SBI E2-Capital *Our small ideas are BIG !*

6 October 2011

Bills Committee,
Legislative Council,
Hong Kong Special Administrative Region of the People's Republic of China

Dear Sirs,

Re: **Bills Committee on Securities and Futures (Amendment) Bill 2011: Invitation for submissions**

We are grateful to the Bills Committee for its invitation (dated 25 July 2011) for submissions on the aforementioned Securities and Futures (Amendment) Bill 2011 ("SF (Amendment) Bill 2011"), which is a significant piece of legislation whose objective is to enhance the regulatory regime for the financial market and improve investor protection. It follows that close attention must be given to the drafting (the actual wording) of the SF (Amendment) Bill 2011 and that, once the SF (Amendment) Bill 2011 is passed in its final form, great care must be taken to ensure that there is not only firmness but fairness in implementing the new statutory regime.

We do not know the extent to which the contents of the SF (Amendment) Bill 2011 are now "set in stone" and consequently incapable of material amendment or reconsideration, given that a decision has been made by the Executive Council and an order consequently made by the Chief Executive of the HKSAR Government to introduce SF (Amendment) Bill 2011 to the Legislative Council. We note that in the Legislative Council Brief it is stated that the 'proposed technical amendments to the SFO are straightforward and carry no controversy" and concludes that public consultation and submission to the FA Panel (Financial Affairs Panel of the Legislative Council) are not considered necessary."

We respectfully hope that, in addition to reading the Legislative Council brief and documents supporting the SF (Amendment) Bill 2011, the members of the Bills Committee will have been able to find the time to read through the extensive submissions made by law firms, listed companies and other parties in response to the consultation paper on the proposed statutory codification of certain requirements to disclose price sensitive information by listed companies that was issued by the Financial Services and Treasury Bureau ("FSTB") in March 2010 and the FSTB's resulting consultation conclusions dated 11 February 2011 (available for view on the weblink http://www.fstb.gov.hk/fsb/ppr/consult/psi.htm). This would help the Bills Committee to have a feel for the weight and content of views and concerns expressed in relation to the proposals and put into perspective the SF (Amendment) Bill 2011 in its present form which the Bills Committee is being asked to consider.

In addition, we should like respectfully to request the Bills Committee to consider including some mechanism in the SF (Amendment) Bill 2011 that would require the Securities and Futures Commission (the "SFC" or the "Commission") to keep the FSTB (as the HKSAR Government department with responsibility for overseeing the financial and securities markets in Hong Kong) informed of, and/or to give the FSTB the right/obligation to enquire into, the status and progress of enforcement cases conducted through the Market Misconduct Tribunal, particularly those relating to "disclosure proceedings" pursuant to Part XIVA of the SF (Amendment) Bill 2011.

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With this preface, we, SBI E2-Capital (HK) Limited, have the following very minor comments on the SF (Amendment) Bill 2011 for your consideration.

Part XIVA Disclosure of Inside Information

– *Division 1 Interpretation*

s.307A (*scope of the definition of "**officer** of the corporation"*): this attracted a lot of comment during the FSTB's consultation exercise and we note from p.2 of the Legislative Council Brief that the term "officer" is simply defined in Part 1 of Schedule 1 of the SFO as being "*a director, manager or secretary of, or any other person involved in the management of, the corporation*" and that the footnote on that page states "*Our intention is to catch directors and high-level individuals responsible for managing the listed corporation, not middle management or low-ranked staff.*" This approach was reflected in the guidance provided by the SFC in its Price Sensitive Information Guidelines: *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"*.

Even with this helpful clarification, there remains substantial uncertainty as to how the current wording contained in the SF (Amendment) Bill 2011 would be applied in practice in relation to what would or would not constitute an "officer" of a corporation if proceedings were to be instituted pursuant to Part XIVA. Attached at Appendix A for your consideration is the broader statutory wording adopted in Australia in the Corporation Act 2001 (as amended). The weblink for the whole "definition" or "dictionary" section as they call it) is http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html.

