Part B Consultation Questions

Please reply to the questions below that are raised in the Consultation Paper downloadable from the HKEX website at: https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/August-2020-Disciplinary-Powers/Consultation-Paper/cp202008.pdf. Please indicate your preference by ticking the appropriate boxes.

Where there is insufficient space provided for your comments, please attach additional pages.

We encourage you to read all of the following questions before responding.

1. We propose to amend the existing threshold for imposing a PII Statement and to make it clear that a PII Statement can be made whether or not an individual continues in office at the time of the PII Statement. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to amend the existing threshold for imposing a PII Statement and to make clear that a PII Statement can be made whether or not an individual continues in office at the time of the PII Statement. It is hard to categorise all actions according to the "wilful" or "persistent" definition, as there are many other actions that might be just as serious, but does not fall under this category. If this happens, no sanctions can be imposed and these individuals won't be disciplined. Thus, lowering the threshold and widening the scope can ensure that the HKEX can apply these guidelines accurately and fairly. Furthermore, CompliancePlus agrees that this sanction should still be imposed even though the individual is not in office. It is important and fair that anyone who violates regulations has to be sanctioned and held accountable for their actions, no matter whether they are in office or not. This is also to prevent individuals from violating the regulations again in a different setting.

2. We propose to extend the scope of a PII Statement to include directors and senior management of the relevant listed issuer and any of its subsidiaries. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees to extend the scope of the PII Statement to include directors and senior management of the relevant listed issuer and any of its subsidiaries. Aside from directors, senior management should also be liable for their violations and actions, since they are very important and powerful individuals. This proposal also makes this sanction more equitable as all senior individuals will be subject to the same disciplinary actions. Thus, the PII statement should also apply to them.

Widening the scope can enhance the disciplinary framework of the Exchange and ensure that all misconduct will be accounted for. This also provides more clarity and certainty for all relevant stakeholders. However, the Exchange should undergo thorough investigation of before issuing such a statement, as there might be other parties involved.

3. We propose to enhance follow-on actions where an individual continues to be a director or senior management member of the named listed issuer after a PII Statement has been made against him. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees to enhance follow-on actions where an individual continues to be a director or senior management member of the named listed issuer after a PII Statement has been made against him. The goal of a PII Statement is to pressurise the director to resign. Without follow-on actions, this pressure might diminish and stop the concerned individual from responding to the PII Statement. Furthermore, the severity of the PII Statement might not be sufficient enough to deter misconduct. This will completely undermine the goal of imposing a PII Statement and lead to a waste of resources.

Follow-on actions can thus ensure the effectiveness of the PII Statement and provide more certainty on the repercussions of the PII Statement. We believe that this proposal will sharpen the focus of listed issuers to ensure compliance among them and will maintain the excellence of the Hong Kong financial market.

4. We propose that, after a PII Statement with follow-on actions has been made against an individual, the named listed issuer must include a reference to the PII Statement in all its announcements and corporate communications unless and until that individual is no longer its director or senior management member. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees that the named listed issuer must include a reference to the PII Statement in all its announcements and corporate communications unless and until that individual is no longer its director or senior management member. This can ensure accountability and keep sufficient records of disciplinary actions to protect the interest of shareholders. Having this requirement can also act as a source of pressure to decide whether they would like to remove the sanctioned individual and ensure that the Company is accountable to the shareholders. We believe that this proposal will encourage the listed issuer from removing the disciplined individual as the PII Statement will affect the reputation and business of the Company.

We also believe that the investing public has the right to know whether the listed issuer has had serious disciplinary records in order to protect their investing interest. Announcing the PII Statement until the individual has resigned will also serve as a notification to the public on whether it would be safe to invest again. If the PII Statement is not announced anymore, shareholders and the public would know that the individual is not in office anymore.

