



Hong Kong

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HKEX CONSULTS ON LISTING RULE AMENDMENTS TO INCREASE ITS DISCIPLINARY POWERS AND SANCTIONS

The Hong Kong Stock Exchange (**HKEx**) is consulting on amendments to the HKEx Listing Rules to increase its disciplinary and sanctioning powers under Chapter 2A of the Main Board Listing Rules and Chapter 3 of the GEM Listing Rules. The HKEx's Consultation Paper on Review of Disciplinary Powers and Sanctions¹ was published on 7 August 2020 seeking comments on a number of proposals including the ability for HKEx to sanction individuals responsible for listed companies' breach of the HKEx Listing Rules.

The deadline for responding to the consultation is **9 October 2020** and responses can be submitted using the questionnaire available on the HKEx website at <https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/August-2020-DisciplinaryPowers/Questionnaire/cp202008q.docx>.

HKEx notes in the Consultation Paper that its disciplinary powers have remained largely unchanged since 1993 and that some of the disciplinary sanctions provided for by HKEx Listing Rule 2A.09 have never been imposed for legal or technical reasons. Reputational sanctions (such as public criticism) with directions for remedial action are the most commonly imposed sanctions for a broad range of misconduct. The main focus of the proposed changes is to give the HKEx the ability to sanction individuals who are responsible for listed companies' breach of the HKEx Listing Rules.

¹ HKEx. August 2020. "Consultation Paper: Review of Listing Rules Relating to Disciplinary Powers and Sanctions". Available at <https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/August-2020-Disciplinary-Powers/Consultation-Paper/cp202008.pdf?la=en>

The key proposals include:

- a) Making it easier for the HKEx to issue a public statement that an individual's continuing to hold the office of director of a listed company is prejudicial to investors' interests (a **PII Statement**) by removing the requirement for the director's "wilful" or "persistent" failure to discharge his Listing Rule obligations;
- b) Allowing the HKEx to impose a PII Statement on current and former directors and members of the senior management of listed companies and their subsidiaries;
- c) Enabling the HKEx to deny the market's facilities to a listed company which retains a director the subject of a PII Statement in addition to the existing follow-on actions of suspending or cancelling the listing of the company's listed shares;
- d) Removing the requirement of "wilful" or "persistent" failure by a listed company in discharging its Listing Rule obligations for denying the company the market's facilities. Listed companies will also be required to fulfil specified conditions (e.g. to remedy the Listing Rule breach);
- e) Creating a new sanction for a director's serious or repeated failure to discharge his Listing Rule obligations - a public statement that a director is unsuitable to act as a director or senior management member of a named listed company or its subsidiaries (a **Director Unsuitability Statement**);

- f) Allowing the HKEx to impose the same follow-on actions as for a PII where a listed company retains a director the subject of a Director Unsuitability Statement after a date specified by the Listing Committee;
 - g) Extending the HKEx's ability to ban a professional adviser from representing a specified party to being able to ban it from representing *any* party;
 - h) Including the following as persons who can be disciplined by the HKEx: (a) employees of a professional adviser of a listed group; (b) guarantors of structured products; (c) guarantors of debt securities; and (d) parties who provide an undertaking to, or enter into an agreement with, the HKEx;
 - i) Imposing secondary liability on parties subject to HKEx's disciplinary regime for Listing Rule breaches which they have caused or knowingly participated in their contravention;
 - j) Imposing express obligations on professional advisers when acting in connection with Listing Rule matters;
 - k) Imposing an explicit sanction for a party's failure to comply with a requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee;
 - l) Imposing an express obligation for parties to provide accurate, complete and up-to-date information when responding to the HKEx's enquires or investigations; and
 - m) Including independent financial advisers within the definition of "professional adviser".
- b) an order requiring a breach to be rectified or remedial action to be taken under Listing Rule 2A.09(6) which may require the appointment of an independent adviser to the company's minority shareholders;
 - c) an order denying a director the facilities of the market for a specified period where a director wilfully or persistently fails to discharge his Listing Rule obligations (Listing Rule 2A.09(9)); and
 - d) a suspension or cancellation of the listing of a company's securities if a director remains in office after the HKEx makes a PII Statement.

