

# APPENDIX 1

## MEMORANDUM OF UNDERSTANDING ('MOU') BETWEEN THE LAW SOCIETY OF HONG KONG AND THE STOCK EXCHANGE OF HONG KONG

### EXPLANATORY NOTE ON THE MEMORANDUM OF UNDERSTANDING BETWEEN THE LAW SOCIETY OF HONG KONG AND THE STOCK EXCHANGE OF HONG KONG PREPARED BY THE SECURITIES LAW COMMITTEE

A memorandum of understanding ('MOU') has been agreed between the Stock Exchange of Hong Kong and the Law Society regarding the circumstances in which the Stock Exchange can make rules on standards of conduct of solicitors in connection with matters relating to the listing or continued listing of securities on the Exchange and impose sanctions for breach of these rules. The MOU also sets out the circumstances in which the Stock Exchange is obliged to refer its investigation of a solicitor to the Law Society. The MOU was entered into on 18 December 1996 and applies only to circumstances giving rise to the imposition of sanctions under the *Listing Rules* which occur on and after that date. The MOU does not give any third party rights and no third party is entitled to require compliance by either the Exchange or the Law Society with any of their respective obligations arising under the MOU. The purpose of these notes is to bring to the attention of members the salient features of the MOU and its implications for members. The sections in bold type reflect the Law Society's Commentary on certain provisions of the MOU but do not form part of the MOU itself.

The arrangements set out in the MOU only apply to solicitors 'in private practice'. Under the *Stock Exchanges Unification Ordinance* (Cap. 361), a person is regarded as acting in the capacity of 'a solicitor in private practice' if in the course of private practice he provides legal services to a client. He is not regarded as so acting where in respect of the matters governed by rules made by the Exchange he is also connected with that matter in any other capacity. **This is an important point for persons involved in such a matter in a capacity such as an in-house lawyer and for solicitors in private practice who sit on the board of listed companies or who, for example, hold some special office as consultant to a listed company. For a person who is not acting in the capacity of a solicitor in private practice the Exchange's right to make rules and/or impose sanctions for breaches of its rules are not**

**restricted by the arrangements now agreed between the Exchange and the Law Society under the MOU.**

Under the MOU, the Exchange recognises that the Law Society regulates conduct of solicitors in Hong Kong and that the Law Society has established well defined disciplinary procedures. The Exchange has therefore agreed that save in relation to the following three circumstances it will not make rules in the *Listing Rules* or make any public finding or impose any penalty or sanction or take other disciplinary action under the *Listing Rules* in respect of conduct of solicitors in private practice.

The three circumstances specified in the MOU are as follows:

1. If a solicitor makes an untrue representation to the Exchange:
  - (a) made on the instructions of his client, and purporting to be so made, and which the solicitor knows to be untrue or made with reckless disregard as to its truthfulness; or
  - (b) made otherwise than on instructions of a client by the solicitor knowing it to be untrue or without having made reasonable inquiries as to its truthfulness.
2. Where a solicitor knowingly or recklessly facilitates or participates in a breach of the *Listing Rules*.

**'Knowingly participates' in a breach is a wide concept but see below the Exchange's express recognition of certain examples where a solicitor will not be deemed to have acted improperly.**
3. Where acting for a client in relation to a listing matter, a solicitor knowingly or unreasonably fails to advise his client in relation to relevant requirements of the *Listing Rules*, or incorrectly advises his client in relation to such requirements, knowing such advice to be incorrect or with reckless disregard as to its correctness.

**Members are reminded that the *Listing Rules* give to the Listing Division discretion in interpretation of the applicability of the rules to certain situations and the Listing Division has its own internal guidelines in respect of interpretation and applicability of the *Listing Rules* to certain situations. This should be considered when members advise clients of relevant requirements of the *Listing Rules*.**

It is acknowledged by the Exchange that other than representations made to the Exchange on the instructions of a client, the *Listing Rules* do not require solicitors to make any representations to the Exchange except for the solicitor's certification in each of Form B and Form H of Appendix 5 of the *Listing Rules*.

In determining whether the conduct of a solicitor falls within the three circumstances the Exchange is obliged to have regard to all relevant factors. These include:

- (i) whether instructions have been given by a client to advise or not to advise on the issue in question and the extent of those instructions; and
- (ii) the degree of knowledge the solicitor has of the underlying facts after making such enquiries as are appropriate in the circumstances. Knowledge means actual knowledge of the solicitor concerned and the knowledge of other legal staff of his firm who are engaged in the same matter and whose knowledge should in the circumstances reasonably be imputed to him.

