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財經事務及庫務局
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政府總部二十四樓

FINANCIAL SERVICES BRANCH
FINANCIAL SERVICES AND
THE TREASURY BUREAU
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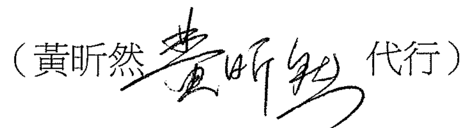
財經事務委員會秘書
（經辦人：司徒少華女士）

司徒女士：

成立獨立保險業監管局（“保監局”）的立法建議

我們已就香港保險業聯會於二零一三年四月二十二日及七月十一日致財經事務及庫務局局長、及二零一三年七月二日致立法會財經事務委員會主席的信函，作出回覆。隨函附上信件副本，以供委員參考。

財經事務及庫務局局長

（黃昕然  代行）

二零一三年八月八日

副本送：保險業監理專員（不連附件）

香港特別行政區政府
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7 August 2013

Mr Thomas Lee
Chairman
Hong Kong Federation of Insurers
29/F, Sunshine Plaza
353 Lockhart Road
Wanchai
Hong Kong

Dear Thomas,

Legislative Proposals on the Establishment of an Independent Insurance Authority ("IIA")

I refer to the Hong Kong Federation of Insurers ("HKFI")'s letters of 22 April and 11 July 2013 to the Secretary for Financial Services and the Treasury, and 2 July 2013 to the Chairman of the LegCo Panel on Financial Affairs ("the letters").

2. The establishment of the IIA is one of the most important reforms in the insurance industry since the enactment of the Insurance Companies Ordinance ("ICO")(Cap. 41) in 1983. The IIA will strengthen the regulatory infrastructure for and public confidence in the Hong Kong insurance industry to pave the way for its sustainable growth. We thank HKFI for supporting the establishment of the IIA and its valuable comments on the legislative proposals.

3. On 26 June 2013, the Financial Services and the Treasury Bureau published the conclusions of consultation on the key legislative proposals on the establishment of the IIA ("consultation conclusions"). The issues

raised by HKFI in its letter dated 22 April and our responses thereto have been uploaded to our website at:

http://www.fstb.gov.hk/fsb/ppr/consult/iiakeylegislative_conclusion.htm

4. We take this opportunity to respond further to the issues raised in the letters.

General response

5. As far as regulatory requirements and compliance are concerned, many issues raised in HKFI's letter of 2 July are about requests for specificity in contexts that warrant generality. We wish to explain again that the legislative approach is to set out in the primary legislation in relatively general terms the scope of regulatory requirements which are supplemented by details contained in subsidiary legislation. The IIA will publish guidelines to illustrate how it interprets the requirements so as to facilitate compliance by the regulatees. Such guidelines can contain non-exhaustive illustrative examples to provide regulatees with vivid references to understand the regulatory requirements. This approach would allow flexibility in updating regulatory requirements in the light of market developments in future and is in line with comparable overseas legislation such as the UK Financial Services and Markets Act 2000 and Australia's Corporations Act 2001. To address industry concerns, we have proposed to introduce a mandatory requirement in the statute requiring the IIA to conduct public consultation on any new statutory regulatory requirements.

6. Our responses to the specific issues highlighted in the letters are set out in ensuing paragraphs.

HKFI's suggested key principles

7. In its letter of 22 April, HKFI has suggested some key principles for IIA's adoption in future.

8. We appreciate HKFI's efforts in proposing the principles. In drafting the legislative proposals, we have made reference to the International Association of Insurance Supervisors ("IAIS")'s Insurance Core Principles ("ICPs"), which lay down the minimum international

standards for the regulation of the insurance industry, as well as other relevant internationally-endorsed regulatory principles (e.g., new consumer protection principles developed after the 2008 financial crisis). The IIA will also observe the ICPs in carrying out its regulatory functions in future. When assessing the soundness of a jurisdiction's financial sector under the Financial Sector Assessment Program, the International Monetary Fund also evaluates the quality of an insurance regulatory regime according to the requirements under the ICPs.

Representation on the IIA Board

9. HKFI suggests that at least 25% of the IIA Board membership should have insurance industry background "to ensure a fair hearing of the voice of the industry".

10. The IIA Board is a governing body of the regulator which will set corporate objectives and high-level policies as well as guiding the executives of IIA in fulfilling the corporate objectives and policies. It is entrusted with the regulatory powers and charged with regulatory duties and functions to implement the ICO. We consider it more appropriate to observe the relevant IAIS ICPs in proposing the composition of the IIA Board instead of making comparison with regulatory bodies of non-financial industries.