The following ancillary and operational sanctions can also be imposed:

- a) reporting the conduct to a regulatory authority (e.g. the SFC or Financial Secretary or an overseas regulatory authority);
- b) banning professional advisers or their employees from representing a specified party in relation to matters coming before the HKEx's Listing Division or Listing Committee for a stated period under Listing Rule 2A.09(5); and
- c) taking any other action the HKEx considers appropriate.

1. HKEx's Current Disciplinary Sanction Regime

Listing Rule 2A.09 allows the HKEx to impose one or more of the following sanctions for a breach of the Listing Rules:

- a) reputational sanctions, which include a private reprimand, public statement involving criticism, or public censure. Of these, a public censure is used for more serious misconduct. Where a director's failure to fulfil his obligations under the Listing Rules is considered to be wilful or persistent, the HKEx can make a public statement that the retention of office by a relevant director is prejudicial to the interests of investors under Listing Rule 2A.09(7);

2. Proposed Changes re. PII Statements

Listing Rule 2A.09(7) enables the HKEx to make a PII Statement in relation to a director who has *wilfully or persistently* failed to discharge his responsibilities under the Listing Rules. HKEx is not able to remove a director from office and that power rests with the company's board and shareholders. However, HKEx can suspend trading in or cancel the listing of the company's listed shares under Listing Rule 2A.09(10) if the director is not removed after the issue of a PII Statement.

HKEx is proposing to amend the rule to enable it to "...state publicly that in the Exchange's opinion the occupying of the position of director or senior management of a named listed issuer or any of its subsidiaries by an individual may cause prejudice to the interests of investors" (New Listing Rule 2A.10(4)).

The revised wording reflects the following changes proposed by the HKEx:

a) Lowering the Threshold for Making PII Statements

According to the Consultation Paper, the HKEx rarely issues PII Statements, in part because of the need to show that a director's failure to discharge his duties is "wilful" or "persistent". This prevents the HKEx from making a PII Statement in relation to some types of misconduct which it considers to warrant a PII Statement because the misconduct is not wilful or persistent. In other cases, there are evidential difficulties in establishing that a director's misconduct was "wilful".

The HKEx is proposing to reduce the current threshold of "wilful" or "persistent" failure to enable it to make a PII Statement where the person's occupying the office *may* cause prejudice to the interests of investors.

b) Extend PII's Scope to Cover Senior Managers and Officers of Subsidiaries

Under the current Listing Rules, an individual the subject of a PII Statement can continue as a member of the listed company's senior management or as a director or senior management member of a subsidiary. HKEx therefore proposes that it should be able to issue a PII statement in relation to: (a) members of a listed company's senior management as well as its directors; and (b) directors and senior management members of a listed company's subsidiaries.

c) Clarifying that PII Statements Can be Imposed on Persons No Longer in Office

The wording of Listing Rule 2A.09(7) suggests that the HKEx can only issue a PII statement with respect to an individual who continues to be a director of the listed company. It is not unusual for a director to have already resigned by the time the HKEx brings disciplinary action. In this situation, the HKEx typically indicates that it was *minged* to make a PII statement had the director remained in office and, that if the individual wished to be a director of a listed company in future, the HKEx would take the relevant conduct into account in assessing the director's suitability under Listing Rule 3.09.

The HKEx is proposing to make clear that it can issue a PII Statement in respect of an individual irrespective of whether they remain a director or senior manager of the listed company at the time the statement is issued.

As is currently the case, the HKEx will be able to impose any disciplinary sanction under Rule 2A.09 alone or in conjunction with any other sanctions under that rule. In determining whether to issue a PII Statement, it will continue to have regard to the non-exhaustive factors and considerations set out in its Enforcement Policy Statement² and Statement on Principles and Factors in Determining Sanctions and Directions imposed by the Disciplinary Committee and the Review Committee.³

The Consultation Paper notes that the statement that an individual's occupation of office may be prejudicial to investors' interests will not have a specified duration, but is not intended to be effective indefinitely. It notes that an individual who is subject to a PII Statement can still continue to be or become a director or a senior management member of another listed company or a listing applicant if he can demonstrate his suitability and/or appropriateness to do so.

