香 港 上 市 公 司 商 會
THE CHAMBER OF HONG KONG LISTED COMPANIES

October 9, 2020

BY EMAIL (response@hkex.com.hk) & BY POST

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

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

We are pleased to submit our response to the captioned consultation.

Before we proceed to answer individual questions, we would like to make several general comments about the proposals.

1) First and foremost, on the point of lowering the threshold of issuing a PII statement by removing the "wilful or persistent" conditions, we disagree vehemently. As the imposition of PII statement aims to removing an individual from office and carries follow-on actions including denying the listed issuer concerned from accessing facilities of the market, it is a very grim penalty to both issuer and individual. It must be used carefully and only upon serious contraventions but not unintentional or single ones. The conditions of "wilful or persistent" are therefore key. The replacement wordings of "..... *may cause prejudice to the interests of investors*" are too arbitrary and leave too much discretion to the Exchange, which is dangerous and unfair to the individual subject to the PII statement.

2) Secondly, in proposing the changes and seeking to enhance the disciplinary powers of the Exchange, the consultation paper fails to present convincing arguments and empirical evidence or statistics showing the existing powers are inadequate and therefore such enhancement is needed. In addition to HKEX Listing Rules, there are other laws and regulations that bind issuers, directors, and other professional parties and hold them responsible for their malfeasances, including Securities and Futures Ordinance, Companies Ordinance, or even the Crimes Ordinance, to name a few. Before seeking to enhance its powers under the Listing Rules, the Exchange should review other disciplinary powers in the whole regulatory regime in a holistic manner. An analogy would be the court system where each level of courts has their

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own scope of penal power. If the accused's crime warrants punishment beyond what can be meted out in a lower court, the case can be referred to a higher court. There is no need to augment the penal power of the lower court per se.

3) Thirdly, we oppose to introducing the secondary liability to widen the scope of the disciplinary powers to Related Parties, in particular the senior management and executives of the issuer where they may be subjected to a PII statement. Senior management and executives are employees of the company; they do not have contractual relationship with the Stock Exchange, and unlike directors, they have not signed undertakings to observe the listing rules. Under the proposals, the PII statement will subject them to being removed from office. This is not only a reputational damage but affects their career and livelihood. Executives often times act upon instructions of the board and have no corresponding power to make important decisions, it is the board's ultimate responsibility to ensure listing rules compliance. The executives' terms of reference and compensation package are not on the same level as directors and it is therefore unfair to put them on the same penalty scale of directors. If the executives are proven to have committed wrongdoings, they could be subjected to other sanctions or disciplinary actions but not a PII statement. The Exchange can request the listed issuer to disclose full particulars of the wrongful act of the executives in the annual reports for a specified period.

4) As regards introducing secondary liability to professional advisers, for the same reason that they do not have contractual relationship with the Exchange (except in cases where explicit obligations with relation to Listing Rules exist, or where undertakings to the Exchange have been made) we do not think it is appropriate to cover them in the disciplinary ambit of the Stock Exchange, especially when the sanctions involves banning their professional activities. Each group of professional advisers have their respective industry regulators, the Exchange by all means can refer findings of wrongdoings to their own regulators for investigation and disciplinary enforcement.

   In any case, the drafting of the threshold for invoking secondary liability for professional advisers is too vague. It says *"... has caused by action or omission or knowingly participated in a contravention of the Listing Rules"*. Omissions could be inadvertent, for example. We believe that unless it amounts to "... aiding and abetting, counselling and procuring a contravention of the Listing Rules", liability on the part of advisers should not be invoked.

The following are our answers to individual questions in the consultative paper.

Q1 Subject to maintaining the "wilful or persistent" threshold, we agree that a PII statement can be made to an individual both in office or has left office. But

since a PII statement has disclosure obligation by the issuer for as long as the subject individual remains in office, such disclosure obligation becomes not so clear in the case where the individual has left office. If the issuer still has to make disclosure of it, how for long? This needs to be clearly clarified. In the case where the individual who receives a PII statement has left the listed issuer concerned and joined another one, we believe the disclosure obligations should not be applicable to the new listed issuer. This also needs to be clarified.

Q2 Subject to maintaining the "wilful or persistent" threshold, we agree that a PII statement can be made to a director (but not senior management) of the relevant listed issuer and any of its subsidiaries. Please see our point 3 above.

Q3 Subject to maintaining the "wilful or persistent" threshold, we agree.

Q4 Subject to maintaining the "wilful or persistent" threshold, we agree.

Q5 Subject to points 1 & 3 above, we agree. We also like to suggest that the obligation to provide full particulars of any public sanctions against directors does not stop the issuer or the individual from stating their disagreement of the sanctions imposed on them or offering their explanation about the sanctions in the same piece of publication. Such statement from issuer or director shall be subject to verification process and vetting by the Exchange (either pre or post) to make sure it is not a misleading statement.

Q6 We disagree. Please see our point 1.

Q7 Subject to maintaining the "wilful or persistent" threshold, we agree that specific conditions can be included as part of the sanctions. Such conditions must be targeted, directly related to correction of the rule contravention, and achievable in the normal realm of control of the issuer.

Q8 The Director Unsuitability Statement (DUS) is introduced to target directors with serious and repeated failure to discharge responsibilities under the Listing Rules, and to differentiate from PII statement in terms of the seriousness of the misconduct (since the consultation paper proposes to remove the "wilful or persistent" threshold of PII). Like PII, the objective of DUS is to remove the director in question from office with the same follow-on actions. But since we believe the "wilful or persistent" threshold of PII should be maintained, it follows that the DUS would be rather similar to a PII. The threshold of the former is "serious and repeated" and that of the latter is "wilful or persistent". Keeping two sets of sanctions with identical consequences would only cause confusion to the market. We therefore do not see the need of introducing DUS.

Q9 We do not agree to introducing DUS.

Q10 We find the wordings *"... has caused by action or omission or knowingly participated in a contravention of the Listing Rules"* too vague. The contravention must at least be caused by actively aiding and abetting, counselling and procuring before secondary liability can be invoked.

Q11-12 We agree subject to points 3 & 4.

Q13 The obligation to provide complete, accurate and up-to-date information in response to enquiries and investigations from the Exchange shall be limited to information specifically requested by the Exchange and to the best of knowledge and ability. It should not be the duty of the parties assisting investigation to second guess what the investigator would be looking for, and be held accountable for missing anything that is not requested specifically

Q14 Please read our point 3 above.

Q15 Please read our point 4 above.

Q16 Since guarantors of structured products already have rule obligation, we agree that they be regarded as Relevant Party.

Q17 We agree to aligning the GEM Rules and MB Rules to include guarantors for an issue of debt securities as a Relevant Party.

Q18 We agree that those parties who give an undertaking to, or enter into an agreement with, the Exchange can be included as Relevant Party.

Q19 As stated in our point 4 above, we disagree to extending disciplinary powers to professional advisers. But we still like to remark that the proposal to enable the Exchange to ban professional advisers from representing any or a specific party is draconian and gives the Exchange too far-reaching powers. Sanctions on professional advisers, if any, should be case specific or related to specific behaviour. A blanket ban will literally drive the advisers out of business. Such grim penalty should be left to the respective regulator of the advisers concerned.

Q20 We agree

Q21-25 We agree

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THE CHAMBER OF HONG KONG LISTED COMPANIES

We hope the above would meet with your due consideration.

Yours sincerely
For and on behalf of
The Chamber of Hong Kong Listed Companies