

LINKLATERS ON BEHALF OF A GROUP OF FINANCIAL INSTITUTIONS

Summary of comments on Parts V-VII of The Securities and Futures Bill

1 Part V - Licensing

1.1 Scope of activities requiring licence

We have some fairly technical drafting comments, and questions that require clarification, on the definitions of the various activities that will be subject to regulation.

We are concerned in particular that the definitions of “dealing in securities” and “providing automated trading services” are overly broad and would, read literally, catch technology vendors and other service providers and operators of systems for dealings by professional investors in swap contracts. If the definitions are to remain as drafted, the SFC should have power to issue binding confirmations as to whether activities of such persons do or do not require licensing.

We are also concerned that further exemptions from the licensing requirement for leveraged foreign exchange trading are needed for inter-professional business. The definition of advising on corporate finance is also too wide, and should not extend to general restructuring advice.

1.2 Individual licensing requirements

1.2.1 Responsible officers

In order to become a responsible officer a person must also be licensed with the SFC. This would appear to result in require significant duplication when making applications for approval.

1.2.2 Licensed representatives

In our view, more guidance is needed as to which activities conducted by an employee would amount to a “regulated function”, and therefore require an individual to be licensed. This is important as breach, without reasonable excuse, of this licensing requirement is a criminal offence punishable with a two-year prison sentence, a fine of HK\$1,000,000 and a daily default fine of HK\$20,000.

1.3 Transitional arrangements

It is important that existing registered persons be “grandfathered” so that they can become re-registered under the new legislation within the 2 year transitional period provided for in the Bill, without having to meet new requirements such as (in the case of individuals) examinations.

It is also important that transitional relief is given, or implementation be deferred for a period after the Bill is enacted, where substantive new prudential or conduct of business requirements are being introduced, for example in relation to exempt dealers that are not currently subject to such requirements.

2 Parts VI and VII - Prudential and conduct of business requirements

2.1 SFC's rule making powers

We remain troubled by the fact that the SFC has extensive power to make rules a breach of which, without reasonable excuse, is a criminal offence punishable by up to two years imprisonment and a fine of HK\$200,000.

The SFC will have, under the Bill, extensive powers to take disciplinary action against intermediaries (including the power to impose civil fines of up to HK\$10,000,000). It seems unnecessary, and unconstitutional, for the SFC to have the power to create criminal offences as well, punishable with imprisonment and a fine.

We are also concerned that there is no requirement for those rules to be issued in draft for public consultation. There should be a requirement for public consultation before rules or a code of conduct is issued. There should also be guidance on when the SFC will exercise its rule-making power or instead choose to issue a code of conduct.

2.2 Unsolicited calls

We agree that there should be restrictions on high-pressure sales techniques through phone calls or personal visits. However, Clause 169 appears to extend the existing law to communications such as mailshots, television advertising and advertisements posted on a website. Restricting those communications seems impractical and out of line with international practice.

The exemption for calls on "professionals" is in some respects narrower than under the existing law, and the new exemption should also include "persons whose business involves the acquisition, disposal and holding of securities".

The right to rescind a contract within a period of 28 days after the person becomes aware "of the contravention" is too widely drafted. A person who receives an unsolicited call should be aware of this from the time the call is made and any right of rescission should operate from that date. There is a significant risk that if a contract turns out to be unprofitable a client may argue he has only just become aware of the contravention of Clause 169 and seek to set aside the contract.