



November 1, 2016

Corporate Finance Division
Securities and Futures Commission
35F, Cheung Kong Center
2 Queen's Road Central
Hong Kong

By post and email: ListingRegulation@sfc.hk

Dear Sir,

Re: Joint Consultation Paper on Proposed Enhancements to the Exchange's Decision-Making and Governance Structure for Listing Regulation

We welcome the opportunity to respond to the Joint Consultation Paper.

The Asian Corporate Governance Association (ACGA) is a not-for-profit association chartered under the laws of Hong Kong. The association is dedicated to assisting companies and markets across Asia in their effort to improve corporate governance practices. In our educational outreach, we are guided by a practical, long-term approach. ACGA's operations are supported by a membership base of institutional investors, such as public pension funds and fund managers, as well as listed Asian companies, law and accounting firms, and universities. ACGA has more than 110 corporate members, two thirds of which are institutional investors with around US\$25 trillion in assets under management globally. They are also significant investors in the Hong Kong market.

High Level Comments

ACGA supports the Joint Consultation's goal of re-aligning Hong Kong's listing regulatory structure. The Joint Consultation Paper correctly acknowledges the urgent need to develop a more holistic and coordinated regulatory structure appropriate to Hong Kong's status as a competitive global financial market. This has become particularly evident in the past two years as existing structures have struggled to address a broad range of IPO suitability issues and fast-moving market developments that threaten broad market interests and are inconsistent with international regulatory norms.

A Necessary Re-alignment of Hong Kong's Regulatory Processes

At the core of the problem has been the dual regulatory structure in which Hong Kong Exchanges and Clearing (HKEx) serves as the frontline regulator for listing matters. While we believe that the Listing Committee and the Listing Division have worked hard to preserve their integrity, conflicts of interest are a natural challenge when any monopoly exchange operator serves in a regulatory capacity. Existing mechanisms for regulatory coordination

between the Listing Department, the Listing Committee, and the Securities and Futures Commission (SFC) have proven cumbersome and no longer serve the needs of Hong Kong's dynamic market. As a result, we support greater and more direct involvement by the SFC and the creation of the proposed Listing Policy and Listing Regulatory Committees, as well as the new review panels. The decision to reduce conflicts of interest by ending the HKEx CEO's participation in the Listing Committee is the proper step. The creation of the Listing Policy Committee, with participation by senior members of the Listing Committee, SFC, Takeovers Panel, and the HKEx CEO provides a more suitable framework for balancing market interests.

We also believe that efforts to reinforce the SFC's senior regulatory role are appropriate as the Hong Kong market addresses long-standing and complex issues of coordination with Chinese and other global market regulators. Sadly, this issue cannot be minimised. Both HKEx and the SFC need to be able to speak with a clear and authoritative voice in their respective realms. The governance of both entities should benefit from greater clarity over their respective obligations to the market.

Stronger Voice for Investors

Just as we applaud the recommendation that the SFC take on a more active role in the regulation of listing matters, we believe it is important that concrete steps be taken to enhance the investor's voice in the listing regulatory and policy process. Much has been written in the wake of the global financial crisis about the vulnerability of global markets to short-termism, weak corporate governance, and the frequently unforeseen consequences of financial product complexity. ACGA believes that long-term investors with a commitment to high standards of corporate governance have an important role to play in addressing these issues. While there is evidence of greater regulatory engagement with Hong Kong-based investors in recent years, investors remain systematically under-represented in most policy forums. As a result, their concerns have often only been recognised in moments of extreme market volatility; and important distinctions between different types of investors and their interests are largely ignored. With greater involvement at an earlier stage of the regulatory process, we believe there will be greater awareness of crucial market trends.

More Efficiency and Transparency

Despite concerns expressed by some market participants, ACGA believes that the newly proposed committee structures will enhance the efficiency of communication surrounding the listing process. By segregating non-controversial IPO applications from those with suitability concerns we believe that potential issuers and intermediaries can approach the market with greater confidence about required norms and the likely timeframe for approval. The new committees should also ensure more timely action to address well-recognised market challenges, while still offering appropriate opportunities for practitioner and issuer input.

