

**Securities and Futures (Amendment) Bill 2015****Responses to Questions Raised by the Legal Adviser of the  
Legislative Council in the letter of 19 August 2015**

This paper sets out the responses from the Administration and the Securities and Futures Commission (“SFC”) to the questions raised by the Legal Advisor of the Legislative Council in the letter of 19 August 2015.

**Clause 18 under Division 4 of Part 2 – Item 9 of Schedule 1 to the  
Securities and Futures (Fees) Rules (Cap. 571AF)**

The policy intent is that a new licence/certificate is required if any information contained in the licence/certificate has been changed. We therefore consider it appropriate to amend “substantial change” to “change” of particulars of a licensed corporation/registered institution to reflect the policy intent more accurately.

**Clause 20(37) under Division 5 of Part 2 – Proposed section 47C  
under the Proposed Part 5A of Schedule 11 to the Securities and  
Futures (Amendment) Ordinance 2014**

Both sections 120(11) and 123(1)(b) of the Securities and Futures Ordinance (Cap. 571) (“SFO”) will be repealed under this exercise. The provision remaining in the SFO which concerns the return of licence or certificate of registration for an intermediary who ceases to carry on all or any of the regulated activities for which it is licensed or registered is section 4(1) of the Securities and Futures (Miscellaneous) Rules (Cap. 571U). It is our policy intent in the proposed section 47C to require an intermediary to return its printed licence/certificate of registration within 7 days, not 7 business days, after the date on which the intermediary ceased to be deemed to be licensed/registered as it is considered more imminent for an intermediary to return its licence once it ceases to carry on the regulated activity.

**Clause 22 under Part 3 – section 180 (supervision of intermediaries and their associated entities)**

- (a) Under the Bill, the SFC will not be able to seek information by virtue of section 181 of the SFO to provide supervisory assistance to regulators outside Hong Kong. Under the proposed section 186(2A), the SFC may only provide supervisory assistance to a regulator outside Hong Kong by directing that the power under the proposed section 180(4A) be exercised. It is not anticipated that the SFC would, in order to provide supervisory assistance to regulators outside Hong Kong, exercise any powers other than those under the proposed section 180(4A). In contrast, section 181, when read with sections 186(1) and (2), is used in relation to investigations, i.e. for enforcement purposes.
- (b) The licensed corporation or its related corporation will be informed of the request as the SFC will relay the request of the regulator outside Hong Kong to the licensed corporation or its related corporation and seek information from them. In doing so the SFC would specify that the request is pursuant to the new section 180(4A) which would make it clear that this is in response to a request for assistance from an authority or regulatory organization outside Hong Kong.

**Clause 24 under Part 3 – section 186 (Commission's assistance to regulators outside Hong Kong)**

- (a)&(b) The scope of information that may legitimately be sought by the authority or regulatory organization outside Hong Kong will depend on the circumstances of each case. For example, the information may be sought pursuant to international standards or guidance issued by the Financial Stability Board such as in relation to systemically important financial institutions. It is not practical to specify each and every criterion in advance. In any event, the information would also be subject to the safeguards provided under the proposed revised section 186.

### **Proposed section 186(2D)**

The proposed section 186(2D) aims to ensure that the authority or regulatory organization outside Hong Kong only seeks supervisory assistance from the SFC where it is not able to obtain the information itself by any other reasonable means. Normally, this would be because the information is located in Hong Kong, so it is within the regulatory jurisdiction of the SFC and outside the regulatory jurisdiction of the other authority. The issue of resources would not usually be a factor on its own, rather the main consideration would be the practical accessibility of the information.

Regarding the issue of the other authority being precluded by law from obtaining the information, this would be governed by other statutory safeguards. For example, the SFC will consider it not in the public interest to provide supervisory assistance to the authority under such circumstances under section 186(3) and decline its request for information.

### **Proposed section 186(2E)**

- (a) “A demand legally enforceable” under the laws of the jurisdiction of the authority or regulatory organization in the proposed section 186(2E) is intended to cover circumstances where a third person has obtained a court order in the jurisdiction of the other authority for discovery of information that is obtained by that authority pursuant to a request for supervisory assistance. It is to enable the SFC to participate in measures to resist such disclosure such as claiming public interest immunity before the relevant court. This is a standard provision in supervisory MOUs.
- (b) The proposed section 186(2E)(d)(ii) states that the written undertaking must be to the effect that the requesting authority will, on receiving a demand legally enforceable for disclosure of information, “assist in preserving the confidentiality of the information by taking all appropriate measures as may be available (including but not limited to asserting legal exemptions or privileges under the laws of the jurisdiction of the authority or regulatory organization)”. By referring to “including but not limited to”, it is clear that there could be other measures. What measures are available will depend on the laws of the

jurisdiction of the authority or regulatory organization.

- (c) We consider it not necessary to add such a provision. Section 380(4) of the SFO unequivocally provides that nothing in the SFO affects any claims, rights or entitlements which would, apart from this Ordinance, arise on the ground of legal professional privilege. The Bill does not seek to amend section 380(4). Therefore, if a licensed corporation or related corporation makes a legitimate claim of legal professional privilege over a document sought by an authority or regulatory organization outside Hong Kong pursuant to supervisory assistance, this would amount to a “reasonable excuse” and would not incur any criminal liability under section 180(14) of the SFO. The SFC could not compel its disclosure so the issue of providing it to the other authority would not arise.
- (d) We consider it not necessary to add such a provision. The assistance to be provided under the proposed section 186(2A) is designed for supervisory but not enforcement purposes. The fact that the information cannot be used for enforcement purposes is reinforced by the requirement for the regulator outside Hong Kong to provide written undertakings to the SFC that the information obtained under supervisory cooperation will not be used in any proceedings. In the event that such information indicates an apparent breach of the regulatory regime administered by a regulator outside Hong Kong and that regulator wishes to use the information in regulatory and/or criminal proceedings against the person from whom such information is obtained, it would have to separately satisfy the legal requirements that apply to enforcement assistance and to commence a separate information request pursuant to the existing SFO provisions governing enforcement-related assistance. In these circumstances, the usual protections under that separate process would apply. For instance, there are safeguards in section 186(6) of the SFO enabling a person to claim the privilege against self-incrimination, for example, with respect to an answer to a question. Where the person does so, the SFC is not permitted to disclose either the question or the answer to a regulator outside Hong Kong for use in criminal proceedings against the person in that jurisdiction.
- (e) Upon receipt of the information from a licensed corporation or its related corporation, the SFC will provide the same to the

requesting regulators without further editing or processing the information. Accordingly, it may not be necessary to add such a provision.

- (f) The proposed section 186(2E)(c) already provides for an undertaking to be given to preserve the confidentiality of information obtained pursuant to supervisory assistance. This will also cover any information that constitutes personal data though it is anticipated that most information obtained pursuant to supervisory assistance will be business information of the relevant licensed corporations/related corporations, rather than personal data. Therefore, in our view, such an addition is not necessary.

**Clause 27(4) under Part 5 – Proposed section 378(9A) (preservation of secrecy)**

We consider that such an addition is not appropriate. The sort of information covered by the proposed section 378(9A) will relate to non-statutory matters such as investigation by a recognized exchange company of suspected breaches of its rules. This is different from the sort of information covered by section 378(9) which may relate to the exercise of statutory powers by the SFC where disclosure is compulsory. Therefore, it is not unlikely that the conditions the SFC might impose under section 378(9) would be more stringent than those that would be necessary for a recognized exchange company to impose under section 378(9A).

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