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16 August 2022

The Securities and Futures Commission
54/F, One Island East
18 Westlands Road, Quarry Bay
Hong Kong

Sent via email (enfconsultation@sfc.hk)

Dear Sir or Madam,

AIMA Response to the SFC Consultation Paper on Proposed Amendments to Enforcement-related Provisions of the Securities and Futures Ordinance ("Consultation Paper")

The Alternative Investment Management Association ("**AIMA**")[1] appreciates the opportunity to provide feedback on the Securities and Futures Commission's ("**SFC**") Consultation Paper in relation to the proposed amendments to enforcement-related provisions of the Securities and Futures Ordinance ("**SFO**"). We adopt the definitions used in the Consultation Paper unless otherwise specified.

AIMA is supportive of the primary objective behind the Consultation Paper, which is to enable the SFC to better protect the interests of the investing public and uphold the reputation of Hong Kong's financial markets through more effective enforcement action.

However, AIMA has some significant concerns regarding the proposed expansion to s.213 of the SFO, which are heightened by the fact that the Consultation Paper did not contain the proposed drafting amendments to s.213. In addition, AIMA would like to provide its feedback on the PI exemption proposal as currently drafted, as well as the proposed amendments to the insider dealing provisions of the SFO. We reflect the feedback below and in **Appendix A**.

Proposed Expansion of s.213

Under the proposed amendment to s.213, the SFC would be able to apply for CFI orders after exercising its disciplinary powers against a regulated person. This means that a breach of the SFC's codes and guidelines (which

[1] AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with around 2,100 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than US$2.5 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council ("ACC") to help firms focused in the private credit and direct lending space. The ACC currently represents over 250 members that manage US$600 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a cofounder of the Chartered Alternative Investment Analyst designation ("CAIA") – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

do not have the force of law) would give rise to a cause of action under s.213. Given the SFC's codes and guidelines are very extensive and principles-based, the current proposal would significantly expand the circumstances in which firms and individuals could face time-consuming and costly litigation, and potentially uncapped restoration or damages orders. There would also be a lack of certainty and transparency regarding the types of cases that the SFC could pursue, making it very difficult for firms and individuals to manage their risk.

AIMA believes that this would put Hong Kong at a significant competitive disadvantage compared to other jurisdictions which have regimes for consumer redress. Instead, given the focus of the amendments to s.213 is on investor protection, we consider that the expanded s.213 should contain specific criteria linked to investor protection which must be met before the SFC can apply for a s.213 order following the exercise of its disciplinary powers. Such criteria should be embedded within the legislative amendments to s.213 and would be focused on ensuring that *large numbers of investors* are protected from *widespread harm*.

PI Exemption

We do not agree that the proposed amendments to the PI exemption are necessary as we find it difficult to understand the potential harm to investors under the existing PI regime, given full KYC procedures should be conducted at the point of sale. Indeed, the concept of harm is even more difficult to envisage in the context of private funds. For example, there are a number of gate-keepers involved in the marketing and subscription process of private funds, such as fund administrators, custodians, transfer agents and lawyers, which significantly reduces the risk that unauthorised marketing or offering material would be provided to non-PIs.

Furthermore, we note that performing the KYC procedures during pre-marketing activities would be a big hindrance to the alternative investment industry and would be out of line with the approach taken in other international financial centres. As the SFC will be aware, potential investors are unlikely to be responsive to KYC procedures at such an early stage of discussions with fund managers. As a result, a fund manager's ability to market to investors would be significantly reduced. If the SFC decides to amend the PI exemption as set out in the Consultation Paper, we consider that, at a minimum, licensed intermediaries should be able to rely on their own preliminary assessment of and/or self-certification from the potential investor, allowing licensed intermediaries to form a reasonable belief that the potential investor will meet the PI criteria. The licensed intermediaries would conduct the full KYC procedures before the actual sale or subscription into the investment product.

Insider Dealing

We appreciate the SFC's desire to expand the scope of the insider dealing provisions of the SFO to align them with those of other major common law jurisdictions and the other market misconduct provisions of the SFO. However, amending the insider dealing provisions to cover non-Hong Kong financial markets is a significant expansion of the SFC's powers and risks impinging upon the jurisdiction of overseas regulators, who are arguably better placed to police conduct impacting their own markets.

