



## HKEx Issues Revised Enforcement Sanctions Statement & New Cooperation Guidance

On 25 October 2022, the Hong Kong Stock Exchange (the **HKEx**) published its new Guidance Note on Cooperation and updated its Enforcement Sanctions Statement.

### The HKEx Enforcement Sanctions Statement

The [Enforcement Sanctions Statement](#) sets out the general principles and factors that a Disciplinary Committee or the Listing Review Committee (the **Committee**) should generally take into account when considering and determining sanctions for breaches of the Main Board and GEM Listing Rules (the **HKEx Listing Rules**). It serves to assist the Committee in achieving consistency when determining and imposing sanctions. However the factors and principles it sets out are not exhaustive. Nor does it allow the Committee to derogate from its obligation to have regard to all relevant circumstances of the individual case when determining the appropriate sanctions and directions.

### The General Principles

The Committee imposes disciplinary sanctions in order to protect the public and the integrity of the Hong Kong market and its facilities with a view to:

- deterring further breaches of the HKEx Listing Rules by respondent(s);
- improving corporate governance;
- remedying conduct in breach of the HKEx Listing Rules; and
- generally deterring those subject to the HKEx's disciplinary jurisdiction from engaging in the same or similar misconduct.

The Committee will take into account the circumstances of the breach, the seriousness of the misconduct and any mitigating or aggravating factors, and impose more severe disciplinary sanctions for repeated misconduct or where misconduct "evidences an intentional, wilful or reckless disregard"<sup>1</sup> for the HKEx Listing Rules.

The misconduct's level of seriousness will be considered with reference to the circumstances of the breach, the conduct involved and the mitigating or aggravating factors below.

## The Mitigating or Aggravating factors

Factors that the Committee may take into consideration include (among others):

- a) the respondent(s)' compliance history;
- b) what disciplinary sanctions were previously applied by the HKEx with regard to the same or similar types of breach, or in comparable circumstances;
- c) the degree and extent of the respondent(s)' cooperation (see the section on the HKEx's Guidance Note on Cooperation below);
- d) the size of any commercial or financial benefit obtained as a result of the misconduct;
- e) whether the relevant conduct had the potential to damage or damage the HKEx's reputation or the integrity of the market and facilities operated by it;
- f) Whether the misconduct:
  - (i) was "unintentional, negligent, wilful, reckless, intentional, deceptive, manipulative and/or fraudulent";
  - (ii) was an isolated event or occurred over an extended period of time;
  - (iii) was systemic or indicative of a pattern of noncompliance with the HKEx Listing Rules; and
  - (iv) resulted in or had the potential to result in loss or injury to other parties (for example shareholders, the investing public, other market participants and creditors), and the nature and extent of the actual or potential loss or injury.
- g) Whether the respondent(s);
  - (i) made an early decision not to contest the case brought against them (inclusive of any recommendations as to sanctions/directions);
  - (ii) self-reported the misconduct in a timely and cooperative manner, or there was a failure to report or attempts to conceal it;
  - (iii) took any steps to remediate the breaches or redress any risk, loss or injury caused;
  - (iv) took steps or measures to prevent recurrence of the contravening conduct subsequent to the breach;
  - (v) placed reasonable reliance on independent professional advice and considered accounting or legal advice;
  - (vi) had, at the time of the breach, "appropriate supervisory, risk management, operation or technical procedures and/or controls in place for procuring compliance with the Rules";
  - (vii) participated in the disciplinary proceedings by filing written submissions; and
  - (viii) except where attendance has been excused, attended the disciplinary hearing.

Disciplinary sanctions will be determined on the basis of the evidence and submissions before the Committee. Further, where a disciplinary action involves multiple respondents, e.g. a number of directors of a listed company, the Committee will generally consider the extent and nature of their individual involvement to determine the sanction to be imposed.

Before ordering a cancellation of listing, suspension of trading, or the denial of facilities of the market under the HKEx Listing Rules, the Committee will take into account the following non-exhaustive matters:

- the seriousness of the misconduct;
- the relevant compliance history;

- whether the concerns or issues identified by the HKEx have been or can be satisfactorily addressed by remedial action; and
- the order's financial impact or likely impact on the respondent(s) or any other parties.

## Updates to the HKEx Enforcement Sanctions Statement

In accordance with the [HKEx Listing Rule Changes on Disciplinary Powers and Sanctions effective 3 July 2021](#), the HKEx recently published its update to the Enforcement Sanctions Statement in addition to a new Guidance Note on Cooperation. The updates to the HKEx's Enforcement Sanctions Statement seek to:

- clarify expectations regarding cooperation;
- provide additional detailed guidance on a listed issuer's internal controls; and
- clarify the extent to which an individual may rely on others in their discharge of duties. Paragraph 5 (General Principles) additions and amendments

### Paragraph 5 (General Principles) additions and amendments

The Statement added three new sub-paragraphs to the "General principles" set out in paragraph 5:

- 5(a) - recognition that "Enforcement action and the imposition of disciplinary sanctions are essential elements of the HKEx's focus on upholding compliance with the Rules, enhancing market quality and corporate governance, protecting investors, maintaining public confidence, and ensuring an orderly, informed and fair market";
- 5(c) - a statement that the range of breaches warranting the imposition of disciplinary sanctions includes both "active" and "passive" misconduct. Passive misconduct would include "a failure to take sufficient steps to discharge a duty". It also adds that public sanctions will often be appropriate where issuers or individuals are found to be responsible for control environment failings (including internal control deficiencies or insufficient oversight). The fact that these failings do not directly lead to any other breaches of the HKEx Listing Rules or loss will not preclude a respondent from disciplinary sanctions; and
- 5(d) - Where there are multiple respondents, as stated above, the new sub-paragraph (d) will now apply a "principle of collective and individual responsibility for Rule compliance".

