



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

## Consultation Conclusions on the draft SFC Disciplinary Fining Guidelines

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## Contents

<b>Introduction</b>	1
<b>Comments on the draft fining guidelines</b>	1
Tariff-based approach	1
Considerations that should be included in the fining guidelines	3
“Conduct”	4
Specific comments on the draft fining guidelines	4
<b>Issues that are outside the scope of the consultation exercise</b>	9
Power of the SFC to impose fines	9
Checks and balances of the power of the SFC	10
Disciplinary or fining guidelines?	11
Relationship of fines and other disciplinary sanctions	11
Options for disciplinary sanctions/settlement	12
General guidance from the SFC	13
Regulatory equality	13
Miscellaneous/general enquiries	14
<b>Conclusion</b>	15
<b>Appendix A</b>	16
<b>Appendix B</b>	19

## **INTRODUCTION**

1. In March 2001, the SFC published for public consultation draft disciplinary fining guidelines to be made under section 199(1)(a) of the Securities and Futures Ordinance (Ordinance). In August 2001, consultation with the Hong Kong Association of Banks and the Hong Kong Association of Restricted License Banks and Deposit-taking Companies was conducted through the Hong Kong Monetary Authority after the Government proposed to extend the SFC's fining power to registered institutions and their associated persons. Twelve submissions were received. This paper summarises the public comments and our responses.

## **COMMENTS ON THE DRAFT FINING GUIDELINES**

### **TARIFF-BASED APPROACH**

2. In the exercise of the power to fine regulated persons, the overriding objectives of the SFC are consistency, proportionality and justice. The SFC has considered the approaches adopted by the regulators of major jurisdictions, and has decided not to adopt the tariff-based approach for reasons that we set out in the circular attached to the draft fining guidelines at the time of public consultation (Appendix A). Notwithstanding this, some respondents were of the view that the tariff-based approach should be adopted while some commented that the guidelines should be more specific.
3. Some respondents submitted that a tariff-based approach would give more certainty to regulated persons, and one commented that the fines should be precise. However, our view remains that a tariff-based approach would be inappropriate because the grounds for which a disciplinary action can be taken are too varied to allow for precise categorisation or conclusive itemisation. The guidelines set out the considerations that the SFC will take into account to ensure that we will act on a just and consistent basis. In our view, the aim of

achieving proportionality will not be reached by correlating prescribed conduct and a fine of a pre-set amount.

4. One respondent considered that there is a need to draw a distinction between administrative and substantive fines, for routine and more serious conduct respectively. A similar approach is adopted by the Financial Services Authority in the UK. The distinction in the UK applies to the very limited areas of late annual reports and annual returns. The fine tariffs are only indicative and may be departed from. Sections 195(4), (5) and (6) of the Ordinance provide for specific sanctions in respect of similar technical breaches, i.e. deemed suspension on failure to pay an annual fee or failure to submit an annual return. Given this, we do not see the merit in mirroring the UK approach. Further, it depends on the circumstances whether conduct is “administrative” or “substantive”. Deeming conduct as either “administrative” or “substantive” in advance cannot cater for this complexity.
5. Some respondents asked us to give specific examples on the types of conduct that do not attract a fine, and circumstances that may attract a fine close to \$10 million. Whether a fine will be imposed depends on all facts and circumstances of a case as viewed through the guidelines. The indicators of the seriousness of the conduct in question are set out in the guidelines. We do not consider it to be helpful to give examples of specific conduct that is “serious” when after taking into account varying mitigating circumstances (whether set out in the guidelines or otherwise) a lower fine may be imposed.
6. One respondent was concerned that the lack of more specific guidelines would lead to the SFC violating human rights laws against the retrospective application of a criminal statute. We are advised that the proposed system complies with applicable human rights protections. Recent UK case law also supports the proposed system.<sup>1</sup>

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<sup>1</sup> *R v The Securities and Futures Authority Limited, ex parte Fleurose* Case No. CO/988/2000.