5. We propose to extend the current express scope of disclosure in listing applicants' listing documents and listed issuers' annual reports in respect of their directors and members of senior management (current and/or proposed, as the case may be) by requiring provision of full particulars of any public sanctions made against those individuals. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to extend the current express scope of disclosure by requiring provision of full particulars of any public sanctions made against those individuals. This can deter individuals from violating regulations and encourage the listed issuer to sharpen their compliance attitude as the full particulars of any sanctions will be disclosed. Though this might seriously affect the reputation and business of the listed issuer, it is necessary to ensure compliance in the industry and protect investors.

Furthermore, as shareholders, they are entitled to have access to comprehensive and consistent information. Thus, disclosing full particulars of any public sanction can ensure that the shareholders and the public are fully informed, so as to achieve transparency in the market. However, the Exchange should further clarify what constitutes as full particulars and what information would be disclosed in order to protect the privacy of the sanctioned individual.

6. We propose to remove the existing threshold for ordering the denial of facilities of the market. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to remove the existing threshold for ordering the denial of facilities of the market. Similar to the threshold for the PII Statement, it is hard to categorize all actions into "wilful" or "persistent" definitions, as a serious violation might not fall into these categories. This will allow violators to get away with their actions if it can be argued that their action is not wilful or persistent. As the denial of market facilities is for severe misconduct, it must be ensured that all violations can be caught and disciplined. However, by removing the existing threshold, the HKEX must also ensure that there are a set of guidelines as to when this sanction will be imposed in order to achieve consistency.

Thus, lowering the threshold and widening the scope can ensure that the HKEX can apply these guidelines accurately and fairly. If this sanction can be imposed accurately and effectively, it can act as a deterrent against future breaches.

7. We propose to include fulfilment of specified conditions in respect of the denial of facilities of the market. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to include fulfilment of specified conditions in respect of the denial of facilities of the market. If there aren't specific conditions that need to be fulfilled during the sanction, the listed issuer will merely wait for the denial of facilities to be reversed rather than remedying the breach or misconduct. If this situation occurs, the sanction will be counter-intuitive and ineffective. Thus, listing the fulfilment of specified conditions can ensure that the listed issuer will take action in response to the sanction, as well as prevent listed issuers from repeating the same violations again.

However, we believe that the Exchange should set out some examples as to what the specified conditions are, and clearly state out what is expected from the listed issuer to enhance clarity and full compliance in these circumstances.

8. We propose to introduce the Director Unsuitability Statement as a new sanction. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to introduce the Director Unsuitability Statement as a new sanction. As there are different levels of severity for misconduct, there should be a spectrum of sanctions imposed depending on the type of misconduct. Thus, we believe that the Director Unsuitability Statement is essential for circumstances at the most serious end of the spectrum of misconduct, so as to distinguish between this and the PII Statement. Having such a sanction can also increase fairness so the sanctions are more proportionate to the misconduct. CompliancePlus also agrees that there should be a high threshold for the Director Unsuitability Statement in order to ensure that this sanction won't be used too frequently as this would have a huge impact on Directors if used inaccurately.

However, with a new sanction, there might still be uncertainties regarding when this sanction will be imposed and the potential consequences. Thus, the Exchange should issue more guidelines for listed issuer, and ensure that sufficient written reasons will be provided if this sanction is used. For example, the Exchange should state how long this statement will take effect for. The Exchange should also conduct a thorough investigation into the matter so they can have a full picture to make a well-informed decision.

9. We propose that the follow-on actions and publication requirement in respect of PII Statements also apply to Director Unsuitability Statements. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees that the follow-on actions and publication requirement in respect of PII statements also apply to Director Unsuitability Statements. Similar to the reasons stated in Question 4, we believe that follow-on actions are necessary. As both Director Unsuitability and PII statements are serious sanctions, aligning the requirements can make it easier to follow and minimise any confusion. Since this statement is for more serious misconduct, it makes sense that these follow-on actions should also be imposed to ensure that the listed issuer takes appropriate action in response to this sanction.

We believe that these follow-on actions can ensure accountability and protect the interest of shareholders, as well as to pressurise the Director to resign from office and do what's best for the Company. Furthermore, as the Director Unsuitability Statement is more serious than the PII Statement, the HKEX can also consider imposing more stringent follow-on actions and publication requirements that is proportional to the seriousness of the misconduct.

