2 June 2021

Hong Kong Exchanges and Clearing Limited
8th Floor, Two Exchange Square
8 Connaught Place
Central
Hong Kong

Re: Consultation Paper on the Listing Regime for Overseas Issuers

Dear Sir or Madam,

The Asian Corporate Governance Association (ACGA) is a non-profit membership association founded in 1999. We conduct research on corporate governance and ESG, and advocate at the regulatory and corporate level across Asia to improve standards and practices. ACGA is entirely funded by a network of 112 member firms, of which 70% are institutional investors with more than US$40 trillion in assets under management globally.

We attach to this letter our completed Questionnaire on the Listing Regime for Overseas Issuers by way of response to the Exchange's Consultation Paper dated 31 March 2021.

While we do not intend to repeat in this letter all of the points that we have made in the Questionnaire, we wish to highlight the following points:

A growing disparity of governance standards between different categories of issuers

ACGA is concerned that market rules and entry requirements are being customized to fit with HKEX's agenda of securing "homecoming" listings of large China tech firms.

The proposals will lower the entry threshold for secondary issuers and allow dual primary listings of firms who will not have to change their existing WVR/VIE structures to comply with shareholder safeguards intended to mitigate the loss of the right to 'one share, one vote.'

This will deepen a regulatory divide where different categories of issuers play by different sets of rules. There is a growing number of secondary-listed firms who are large and influential in the market yet follow much lower and governance standards as primary issuers.

By virtue of being incorporated and listed overseas, these issuers—many with WVR structures without safeguards for minority shareholders—are given a free pass on Hong Kong's takeovers code, rules on notifiable and connected transactions, ESG reports and the CG Code.

We question the rationale for granting automatic and common waivers to these issuers where it is apparent that the corporate governance in their qualifying exchanges or places of incorporation is not on a par with Hong Kong. In many cases, the companies are foreign private issuers who already enjoy significant exemptions from the rules and regulations in their qualifying exchanges.

Under the proposals, the door will be opened even further to these issuers without amplifying shareholder protection.

ACGA is concerned as to how these issuers are to be held accountable. We would urge a comprehensive review by HKEX of the basis for granting such broad waivers to secondary issuers before Hong Kong reaches the point of "one market, two systems.''

Core Standards lower the bar

Several of the proposed Core Standards set the bar below benchmark requirements of the Hong Kong Companies Ordinance, for example allowing broader notice for AGMs while making it more difficult for shareholders to convene general meetings. Others offer generous flexibility in both wording and application. A number would only be applied on a case-by-case basis with automatic exemptions for secondary issuers.

There is also a proposal to delete key provisions from the existing Listing Rules which relate to fair dealing by directors. These safeguards were introduced as a matter of government policy to enhance corporate governance during the Companies Ordinance rewrite of 2014, and we would urge that they be maintained.

It is also ambiguous as to whether issuers will have to amend their Articles of Association to comply with these Core Standards. This could significantly restrict shareholders' private right of action against issuers at a time when the exchange is itself highlighting the diminishing ability of investors in Hong Kong to seek legal recourse.

ACGA notes that HKEX is proposing to codify certain waivers on the basis that they are "unduly burdensome" to issuers. Hong Kong as a financial market should be attracting issuers with premium standards of governance and the ability to attract a higher calibre of shareholder. Granting waivers on a guiding principle of what appears to be mere inconvenience only serves to undermine the quality of the market.

We would be happy to discuss any of the points raised in this letter or in our Questionnaire response.

Yours truly,

Jamie Allen
Secretary General

Jane Moir
Research Director, Hong Kong

HKEX Questionnaire on the Listing Regime for Overseas Issuers

Question 1

Do you agree that the Equivalence Requirement and the concept of "Recognised Jurisdictions" and "Acceptable Jurisdictions" should be replaced with one common set of Core Standards for all issuers? Please give reasons for your views.

Keep equivalence of standards as a HKEX prerequisite for any listing

ACGA has no objection in principle to simplifying the framework for issuers from Recognised and Acceptable jurisdictions and introducing a set of Core Standards. However, we would urge HKEX to benchmark these against the requirements of the Hong Kong Companies Ordinance.

As a bare minimum, the Core Standards should reflect the fundamental rights shareholders enjoy in Hong Kong and where an issuer's jurisdictional protection falls short, we believe they should be expected to alter their constitutional documents to remedy the deficiency.

