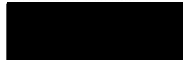


BY HAND and BY EMAIL (response@hkex.com.hk)

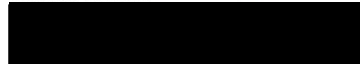
Hong Kong Exchanges and Clearing Limited

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8 October 2020

Dear Sirs:

Consultation Paper on the Review of Listing Rules relating to Disciplinary Powers and Sanctions (the “Consultation Paper”)

We are writing in response to the Consultation Paper. Unless otherwise defined, terms used in this letter have the same meaning ascribed to them in the Consultation Paper.

A. General

In our view, the proposals set out in the Consultation Paper warrant further consideration and refining.

In particular, we wish to stress that legal practitioners owe unique duties to their clients, which are safeguarded by the Basic Law, the Legal Practitioner Ordinance and comprehensive rules and guides as administered by the Law Society of Hong Kong, being the statutory body that regulates the legal profession in Hong Kong. We believe some proposals if implemented will inevitably put legal practitioners in difficult or even conflicting legal positions. It is for this very reason, section 23(7) of the Securities and Futures Ordinance (“SFO”) was included in the legislation.

We believe one of the key objectives of the proposals is to increase accountability of market participants which we undoubtedly support. However, to the extent it relates to legal practitioners, we take the view that the existing system of referral of matters to the Law Society for enforcement should suffice. Accordingly, we are against amendments of the Listing Rules which impose primary/secondary liabilities on legal practitioners. We strongly encourage closer collaboration between the Exchange and the Law Society of Hong Kong in the latter’s efforts on disciplining wrongdoing legal practitioners.

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In relation to the Exchange's proposals affecting non-lawyers (such as directors, senior management members and other professional parties), we would like to draw the Exchange to the following observations. There are well-established enforcement mechanisms that impose liabilities on market related wrongdoings (including but not limited to, the law on contract and tort which are enforceable under Hong Kong courts, sanctions under the Financial Reporting Council Ordinance, disciplinary power under the Professional Accountant Ordinance and sanctions under the Securities and Futures Ordinance). In our opinion, these long-standing enforcement mechanisms have been effective and have been the cornerstone of success of Hong Kong as an international finance centre. Whilst we agree many of the subjects of the proposed sanctions under the Consultation Paper are in powerful and even fiduciary positions, we must not have listing rules which are overly prohibitive or that encroach on the rights, liberty or choice of the shareholders and other stakeholders. We also believe that stakeholders should not be bound by the Listing Rules to the extent they do not have similar common law or statutory duties.

In this connection, against the backdrop of the existing enforcement regulatory regime, we believe that clarity and transparency to the market should, in our opinion, be the priority of this consultation. These include (1) timely exposure/disclosure of the concerns and responses expressed by the Exchange and the listed company; (2) being precise on the proposed scope of the disciplinary power which must be supported by objective criteria/guidelines to be applied by the Exchange and (3) enhancing the referral system by promoting closer collaboration with other regulators.

B. Responses

We refer to the Consultation Paper and set out our responses below.

1. *The Exchange proposes 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?*

We generally agree that the Exchange should be in the position to publicly raise concerns about an individual continuing in a role in circumstances which may be prejudicial to the overall interests of stakeholders relating to a listed issuer, at both director and senior management level within the same listed issuer.

We note the proposed wording of the PII Statement threshold is lowered to "may cause prejudice to the interests of investors". The test may be susceptible to subjective interpretation as the proposed wording states that it would be determined "in the Exchange's opinion". We urge the Exchange to lay down clearer guidance notes or relevant factors as well as including subjectivity such as "reasonable person's test" in the Exchange's determination of a "prejudice to

the interests of investors”. We also suggest the Exchange to also consider the interests of all stakeholders as a whole (such as the interests of the existing shareholders or creditors) and not to limit to potential investors.

2. *The Exchange proposes 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?*

We query whether the proposed rules should extend to the senior management members, especially if the relevant management members take actions/omissions in question pursuant to the direction of the board of directors. If the Exchange is minded to include senior management in the scope of a PII Statement, we suggest the Exchange laying down clear guidance on the definition of senior management to avoid a “catch all” of all senior management and carving out circumstances where the senior management do not proactively participate in the administration of the relevant breaches of the Listing Rules.

