

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 PII Statement is a drastic sanction in that a person subject to a PII Statement would not under normal circumstances be able to secure any directorship or senior management position in any listed company when his/her suitability has been openly called into question.

Thus, a PII Statement, being a sanction that is punitive in nature, should not be imposed lightly against an individual unless the individual’s conduct(s) had reached a high triggering threshold that justifies the issue of a PII Statement against such individual. The removal of the references to “wilful” and “persistent” would effectively take away the objective standard required to invoke a PII Statement, leaving it a matter for the Exchange to decide at its discretion. We therefore disagree to the proposed amendment of the existing threshold for imposing a PII Statement.

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 strongly disagree and find it unnecessary to extend the scope of PII Statements to include (i) senior management of a listed issuer and its subsidiaries (“**Senior Management**”); and (ii) directors of subsidiaries of a listed issuer (“**Subsidiary Directors**”).

At the listed issuer’s level, the members of its board of directors (the “**Board**”) are elected by the shareholders of the listed issuer (or on occasions appointed by the Board to fill a casual vacancy on the Board or as an addition to the existing Board). The Board is tasked with, amongst other things, the duty to manage, oversee and scrutinise the operations and affairs of the listed issuer and its subsidiaries (the “**Listed Issuer Group**”) and to act the best interests of the Listed Issuer Group as a whole. In other words, the directors of the listed issuer (the “**Listed Company Directors**”) owe a fiduciary duty to the listed issuer and are entrusted with the duty to manage, oversee and scrutinise the operations and affairs of the entire Listed Issuer Group under their stewardship.

As the highest management organ of the listed issuer, the Board also has an unfettered and absolute discretion to appoint/remove and exert absolute control over the appointment/removal of all members of the Senior Management and Subsidiary Directors. This means that the Senior Management and Subsidiary Directors are in fact subordinates of the Board, answerable to the Board pursuant to the corporate hierarchy, and are in reality bound to act under the orders and directions of the Board with their hands tied.

Often at times, Senior Management and Subsidiary Directors are bound to rely on, and take actions based on, the Board’s business judgments and orders. By subjecting the Senior Management and Subsidiary Directors to the same PII Statement sanction, which bears serious consequences on an individual, would be far too draconian and unnecessarily burdensome.

It is also worthy to note that in order to become a director of a listed company, Chapter 3 of the Listing Rules already imposes extensive and stringent duties and responsibilities on a listed company’s director, such that if a person fails to fulfil the criteria and responsibilities under Chapter 3 of the Listing Rules, he/she may be sanctioned by the Exchange.

However, on the other hand, the Listing Rules imposes no such criteria or responsibilities on the Senior Management and Subsidiary Directors. This shows that the standards expected of a listed company’s director under the Listing Rules are intended to be higher than that of the Senior Management and Subsidiary Directors.

Given the difference in the standards expected, it is important to bear in mind that the standards expected of Subsidiary Directors (whom are often directors of private companies) and Senior Management, should not be equated with the same level of standards expected from Listed Company Directors.

While the Exchange have raised a number of concerns relating to the current position of PII Statements, we believe it is equally important to consider the practical difficulties and undue hardships faced by the Senior Management and Subsidiary Directors.

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.

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.

Please refer to the reasons set out in Question 1 above.

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.

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.

Not applicable because no opinion is expressed.

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.

Not applicable because no opinion is expressed.

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 strongly disagree and find that the proposed changes to secondary liability on Relevant Parties, particularly Senior Management and Subsidiary Directors, would be extremely unfair to the Relevant Parties and unnecessary. For the reasons provided in Question 2 above, the Board also has an unfettered and absolute discretion to appoint/remove and exert absolute control over the appointment/removal of all members of the Senior Management and Subsidiary Directors. Senior Management and Subsidiary Directors are therefore (i) subordinates of the Board, (ii) answerable to the Board, and (iii) are bound to act under the orders and directions of the Board with their hands tied.

By imposing secondary liability on these categories of persons, who are required to follow the orders and directions of their superiors, would undoubtedly place them in a state of turmoil, whereby on the one hand, they are bound by their terms of employment to support and execute the orders of the Board, and yet on the other hand, their employment is constantly threatened by the fear of bearing secondary liability for ‘**caused by action or omission or knowingly participated in**’ a contravention of the Listing Rules when they’re simply carrying out their superior’s instructions and business directions. Such draconian measure is not only unfair to the Senior Management and Subsidiary Directors, but would also have the effect of distorting the hierarchical corporate culture of a corporation, which is critical for good corporate governance and the success of a company - that is, the duty to manage, oversee and scrutinise the Listed Issuer Group should fall under the highest management organ (i.e. the Board), thereby enabling the subordinates to comply with and act on (free from external interventions) the orders and instructions of their superiors (i.e. the Board) whom are entrusted by the shareholders of the listed issuer to manage, oversee, scrutinise, and make business and commercial judgments for, the entire Listed Issuer Group.

