



Hong Kong

June 2021

## HKEX LISTING RULE CHANGES ON DISCIPLINARY POWERS AND SANCTIONS EFFECTIVE 3 JULY 2021

On 20 May 2021, the Stock Exchange of Hong Kong Limited (the **HKEx**) published conclusions to its consultation on review of the Listing Rules relating to disciplinary powers and sanctions<sup>1</sup> (the **Consultation Conclusions**). The HKEx received diverse views, with a majority of respondents agreeing with most of the proposed changes to the HKEx's disciplinary regime. In the Consultation Conclusions, the HKEx decided to adopt all the proposals outlined in the Consultation Paper on Review of Listing Rules Relating to Disciplinary Powers and Sanctions<sup>2</sup> (the **Consultation Paper**), with modifications to one proposal. The revised Listing Rules will take effect from 3 July 2021. They will increase the range of reputational sanctions the HKEx can impose and enable disciplinary action to be brought against a wider range of individuals, including members of senior management, if they cause or knowingly participate in a breach of the HKEx Listing Rules.

The Consultation Paper was published on 7 August 2020, with the consultation period closing on 9 October 2020. For an overview of the Consultation Paper, please see Charltons' September 2020 newsletter.<sup>3</sup>

1 HKEx. May 2021. "Consultation Conclusions: 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/Conclusions-\(May-2021\)/cp202008cc.pdf?la=en](https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/August-2020-Disciplinary-Powers/Conclusions-(May-2021)/cp202008cc.pdf?la=en)

2 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>

3 <https://www.charltonslaw.com/hkex-consults-on-listing-rule-amendments-to-increase-its-disciplinary-powers-and-sanctions/>

### A. Changes to Existing Disciplinary Powers of HKEx

#### 1. Amendments relating to a public statement that an individual's continued holding office of director of a listed company prejudices investors' interests

HKEx can currently issue a statement that it considers a person's retention of office as a director of a listed company to be prejudicial to investors' interests for "wilful" or "persistent" failure by a director to discharge his responsibilities under the Listing Rules (**PII Statement**) (HKEx Listing Rule 2A.09).

The HKEx proposed:

- lowering the threshold for issuing a PII Statement to allow it to issue a PII Statement where the occupying of office *may cause prejudice* to investors' interests; and
- clarifying that a PII Statement can be made whether or not an individual remains in office at the time of the PII Statement.

Supportive respondents generally agreed that the PII Statement should be an available sanction irrespective of whether the individual is holding office at the time of making the statement, and that the HKEx should impose more serious sanctions for severe misconduct or breaches.

Some respondents voiced their concerns that amending the PII Statement's wording from "*is prejudicial*" to "*may cause prejudice*" would give the HKEx overly wide powers and a discretion to decide what amounts to the possibility of prejudice to investors' interests, while some suggested that the HKEx should provide more guidance on what will be regarded as potentially causing prejudice to investors. The HKEx responded that it will consider publishing guidance on circumstances which may warrant the issuance of a PII Statement.

## 2. HKEX extends PII Statements to senior management and subsidiary directors

Under the current HKEx 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 its subsidiary. The HKEx proposed extending the scope of a PII Statement to cover directors and senior management of the relevant HKEX-listed company and any of its subsidiaries.

Supportive respondents agreed that the proposed extension would ensure that relevant individuals could be held accountable for their misconduct, and address concerns that listed companies' directors who are subject to a PII Statement should not be permitted to continue to exert influence by taking up a senior management position, or occupying a director or senior managerial role at subsidiary level.

Opposing respondents considered the proposal to be too draconian since a listed company's senior management and the directors of its subsidiaries are often required to act in accordance with the directions of the listed company's board. Others noted that senior management and subsidiary directors are not subject to the extensive and stringent duties that the HKEx Listing Rules impose on listed company directors, and should not be subject to equivalent liability and sanction.

The HKEx emphasised that it will not blindly consider senior management as equally culpable as directors, and will assess each case in light of its specific facts and circumstances.

