



立法會秘書處 法律事務部  
LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : ASST/3/1/6C  
本函檔號 OUR REF : LS/S/21(1)/17-18  
電話 TELEPHONE : 3919 3507

傳真 FAX : 2877 5029  
電郵 E-MAIL : bloo@legco.gov.hk

By Fax (2294 0460)

24 May 2018

Miss Renita AU  
Assistant Secretary for Financial Services and the Treasury  
(Financial Services)(1)1  
Financial Services and the Treasury Bureau  
Financial Services Branch  
24/F, Central Government Offices  
2 Tim Mei Avenue, Tamar  
Hong Kong

Dear Miss AU,

### **Securities and Futures (Open-ended Fund Companies) Rules (L.N. 97)**

To assist our scrutiny of the above Rules, we should be grateful for your clarification of the following issues:

#### Use of notes

- (a) The Rules use various notes (e.g. rules 6, 41, 115 and 181) to refer readers to relevant provisions of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), the Securities and Futures Ordinance (Cap. 571) and the Companies Ordinance (Cap. 622).
- (b) We assume that the notes are provided for information only and have no legislative effect. If that is correct, is it necessary to add a provision to rule 2 (interpretation) to clarify the purpose and effect of the notes? In this connection, please refer to the proposed section 26I(2) sought to be added to the Inland Revenue Ordinance (Cap. 112) by the Inland Revenue (Amendment) (No. 4) Bill 2018.

### Constructive notice

- (c) (i) Rule 11(1) provides that in favour of a person dealing with an open-ended fund company ("OFC") in good faith, the directors' power to bind the OFC is regarded as free of any limitation under any relevant document of the company (e.g. instrument of incorporation, any resolution of the company or any agreement between its shareholders). In that regard, rule 11(2)(b)(ii) provides that a person dealing with an OFC is not regarded as acting in bad faith because of the person's knowing that an act is beyond a director's powers under any relevant document of the company, while rule 12 further provides that a person is not regarded as having notice of any matter only because the matter is disclosed in a relevant document kept by the Registrar of Companies ("Registrar").
- (ii) By contrast, rule 110, which requires a director of an OFC to declare any material interests of which he is aware, provides under subrule (3) that a director is regarded as being aware of matters of which the director ought reasonably to be aware.
- (d) Please explain the policy reasons for treating an OFC's directors and third parties differently in terms of the degree of knowledge required to attract adverse consequences under the above rules.

### Defences

- (e) The Rules provide for various defences which require the defendant to establish certain matters in order to avoid criminal liability: see e.g. rules 35(4), 36(3), 121(3), 123(3), 135(2), 139(3), 145(8), 147(3), 157(6) and 165(7).
- (f) The use of "establish" (as opposed to "prove") seems to suggest that the above provisions are intended to impose on the defendant an evidential (rather than legal or persuasive) burden in relation to the relevant matters: see 6.2.17 and 6.2.18 of the *Guide to Styles and Practices on Drafting Legislation in Hong Kong* (2012). Please confirm whether our understanding is correct.

## Privileges

### *Privilege against self-incrimination*

- (g) With regard to the Registrar's power to make enquiry under rule 46, rule 48(7) provides that a person is not excused from complying with a requirement under rule 46 only on the ground that to do so might tend to incriminate the person.
- (h) Rule 49 then goes on to deal with the use of incriminating evidence in proceedings. It appears that under rule 49(2), only information or explanation provided by a person pursuant to rule 46(1)(b) is inadmissible in evidence against the person in criminal proceedings, whereas any record or document produced pursuant to rule 46(1)(a), even if it contains incriminating evidence, remains fully admissible against the person in criminal proceedings. Please explain:
  - (i) why the privilege against self-incrimination only applies to information or explanation, but not records or documents, provided by a person under rule 46; and
  - (ii) whether the use of incriminating evidence in such records or documents (which have been produced under compulsion pursuant to rule 46(1)(a)) against the person in criminal proceedings would be held by the courts as contravening Article 11(2)(g) of the Hong Kong Bill of Rights ("HKBOR") which guarantees that a person charged with a criminal offence shall not be compelled to testify against himself or to confess guilt? In this regard, we refer you to the four-step proportionality test laid down by the Court of Final Appeal in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 ("*Hysan*").

