sanctions.

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.

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.

The Group agrees with this proposal subject to the objections noted in its response to Question 10 in relation to imposing secondary liability on financial advisers, solicitors and accountants.

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.

The Group has no objection to a general obligation to provide complete, accurate and up-to-date information in responding to the Exchange's inquiries. It is however concerned by the statement at paragraph 107 of the Consultation Paper that the Exchange expects parties "*to provide all information relevant to its enquiries even if it has not requested the specific information*". A party under investigation or subject to enquiries should only have to respond to questions which have been properly and fully particularised, rather than having to speculate what an investigator thinks is relevant and to face sanctions for failing to guess at what is relevant. A serious investigator should be able to draft specific questions that cover accurately the information the investigator is seeking.

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 Group agrees with the proposal but would like to clarify how a person is designated as senior management. Presumably this would include those referred to as senior management members in issuers' financial reports? The Consultation Paper gives a "board secretary" as an example of someone who could be subject to secondary liability. Note 51 to the Consultation Paper notes that a board secretary is among the "senior officers" subject to liability under the listing rules of the Shanghai Stock Exchange and thus appears to be a term relevant only to issuers incorporated in the PRC and not a reference to an individual who merely acts as a secretary for a board meeting in the capacity of a note or minute taker. For the sake of clarity, consideration should be given to revising paragraph (i) of the definition of "senior management" in Rule 2A.09(2)(c) to include "in the case of a PRC issuer, a board secretary as defined in [relevant PRC regulations]".

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.

As detailed in the response to Question 10, the Group is concerned about double jeopardy given that the employees of licensed/registered financial advisers are already subject to the disciplinary regime of the SFC. Any conduct on their part which the SFC considers renders them unfit to be licensed (which should cover the scope of conduct the Exchange is seeking to be sanction) can be sanctioned by the SFC suspending or revoking their licence. Like sponsors and compliance advisers, the Group considers that financial advisers, which are regulated and licensed by the SFC, should be carved out from the definition of professional advisers. The Group also opposes the Exchange's proposed ability to sanction the employees of law and accountancy firms who are already subject to the disciplinary regimes of the Law Society and the HKICPA.

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.

The Group agrees with the proposal provided that the contrary is also true, i.e. that parties who have not given an undertaking to or entered into an agreement with the Exchange are not Relevant Parties under the 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.

The Group strongly opposes this proposal which, as already mentioned, would effectively enable the Listing Committee to put a professional adviser out of business. As noted, the SFC already has this ability under the SFO. As already noted, the Group does not consider the Listing Committee or the Listing Review Committee to be a sufficiently judicial forum for the making of sanctions with such serious consequences for the parties involved. As indicated in the response to Question 18, the Group considers that the Exchange's capacity to sanction should be restricted to parties with whom it has a contractual relationship or which have given an undertaking to the Exchange. Financial advisers, lawyers and accountants do not enter into agreements with or give undertakings to the Exchange and should be outside the scope of its regulatory regime particularly where they are already regulated by other bodies as is the case for financial advisers, lawyers and accountants.

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.

The Group does not agree with the proposed obligations which it considers to be too onerous an obligation and too broadly drafted. The definition of professional advisers is wide, and would include, for example, technical advisers in mining / construction which cannot reasonably be expected to advise issuers on Listing Rule compliance.

It would also suggest tightening the drafting of Rule 2A.09(4) to require a limited category of professional advisers (i.e. excluding technical advisers) to "advise their clients as to the scope of the relevant Listing Rules [i.e. those on which they have been instructed to advise] and to use all reasonable efforts to ~~ensure that~~assist their clients in understanding ~~and are advised as to the scope of and~~ their obligations under the Listing Rules." It is not possible to "ensure" that a client "understands" the Listing Rules. What is reasonable is an obligation to use reasonable efforts to assist the client to understand its obligations under the Listing Rules on which the professional adviser has been instructed and not the Listing Rules generally.

The Group does not object to the proposal that professional advisers should not knowingly provide the Exchange with information that is false or misleading in a material particular.

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.

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 -