## 3. HKEx follow-on actions after making a PII Statement

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 therefore proposed that, in cases involving more serious misconduct, it should be able to direct follow-on actions at the same time as making a PII Statement against an individual. Under the revised HKEx Listing Rules, 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 specified by the HKEx Listing Committee, the HKEx will be able to deny the listed company 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)). Denying "the facilities of the market" means that the HKEx will withhold approval of any matters requiring its approval, such as the issue of shares.

Supportive respondents commented that the proposal could increase the effectiveness of PII statements and achieve the desired deterrent effect.

Some respondents raised concerns that the denial of market facilities to listed companies, as a serious follow-on action, may adversely affect minority shareholders who are generally not able to influence the board's composition or behaviour.

The HKEx acknowledged that a denial of market facilities is a serious sanction and noted that it will only impose this sanction where an individual who has been issued with at least a PII Statement nevertheless continues to hold office. The HKEx also believes that the prospect of this follow-on action will incentivise the shareholders and/or board of the listed company to decide whether the relevant individual should remain in office and take timely action to avoid repercussions of the follow-on action.

## 4. Reference to PII Statements with follow-on actions in HKEx announcements and corporate communications

The HKEx proposed that where a PII Statement with follow-on actions has been made against an individual, the listed company referred to (or whose subsidiary is referred to) in the statement, must refer to the PII Statement in all its 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.

Respondents generally agreed that the requirement could assert pressure on listed companies to remove the relevant individual from office. Two respondents suggested that the HKEx publish a list of persons subject to a PII Statement.

The HKEx responded that information about public sanctions imposed is available on the HKEx website and that its regular Enforcement Bulletins provide details of certain sanctions. The HKEx will consider whether there is any room for improving the presentation or searchability of that information.

## 5. HKEx extends disclosure in listing documents and annual reports

The HKEx proposed extending the present disclosure requirements by requiring listing applicants' listing documents and listed companies' annual reports to include full particulars of any public sanctions made against their directors or members of senior management (current and/or proposed) by statutory or regulatory authorities.

Supportive respondents were of the view that the extension will increase market transparency, with one agreeing that the proposal would make it more difficult for directors and senior management who are subject to a PII Statement to move to other listed companies undetected.

Some respondents suggested that there should be a time limit for the disclosures and that subject individuals should be offered an opportunity to "rehabilitate" from their past breaches. However, the HKEx was of the view that a specified period for the disclosures would be contrary to the objective of protecting the investing public. Further, disclosure should not be an obstacle to "rehabilitation" since an individual may still be appointed as a listed company director or senior management member subject to being considered suitable to act as a director or appropriate to be a member of senior management in spite of being subject to a PII Statement.

## 6. HKEx to remove the existing threshold for the denial of market facilities

The Listing Rules currently allow the HKEx to deny the market's facilities to a listed company for a specified period where its failure to discharge its responsibilities under the HKEX Listing Rules is "wilful" or "persistent". The sanction has never been imposed,

in part, because of 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 proposed lowering the existing threshold for ordering the denial of market facilities by removing the requirement for a listed company's "wilful" or "persistent" failure in fulfilling its responsibilities.

Supportive respondents agreed that there may be cases where the conduct is sufficiently serious for imposing the sanction but the conduct does not fall squarely into the categories of either "wilful" or "persistent" failure. Opposing respondents were concerned that the removal of the threshold would allow the HKEx to impose the sanction for minor or inadvertent breaches of the HKEx Listing Rules.

The HKEx responded that removing the threshold will help overcome evidential challenges in proving the culpable individual's wilful mindset, and ensure that appropriate sanctions are imposed in cases of serious misconduct.

## 7. HKEx to include fulfilment of specified conditions in respect of the denial of market facilities

The HKEx proposed extending the scope of the sanction so that the duration of the sanction could be dependent on the fulfilment of specified conditions (e.g. remedying the breach), rather than being for a specified period.