Upgrade, rather than dilute the basic shareholder protections—and apply them to all

We appreciate that there are currently inconsistent shareholder protection standards in place, as illustrated by Table 5 of the consultation paper. However, any standardization process at the very least should aim to uphold the existing safeguards and apply them across the board, if not enhance them. However, what is being proposed in many respects amounts to a compromise of standards (see Q2).

Require an issuer's Articles to be compliant to allow for private shareholder actions

There is some ambiguity as to whether issuers will be required to amend their Articles to comply with the Core Standards. Shareholders' ability to take private legal action relies on these baseline requirements being embedded in an issuers' Articles. Shifting to reliance on similar provisions in the Listing Rules does not give shareholders an opportunity for legal recourse in the issuer's country of incorporation and restricts their right to challenge corporate malfeasance.

Question 2
If your answer to Question 1 is "Yes," do you agree: (a) with the proposed Core Standards set out in paragraphs 79 to 137; and (b) that the existing shareholder protection standards set out in Schedule C should be repealed? Please give reasons for your views.

ACGA is concerned that as a whole, the Core Standards represent a deterioration in shareholder protection. A number of the Core Standards set the bar below the requirements of the Companies Ordinance: if a baseline standard is to be set, it should reflect the protection shareholders enjoy under company law.

18th Floor, Wilson House, 19-27 Wyndham Street, Central, Hong Kong Tel 852 2160 1788 Fax 852 2147 3818

Meanwhile, a number of the Core Proposals will be waived entirely in respect of a certain class of issuers while others will be selectively applied. Others are drafted with broad wording and generous flexibility for issuers. This creates a further regulatory divide between different classes of issuers.

Legal remedies for Hong Kong shareholders have always been limited but have recently declined further, as noted at paragraph 50 of the consultation paper. Multi-jurisdictional enforcement of judgments and investors' ability to secure assets in a winding up is increasingly arduous. HKEX itself is proposing that new issuers publish a risk disclosure to this effect (paragraph 77 of the consultation paper.) As an international finance centre, the lack of legal evolution in Hong Kong for shareholders is surprisingly stark. This is one reason why ACGA lowered Hong Kong's score on public governance and policy in its recent CG Watch 2020 report.

We set out our specific concerns on particular Core Standards below.

a) ACGA disagrees with the following proposed Core Standards:

Core Standard 4

HKEX proposes to give listed companies greater flexibility in the length of notice required for AGMs and general meetings than currently required under Hong Kong company law. In doing so, it will repeal a provision of the CG Code which ACGA had previously given Hong Kong credit for in its 2020 score for CG Watch, released on 20 May 2021.

Under the proposed Core Standard, an issuer would be required to give its members "reasonable written notice" of general meetings. This is more generous than the Hong Kong Companies Ordinance which sets an unequivocal deadline of at least 21 days for an AGM and at least 14 days for other meetings. Shorter notice under the Ordinance can only be given if all members agree.

Under the proposed Core Standard, there is a note stating that "normally" this would mean at least 21 days for an AGM and at least 14 days for other general meetings. Companies however also have the option of showing that "reasonable written notice can be given in less time.''

In benchmarking the standard below the Companies Ordinance, the Exchange opens the door to the possibility that issuers will give less notice and ACGA is concerned this could be abused.

We would urge HKEX to benchmark the requirement according to the Companies Ordinance.
The CG Code at Appendix 14 currently requires notice of *at least 20 clear business day*s before an AGM on a comply or explain basis. In practice, this goes beyond the requirements of the Companies Ordinance. HKEX now proposes to repeal this provision of the CG Code. This is a highly retrograde step.

Core Standard 7

Another area where the benchmark would be below Hong Kong company law is in respect of shareholders' ability to convene a general meeting. HKEX is also proposing to that 10% of voting rights

will be required for shareholders to convene a general meeting, rather than 5% which is required under the Companies Ordinance.

Under the Ordinance, shareholders representing 5% of the total voting rights may request a general meeting. [On a technical note, the Companies Ordinance now uses the terminology "general meeting" rather than EGM, as used in the consultation paper]. Under the proposed Core Standard, the minimum stake required could be as much as 10% of the voting rights on a one share, one vote basis.

This will create a regulatory divide Hong Kong-incorporated listed companies who must follow the Companies Ordinance, and overseas issuers.

In practical terms this also imposes a very high hurdle for shareholders of large issuers as securing just 5% of the total voting rights is already a significant burden. It only goes to ensure that the large issuers will not be subject to shareholders calling a general meeting.