## **CONSIDERATIONS THAT SHOULD BE INCLUDED IN THE FINING GUIDELINES**

7. One respondent commented that the matters specified in sections 194(3) and 196(3) that the SFC should take into account, e.g. present or past conduct of the regulated person, should be included in the guidelines. We believe that the guidelines already include sufficient information in relation to issues that the Ordinance empowers the SFC to take into account in disciplinary proceedings including past and present conduct. Generally, present and past conduct will be considered in determining a penalty, but the relevance of matters such as present or past conduct will depend upon the facts and circumstances of a case as viewed through the guidelines. For example, a previous good record will not usually excuse a very serious breach.
8. One respondent suggested that we should take into account the legal costs of a regulated person in disciplinary proceedings. We will consider all the circumstances of a matter as viewed through the guidelines. If a regulated person raised legal costs in their representations before a final decision was made on the penalty in a disciplinary action it would be considered. However, explicitly including in the guidelines legal expenses incurred as a ground to reduce a fine may encourage the incurring of excessive legal expenses with some believing that there is no downside to do so as it can increase the chance of no penalty. We believe it is more appropriate to consider it in the context of whether a fine would put a regulated person in financial jeopardy as the guidelines propose. In this sense, the SFC will have regard to the financial circumstances of a party.
9. One respondent asked how the SFC would distinguish between corporate and individual regulated persons, and the management and employees of the regulated persons when imposing fines. This will depend on the circumstances of each case. We will take into account the role of the person/entity in question and in relation to those in management, whether there is any consent or connivance or negligence on his/her part, any failure in supervision, or the management of business. This is already to a degree set

out in the Ordinance in respect of “misconduct” under section 193(1) in relation to the attribution of the “misconduct” of a corporation to its management and analogous principles apply where there is a finding based on fitness and properness alone.

#### **“CONDUCT”**

10. A few submissions commented on the use of the word “conduct”. Some respondents asked whether “conduct” means “misconduct” as defined in section 193(1) of the Ordinance, and one respondent felt that the use of the word is too wide. One respondent asked the meaning of “his other conduct” in section 194(2)(ii). “Conduct” in the guidelines carries the natural meaning of the word, i.e. a person’s behaviour. It includes misconduct as defined in section 193(1) and conduct that impugns a regulated person’s fitness and properness, for which the SFC is empowered to discipline a regulated person. We have avoided using “misconduct” as it is a defined term in the Ordinance. Further, “fitness and properness” is elaborated in the Ordinance and guidelines issued by the SFC.

#### **SPECIFIC COMMENTS ON THE DRAFT FINING GUIDELINES**

11. One respondent felt that the guidelines should address the process of reaching the decision of imposing a fine because section 199 stipulates the “functions” of the SFC. We consider “functions” in section 199 to mean the functions of imposing fines and deciding the amount of fines. Other functions and procedures in relation to disciplinary proceedings are set out in other parts of the Ordinance and we do not agree that it would help to repeat those provisions in the guidelines, which are more akin to sentencing guidelines than general procedural guidelines.

12. Some respondents commented that the “General Considerations” do not provide useful guidance on whether a fine will be high or low. The distinction between “General” and “Specific” considerations was a proposal of the SFC Disciplinary Fining Guidelines Working Group with which we agreed. We

feel it is useful in that it highlights the considerations that are generally more important. But the final level of fine will depend on the application of the guidelines to the circumstances of the case. Subsequent to the public consultation exercise, the Government proposed to expressly set out in the Ordinance the general considerations as factors that the Commission should take into account when performing its function of fining (see section 199(2)).