We therefore welcome the SFC's proposed amendments to s.282 (civil regime) and s.306 (criminal regime) which would mean that, in respect of overseas-listed securities or their derivatives, a person would not be regarded as having engaged in insider dealing, unless the conduct would have also been unlawful had it been carried out in the relevant overseas jurisdiction. As noted in the Consultation Paper, this is in line with the legal position for false trading, price rigging and stock market manipulation. Without the safeguards reflected in the proposed amendments to ss.282 and 306, Hong Kong would, in effect, risk punishing firms/individuals for conduct which is not recognised as wrongful in the jurisdiction where the security is listed.

Further consultation needed on proposed draft legislative amendments

Finally, given the significance of the proposed amendments, we strongly encourage the SFC to arrange for further consultation on the proposed draft legislative amendments. This approach would be consistent with previous

amendments to the SFO, for example in the context of amending the definition of "structured product"[2]. A further consultation would allow AIMA and other industry participants to provide more accurate and detailed feedback on the SFC's proposals.

If a formal consultation is not possible, then we would encourage the SFC to engage with the industry on a more informal basis, as we consider that it is imperative that the industry has an opportunity to give its views, whether formally or informally, on the proposed draft legislative amendments. AIMA would also appreciate being kept updated as to the estimated timeframe for the consultation and next steps.

We thank you in advance for your consideration of this important matter.

We would be happy to provide further information or engage in further dialogue which would be helpful to this purpose.

Yours faithfully,

[2]Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance and the Offers of Investments Regime in the Securities and Futures Ordinance dated October 2009.

APPENDIX A

SFC CONSULTATION PAPER ON PROPOSED AMENDMENTS TO ENFORCEMENT-RELATED PROVISION OF THE SECURITIES AND FUTURES ORDINANCE

Responses on behalf of the Alternative Investment Management Association

1. **Do you agree with: (i) the proposal to amend section 213 of the SFO to expand the basis on which the SFC may apply to the CFI for remedial and other orders after having exercised any of its powers under section 194 or 196 of the SFO against a regulated person, and; (ii) the proposed consequential amendments to section 213(1), (2), (7) and (11)? Please explain your view.**

1.1 As described above, AIMA is deeply concerned that the proposed amendments to s.213 will lead to an unmanageable level of uncertainty and risk regarding the circumstances in which the SFC may apply to the High Court for a remedial order. Without further checks and balances in place on the types of cases that could give rise to a cause of action under s.213 following the exercise of the SFC's disciplinary powers, firms and individuals could face time-consuming and costly litigation, and potentially uncapped restoration or damages orders. AIMA considers that this would put Hong Kong at a significant competitive disadvantage compared to other jurisdictions which have consumer redress regimes.

1.2 Furthermore, as the Consultation Paper did not contain the proposed draft legislative amendments, AIMA strongly urges the SFC to consult the industry on the precise proposed drafting once it has had an opportunity to consider the industry's initial feedback on the proposal more broadly. This would be consistent with the SFC's previous approach to amending the SFO and its subsidiary legislation. For example, the SFC set out and consulted on the indicative drafts of the proposed amendments to Part IV (Offer of Investments) and Schedule 1 to the SFO regarding, amongst other things, the definition of "structured product" and amending the definition of "securities"[3]; and the proposed amendments to Schedule 5 to the SFO regarding, amongst other things, the definition of "asset management" "dealing in securities" and "advising on securities"[4].

1.3 AIMA's concerns are informed by the following comments below.

Legal status of SFC's codes and guidelines

1.4 The SFC's codes and guidelines do not have the force of law. In particular, the SFC has stated in its Code of Conduct for Persons Licensed by or Registered with the SFC (the "**Code of Conduct**") that the Code of Conduct "*does not have the force of law and should not be interpreted in a way that would override the provision of any law*". The SFC has also stated in its website that the SFC's "*codes and guidelines are not subsidiary legislation and failure to comply with them does not by itself render a person liable to any judicial or other proceedings*".