Supportive respondents commented that the proposal could encourage listed companies to take remedial action. Others asked the HKEx to provide guidance on the timing and types of conditions that may be imposed.

The HKEx responded that possible conditions may, for example, include market facilities being denied until the listed company has: (a) carried out an independent internal controls review and implemented any relevant recommendations; (b) sought and obtained independent shareholders' ratification of any relevant matter.

## B. New HKEx Disciplinary Sanction

### 1. Introduction of the Director Unsuitability Statement

The HKEx proposed to introduce a new disciplinary sanction which would allow it, "in the case of serious or repeated failure

by a director to discharge his responsibilities under the Listing Rules, [to] state publicly that in the Exchange's opinion the director is unsuitable to occupy a position as director or within senior management of a named listed issuer or any of its subsidiaries" (**Director Unsuitability Statement**).

Most respondents regarded the proposed threshold for imposing this sanction to be appropriate. However, some respondents considered that it should be for the listed company's board to decide whether an individual should remain as a director, and that the proposal may exert undue pressure on the listed company in making that decision. Others questioned the need for a Director Unsuitability Statement in addition to the PII Statement, given the similarity of the two sanctions.

The HKEx responded that the range of current sanctions is too narrow and inadequate to cope with cases involving serious misconduct, so it is necessary to introduce further differentiation and more severe penalties to address the most serious cases. Although the HKEx cannot compel a listed company to remove an unsuitable director, the Director Unsuitability Statement will enable it to express its views on a director's unsuitability and alert investors. The HKEx also noted that the Director Unsuitability Statement is reserved for the most egregious cases of misconduct.

## 2. Application of follow-on actions/publication for Director Unsuitability Statement

The HKEx adopted its proposal that the follow-on actions (denying a listed company the facilities of the market and/or suspending or cancelling trading in its shares), publication requirements and enhanced disclosures that apply to PII Statements should also apply where a listed company director is the subject of a Director Unsuitability Statement.

## C. Additional Circumstances Where HKEx Can Impose Disciplinary Sanctions

### 1. Imposition of secondary liability for HKEx Listing Rule breaches

Currently, the parties that can be sanctioned under HKEx 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 HKEx 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 HKEx 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 therefore proposed 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" (new Listing Rule 2A.10B(3)).

### Fundamentals

Some respondents questioned whether secondary liability can be imposed on the Relevant Parties who, unlike the directors of a listed company, do not give a written undertaking to the HKEx. In the absence of such an undertaking, there is no contractual nexus with the HKEx, raising a question as to the legal basis for imposing secondary liability. Others queried the ability and appropriateness of the HKEx's Listing Division and Listing Committee and Listing Review Committee to investigate and determine disciplinary matters involving secondary liability, particularly in relation to professional advisers and their employees.

The HKEx responded that it has broad powers to make rules on matters that are necessary or desirable for the proper regulation and efficient operation of the market. Subject to the provisions of the Securities and Futures Ordinance (the **SFO**), the HKEx Listing Rules may govern the conduct of persons with whom the HKEx has no contractual nexus. Accordingly, the HKEx's ability to impose disciplinary sanctions extends beyond those with a

contractual nexus with the HKEx to others involved in matters concerning the HKEx Listing Rules.

The HKEx acknowledged that its current authority to make rules under the SFO, or make any public finding, impose any penalty or sanction or take disciplinary action under the HKEx Listing Rules, does not extend to solicitors or certified public accountants in private practice (the **Professional Parties**), except in certain circumstances specified in the arrangements between the HKEx and the regulatory bodies for the Professional Parties.