Likewise, the imposition of secondary liability on significant shareholders and substantial shareholders is also unnecessary as they do not participate in the management of the listed issuer with their role merely being to exercise shareholder rights at general meetings (including the election of members of the Board). Moreover, a listed company is a separate legal entity under the principles of “limited liability” and “separation of ownership and management”, and it would be unfair to introduce secondary liability to these categories of persons for contraventions of the Listing Rules.

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.

Not applicable because no opinion is expressed.

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.

For the reasons set out in Questions 2 and 10 above, we do not think it is necessary to impose secondary liability to the Relevant Parties, particularly Senior Management and Subsidiary Directors.

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.

Whilst we agree that a listed issuer’s response to the Exchange’s enquiries and investigations should be true, accurate and up-to-date to the best of the listed issuer’s and its director’s knowledge in order to ensure a fair, orderly and informed market, we do not believe the scope and wording of the proposed Rule should extend to imposing an onerous obligation on the listed issuer to provide ‘***all information relevant to the Exchange’s enquiries and investigations even if it has not requested the specific information***’, as this would undoubtedly create great disturbance, confusion, and uncertainty as to what exactly is required by the Exchange and what is expected of the listed issuer in order to fully comply with such open-ended, ambiguous and onerous requirement.

For these reasons, we believe the proposed Rule will create great compliance uncertainties for listed issuers and is also unfair and unduly burdensome on the part of listed issuers. Hence, the proposed Rule should NOT include the requirement for listed issuers to provide ‘***all information relevant to the Exchange’s enquiries and investigations even if it has not requested the specific information***’ and should only be confined to requiring listed issuers to provide true, accurate and up-to-date information based on what is specified in the Exchange’s enquiries and investigations.

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 disagree and do not find it necessary to specifically confine the definition of 'senior management' to that proposed by the Exchange. Instead, the current broad and flexible interpretation of 'senior management' should be maintained and assessed on a case-by-case basis based on the factual circumstances.

This is because every company's management structure, corporate hierarchy, culture, allocation of job responsibilities and job title, particularly those incorporated in a jurisdiction outside of Hong Kong, is different, with each having their own unique administrative arrangements, functions and reporting lines associated with a named job title. Hence, it is reasonable to conclude that a particular job title does not necessarily confer or represent a specific job nature or managerial responsibility, and should not by default be associated with as such. One must assess the actual substance and role undertaken by the 'senior management' in question based on the factual circumstances. The proposed definition itself clearly goes against this principle by suggesting that (i) any '**attempts to provide certainty by naming specific senior office holders**'; (ii) any '**managerial functions one level below the board of directors**'; or (iii) any '**person designated as 'senior management' by directors of the listed issuers**', would be captured by the definition of 'senior management', and hence significantly and unnecessarily broadening the scope of coverage to cover persons who are NOT senior management based on the factual circumstances.

It is also worthy to note that the definition of '*manager*' in the Hong Kong Companies Ordinance is not a practical reference point given that the vast number of listed issuers are in fact incorporated outside of Hong Kong and governed by other jurisdictions. Hence, regard and consideration should also be given to the company laws in those overseas jurisdictions as well (and hence favouring the current flexible interpretation of the term 'senior management').

Since the Exchange have already acknowledged that, whether a particular individual will be considered as a 'senior management', will be an issue of fact determined by the evidence obtained during the course of the Exchange's investigation of a suspected breach of the Listing Rules, it would be unnecessary to specifically set out a confined definition of 'senior management' that restricts the flexibility of interpretation.

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.

Professional advisers of listed issuers, such as external legal counsels, are bound by the professional duties imposed by law including those under the Legal Practitioners Ordinance and the Solicitor's Guide. Their professional duty is owed to their clients only and not to the Exchange nor other market participants. The Exchange should not seek to extend its governance to other third parties beyond that of a listed issuer and its directors.

To extend the regulatory function of the Exchange and empowering it to sanction professional advisers of listed issuers would obviously hijack the regulatory functions of other regulatory bodies such as the Law Society of Hong Kong. Furthermore, by allowing the Exchange to impose sanctions on these professional advisers, it would inevitably create a conflict of interest and opinions between that of the professional adviser itself and the client, such that the professional advisers would not be able to impartially advise in the best interest of listed issuers without having the fear of incurring secondary liability.

For these reasons, we do not find it necessary to include employees of professional advisers of listed issuers and their subsidiaries as a Relevant Party.

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.

Not applicable because no opinion is expressed.

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.

Not applicable because no opinion is expressed.

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.

Not applicable because no opinion is expressed.

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.

Not applicable because no opinion is expressed.

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.

Not applicable because no opinion is expressed.

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 -