**Members are advised to ensure that the scope of advice being sought from them from a client is clearly agreed with the client in advance. Whilst it is for each solicitor to develop his own procedures in such matters, it may in certain circumstances be appropriate to record the agreement with the client in writing. Particular care needs to be taken when answering enquiries from clients with whom the solicitor's firm has a long standing relationship as the solicitor may be deemed thereby to have knowledge of information which is relevant to the specific matter then under consideration and the relevant interpretation of the *Listing Rules*. Similarly, where a number of solicitors of the same firm are involved in the same matter care should be exercised.**

**Given the structure of a number of Hong Kong listed groups (particularly where there is more than one Hong Kong listed company in the group) members are also advised to clarify the identity of the clients to whom advice is being given and if necessary to whom it is not being given.**

The Exchange recognises that, under *The Hong Kong Solicitors' Guide to Professional Conduct*, solicitors are under a duty to act in their clients' interests and in accordance with their clients' instructions as well as to maintain strict confidentiality of the business and affairs of their clients. It is also recognised that a client is always at liberty to disregard his solicitor's advice in whole or in part. The Exchange therefore accepts under the MOU that:

- (i) mere knowledge of an actual or potential breach by a client of the *Listing Rules* is not a breach by the solicitor of the *Listing Rules* and the solicitor is under no obligation whatsoever to inform or report the matter to the Exchange; and
- (ii) a solicitor may not be considered to have acted improperly if his client decides not to act in accordance with his solicitor's advice and instead to act in a manner which, in the solicitor's view, may constitute a breach of the *Listing Rules*, whether or not the solicitor continues to act for his client. The Exchange acknowledges that these two examples are not exhaustive.

Where the Exchange has reasonable grounds to believe that the conduct of a solicitor falls within one of the three circumstances and constitutes a breach of the *Listing Rules*, the Exchange must describe the matter in reasonable detail to the solicitor concerned and give a reasonable opportunity to the solicitor to answer the allegation before issuing any ruling or statement. Pending such issue the Exchange shall keep confidential all aspects of the investigation. **Members are reminded that they have a duty to hold in strict confidence all information concerning the businesses and affairs of their clients acquired through the professional relationship and must not divulge such information unless the client has expressly or impliedly authorised the disclosure or waived the duty. Members must therefore consider carefully what information can be disclosed to the Exchange in answer to an allegation by the Exchange that the conduct of the solicitor constitutes a breach of the *Listing Rules*. For example under *The Hong Kong Solicitors' Guide to Professional Conduct* a solicitor shall not without the client's consent disclose that the solicitor has been consulted or retained by a person in relation to a particular matter. A member should advise the Exchange if to divulge such information in answering the allegation would cause the member to breach an obligation of confidentiality.**

If the solicitor contends he is unable to adequately respond to the allegation without breaching a duty owed to his client by law or rules of professional conduct, the Exchange shall request the solicitor to obtain such consent or authorisation as necessary to enable the solicitor to respond. If the solicitor fails to request such consent the Exchange will be entitled to deal with the matter. If the solicitor requests such consent but the client refuses to give such consent and the solicitor lawfully continues to refuse to disclose information, and the Exchange is therefore unable to deal with the matter in question, the Exchange will refer the matter to the Law Society ('Law Society Referral') which shall investigate the matter in accordance with its then current procedures and advise the Exchange of its findings. If a Law Society Referral is made the Exchange shall not be entitled to make any findings or impose any sanctions on the solicitor concerned without the consent of the Law Society, which is not to be unreasonably withheld.

Where the Exchange has reasonable grounds to believe that the conduct of a solicitor falls within one of the three circumstances and constitutes a breach of the *Listing Rules* and may also involve a breach of duty imposed upon the solicitor by law or by virtue of rules of professional conduct, the Exchange shall refer the matter to the Law Society. The Law Society shall promptly notify the Exchange of its findings and any action taken by it in connection with any matter referred to it, but is not obliged to disclose to the Exchange any information on which it based its findings or which comes to its attention during the course of its investigations for this purpose. Subject always to the matter not subsequently becoming a Law

Society Referral, the Law Society's proceedings will neither affect the Exchange's conduct of its own disciplinary proceedings nor affect the Exchange's right to impose sanctions.

In circumstances where it appears to the Exchange that the matter may not have involved a breach of duty imposed on the solicitor by law or by rules of professional conduct, the Exchange may refer the matter to the Law Society and the Law Society can determine whether or not to bring its own disciplinary proceedings for breach of professional conduct. Subject always to the matter not subsequently becoming a Law Society Referral, these proceedings will neither affect the Exchange's conduct of its own disciplinary proceedings nor affect the Exchange's right to impose sanctions.

Upon the Exchange making a finding that a solicitor's conduct falls within one of the three circumstances and constitutes a breach of the *Listing Rules*, the Exchange may impose sanctions on the solicitor in accordance with the *Listing Rules*.