Since: (a) the Professional Parties are covered by the specific statutory regime under section 23(8) of the SFO; (b) the arrangements with the relevant professional regulatory bodies already set out the circumstances where the HKEx may pursue disciplinary action; and (c) the introduction of secondary liability is necessarily subject to such arrangements, the HKEx concluded that it will modify the scope of this proposal by including the following note to Rule 2A.10B of the HKEx Listing Rules:

*"In respect of parties covered by section 23(8) of the SFO, a sanction may be imposed under rule 2A.10B(3) in and only in the circumstances prescribed for disciplinary action in the arrangements agreed from time to time between the Exchange and the relevant professional regulatory body; and, in considering whether a party covered by section 23(8) of the SFO has breached rule 2A.10B(3), the Exchange will take into account, among other things, whether such party has knowingly or recklessly facilitated or participated in a breach of the Listing Rules or any undertaking given or any agreement with the Exchange."*

The HKEx believed that the inclusion of this note will clarify that, whilst it can take disciplinary action against Professional Parties in accordance with the arrangements agreed under section 23(8) of the SFO, the introduction of HKEX Listing Rule 2A.10B will not widen the scope for liability beyond those agreed arrangements.

### **Threshold for imposing secondary liability**

This area focuses on the words "... caused by action or omission or knowingly participated in a contravention of the Listing Rules", and whether this accurately describes the test for establishing secondary liability.

Some respondents voiced their concerns that individuals who are not directors may not be the decision-makers, or have sufficient authority, or may only have limited information, and yet may still either "participate" in, or fail to prevent, conduct that involves or causes a breach. Moreover, some believed that omissions should not form the basis of secondary liability, and that liability for

omissions should only be possible for a person who is under a duty to act but fails to do so.

The HKEx reiterated that it will consider the facts and circumstances of each case, including the Relevant Parties' roles and responsibilities in respect of the breach and also the listed company's compliance with the HKEx Listing Rules in determining whether a person has caused by action or omission or knowingly participated in a contravention of the HKEx Listing Rules.

The HKEx also clarified that liability for an omission will only apply to a person who has a duty to act, and that the existence of knowledge will be relevant to "knowing participation". To explain the relevance of knowledge, the HKEx provided an example that if a senior management member, who is responsible for a transaction, has only been given limited information and enters into the transaction without knowing that the transaction is in fact a connected transaction and governed by the HKEx Listing Rules, he/she cannot be said to have "knowingly" participated in the transaction and subject to secondary liability for the Listing Rule breach.

### **Scope / who should be covered**

Respondents generally agreed that listed companies' directors are ultimately responsible for compliance with the HKEx Listing Rules and should therefore be primarily liable. They also generally considered that secondary liability should be extended to supervisors of listed companies incorporated in the PRC. There was a general view that the HKEx should impose secondary liability for at least some members of senior management, such as chief executive officers, who are not directors.

Some respondents commented specifically on the following Relevant Parties:

#### *Substantial shareholders*

Some respondents opposed the imposition of secondary liability on substantial shareholders as they may not control or be involved in the management of a listed company.

The HKEx clarified that the cases where substantial shareholders are exposed to secondary liability are likely to be relatively rare. It gives as an example the situation where a listed company's substantial shareholders provide undertakings to take appropriate steps to ensure the maintenance of a sufficient public float. Although substantial shareholders do not have a general duty to ensure the listed company's maintenance of a sufficient public float, the undertakings to take appropriate action to maintain the

public float in this scenario would create an obligation to act. As a result, the substantial shareholders may be subject to secondary liability if they fail to maintain the public float.

#### *Professional advisers*

There was significant opposition to the imposition of secondary liability on professional advisers. Some considered that professional advisers are already subject to existing rules and regulations prescribed by law and their respective professional regulatory bodies (such as the Law Society of Hong Kong). In this regard, professional advisers would be exposed to double jeopardy in respect of the same misconduct, i.e. disciplinary proceedings and sanctions by both the HKEx and their regulatory bodies.

The HKEx stated that a Relevant Party subject to oversight by another regulatory body is not of itself a reason to be exempt from secondary liability. The HKEx's disciplinary action is confined to matters governed by or arising out of the HKEx Listing Rules, and not duplicative of the general jurisdiction of a professional regulatory body.

