

# SETTLEMENT WITH SFC IN DISCIPLINARY PROCEEDINGS

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Under section 201 of Securities and Futures Ordinance (Cap. 571) (the “SFO”), the Securities and Futures Commission (the “SFC”) has the power to resolve disciplinary proceedings by agreement (the “**Section 201 Agreement**”) when the SFC considers it appropriate to do so in the interest of the investing public or in the public interest. A regulated person may make a resolution proposal to the SFC for reaching the Section 201 Agreement with the SFC.

This explanatory note intends to provide a summary with respect to the legal landscape under, core objectives of and procedures pertaining to, the Section 201 Agreement.

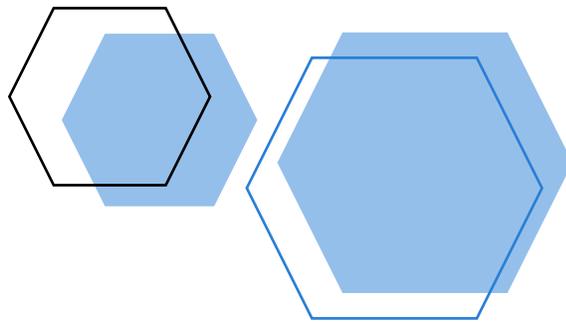


## 1. SECTION 201(3) OF SFO

Where at any time the SFC is contemplating exercising any disciplinary power in respect of a person under section 194(1) or (2), 195(1)(a), (b) or (c), (2) or (7), 196(1) or (2) or 197(1)(a) or (b) or (2), it may, where it considers it appropriate to do so in the interest of the investing public or in the public interest, by agreement with the person: -

- (a) exercise any power the SFC may exercise in respect of the person under Part IX of SFO (whether or not the same as the power of which has been contemplated to exercise); and
- (b) take such additional action as it considers appropriate in the circumstances of the case.

Whether the SFC will resolve a case by agreement varies with the facts and circumstances of individual cases.



## 2. CORE OBJECTIVES

The SFC will enter into agreements bearing in mind the following core objectives:-

- (a) to ensure the problems do not rise again;
- (b) to mitigate the financial consequences of misconduct to the investing public; and
- (c) to increase confidence in the capacity of Hong Kong's regulatory systems to solve problems beneficially.



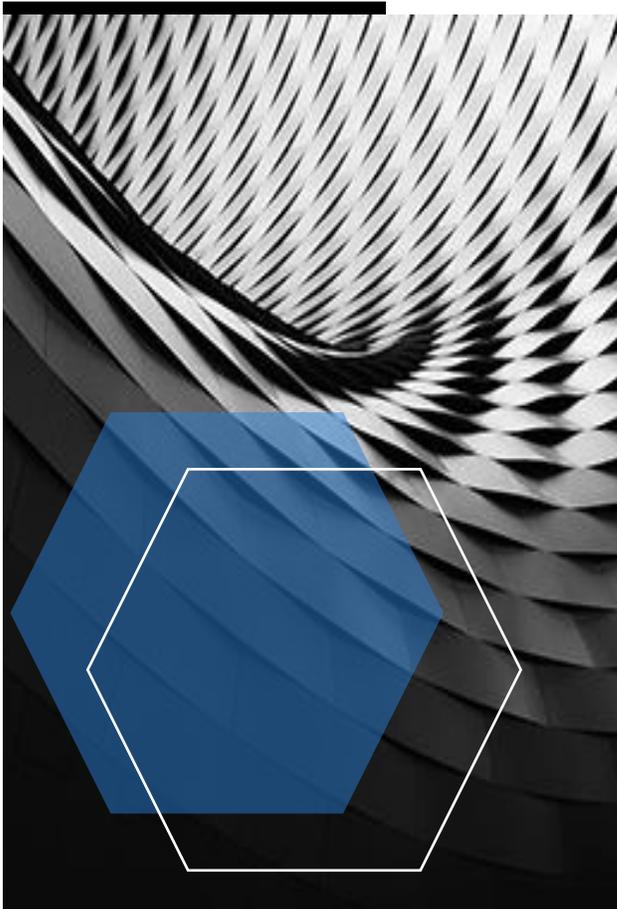


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### 3. PROCEDURES

A regulated person may approach the SFC for discussions with a realistic settlement/resolution proposal (see below for further explanation) to resolve some or all of the SFC's regulatory concerns at any time from the detection of the failings or breaches up to the issuance of the decision notice of the disciplinary action.

When the SFC receives realistic settlement proposals from a regulated person, the SFC will consider every resolution proposal very carefully and may be willing to enter into negotiations with the person, although there is no guarantee that such negotiations will result in a settlement. It goes without saying that the SFC may not settle a case with the regulated person where the core objectives above are not accomplished by virtue of the Section 201 Agreement.