3. HKEx's Imposition of Follow-On Actions for PII Statements

HKEx's Ability to Deny the Market's Facilities

Under the current Listing Rules, the HKEx has no power to remove an individual the subject of a PII Statement from office. The only course of action open to the HKEx is to suspend trading in the listed company's shares or cancel their listing if the individual remains in office. Given the lack of graduated responses to an individual remaining in office, in practice, the HKEx has not suspended or cancelled listings where an individual is not removed from office by its directors or shareholders. HKEx notes that the lack of any immediate consequence for the issue of a PII Statement makes it less effective as a sanction and that any perceived pressure to resign is likely to fade over time.

The HKEx is therefore proposing that where an individual the subject of a PII Statement remains a director or senior management member of the listed company or any of its subsidiaries beyond a date set by the HKEx's Listing Committee, the HKEx will be able to deny the listed company

² HKEx. "Enforcement of the Listing Rules – Policy Statement". Available at: https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Disciplinary-and-Enforcement/Disciplinary-Procedures-and-Enforcement-Guidance-Materials/enf_state_201702.pdf?la=en

³ HKEx. "Statement on Principles and Factors in Determining Sanctions and Directions imposed by the Disciplinary Committee and the Review Committee". Available at: https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Disciplinary-and-Enforcement/Disciplinary-Procedures-and-Enforcement-Guidance-Materials/sancs_0913.pdf?la=en

the facilities of the market for a specified period in addition to, or as an alternative to, suspending or cancelling the listing of the company's shares (New Listing Rule 2A.10A(2)).

Corporate Communications to Refer to PII Statement with Follow-on Actions

The Consultation Paper also proposes that where a PII Statement with follow-on actions has been made against an individual, the listed company referred to in the statement must refer to the PII Statement in all announcements and corporate communications until the individual ceases to be a director or member of senior management of the listed company or the subsidiary named in the PII Statement (New Listing Rule 2A.10A(1)). Corporate communications are defined in Listing Rule 1.01 to include a listed company's annual accounts, interim reports, summary financial reports, the directors' report, listing documents, circulars, notices of meeting and proxy forms.

The publication requirement will operate as a Listing Rule obligation once the HKEx issues a PII Statement with a follow-on action (whether a denial of market facilities or suspension of cancellation of listing).

Extending Disclosure of PII Statements

Other listed companies of which an individual mentioned in a PII Statement is a director are required to announce the sanction under Listing Rule 13.51B(2) as soon as practicable. Any other listed companies which appoint the individual as a director must disclose in the appointment announcement that the director is subject to a PII Statement under Listing Rule 13.51(2)(h). Listing applicants are required to disclose in their listing documents certain information about their current and proposed directors and members of senior management. Listed companies also need to disclose certain information in their annual reports about their directors and senior management members.

HKEx is proposing to extend the disclosure requirements by requiring listed issuers' annual reports and listing applicants' listing documents to include full particulars of any public sanctions made by any statutory or regulatory authorities against their directors or senior management, whether current or proposed.

4. Denial of Facilities of the Market

Listing Rule 2A.09(9) allows the HKEx to deny the market's facilities to a listed company for a specified period where a listed company's failure to discharge its responsibilities is *wilful or persistent*. It can also prohibit dealers and financial advisers from acting or continuing to act for the listed company in the same circumstances.

This sanction has never been imposed by the HKEx, partly because of the limitations of only being able to impose the sanction where there is a 'wilful' or 'persistent' failure by a listed issuer and the evidential difficulties involved. Further, as the sanction can only be imposed for a specified period, listed companies have no incentive to remedy the issues which gave rise to the breach and can simply wait for the sanction to lapse.

The HKEx is proposing to:

- a) lower the existing threshold by removing the requirement for 'wilful' or 'persistent' failure; and
- b) require the listed company to meet specific conditions (e.g. to remedy the Listing Rule breach).