#### *Senior management*

Opposing respondents expressed their views that senior management should not be subject to secondary liability as they act in accordance with directors' instructions and may not have full information or authority to prevent breaches of the HKEx Listing Rules. Another opposing view was that subjecting senior management members and subsidiaries' directors to the same sanctions as listed company directors is unfair as their terms of reference and compensation package are not comparable.

In particular, the Hong Kong Institute of Chartered Secretaries (**HKICS**) opposed the imposition of secondary liability on company secretaries who only play a supporting role in the affairs of listed companies. The HKICS also considered that it should deal with company secretaries' failure to discharge their professional duties.

The HKEx responded that members of senior management are currently Relevant Parties subject to the HKEx's disciplinary regime. However, as there are currently no Listing Rule obligations imposed on, and no prescribed standard of compliance for, senior management members, the HKEx cannot take disciplinary action against them even in circumstances where they have played a significant role in a breach of the HKEx Listing Rules. Therefore, the HKEx considered it necessary to impose secondary liability to close a gap in its disciplinary regime.

In response to HKICS's comments, the HKEx stated that company secretaries are responsible for, among other things, advising the board through the chairman and/or the chief executive on governance matters under the Corporate Governance Code (**CG Code**). The CG Code also specifies that company secretaries should be employees of listed companies and have day-to-day knowledge of their affairs. Therefore, company secretaries are and should be senior management members who play a significant role in listed companies' compliance with the HKEx Listing Rules and corporate governance matters. Moreover, the HKEx pointed out that company secretaries are not subject to a mandatory and statutorily-backed professional regime, unlike lawyers and accountants. It is also not guaranteed that company secretaries will be governed by HKICS's disciplinary regime.

## **2. Explicit sanction for failure to comply with requirements imposed**

The HKEx proposed including an express provision in the HKEx Listing Rules allowing the imposition of a sanction in cases where there has been a failure to comply with a requirement imposed by the Listing Division, Listing Committee or the Listing Review Committee of the HKEx.

Opposing respondents were concerned that lawyers might find themselves in a conflict situation (for instance, by virtue of the duties owed to their clients, client confidentiality and legal professional privilege), which could mean that they are unable to comply with the requirements imposed. These respondents therefore objected to the application of the proposal to lawyers acting in their professional capacity.

The HKEx responded that the requirements are typically imposed on listed companies under specific provisions of the HKEx Listing Rules, or on listed companies or individuals as a result of disciplinary action. It did not expect that these requirements will place lawyers or other professional parties in situations of conflict of interest.

## **3. Secondary liability – failure to comply with a requirement imposed by the HKEx**

The HKEx proposed that sanctions may be imposed on all Relevant Parties through secondary liability if a party has failed to comply with a requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee of the HKEx.

One respondent commented that the scope of secondary liability is ambiguous, and asked the HKEx to clarify whether all Relevant Parties under the Listing Rules, or only those Relevant

Parties which have caused by action or omission, or knowingly participated in, a breach of a requirement, will be subject to secondary liability. The HKEx responded that secondary liability will only be imposed on the latter.

#### 4. Obligation to provide complete, accurate and up-to-date information to the HKEx

The HKEx proposed including a provision in the HKEx Listing Rules to make explicit the obligation to provide complete, accurate and up-to-date information when responding to HKEx enquiries or investigation.

Opposing respondents commented that the proposed obligation is too wide, and will place an onerous burden on parties, or may infringe the right to silence, privilege against self-incrimination, or legal professional privilege. Some commented that parties cannot and should not be expected to know what information the HKEx might consider relevant, if the HKEx did not ask for it. Comments were made that parties may submit voluminous materials to the HKEx as a result of the proposal.

The HKEx stated that it did not expect parties to speculate as to the information that it might find relevant in circumstances where it has not asked for any information. However, it notes that where a party provides information to the HKEx on any matter, whether proactively or in response to an enquiry, the information provided should be as complete, accurate and up-to-date as possible.

