FAQ on Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (the "Code")

This FAQ aims to provide guidance on the application of paragraph 6.2(i) of the Code.

A. Asset management activities

1. Are intermediaries licensed or registered for Type 9 regulated activity (asset management) required to insert the new clause under paragraph 6.2(i) of the Code ("New Clause") into the agreements that they signed with their clients?

As stated in the Consultation Conclusions on the Client Agreement Requirements ("Consultation Conclusions") issued on 8 December 2015, all intermediaries, including those licensed or registered for Type 9 regulated activity, should include the New Clause in their client agreements.

Furthermore, it is explained in paragraph 36 of the Consultation Conclusions that under the new professional investor regime, all intermediaries serving "Institutional Professional Investors ("Institutional PIs")" or "Corporate Professional Investors ("Corporate PIs")" (as defined under the new paragraph 15.2 of the Code) are entitled to certain Code exemptions. These include the discretion to waive the need to enter into a client agreement when dealing with these classes of investors under the new paragraph 15.4 of the Code (for an intermediary serving a Corporate PI to be exempt, it should observe the assessment requirements under the new paragraph 15.3A and comply with the new paragraph 15.3B of the Code). Should an intermediary still choose to enter into a client agreement with such a client for business efficacy or other valid reasons, it would not be obliged to include the New Clause given that the requirement for an agreement can be waived under the Code in the first place.

2. Are intermediaries that enter into discretionary investment management agreements ("IMAs") with their clients for providing discretionary investment management services to them required to insert the New Clause into the IMAs?

Intermediaries should include the New Clause in the client agreements unless they are entitled to exemptions as explained in paragraphs 35 and 36 of the Consultation Conclusions. As such, all intermediaries that provide discretionary investment management services to their clients and enter into agreements with them, such as IMAs, should include the New Clause in the agreements unless they are entitled to the exemptions.

3. **Where a client is an unregulated fund, a hedge fund or a sovereign wealth fund, can an intermediary treat such client as an Institutional PI for the purpose of complying with paragraph 6.2(i) of the Code?**

The term “Institutional Professional Investors” is defined in paragraph 15.2 of the Code to mean persons falling under paragraphs (a) to (i) of the definition of “professional investor” in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (“SFO”). Intermediaries shall have regard to the definition set out in the SFO in determining whether their clients could be treated as Institutional PIs for the purpose of complying with paragraph 6.2(i) of the Code.

B. Corporate finance activities

4. **Are intermediaries that engage in corporate finance activities (e.g. advising on new share placements or rights offerings, merger and acquisition advisory, corporate restructuring, financing activities, underwriting and sponsor activities) required to insert the New Clause into the client agreements?**

As provided in paragraph 35 of the Consultation Conclusions, the New Clause is unlikely to be applicable in a standard corporate finance mandate. As a standard corporate finance mandate essentially covers all corporate finance activities falling within the definition of advising on corporate finance in Part 2 of Schedule 5 to the SFO, an intermediary conducting corporate finance activities should generally be able to rely on paragraph 6.4 of the Code given the limited nature of the services provided.

C. Others

5. **Can the wording in the New Clause be changed while preserving the overall meaning / substance of such clause?**

The New Clause must be incorporated verbatim with no modification to its original wording. However, the SFC has no objection to minor and inconsequential drafting amendments to the New Clause which modify the references of ''we'' to ''the Firm'', ''you" to "the Customer" and "agreement" to "Terms" etc. so as to make them compatible with the cross-references in the firms’ underlying documents.

6. **Are intermediaries required to re-execute new client agreements with existing clients to comply with the new client agreement requirements?**

Intermediaries are expected to make available revised client agreements expeditiously to enable existing clients to enter into revised client agreements (by way of amending / replacing their existing agreements) as soon as possible.

With regard to how to amend the client agreements, it depends on the circumstances and can be done in different ways (e.g. by negative consent approach or by re-executing the agreement) and intermediaries should seek legal advice on this if in doubt.