10. We propose to impose secondary liability on Relevant Parties if they have 'caused by action or omission or knowingly participated in a contravention of the Listing Rules'. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to impose secondary liability on Relevant Parties if they have 'caused by action or omission or knowingly participated in a contravention of the Listing Rules'. Secondary liability is not a concept new to Hong Kong legislation. It is justifiable in circumstances where the Rule breach is primarily caused by the Relevant Parties, while acknowledging that the listed issuer and its directors are still primarily responsible. Since the categories and definitions of Relevant Parties are set out explicitly in the Rule, it will enhance the overall alertness of the Relevant Parties and compliance of the relevant rules. As the Relevant Parties (such as the senior management and significant shareholders) have significant influence over the management or decision making of the listed issuers, this Rule will allow them to be mindful of their actions, and consequently, providing protection to the investors.

However, similar to the evidential difficulties encountered in establishing the wilful or persistent mindset of the culpable director, the phrase 'knowingly participated' may also give rise to evidential difficulties in establishing the actual knowledge of the Relevant Parties. Therefore, CompliancePlus suggests that more guidance should be provided regarding this particular phrase.

11. We propose to include an explicit provision permitting the imposition of a sanction in circumstances where there has been a failure to comply with a requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee of the Exchange. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to include an explicit provision permitting the imposition of a sanction in circumstances where there has been a failure to comply with a requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee of the Exchange. The current Rule 2A.09 allows the Listing Committee of the Exchange to impose sanctions when there has been a Rule breach, but it does not explicitly state whether the Listing Divisions and Listing Review Committee of the Exchange also have the same power for breach of a requirement imposed by them. We believe this will enhance the efficiency and compliance of the Rule.

12. We propose that sanctions may be imposed on all Relevant Parties through secondary liability where a party has failed to comply with a requirement imposed by the Listing Division, the Listing Committee or the Listing Review Committee. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees that sanctions may be imposed on all Relevant Parties through secondary liability where a party has failed to comply with the requirements. To align with the answer to question 10, if Relevant Parties are liable as a secondary party, it follows that they should be subjected to sanctions if they have failed to comply with the requirements. Imposing the sanction will provide a complete regulatory process as follows: the relevant parties are (1) subject to the disciplinary jurisdiction of the Exchange, (2) subject to rule obligation, (3) subject to sanctions in breach of the Rules and requirements.

The whole process will ensure the effectiveness of the Rule, and deter the Relevant Parties from breaching the Rules.

13. We propose to explicitly provide in the Rules the obligation to provide complete, accurate and up-to-date information when interacting with the Exchange in respect of its enquiries or investigations. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to explicitly provide in the Rules the obligation to provide complete, accurate and up-to-date information when interacting with the Exchange in respect of its enquiries or investigations. The reason is that without an explicit provision, the parties might not be aware of the duty to provide complete and accurate information while responding to enquiries. The definition is also currently quite vague and parties might use it to their advantage and single out some information, which might lead to an inaccurate and misleading investigation. By providing a clear statement as to the individual's obligation, it will avoid any doubts and possible disputes that may arise, and also ensure that all investigations are carried out with the necessary information.

It is also ideal that disciplinary action may be taken where the Exchange finds that information has been deliberately not given, which can incentivize parties to cooperate and prevent any further sanctions arising from misinformation.

14. Do you agree with the proposed definition of 'senior management'?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposed definition of 'senior management'. The proposed definition is aligned with the definition of 'senior management' provided in the Hong Kong legislation and other overseas jurisdictions, so this centralized definition will prevent confusion and allow listed issuers to comply with relevant rules easily.

We also agree that the decision of whether a particular individual falls within the definition will be an issue of fact to be determined by evidence. It is common that companies have different arrangements or definitions as to the job title, so it is reasonable to conclude that the job title does not necessarily represent the job nature. Thus, we believe that the Exchange should set out more guidelines as to what constitutes "senior management".

