



Update ^{on} Disciplinary Proceedings and Sanctions under the **Listing Rules**

有關 **《上市規則》** 下
紀律處分程序及
制裁的**最新消息**

All companies listed on The Stock Exchange of Hong Kong Limited (Exchange) are subject to the Listing Rules, namely, Main Board Listing Rules for companies listed on the Main Board and GEM Listing Rules for companies listed on the GEM. The Listing Rules are not statutory and are imposed on listed companies by the Exchange upon listing by way of contract. In consequence, any breach of Listing Rules per se will not be subject to any criminal prosecution and will be subject to disciplinary proceedings and sanctions under the Listing Rules. Under the Main Board Listing Rules (MBLR), the disciplinary proceedings and sanctions are mainly contained in chapter 2A.

Disciplinary Sanctions under Main Board Listing Rules

For a breach of the Listing Rules, the main sanctions under MBLR 2A.19 are:

- (a) reputational sanctions including private reprimand, public statement involving criticism, public censure, and a public statement that the retention of office by the director is prejudicial to the interests of investors (commonly referred to as PII Statement);
- (b) rectification or remedial sanctions;
- (c) denial of facilities of the market (commonly referred to as cold shoulder sanctions);
- (d) suspension of trading; and/or
- (e) cancellation of listing.

In addition to the main sanctions, the following ancillary or operational sanctions are also available to the Exchange:

- (a) reporting the misconducts to relevant regulatory authorities for investigations and disciplinary actions; for example, any possible breach of the Securities and Futures Ordinance (SFO) will be referred to the Securities and Futures Commission for further action under SFO;
- (b) imposing a ban on professional advisers from representing a specified party in relation to matters under the Listing Rules; and/or
- (c) taking, or refraining from taking, such other actions as imposed by the Exchange.

Under MBLR 2A.10, the sanctions under MBLR 2A.09 may be imposed on the following parties:

- (a) the listed company or any of its subsidiaries;
- (b) any director or his alternate;
- (c) any member of the senior management;
- (d) any substantial shareholder;
- (e) any professional adviser;
- (f) any authorised representative;
- (g) any supervisor of a PRC issuer; and/or
- (h) any independent financial adviser.

The Exchange Market Consultation

By way of background, the disciplinary proceedings and sanctions as currently contained in chapter 2A of the Main Board Listing Rules

所有在香港聯合交易所有限公司（聯交所）上市的公司均須遵守《上市規則》，即《主板上市規則》（適用於在主板上市的公司）和《GEM上市規則》（適用於在GEM上市的公司）。《上市規則》並非法定規則，由聯交所以合約方式在上市時對上市公司施加。因此，違反《上市規則》本身不會遭受刑事檢控，但將面臨《上市規則》下的紀律處分程序及制裁。根據《主板上市規則》，紀律處分程序及制裁主要載於第2A章。

《主板上市規則》下的紀律制裁

針對違反《上市規則》的情況，《主板上市規則》第2A.19條下訂明的主要制裁包括：

- (a) 聲譽性制裁，包括私下指責、發出載有批評的公開聲明、公開譴責，以及發表公開聲明，指出特定董事繼續留任將損害投資者權益（通常稱為損害投資者權益聲明）；
- (b) 修正或補救性制裁；
- (c) 禁止使用市場設施（通常稱為冷待制裁）；
- (d) 停牌；及 / 或
- (e) 取消上市地位。

除主要制裁以外，聯交所亦可施加以下其他附帶或操作層面上的制裁：

- (a) 向相關監管機構匯報不當行為，以進行調查及紀律行動；舉例而言，任何可能違反《證券及期貨條例》的行為，均會轉交予證券及期貨事務監察委員會，以根據《證券及期貨條例》採取進一步行動；
- (b) 禁止專業顧問就《上市規則》事宜代表某指定一方；或
- (c) 採取或不採取聯交所施加的其他行動。

根據《主板上市規則》第2A.10條，《主板上市規則》第2A.09條下訂明的制裁可對以下各方施加：

- (a) 上市公司或其任何附屬公司；
- (b) 任何董事或其替任人；
- (c) 任何高級管理層成員；
- (d) 任何主要股東；
- (e) 任何專業顧問；
- (f) 任何授權代表；
- (g) 中國發行人的任何監事；及 / 或
- (h) 任何獨立財務顧問。