In addition to supporting better coordinated regulatory processes, we endorse the theme of improved transparency and coordination amongst the various regulatory bodies as an

important goal of this exercise. The protracted market debate over “weighted voting rights” (i.e., dual-class shares) came at a high cost to the Hong Kong market and demonstrated structural weaknesses in the market’s dual regulatory structure. In the absence of active and regular updates on regulatory trends, practitioners have tended to adopt a reactive rather than proactive posture toward market trends and regulatory risks. We believe that more regular disclosure of regulatory decisions and better coordinated approaches to market development have the potential to improve the regulatory “ecosystem” of Hong Kong’s market and reduce reliance on advice from intermediaries with a short-term bias.

Specific Concerns

While ACGA broadly agrees with the policy objectives that frame the Joint Consultation Paper and its core proposals, we believe the following issues deserve further consideration:

An Improved and Better Governed Listing Committee

A central element of the Listing Policy and Regulatory Committees is the decision to ensure a senior role for the Chair and Deputy Chairs of the Listing Committee, with a particular emphasis on the inclusion of at least one investor representative. In principle, this should be a practical means of ensuring that the practitioner and listed company voice of the Listing Committee can inform the work of the two new committees. In practice, however, there is a risk that it may concentrate power in a small circle, while overlooking the need for a more engaged and appropriately governed Listing Committee to support the proposed listing regulatory and policy committee processes. The Listing Committee has long suffered from weaknesses common to theoretically representative self-regulatory bodies that make financially material decisions for commercial interests. Specifically, there has been an observable pattern of box-ticking in member selection from intermediaries (investment banks, brokers, law firms, and accountants), a lack of skill or motivation on the part of certain members, under-management of conflicts of interest and the obligation of confidentiality, and over-representation of certain listed companies.

Despite these challenges, we believe that there is still an important consultative role for the Listing Committee to play subject to certain reforms. It is urgent that more effective steps be taken to identify and manage members who often interpret their obligations narrowly and without regard to the market’s long-term interests. We would urge that the HKEx Listing Nominating Committee be reconstituted with a new mandate more reflective of company board best practices and the spirit of transparency and market engagement articulated in the Joint Consultation Paper. Specifically, a “skills matrix” should be developed to guide Listing Committee member selection and evaluation. Careful attention should be given to the trade-off between the desire to have industry representation and the capacity of nominated individuals to do the work. Identifying capable candidates from a broader range of listed companies—as well as investors—should be a priority.

Finally, in light of the enhanced role that the Chair and Deputy Chairs of the Listing Committee are expected to play in the new structure, we believe it is imperative that a more robust evaluation of the conflicts policy be developed to guide selection of candidates and to set accurate expectations for conduct, time management, and compensation. The requirements of these enhanced roles go well beyond the boundaries of traditional public service and the market impact of the issues to be discussed is often high. Individuals who serve their firms in marketing roles, rely on IPOs and other corporate finance business, or who play a direct role in shaping portfolio strategy have unique opportunities to monetise insights from their role on the Listing Committee or in the new super committees. Hong Kong's mixed model of listing regulation has long been vulnerable to abuse, and we would hope that the steps toward reform in this Joint Consultation would open the door to a new culture of clarity on the conflicts issue.

Accountability not Alternates

We are mindful of the vulnerability of the proposed committees, with their significant responsibilities, to the realities of scheduling and conflicts. Nevertheless, we are concerned that extensive reliance on alternates, whether designated or from a pool of designates, will undermine the committees' effectiveness. As noted in the Joint Consultation Paper, it is hoped that decision-making by these committees will typically be by consensus. We do not believe that this objective is consistent with extensive reliance on alternates as a tool for coping with significant workload obligations. Indeed, the creation of a pool of alternates within the Listing Committee to support the LRC nominees has the potential to undermine accountability and effectiveness of the new structure. If the principal Listing Committee nominees are not well positioned to devote time to the process, we believe it would be preferable to re-evaluate their suitability at the outset. In addition, we worry that the creation of a super-tier of LRC alternates could undermine the collegiality that shapes the culture of the Listing Committee.