### 4. SETTLEMENT/RESOLUTION PROPOSAL

*(a) "Without Prejudice" basis*

As per the "Disciplinary Proceedings at a Glance" published by the SFC in December 2017, unless the regulated person and the SFC agree otherwise, all discussions about resolution proposals will be treated as "without prejudice", meaning that neither the SFC nor the regulated person may refer to those discussions in the disciplinary proceedings or subsequent legal proceedings.

*(b) No resolution in private or as "no admission of liability"*

In accordance with the "Guidance Note on Cooperation with the SFC" published by the SFC in December 2017, the SFC is of the view that, as a general principle, it would not be in the public interest for disciplinary matters to be resolved in private or on a "no admission of liability" basis. As a result, offers to resolve a matter on such terms are unlikely to be considered by the SFC.

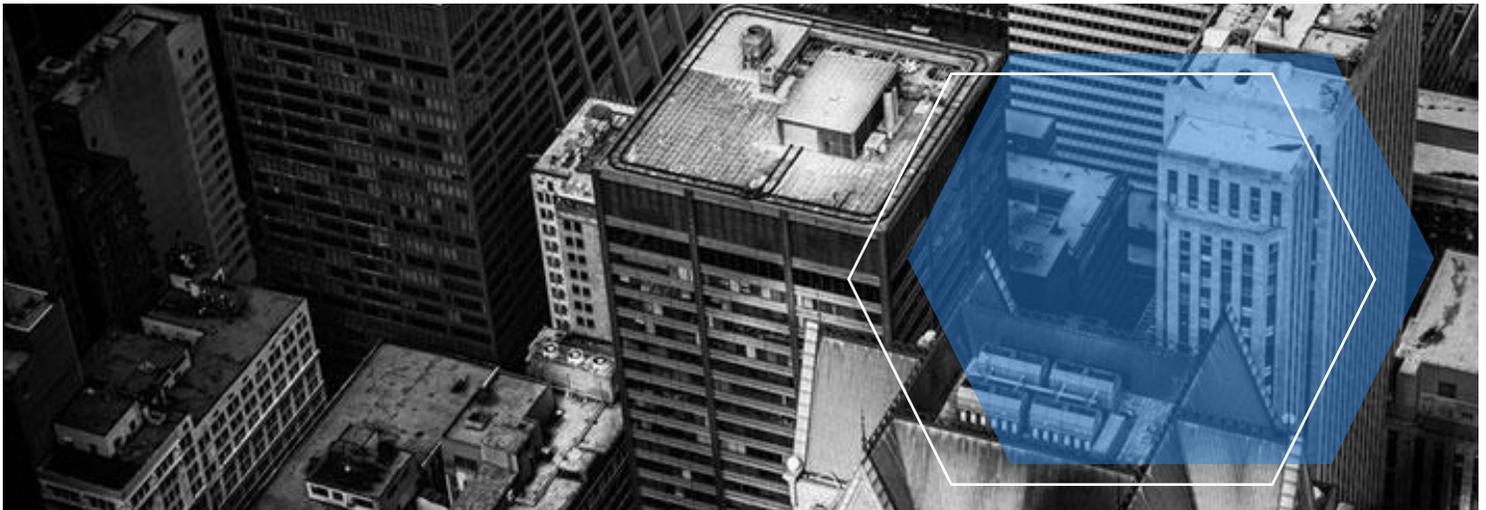
## 5. SECTION 201 AGREEMENT

### *(a) Confidentiality Obligations*

The Section 201 Agreement may also include confidentiality obligations, the effect of which will be that the regulated person will not be entitled to disclose the terms of the agreement and may only disclose such information as the SFC may agree.

### *(b) Review*

The Section 201 Agreement will usually represent a contract with the SFC which will compromise the regulated person's rights under the SFO and thus, the regulated person will have no right to seek a review of the agreement by the Securities and Futures Appeal Tribunal. Nevertheless, all of the enforcement cases, including those cases resolved under the Section 201 Agreement, are subject to review by the Process Review Panel.



## 6. FACTORS TAKEN INTO CONSIDERATION

Cooperation from the regulated person and the extent and nature of such cooperation are factors considered by the SFC in exercising this discretion. The SFC is more willing to enter into the Section 201 Agreement if cooperation is demonstrated by the regulated person. The following are illustrated examples of cooperation with the SFC.

### *(a) Full and frank disclosure*

Voluntarily and promptly reporting any breaches or failings to the SFC, providing true and complete information regarding breaches or failings, acceptance of liability and/or taking rectification measures.

### *(b) Conduct third-party review (in case of a firm)*

Jointly with the SFC, appointing a third-party reviewer to conduct a fact-finding review with respect to the breaches or failings, or a prospective internal control review, as well as agreeing to: -

- (i) bear the cost of engaging the third-party reviewer (the SFC will contribute a nominal amount towards the review to ensure it is a contractual party to the review with resulting rights);
- (ii) the terms of reference of the review determined by the SFC;
- (iii) accept the reviewer's findings (the firm will generally not be entitled to review the reviewer's report before it is provided to the SFC or to request that changes be made to the report);
- (iv) (in the case of a fact-finding review) the SFC's use of the reviewer's findings of fact as the basis for appropriate disciplinary proceedings; and
- (v) (in the case of a prospective internal control review) take the remedial steps advised by the SFC and the reviewer and all other necessary enhancements to the firm's internal controls.

