

## QUESTIONNAIRE ON REVIEW OF LISTING RULES RELATING TO DISCIPLINARY POWERS AND SANCTIONS

### 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.**

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 do **not** agree with the proposal to impose secondary liability on solicitors, as Relevant Parties, for the following reasons:-

**(1) Case law established under Egan and Shanghai Land cases**

In HKSAR v Egan (2010) 13 HKCFAR 314, Ribeiro PJ pointed out that: "*[i]n the absence of actual knowledge, a solicitor (or barrister) is bound to adopt an agnostic approach towards the client's instructions in carrying out his professional duties since it is not his business to judge their truth or falsity. The solicitor or barrister may privately harbour distinct feelings of scepticism about his client's story but that is wholly beside the point. Professionally, he is required to abstain from forming any belief one way or the other on the topic. For a court to attribute guilty knowledge or belief and criminal liability to the legal adviser in such circumstances would gravely endanger the fundamental right to legal advice and representation.*"

In Vivien Fan v HKSAR [2011] HKEC 949 (commonly referred to as the "Shanghai Land case"), Bokhary J pointed out that: "*[t]he duty of lawyers and other professional persons is to serve their clients' legitimate interests and do so within the bounds of the law and professional ethics. Sometimes a court is invited to find it proved beyond reasonable doubt that a lawyer or other professional person has strayed from that duty and into criminal conduct in league with his or her client. If such a finding is to be made, the evidence in proof of it must be very plain indeed. Such evidence must be seen after strict scrutiny to admit of no other reasonable conclusion. The evidence in the present case is nothing of that kind. Indeed, it points more to Ms Fan and Mr Lai being deceived than to either of them being a deceiver.*"

While these cases are in relation to the criminal liability of solicitors in relation to disclosure failings, it is clear from the above cases that the duty of solicitors is to serve their client's

legitimate interests and “personal scepticism” as to their client’s instructions should not prevent the solicitors from doing so and solicitors should not form any belief one way or the other on the same. As such, it is respectfully submitted that the proposal is contrary to these principles.

In any event, solicitors must not act contrary to law and ethics under Principle 3.01 Commentary 8 of the Hong Kong Solicitors’ Guide to Professional Conduct ("**Guide to Professional Conduct**").

## **(2) Legal professional privilege and code of conduct**

Solicitors are bound by the principle of legal professional privilege ("**LPP**") and the Guide to Professional Conduct. LPP prevents information shared by clients with their solicitors from being used against the clients themselves subsequently. Only clients have the right to waive LPP and their solicitors are unable to disclose such information without such waiver.

Under Principle 8.01 of the Guide to Professional Conduct, a solicitor has a legal and professional duty to his client to hold in strict confidence all information concerning the business and affairs of his client acquired in the course of the professional relationship, and must not divulge such information unless disclosure is expressly or impliedly authorized by the client or required by law or unless the client has expressly or impliedly waived the duty. Under Principle 8.01 Commentaries 4 and 21 of the Guide to Professional Conduct, a solicitor should not disclose that he has been consulted or retained by a person in relation to a particular matter and a solicitor owes the duty of confidentiality to every client without exception. The duty survives the professional relationship and continues indefinitely after a solicitor has ceased to act for a client, whether or not differences have arisen between them. Under Principle 8.01 Commentary 5 of the Guide to Professional Conduct, unauthorised disclosure of a client's confidence could lead to disciplinary proceedings against a solicitor and could also render a solicitor liable to a civil action by the client arising out of the misuse of confidential information.

It is submitted that the LLP and the abovementioned requirements under the Guide to Professional Conduct would render it impossible for solicitors to disclose confidential information to the regulator without client's consent or answer or defend any allegation of secondary liability made against them under the Listing Rules.

## **(3) Existing criminal liability**

The Securities and Futures Ordinance (Cap 571) ("**SFO**") already imposes criminal and civil liabilities on a person who discloses or provides the Hong Kong Stock Exchange or the Securities and Futures Commission ("**SFC**") with information that is false or misleading in a material particular and the person knows that (or is reckless or negligent as to whether) the information is false or misleading in a material particular, including sections 277 and 298 (disclosure of false or misleading information inducing transactions), section 305 (civil liability to pay compensation to any person for any pecuniary loss sustained as a result of contravention of section 298) and section 384 (provision of false or misleading information).

Pursuant to sections 8A and 10 of the Legal Practitioners Ordinance (Cap 159), a solicitor convicted for an offence which is punishable by imprisonment may be suspended from practice or struck off the roll of solicitors.

It is submitted that these statutory provisions are sufficient as deterrent against misconduct by solicitors and it is not necessary to impose secondary liability on solicitors for breaches of the Listing Rules.

**(4) Section 23(8) of the SFO and Memorandum of Understanding between the Exchange and The Law Society of Hong Kong**

Pursuant to section 23(8) of the SFO, the Exchange shall, in circumstances stipulated in arrangements agreed between it and The Law Society of Hong Kong ("**Law Society**"), refer breaches of the Listing Rules, which are alleged to have been committed by a solicitor in private practice and which may also constitute a breach of duty imposed by law or under rules of professional conduct, to the Law Society for determination of whether to make a finding, impose a penalty or sanction or take other disciplinary action.