The proposed amendment would allow the HKEx to deny the facilities of the market to a listed company for a specified period and/or until specified conditions are fulfilled. Denying the 'facilities of the market' would include the HKEx withholding approval of any matters that require its approval, including share issues. Examples of circumstances in which the HKEx would deny a company the market's facilities would include where:

- a) a listed company has repeatedly breached the Listing Rules depriving shareholders of their right to receive material information in a timely manner and to vote on notifiable or connected transactions; and
- b) the Listing Rule breaches are serious and result partly from significant deficiencies in the listed company's internal control systems.

Where there are significant deficiencies in a listed company's internal controls, this sanction might be imposed until an external professional adviser has conducted an internal control review and the listed company has implemented adequate and effective internal controls facilitating its Listing

Rule compliance. The aim would be to ensure that the cause of the Listing Rule breach is remedied before the listed company is allowed access to the market's facilities again.

5. Proposals for New Disciplinary Sanctions

Director Unsuitability Statement

It is proposed that where a director's misconduct is particularly egregious, the HKEx will be able to issue a public statement that the director is unsuitable to be a director or senior management member of the listed company or its subsidiary named in the statement (**Director Unsuitability Statement**) (proposed new Listing Rule 2A.10(1)). A Director Unsuitability Statement could be imposed in the case of a director's serious or repeated failure to discharge his responsibilities under the Listing Rules. Examples of these circumstances would include where a director has entered into unauthorised transactions which are not in the interest of the listed company and/or its shareholders or which involve a conflict of interest on the director's part or where the director is responsible for the listed company's frequent Listing Rule breaches.

If a director the subject of a Director Unsuitability Statement continues to occupy the position of director or a member of senior management of the listed company named in the statement or its subsidiary after the date set by the Listing Committee, the HKEx will have the same powers as for a PII Statement. It will be able to deny the listed company the facilities of the market for a specified period and/or to suspend or cancel the listing of the company's listed shares. The listed company will also be required to refer to the imposition of the Director Unsuitability Statement in its announcements and corporate communications until the individual ceases to be a director or senior management member of the relevant listed company or its subsidiary (New Listing Rule 2A.10A(1)).

6. Introduction of Secondary Liability

Currently, the parties that can be sanctioned under Listing Rule 2A.10 are: (i) the listed company and its subsidiaries; (ii) any director (or an alternate of a director) or member of senior management of a listed company or any of its subsidiaries; (iii) a listed company's substantial shareholder (i.e. a holder of 10% of the company's voting power); (iv) for GEM-listed companies only, a significant shareholder (a person(s) controlling 5% of the company's voting power immediately prior to the date of its listing document and commencement of trading in its shares on HKEx (GEM Rule 3.11(e)); (v) a professional adviser to a listed company or any of its subsidiaries; (vi) a listed company's

authorised representative; (vii) a supervisor of a PRC issuer; and (viii) an independent financial adviser to a listed company (together, **Relevant Parties**). A "professional adviser" is defined to include financial advisers, lawyers, accountants, property valuers and any other person retained by a listed company to provide professional advice in relation to a matter governed by the HKEx Listing Rules. Professional advisers do not include sponsors or Compliance Advisers.

However, some Relevant Parties, such as senior management members of listed companies and their subsidiaries and significant shareholders, have no obligations under the Listing Rules. Moreover, the Listing Rules do not impose secondary liability for Listing Rule breaches – i.e. those responsible for the listed company's breach of the Listing Rules cannot currently be disciplined unless they are directors or another party with obligations under the Listing Rules. Further, no standard of compliance is set for senior management members, substantial shareholders, professional advisers, authorised representatives and significant shareholders.

The HKEx is proposing that all Relevant Parties should be subject to secondary liability where the HKEx determines that the person "*has caused by action or omission or knowingly participated in a contravention of the Listing Rules*" (proposed Listing Rule 2A.10B(3)). The Consultation Paper sets out the following examples of how secondary liability would work.