Core Standard 11

This proposed Core Standard would allow proxies and corporate representatives to attend and vote at a general meeting. There is however no mention of a proxy being allowed to *speak* on behalf of the member, which is expressly permitted under Section 596(1) of the Companies Ordinance.

Selective application

ACGA is concerned that a number of the proposed Core Standards will be applied on a case-by-case basis.

Core Standard 1

Under this Core Standard, the removal of directors before expiry of office by ordinary resolution in general meeting (Required by Section 462(1) of the Companies Ordinance) will be applied on a case-by-case basis for Grandfathered Greater China Issuers and Non-Greater China issuers with WVR structures which do not comply with Chapter 8A of the Listing Rules.

Core Standard 2

This stipulates that a casual vacancy appointment can only hold office until the next following AGM. It is to be applied on a case-by-case basis for Grandfathered Greater China Issuers and Non-Greater China issuers permitted to have a WVR structure that does not comply with Chapter 8A of the Listing Rules. It is not clear what HKEX means by a case-by-case application in the circumstances that a casual vacancy exists nor what criteria will be applied in selectively waiving the requirement.

18th Floor, Wilson House, 19-27 Wyndham Street, Central, Hong Kong Tel 852 2160 1788 Fax 852 2147 3818

Default waivers will apply for certain issuers

Core Standard 5 and Core Standard 6

Secondary issuers will by default be waived from complying with these two Core Standards, which govern restrictions on shareholder voting and speaking at general meetings where members have a material interest.

As there is a blanket exemption from Chapter 14 and 14A of the Listing Rules for secondary issuers governing notifiable and connected transactions, the Core Proposals would not be applicable to them. This highlights a regulatory gap in shareholder protection in respect of material and related party transactions and ACGA would urge HKEX to close this loophole.

Secondary-listed issuers are among the largest companies on HKEX, and one is now included in the Hang Seng Index. Yet they are exempt from these rules which protect minority shareholders from potentially abusive corporate transactions.

b) ACGA does not agree that the following existing shareholder protection standards set out in Schedule C should be repealed:

ACGA disagrees with the repeal of a number of the shareholder standards currently in the Listing Rules which are set out in Schedule C, in particular:

Item 8 of Schedule C

There is a proposal to repeal a requirement currently in Appendix 3 of the Listing Rules that issuers state in their Articles that directors may not vote on any board resolutions approving a contract or arrangement he or his close associates has a material interest in, and that the director should not be counted in the quorum present at the meeting.

This mirrors part 11 (Fair Dealing by Directors) of the Companies Ordinance which was specifically introduced in 2014 to deal with potential conflicts of interest and cover disclosure by directors of material interests in transactions, arrangements or contracts.

The stated government aim of this particular initiative in the legislative overhaul was to enhance corporate governance.

The stated reason for now repealing this requirement is that Rule 13.44 contains the same requirement and exceptions. Secondary listed issuers are exempt from compliance with Rule 13.44 (as they were exempt from Appendix 3 para 4(1).

This provision is a fundamental shareholder protection provided by Hong Kong company law and should be included as a Core Standard. Issuers should be expected to amend their Articles to comply.

18th Floor, Wilson House, 19-27 Wyndham Street, Central, Hong Kong Tel 852 2160 1788 Fax 852 2147 3818

If it is merely kept only as a Listing Rule, it not only automatically exempts secondary issuers but also restricts the ability of shareholders to take private legal action where there is a breach.

Item 11 of Schedule C

HKEX seeks to repeal a requirement in the current Appendix 13 that issuers' articles must state that payments to directors for compensation for loss of office/retirement be approved by shareholders at a general meeting.

This was also one of the key initiatives in the rewrite of the Companies Ordinance in 2014 on fair dealing by directors. HKEX notes that the requirement overlaps that of Chapter 14A. However, secondary issuers enjoy automatic waivers from Chapter 14A and we repeat our point above: if this provision is merely kept as a Listing Rule and is not embedded in an issuer's Articles, it restricts the ability of shareholders to take private legal action where there is a breach.

Item 12 of Schedule C

This relates to a restriction contained in Appendix 13 on loans to directors and their close associates. At present, an issuer's Articles must restrict such making of loans and "shall import provisions at least equivalent to the provisions of Hong Kong law prevailing at the time of the adoption of the Articles of Association.''

