

Securities and Futures (Amendment) Bill 2015**Responses to Questions Raised by the Legal Adviser of the
Legislative Council in the letter of 23 September 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 23 September 2015.

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

The proposal seeks to amend section 378 of the Securities and Futures Ordinance (“the Ordinance”) to provide that the recognized exchange company that made the initial disclosure of information may consent to onward disclosure of the information to improve administrative efficiency (please refer to paragraph 12 of the Legislative Council Brief). The scenarios that occur routinely in practice are where the Stock Exchange of Hong Kong Limited (“SEHK”) (a recognized exchange company) is investigating a possible breach of the Listing Rules by a listed corporation. The listed corporation usually needs to inform its insurers and/or auditors of the fact that it is under investigation by the SEHK. In order to do so, the listed corporation or its legal advisers (or the SEHK) will need to write to the SFC seeking consent because only the SFC can consent to onward disclosure of information under section 378(7)(i) of the Ordinance. Since it is the SEHK that administers the Listing Rules, there is normally no regulatory need for the SFC otherwise to be involved in the process. Therefore, the amendments in Part 5 of the Bill have been proposed to provide that the recognized exchange company that made the initial disclosure of information may consent to onward disclosure of the information to address the abovementioned issue and improve administrative efficiency.

The issue involved is routine in nature, and in our view, it is not necessary to state in the Bill the factors to be considered by a recognized exchange company or the purposes for onward disclosure of information, which are consistent with the existing provisions for the SFC.

Cross-border on-site visits

- (a) Some authorities outside Hong Kong (e.g. the United States) have extra-territorial powers under their domestic law to conduct cross-border on-site visits on entities which are under their jurisdictions or have otherwise submitted themselves to their jurisdictions (for example, a subsidiary of a parent company regulated outside Hong Kong). Such extra-territorial powers would not extend to a licensed corporation in Hong Kong which has no nexus to an authority outside Hong Kong. In the past, a number of non-Hong Kong regulatory authorities have informed the SFC of their intention to conduct cross-border on-site visits. This advance notice usually outlines the purpose and focus of their visits. These visits are conducted for supervisory purposes only and they are distinguished from cross-border enforcement enquiries that are governed by a separate regime. Upon completion of such on-site visits the non-Hong Kong regulators usually inform the SFC of their key findings and observations. Where appropriate, although there is no legal obligation to do so, the SFC had also undertaken concurrent inspections with the regulator outside Hong Kong and shared supervisory findings.
- (b) Where a licensed corporation is also regulated by an authority outside Hong Kong which has extra-territorial powers under its domestic law to conduct cross-border on-site visits, the licensed corporation is unlikely to object to an on-site visit by that authority. An authority outside Hong Kong would usually notify the licensed corporation of the inspection in advance so that appropriate arrangements could be made. Cross-border on-site visits in Hong Kong are arranged directly between the regulatory authority outside Hong Kong and the licensed corporation concerned. The SFC does not facilitate cross-border on-site visits for non-Hong Kong regulators.
- (c) Clauses about cooperation amongst international regulators on “cross-border on-site visits” are commonly found in Memoranda of Understanding (“MOUs”) relating to supervisory cooperation between regulators. In some jurisdictions, authorities have extra-territorial powers under their domestic law to conduct on-site visits outside their jurisdictions. Their powers to conduct such visits therefore are not derived from the Ordinance or the Bill, but their own legal powers in their jurisdiction. The Ordinance is silent on cross-border on-site visits and licensed corporations cannot be

compelled under Hong Kong law or by the SFC to accept such a visit. Each MOU sets out the agreed scope of cooperation and is always subject to each regulator's domestic laws and regulations.

“Cross-border on-site visits” clauses in MOUs are long standing arrangements and are considered appropriate so as to encourage better cooperation between regulatory authorities. In fact, notwithstanding that authorities with extra-territorial powers under their domestic law are not seeking the SFC's supervisory assistance in any way and the SFC's consent is therefore not required, with the “cross-border on-site visits” clauses in the MOUs, these authorities are required to consult the SFC first and follow certain procedures before they carry out any on-site visits in Hong Kong.

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