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THE HONG KONG INSTITUTE OF COMPANY SECRETARIES
香港公司秘書公會

12 May, 2005

Listing Division
Hong Kong Exchanges and Clearing Limited
11/F, One International Finance Centre
1 Harbour View Street, Central
Hong Kong

Attn: Ms Kelly Wick
Assistant Vice President

(Fax : 2295-3180)

Dear Sirs,

Re : Consultation Paper on New Structure for Listing Decision-Making

Thank you for inviting The Hong Kong Institute of Company Secretaries to comment on the New Structure for Listing Decision-Making. Attached please find our submission.

Thank you very much for your attention to this matter.

Best regards,

Neil M McNamara
President

**SUBMISSION BY
THE HONG KONG INSTITUTE OF COMPANY SECRETARIES**

**CONSULTATION PAPER ON
NEW STRUCTURE FOR LISTING DECISION-MAKING**

1. At the outset, the Institute commends on the steps continuously taken by the administration to improve the quality of the Hong Kong financial market. The object in this consultation is a proposal to implement a new decision-making structure for listing matters.
2. The Institute fully supports the Exchange's aim in developing the proposed new structure, i.e. to put in place a simpler administrative framework for listing decision-making whilst also ensuring the checks and balances necessary to minimize regulatory risk including real or potential conflicts of interest within the HKEx.
3. With that in mind, the Institute sets out in the paragraphs below our comments on various questions posed in this consultation.

Part A: Non-Disciplinary Matters

Policy proposal

A1 A new Listing Policy Committee would be established with responsibility for :

- (a) advising on and, as necessary, approving policy concerning listing matters including disciplinary listing matters;
- (b) considering and approving Rule amendments; and
- (c) approving material Rule waivers or modifications that are intended to have general effect.

A2 The Listing Policy Committee would have up to 28 members and a quorum of 12 members would be required for the transaction of any business by the Committee.

The Institute's feedback

A1Q1 The Institute agrees to this proposed set up including the scope of roles to be exercised by the new Listing Policy Committee. Insofar as responsibility (b) is concerned, the Institute suggests to add "initiating" in front of "considering and approving Rule amendments" such that members of the Listing Policy Committee may be able to take a more proactive approach in regard to Rule amendments.

A2Q1 The Institute supports the idea to enhance the representation status of the Listing Policy Committee. The proposed number of 28 members is appropriate.

A2Q2 The proposed quorum of 12 members is appropriate in the proposed circumstances of 28 members.

Policy proposal

A3 All members of the Listing Policy Committee would be nominated by a Listing Nomination Committee but include:

- (a) one chairman and two deputy chairmen, who between them would chair all Listing Policy Committee meetings;
- (b) The HKEx Chief Executive; and
- (c) at least eight investor representatives.

The listing Nomination Committee's mandate would be to ensure the non-prescribed members of the Listing Policy Committee are a suitable balance of listed issuers and market practitioners including lawyers, accountants, corporate finance advisers and brokers.

A4 The Listing Nomination Committee would be composed as it is under the current Rules. (It is currently called the Listing Nomination Committee.) That is, it would consist of:

- (a) the Chief Executive of the Exchange;
- (b) two members of the HKEx Board;
- (c) the Chairman of the SFC; and
- (d) two Executive Directors of the SFC.

The Institute' s feedback

A3Q1 The Institute agrees to the proposed composition of the Listing Policy Committee including prescribed and non-prescribed members, in particular the Institute would like to emphasize the important role of non-prescribed members who are experienced professionals or representatives from professional bodies like lawyers, accountants, corporate advisors, securities professional and the like. These professionals are major participants in the financial markets for listed companies and often adopt relatively more pragmatic or balanced views between the regulators and the issuers. Their presence should contribute to the proper function of the proposed Listing Policy Committee.

A3Q2 The Institute considers that at least eight investor representatives (28.6% of the Listing Policy Committee) ensures appropriate investor representation on the Listing Policy Committee, although as time goes by, such number of investor representatives can be reviewed to see how investor representation can be further enhanced.

A4Q1 As to the retention of the current composition of the Listing Nomination Committee. The Institute considers that the proposal is fine, but would echo that the trend should be moving towards an enlarged representation even in the Nomination Committee in future, otherwise, the administration may still be accused of wholly controlling who to be nominated to the Listing Policy Committee.

Policy proposal

A5 A new Listing Decisions Panel would be established with responsibility for significant first instance listing application and delisting decision, specifically:

- (a) approval of applications for listing by new equity and new non-structured product issuers (including all related waivers);
- (b) approval of new issuers of structured products;
- (c) approval of new guarantors of guaranteed structured products; and
- (d) cancellation of any listing (except the cancellation of listing of securities with an expiry date or event specified at the time of listing upon their expiry).

