



CONSULTATION PAPER ON
REVIEW OF LISTING RULES RELATING TO
DISCIPLINARY POWERS AND SANCTIONS

The Law Society's Submissions

The Stock Exchange of Hong Kong Limited (the “**Exchange**”) launched a public consultation on “Review of Listing Rules Relating to Disciplinary Powers and Sanctions” (the ‘**Consultation Paper**’) on 7 August 2020.

The Law Society is generally supportive of the proposals in the Consultation Paper, but this is subject to the important caveat in the paragraphs immediately below.

Solicitors are in a different position from other professional advisers in that they owe special duties to their clients. Such duties do not apply to other professional advisers. It is in recognition of this very fact that the Exchange and the Law Society concluded a memorandum of understanding dated 18 December 1996 (“**MOU**”) regarding solicitors in private practice. Section 23(7) of the Securities and Futures Ordinance (“**SFO**”) requires the Exchange to take into account the duties imposed by law and rules of professional conduct applicable to solicitors in private practice when the Exchange makes rules, including the Listing Rules. Section 23(8) of the SFO further requires the Exchange to refer breaches of the Listing Rules by solicitors in private practice to the Law Society, where such breaches may also involve a breach of duties imposed by law or professional conduct, and these referrals should be made in accordance with the MOU.

The Law Society further provides the following submission on the consultation questions posed.

Q1 The Exchange proposes to amend the existing threshold for imposing a PII Statement¹ and to make it clear that a PII Statement can be made whether or not an individual continues in office at the time of the PII Statement. Do you agree? If not, please provide reasons for your views.

¹ PII Statement – a public statement that the retention of office by the director is prejudicial to the interests of investors. See Rule 2A.09(7) of the Listing Rules

Law Society's response:

Agree. However, we note that the proposed wording “*may* cause prejudice to the interests of investors” potentially gives the Exchange a wide power and discretion to determine what amounts to the *possibility* of resulting in prejudice to the interests of investors based on the circumstances of each case. It is questionable whether the non-exhaustive factors and considerations set out in the current Enforcement Policy Statement or the Sanctions Statement (referred to in footnotes 18 and 19 of the Consultation Paper) are specific enough to address the “remoteness” involved in the proposed wording. To give the market more clarity and certainty, and to avoid arbitrary exercise of such power and discretion, clearer guidance is needed by the Exchange indicating some of the key factors that the Exchange will consider when assessing whether a director or a senior management member of a listed issuer *may possibly* give rise to prejudice to the interests of investors.

Q2 The Exchange proposes to extend the scope of a PII Statement to include directors and senior management of the relevant listed issuer and any of its subsidiaries. Do you agree? If not, please provide reasons for your views.

Law Society's response:

Agree. In practice, particularly for issuers of a large market cap, the listed entity is often merely an investment holding vehicle. The directors and senior management of its subsidiaries are generally responsible for steering the relevant misconduct, and they should, therefore, be held accountable.

Q3 The Exchange proposes to enhance follow-on actions where an individual continues to be a director or senior management member of the named listed issuer after a PII Statement has been made against him. Do you agree? If not, please provide reasons for your views.

Law Society's response:

Agree. We share the frustration of the Exchange that there are limitations to what they can do, and it is up to the listed issuer and its shareholders to decide what action to take when a PII Statement has been made on one of its directors. However, we also believe more follow-up actions can be taken before one comes to a denial of market facilities where the minority shareholders may suffer at the same time. For example, we agree that after a PII Statement has been made, the board of the listed issuer "would be expected to assess and determine whether the individual should continue to serve" and it would be logical for them also to publish their decision, including the views of the nomination committee. This is only fair if they

decided that the individual should stay notwithstanding a "Director Unsuitability Statement"², particularly if the board has the power under their constitution to vacate an individual from office by unanimous vote. In addition, if the board decides that the individual should stay, the Exchange may consider requiring the listed issuer to assess and disclose (i) the potential risks on the operational impact of the listed issuer as a whole, and (ii) whether there are adequate internal control measures to prevent similar misconduct from occurring in the future. This is consistent with the risk assessment requirement imposed on listed issuers and the general disclosure regime in the Hong Kong market.

We note that the Exchange does not intend the PII Statement or the Director Unsuitability Statement to have an indefinite effect, but having regard to the follow-on actions attaching to these statements, clear guidance should be given on the duration and circumstances when the statement can be uplifted and when the publication requirements referred to in Q5 and Q6 no longer apply.

Q4 The Exchange proposes that, after a PII Statement with follow-on actions has been made against an individual, the named listed issuer must include a reference to the PII Statement in all its announcements and corporate communications unless and until that individual is no longer its director or senior management member. Do you agree? If not, please provide reasons for your views.

Law Society's response:

Agree and see also the Law Society's response in Q3.

Q5 The Exchange proposes to extend the current express scope of disclosure in listing applicants' listing documents and listed issuers' annual reports in respect of their directors and members of senior management (current and/or proposed, as the case may be) by requiring provision of full particulars of any public sanctions made against those individuals. Do you agree? If not, please provide reasons for your views.

Law Society's response:

Agree and see also the Law Society's response in Q3.

Q6 The Exchange proposes to remove the existing threshold for ordering the denial of facilities of the market. Do you agree? If not, please provide reasons for your views.

² Director Unsuitability Statement – discussed in section 3 of the Consultation Paper

Law Society's response: Agree.

Q7 *The Exchange proposes to include fulfilment of specified conditions in respect of the denial of facilities of the market. Do you agree? If not, please provide reasons for your views.*

Law Society's response: Agree.

Q8 *The Exchange proposes to introduce the Director Unsuitability Statement as a new sanction. Do you agree? If not, please provide reasons for your views.*

Law Society's response:

Agree. Please also refer to the Law Society's response to Q3 and Q5 above.

