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5 December 2011

Ms Anita Sit
Clerk to Bills Committee on Securities
and Futures (Amendment) Bill 2011
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Ms Sit,

**Bills Committee on Securities and Futures (Amendment) Bill 2011
Follow-up to meeting on 24 November 2011**

Thank you for your letter of 28 November 2011.

In response to item (a) in the list of follow-up action attached to your letter, the Securities and Futures Commission has prepared the paper at Annex.

On item (c), we will move a Committee Stage Amendment (CSA) to add a provision to the Bill to clarify that the notes under the proposed sections 307A(2) and 251(1) are for information only and have no legislative effect.

As regards items (d), there is no time limit for institution of proceedings in the Market Misconduct Tribunal under the proposed section 307I.

As regards item (e), at the last meeting, Members enquired about the purpose of applying the restriction under the proposed section

307L(1)(b) to proceedings “**brought by**” the person. An example of the application of the subsection is illustrated in the scenario set out as follows: Person A gave evidence at or for the purpose of a disclosure proceeding. Subsequently, Person A lodges a civil claim, unrelated to the giving of evidence at or for the purpose of the disclosure proceeding, against Person B. If Person B makes a counterclaim against Person A in the same civil action, under the proposed section 307L(1)(b), Person B cannot use the evidence given by Person A at or for the purpose of the disclosure proceeding as evidence in the counterclaim against Person A. The proposed section 307L(1) mirrors the existing section 255(1) of the Securities and Futures Ordinance.

On item (b), we will revert to the Committee as soon as possible.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Anthony Li', written over a circular stamp or seal.

(Anthony Li)

for Secretary for Financial Services
and the Treasury

Bills Committee on Securities and Futures (Amendment) Bill 2011

Scope of “officers” under the PSI disclosure regime and relationship between the Guidelines on Disclosure of Inside Information and the Securities and Futures Ordinance

Purpose

This paper provides information on the following issues raised by Members in relation to the scope of “officers” proposed for the PSI disclosure regime –

- (a) the scope of “officers” and the relationship between the definition of “officer” under the Securities and Futures Ordinance (“SFO”) and the relevant supplementary information set out in the draft Guidelines on Disclosure of Inside Information (“Guidelines”); and
- (b) the status and effect(s) of the Guidelines in relation to the disclosure proceedings under the regime; and the procedures for making amendments to the Guidelines.

Scope of “officers” and the relationship between the definition of “officer” under the SFO and the relevant supplementary information set out in the Guidelines

2. The term “officer” is defined in Part 1 of Schedule 1 to the SFO as follows –

- “(a) in relation to a corporation, means a director, manager or secretary of, or any other person involved in the management of, the corporation; or
- (b) in relation to an unincorporated body, means any member of the governing body of the unincorporated body;”

As the PSI disclosure regime concerns obligations of a listed corporation, paragraph (a) of the definition (as underlined) is relevant in this context.

3. Under the term “officer”, apart from a director, an “officer”

comprises (a) a manager; (b) a secretary; and (c) any other person involved in the management of the corporation. A “secretary” means the company secretary which a corporation must have under the Companies Ordinance. For a “manager” or a “person involved in the management of the corporation”, paragraph 52 of the draft Guidelines offers the following interpretive guidance.

“As a general principle, one must look to the object of the legislation and the context to determine the meaning of the term “manager”. In the context of Part XIVA, in considering whether a person is a “manager”, the person’s actual responsibilities are more important than the person’s formal title. A “manager” normally refers to a person who, under the immediate authority of the board, is charged with management responsibility affecting the whole of the corporation or a substantial part of the corporation. A person may be regarded to be “involved in the management of the corporation” if the person discharges the role of a “manager”.”

4. The term “officer” has been used in the SFO and its predecessor ordinances for many years. Despite this, there are concerns from public respondents that the definition of “officer” might be too broad and catch middle management and low ranking staff. In view of these concerns and to enhance certainty of the term, we have included relevant guidance in relation to the meaning of “officers”. In providing the guidance, the SFC has considered relevant interpretations under common law and comparable concepts adopted in major international jurisdictions.

5. The policy intention is to cover senior members of a corporation who are charged with management responsibility affecting the whole or a substantial part of the corporation. If these persons become aware of certain information, they would be in a position to determine whether such information amounts to inside information. These persons would also be responsible for taking all reasonable measures from time to time to ensure proper safeguards exist to prevent a breach of the disclosure obligation.

Status and effect(s) of the Guidelines in relation to the disclosure proceedings and the procedures for making amendments to the Guidelines

6. It is proposed that the Guidelines will be issued by the SFC under section 399 SFO in relation to its functions under Part XIVA. The

Guidelines provide a detailed discussion of what may constitute inside information by quoting and discussing previous tribunals' decisions. Other than this, the Guidelines set out the SFC's views on the operation of certain provisions under Part XIVA.