The revised Enforcement Sanctions Statement also added the principle of 'educating the market' in terms of the rationale for imposing disciplinary sanctions in sub-paragraph (b).

### New Paragraph 6 - The Primary Disciplinary Sanctions available to the HKEx

The new paragraph now explicitly states that where the Committee finds that there has been a breach of the HKEx Listing Rules by any of the parties within the HKEx's disciplinary jurisdiction, it may impose sanctions on/or take actions in accordance with Rule 2A.10 of the Main Board Rules or Rule 3.11 of the GEM Rules.

### Paragraph 7 (Principal Factors) amendments and additions

Paragraph 7 of the Enforcement Sanctions Statement sets out the principal factors the Committee will take into account (in mitigation or aggravation) in determining an appropriate sanction. The changes that have been made are set out below.

Paragraph 7(m) broadens the scope of persons a respondent places reasonable reliance upon to include other directors, senior management and staff members. The Committee will also consider whether such reliance was reasonable in the circumstances, for example whether the respondent(s) has continued to:

- give adequate oversight;
- apply professional scepticism; and
- exercise independent judgement.

In line with the addition of 5(c), amended sub-paragraph (n) now specifies what constitutes having "appropriate supervisory, risk management, operational or technical procedures and/or controls". They may include:

- a) a robust and effective internal controls system covering “the full control environment from policies through procedures and working practices”;
- b) directors and staff members having the necessary skills, experience, resources and training on internal controls and risk management measures;
- c) a control environment that is regularly reviewed, maintained and updated, and is in compliance with the Corporate Governance Code; and
- d) the existence of proper channels for raising concerns in relation to risk or HKEx Listing Rule compliance matters, and whether escalated concerns are then appropriately handled.

## HKEx Guidance Note on Cooperation

The HKEx’s new [Guidance Note on Cooperation](#) urges directors of listed companies and other relevant parties to cooperate in HKEx investigations and disciplinary actions. Listed company directors are in any event required to cooperate in any HKEx investigation under the terms of the [Declaration and Undertaking with regard to Directors](#).

The Guidance Note on Cooperation refers to the provisions of the HKEx Enforcement Sanctions Statement which include the following as matters that will be taken into account as mitigating (or aggravating) factors by the Listing Committee and Listing Review Committee when determining appropriate sanctions:

- a) whether the respondent(s) fully assisted and cooperated with the HKEx in its investigation, and whether the level of assistance and cooperation provided minimised the time and costs of the investigation (or conversely, whether the respondent(s) failed to fully assist or cooperate with the investigation);
- b) whether the respondent(s) made an early decision not to contest the case brought against it/ them.<sup>2</sup>

With regards to the level of cooperation as a mitigating or aggravating factor, the guidance note clarifies what will and will not constitute cooperation in the context of the HKEx’s work, and the HKEx’s approach to cooperation.

The Guidance identifies the following non-exhaustive examples of cooperative conduct:

- a) provision of true and complete information and documents in relation to the suspected breach of the HKEx Listing Rules or misconduct;
- b) taking a proactive approach by demonstrating the party’s willingness to devote resources to the investigation, prioritising the matter and responding to the HKEx’s enquiries;
- c) early admission, in writing, of the breaches; and
- d) initiating settlement or accepting sanctions.

Conversely, the following are stated as examples of uncooperative conduct which can constitute an aggravating factor:

- a) failure to respond to the HKEx, inclusive of failures to provide substantive responses to all or some of the HKEx’s enquiries;
- b) providing inaccurate, incomplete or misleading information;
- c) unnecessarily prolonging the HKEx’s investigation;
- d) where requested to appear, failure to attend an interview or the disciplinary hearing; and
- e) providing late submissions, evidence or documents.<sup>3</sup>

The Guidance also covers a party’s right to legal professional privilege in this context stating “assertion of this right on a bona fide basis will not be regarded as uncooperative conduct”,<sup>4</sup> although voluntary waiver, even on a limited basis, that assists the HKEx’s investigation will be taken into consideration in the assessment of the extent of cooperation provided.

[1] All quotes are from Hong Kong Stock Exchange *Enforcement Sanctions Statement (25 Oct 2022)*

[2] HKEx Enforcement Sanctions Statement at paragraph 7(c) and (d)

[3] See Hong Kong Stock Exchange *Guidance on Cooperation (25 October 2022)* paragraph 3.3 for details and 3.4 for consequences

[4] Ibid.

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CHARLTONS  
易周律師行

Hong Kong Office

Dominion Centre 12th Floor  
43-59 Queen's Road East Hong Kong

[enquiries@charltonslaw.com](mailto:enquiries@charltonslaw.com)

[www.charltonslaw.com](http://www.charltonslaw.com)  
Tel: + (852) 2905 7888  
Fax: + (852) 2854 9596