

9<sup>th</sup> October 2020

By Email Only: [response@hkex.com.hk](mailto:response@hkex.com.hk)

Hong Kong Exchanges and Clearing Limited  
8<sup>th</sup> Floor, Two Exchange Square  
8 Connaught Place, Central  
Hong Kong

Dear Executive Committee of the Hong Kong Exchanges and Clearing Limited  
("HKEX"),

**Re: Consultation Paper on Review of Listing Rules relating to Disciplinary Powers and Sanctions ("Consultation Paper")**

Vistra is a global corporate service provider headquartered in Hong Kong, ranking amongst the top three corporate service providers worldwide. With a presence in close to 50 jurisdictions and over 4,600 professionals, our capabilities span across company formations, on-going corporate services and fund administration to trust, fiduciary and private client services. As part of our services, we provide named company secretary services to public companies listed on the Stock Exchange of Hong Kong Limited (the "Exchange").

Through this letter, we would like to express our disagreement as to the necessity of the proposals listed in the Consultation Paper to impose secondary disciplinary liability on Relevant Parties (as defined under paragraph 86 therein) who have caused by action or omission or knowingly participated in a contravention of the Listing Rules (the "Proposal").

**The Advisory Role of the Company Secretary**

Under paragraph 115(a) of the Consultation Paper, the term 'senior management' is correctly defined to include company secretaries, among other positions. Company secretaries indeed play an indispensable role in the corporate governance of listed issuers. This being said, the role of a company secretary is and always has been a supporting role to the board of directors. Under Section F of the Corporate Governance Code, company secretaries have "an important role in supporting the board by ensuring good information flow within the board and that board policy and procedures are followed." Furthermore, under paragraph 6.2 of the Guidance for Boards and Directors issued by the Exchange in July 2018, they are "regarded as key advisers on corporate governance and other regulatory compliance matters" who may discharge their duties by ensuring "that the board receive continuous training on regulatory developments that are relevant to their business developments and needs."

These authorities clearly convey the supporting and advisory role designated to company secretaries in relation to the issuers that they serve, as opposed to the role of the other members of the board in

the decision-making process of the issuer. As such, the duty of the company secretary is discharged upon their provision of advice to the board, which the board may consider.

This reality of the nature of the company secretary's role was not given due consideration in paragraph 93(c) of the Consultation Paper which describes one of the instances in which a company secretary may be charged with the proposed secondary disciplinary liability. In this particular example, the company secretary allegedly failed to properly review and rectify material omissions in an issuer's announcements before they are published, and thus has supposedly contributed to the issuer's breach of the Listing Rules. We have many concerns with this finding of liability. Firstly, this conclusion fails to consider the supporting and advisory role of company secretaries. As earlier mentioned, the role of company secretaries is limited to advising on the content of announcements, however it is ultimately the directors who give the final approval thereof. Secondly, company secretaries have no veto power to inhibit the authorization of the announcements, should they contain any ambiguities. The significance of this is that company secretaries would invariably be implicated in the preparation of erroneous announcements despite the limitations of their contributions. Therefore, this Proposal risks exposing company secretaries to undue secondary disciplinary liability for mere participation in the board's contravention of the Listing Rules.

On the other hand, the Exchange is fully aware of the role of directors as decision-makers of listed issuers. In assuming their role as directors of listed issuers, they are obliged to sign the Form B Declaration and Undertaking with regard to Directors, pledging their commitment to comply with and adhere to the Listing Rules to the best of their abilities. In signing this, the directors simultaneously undertake not to permit any contravention of the Listing Rules on the part of the listed issuers that they represent, as this would result in the breach of their undertakings.

### **Lack of Clarity in the Application of the Proposal**

We do not see many details in the Proposal, as it is currently constructed, as to the application of the proposed disciplinary measures. The Proposal does not mention how the Exchange will exercise its power of imposing secondary disciplinary liability, in what circumstances will the Exchange exercise such disciplinary powers, whether such disciplinary powers will only be exercised with respect to significant inaccuracies or also minute inaccuracies (and whether there are any guidelines to determine what constitutes a significant or minute inaccuracy).

The resultant impression of the Proposal as it is currently drafted, is a power that is wholly arbitrary and up to the subjective discretion of the enforcer of such power.

Moreover, the Proposal does not provide any details as to how a Relevant Party may defend itself when facing disciplinary action. There is no mention of any right to appeal against the imposition of disciplinary liability.

### **Distinction between Internal and External Company Secretaries**

The Proposal also does not distinguish the practical difficulties between internally employed company secretaries and externally appointed company secretaries. External company secretaries are service providers and are in no different a position from other external parties (e.g. lawyers, auditors and financial advisers) who provide services on a retainer basis to listed issuers. Further, external company secretaries may not promptly be privy to information regarding ad-hoc

transactions by listed issuers, who deliberately elect to withhold such information on the basis of confidentiality.

These practical limitations have been acknowledged by the Exchange in the past. Under paragraph 6.5 of the Guidance for Boards and Directors, the Exchange recognized that external company secretaries “may not have day-to-day knowledge of the issuer’s affairs” and that “there may be time gaps in communication particularly those that may be time sensitive.” At times, even internally employed company secretaries residing in Hong Kong face the same challenges when the issuers’ headquarters or operations are outside of Hong Kong. However, it appears that the Proposal has not taken into account these crucial practical difficulties in proposing disciplinary treatment for internal and external company secretaries in its most recent Consultation Paper.

### **Our recommendations**

We submit that the Exchange should enhance the already existing mechanisms introduced to promote corporate governance. In particular, the Exchange should consider building upon principle C.2 of the Corporate Governance Code, and improve the effectiveness of the internal control systems already in place within each listed issuer.

Lastly, we also contend that the imposition of secondary disciplinary liability on company secretaries should instead be subject to their ability to perform their duties in accordance with the relevant professional standards applicable to them, as determined by the professional bodies as defined under Rule 3.28 of the Listing Rules. In this respect, the role of the Exchange should be to refer appropriate cases to the relevant professional bodies so that they may determine whether their members have failed to meet the applicable professional standards in contributing to a contravention of the Listing Rules.

We appreciate that the Exchange will take our concerns and recommendations into due consideration.

Yours truly,

For and on behalf of

**VISTRA CORPORATE SERVICES (HK) LIMITED**