聯交所市場諮詢

從背景來看，目前《主板上市規則》第2A章所載的紀律處分程序及制裁自1993年實施以來不曾有過重大修訂（2005年、2007年、2009年及2010年有過輕微修訂）。聯交所於2020年8月7日刊發諮詢文件，以就紀律處分權力及制裁措施對《上市規則》作出檢討，並就此向市場進行諮詢。

have been in place since 1993 (with minor updates in 2005, 2007, 2009 and 2010) but with no major amendment. On 7 August 2020, the Exchange issued the consultation paper to review the Listing Rules relating to disciplinary powers and sanctions and to consult the market in relation thereto.

The consultation paper acknowledges that the objectives of disciplinary actions imposed are:

- (a) to protect the public and the integrity of the market and facilities the Exchange operates;
- (b) to improve corporate governance;
- (c) to remedy conduct in breach of the Listing Rules; and
- (d) to deter future breaches of the Listing Rules by any listed company and market participant that are subject to the disciplinary jurisdiction of the Exchange under the Listing Rules.

Under the consultation paper, all existing sanctions under MBLR 2A.09 are retained, subject to enhancements as therein proposed.

Key Proposals under Consultation

Under the consultation paper, the key proposals and enhancements to the existing disciplinary regime are as follows:

- (a) to lower existing thresholds (of 'wilful or persistent' failure) for public statements regarding individuals;
- (b) to enhance follow-on actions in relation to public statements regarding individuals;
- (c) to remove existing thresholds for denying the facilities of the market (cold shoulder sanctions) to listed companies;
- (d) to introduce director unsuitability statements against individuals;
- (e) to enhance disclosure requirements for directors and senior management members subject to public sanctions;
- (f) to introduce secondary liability for any breach of the Listing Rules;
- (g) to define 'senior management' within a listed company and its subsidiaries;
- (h) to expand the disciplinary regime to include new parties that will be subject to disciplinary sanctions under the Listing Rules; and
- (i) to include an explicit provision in the Listing Rules that there is an obligation to provide accurate complete and up-to-date information and explanation to the Exchange when responding to its enquiries and investigations.

On the definition of senior management for sanctions, it is proposed to include:

- (a) any person occupying the position of chief executive, supervisor, company secretary, chief operating officer or chief financial officer, by whatever name called;
- (b) any person who performs managerial functions under the directors' immediate authority; or
- (c) any person referred to as senior management in the listed company's corporate communication or any other publications on its or the Exchange website.

聯交所諮詢文件中確認紀律處分的目標為：

- (a) 保障公眾以及聯交所轄下市場及設施的持正操作；
- (b) 改善企業管治；
- (c) 糾正違反《上市規則》的行為；及
- (d) 阻嚇任何受制於聯交所在《上市規則》下紀律管轄權的上市公司及市場參與者日後作出違規行為。

根據諮詢文件，《主板上市規則》第2A.09條下的所有現行制裁將予保留，但會因應諮詢文件中建議的加強措施作出修訂。

諮詢文件的主要建議

諮詢文件對現行紀律機制的主要建議及加強措施載列如下：

- (a) 降低現時對個人發出公開聲明的門檻（「故意或持續」未能履行職責）；
- (b) 加強對個人發出公開聲明後的跟進行動；
- (c) 取消現行禁止上市公司使用市場設施的門檻（冷待制裁）；
- (d) 增設針對個人的董事不適合性聲明；
- (e) 加強受到公開制裁的董事及高級管理階層成員的披露規定；
- (f) 引入違反《上市規則》的間接責任；
- (g) 界定何謂上市公司及其附屬公司的「高級管理階層」；
- (h) 擴大紀律機制的覆蓋範圍，以把將可面臨《上市規則》紀律制裁的相關各方包括在內；及
- (i) 在《上市規則》中加入明確條文，訂明在回應聯交所的查詢及調查時，有責任向聯交所提供準確、完備及最新的資料及解釋。

