7 March 2005

HKIoD Response to the Consultation Paper on Proposed Amendments to the Securities and Futures Ordinance to Give Statutory Backing to Major Listing Requirements

1. General Views

We fully support the need to improve and promote compliance and enhance market quality by introducing statutory backing to certain parts of the Listing Rules whereby breaches of which would have serious consequences for the investors and the overall confidence of the market.

In relation to directors' legal duties, it is noted that currently there is no statutory directors' duties imposed under the Hong Kong Company Law although there are certain related guidelines issued by the Companies Registry on the subject matter. Therefore in considering the captioned matter, it should be borne in mind that, although under the Company Law, there is no distinction in legal rights and obligations among executive, non-executive and independent non-executive directors, in reality, differences in actual duties exist among them, for example, oversight of internal control procedures has been the main focus and responsibility for independent non-executive directors who act in the interests of minority shareholders.

2. Appendix A of the Consultation Paper

We agree that the Securities and Futures Commission (SFC) should make rules to prescribe listing requirements and ongoing obligations of listed corporations in relation to aspects regarding price sensitive information, timely disclosure of financial information and timely disclosure of notifiable and connected transactions for the benefit of the investing public.

Currently, all Listing Rules are not statutory. Any changes introduced to the Listing Rules were initiated by the Hong Kong Exchanges and Clearing Limited (HKEx) and approved by the SFC. However, the new Securities and Futures Ordinance (Cap. 571, Laws of Hong Kong) has provisions which safeguard the interests of relevant parties i.e. the rules made by the SFC are subsidiary legislation and will be subject to negative vetting by the Legislative Council. Be that as it may, if the SFC were to make statutory Listing Rules on its own, it is advisable to consider setting up an independent Review Committee to oversee, consider and review, if necessary, all those relevant procedures, draft proposals and related documents in connection with the same before proceeding to the Legislature. It is important that sufficient time and professional resources are dedicated to ensure statutory Listing Rules are made legally effective with the ultimate aim of benefiting the Hong Kong market as a whole.

3. Breaches of Statutory Listing Rules - Proposed Civil Sanctions Imposed

Although we are of the view that civil sanctions should be introduced, it is doubtful whether it is appropriate to introduce criminal sanctions at this early juncture of the new statutory Listing

香港銅鑼灣謝斐道 414-424 號中望商業中心 8 樓● 8/F, Chinaweal Centre, 414-424 Jaffe Road, Causeway Bay, Hong Kong
電話 Tel: (852) 2889 9986 傳真 Fax: (852) 2889 9982 電郵 E-mail: executive@hkiod.com 網頁 Web-site: www.hkiod.com

Rules regime. Listing Rules currently administered by the HKEx are rather complex in nature and have been subject to wide and differing interpretations over the years. It might be unfair to issuers, directors and a number of other relevant parties in the market, to be subject to criminal sanctions when the new statutory regime and the new laws have not been tested in any litigation process. Under the current circumstances, it is believed that imposing criminal sanctions for breaches of statutory Listing Rules is not appropriate and a step-by-step approach should be adopted.

It is believed that the SFC instead of the Exchange should take up the role of enforcing statutory Listing Rules. However, in this connection, certain concerns were raised in relation to the checks and balances that will be available under the new statutory Listing Rules regime. We believe that it is important that there should be necessary and sufficient checks and balances in place at all times; however, the same was not mentioned in the Consultation Paper.

4. Breaches of Statutory Listing Rules - Proposed Level of Civil Fines Imposed

In relation to the proposed level of civil fines imposed for breaches of statutory Listing Rules, we are of the view that the difference for the maximum amount of civil fines of HK$5 million proposed to be imposed by the SFC and HK$8 million proposed to be imposed by the Market Misconduct Tribunal ("MMT") is unrealistic and the former should be set at a much lower level.

In order to avoid duplication of efforts under the concurrent civil regimes by both the SFC and the MMT, it is suggested that the proposed concurrent civil regimes should not proceed as proposed. It will be more effective if (a) minor breaches of the statutory Listing Rules are dealt with by the SFC directly as strict liability breaches which, we believe, should consist of a majority part of the statutory Listing Rules offences and (b) leave the relatively more serious breaches to be dealt with by the MMT.

We are supportive of the maximum amount of civil fine of HK$8 million that may be imposed by the MMT. However, in relation to the maximum penalty amount that may be imposed by the SFC, we are of the view that it will be difficult to set a maximum cap under the circumstances. However, in view of our foregoing alternative suggestion, even if a maximum cap has to be set for the SFC, we believe that a civil fine of no more than HK$2 million in relation to strict liability breaches of the statutory Listing Rules will be sufficient.

Also, we believe that only listed issuers and directors should be subject to civil fines sanctions while officers, senior or otherwise, should not.

5. SFC's Regulatory Decisions Relating to Statutory Listing Rules Breaches - Proposed Additional Checks and Balances

In order to maintain the due process of law, it would not be procedurally fair to allow the SFC alone to make statutory Listing Rules, investigate, prepare, prosecute and adjudicate on cases

of breaches of statutory Listing Rules on its own.

We believe it would be better if an independent committee, acting as an additional layer of checks and balances, be established to oversee and review SFC's regulatory decisions relating to listing because the number of listed companies and directors that may be involved these days can be substantial (N.B. Currently, there are over 1,000 companies listed in Hong Kong with approximately 6 directors in each of them.)

6. Other Issues

The Hong Kong Companies Registry (the "Registry") administers the Companies Ordinance (Cap. 32, Laws of Hong Kong) (the "Ordinance") and is legally empowered to impose sanctions for breaches of the more serious corporate misbehaviour under the Ordinance, such as, disqualification of directorships etc. However, in reality, due to the limited resources of the Registry, it is often not capable of handling corporate misbehaviour committed under the Ordinance and, currently, there is no other regulatory authority dealing with breaches of relevant parts of the Ordinance in this regard. As such, subject to relevant jurisdictional issues being resolved, it is advisable to consider whether MMT could take up part of the functions currently performed by the Registry i.e. MMT to be empowered to handle certain more serious breaches of the Ordinance committed by Hong Kong listed corporations, which include, all those companies listed in Hong Kong, irrespective of their place of incorporation and their directors.

Also, it is noted that there is no provision in the Consultation Paper in relation to the budget that will be needed and financial implication for the administration and enforcement of breaches.

We hope our views set out above are useful for your consideration in the formulation of the new statutory Listing Rules regime.