The Memorandum of Understanding dated 18 December 1996 between the Exchange and the Law Society ("**MOU**") sets out the circumstances in which the Exchange is obliged to refer its investigation of a solicitor in private practice to the Law Society.

Under the MOU, the Exchange recognises that the Law Society regulates conduct of solicitors in Hong Kong and that the Law Society has established well-defined disciplinary procedures. **The Exchange has therefore agreed under paragraph 2.3 of the MOU that, save in relation to the following three circumstances, it will not make rules in the Listing Rules or make any public finding or impose any penalty or sanction or take other disciplinary action under the Listing Rules in respect of conduct of solicitors in private practice.** The three circumstances specified in paragraph 3.1 of the MOU are "*where any solicitor in private practice:*

- (a) *makes an untrue representation to the Exchange: (i) which is made on the instructions of his client, and purporting to be so made, and which the solicitor knows to be untrue or made with reckless disregard as to its truthfulness; or (ii) which, in case of any other representation [i.e. the solicitor's certification in each of Form B and Form H of Appendix 5 of the Listing Rules], is made by the solicitor knowing it to be untrue or without having made reasonable inquiries as to its truthfulness; or*
- (b) *knowingly or recklessly facilitates or participates in a breach of the Listing Rules; or*
- (c) *when acting for a client in relation to 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."*

As such, it is submitted that the scope of the proposed new Rule 2A.10B(3) which seeks to impose secondary liability on, amongst others, solicitors is much wider than the three circumstances specified in the MOU and, therefore, should not be adopted insofar as solicitors are concerned.

It is also stated **in paragraph 3.3 of the MOU that the Exchange acknowledges that in accordance with the Guide to Professional Conduct, solicitors in private practice are under a strict professional obligation to act in accordance with their clients' instructions and to act solely in their clients' interests and must not divulge information concerning the business and affairs of their clients acquired in the course of the 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. The Exchange also recognised that a client is always at liberty to disregard his solicitor's advice in whole or in part.** Accordingly, subject to the foregoing, **the Exchange specifically agrees** under paragraph 3.3. of the MOU that:

- (i) **mere knowledge of an actual or potential breach by a client of the Listing Rules is not a breach by the solicitor of the Listing Rules.** The solicitor is under no obligation whatsoever to inform or report the matter to the Exchange; and
- (ii) **a solicitor may not be considered to have acted improperly if his client decides not to act in accordance with his solicitor's advice and instead to act in a manner which, in the solicitor's view, may constitute a breach of the Listing Rules, whether or not the solicitor continues to act for his client.**

The Exchange acknowledges that these two examples are not exhaustive.

It is submitted that this proposal is contrary to the abovementioned acknowledgments and agreements by the Exchange under paragraph 3.3. of the MOU and, therefore, should not be adopted insofar as solicitors are concerned.

#### **(5) Double jeopardy**

Given the extensive disciplinary powers of the Law Society over its members, the rule against double jeopardy should prevent the Exchange from initiating another set of disciplinary proceedings under the Listing Rules based on the same set of factual circumstances or events leading to an allegation of breach of the Listing Rules against a solicitor.

#### **(6) Principle established under the inside information disclosure regime and practical difficulties faced by solicitors**

It is well recognised under section 307B of the SFO and the Guidelines on Disclosure of Inside Information published by the SFC that only the listed corporation and its officers are in a position to judge whether a particular piece of information is likely to materially affect the price of its listed securities and, therefore, would constitute an "inside information" under the SFO.

Similarly, only the listed corporation and its officers are in a position to ensure compliance with the Listing Rules, e.g. the information contained in any corporate communication are accurate and complete in all material respects and not be misleading or deceptive in accordance with Rule 2.13 of the Listing Rules. Solicitors' responsibility here is to advise the client regarding the meaning of the relevant laws and regulations and should not be made responsible for whether such laws and regulations have in fact been complied.

#### **(7) Positions in the UK, Singapore and Malaysia**

Paragraph 41 of the Consultation Paper states that the concept of secondary liability is imposed by certain rules of overseas exchanges and securities regulators, namely, the Financial Conduct Authority of the UK's Disclosure and Transparency Rules DTR 1.5.3G, Singapore Exchange's Mainboard Rules paragraph 1402 and Catalist Rules 302 and Bursa Malaysia Main Market and ACE Market Listing Requirements paragraph 16.13. We note from these rules that the UK, Singapore and Malaysia do **not** impose secondary liability on external legal advisers, and such liability is mainly imposed on former directors and directors.

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.

We do **not** agree with the proposal to impose secondary liability on solicitors, as Relevant Parties. Solicitors are not in a position to force their client to comply with any requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee of the Exchange. Our response to Question 10 also applies to this Question 12.

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 do **not** agree with the proposal to impose such an obligation on the solicitors. Our response to Question 10 also applies to this Question 13.

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.

We do **not** agree with this proposal. Our response to Question 10 also applies to this Question 15.

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 do **not** agree with the proposal to extend the ban on solicitors to cover banning of representation of any party as this is overly broad and far-reaching.

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.

We do **not** agree with the proposal to impose express obligations on solicitors when acting in connection with Rule matters. Our response to Question 10 also applies to this Question 20.