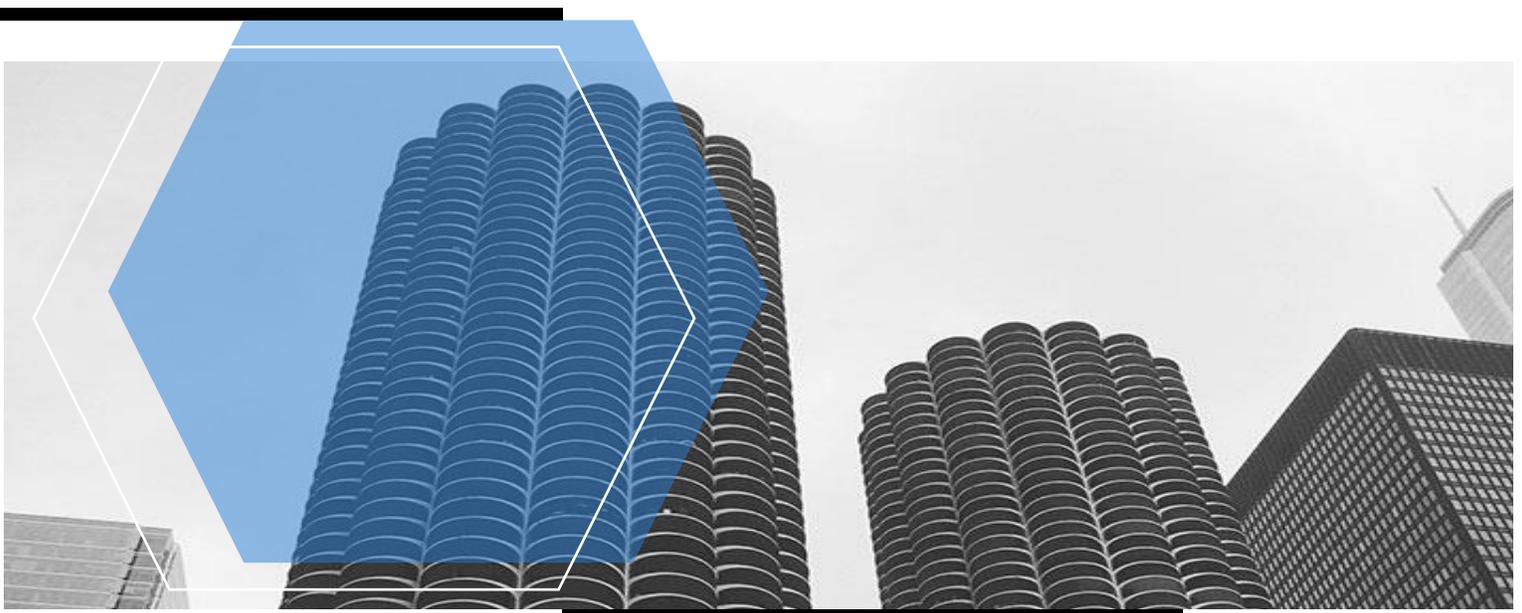
*(c) Undertaking by Directors (in case of a firm)*

Giving of undertakings by its board of directors collectively and individually to address the SFC's regulatory concerns will be taken into account when considering the Section 201 Agreement. These may include, for instance, undertakings to remedy deficiencies identified in a third-party review within a specified period of time (e.g. 12 months and to ensure that such failings would not reoccur.

*(d) Waiver of Privilege*

The SFC acknowledges that a bona fide refusal to waive legal professional privilege attached to a document provided to the SFC will not be regarded as uncooperative conduct, recognises that legal professional privilege is a fundamental right and fully respects the exercise thereof.

Be that as it may, if a person voluntarily waives a claim to legal professional privilege over a document (whether in whole or in part), this may be considered as cooperation.



## 7. SANCTION REDUCTION

The followings are possible sanction reductions when the Section 201 Agreement is reached.

	Disciplinary Process	Sanction Reduction
Stage 1	From the detection of the misconduct or regulatory failings up to the issuance of a Notice of Proposed Disciplinary Action (“NPDA”)	Up to 30%
Stage 2	From the issuance of an NPDA up to the deadline for the regulated person to make written representations in response to the NPDA	Up to 20%
Stage 3	From the deadline for making representations up to the issuance of a decision notice of the disciplinary action	Up to 10%

Further reductions in sanctions may be possible in cases where the regulated person has provided exceptional and substantial cooperation to the SFC.

Should you have any questions, please contact our Mr. Lawrence Yeung on (852) 2854 3070 or by email at [lawrence.yeung@ycylawyers.com.hk](mailto:lawrence.yeung@ycylawyers.com.hk).

*This explanatory note is not, and should not be regarded as, legal advice. Should you have any enquiries, please seek specific advice from legal advisers.*

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