

Issued on: 9 October 2020

The Exchange's Consultation Paper

Review of Listing Rules Relating to Disciplinary Powers and Sanctions (August 2020)

In response to the captioned Consultation Paper, The Hong Kong Institute of Directors has the following views and comments.

General comments

HKIoD generally supports the proposals.

The fact of a PII Statement or a Director Unsuitability Statement ought to be material information. The publication requirement in the proposals are reasonable. The essence is for shareholders of the respective issuers and the wider investing public to have available information.

When it comes to imposing sanctions on Relevant Parties (especially those in professional realms) who may be subject to particular (even statutory) practice rules, the regime needs to take into consideration existing regulatory and disciplinary processes that may be relevant and applicable to those Relevant Parties. In addition, the eventual sanction should apply only after all possible review (and appeal) process (and judicial challenges, if a particular case can permit or require) has been exhausted.

To align the practices for disciplinary and non-disciplinary review matters should simplify the administrative aspects of the review process yet provide affected parties with venue to present their substantive case.

Responses to specific consultation questions

Subject to the general comments, we state our responses to specific questions as set out in the Consultation Paper as follows:

PII Statement – “prejudicial to the interests of investors”

Question 1: We propose to amend the existing threshold for imposing a PII Statement 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?

HKIoD Response:

- AGREE with reservations
 - Triggering threshold: The proposal is a ‘*may cause prejudice*’ construction which hints at mere possibility. The triggering threshold should be at a higher standard to not be arbitrary. We suggest a “*will likely cause prejudice*” construction.
 - Not need to be specific to an issuer: It makes sense to enable PII Statements to be made whether or not an individual continues in office. That the subject individual may hold office with another listed issuer should be material information for shareholders of that issuer and for the wider investing public.
 - Duration: The Exchange may want to elaborate on the substantive factors or procedural mechanisms that may determine the duration for which a PII Statement is to have effect.

Question 2 We propose to extend the scope of a PII Statement to include directors and senior management of the relevant issuer and any of its subsidiaries. Do you agree?

HKIoD Response:

- AGREE
 - Actual misconduct may be committed at the subsidiary level. Those committing such misconduct should also be held accountable.

Enhancements to follow-on actions for PII Statements and publication requirements

Question 3 We propose 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?

HKIoD Response:

- AGREE

- PII Statements need to have consequences (or at least potential impact) to have effective deterrence.

Question 4 We propose 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?

HKIoD Response:

➤ AGREE

- Publication requirement – named issuer: The publication requirement is reasonable. The occurrence of acts and deeds that triggers a PII Statement should be material information for shareholders of the named issuer and for the wider investing public.
- Publication requirement – other listed issuers: The publication requirement is reasonable. That an individual they have or want to appoint is subject to a PII Statement should be material information for shareholders of these other listed issuers and for the wider investing public.
 - The board of these other listed issuers should indeed assess and determine whether the individual should continue in office or be removed. The findings and decision outcome should be properly and timely disclosed.

Question 5 We propose to extend the current express scope of disclosure in listing applicant's 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 provisions of full particulars of any public sanctions made against those individuals. Do you agree?

HKIoD Response:

➤ AGREE

- The essence is for shareholders of the respective issuers and for the wider investing public to have available the information.

Denial of facilities of the market to an issuer

Question 6 We proposed to remove the existing threshold for ordering the denial of facilities of the market. Do you agree?

HKIoD Response:

➤ AGREE

- To remove the existing threshold of ‘wilful’ and ‘persistent’ failure is reasonable. Though it may seem like more issuers could be denied market facilities more of the time, affected issuers can manage the situation and clear the air with some active response.

Question 7 We propose to include fulfilment of specified conditions in respect of the denial of facilities of the market. Do you agree?

HKIoD Response:

➤ AGREE

- To deny market facilities merely for a specified period may never achieve the necessary deterrence; a listed issuer can merely wait it out. Consultation Paper para 61. To have the ability to deny market facilities until fulfilment of specified conditions will have the better likelihood of cajoling some active response from the issuer, whether to bring itself to compliance or to mount a review to dispute the basis for imposing sanctions.

Director unsuitability statement against individuals

Question 8 We propose to introduce the Director Unsuitability Statement as a new sanction. Do you agree?

HKIoD Response:

➤ AGREE with reservations

- Triggering threshold: The proposed threshold is ‘*serious or repeated failure by a director to discharge his responsibilities under the Listing Rules*’. This is a sufficiently high standard to take out the plainer less egregious mistakes or omissions.
- Finality: It is a necessary safeguard, for reputation or otherwise, to have DUS and related sanctions to apply only after the decision is final and all possible review and appeal process (and judicial challenges, if a particular case can permit or require) has been exhausted.

Question 9 We propose that the follow-on actions and publication requirement in respect of PII Statements also apply to Director Unsuitability Statements. Do you agree?

HKIoD Response:

➤ AGREE

- Follow-on actions: It is reasonable to have follow-on actions also apply in respect of a DUS but only against the listed issuer in the statement.
- Publication requirement: It is reasonable to have the publication requirement also apply to the named issuer and to other listed issuers of which the individual is a director.