11. IAIS ICP 2.4 states that the regulator and its staff are required to be "free from undue political, governmental and industry interference in the performance of supervisory responsibilities". IAIS ICP 2.42 further requires that "a member of the governing body of the supervisor should exclude him/herself from decisions where he/she is in a conflict of interest position". Our proposal of including at least two members with knowledge or experience of insurance industry on the IIA Board seeks to balance the need to enable the Board to tap industry expertise direct in carrying out its functions and the need to maintain impartiality of the Board. This has already invited concern from consumer interest groups that the presence of regulatees on the IIA governing body may compromise its independent enforcement of the law without fear or favour. We would need to strike a reasonable balance in ensuring fair regulation.

12. No matter how the IIA Board is constituted, voice of the industry and other groups including millions of policyholders can always be heard

fairly, openly and impartially by the IIA through multiple channels, including specific committees or working groups set up by the IIA, meetings with the IIA, public consultations on topical issues launched by the IIA and ad hoc submissions from the industry and other sectors. We believe that the above-mentioned consultation requirement (see para 5), together with these engagement channels, would be a more effective bridge to bring together the IIA and the industry.

Industry Advisory Committees ("IACs")

13. HKFI has suggested that it should be a statutory requirement for the IIA to consult the IACs on all policies and related decisions which may affect the industry as a whole. This would not be practical in actual practice and may undermine any necessary investor protection measures.

14. We believe that the mandatory requirement set out in para 5 above should be able to achieve the purpose of consulting the industry on major regulatory matters affecting the industry as a whole. More importantly, we will set out in the legislation that the two statutory IACs, one on life insurance and the other on non-life insurance, will hold meetings at least quarterly. The IIA should decide on what, when, and how to consult the two statutory IACs having regard to relevant considerations such as the importance, market-sensitivity, and need to preserve confidentiality of specific information of the subject matter. We envisage that the IIA would seek advice from the IACs as often as operationally required and justified.

The role of the CEO

15. HKFI has suggested that there should be legislative provisions specifying that the CEO of an insurance company may assign or delegate his statutory responsibilities as a responsible officer ("RO") to others and that the legislation should specify the required steps to be taken by ROs in fulfilling their statutory responsibilities.

16. Under the existing ICO, the CEO of an insurance company is already held responsible for the insurance business of an insurance company in entirety pursuant to section 9(2) of the ICO. Thus, the CEO has been responsible for the conduct of the company's tied agents. We wish to emphasize that the regulator should not regulate through fishing

expeditions but by promoting awareness of good conduct and compliance through effective internal control systems in insurance companies and corporate licensees. That is why holding a senior executive responsible for the internal control system is pivotal in the new regulatory regime. Nevertheless, in response to HKFI's comments, we have refined our proposals to allow an insurer to appoint an additional RO who, together with the CEO as an RO, will be jointly and severally responsible for fulfilling the relevant statutory requirements.

17. Regarding HKFI's request for specifying the core steps required to be taken by an RO, we agree with HKFI that there should be compliance guidance for ROs' reference. But such specific details should be set out in guidelines to be issued by the IIA rather than in the primary legislation. This is in line with HKFI's approach of laying down only the broad principle without specifying the steps need to be taken by ROs in Clause 38 of its Code of Practice for the Administration of Insurance Agents that "the RO of an insurance agent (which means agency) shall ensure that all Technical Representatives of that insurance agent comply with this Code".

Conduct requirements

18. HKFI considers that the proposed statutory conduct requirement of "acting in the best interest of policyholders" is too general.

19. According to international deliberations, "acting in the best interest of the client" in essence means (i) according the client's interest ahead of the interests of the insurance intermediary and insurer; and (ii) disclosing to the client when there is a conflict of interest.

20. We agree with HKFI that clearer illustrations on acting in the best interest of policyholders are necessary to facilitate compliance. In Australia, the general principle of acting in the client's best interests is cast in the Corporations Act. The compliance details and illustrative conduct examples are set out in Regulatory Guide 175 issued by the Australian Securities and Investments Commission. One of the examples in the Guide is extracted at **Annex A**.

21. We envisage that the IIA will issue a guideline that will include a non-exhaustive list of examples illustrating what constitutes "acting in the

best interest of policyholders" to facilitate compliance by licensed insurance intermediaries.

Pecuniary penalties

22. HKFI has suggested specifying in the legislation the factors of consideration to be taken into account in determining the quantum of a disciplinary pecuniary penalty.