– *Division 2 Disclosure of Inside Information*

s.307B Requirement for listed corporations to disclose inside information:
*Subsection (2) (a) and (b) (the phrases "or ought **reasonably** to have," and "or ought **reasonably** to have known"*): We share the concern expressed during the FSTB's public consultation exercise as to the rightfulness of a listed corporation to be potentially subject to enforcement action under the proposed Part XIVA of the SF (Amendment) Bill 2011 for not taking action to disclose information that it did not know of and in respect of which an officer of that listed corporation did not know of but which, in the view of the Market Misconduct Tribunal ("Tribunal"), "*ought **reasonably** to have*" come to the knowledge of an officer of that corporation or information that an officer of that corporation, again in the view of the Tribunal, "*ought **reasonably** to have known*". We note that under s.307U (1) an appeal of a determination by the Tribunal to the Court of Appeal can only be made (a) on a point of law or (b) with the leave of the Court of Appeal, on a question of fact. Given the foregoing, we request the Bills Committee to consider seriously the appropriateness of the phrases "*or ought **reasonably** to have,*" and "*or ought **reasonably** to have known*" and consider whether, from a point of natural justice, the determination of the Tribunal in relation to disclosure proceedings should be based on fact or at least the preponderance of clear evidence rather than on reasonable assumption with the benefit of hindsight. We recommend that the Bills Committee review and consider deleting the phrases "*or ought reasonably to have,*" (in subsection (2) (a)) and "*or ought reasonably to have known*" (in subsection (3) (b)).

s.307G (1) and (2)(b): We suggest that the Bills Committee consider deletion of "**all**" before "reasonable measures" – as, notwithstanding that this phrase ("all reasonable measures") has been included in the SFC's Price Sensitive Information Guidelines, this is quite subjective since different parties might have a different interpretation of what constitutes "all".

s.307P *Costs*: In cases where proceedings have been instituted by the Commission but not concluded and where a decision to withdraw or discontinue such proceedings (as referred to in Schedule 9 s.32A) has been served on the Tribunal by the Commission, there should be scope for a costs award to be considered by the Tribunal, notwithstanding the provisions of s.307P(4) (a), (b) and (c) (details of such procedure to be contained in the relevant rules on the award of costs made by the Chief Justice under s.307X, Order 62 of the Rules of the High Court and any other applicable regulations).

s.307ZA *Evidentiary provisions for the purposes of s.307Z(1):* it should be noted that the mere fact of the Tribunal having instituted disclosure proceedings **without** having made a determination under s.307J (1)(a) that a breach of a disclosure requirement has taken place should not be admissible in evidence in any civil action under s.307Z (1) for the purpose of proving that a breach of a disclosure requirement has taken place. Equally, it should be noted that the mere fact of the Tribunal having instituted disclosure proceedings against a person **without** having made a determination s.307J (1)(b) identifying such person as being in breach of a disclosure requirement should not be admissible in evidence in any civil action under s.307Z (1) for the purpose of proving that such person is in breach of a disclosure requirement.

Part 5 Miscellaneous Amendments to Securities and Futures Ordinance

s.10 *(Delegation and sub-delegation of the Commission's functions)*: in relation to the proposed new s.10 (2)A concerning the selection by the Commission of a consultant, agent or adviser for the purpose of investment of the Commission's funds and/or the investment of money forming part of the compensation fund, we consider that in the public interest there should be specific safeguards and procedures put in place and reviewed on an ongoing basis and the performance of such consultants reviewed on an ongoing basis. Since there are independent directors on the Board of the Commission, we consider it appropriate and in the spirit of proper corporate governance that they be entrusted with this task. The adequacy of these safeguards and procedures can be reviewed and reported on by the Process Review Panel in the course of its periodic reviews of the Commission's work..

Should you have any queries, please do not hesitate to contact the undersigned on 2533-5638.

Yours faithfully,

For and on behalf of
SBI E2-Capital (HK) Limited

Simon Harding
Deputy Managing Director

APPENDIX

Extract from the Australian Corporations Act 2001 (as amended) Section 9 Dictionary

CORPORATIONS ACT 2001 - SECT 9

Dictionary

"officer" of a corporation means:

(a) a director or secretary of the corporation; or

(b) a person:

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

(ii) who has the capacity to affect significantly the corporation's financial standing; or

(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or

(c) a receiver, or receiver and manager, of the property of the corporation; or

(d) an administrator of the corporation; or

(e) an administrator of a deed of company arrangement executed by the corporation; or

(f) a liquidator of the corporation; or

(g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.