3. *The Exchange proposes 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?*

As mentioned in our Paragraph A, we believe the existing enforcement system is comprehensive and the wrongdoing listed company/wrongdoer could be held accountable accordingly. We do not think the enhanced follow-on actions as envisaged under the Consultation Paper is necessary.

However, if the Exchange is minded to adopt the proposal in Q3, we would like to draw the Exchange to the following. In our view, it is the prerogative of the shareholders of a listed issuer on what the company does after a PII Statement is issued against one or more of the company’s directors or senior management officers. We do believe that the ultimate objective of these proposals is to enhance corporate governance and accountability but not to penalise shareholders of the listed issuer, in particular, the minority shareholders of the listed company (minority shareholders will suffer the direct and immediate consequence of loss in value of their securities on a suspension or denial of facilities). We therefore suggest that before the Exchange imposing more stringent follow-on measures (such as suspension of trading of securities or denial of facilities) on the listed company, the follow-on measures be targeted on the relevant individuals. We also believe that the Exchange may require the board of the listed company to be accountable in explaining to its shareholders with reasons why an individual should remain in the board/senior management after a PII Statement is issued against him/her.

We also believe, as a public policy reason, an individual should have the opportunity to “rehabilitate” if and when a person can demonstrate to the satisfaction of the board/ Exchange that the underlying concerns for the issuance of a PII Statement against him/her are addressed in time. Therefore, we suggest that the Exchange considers prescribing a procedure and time limit for a person to have the effect of the PII Statement or relevant follow-on actions removed.

4. *The Exchange proposes 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?*

Subject to our comments in Q3, yes.

5. *The Exchange proposes 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?*

Subject to our comments in Q3, yes.

6. *The Exchange proposes to remove the existing threshold for ordering the denial of facilities of the market. Do you agree?*

As a last resort, having exhausted disclosure and other follow-on actions on the wrongdoing individuals, we agree. Please also note our comments in Q3.

7. *The Exchange proposes to include fulfilment of specified conditions in respect of the denial of facilities of the market. Do you agree?*

Please refer to our comments in Q3.

8. *The Exchange proposes to introduce the Director Unsuitability Statement as a new sanction. Do you agree?*

We note that there might be a large degree of overlap between the scope of a PII Statement and a Director Unsuitability Statement. Whilst we are generally not against creating a new class of sanction, we do wish the Exchange could clearly delineate the scope and the enforcement guidance of the two statements and their respective follow-on actions. We also draw the Exchange’s attention to our opening statement in Paragraph A.

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

Please see our response in Q8.

10. *The Exchange proposes 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?*

As stated in our Paragraph A, the legal profession is a unique profession where practitioners owe statutory and professional duties towards their clients in the course of their practice of law. Constitutionally, Hong Kong residents' rights to confidential legal advice are safeguarded under Article 35 of the Basic Law. Whilst perhaps unintended, the proposed imposition of secondary liability on legal practitioners may have the undesirable effect of:

- Placing the relevant legal practitioner in a potentially difficult if not impossible conflicting position between the Exchange, the client and the legal practitioner (especially in relation to client confidentiality and legal professional privilege);
- Inadvertently prohibiting or limiting access of clients to legal advice; and
- Potentially duplicative enforcement procedures (conduct section of the Law Society of Hong Kong and Solicitors Disciplinary Tribunal on one hand and Exchange on the other hand).

We therefore take a strong view that legal practitioners should be excluded from this proposal.

We are further of the view that the existing enforcement regime administered by the Law Society of Hong Kong and the Solicitors Disciplinary Tribunal is sufficient and we would encourage a closer collaboration between the Law Society of Hong Kong and the Exchange on similar types of enforcement. We believe the Law Society and the Solicitors Disciplinary Tribunal, being the statutory bodies tasked with the regulation of legal practitioners are better equipped in handling related enforcements.

As regards other Relevant Parties, we note that there are well-established enforcement mechanisms that impose liabilities on market related wrongdoings (including but not limited to, the law on contract and tort which are enforceable under Hong Kong courts, sanctions under the Financial Reporting Council

Ordinance, disciplinary power under the Professional Accountant Ordinance, sanctions under the Securities and Futures Ordinance). In our opinion, these long-standing enforcement mechanisms have historically been effective against Relevant Parties. Whilst we agree many of the subjects of the proposed sanctions under the Consultation Paper are in powerful and even fiduciary positions, we must not have listing rules which are overly prohibitive or that encroach on the rights, liberty or choice of the shareholders and other stakeholders. We also believe that stakeholders should not be bound by the Listing Rules to the extent they do not have similar common law or statutory duties.