就制裁事宜界定高級管理階層的定義，其中建議包括：

- (a) 擔任行政總裁、監事、公司秘書、營運總監或財務總監的任何人士（不論以任何職稱擔任）；
- (b) 在董事直接權限下執行管理職能的任何人士；或
- (c) 於上市公司的企業傳訊或上市公司或聯交所網站上的任何其他刊物中被指為高級管理階層的任何人士。

關於上述建議 (h)，以下新包括的相關各方將受到紀律制裁：

- (a) 上市公司或其任何附屬公司的專業顧問的任何僱員；
- (b) （於有擔保的債務證券或結構性產品發行時）發行人的任何擔保人；及
- (c) 向聯交所作出承諾或與聯交所訂立協議的任何人士。

As regards proposal (h) above, the following new parties are subject to disciplinary sanctions:

- (a) any employee of a professional adviser of a listed company or any of its subsidiaries;
- (b) any guarantor of an issuer in the case of a guaranteed issue of debt securities or structured products; and
- (c) any party who or which gives an undertaking to or enters into an agreement with the Exchange.

Minor and Housekeeping Amendments

Under chapter 6 of the consultation paper, the following minor amendments to the Listing Rules are proposed:

- a) any ban on professional advisers is extended to cover banning of representation of any or a specified party;
- b) express obligations are included on professional advisers when acting in connection with Listing Rule matters; and
- c) the practices for filing review applications and requesting or providing written reasons for decisions are aligned.

Under chapter 7 of the consultation paper, the following housekeeping amendments are proposed which do not involve any change in policy direction:

- (a) rewriting MBLR 2A.09 and 2A.10; and
- (b) removal of independent financial advisers as a standalone relevant party subject to sanctions and including them under professional advisers.

Draft amendments to the Main Board Listing Rules are contained in Appendix I with consequential amendments contained in Appendix II to the consultation paper.

CHKLC Response

The consultation period has ended on 9 October 2020 and CHKLC has made a submission. CHKLC took a different view on a number of key issues including:

- (1) We oppose lowering the threshold of issuing a PII statement by removing the “wilful or persistent” conditions. As the imposition of PII statement aims to removing an individual from office and carries follow-on actions including denying the listed issuer concerned from accessing facilities of the market, it is a very grim penalty to both issuer and individual. It must be used carefully and only upon serious contraventions but not unintentional or single ones. The conditions of “wilful or persistent” are therefore key. The replacement wordings of “..... may cause prejudice to the interests of investors” are too arbitrary and leave too much discretion to the Exchange, which is unfair to the individual subject to the PII statement.



非主要及輕微修訂

諮詢文件第六章建議對《上市規則》作出以下非主要修訂：

- (a) 將對專業顧問所施加的任何禁令擴大至包括禁止擔任任何或指定人士的代表；
- (b) 明文列出專業顧問就《上市規則》事宜行事時的責任；及
- (c) 就提交覆核申請以及就決定要求提供或提供書面理由統一做法。

諮詢文件第七章建議作出以下不牽涉改變政策方向的輕微修訂：

- (a) 重寫《主板上市規則》第2A.09條及第2A.10條；及
- (b) 取消獨立財務顧問自成另外一類可面臨制裁的相關人士，並將其納入專業顧問的範圍內。

《主板上市規則》修訂擬稿載於附錄一，相應修訂則載於諮詢文件附錄二。

香港上市公司商會的回應

有關諮詢期已於2020年10月9日結束，香港上市公司商會已提交回應。香港上市公司商會對多個關鍵事項持不同看法，包括：

- (1) 我們反對透過取消「故意或持續」條件來降低發出損害投資者權益聲明的門檻。由於實施損害投資者權益聲明旨在解除個人職務並採取跟進行動，包括禁止有關上市發行人使用市場設施，無論對發行人及個人而言，有關聲明都是一項非常嚴厲的懲罰，故必須謹慎採用，並且只用於在出現多次嚴重違規的情況，而不是非蓄意違規或單一事件。因此，「故意或持續」是關鍵的條件。