The Listing Division would make all other first instance listing-related decisions. For example, the approval of applications for listing in respect of debt securities issued or guaranteed by certain issuers or guarantors, and waiver applications by listed issuers excluding material waivers that are intended to have general effect. The Listing Division may also decide whether to reject applications for listing by new equity and new non-structured product issuers.

The Institute's feedback

A5Q1 & A5Q2 & A5Q3

The Institute supports to setting up of a new Listing Decisions Panel charged with responsibility for significant first instance listing application and delisting decisions. All the other first instance listing-related decisions are then to be dealt with by the Listing Division. The new set-up has the advantages of improving governance and transparency on important listing decisions by drawing its members from members of the Listing Policy Committee.

On all other listing-related decisions, these are usually less controversial and often are administrative decisions, they can be dealt with adequately by the Listing Division.

Policy proposal

A6 Under the current structure, the Board delegates its listing decision-making powers to the Listing Committee and the Listing Committee has sub-delegated those powers to the Listing Division.

Furthermore, the Rules provided for the Listing Committee to have an oversight role in relation to the Listing Division.

To address reservations expressed by the Listing Committee and more appropriately reflect the arrangements currently in place, it is proposed that the Rules be amended so that the Board delegates decision-making power directly to the Listing Division and to remove reference to any of the Listing Policy Committee, Listing Decisions Panel or Listing Review Panel undertaking a formal oversight role in relation to the Listing Division.

However, it is proposed that the Listing Policy Committee may, on its own initiative, request that the Listing Division prepare and present to the Committee, analysis or other information in relation to the Listing Division's exercise of its decision-making power.

The Institute's feedback

A6Q1 The Institute agrees that the Rules should be amended as proposed with respect to delegation of decision-making power from the Board directly to the Listing Division.

A6Q2 The Institute agrees that the Rules should be amended as proposed with respect to the Listing Policy Committee's oversight and supervision of the Listing Division.

Policy proposal

A7 Each Listing Decisions Panel would be drawn from the pool of members of the Listing Policy Committee excluding the chairman and two deputy chairmen of the Listing Policy Committee and the HKEx Chief Executive (the Listing Decisions Panel pool).

The Listing Decision Panel pool would be divided into three sub-pools, which would generally form Listing Decisions Panels on a rotating basis.

(The HKEx Chief Executive (or his alternate) would) would form part of the Listing Decisions Panel pool because he would be entitled to attend all meetings of the Listing Decisions Panel.)

A quorum of five members would be required for each matter discussed at Listing Decisions Panel meetings. The HKEx Chief Executive (or his alternate) would be entitled to be counted in the quorum for any meeting.

The Institute's feedback

A7Q1 to Q4

The Institute agrees to the approach set up the consultation paper.

Policy proposal

A8 All first instance non-disciplinary decisions would be reviewable by a new Listing Review Panel.

The Listing Review Panel would be the sole review body for all non-disciplinary decisions.

The Institute's feedback

A8Q1 The Institute supports the establishment of the new Listing Review Panel to decide on the reviews of all first instance non-disciplinary decision. Disciplinary decision is quite a different matter, more appropriate to be dealt with by another panel.

A8Q2 The Institute agrees that there should be only one review of any first instance non-disciplinary decision. If the aggrieved party is still not satisfied, he/she/it can take the matters further to Court by way of judicial review or otherwise. There should be an end of any decision by HKEx within a reasonable time. It is not justified to introduce a further appeal process within the HKEx or the Exchange.

Policy proposal

A9 Each review hearing by the Listing Review Panel would be formed by:

- (a) a chairman, who would be either the chairman or one of the deputy chairmen of the Listing Policy Committee; and
- (b) four members from the Listing Decisions Panel pool.

Except, in the case of review of a decision of the Listing Decisions Panel, the members of the Listing Decisions Panel pool who were members of the Listing Decisions Panel that made the relevant decision could not be members of that Listing Review Panel.

The membership for each Panel (including the chairman) would be selected according to a system that would distribute participation evenly and in which the Committee Secretary would not have discretion. The system would be set out in internal procedures established by the Exchange from time to time pursuant to draft Rule 2A.14.

A quorum of three members would be required for the transaction of business at each hearing of the Listing Review Panel.

The Institute's feedback

A9Q1 The Institute agrees with the size and composition of the Listing Review Panel including that the members should be drawn from the Listing Policy Committee. The present proposal avoids any conflict of interest or review of his/her own decision. That's fine.

A9Q2 The quorum of 3 is appropriate and the distribution system is particularly important to ensure that there is no concentration of any decisions/or reviews on a particular member.

Policy proposal

A10 As under the current structure, seeking a review of a decision would involve payment of a review fee. Otherwise, the draft Rules provide for each party to bear its own costs in preparation for the hearing.