Please also refer to Paragraph A for further comments.

11. *The Exchange proposes 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?*

Subject to very limited exceptions set out below, for reasons set out in our response to Q10 above, we disagree with expanding this proposal to cover legal practitioners. If implemented, we envisage that a legal practitioner will run into direct conflict situations which will either prohibit the practitioners to continue to act for the relevant client or to cause the practitioners to be in breach of the requirements imposed by the Exchange.

We believe exceptions would apply in the event of a legal practitioner actually performing a duty as a director / senior management officer, instead of as a lawyer in the practice of law.

As regards non-lawyers, please note our comments in Q10.

12. *The Exchange proposes 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?*

Please note our comments in Q10 and Q11.

13. *The Exchange proposes 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?*

Please refer to our response in Q10 and Q11 above.

14. *Do you agree with the proposed definition of 'senior management'?*

Please note our comments in Q2.

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

So far as employees of law firms are concerned, our view on this question is the same as Q10 and Q11 above.

16. *The Exchange proposes to include guarantors of structured products as a Relevant Party under the Rules. Do you agree?*

We do not object to it.

17. *The Exchange proposes to include guarantors for an issue of debt securities as a Relevant Party under the MB Rules. Do you agree?*

We do not object to it.

18. *The Exchange proposes 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?*

No, since there is a contractual relationship between the contracting party and the Exchange for a party who has entered into an undertaking or agreement, should there be any breach under such contract, the Exchange is able to seek remedy or enforce its position through court proceedings. Under such circumstances, we do not agree to include such contracting parties as Relevant Parties under the Listing Rules as the Exchange has other avenue to go after such parties. Further, in a lot of circumstances, such contracting parties would be considered as a Relevant Party under the current definition of Relevant Parties in the Listing Rules.

19. *The Exchange proposes to extend the ban on professional advisers to cover banning of representation of any or a specified party. Do you agree?*

So far as it relates to legal practitioners or law firms, pursuant to the Basic Law, subjects in Hong Kong have the right to obtain confidential legal advice. The proposal to ban a legal practitioner or a law firm from representing any party or matter coming before the Listing Division or the Listing Committee is a

violation of one of the fundamental rights under the Basic Law. Should a legal practitioner commit any breach under the Listing Rules, the Exchange can refer the matter to the Law Society of Hong Kong and the Law Society of Hong Kong, under its statutory power, can take appropriate disciplinary actions against the relevant legal practitioner. Please also refer to the reasons explained in Q10 and Q11 above.

Whilst we do not intend to speak for other professional advisers, we believe the existing disciplinary mechanisms applicable in other industries (such as those administered by the Hong Kong Institute of Certified Public Accountants in respect of accountants and the Securities and Futures Commission in respect of licensed persons/firms) are effective in sanctioning the wrongdoing professional advisers according to the relevant industry standards. We therefore do not feel that this proposal is necessary.

20. *The Exchange proposes to include express obligations on professional advisers when acting in connection with Rule matters. Do you agree?*

So far as it relates to legal practitioners, we maintain the view that they should be excluded from this proposal for reasons set out in our responses in Q10, Q11 and Q19.

21. *The Exchange proposes 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.

22. *The Exchange proposes that all review applications must be served on the Secretary. Do you agree?*

Yes.

23. *The Exchange proposes 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.

24. *The Exchange proposes that the counting of the period for requesting written reasons be from the date of issue of the decision. Do you agree?*

Yes.

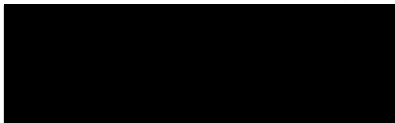
25. *The Exchange proposes that the counting of the period for providing written reasons be from the date of receipt of the request. Do you agree?*

Yes.

This response represents the views of Howse Williams. We confirm that we are happy for the contents of this letter to be made publicly available as part of the consultation process.

If you have any questions in relation to this submission, please contact [REDACTED]
[REDACTED] or [REDACTED]

Yours faithfully,



HOWSE WILLIAMS