

# SFC and HKEx Release Listing Regulatory Structure Consultation Conclusions

September 19, 2017

Ten months after the close of the consultation period, the SFC and HKEx have published the conclusions to their June 2016 Consultation Paper on Proposed Enhancements to the Exchange's Decision-Making and Governance Structure for Listing Regulation. Please access the consultation paper [here](#) and the conclusions [here](#).

Here are some highlights from the consultation conclusions:

## A new advisory panel for listing policy

The concept of the new Listing Policy Committee (LPC) has been replaced with that of a Listing Policy Panel (LPP). Comparing the two, we note the following:

- The LPP will be an “advisory, consultative and steering body to initiate and centralise discussions on listing policy with broader regulatory or market implications”. This is similar to the LPC’s proposed mandate to “initiate, steer, and decide listing policy”, except that it is clear that the LPP will not have rule-making powers. Its recommendations will be non-binding.
- Unlike the LPC, the LPP will not be a committee within the Stock Exchange, nor will it be a committee under the SFC. Instead it will be constituted pursuant to a memorandum of understanding to be signed by the two regulators, governed by its own terms of reference.
- The LPP members will attend meetings as representatives of their respective organisations. In particular, they may raise items for discussions that have arisen in the course of these organisations performing their respective functions, which is the way in which the SFC, the Listing Committee and HKEx will all be able to contribute, via the same platform, to making listing policy in future.
- The composition of the LPP will be as proposed for the LPC, plus two non-executive directors (NEDs) from each of the SFC’s and HKEx’s boards. In other words, the LPP’s composition will be as follows:

SFC representative	Listing Committee representatives	HKEx representatives
<ul style="list-style-type: none"> <li>▪ Chairperson of Takeovers Panel</li> <li>▪ CEO of SFC</li> <li>▪ Executive Director of Corporate Finance Division</li> <li>▪ 1 senior Director of Corporate Finance Division</li> <li>▪ 2 NEDs</li> </ul> <p>Total : 6 persons</p>	<ul style="list-style-type: none"> <li>▪ Chairperson of Listing Committee</li> <li>▪ 2 Deputy Chairpersons of Listing Committee (including 1 investors’ representative)</li> </ul> <p>Total : 3 persons</p>	<ul style="list-style-type: none"> <li>▪ CEO of HKEx</li> <li>▪ 2 NEDs</li> </ul> <p>Total : 3 persons</p>

- The LPP may request the Stock Exchange's Listing Department (LD) to work on a detailed proposal on a matter being discussed by the LPP. The LD will consult the LPP from an early stage when formulating proposed Listing Rule amendments or other policy proposals, and will take into account the LPP's recommendations. An advanced policy proposal will first be presented to the Listing Committee for approval, followed by approval of the HKEx board if necessary, and finally the SFC board.
- The LPP will meet both regularly and on an ad hoc basis. Meetings will be chaired in turns by the CEO of the SFC and the chairperson of the Listing Committee.
- The LPP's decisions will be published regularly on the SFC and HKEx websites.

As background information, the regulators have set out in the consultation conclusions a summary of how listing-related policies are made under the current system, from their (typical) initiation by the LD, to regular meetings between the staffs of the SFC and the LD at which policy issues may be raised, to referrals (at the discretion of the Head of Listing) to the Listing Committee which discusses policy issues at quarterly and ad hoc meetings and finally, escalation of such issues to the HKEx board and the SFC's senior management.

It is emphasised in the consultation conclusions that the powers of the SFC to direct the Stock Exchange to make or amend Listing Rules, and for itself to make statutory rules in respect of listing matters under current legislation will remain unchanged. Likewise, the current powers of the Stock Exchange to make Listing Rules (subject to SFC approval) will also be unchanged.

## Decision-making in listing matters

### 1. General

The proposal for a new Listing Regulatory Committee (LRC) will not be adopted. The Stock Exchange will continue to make decisions regarding listing application including listing suitability issues, and will remain the first point of contact for listing applicants. This is, however, subject to the "SMLR issues" discussed below.

