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.

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.

Follow-on actions may include the denial of facilities of the market for a specified period, in addition to suspension or cancellation of the listing etc. which in our view, are wide-ranging serious punishments and raise the question on due process, burden of proof (on the Exchange), proportionate punishment etc. and whether actions such as delisting or denial of facilities of the market would amount to "collateral damage" to independent shareholders where their interests would also be materially and adversely affected, notwithstanding that they have nothing to do with the relevant Rule breach or corporate malfeasance and may in fact, have been victims of such acts already. A delisting means these independent shareholders would not even have a chance to participate in any of the corporate restructuring or recovery exercises where some of their losses might be recovered.

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.

See our response in 3 above.

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.

See our response in 3 above.

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.

See our response in 3 above. We are of the view that denial of facilities of the market is an “across the board” punishment and may have unintended consequences, insofar as independent shareholders’ interests are concerned e.g. what if the listed issuer facing such denial when it also needs to use market facilities to raise funds for urgent cash flow needs and failing which, the listed issuer would be in financial difficulty (note: such listed issuer is likely to have its bank loans called under this denial of facilities scenario). The SFC's regulatory sanction equivalent to such denial of facilities is "cold shoulder" order under the Takeovers Code, which in our view, has a more targeted approach and hence, the non-application of "collateral damage" or "unintended consequence" to innocent third parties.

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.

See responses in 3 and 6 above.

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.

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.

See our responses in 3 and 6 above. Using your illustrative example of a financial adviser triggering secondary liability for material inaccuracy of listed issuer's acquisition circular, such misconduct would in our view, fall under the SFC's Corporate Finance Adviser Code of Conduct and it is not clear to us why there is a need for double or parallel disciplinary proceedings and potentially double sanctions imposed for the same offence as a result. The same apply to your other illustrative examples involving CFO, COO, board secretary and CEO as each of these examples would fall under various SFC's regulatory and disciplinary regimes, some of which such as Part XIVA of the SFO (i.e. price-sensitive or inside information disclosure requirements) have also been given statutory backing and in our view, a better regulatory regime. Your example of a substantial shareholder triggering secondary liability for breach of minimum public float requirement as a result of shareholders' fight is even more onerous, as this scenario often involves complicated issues and disputes, an "across the board" ruling for a secondary liability to have been arisen runs the risk of over-simplifying the crux of the matter and may result in unjust and unfair punishment or sanction imposed, without regard to the facts and circumstances of each of these cases.

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.

See response in 3 above.

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.

See response in 3 above.

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 are of the view that this proposed obligation to disclose “all information”, which would also apply to professional advisers, “provided that such provision does not contravene the relevant requirements of professional conduct”, is unclear insofar as legally privileged information is concerned. For example, if the professional advisers are non-legal professionals, and the fact that the Rule breaches do not have statutory backing, whether or not such legal privilege protocol would apply is unknown. Under SFC’s enforcement action, even computer files stored in hard disks seized under the so called “dawn raid” which would fall under legal privilege would and should remain sealed by the SFC. Likewise, non-legal professional advisers could invoke similar legal privilege on documents sought, when faced with a legal demand from the SFC to provide information. In short, the SFC has a better established protocol for information sought which might be legally privileged. It is unclear to us how such protocol or practice would apply under this proposed Rule provision.

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.

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.

See our responses in 3, 10 and 13 above.

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.

See our responses in 3, 6 and 10 above.

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.

See our responses in 3, 10 and 13 above.

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.

See our responses in 3, 10 and 13 above. We are of the view that the proposed Rule changes have already been covered under the SFC's Corporate Finance Adviser Code of Conduct.

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 -