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.

Given the sanction involving a PII Statement will bring along serious consequences, it should only be applied in serious cases. Therefore, we do not agree the removal of the existing threshold which should be applied to differentiate serious cases which a PII statement is warranted. We agree to the current approach that more severe sanction is warranted for misconducts involving an intentional, wilful or reckless disregard of the Listing Rules or repeated misconducts, thus the application of existing thresholds of "wilful" or "persistent" failure to differentiate serious cases is appropriate. Proceedings before the Disciplinary Committee are civil in nature. Accordingly, the standard of proof is on the balance of probabilities. We do not quite agree with the Exchange's assertion that there were evidential difficulties in establishing the wilful mind-set of the culpable director. On the other hand, the Exchange might consider to provide clearer guidance as to what will amount to repeated misconducts, for example whether it is being referred to repeated breaches of the same Rules by the same person or entity.

There may be practical difficulties to make a former director a party to a prolonged disciplinary action. Commercially, directors' and officers' liabilities insurance ("D&O insurance") purchased by listed issuers might not necessarily provide enough coverage for former directors. Besides, Rule 3.20 only requires that for a period of 3 years from the date on which they cease to be directors of the issuer, they should inform the Exchange any change to their contact information as soon as reasonably practicable. However, they might not be contactable afterwards. The Exchange might need to make it clear for a definite period when a former director might be made a party to a disciplinary action after he has ceased his office as a director of a listed issuer, say for an example 3 years.

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 do not agree the extension of the sanction to senior management of a company. Directors who are the decision makers and owe fiduciary duties to a company are different from other officers. Through their undertakings to the Exchange, directors are primarily responsible for listed issuers' compliance with the Listing Rules. In a corporate governance perspective, they function differently with senior management. Should directors have delegated all or some of their power and responsibilities to senior management, they are still responsible to monitor the work and procure the compliance of their delegates. Senior management, on the contrary, act according to directors' instructions as executors, who are not decision makers and might not have full information, ability and/or power to deter a breach of the Listing Rules by a listed issuer. It might be unfair to make them as a party to a disciplinary action due to a breach of the Listing Rules by a listed issuer. For example, company secretary who is being named as senior management by the Exchange, normally acts as the compliance officer in a listed issuer. They assisted the board in complying with the Listing Rules requirement and normally participated in preparation of corporate disclosures, but they might not have full information on the underlying transactions and/or involved in performing the due diligence work which is the responsibility of directors under the existing statutory requirements. By introducing the secondary liability concept, there may be risks for a company secretary to be prosecuted on any deficiencies in corporate disclosures which they have participated in the preparation or authorization process which is unfair.

We consider that it is more appropriate to promote a better corporate governance culture by a top-down approach, encouraging director's engagement in directing and monitoring businesses of a corporation and holding them responsible for conducts of a corporation, instead of holding senior management who are not in fact being empowered for making decisions responsible for the acts of a corporation.

We would like to add that any deficiencies of senior management should be judged and penalized by the listed issuers as their employers. If any of them have committed any offences to laws and legislations during their course of work, they might as well be prosecuted by law enforcement agencies.

Further, we do not agree on imposing the PII Statement against directors of subsidiaries. If they do not at the same time hold directorships in listed parents, they owe fiduciary duty only to the subsidiaries. Some of them are senior management being appointed as directors of subsidiaries to execute decisions of listed parents. Therefore, it may be unfair to hold them responsible for breach of the Listing Rules by their listed parents.

The Exchange might have concerns that former directors who are subjects to PII Statements can still maintain significant influence within a listed issuer through other means despite they have ceased to be directors. In such case, the Exchange should instead explore means to deter them acting as "shadow directors" of a listed issuer.

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.

As we have mentioned in our response to question 2, we only agree to the extent that a PII Statement and thus any follow-on actions are made against a director, but not senior management. We understand that the Exchange wants to use follow-on actions to exert pressure on a director to resign following a PII Statement, but they should be mindful of any adverse impacts resulting from the follow-on actions which might in extreme cases causing business failures. Denying market facilities to a listed issuer or prohibiting dealers and financial advisers to act for it are severe punishments to the listed issuer and its shareholders, but not punishments to the director himself. Listed issuers might have practical difficulties in removing a director from his office within a specified period and any punishment in light of that might not in fact be in the interest of the listed issuer and its shareholders.

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.

We consider that an appropriate duration should be specified for this. The PII Statement has already been made public, if the board and shareholders consider that the individual still meets the suitability requirement as the director, the inclusion of such disclosure in every announcements and corporate communications merely increases the administrative burden of listed issuers. Again, we consider that senior management should not be a subject to the PII Statement.

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.

Unlike a director disqualification order imposed by courts, the PII Statement and public sanctions imposed by the Exchange do not carry a specified duration. We consider that PII Statement should also carry a specified duration like director disqualification orders, to align with the Exchange's intention that it will not have an indefinite effect. It is noted that express scope of disclosure is required in listing applicants' listing documents under Appendix 1a paragraph 41 (1) for biographical details in respect of each director, proposed director, supervisor and proposed supervisor, with details not be less than those required to be disclosed in an announcement relating to the appointment or re-designation of the director or supervisor pursuant to Rule 13.51(2). For listed issuers' annual reports, we disagree with this proposal as announcements are required as soon as practicable under Rule 13.51B(2) should there are any updates to directors' information involving any public sanctions against them. Such disclosure is also required whenever a director is being appointed and re-elected. The inclusion of details of public sanctions in annual reports may only increase the administrative burden of listed issuers. Also, it somehow contradicts with Rule 13.51B(3)(c) that an issuer need not disclose in the directors' biographies in the annual and interim reports for any sanction imposed on the directors by the Exchange.