### 2. SMLR Issues and SFC's powers to object to a listing

The role of the Listing Committee will remain unchanged. The current IPO application and filing procedures will remain largely in place, and the current coordination and cooperation between the SFC and the Stock Exchange will continue.

The SFC will continue with its current targeted and "real-time" intervention on matters within the scope of the Securities and Futures (Stock Market Listing) Rules (SMLR) or the Securities and Futures Ordinance (SFO), complemented by rigorous enforcement efforts.

In addition, the SFC may raise concerns under the Securities and Futures SMLR – that is to say, in a new listing application, if the SFC foresees an objection under SMLR, it will promptly issue a letter of mindedness to object (LOM) with detailed reasons. In the course of assessment of a case which may involve the issue of such an LOM, the SFC will communicate with the applicant **directly** for relevant information.

SFC staff will be available for pre-IPO enquiries on issues that potentially involves SMLR concerns. The key objective is to allow the SFC to intervene, regarding an SMLR issue, at an earlier stage of the listing process than before.

### 3. Timeframe for the SFC and final decision

In exercising its powers, the SFC will adhere to the 10-business-day timeframe set out in the SMLR for raising each query or objection to a listing application. The SFC will also endeavour to work within the Stock Exchange's timetable for processing listing applications. If an applicant's response to LOM

concerns is considered inadequate, the SFC will issue a final decision notice (FDN) within the time specified in the SMLR.

An FDN that is no longer subject to appeal will be published on the SFC website (on a no-names or a delayed basis if disclosure will unduly prejudice the interest of the applicant or if there are price-sensitivity concerns) and will be statutorily reviewable by the Securities and Futures Appeals Tribunal (SFAT).

#### **4. Public interface with the regulators**

Otherwise, the Stock Exchange will remain the frontline regulator and hence the contact point for listing applicants. Once the SFC is satisfied that there are no concerns under the SMLR, it will cease to review and comment on a listing application. When the SFC has issued an LOM, the Stock Exchange may at its own discretion suspend, resume or continue its own vetting process regardless of whether the concerns raised in the LOM have been addressed.

There will be close coordination between the SFC and the Stock Exchange to ensure mutual exchange of information and avoidance of duplication.

#### **“SMLR issues” – an undefined concept**

Going forward, a pre-IPO enquiry may be made to either the SFC (regarding an SMLR issue) or to the Stock Exchange (regarding other issues). To avoid duplication of efforts, if a question is made to the SFC but involves a Listing Rule matter, the SFC will refer it to the Stock Exchange. If it is made to the Stock Exchange but involves an SMLR matter, there will be referral in the opposite direction.

The key concept of “SMLR issues”, unfortunately, is not clearly articulated in the conclusions – it is not entirely clear how it is different in practice from the originally proposed “LRC matters” (defined in the consultation paper as those involving, amongst others, suitability for listing concerns; novel, potentially controversial or sensitive nature; or that appear to have policy implications).

However, the relevant sections of the SMLR give some broad indications as the ambit of the SFC’s statutory powers of objection:

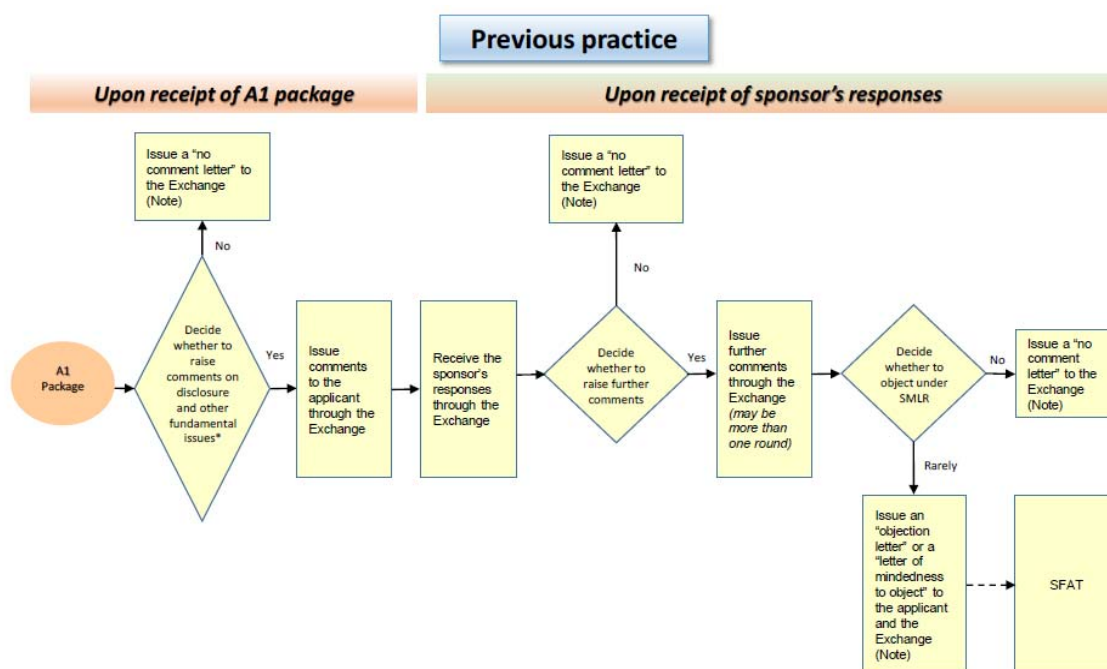
- Under s.3, the statutory requirements for a listing application are that it must:
  - comply with the rules and requirements of the Stock Exchange;
  - comply with applicable law; and
  - contain particulars and information which, having regard to the particular nature of the applicant and the securities, is necessary to enable an investor to make an informed assessment of the activities, assets and liabilities and financial position of the applicant at the time of the application and its profits and losses and of the rights attaching to the securities.
- Under s.6(2), the SFC may object to a listing application if:
  - it does not apply with any of the above;
  - the application is false or misleading as to a material fact or is false or misleading through the omission of a material fact;
  - the applicant has failed to comply with a request for information by the SFC; or
  - it would not be in the interest of the investing public or in the public interest for the securities to be listed.

Further, please see relevant comments by the CEO of the SFC in a recent speech date 13 July 2017, in which he clarified the SFC’s views on key areas of concern. The text of the speech can be accessed [here](#).

Legally speaking, the reassertion of the SFC’s powers under the SMLR is not a new development, as these powers have been in existence for many years. Indeed, it is reiterated in the conclusions that the SFC will be the statutory regulator for SFO and SMLR matters, while the Stock Exchange will administer the Listing Rules. However, whilst the regulators agree (in para. 77 of the consultation conclusions) that the interpretation of the Listing Rules including suitability for listing is determined solely by the Stock Exchange, they have not stated what approach should be taken when an issue can potentially be read both as a “suitability” concern under the Listing Rules and a “public interest” concern under the SMLR. It remains to be seen how such cases will be resolved in practice.

### The decision flow – before and after

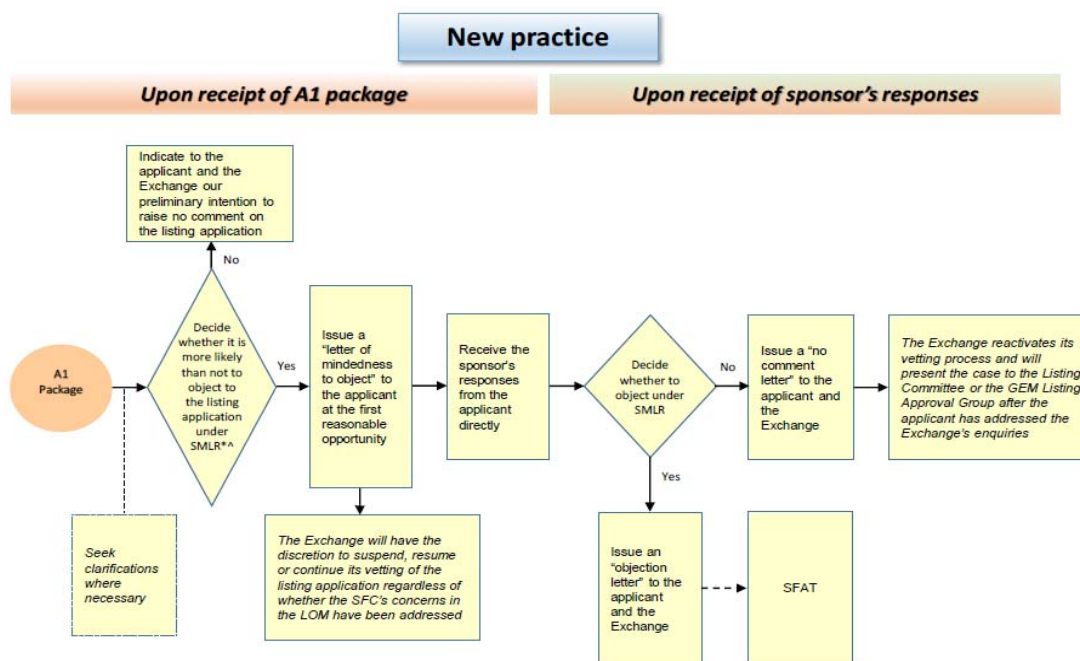
The SFC has visualised the current and future decision processes as follows:



\* The application proof should be substantially complete with sufficient information for an informed assessment.

Note: In general, the Exchange will not present a listing application to the Listing Committee or the GEM Listing Approval Group for approval until the SFC has issued a “no comment” letter.

(Source: the consultation conclusions issued by the SFC and the Stock Exchange)



\* The application proof should be substantially complete with sufficient information for an informed assessment.  
 ^ Prior to issuing an LOM, when the SFC staff see potential grounds for issuing an LOM but require further clarification from the applicant, they will directly ask the applicant for the necessary information.

(Source: the consultation conclusions issued by the SFC and the Stock Exchange)

## Review of decisions

The SFC is of the view that there should be no overlap of membership between each review body and the body whose decisions it will review. It proposes that the Listing (Review) Committee and the Listing Appeals Committee should be replaced by one or more independent committees consisting entirely of outside market participants, with no current Listing Committee members, nor any SFC or Stock Exchange representatives. The Stock Exchange will conduct further consultation on this in 2018.

## Regulation of post-listing matters

The SFC emphasises its early intervention and stepped-up enforcement efforts on post-listing matters. Going forward, its approach on post-listing matters will be similar to that on new listing applications.

For example, the LOM / FDN process will be applicable equally to a listed issuer applying for listing approval for a follow-on securities offering, if there are SMLR concerns that are not resolved to the SFC's satisfaction. On these matters, the SFC staff will be available for discussion with the issuer and its advisers. The SFC will publish guidance on post-listing regulation as and when required.

The powers of the Stock Exchange on post-listing compliance will remain unchanged.

## Other matters

Other conclusions drawn from the consultation process include:

### 1. SFC supervision over the Stock Exchange

The SFC will enhance its supervision over the Stock Exchange by focusing on three aspects, namely:

- discharge by the Stock Exchange of its listing regulatory function, including administration of the Listing Rules
- adequacy of the Stock Exchange's systems and processes
- management of the Stock Exchange's conflict of interest as both a regulator and a for-profit company

## 2. Publication of review decisions

The proposed new review committee(s) (subject to further consultation) will have discretion to allow review decisions to be published either on a no-names or delayed basis if disclosure of the applicant's identity will be unduly prejudicial to interests or that the decision is price sensitive, or if the decision remains subject to review.

## 3. Discipline

The proposal for the new Listing Disciplinary Chairperson Group will not be adopted. In view of the comments received, the Stock Exchange will conduct further consultation on its disciplinary powers and sanctions.

## 4. Listing Committee

The role of the Listing Committee will remain the same. In response to a comment by the Financial Services Development Council (not being a point raised in the consultation paper), the SFC and the Stock Exchange agreed that there should not be a perceived "norm" of a 6-year term for each Listing Committee member appointed. The Stock Exchange will continue to encourage more frequent turnover of Listing Committee membership, with a possibility of re-appointment after a two-year absence.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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