

## Response to the SFC/HKEX joint consultation paper dated June 2016

*Provided on the basis that the response can only be published anonymously.*

### Introduction

This consultation paper describes a new structure for the listing process of the HKEX and the SFC, including setting up two new committees. It is said that the changes will create closer coordination between the two bodies, and streamline processes for making important or difficult decisions. Exactly how or why there is currently insufficient co-ordination, or that current processes for making decisions are not working, is not described. It is therefore difficult to appreciate the nature of the problem requiring a solution.

### History

Long ago it was decided that Hong Kong listings would be approved by gathering together a group of experienced professionals of diverse experience. The alternative would have been that the job be given to full-time administrators. I sat on the listing committee for quite a few years bringing experience as an accountant working for a listed company. The listing committee worked well although most thought the process laborious and the time required to be great. The time pressure was particularly on listed company members who rarely had the conflicts that often affected the attendance of many others.

There appears to be no suggestion that this “non-executive and part-time” listing committee be changed, so the analysis of the proposals must be in the context that the listing committee will continue with much the same composition and operational method. The listing committee is therefore the foundation of the whole listing system.

### Analysis

In building any structure the most important part is a sound and strong foundation.

The fundamental question (unanswered in the consultation paper) is “Will the proposals tend to strengthen or weaken the listing committee?” I worry that the proposals will weaken the listing committee. This is because the most interesting parts of a listing committee member’s tasks – rule changes and appeals – are being removed to a higher level. Most likely it will become increasingly difficult to attract the same high quality of listing committee members as currently, and in the past.

To take the analogy of a building, the effect of the proposals is to add another floor to the top of a building at the very moment the foundations are being weakened.

My recommendation is that the listing committee remains the first and primary point for decisions on rule changes and appeals.

### Alternative solution

Looking at the composition of both new committees it seems that their purpose is to provide a forum in which differences of opinion between the HKEX and the SFC can be resolved by developing a consensus.

If this is the main purpose, it would be more sensible for the SFC to appoint representatives to the listing committee. This would strengthen the foundation of the system. The SFC representatives would participate in the debate over listings and obtain knowledge of future listings and policy dilemmas. They could then discuss the issues with their SFC colleagues and contribute to further discussions within the listing committee. The objectives of the changes stated on page 5 – “the SFC will have earlier and more direct input on listing policy matters and listing regulation” will be satisfied.

### The Alibaba case

A market commentator recently asserted on the radio that Hong Kong deliberately decided to give up the turnover from trading the shares in Alibaba (he said the volume was comparable to the current total volume on HKEX) because it decided that it was more important to stick to the current rules than benefit Hong Kong’s market practitioners with more business.

The question is who made such a decision? Or was such a conscious decision made at all? Privately I was told that the listing division of the stock exchange tried to fit Alibaba’s requirements into the existing rules, but failed to satisfy Alibaba. The balance to be struck between changing the rules to meet new circumstances, and not doing so, may not have been made explicitly. In any event Alibaba listed elsewhere.

Whatever the true story, it seems that currently there is no organizational body with the responsibility to resolve high level policy<sup>1</sup>. There should be. In the Alibaba case the trade-off was between keeping the current rules, and the benefit to society of additional work to the many people employed in Hong Kong providing financial advice, accounting and legal services, broking, and trading services.

The proposed composition of the listing policy committee is too narrow to make such a trade-off. Some members need to have a wider view of society’s needs than a regulator (considering the SGC, listing committee and takeover panel all as regulators). The answer is to appoint a majority of non-executive members who have wider business, academic or other experience. (That is not unlike the requirement that companies have independent non-executive directors.) Such a committee would be well equipped to make policy decisions.

### Specific comments

The following are comments on particular elements of the proposals.

---

<sup>1</sup> The consultation seems to think policy is just changing rules, but here it is used much more broadly.

### *Suitability concerns*

The phrase “suitability concerns” is very unfortunate. It suggests arbitrariness, and even undisclosed prejudice, in deciding if a company should be allowed to list.

The requirements for listing should be clearly spelled out in the rules and if a company complies with them listing should be allowed. If an unsuitable company gets listed, it should be blamed on imperfect rules, those behind any untoward activities held to account, and the rules revised.

### *Listing policy committee*

Alternates should not be permitted as a matter of principle for they adversely affect the unity of a committee.

If a lot of conflicts of interests are anticipated the composition of the committee must be reconsidered. It is particularly difficult to see how the chairman and deputy chairmen of the listing committee can be effective members, for they will be often in conflict as they attend listing committee meetings.

It is reasonable that the HKEX should have the opportunity to say how a proposed rule amendment will affect its commercial interests, but why should HKEX have a preference in articulating their commercial interests ahead of others involved in the listing process? It would be fairer to all if the proposed rule changes be published for consultation, and that HKEX makes its views known as an equal with all market participants.

### *Listing regulatory (review) committee*

The idea of harnessing the experience of former listing committee members to review decisions is both imaginative and excellent.

Even if my alternative suggestion that the listing committee is strengthened by adding SFC members is adopted, there is no reason why former listing committee member should not form part of the listing committee review committees.

### *Listing disciplinary chairperson group*

Senior counsel tends to take a very narrow, legalistic approach to analysing issues. Their style is often not helpful to a balanced judgment as their experience is invariably representing one side of an argument. It would be better to appoint people with wide real-world experience whose approach is likely to be more balanced. A parallel is the advantage of resolving issues through a non-legal expert arbitrator compared with a court.

### *Listing division*

The proposals put the listing committee in a strange organizational position. While the services are primarily given to the listing committee, its evaluation is not done by the listing committee. It would be much less ambiguous if the listing committee continued to evaluate the performance of the listing division. It does not seem wise to me that the listing division should report directly to the listing regulatory review committee on any matter before it has been considered by the listing

committee. A wider issue is if the listing committee should remain connected the HKEX indefinitely, or become an autonomous body.

**12 November 2016**

These views are provided on the basis that the response can only be published anonymously without attribution to the author.