15. We propose to include employees of professional advisers of listed issuers and their subsidiaries as a Relevant Party under the Rules. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to include employees of professional advisers of listed issuers and their subsidiaries as a Relevant Party under the Rules. We believe that this will reasonably pressurize the listed issuer to implement strict management measures to reduce Rule breach, and also enhance the level of compliance within the employees.

However, it is noted that this may over expand the scope, which may involve a wide range of individuals liable for Rule breach and undermine the purpose of the Rule. Thus, it is recommended that further guidance and clarity are needed to avoid doubt. For example, the definition of 'employees of professional advisors' may need clarification. The employee in question may be the employee of the listed issuer but not officially categorized as the employee of a professional advisor, he or she may only be working temporarily under the professional advisor at the time he or she caused the Rule breach. Therefore, it is suggested that the decision of whether or not an individual is categorized as an 'employee of the professional advisor' shall depend on the facts and circumstances of each case, such as the job nature.

It is also minded that whether or not the employee is liable for Rule breach shall depend on the facts and circumstances of each case. In some circumstances, it may not be justifiable to impose sanctions on the employee even if the Rule breach is caused by the employee, since the professional adviser has a duty to ensure the rule compliance on behalf of their employees in a reasonable manner. That being said, the employees can be liable for the Rule breach that they caused if the employers (professional advisors) have done everything they can to ensure rule compliance or have fully discharged their duty in a reasonable manner.

It is worth noting that adding persons as Relevant Parties depending on their titles or roles may not cover all relevant parties, which may undermine the purpose of the Rule. For example, it does not cover persons that do not have a role but still constitute an important part of the Rule breach. There are many factors to be taken into consideration in determining whether a person shall be deemed as a 'relevant party', such as the individual's involvement or knowledge. The same also applies to question 16-18 below.

16. We propose to include guarantors of structured products as a Relevant Party under the Rules. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to include guarantors of structured products as a Relevant Party under the Rules. Since guarantors are required to comply with the Exchange Listing Rules to the same extent as if it were the issuer of the structured products, it is reasonable to include them as a Relevant Party. It might also be unfair to other relevant parties if the guarantors will not be subject to the Exchange's disciplinary jurisdiction. Therefore, including guarantors of structured products as a Relevant Party will ensure fairness and consistency among the disciplinary regime.

17. We propose to include guarantors for an issue of debt securities as a Relevant Party under the MB Rules. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to include guarantors for an issue of debt securities as a Relevant Party under the MB Rules. Previously, guarantors are a relevant party under the GEM rules but not the MB rules. Therefore, it is beneficial to align the list of Relevant Parties under the MB and GEM rules in the interest of consistency. This can also prevent companies from breaching the rules caused by the confusion of whether guarantors are under the MB rules or not.

Including guarantors for an issue of debt securities as a Relevant Party better and adequately ensure that all violations can be covered and that disciplinary action will be taken against these parties.

18. We propose to include parties who give an undertaking to, or enter into an agreement with, the Exchange as Relevant Parties under the Rules. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to include parties who give an undertaking to, or enter into an agreement with, the Exchange as Relevant Parties under the Rules. Since they might not belong to a listed issuer, they may not be liable for their Rule breach under the current Rule.

Although the Exchange may still enforce the contractual breach through court actions, the expansion of the scope of Relevant Parties is still necessary in order to save resources and enhance efficiency. As it is common for court action to take a longer time with the more rigorous and complicated process, court action may not be ideal in the commercial setting or when the breach is not major.

As they are connected to the Exchange when they enter into agreements with them, it follows that they should be considered to be Relevant Parties and be liable for their misconduct.

19. We propose to extend the ban on professional advisers to cover banning of representation of any or a specified party. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to extend the ban on professional advisers to cover banning of representation of any or a specified party. The current ban only applies to specified parties and it has little effect as a reputational sanction as the professional advisors may still represent other parties that are not banned by the Exchange. The impact of the current sanction is limited and narrow, which may undermine the purpose of imposing sanction. Thus, by extending the ban, it reasonably increases the severity of the punishment and better enhances the effect of deterrence.