The HKEx also notes that the obligation will not broaden its power to compel the supply of information from parties which are currently not under such an obligation, and that it will not infringe on the right to silence. The obligation will apply “when interacting with” the HKEx.

#### 5. “Relevant Parties” – HKEx Definitions and Inclusions

##### *Definition of “senior management”*

The HKEx proposed defining the term “senior management” to include:

- any person occupying the position of chief executive, supervisor, company secretary, chief operating officer or chief financial officer, by whatever name called;
- any person who performs managerial functions under the directors’ immediate authority; or

- any person referred to as senior management in the listed company’s corporate communication or any other publications on the website of the HKEx or the listed company.

Supportive respondents considered that a centralised definition would provide greater clarity to the market, and may encourage listed company boards to adopt a management structure providing for the clear delineation and delegation of management authority.

Opposing comments generally fell into two categories: some regarded the definition as too broad and imprecise, whilst others thought the prescribed definition would be too narrow and restrict flexibility as the circumstances of each company and individual vary.

The HKEx responded that the definition was intended to minimise potential ambiguity as to who falls within its disciplinary regime. The definition is intended to capture a balanced category of individuals so that individuals with decision-making responsibilities and/or significant influence over board decisions may be held accountable.

#### 6. Inclusion of employees of professional advisers as Relevant Parties

The HKEx proposed including the employees of professional advisers to listed issuers and their subsidiaries as a Relevant Party under the HKEx Listing Rules.

Several opposing respondents regarded the inclusion of all employees of a professional adviser to be too wide, with one suggesting that only individuals at the highest level of a professional adviser should be included.

The HKEx clarified that the current Listing Rules already specify that employees of professional advisers can be banned following a breach. In particular, HKEx Listing Rule 2A.09(5) stipulates that the Listing Committee may ban “a named individual employed by a professional adviser”. The proposed inclusion aimed to resolve a technical inconsistency in the HKEx Listing Rules which affects the implementation of this sanction.

#### 7. Inclusion of guarantors of structured products and debt securities as a Relevant Party

The HKEx proposed including the guarantors of structured products as a Relevant Party so that disciplinary action can be taken against them if they fail to fulfil their obligations under the

HKEx Listing Rules. Guarantors for an issue of debt securities were also proposed to be included as a Relevant Party under the Main Board Listing Rules.

Supporting respondents generally agreed that the inclusion would ensure fairness to the other Relevant Parties as well as consistency under the revised disciplinary regime.

Opposing respondents' views were diverse. Some commented that a breach of any undertakings or agreements should be dealt with by the court, whilst some believed that the proposal would make it more difficult to find a guarantor and that guarantors (for instance, a subsidiary of a listed company) may not have sufficient information to discharge its obligations.

## 8. Inclusion of a party giving undertaking / entering into an agreement as a Relevant Party

The HKEx proposed including parties who give an undertaking to, or enter into an agreement with, the HKEx as Relevant Parties under the HKEx Listing Rules.

Supportive respondents agreed that the inclusion could increase efficiency and save resources. Their inclusion as Relevant Parties could provide the HKEx with an alternative route for taking action against those who breach their undertakings or agreements, rather than pursuing the matter through the courts.

Opposing respondents commented that the breach of an undertaking or agreement is a contractual issue which should be resolved through the court.

The HKEx agreed with the supportive respondents' views. It clarified that it will include a clause in an undertaking or agreement where possible to alert the contracting parties and those who have provided an undertaking to the HKEx that they are all regarded as Relevant Parties.

## D. Proposed Minor Rule Amendments

### 1. Extending the ban on professional advisers to representation of any party

The HKEx proposed extending the ban on professional advisers representing a specified party to a ban on representing any or a specified party.

Supportive respondents believed that the proposal could serve

as a more effective deterrent, while opposing respondents considered the extension to be too draconian.

The HKEx acknowledged that the ban is a severe penalty and confirmed that it will assess the circumstances for its imposition on a case-by-case basis.