1.5 This is also consistent with the current legislation:

[3] Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance and the Offers of Investments Regime in the Securities and Futures Ordinance dated October 2009.

[4] Consultation Paper on Proposed Amendments to Schedule 5 to the Securities and Futures Ordinance dated February 2005.

1.5.1 S.399(6) of the SFO: "*A failure on the part of any person to comply with the provisions set out in any code or guideline published under this section or any other provision of this Ordinance that apply to him shall not by itself render him liable to any judicial or other proceedings*"; and

1.5.2 S.399(8) of the SFO: "*Any code or guideline published under this section is not subsidiary legislation*".

1.6 However, the proposed amendments to s.213 appear to have elevated the non-legal status of the SFC's codes and guidelines. It was never intended that a breach of the SFC's codes or guidelines would lead to an application and/or the making of CFI orders under s.213 (e.g. restoration orders) without breaching any other provisions in the legislation.

1.7 In particular, the introduction of the SFC's codes and guidelines and/or amendments to the same are not subject to the same level of scrutiny as legislative amendments to the SFO. This is concerning where a breach of such codes and guidelines would trigger the new cause of action and allow the SFC to apply for a s.213 order under the proposed amendment.

1.8 Therefore, AIMA considers that the SFC should impose specific criteria which must be met before the SFC can apply for a s.213 order following the exercise of its disciplinary powers. Such criteria should be embedded within the legislative amendments to s.213.

1.9 The SFC's codes and guidelines are very extensive and principles-based. AIMA considers that it would be inappropriate for any breach of the SFC's codes and guidelines (which leads to the SFC exercising its disciplinary powers) to provide the SFC with a new cause of action to seek a civil remedy under the amended s.213. Although under s.213(4) the court is required to satisfy itself that it is desirable that the order sought be made, and that the order will not unfairly prejudice any person, once an application under the amended s.213 is made by the SFC, the regulated persons will still be subjected to stressful, time-consuming and costly court proceedings. This could bring hardship on the regulated persons or serve as punishment in itself, even if the court ultimately does not make the requested orders.

1.10 While we appreciate the differences between the proposed investor compensation regime under the amended s.213 in Hong Kong and the consumer redress schemes in the UK, we believe that the SFC may still make reference to or borrow concepts from the UK Financial Conduct Authority ("**FCA**"). S.213 is a collective remedy and such orders were designed for cases involving systemic or widespread issues where large groups of investors were affected by similar circumstances. By way of comparison, the FCA can only exercise its powers in relation to consumer redress schemes if certain conditions are satisfied. Redress schemes imposed on multiple firms require widespread or regular failure by firms to comply with the applicable requirements and those imposed on individual firms are intended for cases with potential for mass claims from consumers on a single issue. We consider that any amendments to s.213 should adopt a similar approach, setting out the narrow set of circumstances in which the SFC would apply for s.213 orders following the exercise of its disciplinary powers. This would allow firms and individuals to gain more clarity and certainty as to the legal obligations of regulated persons and related parties and any potential consequences upon a breach of the SFC's codes and guidelines.

1.11 In light of paragraphs 1.9 and 1.10, we urge the SFC to only apply to the CFI for injunctions and other orders under the amended s.213 after exercising its disciplinary powers where (i) the underlying breach involves the interests of a large number of investors; and (ii) the harm is widespread. We are of the view that this would strike the appropriate balance between providing investor protection and providing appropriate clarity to the industry in order to allow better risk management.