The introduction of secondary liability

Question 10 We propose 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?

HKIoD Responses:

➤ AGREE with reservations

- Chance to appeal: We generally agree with the concept of secondary liability. Some Relevant Parties (especially those in the professional realms) may be subject to particular (even statutory) practice rules. The regime needs to take into consideration existing regulatory and disciplinary processes that may be relevant and applicable to those Relevant Parties.

Explicit sanction for failure to comply with requirements imposed by the Listing Division, the Listing Committee or the Listing Review Committee

Question 11 We propose 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?

HKIoD Responses:

➤ AGREE

Question 12 We propose that sanctions may be imposed on all Relevant Parties 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?

HKIoD Responses:

- AGREE with reservations
 - Chance to appeal: We generally agree with the concept of secondary liability. Some Relevant Parties (especially those in the professional realms) may be subject to particular (even statutory) practice rules the operation of which may render the party not able to comply on its face. The regime needs to take into consideration existing regulatory and disciplinary processes that may be relevant and applicable to those Relevant Parties.

***Failure to provide accurate, complete and up-to-date information
when responding to the Exchange's enquiries or investigations***

Question 13 We propose to explicitly provide in the 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?

HKIoD Response:

- AGREE with reservations
 - Chance to appeal: There would have to be procedural mechanisms for a party to present its case as to how and to what extent such obligation is or can be met. This would be so for any party who may be subject to particular practice rules the operation of which may render the party not able to meet the obligation.

'Senior management' under current Rule 2A.10(c)

Question 14 Do you agree with the proposed definition of 'senior management'?

HKIoD Response:

- AGREE
 - An issuer's board should give some thought to a suitable management structure so to have a clear delineation and the ensuing delegation of management authority.

***Include employees of a professional adviser
of a listed issuer or any of its subsidiaries as a Relevant party***

Question 15 We propose to include employees of professional advisers of listed issuers and their subsidiaries as a Relevant Party under the Rules. Do you agree?

HKIoD Response:

- AGREE with reservations
 - Nexus: The purpose or intent of the proposal should not be to impose sanctions on every and all employees of a professional adviser. At the least there ought to be some substantial connection to the specific acts or deeds that give rise to the Rule breach. And there must be the chance to appeal. The Exchange may want to elaborate and clarify.
 - See also our response to Question 10-12

Include guarantors of structured products as a Relevant Party

Question 16 We propose to include guarantors of structured products as a Relevant Party under the Rules. Do you agree?

HKIoD Response:

- AGREE
 - To give a guarantee to facilitate a securities offering is a serious matter that should require the person giving the guarantee to have given it deliberation and understood the consequences.

Include guarantors of debt securities as a Relevant Party under the MB Rules

Question 17 We propose to include guarantors of an issue of debt securities as a Relevant Party under the MB Rules. Do you agree?

HKIoD Response:

- AGREE
 - To give a guarantee to facilitate a securities offering is a serious matter that should require the person giving the guarantee to have given it deliberation and understood the potential consequences.

***Include a party who provides an undertaking to
or who enters into an agreement with the Exchange as a Relevant Party***

Question 18 We propose 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?

HKIoD Response:

- AGREE
 - To give an undertaking to, or to enter an agreement with, the Exchange (or another entity for that matter) should be a serious act to require the party to have given deliberation and understood the potential consequences.

Ban on professional advisers

Question 19 We propose to extend the ban on professional advisers to cover banning of representation of any or a specified party. Do you agree?

HKIoD Response:

- AGREE with reservations
 - Finality: It is a necessary safeguard, for reputation or otherwise, to have the ban apply only after all possible review or appeal process (and judicial challenges, if a particular case can permit or require) has been exhausted.

Clarification on the position of professional advisers

Question 20 We propose to include express obligations on professional advisers when acting in connection with Rule matters. Do you agree?

HKIoD Response:

- AGREE with reservations
 - See our response to Questions 10-12.

***Aligning the practices for filing review applications
and requesting or providing written reasons for decisions***

Question 21 We propose 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?

HKIoD Response:

- AGREE
 - The proposal is to align the practices for disciplinary and non-disciplinary review matters.

Question 22 We propose that all review applications must be served on the Secretary. Do you agree?

HKIoD Response:

- AGREE
 - The proposal is to align the practices for disciplinary and non-disciplinary review matters.

Question 23 We proposed 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?

HKIoD Response:

- AGREE
 - The proposal is to align the practices for disciplinary and non-disciplinary review matters.

Question 24 We propose that the counting of the period for requesting written reasons be from the date of issue of the decision. Do you agree?

HKIoD Response:

- AGREE
 - The proposal is to align the practices for disciplinary and non-disciplinary review matters.

Question 25 We propose that the counting of the period for providing written reasons be from the date of receipt of the request. Do you agree?

HKIoD Response:

➤ AGREE

- The proposal is to align the practices for disciplinary and non-disciplinary review matters.

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