

Corporate Finance

HKEX proposes widening of disciplinary regime under the Listing Rules

Introduction

The Stock Exchange of Hong Kong Limited (the “**Stock Exchange**”) recently issued a consultation paper on the proposed changes to the Rules Governing the Listing of Securities on the Stock Exchange (the “**Listing Rules**”) in relation to disciplinary powers and sanctions (the “**Consultation Paper**”). In the Consultation Paper, the Stock Exchange, among other things, made several proposals to expand its disciplinary powers and the range of sanctions available to ensure effective sanctions can be brought against individuals who cause or participate in a breach of the Listing Rules. The major proposed changes in the Consultation Paper are set out below.

Statements against individuals in breach of the Listing Rules

In relation to the statement to be made by the Listing Committee under Rule 2A.09(7) of the Listing Rules (the “**PII Statement**”), the Stock Exchange proposes to lower the existing threshold to allow the Listing Committee to issue the PII Statement when it is of the opinion that “*the occupying of the position of director or senior management of a named listed issuer or any of its subsidiaries by an individual may cause prejudice to the interests of investors*” and to directly identify in the PII Statement the relevant listed issuer at which the individual was a director or senior management member at the time of the breach of the Listing Rules in respect of which the sanction was imposed.

To enhance the options available to the Stock Exchange when dealing with cases concerning more serious breaches of the Listing Rules and director misconduct, the Stock Exchange proposes to impose a new sanction of issuing a director unsuitability statement. The director unsuitability statement will state publicly that in the Stock Exchange’s opinion the director is unsuitable to be a director or a member of the senior management of a named listed issuer or any its subsidiaries. Where an individual continues to be a director of another listed issuer, the Stock Exchange may make enquiries as to his suitability to do so and take separate and independent action in relation to that listed issuer and the director.

Introduction of secondary liability

Under the current disciplinary regime, relevant parties, including the listed issuer and its subsidiaries, directors, members of the senior management and substantial shareholders, etc. (the “**Relevant Parties**”), may be subject to disciplinary actions of the Stock Exchange. However, not all of the Relevant Parties are subject to obligations under the Listing Rules

and there is no prescribed standard of compliance for certain Relevant Parties. The Stock Exchange therefore proposes to introduce secondary liability to all Relevant Parties for breaches of the Listing Rules in circumstances where the Stock Exchange determines the person “*has caused by action or omission or knowingly participated in a contravention of the Listing Rules*”. According to the Consultation Paper, secondary liability will arise and be attached only in limited circumstances where the individual concerned has exhibited conduct which has caused a breach of the Listing Rules or has participated in, knowing that the conduct amounts to, a breach of the Listing Rules.

Through the introduction of secondary liability, the Consultation Paper seeks to impose disciplinary liability on other classes of officers or parties of a listed issuer, including:

1. chief financial officers for failure to obtain auditors’ agreement before publication and material inaccuracy of preliminary results announcement;
2. chief operating officers for failure to disclose share charge in a timely manner and in the listed issuer’s interim report and for listed issuer’s breach of procedural requirements for very substantial acquisition;
3. board secretaries for material inaccuracy of listed issuer’s announcement of controlling shareholder’s transfer of shares;
4. substantial shareholders for failure to maintain sufficient public float; and
5. financial advisers for material inaccuracy of listed issuer’s circular.

Definition and scope of Relevant Parties

In relation to the definition and scope of Relevant Parties, the Stock Exchange also proposes to include an explicit definition of “senior management” within the Listing Rules and expand its disciplinary jurisdiction to include (i) employees of professional advisers of listed issuers and their subsidiaries; (ii) guarantors of structured products; (iii) guarantors for an issue of debt securities in respect of the Main Board Listing Rules; and (iv) parties who voluntarily give undertakings to, or enter into agreements with, the Stock Exchange in a variety of circumstances under the scope of “Relevant Parties” so that disciplinary actions can be taken against them for failure to discharge any obligations under the Listing Rules.

Imposing additional sanctions on Relevant Parties

Rule 2A.09 of the Listing Rules provides that sanctions may be imposed on the Relevant Parties if there has been a breach of the Listing Rules by them. However, there is no sanction available in the case of non-compliance with a requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee of the Stock Exchange.

In light of the above, the Stock Exchange proposes to have a provision that explicitly refers to the ability of its power to impose sanctions on Relevant Parties in circumstances where they have failed to comply with a requirement imposed by the Listing Division or the Listing Committee. In addition, the Stock Exchange also proposes that sanctions may be imposed on all Relevant Parties through secondary liability, where a party fails to comply with a requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee if the Relevant Parties have caused, by action or omission or knowingly participated in, a contravention of the requirement.

Provision to draw parties' attention to their duty to provide information

Another highlighted proposal is the inclusion of an explicit provision regarding the obligation to provide complete, accurate and up-to-date information when interacting with the Stock Exchange in respect of its enquiries or investigations. The proposed provision will make it clear that parties subject to its enquiries and investigations shall provide all information relevant to its enquiries even if it has not required the specified information, and such information should be accurate, complete and up-to-date, provided that such provision does not contravene the relevant requirements of professional conduct.

Furthermore, directors, supervisors, sponsors, compliance advisers and independent financial advisers are obliged to cooperate in the Stock Exchange's investigations and enquiries, such as answering promptly and openly any questions addressed to them.

Conclusion

By the proposed changes to the current disciplinary regime under the Listing Rules, the Stock Exchange aims to include a wider spectrum of graduated sanctions available and enhance existing sanctions for effective disciplinary action to be taken, in particular emphasising on misconduct by individuals in relation to breaches of the Listing Rules. The consultation period will end on 9 October 2020.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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