1.12 Furthermore, with all due respect, AIMA considers that under the current proposal, the SFC could rely too heavily on the courts to determine whether it would be appropriate to order a restoration or damages order. As mentioned above, under s.213(4) the CFI shall, before making a s.213 order, "*satisfy itself, so far as it can reasonably do so, that it is desirable that the order be made, and that the order will not unfairly prejudice any person*". In determining these two limbs (which are general concepts), the CFI will adopt a fairly broad-brush approach where necessary. In practice, this may mean that the CFI will conduct its own assessment rather than simply accepting the outcome of the SFC's investigation or endorsing the SFC's disciplinary action. Under the amended s.213, the CFI may focus on whether the order would be consistent with and advance, generally, the objects and purpose of the SFO, the role of the disciplinary decision (and the breach of the underlying codes and guidelines) and the role of the remedial orders in deterring such a breach. However, as the SFC's codes and guidelines do not have the force of law, there is no body of case law which would help inform the courts as to whether the orders sought would be desirable and fair. It is likely that the CFI will need significant guidance on the different regulatory principles and objectives under the various codes and guidelines given they carry different weight. Whilst AIMA is not questioning the competence of the Hong Kong courts, it does consider that the current proposal imposes *too* much responsibility on them. AIMA considers that this could lead to unfair decisions being made given the court's lack of familiarity with the huge volume of SFC non-statutory requirements set out in an array of codes, guidelines, circulars, thematic reviews and consultation conclusions.

1.13 Indeed, we note that, when compared to the Securities and Futures Appeals Tribunal ("**SFAT**"), the CFI is a very different body and the level of expertise which sits with the SFAT is very different, given it is, by its very nature, required to consider and review the SFC's regulatory requirements and/or disciplinary decisions made by the SFC. It is unclear how the CFI would be in a position to interpret the requirements under the SFC's codes and guidelines and this uncertainty gives rise to a risk that the CFI would make findings which broaden or narrow the SFC's regulatory expectations from their original intended purpose. Similarly, AIMA considers that the body of non-statutory guidance which has built up over the years is arguably inappropriate in the context of the proposed new expanded s.213 where the financial consequences would be uncapped. Instead, it is much more appropriate in the context of SFC disciplinary actions, where breach of the SFC's guidance often informs the SFC's decision to publicly reprimand and/or fine a regulated person.

1.14 Finally, there may also be other jurisprudence-based challenges to the current proposed amendments to s.213 if they are to be implemented without the necessary safeguards (as set out at paragraph 1.11above). In particular, we believe that the lawfulness of the amended s.213 and the lawfulness of a decision to commence proceedings under the new s.213(1)(c) may be susceptible to judicial review challenges which would be time-consuming and costly for all parties involved. For example, one could potentially argue that the amended s.213 is incompatible with s.399(6) of the SFO and it is unreasonable and procedurally improper for a cause of action to arise following a breach of a SFC code on the basis that the code (which led to the exercise of the SFC's disciplinary powers) does not have the force of law and cannot "*by itself*" give rise to any judicial or other proceedings according to s.399(6). One could also conceive a possible argument being run that the expanded s.213 is a breach of the powers and functions afforded to the Legislature under the Basic Law and is equivalent to giving the SFC the legislative power to "re-write" s.213 every time the SFC amends its underlying codes and guidelines. The increased risk of challenge that may arise as a result of an expanded s.213 as proposed, in our view, warrants the Commission giving further thought to the need for such an expanded s.213, and the need for further clarity on the specific types of cases in respect of which the SFC would seek orders under s.213.

1.15 AIMA is very grateful and supportive of the collaborative environment between the industry and the SFC, in which there is open and transparent dialogue regarding the introduction of new SFC regulatory expectations, whether through circulars, or more formal consultations. If the amended s.213 is implemented without the necessary safeguards (as set out at paragraph 1.11 above), there is a risk that the industry will lose the flexibility and certainty which is currently afforded to it. Given the potential

financial consequences of the proposed s.213 amendments, this will naturally lead to a more litigious environment which may impact the current dynamic between the industry and the SFC. AIMA considers that the proposed safeguards will help address this concern.