Imposition of Secondary Liability for an Action or Omission Causing a Listing Rule Breach

- a) A chief financial officer (**CFO**) could be secondarily liable for a listed company's failure to obtain the company's auditors' agreement before publishing a preliminary results announcement containing a material inaccuracy. If the CFO publishes a results announcement without including further comments made by the auditors after the board and audit committee approved the results announcement, the CFO would be responsible for the listed company's breach of the Listing Rules. Under the current Listing Rules, the CFO could not be sanctioned for his conduct as the Listing Rules do not impose any liability on a CFO to procure the listed company's compliance with the Listing Rules. If the proposed Listing Rule change is implemented, the CFO could be disciplined as a member of the listed company's senior management whose action and omission caused the Listing Rule breach.

- b) A listed company's chief operating officer (**COO**) could have secondary liability for a listed company's failure to disclose a share charge in a timely manner and in its interim financial report where the board has delegated the responsibility for the listed company's Listing Rule compliance and finalising the interim report to the COO. Under the revised Listing Rules, as a member of senior management, the COO would be liable for the Listing Rule breach caused by him omission.
- c) A substantial shareholder could have secondary liability for a listed company's breach of the minimum public float requirement if this results from the substantial shareholder refusing to reduce its shareholding in the listed company or to approve proposals which would address the issue despite its undertaking to take appropriate steps to ensure the maintenance of a sufficient public float in the listed company's shares. Under the proposed Listing Rule changes, a substantial shareholder could be sanctioned in this situation if the breach of the public float requirement was caused by an action or omission on its part.

Imposition of Secondary Liability for Knowing Participation in a Listing Rule Breach

- a) A listed company's CEO who is not a director could be secondarily liable for a listed company's failure to comply with the procedural requirements for a very substantial acquisition if he and the company's directors decided not to comply as a matter of commercial expediency despite knowing the requirements of the Listing Rules. The HKEx Listing Rules do not impose any obligation on a CEO and he could not be disciplined under the current Rules despite having participated in the decision not to procure the listed company's compliance, knowing that failure to do so would cause the company to breach the Listing Rules. Under the revised Listing Rules, the CEO would be subject to secondary liability for knowingly participating in a breach of the Listing Rules.
- b) A financial adviser engaged by a listed company to advise it on an acquisition could be secondarily liable for the listed company's failure to disclose the target's significantly deteriorating financial performance in its circular to shareholders where the financial adviser agrees with the listed company's directors to withhold the information. Despite participating in the decision to withhold the information, the financial adviser would not have breached the current Listing Rules. Under the

proposed Listing Rule change, the financial adviser could be sanctioned for having knowingly participated in the Listing Rule breach.

The introduction of secondary liability where a person is responsible for a Listing Rule breach or knowingly participates in it will allow the HKEx to impose sanctions on Relevant Parties without having to impose Listing Rule obligations on them.

7. Explicit Sanctions for Failure to Comply with Requirements of HKEx's Listing Division, Listing Committee or Listing Review Committee.

Listing Rule 2A.09 allows the HKEx's Listing Committee to impose sanctions where a Relevant Party has breached the HKEx Listing Rules. However, Relevant Parties do not always comply with a requirement imposed by the HKEx's Listing Division, Listing Committee or Listing Review Committee. Examples of non-compliance include listed companies failing to appoint a Compliance Adviser for a specified period after being directed to do so by the Listing Division, and listed companies and their directors failing or refusing to conduct an internal control review or Relevant Parties failing or refusing to undergo training, as directed by the Listing Committee on conclusion of a disciplinary action.

The HKEx proposes to include an explicit statement in the HKEx Listing Rules of the HKEx's ability to sanction a Relevant Party who has failed to comply with a requirement imposed by the Listing Division, the Listing Committee or Listing Review Committee. It is also proposing that it should be able to sanction a Relevant Party who has secondary liability for the failure of the person primarily responsible for compliance with the requirement imposed if the Relevant Party caused the non-compliance by action or omission or knowingly participated in not complying with the requirement.

8. New Obligation to Provide Accurate, Complete and Up-to-date Information

The HKEx is proposing to include an explicit obligation on parties responding to enquiries or an investigation by the HKEx to provide information or an explanation to the HKEx that is complete, accurate and up-to-date (New Listing Rule 2.12B).