### 2. HKEx Listing Rules to impose express obligations on professional advisers

The HKEx proposed that professional advisers should be under an explicit duty:

- to use all reasonable efforts to ensure that their clients understand and are advised on the scope of and their obligations under the HKEx Listing Rules when acting in relation to HKEX Listing Rule matters on which they are instructed to advise; and
- not to knowingly supply information to the HKEx which is false or misleading in a material particular.

Opposing respondents expressed views that professional advisers are external parties and rely on information provided by listed companies, and that the express obligation would add little to the current provisions of the SFO which already impose civil and criminal liability for the provision of false or misleading information by professional advisers.

Despite the overlap with the SFO, the HKEx believed that it is still appropriate for it to take action against a professional adviser (as a Relevant Party) if it has been misled by the adviser.

### 3. Aligning the practices for filing review applications and requesting or providing written reasons for decisions

In light of the current different requirements and/or practices for filing review applications and requesting or providing written reasons for decisions for disciplinary and non-disciplinary review matters, the HKEx proposed aligning the following requirements and practices:

#### ***Benchmark for counting relevant periods***

The HKEx proposed that "business day" be used as the benchmark for determining the periods for filing review applications, and for requesting or providing written reasons for decisions.

Respondents supported the amendment as it can eliminate



uncertainty and confusion to listed companies caused by the different counting benchmarks.

***Review applications must be served on the secretary to the HKEx Listing Committee or the secretary to the HKEx Listing Review Committee (collectively referred to as the Secretary)***

The HKEx proposed that all review applications should be served on the Secretary.

One respondent requested elaboration on the role of the Secretary and the rationale for the proposal.

To avoid doubt, the HKEx elaborated the following key responsibilities of the Secretary:

- overseeing and coordinating the operation of review procedures;
- ensuring that notices, notifications and all relevant submissions filed in the course of the disciplinary proceedings or the review process are provided to all parties involved and the HKEx Listing Committee or the HKEx Listing Review Committee, as appropriate;
- serving as a point of contact for all relevant parties regarding any administrative matter arising out of the review procedures; and
- advising the Listing Committee or the Listing Review Committee on procedural matters, and referring any pre-hearing enquiries or matter to the chairman of the Listing Committee or the Listing Review Committee, as the case may be.

***Counting of the period for filing review applications and requesting written reasons***

The HKEx proposed that the period for filing review applications should start from the date of issue of the decision or written reasons, and that the period for requesting written reasons should commence from the date of issue of the decision.

Supportive respondents believed that this is the most efficient

and straightforward approach, while an opposing respondent suggested counting the period from the date of receipt of the decision or written reasons, having regard to the possible delay in delivery of the documents.

The HKEx considered the opposing respondent's suggestion to be impracticable because of the potential for disagreement as to the actual date of receipt which could complicate or prolong the review process.

***Counting of the period for providing written reasons***

The HKEx proposed that the counting of the period for providing written reasons should begin from the date of receipt of the request.

A supportive respondent believed that it is sufficient for the HKEx to provide written reasons within 14 business days from the date of receipt of the request. The HKEx agreed that the period is reasonable and justifiable.

**4. HKEx housekeeping amendments without changes in policy direction**

The HKEx will make the housekeeping amendments to the HKEx Listing Rules specified in Chapter 7 of the Consultation Paper.<sup>4</sup>

In addition, the HKEx proposed to amend the Listing Rules in respect of contact and communication with regulators. It emphasized that listed issuers and directors are obliged to provide the HKEx with up-to-date contact information, and loss of contact with the regulators is unacceptable.

The Listing Rules and Directors' Undertaking contain clear provisions on supply of information as requested by regulators and service of notices or other documents on directors. To enhance effectiveness of these provisions and facilitate the taking of regulatory action where appropriate, the HKEx will amend the relevant provisions to the effect that the Securities and Futures Commission may rely on them as well.

<sup>4</sup> See Charltons' September 2020 newsletter for a summary of the housekeeping amendments in Chapter 7 of the Consultation Paper.

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Dominion Centre

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