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.

As explained in our response to question 3, given the potential serious adverse impacts for denial of facilities to a listed issuer, they should be mindfully applied in serious cases. Therefore, the existing threshold of "wilful" or "persistent" failure is necessary and appropriate.

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.

We do not object to the proposal. However, the Exchange mentioned in paragraph 67 of the consultation paper that there will be a wide ranging conduct and Rule breaches which may warrant the sanction for denial of facilities. Given the potential serious adverse impacts and to allow listed issuers to quantify the potential risks and consequences, the Exchange should specify a list of circumstances under which the sanction may be imposed and the corresponding specified conditions to be imposed if any.

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.

Our view is to retain the current sanction of PII Statements in serious cases involving "wilful" and "persistent" misconducts, the effect and the criteria for imposing the PII Statement currently and the newly proposed Director Unsuitability Statement are very similar. On one hand, the Exchange proposes to lower the threshold for PII Statement and on the other hand, it introduces a new sanction of Director Unsuitability Statements having similar threshold as being "serious or repeated failure". We are concerned if this will lead to abuse of the use of PII Statement and create confusion.

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.

As mentioned in our response to question 8, we doubt on the necessity for the introducing the Director Unsuitability Statement as a new sanction.

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.

As mentioned in our response to question 2, it might be unfair to make senior management as a party to a disciplinary action due to a breach of the Listing Rules by a listed issuer.

On the other hands, it might not be appropriate to penalize substantial shareholders who purely act as shareholders of a listed issuer and have not assumed any management role for breaches of the Listing Rules by a listed issuer. The Exchange should take into consideration cases which insufficient public float might be caused by shareholders' fight for control in a corporation. There is sound commercial rationale behind and it may be unfair to force the shareholders to sell down their equity interests by imposing sanctions against them for Rule breach.

For the concept of introducing secondary liability and prosecution of professional advisers by the Exchange, we consider that there should be segregation of duties between the Exchange and professional bodies. Given the existence of good cooperation and referral mechanism between local regulators and professional bodies, it might be more appropriate for the Exchange to report possible misconducts of professional advisers and/or their employees to the regulatory or professional bodies governing them. Further, there have not seemingly been precedent cases for prosecution of professional advisers by the Exchange and misconducts of professional advisers were dealt with by their respective regulatory or professional bodies. It is not evidenced that the local regulatory framework and the existing enforcement and/or referral mechanism is ineffective such that the extension of prosecution scope by the Exchange is warranted. We are also concerned that the significant overlapping on prosecution scope of various regulators and enforcing agencies may cause abuses and competitions among themselves for building up cases, which might not be a healthy situation for the industry development.

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.

We do not object to the proposal. However, for better market guidance, the Exchange should consider to specify the list of requirements which might be imposed and the circumstances when such requirements might be imposed.

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.

Same as our response to question 10, we disagree with the concept of imposing secondary liability on Relevant Parties.

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 object to the proposal. However, paragraph 107 of the consultation paper states that the Exchange expects parties subject to its enquiries and investigations to provide information relevant to its enquires even if it has not requested the specific information. We consider that there will be practical difficulties in providing the specific information not requested by the Exchange.

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 consider that whether an individual should be referred to as senior management should be determined by the listed issuers based on their specific facts and circumstances instead of being classified by the Listing Rules. Due to the different corporate structures of different listed issuers, officers having the same title among different listed issuers might in fact be delegated different power and responsibilities. An example is that it is common for listed issuers to engage external services provider as company secretary, such individual is neither management nor employee of the listed issuer who might not have day-to-day knowledge of the listed issuers' affairs. It is not appropriate that such individual be referred as senior management of the listed issuers. Given there is no universal definition of senior management which can fit all situations, we urge the Exchange to carefully reconsider defining senior management in the Rules and imposing secondary liability on senior management.

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.

Please refer to our response to question 10, we are of the view that it is not evidenced that the local regulatory framework and the existing referral mechanism is ineffective such that the extension of prosecution against employees of professional advisers by the Exchange is warranted.

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.

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.

Same as our response to questions 10 and 15, we are of the view that there should be segregation of duties between the Exchange and professional bodies. It might be more appropriate for the Exchange to report possible misconducts of professional advisers to the regulatory or professional bodies governing them.

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 agree that professional advisers should not knowingly provide information to the Exchange which is false or misleading in a material particular. However, facts and circumstances of each listed issuer and individual vary, the same detailed explanation might not be necessary for experienced individuals in some cases while more detailed explanation is warranted in some other cases. There might be practical difficulties for professional advisers to prove themselves that they have used all reasonable efforts to ensure that their clients understand and are advised as to the scope of and their obligations under the Rules.

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 -