The new Listing Rule will be an explicit statement of the HKEx's existing expectation that parties subject to its enquiries and

investigations should provide all information relevant to the enquiries even if it has not requested the specific information. It states specifically that this expectation, and thus presumably the proposed new Listing Rule, applies to professional advisers provided that the provision of information does not contravene any relevant requirements of professional conduct. That is not however made explicit in the draft Listing Rules.

9. Extension of Scope of Persons who may be Liable for Listed Company Rule Breaches

New Definition of Senior Management

A member of a *senior management* of a listed company and their subsidiaries can be sanctioned under existing Listing Rule 2A.10(c). The term is not however defined and the HKEx is therefore proposing to include the following definition to create certainty as to who is within the scope of the HKEx's disciplinary regime. The proposed definition of "senior management" will include any person:

- a) occupying the position of chief executive, supervisor, company secretary, chief operating officer or chief financial officer (whatever the name of the position);
- b) performing managerial functions under the immediate authority of the company's directors;
- c) referred to as senior management in the listed company's corporate communications or any other publications on the website of HKEx or the company.

According to the Consultation Paper (paragraph 116(b)), the term covers:

- a) senior individuals with decision-making responsibilities which give rise to Listing Rule implications who report directly to the board; and
- b) individuals designated by listed company directors as "senior management".

It will be a question of fact in each case whether a particular individual is within the definition of "senior management". Relevant Parties subject to investigation will be given the opportunity to state their case.

Ability to Ban Employees of Professional Advisers

The HKEx can currently ban a professional adviser or a named individual employed by a professional adviser from representing a named party in relation to a stipulated matter or matters coming before the Listing Division or the Listing Committee for a specified period (Listing Rule 2A.09(5)). Employees of a professional adviser are not however included as Relevant Parties under Listing Rule 2A.10 on whom HKEx can impose the ban provided for by Listing Rule 2A.09(5), even where they are liable for a Listing Rule breach.

The Consultation Paper therefore proposes to include employees of professional advisers to listed companies and their subsidiaries as Relevant Parties so that the HKEx's Listing Committee or Listing Review Committee can ban individual employees from representing parties on stipulated matters before the HKEx's Listing Division or Listing or Listing Review Committees for a specified period.

Extending Ban on Professional Advisers to Prohibit Representing Any Party

The Consultation Paper includes among its "proposed minor rule amendments" in Chapter 6 of the Consultation Paper, a proposal to extend HKEx's ability to ban a professional adviser from representing any party (or a specified party as currently) on stipulated matters before the Listing Division or Listing Committee for a stated period. The HKEx's rationale for the extension of its power to ban professional advisers from acting is that its deterrent power will be increased.

Inclusion of Guarantors of Structured Products as Relevant Parties

Guarantors of structured products are required to comply with the HKEx Listing Rules to the same extent as if they were the issuer of the structured product under Listing Rule 15A.16(3). They are required to sign a Listing Agreement in which they undertake to comply with its covenants. Examples of the obligations of a guarantor of a structured product are their obligations to announce information necessary to avoid a false market in the securities and information which may have a material effect on their ability to meet their obligations under the securities. Structured product guarantors are not currently Relevant Parties which can be sanctioned for their breach of their Listing Rule obligations. The HKEx therefore proposes to include them as Relevant Parties who can be sanctioned under Listing Rule 2A.09.

Inclusion of Guarantors of Debt Securities as Relevant Parties under the Main Board Listing Rules

The guarantors of debt securities are Relevant Parties under the GEM Listing Rules but not under the Main Board Rules. Guarantors of debt issues (except those guaranteeing debt issues to professional investors only under Chapter 37) are required to sign a Listing Agreement in which they undertake to perform the covenants it contains. Guarantors of debt securities issued only to professionals sign the application form for listing the debt securities which includes an undertaking to comply with the Listing Rules.

The HKEx is proposing to make guarantors of debt securities Relevant Parties for the purposes of the Main Board Listing Rules.