Proportionality of aggregated financial impact against regulated persons

1.16 AIMA considers that the SFC should take into account any amounts likely to be sought by way of remedial orders from the court under the amended s.213 when considering whether to impose fines using its disciplinary powers and/or the size of such fines. While we appreciate that disciplinary fines are punitive in nature and are different to s.213 remedial orders, which seek to compensate investors, the financial impact of disciplinary fines in conjunction with restoration and/or damages orders under s.213 may be significant on regulated persons (which includes individuals) and ultimately risk being disproportionate. AIMA considers that this approach would be consistent with the approach currently set out in the SFC's Disciplinary Fining Guidelines. These Guidelines provide that, in any particular case, the SFC will take into account a number of considerations in determining whether or not the SFC will impose a fine and, if so, the amount of the fine, including:

1.16.1 any remedial steps taken since the conduct was identified, including any steps taken to identify whether clients or others have suffered loss and any steps taken to sufficiently compensate those clients or others, any disciplinary action taken by a firm against those involved and any steps taken to ensure that similar conduct does not occur in the future; and

1.16.2 result or likely result of any civil action taken or likely to be taken by third parties – successful or likely successful civil claims may reduce the part of a fine, if any, that is intended to stop a person benefiting from their conduct.

1.17 In light of the above, we would also encourage the SFC to consider determining the precise level of any disciplinary fine to be imposed on a regulated person, as well as requiring payment of the fine, only after any proceedings under the amended s.213 have been concluded. This would allow the SFC to consider the financial impact on the regulated person in totality.

1.18 We also consider that it would be inappropriate for the SFC to seek restoration and damages orders where it has exercised its disciplinary powers, and would lead to an unfair outcome. Given the potentially open-ended nature of damages orders, we also consider that the SFC should meet additional criteria before it can seek damages orders (as opposed to restoration orders) against firms or individuals in addition to disciplinary action.

Impact on limitation periods

1.19 AIMA would like to clarify when the cause of action under the proposed s.213 will arise if triggered following the SFC's exercise of its disciplinary powers. AIMA is concerned that if the cause of action under the expanded scope of s.213 only arises after the SFC has exercised its disciplinary powers, this would mean that the SFC can potentially extend the limitation period for compensatory remedies for as long as it takes the SFC to complete the investigation and disciplinary process. This may be significantly longer than six years, given the time taken to conduct investigations, and the appeal process (if any). Again, this risks creating a huge amount of uncertainty for regulated persons given it will be much more difficult to manage and predict the consequences of any regulatory breach which gives rise to disciplinary action.

1.20 AIMA is therefore of the view that revisions to s.213 should not create a "new" cause of action for the purposes of s.4(1) of the Limitation Ordinance, and limitation should continue to run in the way it currently does i.e. the cause of action accrues from the date of the breach, rather than the date on which the SFC has exercised its powers under ss.194 or 196 of the SFO.

Meaning of "where the SFC has exercised any of its powers under s.194(1), 194(2), 196(1) or 196(2)" against a regulated person

1.21 AIMA would like to seek further clarity from the SFC as to the precise meaning of "*where the SFC has exercised any of its powers under section 194(1), 194(2), 196(1) and 196(2)*" given the Consultation Paper does not make this clear. For example, would a cause of action under the proposed s.213 only arise where a regulated person has fully exhausted the appeal process to the SFAT and potentially also the Court of Appeal? Would a successful appeal to the SFAT or Court of Appeal mean that the SFC is considered not to have exercised its disciplinary power? In this regard, AIMA considers that it would be unfair for the SFC to be able to seek a remedial order under s.213 in circumstances where the regulated person has successfully appealed the SFC's disciplinary decision to the SFAT or the Court of Appeal.

Applicability of restoration orders

1.22 It is unclear which parties could be subject to restoration orders under the proposed amendments, particularly as we have not seen the precise proposed legislative amendments. The Consultation Paper describes the proposed restoration order as an order "*to restore the parties to any transaction to the position in which they were before the transaction was entered into, where the SFC has exercised any of its [disciplinary] powers in respect of the regulated person*". Although "*parties to any transaction*" may refer to the victims of misconduct, without seeing the proposed drafting, it is possible that the amended restoration order would not be restricted to regulated persons, but could also potentially be made against any "*parties to any transaction*". If there is no qualification, it is possible that any party may potentially be subject to a restoration order, regardless of whether they were the subject of the SFC's disciplinary decision. AIMA strongly encourages the SFC to limit the applicability of restoration orders to those who were the subject of the disciplinary action, and this should be made clear in the proposed legislative draft.