The Institute's feedback

A10Q1 The Institute supports that a review of decisions should incur payment of a review fee. The setting up of the fee level should be just moderate, reflecting the share of the allowance to be given to panel members under the proposed structure.

A10Q2 The Institute does not object to the rule that each party should otherwise bear its own costs, for example, in preparation for the review hearing. Such system has the advantage of being simple. Otherwise, there may be another round of argument on costs concerning which side's conduct and/or decision is more reasonable than the other, irrespective of the outcome of the review decision.

A10Q3 The Institute does not support the idea that the Listing Review Panel should have discretion to refund a review fee in certain limited circumstances. That will destroy the whole purpose of A10Q2 i.e. adopting a simple cost system, so long as the fee for review is just moderate. .

Policy proposal

A11 All members of the Listing Policy Committee, Listing Decisions Panel and Listing Review Panel would be eligible for a daily (or per diem) allowance for time spent, for example, preparing for and in the conduct of meetings or hearings.

The Institute's feedback

A11Q1 The Institute supports the idea that the Listing Policy Committee, Listing Decisions Panel and Listing Review Panel members should be compensated on a per diem basis. The level of remuneration may draw experience from the fee level of lay members sitting on some of the government tribunals.

Policy proposal

A12 Any application for listing or other non-disciplinary matter commenced prior to commencement of the amended Rules would be dealt with under the current Rules unless the affected person, for example, new applicant, elects otherwise.

The Institute's feedback

A12Q1 Generally, rules should not be applied retrospectively unless the affect person elects otherwise (which normally work for his/her advantage). The Institute in that sense supports the proposed transitional arrangements.

Part B: Disciplinary Matters

Policy proposal

B1 An adjudicator would be appointed as a full time staff member of the Exchange. The appointment would be on the recommendation of the Exchange's Head of Listing to the Exchange Board.

To retain flexibility the Exchange may appoint a consultant to perform this role at some time in the future, if the shape and character of the enforcement workload alters significantly. (Such change in circumstances may come about as a result of the implementation of statutory backing of some of the Rules.)

Subject to budgetary control applied by the Exchange's Head of Listing, the Adjudicator may employ or second staff to assist him.

The Listing Division would be responsible for investigating and referring suspected breaches of the Rules to the Adjudicator. To ensure any conflict of interest is appropriately managed, there would be an information barrier (Chinese wall) between the Adjudicator and the Listing Division.

The Institute's feedback

B1Q1 The Institute supports the proposals for the handling of first instance decisions for disciplinary matters by an adjudicator retained by the Exchange. That would enhance the independence of the decision made by the adjudicator who is not involved in any investigative side.

Policy proposal

B2 The Adjudicator's decision-making processes, including the submissions of the affected parties, would, save for exceptional circumstances, only be in writing. That is, there would not be an opportunity for the parties to make oral submissions.

The Institute's feedback

B2Q1 The Institute considers such approach is moving backward, even the current practice allows the affected parties to make an oral submission within a short period of time. The opportunity of oral submissions, in addition to written ones, has the benefit of directing/addressing/clarifying issues in question which the adjudicator is called upon to decide. The Institute suggests that on balance, the opportunity for making oral submissions should be retained although a chest-clock approach, e.g. granting a certain time slot beforehand, can be adopted so that the hearing would not be unnecessarily prolonged.

Policy proposal

B3 Reviews of first instance disciplinary decisions would be de novo reviews. That is, the issues would be considered afresh rather than limited to specific factual or legal issues identified as giving rise to a need for review.

The Institute's feedback

B3Q1 The Institute agrees that the review should be a de novo review. That is in line with usual approach adopted by many other bodies in the case of a review.

Policy proposal

B4 Each review would be decided by a separately constituted panel.

The individual panels, to be known as the Disciplinary Review Panel, would be drawn from a pool. The Disciplinary review panel pool would have a minimum 20 members. The members would be nominated by the Listing Nomination Committee, referred to at proposal A4 above, in the same way as for the Listing Policy Committee (as set out a proposal A3 above).

The pool members would include at least seven investor representatives and four legally qualified persons. In addition to the seven investor representatives and four legally qualified persons, the Listing Nomination Committee would be required to ensure the pool consists of a balance of market and professional experience. There would be no requirement for directors of listed issuers or other representatives of listed issuers to be members of the pool.

There would be no restriction on the number of members of the Disciplinary Review Panel who may also be members of the Listing Policy Committee (and thereby the pool for the Listing Decisions Panel and the Listing Review Panel referred to at proposals A7 and A9 above).

The Institute's feedback

B4Q1 The Institute supports the establishment of the new Disciplinary Review Panel to decide on the review of all first instance disciplinary decisions. A decision by panel is less prone to the accusation of bias (like that of a single adjudicator).