By removing this requirement from Appendix 13 and instead relying on Chapter 14A this will restrict shareholders' rights. Secondary issuers do not have to comply with chapter 14A and will be exempt, and if this provision is merely kept as a Listing Rule and is not embedded in an issuer's Articles, it restricts the ability of shareholders to take private legal action where there is a breach.

Item 13 of Schedule C

This relates to an Appendix 13 requirement that an issuer's Articles contain provisions requiring directors to declare their material interests in contracts. This was also a new provision in the Companies Ordinance (Section 536) introduced to enhance shareholder protection and fair dealing by directors. The exchange proposes to instead rely on the Listing Rules (Rule 13.44) however secondary issuers are exempt from compliance with this rule and if this provision is merely kept as a Listing Rule and is not embedded in an issuer's Articles, it restricts the ability of shareholders to take private legal action where there is a breach.

Question 3

Do you agree to codify the current practice that all issuers must conform their constitutional documents to the Core Standards or else demonstrate, as necessary for each standard, how the domestic laws, rules and regulations to which the issuer is subject and its constitutional documents, in combination, provide the relevant shareholder protection under the Core Standards? Please give reasons for your views.

18th Floor, Wilson House, 19-27 Wyndham Street, Central, Hong Kong Tel 852 2160 1788 Fax 852 2147 3818

If the Core Standards are to be fundamental safeguards, they should be embedded in an issuer's articles of association (or equivalent document) to give shareholders a legal right of action. We disagree that a mixture of Articles/domestic laws/rules/regulations will suffice.

The proposed Core Standards already offer a weakened version of current shareholder protection and by moving key provisions of Appendix 13—in particular requirements dealing with fair dealing by directors—to the Listing Rules further diminishes opportunities for legal recourse.

The current requirement of Appendix 3 that shareholder protection provisions **must** conform with an issuer's articles should be maintained.

Question 4
Do you believe any other standards or Listing Rules requirements, other than those set out in paragraphs 79 to 137 or Schedule C, should be added or repealed? Please provide these other standards with reasons for your views.

ACGA reiterates its points in Question 2(b). Shareholder protection in respect of fair dealing by directors should be included.

Question 5
Do you agree that existing listed issuers should be required to comply with the Core Standards? Please give reasons for your views.

We find this question to be contradictory. Existing listed issuers who are incorporated in Hong Kong would be required to comply with Core Standards, which in a number of cases set the benchmark below the Companies Ordinance. Yet by law, the issuers must comply with the Companies Ordinance. In effect they would be allowed to adopt lower standards, but they are forbidden from doing so. In practice, non-Hong Kong incorporated issuers would play by a more generous set of rules.

Question 7
Do you agree with the principle set out in paragraph 155 for use when considering waiver applications from Overseas Issuers applying for a dual primary listing in Hong Kong? Please give reasons for your views.

Granting a waiver on the basis that strict compliance with the Listing Rules and overseas regulations would be "unduly burdensome or unnecessary" is hardly a technical yardstick to warrant codification. HKEX has not defined the term nor its parameters. In the absence of guiding principles and clear criteria, AGCA is concerned this sends a message that waivers will be granted on the basis of mere inconvenience.

Question 9
Do you agree that Grandfathered Greater China Issuers and Non-Greater China Issuers with Non-compliant WVR and/or VIE Structures should be able to apply for dual primary listing directly on the Exchange as long as they can meet the relevant suitability and eligibility requirements under Chapter 19C of the Listing Rules for Qualifying Issuers with a WVR structure? Please give reasons for your views.

ACGA reiterates its general point that direct dual primary listings with non-compliant WVR will further widen the regulatory gap between different categories of issuers. If issuers are dual primary listed, they should be governed by the same rules as primary listed issuers with WVR and be required to comply with Chapter 8A of the Listing Rules. They should also not be given waivers.

Question 10
Do you agree that Grandfathered Greater China Issuers and Non-Greater China Issuers referred to in Question 9 above be allowed to retain their Non-compliant WVR and/or VIE Structures (subsisting at the time of their dual primary listing in Hong Kong), even if, after their listing in Hong Kong, they are de-listed from the Qualifying Exchange on which they are primary listed? Please give reasons for your views.

ACGA disagrees and reiterates its general point about a widening regulatory gap between different categories of issuers. If an issuer is de-listed from its qualifying exchange it will no longer have to follow the shareholder protection standards of that jurisdiction. This will leave a shortfall in standards. There will also be another category of issuers where they do not have to have a WVR structure which complies with Chapter 8A.