7. The purpose of the Guidelines is to assist listed corporations and their officers to understand and meet the statutory disclosure obligations under Part XIVA. It is stated that the Guidelines have no application to the operation of other parts of the SFO. In discharging its functions under the disclosure regime, the SFC will have regard to the provisions of the Guidelines.

8. According to section 399(6) of the SFO, "a failure on the part of any person to comply with the provisions set out in any code or guideline published under this section that apply to him shall not by itself render him liable to any judicial or other proceedings, but in any proceedings under the SFO before any court the code or guideline shall be admissible in evidence, and if any provision set out in the code or guideline appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining that question".

9. Accordingly, section 399(6) makes clear that the Guidelines made thereunder shall be admissible in evidence and may be taken into account as a relevant matter in deciding any question arising in the proceedings under the SFO, although a failure to comply with it shall not by itself render a person liable to any judicial or other proceedings.

10. Although it is not obliged to by the SFO, it is the SFC's stated policy and procedure to conduct a public consultation on any codes or guidelines it proposes to make under section 399 of the SFO. In tandem with the Administration's consultation on the PSI proposals, the SFC launched a public consultation on the proposed Guidelines. We have taken into account public comments and revised the Guidelines accordingly, a copy of which has been provided for Members' information. It is intended that the Guidelines will be finalized and issued upon the passage of the Bill.

11. In future, any amendments of the Guidelines would only be made after public consultation and with the approval of the SFC's Board.

12. Extract of the provisions in the SFO quoted in this paper is attached at **Appendix**.

**Financial Services and the Treasury Bureau
Securities and Futures Commission
December 2011**

Part 1 of Schedule 1 to the SFO

“officer” (高級人員)-

- (a) in relation to a corporation, means a director, manager or secretary of, or any other person involved in the management of, the corporation; or
- (b) in relation to an unincorporated body, means any member of the governing body of the unincorporated body;

Section 399 of the SFO - Codes or guidelines by Commission

(1) The Commission may publish, in the Gazette and in any other manner it considers appropriate, such codes and guidelines as it considers appropriate for providing guidance-

- (a) for the furtherance of any of its regulatory objectives;
- (b) in relation to any matter relating to any of the functions of the Commission under any of the relevant provisions;
- (c) in relation to the operation of any provision of this Ordinance.

(2) Without limiting the generality of subsection (1), the Commission may publish under that subsection-

- (a) a code to provide for matters concerning takeovers and mergers and matters incidental thereto;
- (b) a code to provide for matters concerning share repurchases and matters incidental thereto.

(3) Notwithstanding anything in this section-

- (a) the power of the Commission to publish codes or guidelines under this section in respect of any persons as intermediaries shall, where the intermediaries are registered institutions, be regarded as the power to publish codes or guidelines in respect of the intermediaries only in relation to the businesses which constitute any regulated activities for which they are registered;
- (b) the power of the Commission to publish codes or guidelines under this section in respect of any persons as associated entities shall, where the associated entities are authorized financial institutions, be regarded as the power to publish codes or guidelines in respect of the associated entities only in relation to their businesses of receiving or holding client assets of intermediaries of which they are associated entities.

- (4) For the avoidance of doubt, the power of the Commission to publish codes or guidelines under this section is in addition to and not in derogation of any other power of the Commission to publish codes or guidelines under any provision of this or any other Ordinance.
- (5) The Commission may from time to time amend the whole or any part of any code or guideline published under this section in a manner consistent with the power to publish the code or guideline under this section, and-
- (a) the other provisions of this section apply, with necessary modifications, to such amendments to the code or guideline as they apply to the code or guideline; and
 - (b) any reference in this or any other Ordinance to the code or guideline (however expressed) shall, unless the context otherwise requires, be construed as a reference to the code or guideline as so amended.
- (6) A failure on the part of any person to comply with the provisions set out in any code or guideline published under this section that apply to him shall not by itself render him liable to any judicial or other proceedings, but in any proceedings under this Ordinance before any court the code or guideline shall be admissible in evidence, and if any provision set out in the code or guideline appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.
- (7) Any code or guideline published under this section-
- (a) may be of general or special application and may be made so as to apply only in specified circumstances;
 - (b) may make different provisions for different circumstances and provide for different cases or classes of cases.
- (8) Any code or guideline published under this section is not subsidiary legislation.
- (9) Notwithstanding any other provisions of this Ordinance, the Commission shall consult the Monetary Authority regarding codes or guidelines it proposes to publish under this section or any other provision of this Ordinance, or amendments it proposes to make to codes or guidelines published under this section or any other provision of this Ordinance, in so far as such codes or guidelines or such amendments (as the case may be) apply to authorized financial institutions by reason of their being registered institutions, or associated entities of intermediaries.