Inclusion of a Party who Provides an Undertaking to or who Enters into an Agreement with the HKEx as a Relevant Party

The HKEx does not currently have the ability to take disciplinary action under the Listing Rules against a party who has given an undertaking to, or entered into an agreement with, the HKEx in connection with listing matters. The breach of an undertaking or agreement can be enforced against the party who gave the undertaking or the counterparty to the agreement through the courts. The HKEx thinks that it would be useful for it to have the ability to take disciplinary action and impose sanctions against parties who give it undertakings or enter agreements with it. An example would be where an offeror in a mandatory offer under the Takeovers Code undertakes to the HKEx to take appropriate steps to ensure that a sufficient public float in the shares exists after the offer closes. A breach of that undertaking would potentially cause a breach of the listed company's obligation to maintain a minimum public float. The proposed Rule amendment would make the offeror a Relevant Party which could be disciplined and sanctioned under the Listing Rules.

Express Listing Rule Obligations on Professional Advisers

The existing Notes to Listing Rule 2A.10 provide that:

- a) An adviser's obligations to use all reasonable efforts to ensure that their clients understand and are advised as to the scope of the Listing Rules are subject to any relevant requirements of professional conduct, as policed and enforced by any professional body of which that adviser is a member. In other words, compliance with such obligations should not contravene a relevant requirement of professional conduct.

- b) The scope of any disciplinary action taken, in particular, any ban imposed on a professional adviser under Listing Rule 2A.09(5) must be limited to matters governed by or arising out of the Listing Rules.

The Consultation Paper notes that the wording of these Notes appears to assume that professional advisers have an obligation to use all reasonable efforts to ensure that their clients understand and are advised as to the scope of the Listing Rules. However, there is no express obligation on professional advisers to this effect under the Listing Rules. Nor do the Listing Rules prohibit advisers from providing information to the HKEx which is false or misleading in a material respect, although this would likely breach section 384 of the Securities and Futures Ordinance.

The HKEx is proposing to impose express obligations on professional advisers under revised Listing Rule 2A.09(4):

- a) so that when advising clients in connection with the Listing Rules, they must use all reasonable efforts to ensure that the client understands and is advised as to the scope of and their obligations under the Listing Rules; and
- b) to not knowingly provide information to the HKEx which is false or misleading in a material particular.

Position of solicitors and accountants

The Consultation Paper notes that in exercising disciplinary powers against solicitors and certified public accountants, the HKEx will need to comply with the arrangements it has agreed with the Hong Kong Law Society or Institute of Certified Public Accountants (**HKICPA**) (at paragraph 142). Section 23(8) of the Securities and Futures Ordinance provides that where a solicitor's or accountant's conduct breaches the Listing Rules and may also breach a duty imposed by the rules of professional conduct of the Law Society or HKICPA, the HKEx should refer the matter to the relevant professional body to determine whether disciplinary action should be commenced and impose any penalty.

Aligning the Practices for Filing Review Applications and Requesting or Providing Written Reasons for Decisions

The HKEx is proposing to align the practices for filing review applications and for requesting or providing written reasons for

decisions for disciplinary and non-disciplinary review matters. The proposals are to:

- a) use “business days” for counting the periods for filing review applications and requesting or providing written reasons for decisions;
- b) require all review applications to be served on the Secretary to the Listing Committee and the Listing Review Committee;
- c) provide that commencement of the relevant filing periods:
 - i) for filing review applications will be counted from the date of issue of the decision or the written reasons;
 - ii) for requesting written reasons for decisions will be counted from the date of issue of the decision; and
 - iii) for providing written reasons for decisions will be counted from the date of receipt of the request.

10. Publication of Sanctions

a) Private Reprimands

The HKEx is proposing to publish the substance of a private reprimand without disclosing the party’s identity in appropriate cases. The HKEx believes that this will be beneficial from the perspective of educating the market, deterrence and influencing compliance culture and corporate governance.

b) Public Sanctions

HKEx will amend the Listing Rules to reflect its current practice of publishing public sanctions or statements made under Listing Rule 2A.10 on the website of HKEx.

c) Other Sanctions under Listing Rules 2A.10 and 2A.10A

The revised Listing Rules will allow the HKEx to take any other action it considers appropriate which includes making public the imposition of any sanction.