B4Q2 The size of 20 members and the composition of the Disciplinary Review Panel pool including that there should be no restriction on the number of members of the Disciplinary Review Panel who may also be members of the Listing Policy Committee? Please explain your views appears to be workable and appropriate. The Institute however notes that at least 7 investor representatives out of 20 means a percentage of 35%, bigger than the percentage in the Listing Policy Committee.

B4Q3 The Institute does not object to retain some flexibility by not prescribing the number of representatives of each market category, rather than just the investor representatives to cater for the situation of Hong Kong.

B4Q4 See feedback answer in B4Q2.

B4Q5 The Institute considers that it is appropriate for the time being for the Listing Nomination Committee to appoint Disciplinary Review Panel pool members but would like to mention that there may be a need for inclusion of investor representatives and/or professional representative in the Nomination Committee in future.

B4Q6 The Institute opines that it is sufficient for the Disciplinary Review Panel as set out in the consultation papers to be the sole Exchange review body for all disciplinary decisions.

Policy proposal

B5 For each review, five members of the Disciplinary Review Panel pool would be empanelled. Each Disciplinary Review Panel would have a quorum of three members.

The chairman of every Disciplinary Review Panel would be legally qualified.

The chairman would be responsible for writing up the Disciplinary Review Panel's decision and reasons for its decision.

The chairmanship and membership of the Disciplinary Review Panel would be determined on a rotating basis. The membership for each Panel (including the chairman) would be selected according to a system that would distribute participation evenly and in which the Committee Secretary would not have discretion as to which chairman is selected and which other persons are selected from the pool save for urgent cases or when insufficient Panel members from the respective pools are available. The system would be set out internal procedures established by the Exchange from time to time pursuant to draft Rule 2B.10.

The Institute's feedback

B5Q1 The size of 5 is suitable.

B5Q2 A quorum of 3 is also suitable.

B5Q3 The Institute supports the proposal that the chairman of every Disciplinary Review Panel would be legally qualified and responsible for writing up the Disciplinary Review Panel's decision and reasons for its decision. The process may involve fact finding exercises and consideration of legal issues, such approach is most appropriate.

Policy proposal

B6 The procedures would provide for the Committee Secretary to co-opt members from the Listing Policy Committee to the Disciplinary Review Panel if, due to unavailability or conflict, the Committee Secretary is unable to select a Disciplinary Review Panel chairman and four other Disciplinary Review Panel members.

B7 All members of the Disciplinary Review Panel would be eligible for a daily (or per diem) allowance for time spent, for example, preparing for and in the conduct of hearings.

B8 As with non-disciplinary reviews, the Rules would provide for a fee to be paid for a review application. The fee is to compensate the Exchange for costs it incurs in reviewing a decision.

In addition, the proposed sanctions available to be made by the Adjudicator or Disciplinary Review Panel would include an order requiring parties to the proceedings to pay the reasonable investigation costs of the Exchange.

The Institute's feedback

B6Q1 The Institute opines that it is not objectionable that the Committee Secretary be able to co-opt members from the Listing Policy Committee to the Disciplinary Review Panel if necessary, however to avoid any possible conflicts or allegation of bias, that should only be sparingly deployed.

B7Q1 Likewise, the Institute supports that the Disciplinary Review Panel members should be compensated on a per diem basis (as with the Listing Policy Committee, Listing Review Panel).

B8Q1 The Institute supports that a review of decisions should incur payment of a review fee and the fee level should be a moderate one.

B8Q2 Disciplinary proceedings carry a higher degree of burden of proof. The conviction might carry some sort of stigma on the affected parties. The process is likely more adversarial than other decision process. In that circumstances, and provided that the chairman supervising the process is familiar with the making of appropriate cost orders, the Institute agrees that it is appropriate for the Adjudicator and the Disciplinary Review Panel to have the option of ordering recovery of the Exchange's reasonable investigation costs, vice versa, the Adjudicator and the Disciplinary Review Panel should also be empowered to make cost orders against HKEx should the disciplinary proceedings be instigated unmeritoriously. That there should be some discretion conferred on the Adjudicator or Panel on costs, depending on the circumstances of the case.

Policy proposal

B9 Any matter in relation to which the Listing Division has sent a report to the Listing Committee prior to the commencement of the amended rules would be dealt with under the current rules. All other matters would be subject to the amended Rules (and procedures).

The Disciplinary Review Panel would only review decisions made under the amended Rules. Consequently, any disciplinary decisions made by the Listing Committee under the current Rules would be subject to the review procedures under the current Rules.

The Institute's feedback

B9Q1 The Institute agrees to the proposed transitional arrangements for disciplinary matters and consider they will not give rise to any unintended effects.