23. Generally, the statute will state the maximum limit of a fine whereas the factors of consideration to be taken into account in determining the quantum of a fine are set out in a guideline. An example is SFC's disciplinary fining guideline at **Annex B** which sets out, inter alia, the following factors for determining the level of fines -

(a) the nature and seriousness of the conduct;
(b) the amount of profits accrued or loss avoided;
(c) a fine should not have the likely effect of putting a firm or individual in financial jeopardy;
(d) any remedial steps taken since the conduct was identified; and
(e) the previous disciplinary record of the firm or individual.

Appellate mechanism

24. HKFI has suggested that costs orders by the Insurance Appeals Tribunal ("IAT") against an individual appellant be capped at a fixed sum and could be waived.

25. The IAT is to be chaired by a person eligible for appointment as a High Court Judge. Same as other statutory tribunals the Chairman of which has a similar qualification requirement, the IAT shall award costs according to the considerations and proceedings stipulated in Order 62 of the Rules of the High Court (Cap. 4 sub. leg. A). We do not see justifications for the IAT to deviate from the Order in making its decisions in this respect.

Transitional arrangements

26. HKFI has pledged its support for assisting the OCI and IIA in compiling relevant records to facilitate transition and therefore considers

the proposed legislative provisions to require all three Self-regulatory Organisations ("SROs") to assist OCI and IIA in compiling relevant records unnecessary. HKFI has suggested setting up a working group with the Government to oversee the transition.

27. We thank HKFI's commitment to assisting the OCI and IIA in documentary compilation to ensure a smooth transition. The proposed statutory requirement for all three SROs, not only HKFI, to render such assistance is necessary and reasonable. Having this statutory requirement will provide registered insurance intermediaries with assurance of a smooth record transfer during the transition.

28. The OCI has been communicating with the three SROs to solicit their views on the transitional arrangements, including compilation of the relevant records for transfer. We will continue to maintain close liaison with the SROs to ensure a smooth transition and are liaising with the SROs on the formation of a working group to tackle all transitional issues.

Regards,

Yours sincerely,

(Eddie Cheung)
for Secretary for Financial Services and the Treasury

c.c. Commissioner of Insurance
Insurance Agents Registration Board

Annex A

Extract from Regulatory Guide 175 Licensing: Financial product advisers – Conduct and disclosure issued by the Australian Securities & Investments Commission

*"**Example 20: Remuneration conflicts – life insurance commissions***

Scenario
An advice provider is providing a client with a review of their life insurance policy, which currently sets a death benefit of $300,000. The advice provider advises the client that they require additional cover of $100,000.

The advice provider recommends that the client obtain a new policy for $400,000 and then cancel the existing policy, rather than apply additional cover within the existing policy. The terms of the life insurance policies and the annual premiums are the same.

The advice entitles the advice provider to a commission of 120% of the annual premium of the whole insured amount (i.e. $400,000), rather than just the increased amount (i.e. $100,000).

The client follows the advice. As a result, they need to have medical checks, which they would not have needed if their level of cover was increased.

The client was nearing the four year anniversary of their existing policy. If they had continued to hold their existing policy, including if they increased their level of coverage, they would have been entitled to a 5% increase in the level of cover at no extra cost.

Commentary
In this situation, we consider that s961J has been breached. The advice provider has given priority to maximising the non-client source of remuneration over the interests of the client."

Annex B

G.N. 1410

SECURITIES AND FUTURES ORDINANCE (Chapter 571)

Pursuant to section 199(1) of the Securities and Futures Ordinance, the Securities and Futures Commission published the SFC Disciplinary Fining Guidelines in the Schedule for information.

28 February 2003

Alan Linning
Executive Director, Enforcement
Securities and Futures Commission

Schedule

SFC Disciplinary Fining Guidelines

Securities and Futures Ordinance
Considerations relevant to the level of a disciplinary fine

These guidelines are made under section 199(1)(a) of the Securities and Futures Ordinance to indicate the manner in which the Securities and Futures Commission (SFC) will perform its function of imposing a fine on a regulated person under section 194(2) or 196(2). Section 199(1)(b) requires the SFC to have regard to these guidelines in performing its function of fining under section 194(2) or 196(2). Section 199(2) sets out some factors that the SFC should take into account in exercising its fining power among other factors that the SFC may consider. These factors are included in the considerations set out below.

Under section 194 or 196 of the Ordinance, the SFC may impose a fine either on its own or together with other disciplinary sanctions. The SFC regards a fine as a more severe sanction than a reprimand (and a public reprimand more severe than a private reprimand). The SFC will not impose a fine if the circumstances of a particular case only warrant a public reprimand. As a matter of policy, the SFC will publicise all fining decisions. This means that the SFC will never impose both a fine and a private reprimand.