Potential impact on directors' and officers' liability insurance ("**D&O Insurance**") and Managers-In-Charge ("**MICs**")

1.23 The proposed amendments to s.213 will impact firms' D&O Insurance and firms will need to consider how their policies will be affected and may require amendment. In the longer term, the new s.213 (if introduced as currently proposed) could also impact the ability of firms to obtain competitively priced D&O Insurance. Given the importance to the industry of D&O Insurance, AIMA believes that this is another reason why the industry should be afforded an opportunity to comment on the proposed legislative drafting as coverage under current D&O policies will be informed by the precise wording of the amended s.213. It would be in the SFC's interests to ensure that the proposed drafting does not have any unintended consequences in terms of D&O Insurance.

1.24 AIMA is also concerned that the increased level of potential financial jeopardy may make it more difficult for regulated firms to identify and appoint offshore MICs, particularly given the proposed amendments to s.213 are significantly different from the approaches taken by many other jurisdictions.

2. **Do you have any comments on the proposed consequential amendments to section 213(3A) in respect of OFCs? Please explain your view.**

2.1 AIMA does not have any comments in addition to the comments made under section 1 above.

3. **Do you agree with the proposal to amend the exemption set out in section 103(3)(k) and the consequential amendments to section 103(3)(j)? Please explain your view.**

3.1 We do not agree that the proposed amendments to the PI exemption are necessary as we find it difficult to understand the potential harm to investors under the existing PI regime, given full KYC procedures should be conducted at the point of sale. Indeed, the concept of harm is even more difficult to envisage in the context of private funds. For example, there are a number of gate-keepers involved in the marketing and subscription process of private funds, such as fund administrators, custodians, transfer agents and lawyers, which significantly reduces the risk that unauthorised marketing or offering material would be provided to non-PIs.

3.2 In particular, paragraph 28 of the Consultation Paper suggests that, following the proposed amendments, licensed intermediaries will be required to perform its know-your-client and related procedures ("**KYC Procedures**") to identify potential investors as PIs in advance, prior to the issuance of any unauthorised marketing materials to them. This would lead to practical difficulties as set out below.

3.3 Given the wide scope of advertisements, invitations and documents relating to investments under s.103 of the SFO, any pre-marketing activities could potentially be caught under the offer of investments regime and therefore be restricted. In practice, potential investors are less willing to provide their information at such a preliminary stage.

3.4 Performing the KYC Procedures to identify PIs in advance of such issuance would be a big hindrance to the alternative investment industry, as the potential investors are unlikely to be responsive to KYC Procedures at such an early stage. As a result, a fund manager's ability to market to investors would be significantly reduced. It may also potentially provide an unfair advantage to banks, which would often already be in possession of the relevant KYC information. This would run counter to the original intention behind the PI exemption when the SFO was introduced: "*The main objective is to ensure protection for investors while allowing room for market development through the provision of a wider range of investment products*"[5].

3.5 If the SFC decides to amend the PI exemption as set out in the Consultation Paper, we consider that, at a minimum, licensed intermediaries should be able to rely on their own preliminary assessment of the potential investor (e.g. from public information) and/or self-certification from the potential investor. AIMA considers that there is no one-size-fits-all approach, and that how one conducts the preliminary assessment would depend on the specific facts of the case. Instead, the licensed intermediaries would conduct the full KYC Procedures before the actual sale or subscription into the investment product. This would allow the licensed intermediaries to form a reasonable belief that the potential investor will meet the PI criteria prior to issuing the marketing materials. Licensed intermediaries would also keep records of such preliminary assessment for production if requested by the SFC.

3.6 In light of paragraphs 3.1 to 3.5, we believe that any amendment should allow licensed intermediaries to engage in pre-marketing activities to provide sufficient information on the investment product (e.g. fact sheets and/or key terms of the investment product) to the potential investor to ascertain genuine interest, before they are required to perform the KYC Procedures ahead of the actual offer/subscription being made.

3.7 This would allow Hong Kong to remain competitive when compared with other international financial centres, which do not restrict such pre-marketing activities to potential investors in their jurisdictions. Otherwise, funds may choose to be marketed in other jurisdictions which are subject to less onerous marketing requirements.

