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LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (2294 0460)

16 March 2016

Ms HO Kwok-shan, Joyce
Principal Assistant Secretary for Financial Services &
the Treasury (Financial Services)1
Financial Services and the Treasury Bureau
24/F, Central Government Offices
2 Tim Mei Avenue
Tamar
Hong Kong

Dear Ms HO,

Securities and Futures (Amendment) Bill 2016

We are scrutinizing the legal and drafting aspects of the Bill and would like to seek clarification of the following matters:

Part I - Legal issues

Incorporation and Registration

Under the new section 112D(4), the Securities and Futures Commission (the Commission) must refuse to register a proposed company unless it is satisfied that the requirements for registration specified in the new section 112E will, on the day on which the registration takes effect, be met with respect to the company.

It appears that a person may apply for registration of a proposed company and the Commission may register a proposed company before all the requirements for registration specified in section 112E are met.

- (a) Please clarify in what circumstances the Commission would register a proposed company before all the requirements for

registration are met, and whether the Commission would notify the Registrar of Companies of such registration and specify in the notification that there is/are requirement(s) for registration yet to be met.

- (b) Under the new section 112D(3), the registration of a proposed company takes effect on the day on which a certificate of incorporation is issued by the Registrar of Companies. Under the new section 112C(4), the Registrar of Companies must not issue a certificate of incorporation unless the Registrar has been notified of the registration of the proposed company. Please clarify how this mechanism for incorporation and registration operates. Is there any possibility that the requirements for registration are not met with respect to a proposed company on the day on which a certificate of incorporation is issued by the Registrar of Companies?

Imposing conditions

The Commission may impose any condition that it considers appropriate on registering a proposed company and on cancelling the registration of an open-ended fund company under the new section 112D(6) and the new section 112ZH(3) respectively. In addition, the Commission may impose on an open-ended fund company new conditions in respect of its registration and impose on an open-ended company the registration of which is cancelled new conditions in respect of the cancellation under the new section 112F and the new section 112ZH(4) respectively.

- (a) Please clarify by what means the conditions in respect of registration and cancellation of registration are imposed and when such conditions and new conditions would take effect.
- (b) Would the proposed company or open-ended fund company affected by the Commission's decision to impose the condition or new condition be given an opportunity to be heard, and would such decision be subject to review or appeal? If not, why?

Publication of particulars of open-ended fund company

Under the new section 112G, the Commission may publish, in any manner it considers appropriate, particulars of an open-ended fund company.

Please clarify whether it is the intention of the Administration to make the publication of particulars of an open-ended fund company discretionary. If the publication is discretionary, please clarify the circumstances under which the Commission will or will not publish the particulars of an open-ended fund company. If the particulars of an open-ended fund company are not published, how could the particulars of an open-ended fund company be made know to the public? If the publication is mandatory, please replace the word "may" with "must" in the new section 112G and provide a time frame for publication of such information.

Custodian

Under the new section 112ZA(4), a custodian of an open-ended fund company must take reasonable care, skill and diligence to ensure the safe keeping of the scheme property of the company that is entrusted to the custodian for safe keeping.

Given the new section 112ZA(5) provides that a custodian is not prohibited from entrusting or authorizing a third party to entrust a sub-custodian for safe keeping the scheme property, please consider adding a provision to the effect that the requirement to take reasonable care, skill and diligence as provided in section 112ZA(4) also applies to a sub-custodian to whom any scheme property is entrusted for safe keeping by virtue of section 112ZA(5). In addition, please consider whether provisions elaborating on the care, skill and diligence required should be added for the sake of clarity.

Publication of the notice of the cancellation

Under the new section 112ZH(8)(b) and 112ZI(6)(b), the Commission may publish notice of cancellation of the registration of an open-ended fund company and the reason for the cancellation in any manner that it considered appropriate.

Please clarify whether it is the intention of the Administration to make the publication of the notice of cancellation discretionary. If the publication is discretionary, please clarify the circumstances under which the Commission will or will not publish the notice of cancellation. If a notice of cancellation is not published, how could the cancellation of the registration of an open-ended fund company be made know to the public? If the publication is mandatory, please replace the word "may" with "must" in the new section 112ZH(8)(b) and 112ZI(6)(b) and provide a time frame for publication of such notice.

Part II - Drafting issues

New section 112ZG(3)

The new section 112ZG(3) provides that if there is a reasonable likelihood that a person will fail to comply with a direction given under the new section 112ZF, the Commission may apply to the Court of First Instance for an order that (a) the person; and (b) any other person whom the Court is satisfied is able to procure the person to comply with the direction, take any action or refrain from taking any action that the Court directs.

If it is the Administration's intention that the Commission may make an application on the ground that the Commission considers that there is a reasonable likelihood that a person will fail to comply with a direction given under the new section 112ZF, please consider adding "the Commission considers that" after the word "If" in the new section 112ZG(3) for the purpose of clarity.

New section 112C(3)

The Chinese rendition of "the requirements for incorporation prescribed by the OFC rules are met with respect to the proposed company" in the new section 112C(3) is "就某開放式基金型公司而言，《開放式基金型公司規則》所訂明的關於成立法團的規定已獲符合". Please consider amending it to "就某開放式基金型公司而言，已符合《開放式基金型公司規則》所訂明的關於成立法團的規定" to enhance its readability.

New section 112D(4)

The Chinese rendition of "the requirements for registration specified in section 112E will, on the day on which the registration takes effect, be met with respect to the company" in the new section 112D(4) is "就某擬成立公司而言，第112E條指明的註冊規定，將會在註冊當日獲符合". Please consider amending it to "就某擬成立公司而言，將會在註冊當日符合第112E條指明的註冊規定" to enhance its readability.

New section 112ZF(1)(a) and 112ZI(1)(a)

The Chinese rendition of "with respect to an open-ended fund company, any of the requirements for registration specified in section 112E is no longer met" in the new section 112ZF(1)(a) is "就某開放式基金型公司而言，第112E條指明的任何註冊規定，不再獲符合". Please consider amending it to "就某開放式基金型公司而言，不再符合第112E條指明的任何一項註冊規定" to enhance its readability. A similar provision is

found in the new section 112Z(1)(a). Please consider making the same amendment to the Chinese text of the new section 112Z(1)(a) to enhance its readability.

New section 112ZF(1)(c) and 112ZF(1)(e)

In the Chinese text of the new section 12ZF(1)(c) and 112ZF(1)(e), "或罔顧實情地向證監會提供" are shown in brackets. The brackets do not seem to serve any purpose in these provisions. Please consider deleting the brackets to tally with the English text.

As scrutiny of the Bill is continuing, further letter may be issued to seek clarification, if necessary.

To enable us to advise Members properly, we should be grateful if you could let us have your reply in both English and Chinese with soft copy to Ms Christine LIU at ylliu@legco.gov.hk at your earliest convenience.

Yours sincerely,



(Rachel DAI)
Assistant Legal Adviser

cc. DoJ (Attn: Ms Monica LAW, SALD(II)2, Ms Amy CHAN, SALD(II)3 and
Mr Peter SZE, SGC (By Fax: 3918 4613))

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