Oversight of the Listing Function

We share the view that the Listing Committee has been poorly positioned to provide meaningful evaluative input on the performance of the Listing Department, but the current proposal lacks clarity on how the Listing Department should be incentivised to best meet the needs of the market. In particular, we believe that this governance shift should be accompanied by greater transparency on the nature of the objectives that will be used to evaluate the Listing function. It stands to reason that the marketplace and the morale of the Listing Department would benefit if the Listing Policy Committee and the HKEx Remuneration Committee were to establish guidance on key priorities and KPIs to ensure that there is alignment between the goals articulated in the Joint Consultation Paper and the incentives for HKEX professionals.

Proposed Changes to the Disciplinary Process

The Listing Disciplinary process has, over the years, attracted proposals which typically feature the introduction of a legally trained non-Listing Committee members to chair or conduct the hearings. We are mindful of the fact that there may be substantive reasons beyond those outlined in the Consultation Paper to justify this recommendation. However, we are concerned that further legalising the process by introducing new participants may result in optical improvements in the quality of decisions—by framing them in more traditional legal terms—yet could undermine valuable practitioner and issuer input to the process and impair the Listing Committee’s sense of accountability to the market.

A better approach may be to ensure that Listing Committee members serving as Disciplinary Committee Chairs have access to appropriate training or resources in the event that specific legal or process issues must be addressed. Legal gamesmanship has long been a source of frustration for participants in the Listing Disciplinary process. It is important that steps taken to enhance accountability, transparency and consistency of the disciplinary process do not encourage new forms of delay and cost due to heightened legalisation of the process.

Recommendations

The Joint Consultation offers market participants a valuable opportunity to consider solutions to some of the structural problems that have bedeviled the Hong Kong market. Hong Kong has historically relied on self-regulated industry bodies and trade organisations to interact with government on potential policy directions. Given the often immediate and powerful commercial interests at stake, this has often resulted in a one-dimensional policy environment with only a small voice speaking on behalf of investors. Nevertheless, the recent endorsement of a voluntary stewardship code and new enforcement initiatives speak to greater focus on the needs of investors. We welcome this development and believe that this is an appropriate time to consider additional steps to enhance the investor voice and broaden participation in policy bodies by professionals with fewer conflicts of interest.

More Outreach by the SFC and HKEx

In the wake of the Global Financial Crisis, there has been a productive global debate about how regulators can work in the public interest to develop and enforce more effective regulations to address well understood market failures. Hong Kong has not been static during this period, but press commentary on market problems demonstrates that gossip and misdirected analysis win too much attention due to a lack of familiarity with the normal role of a securities market regulator in comparable markets. As a result, we believe that the market would benefit from more interaction with SFC and HKEx professionals, whether at investor conferences, policy forums, or one-off events focused on topical policy issues. Regulators in other Asian markets are increasingly embracing market outreach to build more robust channels of communication. Indeed, it is noticeable that while regional regulators frequently attend corporate governance events in Asia and globally as delegates, their Hong Kong peers are rarely in attendance (except as occasional speakers).



A second potential benefit of greater market engagement by appropriate SFC and HKEx professionals would be the opportunity to encourage the development of the talent pool for market-linked advisory and quasi-regulatory panels. Hong Kong has long relied on ad hoc “soft” consultations with a small circle of participants. All too often, however, Hong Kong’s leading intermediaries labour under the burden of pressing client considerations that limit their ability to look at market issues holistically. At the same time, many investors and board directors have valuable insights on the market, but a limited understanding of regulatory imperatives. If the SFC and HKEx were to look for ways to support a programme of regular outreach events, with dedicated staff resources devoted to this function, we believe that this education deficit could be addressed and a more diverse and investor-oriented talent pool would naturally develop.

We would be pleased to discuss any of our points above further.

Yours truly,

A handwritten signature in blue ink, appearing to read 'JA', written over a light blue horizontal line.

Jamie Allen
Secretary General

**Melissa Brown, Specialist Consultant, ACGA, contributed to this letter.*