### *Legal professional privilege*

- (i) Unlike rule 134(5) in Division 5 of Part 6 (auditor), Division 7 of Part 3 (enquiry by Registrar) does not specifically provide whether a person can be compelled under rule 46 to disclose legally privileged information. Please consider whether the issue should be explicitly addressed in Division 7 of Part 3 of the Rules.

### Inspection of records

- (j) The Rules (e.g. rules 41, 102(5), 105(2) and 115(5)) allow any person to inspect certain registers or records kept by the Registrar or an OFC so as to obtain, among other information, the residential addresses and/or identity card or passport numbers of individuals (e.g. directors, process agents, receivers and managers of an OFC).
- (k) Please advise whether such disclosure to the public would be held by the courts as contravening Article 29 of the Basic Law and/or HKBOR 14 which protect an individual's home and privacy, having regard to the four-step proportionality test in *Hysan*.
- (l) Would inspection of the registers or records entail the collection, use or disclosure of living individuals' personal data within the meaning of the Personal Data (Privacy) Ordinance (Cap. 486) and, if so, be subject to any Data Protection Principles under Cap. 486? In this regard, have you sought the views of the Privacy Commissioner for Personal Data on the relevant provisions of the Rules? If so, what are his comments?

### Written resolutions

- (m) Rules 90 to 95 contain detailed provisions as to how shareholders' written resolutions may be proposed and agreed to, and when they are deemed to be passed.
- (n) No such provisions are included in Division 2 of Part 6 (directors) in relation to resolutions passed by directors without a meeting. Is it necessary for Division 2 of Part 6 to provide for how directors' written resolutions may be proposed and agreed to, and when they are regarded as passed without a meeting for the purpose of computing the 10-year retention period under rule 112(2)(b)?

### Statements of circumstances

- (o) Under rules 122, 143 and 146, the Court of First Instance ("Court") can make an order directing that a statement of circumstances made by an outgoing custodian or auditor is not to be sent to an OFC's shareholders if the Court is satisfied that the maker of the statement has abused the use of the statement or is using it to secure needless publicity for defamatory matter.

- (p) Please provide examples to illustrate the circumstances in which the Court would exercise its power to make the above order.
- (q) It is noted that while rules 122(2)(b) and 146(2)(b) allow the Court to order costs against the maker of the statement, no such power is given to the Court under rule 143(6). Please explain the Court's different powers under rules 122, 143 and 146.

#### Offences relating to auditor's report

- (r) In relation to rule 155(1), why is a knowing or reckless omission of a statement required to be contained in an auditor's report under rule 154(2)(a) (i.e. the auditor's opinion that adequate accounting records have not been kept by an OFC) not an offence?

#### Parts 10 and 11

- (s) To facilitate Members' scrutiny of Parts 10 and 11, would you please provide a marked-up version of the relevant provisions of Cap. 32 (as defined in rules 171 and 176) showing (in revision mode) the modifications specified in rules 173 and 178 to 187?

#### Chinese text

- (t) In rule 40, while "note" is rendered as 註明, "annotate" (i.e. to make notes) is referred to in the heading as 加上註釋. Please consider whether the inconsistent use of 註明 and 註釋 in rule 40 is likely to confuse readers.
- (u) Under rule 55(2), subject to any reasonable conditions the Registrar *may* impose, the Registrar *must* permit certain persons to inspect records or documents of which the Registrar has taken possession. In the Chinese text, while 可 (may) is used in relation to 施加 (impose), 須 (must) appears to have been omitted in relation to 准許 (permit). Please consider whether the Chinese text, as currently written, would give readers the impression that the Registrar may permit inspection but is not obliged to do so, which would be contrary to the apparent meaning of the English text.
- (v) "Removal" is rendered as 罷免 in relation to directors under rule 103, but as 免任 in relation to auditors under rule 140. Please explain the discrepancy between the two renditions.

Your early reply to the above in both languages would be greatly appreciated.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Bonny Loo". The signature is fluid and cursive, with the first name "Bonny" and the last name "Loo" clearly distinguishable.

(Bonny LOO)  
Assistant Legal Adviser

c.c. Department of Justice  
(Attn: Miss Annet LAI, Government Counsel,  
Ms Mandy NG, Senior Government Counsel)  
(Fax: 3918 4613)  
Legal Adviser  
Senior Assistant Legal Adviser 2