Q9 *The Exchange proposes that the follow-on actions and publication requirement in respect of PII Statements also apply to Director Unsuitability Statements. Do you agree? If not, please provide reasons for your views.*

Law Society's response:

Agree. More clarity is needed in the distinction for determining any follow-on actions in a PII Statement and that of a Director Unsuitability Statement. Currently, both seem to rest on the same set of enforcement guidance currently in use by the Exchange.

Q10 *The Exchange proposes to impose secondary liability on Relevant Parties if they have 'caused by action or omission or knowingly participated in a contravention of the Listing Rules'. Do you agree? If not, please provide reasons for your views.*

Law Society's response:

As set out in the inception of this paper, we would like to refer you to the MOU between the Exchange and the Law Society dated 18 December 1996 and to elaborate. So far as it relates to practising solicitors, the Law Society feels strongly that the proposed changes on secondary liability are unnecessary, and in certain circumstances, may place a solicitor in difficult and conflicting situations where they may be required to observe his/her professional duties as required by the Legal

Practitioners Ordinance and other applicable laws or rules as regulated/administered by the Law Society. It is, therefore, entirely inappropriate for practising solicitors to be included in the scope of the proposals. The following note should be added to the proposed new rule 2A.09(4) *“When exercising its power to review the conduct of and impose sanctions against lawyers, the Exchange shall take into account that a lawyer acting in his professional capacity has duties imposed by law and under rules of professional conduct as regulated/administered by the Law Society, and give due regard to the memorandum of understanding between the Exchange and the Law Society on handling the conduct of lawyers.”*

Further to the above, the Law Society also considers that the Exchange’s proposed secondary liability should not be extended to in-house lawyers who have practising certificates (as they will be subject to the Legal Practitioners Ordinance and should, therefore, be excluded).

Subject to above, we agree otherwise.

Q11 The Exchange proposes to include an explicit provision permitting the imposition of a sanction in circumstances where there has been a failure to comply with a requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee of the Exchange. Do you agree? If not, please provide reasons for your views.

Law Society’s response: We envisage that a solicitor will unavoidably run into conflicting situations; for example, where a solicitor in his professional capacity has duties imposed by law, and under rules of professional conduct as regulated by the Law Society, which prohibit the solicitor from fulfilling the requirements to be imposed by the Listing Division. Examples would also raise concerns about client confidentiality and legal professional privilege (which is a fundamental right of all legal persons and not subject to any competing policy). Accordingly, the proposed provision should apply to non-lawyers only. All lawyers who are subject to the Legal Practitioners Ordinance should, therefore, be excluded.

Otherwise, we agree.

Q12 The Exchange proposes that sanctions may be imposed on all Relevant Parties³ through secondary liability where a party has failed to comply with a requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee. Do you agree? If not, please provide reasons for your views.

³ Relevant Parties – see paragraph 86 of the Consultation Paper

Law Society's response:

Agree. Please also refer to Law Society's responses in Q10 and Q11 above.

Q13 *The Exchange proposes to explicitly provide in the Listing Rules the obligation to provide complete, accurate and up-to-date information when interacting with the Exchange in respect of its enquiries or investigations. Do you agree? If not, please provide reasons for your views.*

Law Society's response: Our position on this is the same as Q11 above.

Q14 *Do you agree with the proposed definition of 'senior management'? If not, please provide reasons for your views.*

Law Society's response: Agree.

Q15 *The Exchange proposes to include employees of professional advisers of listed issuers and their subsidiaries as a Relevant Party under the Listing Rules. Do you agree? If not, please provide reasons for your views.*

Law Society's response:

Agree. Please also refer to Law Society's responses on Q10 and Q11 above.

Q16 *The Exchange proposes to include guarantors of structured products as a Relevant Party under the Listing Rules. Do you agree? If not, please provide reasons for your views.*

Law Society's response: Agree.

Q17 *The Exchange proposes to include guarantors for an issue of debt securities as a Relevant Party under the Main Board Listing Rules. Do you agree? If not, please provide reasons for your views.*

Law Society's response: Agree.

Q18 *The Exchange proposes to include parties who give an undertaking to, or enter into an agreement with, the Exchange as Relevant Parties under the Rules. Do you agree? If not, please provide reasons for your views.*

Law Society's response: Agree.

Q19 *The Exchange proposes to extend the ban on professional advisers to cover banning of representation of any or a specified party. Do you agree? If not, please provide reasons for your views.*

Law Society's response: Agree.

Q20 *The Exchange proposes to include express obligations on professional advisers when acting in connection with Listing Rule matters. Do you agree? If not, please provide reasons for your views.*

Law Society's response: Please also refer to Law Society's responses on Q10 and Q11 above.

Q21 *The Exchange proposes that 'business day' be used as the benchmark for counting the periods for filing review applications, and for requesting or providing written reasons for decisions. Do you agree? If not, please provide reasons for your views.*

Law Society's response: Agree.

Q22 *The Exchange proposes that all review applications must be served on the Secretary. Do you agree? If not, please provide reasons for your views.*

Law Society's response: Agree.

Q23 *The Exchange proposes that the counting of the period for filing review applications be from the date of issue of the decision or the written reasons. Do you agree? If not, please provide reasons for your views.*

Law Society's response: Agree.

Q24 *The Exchange proposes that the counting of the period for requesting written reasons be from the date of issue of the decision. Do you agree? If not, please provide reasons for your views.*

Law Society's response: Agree.

Q25 The Exchange proposes that the counting of the period for providing written reasons be from the date of receipt of the request. Do you agree? If not, please provide reasons for your views.

Law Society's response: Agree.

**The Law Society of Hong Kong
29 September 2020**