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**CB(1)687/11-12(02)**

21 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 6 December 2011**

Thank you for your letter of 7 December 2011.

On item (a)(i) in the list of follow-up action attached to your letter, the term “officer” is defined in Part 1 of Schedule 1 to the Securities and Futures Ordinance (“SFO”) as follows –

“in relation to a corporation, means a director, manager or **secretary of**, or any other person involved in the management of, the corporation”.

The definition of “officer”, and accordingly the term “secretary of (the corporation)”, has been used in the SFO and its predecessor ordinances for many years and are therefore familiar to the market. Within the definition of “officer”, the term “secretary” reads “secretary of the corporation”. It refers to “company secretary”, which has

the same meaning as ascribed to it under the Companies Ordinance (Cap. 32)<sup>1</sup>. In the context of the disclosure requirements, a person is normally regarded to be “involved in the management of the corporation” if the person discharges the role of a “manager”, which 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.

As regards item (a)(ii), to facilitate compliance, Securities and Futures Commission will publish Guidelines on Disclosure of Inside Information. An interpretive guidance on the meaning of “officer” is set out in paragraph 52 of the draft Guidelines, which is reproduced below –

“According to Part 1 Schedule 1 of the SFO, an “officer”, in relation to a corporation, means “a director, manager or **secretary of**, or any other person involved in the management of, the corporation”. 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””.

As regards item (b), the proposed provisions for the institution of disclosure proceedings mirror the current arrangements in relation to proceedings before the Market Misconduct Tribunal (“MMT”). Currently no time limit is set. It is noted that an MMT inquiry is inquisitorial<sup>2</sup>, as

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<sup>1</sup> Section 154 of the Companies Ordinance provides that every company shall have a secretary. Section 158 states that every company shall keep in the English or Chinese language a register of its directors and secretaries. Where there is any change in the company’s secretary or joint secretaries (if any), the company shall, within 14 days from the change, send to the Registrar a notification in the specified form of the change and of the date on which it occurred, and such other matters as may be specified in the form. A company secretary is required under section 158B to give notice to the company of such matters relating to himself as may be necessary for the company to maintain a register of directors and secretaries and to give notifications to the Registrar, as the case may be. The statutory functions and duties of a company secretary are provided for under various provisions of the Companies Ordinance.

<sup>2</sup> Reference is made to the inquisitorial processes relating to a Commission of Inquiry set up under the Commission of Inquiry Ordinance, Cap. 86 and inquiries held under the Legislative Council (Power and Privileges) Ordinance, Cap. 382. There is no limitation period for the inquiries in question under the respective Ordinances.

opposed to an adversarial civil litigation for which a time limit usually applies. Moreover, market misconduct and disclosure breaches could be serious civil contraventions and from an investor protection perspective, it would not be desirable to specify a time period to limit the institution of actions against such serious cases. When instituting any proceedings before the MMT, the principles of fairness, justice and reasonableness must be observed. Any undue delay can be taken as a ground for a person to object to the institution of the proceedings, either before the MMT or before a court of law. It is noted that no limitation period is found in disciplinary proceedings under a number of Ordinances<sup>3</sup> which are also regulatory in nature.

On item (c)(i), according to our case search, there is no proceedings instituted under section 281 of SFO so far. Regarding item (c)(ii), since "fair, just and reasonable" is the test adopted by the court in determining whether a defendant is liable to compensate the plaintiff for losses suffered due to his negligence. We cannot locate any example where a person is held to be liable even if this test cannot be satisfied. The inclusion of the "fair, just or reasonable" test in the new section 307Z will serve as a useful guidance to the court to allay concerns that new section 30Z(1) may be overly wide, thereby leading to a floodgate of claims lodged against persons who are in breach of the disclosure requirements.

As regards item (d), the purpose of placing the description of "the person" in brackets in the Chinese text of the proposed section 307N(1)(d) is to better connect with the lead clause and to facilitate understanding. This drafting technique is commonly used in other provisions of SFO. The current drafting serves to express the policy in a clear way.

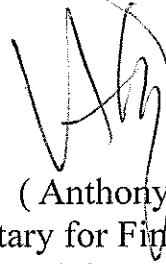
On the suggestion of providing some quantitative thresholds in the SFC's Guidelines with regard to price sensitive information, we note that the Insider Dealing Tribunal (IDT) and now the Market Misconduct Tribunal (MMT) have given on occasions views on the concept of material change. The SFC is exploring the feasibility of setting out in its Guidelines relevant precedent cases in the IDT and the MMT in Hong

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<sup>3</sup> Professional Accountants Ordinance, Cap. 50, Buildings Ordinance, Cap. 123, Dentist Registration Ordinance, Cap. 156; Legal Practitioners Ordinance, Cap. 159, Medical Registration Ordinance, Cap. 161, Nurses Registration Ordinance, Cap. 164, Supplementary Medical Professions Ordinance, Cap. 359, Chinese Medicine Ordinance, Cap. 549.

Kong for listed corporations' reference in deciding whether a particular piece of information is price sensitive.

Yours sincerely,

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

( Anthony Li )  
for Secretary for Financial Services  
and the Treasury