20. We propose to include express obligations on professional advisers when acting in connection with Rule matters. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal to include express obligations on professional advisers when acting in connection with Rule matters. Currently, it only states that professional advisers have to use reasonable efforts to ensure that their clients understand the rules. However, it is noted that the phrase "reasonable effort" is quite vague and may give rise to uncertainty as to the obligations of the advisers. Since professional advisors play an important role in ensuring rule obligations by listed issuers, we believe that setting out an express obligation can emphasize that professional advisers have an important duty in advising their clients accurately and not mislead the Exchange. This will also avoid any doubts and possible disputes that may arise.

21. We propose that 'business day' be used as the benchmark for counting the periods for filing review applications, and for requesting or providing written reasons for decisions. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal that 'business day' be used as the benchmark for counting the periods for filing review applications, and for requesting or providing written reasons for decisions. It is noticed that by distinguishing between "calendar days" and "business days", it might create uncertainty and listed issuers are prone to mistakes during the process of filing applications. There are also no apparent or particular reasons as to the different counting methods employed, so it would be more beneficial to use "business days".

Using the same benchmark for both applications allows uniformity and aligns the practices for filing or requesting for review applications, which will avoid confusion that may arise when applications of a similar nature have different requirements.

22. We propose that all review applications must be served on the Secretary. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal that all review applications must be served on the Secretary. The method of filing for disciplinary matters will also require individuals to serve on the Secretary, in addition to the current requirement of notifying the Exchange. It is beneficial to the Exchange and provides an easy screening process as the Secretary can review and process these applications before passing on the decision to relevant individuals.

CompliancePlus suggests that the Exchange may provide the rationale behind the imposition of the additional requirement for the purpose of clarity, and to further elaborate on the role of the Secretary in review applications.

23. We propose that the counting of the period for filing review applications be from the date of issue of the decision or the written reasons. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

Complianceplus agrees with the proposal that the counting of the period for filing review applications be from the date of issue of the decision or the written reasons. As these sanctions heavily impact the market and are time sensitive, it is the most sensible method that review applications are allowed to be filed once the decision is issued, as it speeds up the processing time. Delaying it to from the date of receipt might cause unforeseen problems and listed issuers might take a long time before they file a review application. Thus, using this method is the most efficient and straightforward way.

However, there might be some difficulties for listed issuers, as even though the decision is issued, the party concerned might not have received the decision due to certain reasons. Thus, an adequate time period should be given so that a proper review application can be filed in the interest of procedural fairness.

24. We propose that the counting of the period for requesting written reasons be from the date of issue of the decision. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal for the counting of the period for requesting written reasons be from the date of issue of the decision. Similar to the answer to Question 23 above, it is the most sensible method that requests for written reasons are allowed to be filed once the decision is issued. If the counting period starts from the date of receipt, it might be hard to count if the date of receipt is unclear. Furthermore, delaying it will cause unforeseen problems and lengthen the period for handling one case, thus wasting the resources of the Exchange.

Lastly, aligning the method for both filing for review and requesting written reasons also makes it easier for listed issuers to understand the procedures and allow for a speedy application process. However, similar to the difficulties stated in the previous question, adequate time might be needed so that a proper request can be filed.

25. We propose that the counting of the period for providing written reasons be from the date of receipt of the request. Do you agree?

☒ Yes

☐ No

If your answer to the above question is "no", please provide reasons for your views.

CompliancePlus agrees with the proposal for counting of the period for providing written reasons from the date of receipt of the request. Though this method is different compared to for filing review applications and requesting written reasons, we believe that this is justified. For providing written reasons, it is understandable as the HKEX needs enough time to process the request and write up the reasons to submit to the listed issuer. As the HKEX has to process and handle multiple requests and applications, if the period starts from the date of issue, the HKEX might not have enough time to provide well-prepared and explained written reasons.

CompliancePlus believes that counting from the date of issue can speed up the whole process as sanctions are time-sensitive to other parties in the industry, but we also have to consider the perspective of the HKEX. Thus, we agree that counting should start from the date of receipt, but suggest that the HKEX should try to shorten the time needed as much as possible to enhance efficiency.

- End -