# SECURITIES AND FUTURES COMMISSION 證券及期貨事務監察委員會

# **Guidance Note on Cooperation with the SFC**

December 2017



### 1. Purpose

1.1. This document is published by the Securities and Futures Commission (SFC) to replace the Guidance Note on Cooperation with the SFC dated March 2006 (2006 Guidance Note) and seeks to clarify our approach to cooperation in our disciplinary<sup>1</sup>



 To the extent legally permissible, disclosing relevant documents located outside Hong Kong and facilitating the production of documents and witnesses from outside Hong Kong

#### Acceptance of liability, for instance:

- Willingness to take responsibility for the breaches or failings, address our regulatory concerns and accept our investigation findings or proposed sanctions
- Taking a proactive and positive approach to bring the case to an early conclusion, for instance, in respect of a corporation, by involving senior management in communications with the SFC and devoting manpower and resources to assist us in our investigation

#### Taking rectification measures, for example:

- Taking early and active steps to contain breaches or failings
- Making full and prompt compensation to the affected investors for their losses
- In the case of a corporation, instituting necessary enhancements to its internal controls and procedures
- 2.2. Examples of other forms of cooperation can be found in paragraphs 5.2, 6.3, 7.2 and 7.4 below.

#### 3. What does not amount to cooperation

3.1. Mere compliance with statutory or regulatory requirements does not, in itself, amount to cooperation. This includes, for instance:

In the case of an individual or corporation, compliance with an investigator's direction or notice issued under sections 179 or 183 of the SFO by producing documents or attending an interview

In the case of a licensed corporation:

- Compliance with the obligation under section 146(3) of the SFO to notify the SFC that it is unable to comply with, or to ascertain its compliance with, the Securities and Futures (Financial Resources) Rules
- Compliance with its self-reporting obligations under section 12 of the Securities and Futures (Client Securities) Rules, section 11 of the Securities and Futures (Client Money) Rules and section 11 of the Securities and Futures (Keeping of Records) Rules

In the case of a licensed corporation or registered institution, compliance with its self-reporting obligations under paragraph 12.5 of the Code of Conduct for Persons Licensed by or Registered with the SFC



#### 4. How we measure cooperation

- (i) Cooperation assessment factors
- 4.1. While we seek to maintain consistency in our enforcement actions, fairness and public interest require each case to be considered on its own facts. As such, the principles and assessment factors set out in this Guidance Note are neither exhaustive nor definitive.
- 4.2. Nonetheless, we will generally take the following factors into account when we assess cooperation:

The value of the assistance provided in our investigation and enforcement proceedings, including, amongst other things:

- the timeliness of the cooperation
- the quality, extent and substance of the assistance provided, including, for instance, the truthfulness and completeness of any information provided to the SFC in relation to breaches or failings
- whether our investigation was initiated based on information provided by the party
- the time and resources conserved by the SFC as a result of the cooperation

The nature and seriousness of breaches or failings and their impact on the securities and futures market

The general conduct of the party after the breaches or failings and other circumstances of the party

- (ii) Effect of uncooperative conduct
- 4.3. If a person engages in conduct with the intent or effect of impeding our investigations or enforcement proceedings (uncooperative conduct), the SFC may take this into account when considering the appropriate outcome.
- 4.4. Uncooperative conduct includes, amongst other things:

failing to promptly and fully report a material breach or failing

withholding information relating to a breach or failing

engaging in evasive conduct during our investigation

arranging affairs with the intention of unnecessarily prolonging the SFC's investigation

#### 5. Legal professional privilege

5.1. For the avoidance of doubt, a bona fide refusal to waive legal professional privilege attached to a document provided to the SFC will not be regarded as uncooperative conduct. The SFC recognises that legal professional privilege is a fundamental right



- protected by the Basic Law and section 380(4) of the SFO and fully respects the exercise of this right.
- 5.2. Nonetheless, if a person voluntarily waives a claim to legal professional privilege over a document, even on a limited basis, this may be recognised as cooperation which may be taken into account when the SFC considers the appropriate outcome.

#### 6. Disciplinary matters

Benefits of cooperating with the SFC

#### (i) Early resolution of disciplinary proceedings

- 6.1. Cooperation may result in a decision by the SFC to enter into an agreement to resolve disciplinary proceedings at an early stage pursuant to section 201 of the SFO (section 201 Agreement).
- 6.2. The SFC may enter into a section 201 Agreement if it considers it appropriate to do so in the interest of the investing public or in the public interest. Cooperation from the regulated person and the extent and nature of such cooperation are factors considered by the SFC in exercising this discretion.
- 6.3. As a general principle, the SFC is more willing to enter into a section 201 Agreement if cooperation is demonstrated by the regulated person in the ways described in paragraphs 2.1 or 5.2 above or in the following manner:



- identified in a third-party review within a specified period of time and to ensure that such failings would not reoccur.
- 6.4. A regulated person may approach the SFC for discussions with a view to resolving some or all of our regulatory concerns at any time from the detection of the failings or breaches up to the issuance the



- 6.9. Further reductions in sanctions may be possible in cases where the regulated person has provided exceptional and substantial cooperation to the SFC.
- 6.10. The provisions in this Guidance Note are guiding principles. They do not confer any right or create any legitimate expectations on any person under investigation to: (i) resolve a matter under a section 201 Agreement; (ii) be informed of the progress of any SFC investigation; or (iii) prior to the issuance of an NPDA, be informed of the SFC's preliminary assessment of any potential disciplinary matter.

Our policy on resolutions made in private or on a "no admission of liability" basis

6.11. Given the current market conditions in Hong Kong and the need for public accountability



## a reduced proposed sanction



at the conclusion of the case, state in the press release that the party cooperated and provide a general description of the cooperation.