When considering whether to impose a fine under section 194(2) or 196(2) and the size of any fine, the SFC will consider all the circumstances of the particular case, including the Specific Considerations described below.

A fine should deter non-compliance with regulatory requirements so as to protect the public.

Although sections 194(2)(ii) and 196(2)(ii) state that one alternative maximum level of fine that can be imposed is three times the profit made or secured, or loss avoided or reduced, the SFC will not automatically link the fine imposed in any particular case with the profit made or secured, or loss avoided or reduced.

The more serious the conduct, the greater the likelihood that the SFC will impose a fine and that the size of the fine will be larger.

In determining the seriousness of conduct, in general, the SFC views some considerations as more important than others. The General Considerations set out below describe conduct that would be generally viewed as more or less serious. In any particular case, the General Considerations should be read together with the Specific Considerations in determining whether or not the SFC will impose a fine and, if so, the amount of the fine.

General considerations

The SFC generally regards the following conduct as more serious:

- conduct that is intentional or reckless
- conduct that damages the integrity of the securities and futures market
- conduct that causes loss to, or imposes costs on, others
- conduct which provides a benefit to the firm or individual engaged in that conduct or any other person.

The SFC generally regards the following conduct as less serious and so generally deserving a lower fine:

- negligent conduct – however, the SFC will impose disciplinary sanctions including fines for negligent conduct in appropriate circumstances
- conduct which only results in a technical breach of a regulatory requirement or principle in that it:
  - + causes little or no damage to market integrity and
  - + causes little or no loss to, or imposes little or no costs on, others

- conduct which produces little or no benefit to the firm or individual engaged in that conduct and their related parties.

These are only general considerations. These considerations together with the other circumstances of each individual case including the Specific Considerations described below will be determinative.

Specific considerations

The SFC will consider all the circumstances of a case, including:

The nature and seriousness of the conduct

- the impact of the conduct on the integrity of the securities and futures market
- whether significant costs have been imposed on, or losses caused to others, especially clients, market users or the investing public generally
- whether the conduct was intentional, reckless or negligent, including whether prior advice was sought on the lawfulness or acceptability of the conduct either by a firm from its advisors or by an individual from his or her supervisors or relevant compliance staff of the firm or group that employs him or her
- the duration and frequency of the conduct
- whether the conduct is widespread in the relevant industry (and if so, for how long) or there are reasonable grounds for believing it to be so widespread
- whether the conduct was engaged in by the firm or individual alone or whether as part of a group and the role the firm or individual played in that group
- whether a breach of fiduciary duty was involved
- in the case of a firm, whether the conduct reveals serious or systematic weaknesses, or both, in respect of the management systems or internal controls in relation to all or part of that firm's business
- whether the SFC has issued any guidance in relation to the conduct in question

The amount of profits accrued or loss avoided

- a firm or individual and related parties should not benefit from the conduct

Other circumstances of the firm or individual

- a fine should not have the likely effect of putting a firm or individual in financial jeopardy. In considering this factor, the SFC will take into account the size and financial resources of the firm or individual. However, if a firm or individual takes deliberate steps to create the false appearance that a fine will place it, him or her in financial jeopardy, eg by transferring assets to third parties, this will be taken into account
- whether a firm or individual brings its, his or her conduct to the SFC's attention in a timely manner. In reviewing this, the SFC will consider whether the firm or individual informs the SFC of all the conduct of which it, he or she is aware or only part, and the manner in which the disclosure is made and the reasons for the disclosure
- the degree of cooperation with the SFC and other competent authorities
- any remedial steps taken since the conduct was identified, including any steps taken to identify whether clients or others have suffered loss and any steps taken to sufficiently compensate those clients or others, any disciplinary action taken by a firm against those involved and any steps taken to ensure that similar conduct does not occur in future
- the previous disciplinary record of the firm or individual, including an individual or firm's previous similar conduct particularly that for which it, he or she has been disciplined before or previous good conduct
- in relation to an individual, his or her experience in the industry and position within the firm that employed him or her

Other relevant factors, including

- what action the SFC has taken in previous similar cases – in general similar cases should be treated consistently
- any punishment imposed or regulatory action taken or likely to be taken by other competent authorities
- result or likely result of any civil action taken or likely to be taken by third parties – successful or likely successful civil claims may reduce the part of a fine, if any, that is intended to stop a person benefiting from their conduct.