- (2) Secondly, we believe the Exchange fails to present convincing arguments and empirical evidence or statistics showing the existing powers are inadequate and therefore such enhancement is needed. In addition to the Exchange Listing Rules, there are other laws and regulations that bind issuers, directors, and other professional parties and hold them responsible for their malfeasances, including Securities and Futures Ordinance, Companies Ordinance, or even the Crimes Ordinance, to name a few. Before seeking to enhance its powers under the Listing Rules, the Exchange should review other disciplinary powers in the whole regulatory regime in a holistic manner.
- (3) Thirdly, we oppose to introducing the secondary liability to widen the scope of the disciplinary powers to Related Parties, in particular the senior management and executives of the issuer where they may be subjected to a PII statement. Senior management and executives are employees of the company; they do not have contractual relationship with the Exchange, and unlike directors, they have not signed undertakings to observe the Listing Rules. Under the proposals, the PII statement will subject them to being removed from office. This is not only a reputational damage but affects their career and livelihood. Executives often times act upon instructions of the board and have no corresponding power to make important decisions, it is the board's ultimate responsibility to ensure listing rules compliance. The executives' terms of reference and compensation package are not on the same level as directors and it is therefore unfair to put them on the same penalty scale of directors. The executives could be subjected to other sanctions or disciplinary actions but not a PII statement.
- (4) As regards introducing secondary liability to professional advisers, for the same reason that they do not have contractual relationship with the Exchange (except in cases where explicit obligations with relation to Listing Rules exist, or where undertakings to the Exchange have been made) we do not think it is appropriate to cover them in the disciplinary ambit of the Exchange, especially when the sanctions involves banning their professional activities. Each group of professional advisers have their respective industry regulators, the Exchange by all means can refer findings of wrongdoings to their own regulators for investigation and disciplinary enforcement.

For details of CHKLC's response, please visit our website www.chkcl.org. 

— Vincent P C Kwan


Solicitor/Certified Public Accountant (Fellow) (Non-Practising)
Member (Formerly Chairman), FRA Committee
The Chamber of Hong Kong Listed Companies

— Mike Wong

Chief Executive Officer
The Chamber of Hong Kong Listed Companies

替代措詞「……可能會損害投資者權益」過於武斷，並給予聯交所過多酌情權，對被發出損害投資者權益聲明的個人而言屬不公平。

- (2) 第二，我們認為聯交所未能提出令人信服的論據及確切證據或統計數據，以顯示現有權力不足而因此有需要加強有關權力。除了聯交所《上市規則》外，目前亦有其他法律法規約束發行人、董事及其他專業各方並就他們的不當行為追究責任，當中包括《證券及期貨條例》、《公司條例》或甚至是《刑事罪行條例》等等。聯交所在尋求加強其在《上市規則》下的權力之前，應全面檢視整個監管制度內的其他紀律處分權力。
- (3) 第三，我們反對引入間接責任來擴大對相關人士的紀律處分權力範圍，特別是涵蓋到發行人的高級管理階層及行政人員，因為他們可能會因此被發出損害投資者權益聲明。高級管理階層及行政人員是公司的僱員，與聯交所並無合約關係，且有別於董事，他們並無簽署遵守上市規則的承諾書。根據諮詢建議，損害投資者權益聲明將令他們面臨被免職，不僅損害他們的聲譽，亦會影響其事業及生計。董事會為確保上市規則的遵守負上最終責任，行政人員往往是根據董事會的指示行事，沒有作出重大決定的相應權力。行政人員的職權範圍及薪酬待遇不能與董事相提並論，向他們施以與董事程度相同的懲罰是不公平的。行政人員可受到其他制裁或紀律處分，但不應被發出損害投資者權益聲明。
- (4) 就對專業顧問引入間接責任而言，基於相同原因，即他們與聯交所並無合約關係（除非在存在與上市規則有關的明確責任，或已向聯交所作出承諾的情況下），我們認為不適宜將他們納入聯交所的紀律處分範圍內，特別是在有關制裁涉及禁止他們從事專業活動的情況下。每一個專業顧問組別都設有各自的行業監管機構，聯交所可將不當行為的調查結果轉交予其各自的監管機構，以進行調查及作出紀律處分行動。

有關香港上市公司商會回應的詳情，請瀏覽我們的網站 www.chkcl.org。 

— 關保鈺

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財經事務及監管政策委員會委員（及前任主席）

— 黃明偉

香港上市公司商會
總幹事