There is also a concern that the circumstances under which these issuers de-list is often detrimental to shareholders in the qualifying jurisdiction (notably where issuers have privatised at a gross undervalue) and that such suitability considerations would be disregarded in a changing of listing status.

If an issuer is to effectively change its listing status to a primary listing, it should be treated as a primary listing and required to comply with the relevant rules. No waivers should be given and there should be compliance with Chapter 8A for issuers with WVR.

Question 12
Do you agree that the Exchange should implement the quantitative eligibility criteria as proposed in paragraphs 199 and 201 for all Overseas Issuers without a WVR structure (including those with a centre of gravity in Greater China) seeking to secondary list on the Exchange? Please give reasons for your views.

ACGA reiterates its general point about creating a wider regulatory gap between different categories of issuers. By widening the pool of secondary issuers who enjoy a vast array of waivers, HKEX is creating an uneven playing field. The basis for granting of these waivers is in large part not based upon corporate governance/shareholder protection considerations.

Question 13
Do you agree that an exemption from the listing compliance record requirement be introduced, similar to the current JPS exemption, to cater for secondary listing applicants without a WVR structure that are well-established and have an expected market capitalisation at listing that is significantly larger than HK$10 billion? Please give reasons for your views.

18th Floor, Wilson House, 19-27 Wyndham Street, Central, Hong Kong Tel 852 2160 1788 Fax 852 2147 3818

ACGA reiterates its point in Q12.

Question 14
Do you agree that new secondary listing applicants without a WVR structure (including those that have a centre of gravity in Greater China) should not have to demonstrate to the Exchange that they are an "Innovative Company"? Please give reasons for your views.

While ACGA is sympathetic that companies in non-tech industries without WVR cannot secondary list, we are wary of an expanded pool of secondary issuers who receive generous waivers from the takeovers code, notifiable and connected transactions, ESG reporting and the CG Code without a comprehensive review of the basis upon which these exemptions are granted.

Question 17
Do you agree that the scope of the Trading Migration Requirement should be extended to cover all issuers with a secondary listing? Please give reasons for your views.

ACGA agrees but only if issuers are treated as primary listed companies and must be compliant with Chapter 8A and receive no waivers. We would stress that Chapter 8A is not particularly onerous but does offer some level of shareholder compensation for the loss of one share, one vote.

Question 18
In your opinion, will the extension of the Trading Migration Requirement to all secondary listed issuers be unduly burdensome for those that are not currently subject to this requirement? Please give reasons for your views.

No. ACGA is concerned that this term "unduly burdensome" is being applied with such regularity yet has no definition and appears to suggest that mere inconvenience is a guiding principle.

Question 19
Do you agree with the codification of the principles set out in paragraph 215 on which exemptions/waivers are granted to secondary listed issuers? Please give reasons for your views.

ACGA disagrees. See Q20 below on waivers. Again, it is disconcerting that one of the criteria mooted for being granted a waiver would be that compliance with the Listing Rules would be "unduly burdensome.''

Question 20
Do you agree to codify the Automatic Waivers and conditional Common Waivers in the Listing Rules for all issuers with, or seeking, a secondary listing? Please give reasons for your views.

Waivers should be the exception rather than the norm and in the case of secondary issuers we challenge the rationale behind exemptions in respect of notifiable and connected transactions as well as ESG reports and the CG Code. These waivers warrant more detailed scrutiny and a proper comparison of the supposed equitable standards in the qualifying exchange.

For these reasons ACGA opposes codification of the waivers, which creates an expectation that exemptions will be forthcoming once general conditions are met.

Question 22
Do you agree that secondary listed issuers should comply with the requirements for a diversity policy and for such policy to be disclosed in their annual reports (for the reasons set out in paragraph 223?) Please give reasons for your views.

ACGA agrees. We hope HKEX revisits its rationale for waiving secondary issuers from compliance with other key corporate governance requirements such as the CG Code and ESG reports.

Question 24
Do you agree that the Exchange should codify the Regulatory Cooperation Requirement (with modification as described in paragraph 242) into Chapter 8 of the Listing Rules for all issuers? Please give reasons for your views.

ACGA disagrees. Bilateral agreements should continue to be referenced in Chapter 8 of the Listing Rules and we see no rationale for deleting these.

ends