

13 September 2019

Securities and Futures Commission

35/F Cheung Kong Center
2 Queen's Road Central
Hong Kong

Ms. Julia Leung
Executive Director, Intermediaries Division

Dear Ms. Leung,

Frequently Asked Questions on "Disclosure of investigations commenced by licensed corporations in the notifications of cessation of accreditation" and the SFC Compliance Forum 2019

We refer to the [frequently asked questions](#) issued by the Securities and Futures Commission of Hong Kong (the "**Commission**") on 21 May 2019 (the "**FAQs**"), in relation to the disclosure of investigations commenced by licensed corporations and registered institutions in notifications of cessation of accreditation (the "**Internal Investigation Disclosure Obligation**"), and the remarks made by Ms. Leung and Mr. Lo during the SFC Compliance Forum held on 17 June 2019 (the "**Forum**").

The Asia Securities Industry & Financial Markets Association ("**ASIFMA**") and its members welcome the [FAQs](#) and additional guidance from the Forum that, in providing notifications of cessation of accreditation, firms should have regard to the spirit of the Internal Investigation Disclosure Obligation in assessing whether an internal investigation commenced by firms is within scope of the disclosure requirements.

With the hope of maintaining an open dialogue with the Commission, and ensuring that the Commission receives information that will assist it in achieving its objectives of reducing misconduct across the industry, ASIFMA and its members, with the assistance of Herbert Smith Freehills, have sought to set out a general approach to interpreting the Commission's [FAQs](#) and additional guidance from the Forum.

We have also highlighted some practical difficulties encountered by some of ASIFMA's members when providing an internal investigation notification to the Commission, which might compromise the efficiency and transparency of the measures.

1. Types of matters which are disclosable under the Internal Investigation Disclosure Obligation

ASIFMA is supportive of the Commission's view that it is impractical to provide an exhaustive series of examples of the types of processes that would be considered "internal investigations", for the purposes of the Internal Investigation Disclosure Obligation.

That being said, the Commission's guidance to have regard to the spirit of the Internal Investigation Disclosure Obligation, as mentioned during the Forum, is helpful in providing some clarity as to what types of matters are disclosable under the Internal Investigation Disclosure Obligation. ASIFMA and its members have interpreted these comments as an indication from the Commission that the disclosure obligation applies to internal investigative actions relevant to fitness and properness.

For example, the types of matters which might be disclosable under the Internal Investigation Disclosure Obligation relate to misconduct or suspected misconduct which:

- would trigger the reporting obligation under 12.5(a) of the [Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission](#) ("**SFC Code of Conduct**");
- raises fitness and properness concerns under the Commission's Fit and Proper Guidelines;
- involves substantial breaches of internal policies;
- has an adverse market impact;
- has an adverse client impact; or
- involves fraud or corruption.

2. Types of matters which are not disclosable under the Internal Investigation Disclosure Obligation

Conversely, we consider that the guidance from the Commission excludes matters which do not trigger fitness and properness concerns from the scope of the notification requirements.

Examples might include (depending on the facts and circumstances):

- business-as-usual control processes, checks and escalations where there is no reasonable suspicion that misconduct has occurred, including, for example:
 - routine follow-ups on trade surveillance; or
 - communication surveillance alerts involving licensed individuals;
- minor contraventions of internal policies which do not relate to matters of fitness and properness, such as:
 - minor contraventions of internal restrictions on employees' trading activities, where they are inadvertent and only constitute a low level contravention of internal policies rather than regulatory obligations;
 - a technical failure to pre-clear client entertainment expenses (not involving a government official) in excess of internal policies;
 - a minor delay in completing internal mandatory training;
 - low-level contraventions of internal security policies, such as a delay in declaring a security pass has been lost; and
 - technical non-compliance with internal expense policies which may result in a reminder to comply with those policies (and where the non-compliance does not cross any applicable internal monetary thresholds which might trigger more serious disciplinary action).

3. New developments in an investigation that was previously disclosed to the Commission

The Commission has indicated in its [FAQs](#) at Question 7 that, if there is a new development (such as new information or updates on the outcome of an investigation and the basis of conclusion) in an investigation

previously disclosed to the Commission by a licensed corporation or registered institution, the entity should provide such information to the Commission as soon as practicable.

For practical reasons, ASIFMA and its members assume that, where an investigation is ongoing, the Commission only expects updates in relation to significant developments (similar to the Commission's expectations in relation to updates on s 12.5(a) notifications under the [SFC Code of Conduct](#)).

4. Cessation of accreditation prior to 11 April 2019

As noted in the [circular](#) issued by the Commission on 1 February 2019 to announce new licensing forms and mandatory electronic submission of annual returns and notifications, the Internal Investigation Disclosure Obligation came into effect on 11 April 2019.

On this basis, ASIFMA and its members consider that the Internal Investigation Disclosure Obligation does not apply to internal investigations commenced on individuals whose licence cessation was notified to the Commission prior to 11 April 2019, using the "old" cessation notification form.

5. Internal investigations on circumstances or events occurring outside Hong Kong

In respect of internal investigations commenced by the licensed corporation on licensed individuals in relation to circumstances or events that have occurred outside of Hong Kong, ASIFMA and its members consider the Commission's guidance in its [circular](#) to intermediaries regarding compliance with notification requirements dated 11 May 2015 to be relevant. ASIFMA is of the view that internal investigations on licensed individuals will be within scope of the Internal Investigation Disclosure Obligation, so long as the matter is sufficiently serious to be of interest to the Commission, and has the requisite nexus to Hong Kong.

6. Confidentiality

Whilst Question 8 of the Commission's [FAQs](#) helpfully clarify that the SFC is bound by section 378 of the Securities and Futures Ordinance to preserve secrecy with regard to any information obtained during the performance of its regulatory functions, ASIFMA wishes to note that licensed corporations and registered institutions may still be obliged to disclose information contained within an Internal Investigation Disclosure to former employees, if a Data Access Request under the Personal Data (Privacy) Ordinance has been lodged. This might create particular challenges in, for example, managing internal investigations arising from whistleblowing allegations and protecting the identity of a whistleblower.

7. Discrepancy in forms used by registered institutions in relation to executive officers

It appears that the contents of the electronic cessation notification form for registered institutions has not been fully replicated in section 4.2 of Form 5U, which is used by registered institutions when the SFC Online Portal is not in service. Strictly speaking, this results in the anomalous situation where the Internal Investigation Disclosure Obligation does not apply to registered institutions when the SFC Online Portal is not in service.

In contrast, licensed corporations are required to disclose internal investigations under section 3.6 of Form 5U. ASIFMA and its members have assumed that this discrepancy is unintended and in the event the SFC Online Portal is not in service, registered institutions should nevertheless submit an Internal Investigation Disclosure as an annexure to section 4.2 of Form 5U.

ASIFMA would welcome an opportunity to discuss this further with the Commission, or to receive any comments the Commission might have on the matters set out above. If the Commission has any comments or requires further clarification on any of the matters discussed in this letter, please do not hesitate to contact Patrick Pang (ppang@asifma.org).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Mark Austen', written in a cursive style.

Mark Austen
Chief Executive Officer, ASIFMA

cc Patrick Pang, ASIFMA