11. New Regulatory Letters Regime

Where the Listing Division considers that there has been a breach of the Listing Rules, it will determine whether to bring a disciplinary action before the Listing Committee. If it decides that disciplinary action is not warranted, it will issue a regulatory letter to the party in breach of the Listing Rules. There will be three categories of regulatory letters: warning letters, guidance letters and no further action letters.

The level of severity of the conduct, the seriousness of the Listing Rule breach(es) and the nature of the regulatory concerns will determine whether a warning letter or guidance letter is issued. Warning letters are more severe than guidance letters and, as is the current practice, they need to be acknowledged, signed and returned by the relevant board members. Both categories will form part of the recipient’s compliance record.

12. Proposals on Housekeeping Matters

Re-writing Listing Rules 2A.09 and 2A.10

Currently, Listing Rule 2A.09 sets out a list of sanctions the Listing Committee may impose for Rule breaches and Listing Rule 2A.10 lists the persons subject to the disciplinary jurisdiction of the HKEx.

The HKEx propose to rewrite these Listing Rules to list the Relevant Parties first and then set out the disciplinary sanctions available to the Listing Committee. The drafting of the Listing Rules will also be simplified with removal of obsolete references.

Removal of independent financial advisers as a standalone Relevant Party

An independent financial advisers of a listed issuer is a Relevant Party under existing Main Board Listing Rule 2A.10(j) but not under the GEM Listing Rules despite being subject to obligations under the GEM Rules. For example, GEM Rule 17.92 requires an independent financial adviser appointed under GEM Listing Rules 17.47(6)(b), 20.42 or 24.05(6)(a) (ii) to take all reasonable steps to satisfy itself that it has a reasonable basis for making the statements required by GEM Rule 20.43 in relation to a connected transaction which is subject to shareholders’ approval and that there is no reason to believe that any information relied on by it is not true.

Professional advisers of a listed issuer or any of its subsidiaries are also Relevant Parties under current Main Board Listing Rule 2A.10(e). Professional advisers are defined to include “any financial adviser, lawyer, accountant, property valuer or any other person retained by an issuer to provide professional advice in relation to a matter governed by the Exchange Listing Rules”. The definition specifically excludes sponsors and Compliance Advisers.

As independent financial advisers are within the definition of “professional advisers”, the HKEx is proposing to remove them as a separate category of Relevant Parties and make clear that they are included within “professional advisers”.

Summary of HKEx’s proposals on disciplinary sanctions

Current Sanctions		Proposed Change	Against listed companies and other entities	Against individuals
Reputational Sanction	Private reprimand	The substance of a private reprimand will be made public while preserving the anonymity of the party involved	Yes	Yes
	Public statement involving criticism	Retain	Yes	Yes
	Public censure	Retain	Yes	Yes
	PII Statement	a) Remove the requirement for ‘wilful’ or ‘persistent’ failure to discharge obligations. b) Apply to former and current directors and senior management member of listed group	N/A	Directors and senior management of named listed companies and their subsidiaries
<u>New Sanction</u> Director Unsuitability Statement	Director Unsuitability Statement to be made against directors for serious or repeated failure to discharge their Listing Rule obligations	N/A	Directors of named listed companies and their subsidiaries	

Current Sanctions		Proposed Change	Against listed companies and other entities	Against individuals
Remedial Sanction	Denial of facilities of the market	a) Remove the thresholds of 'wilful' or 'persistent' failure to discharge obligations b) Require specific conditions to be fulfilled	Only applicable to listed issuers	N/A
	Suspension or cancellation of listing as a follow-on action if an individual subject to a PII Statement continues in office of the specific listed company	Retain and enhance by including denial of the facilities of the market as a follow-on action. This will also apply where a director subject to a Director Unsuitability Statement continues in office	Only applicable to listed issuers	N/A
	Rectification or remedial sanctions	Retain	Applicable	Applicable
Ancillary or operational sanctions	Ban on professional advisers	Extend HKEx's ability to apply ban the representation of <i>any</i> party or a specified party	Applicable to professional advisers only	Applicable to employees of professional advisers only
	Report the offender's conduct to another regulatory authority	Retain	Applicable	Applicable
	Take other appropriate action	Retain	Applicable	Applicable

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