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Hong Kong

9 October 2020

Dear HKEX

**Consultation Paper – Review of Listing Rules relating to Disciplinary Powers and Sanctions, August 2020 ("Consultation Paper")**

We welcome the opportunity to participate in this consultation which has as its aim the improvement of corporate governance standards and market integrity by ensuring greater compliance with the Listing Rules.

We take this opportunity to note our concerns with the proposals (i) to introduce a "secondary liability" for Listing Rule breaches in circumstances where HKEX determines the person "...has caused by action or omission or knowingly participated in a contravention of the Listing Rules."; and (ii) to seek to define the scope of "senior management" who may be subject to that secondary liability very widely.

We believe these proposals are disproportionate when taking into account the intended purpose of the Consultation Paper which is only to impose liability "where the circumstances justify"<sup>1</sup> and then "only in limited circumstances"<sup>2</sup>. The proposals go further than, for instance, the regime in the UK that is referred to in paragraph 91 of the Consultation Paper as they impose liability:

- for a breach of any of the Listing Rules, not just those Listing Rules which HKEX identifies as being of particular importance to the integrity of the market. For example, the sanctions in DTR1.5.3G of the UK's Disclosure Guidance and Transparency Rules only apply to a breach of specific Articles of the Market Abuse Regulation relating to disclosure of inside information, maintenance of insider lists and restrictions on, and disclosure of, dealings in securities by persons discharging managerial responsibility; and
- on a very broad range of individuals in relation to a listed issuer (for example the company secretary and chief operating officer of a subsidiary).

There is also scope for doubt as to how the test for secondary liability would be applied. Liability may be imposed where HKEX determines that the person "*has caused by action or omission or knowingly participated in a contravention of the Listing Rules*". This is very wide. For example, any failure by the board could potentially lead to an unwarranted secondary disciplinary liability on an expanded range of individuals – for example, where their involvement was only in the production and authorisation process of an announcement, and not in the underlying transaction itself; or if they are not privy to an issuer's day-to-day business and information.

If the stated purpose is to impose liability only in the limited circumstances mentioned in the Consultation Paper, we do not believe this is reflected in the applicable test itself which is very broadly formulated; in particular, the elements of "action" or "omission" may inadvertently catch parties which have no intention to breach the Listing Rules.

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<sup>1</sup> Paragraph 95 of the Consultation Paper

<sup>2</sup> Paragraph 96 of the Consultation Paper

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We would suggest that:

- while we are supportive of the aims of the Consultation Paper, the concept of "secondary liability" be reconsidered and removed;
- if that is not considered to be appropriate:
  - then the drafting of the "secondary liability" proposal: (i) be restricted only to those breaches which HKEX considers to be of particular importance to the integrity of the market; and (ii) be amended to make it clear that there should be an element of intention or at the very least recklessness on the part of the relevant person concerned not just in relation to the participation in a contravention but also in relation to the action or omission element of the test; and
  - the definition of "senior management" be linked to an individual's actual role and responsibility within an organisation rather than be ascribed by title (e.g. someone who has control or can influence the decision-making in an organisation), and is aligned with that used in other major jurisdictions.

We would be most willing to discuss the points made above if helpful for purposes of clarification.

Yours sincerely,

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