

Hong Kong SFC and Insurance Authority Sign MoU to Enhance Information Sharing and Case Referral

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INTRODUCTION

On 28 September 2020, the Securities and Futures Commission (“SFC”) and the Insurance Authority (“IA”) announced that they had signed a [memorandum of understanding](#) (“SFC MoU”) following the IA’s assumption of direct regulatory powers over insurance intermediaries last year.

The SFC MoU aims to further strengthen the cooperation between the SFC and the IA, facilitate the performance of their respective regulatory functions and reduce any administrative duplication between them by specifying their respective responsibilities in various areas including sharing and exchange of information, joint investigations and inspections, and supervision and enforcement matters.

REGULATORY BACKGROUND

The SFC MoU comes just over one year after the new statutory regime for the regulation of insurance intermediaries took effect on 23 September 2019, under which the IA assumed direct regulatory supervision of insurance intermediaries. The new regime provided the IA with powers of inspection and enforcement in relation to an intermediary industry that was previously primarily self-regulated. These powers are similar to, and in some instances go beyond, the corresponding powers the IA has with regard to authorised insurers.

Although there have been no high-profile enforcement actions by the IA to date (no doubt in part due to the relative infancy of the IA enforcement regime), the IA has nevertheless been proactive in carrying out its regulatory functions and duties under the Insurance Ordinance, for example: publishing a set of [FAQs](#) to clarify the disciplinary process and secrecy provisions under the Insurance Ordinance (Cap. 41); working on the implementation of a new group-wide supervision framework for IA-regulated multinational insurance groups which is due to be introduced in the first quarter of 2021 and contains new powers of investigation and enforcement in relation to such insurance groups; and signing a memorandum of understanding with the Hong Kong Monetary

Authority (“HKMA MoU”) to strengthen cooperation in respect of regulation and supervision of entities or financial groups in which they have a mutual regulatory interest.

A memorandum of understanding had been in place between the IA and the SFC since 2005 when the IA was still a government entity. The IA becoming an independent industry regulator with enforcement powers comparable to those of the SFC and subsequently assuming the direct regulation of insurance intermediaries necessitated an update of the arrangements between the IA and the SFC, and the SFC MoU therefore supersedes the 2005 memorandum.

WHAT DOES THIS MEAN FOR BUSINESSES GOING FORWARD?

(A) Some Businesses May Be Subject to the Scrutiny of Both Regulators

There are circumstances where an authorised insurer, a licensed insurance intermediary, an SFC-licensed person or a financial group may fall under the regulatory ambit of both the IA and SFC, for example:

- a) where an authorised insurer or a licensed insurance intermediary is (or is not but may be required to be) an SFC-licensed person;
- b) where an authorised insurer or a licensed insurance intermediary has a subsidiary that is an SFC-licensed person;
- c) where an SFC-licensed person has a subsidiary that is an authorised insurer or a licensed insurance intermediary;
- d) where an authorised insurer or a licensed insurance intermediary has involvement in the management, operation or administration or issuance or distribution of certain financial products;
- e) where a financial group has both an SFC-licensed person and an entity that is an authorised insurer or a licensed insurance intermediary; and
- f) where an authorised insurer is seeking to obtain or maintains an authorisation by the SFC of an investment-linked assurance scheme (“**ILAS**”) or other insurance-related investment products such as pooled retirement funds.

In these circumstances, under the SFC MoU, the IA and the SFC agree to coordinate with each other and exchange information to facilitate supervision. This will mean that businesses in which both regulators take an interest will need to approach compliance

matters on the assumption that information provided to one regulator may be shared with the other, subject to the limits imposed on such information-sharing under the Insurance Ordinance and the Securities and Futures Ordinance.

(B) Joint Investigations and Inspections

Unlike the arrangement with the HKMA where the IA has delegated certain inspection and investigation powers to the HKMA in relation to banks conducting insurance intermediary activities, the SFC MoU allows the IA and the SFC to commence a joint investigation or to conduct a joint inspection if a case falls within the functions of both regulators.

In the case of a joint investigation, a joint task force will be set up to convene an initial coordination meeting to formulate investigation plans, determine investigatory responsibilities and coordinate the collection of evidence. The joint task force will also convene regular meetings to review the progress of the joint investigation or inspection. At the conclusion of the joint investigation, the joint task force will discuss the action to be taken against the wrongdoing party, though it is unclear if the regulators will take enforcement action in parallel or jointly with each other.

Joint investigations benefit businesses in that they may save costs and resources by avoiding parallel investigations separately brought by the two regulators. However, joint investigations will generally have a wider scope which inevitably will increase the scale and ambit of the investigation, increasing the chances of uncovering misconduct.

(C) Referrals of Enforcement Cases

In the discharge of its duties, each regulator will actively consider whether it should refer matters to the other regulator for possible action. In cases where the suspected offence or misconduct falls entirely outside of a regulator's functions but within the functions of the other regulator or where a regulator believes that the other regulator is better placed to take a case forward, the case may be referred to the other regulator for possible action.

Since the SFC MoU does not specify at what stage of the process regulators will consider case referrals, businesses subject to both regulatory regimes should be prepared for a shift in focus and approach at any time during the investigation should the case be referred to the other regulator.

CONCLUSION

The SFC MoU will enhance the regulatory cooperation and effectiveness of both regulators in discharging their regulatory responsibilities with regard to entities and

groups in which they both take an interest. This is relevant, for instance, to financial intermediaries that are both SFC-licensed persons and IA-licensed insurance intermediaries since compliance findings by one regulator (in relation to issues such as anti-money laundering) are likely to result in the other regulator considering whether a regulatory investigation is appropriate under its own regime.

Although the IA now has essentially the same investigation and enforcement powers as the SFC, the IA does not (yet) have the same enforcement culture as the SFC, which for many years has taken a hard-line approach to enforcement. The possibility of joint investigations and increased cooperation is therefore likely to lead to increased regulatory scrutiny—and risk of regulatory fines—for entities whose insurance intermediary activities were previously subject to a self-regulatory regime. The same is true for financial groups containing both IA- and SFC-regulated entities. Since the IA's investigation and enforcement powers are modelled upon those of the SFC, the IA will likely look to the SFC with regard to the exercise of its investigation and enforcement powers and potentially the level of fines to be imposed.

While the SFC MoU is conceived as a mutual arrangement, it may be particularly beneficial to the IA since it provides an avenue to benefit from the experience and expertise of the SFC in investigating and sanctioning regulated persons.

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Please do not hesitate to contact us with any questions.

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