[5] Para 123 of the Report of the Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 to Council Meeting on 13 March 2002.

3.8 Also, if the SFC has a particular category of professional investors (e.g. high net worth individuals) or practice in mind, then we would encourage the SFC to focus any amendments on the specific category or practice to ensure that they are focused only on those problematic areas, without unnecessarily increasing the regulatory burden on other areas of the industry which are not problematic, such as private fund management.

3.9 We do not consider that the proposed amendment to the PI exemption should impact the SFC's requirements around suitability and know-your-client under paragraphs 5.1 to 5.5 of the Code of Conduct, and we understand that this is not the SFC's intention behind the Consultation Paper.

3.10 Finally, AIMA also strongly encourages the SFC to further consult on the proposed draft legislative amendments to ensure that the amendments do not lead to any unintended consequences for fund managers or the industry more broadly. As the SFC will be aware, s.103 is wider in scope than the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), which only relates to "offers" of shares and debentures. AIMA would recommend that the SFC takes this opportunity to clarify that, as part of the proposed amendments to the SFO, pre-marketing activities would not fall within the scope of s.103, and therefore managers are not required to rely on any of the exemptions, including the PI exemption. This would further enhance the practicality of s.103.

4. **Do you agree with the proposal to expand the scope of insider dealing provisions of the SFO to cover insider dealing perpetrated in Hong Kong with respect to overseas-listed securities or their derivatives? Please explain your view.**

4.1 We appreciate the SFC's desire to expand the scope of the insider dealing provisions of the SFO to align them with those of other major common law jurisdictions and the other market misconduct provisions of the SFO. However, amending the insider dealing provisions to cover non-Hong Kong financial markets is a significant expansion of the SFC's powers and risks impinging upon the jurisdiction of overseas regulators, who are arguably better placed to police conduct impacting their own markets. We note the comparable extra-territorial approaches in Australia and Singapore as set out in paragraphs 44 and 45 of the Consultation Paper. With all due respect, however, we would like to clarify the extra-territorial scope of the UK's criminal insider dealing regime. Whilst paragraph 46 of the Consultation Paper implies that the insider dealing offences under the UK Criminal Justice Act 1993 ("**UK CJA**") also have a similar territorial scope to Australia and Singapore, the primary insider dealing offence and the encouraging offences are only committed if the dealing is on a specified regulated market or through a professional intermediary (s.52(3)) **and** then one of the conditions in s.62 must apply. In any event, the securities must be securities which satisfy the conditions specified under s.54, which, in summary, are that they are listed or admitted to trading or quoted on any market established under the rules of an investment exchange specified in the Insider Dealing (Securities and Regulated Markets) Order 1994 (1994/187) (as amended from time to time) (the "**Order**"). The Order includes UK markets and any markets established under the rules of a list of Exchanges which are primarily European based, plus NASDAQ. In short, the UK CJA is not as broad as the proposed amendments to the Hong Kong insider dealing provisions.

4.2 We therefore welcome the SFC's proposed amendments to s.282 (civil regime) and s.306 (criminal regime) which would mean that, in respect of overseas-listed securities or their derivatives, a person would not be regarded as having engaged in insider dealing, unless the conduct would have also been unlawful had it been carried out in the relevant overseas jurisdiction. As noted in the Consultation Paper, this is in line with the legal position for false trading, price rigging and stock market manipulation. The proposed amendments to ss.282 and 306 would serve to avoid the possibility of incompatibility with applicable laws of other countries in respect of the amended insider dealing provisions (which will have extra-territorial effect if amended) and would serve to ensure that, in effect, the SFC does not police insider dealing in

places where such acts are not recognised as wrongful. Without the safeguards reflected in the proposed amendments to ss.282 and 306, Hong Kong would, in effect, risk punishing firms/individuals for conduct which is not recognised as wrongful in the jurisdiction where the security is listed.

5. **Do you agree with the proposal to expand the scope of insider dealing provisions of the SFO to cover insider dealing perpetrated outside of Hong Kong, if it involves any Hong Kong-listed securities or their derivatives? Please explain your view.**

5.1 AIMA agrees with the SFC's proposal.