13. Some respondents felt that negligent conduct does not warrant a fine. But, depending on the circumstances of the case, the range of negligent conduct is very broad and some negligent conduct can be very serious. Negligence is a recognised head of discipline. Whether a fine is warranted and if so how much depends on the circumstances of a case.
14. Some respondents suggested that minor technical breaches or trivial conduct does not warrant a fine, and generally warrants lower or pre-determined penalty, e.g. a reprimand. We agree, but what amounts to a technical breach or trivial conduct depends on the circumstances as viewed through the guidelines and cannot be prescribed in advance.
15. One respondent suggested that the SFC should consider conduct that produces loss or causes detriment to the firm or individual involved as a mitigating factor. We do not agree as whether this is a mitigating factor will depend on the circumstances, e.g. whether market integrity is affected, loss to others, the intention of the regulated person when engaging in the conduct, etc. For example, if a person intended his/her conduct to result in a large profit, but because of poor execution or bad luck, it resulted in a small loss to them, but the conduct distorted the whole market, we would view that as serious conduct.
16. We were asked by some respondents to further elaborate on “conduct that damages or impacts on the integrity of the market”. From our experience, regulated persons and people involved in the financial market seem to have a good understanding of “the integrity of the market”. This phrase has been used internationally and in Hong Kong (e.g. the Code of Conduct). We do not propose to elaborate on it.

17. One respondent asked us to consider whether it was reasonable for the regulated person to obtain advice when we consider the factor of whether prior advice was sought. The circumstances surrounding whether prior advice was sought will be considered, including whether it was reasonable for the regulated person to do so. We do not believe it is necessary to elaborate further in the guidelines.
18. On the consideration regarding whether the conduct is widespread, a respondent asked whether this is a factor for increasing or decreasing the penalty. We would draw an analogy with a criminal court's consideration of the prevalence of an offence on sentencing. It was held in decided cases that where an offence is common, a heavier sentence might be appropriate to deter those of a like mind. However, we understand that general deterrence must be balanced against the need for fairness in the individual case and proportionality of penalty. Another respondent suggested that we could include how long the conduct in question has been in place in the relevant industry. We have now included in the guidelines the period of time that the conduct has been in place in the relevant industry.
19. One respondent commented that a breach of fiduciary duty does not necessarily indicate that the conduct is serious, and the important factors are the nature and effect of the conduct. Breach of fiduciary duty is just one of the considerations that we will take into account, together with other considerations that are relevant to a case. But, in our view, the existence of a fiduciary duty implies a higher standard of conduct, and frequently a breach of faith in a circumstance of reliance and, so, a breach may imply graver conduct.
20. On the consideration of whether the conduct reveals serious or systematic weaknesses in a firm's business, a respondent suggested that we should consider whether the firm with reasonable efforts, should have been able to identify and eliminate the risk. This is a consideration that we already take into account in disciplinary actions involving a firm's internal control

weaknesses. We do not believe further elaboration is necessary as we feel this is already implicit in the guidelines and our past disciplinary decisions.

21. A respondent asked whether the level of the fine is automatically linked with the amount of profit gained or losses avoided (if any) as sections 194(2) and 196(2) provide that the fine should not exceed \$10 million or 3 times the profit gained or loss avoided. It was also suggested that we should delete the sentence on the deterrent effect of a fine as it is not a consideration relevant to the level of fine, and move the factor on whether a firm or an individual and related parties benefit from the conduct to the section on the nature and seriousness of the conduct. It is not our intention to automatically link the fine with the profit gained or loss avoided in cases where there is profit secured or loss avoided. \$10 million or 3 times the amount of the profit is stated in sections 194(2) and 196(2) as a means of limiting the *maximum* fine that can be imposed by the SFC. We will consider all relevant circumstances of a case including the fact that there was profit secured or loss avoided. We have clarified this in the introductory paragraphs of the guidelines and have moved the sentence on the deterrent effect of fines to the introductory paragraphs. However, profit gained or loss avoided by a regulated person is different from the question of loss caused to others.
22. Some respondents expressed concern or caution about using “the size, financial resources and other circumstances of the firm or an individual” as a consideration, claiming that it will be open to manipulation or would lead to inconsistency. One respondent asked why the issue of the possible deliberate dissipation of assets is included in the guidelines. In our view, consistency is a consideration, as is justice in the circumstances of a particular case. Size and financial resources of a firm or an individual are not usually factors except insofar as a fine should not put a regulated person in financial jeopardy. We have amended the guidelines to limit the consideration to that. The point on dissipation of assets is included because we foresee that it is possible that some firms or individuals may manipulate a situation to create the appearance of possible financial jeopardy if a fine were to be imposed.

23. One respondent considered the way in which the conduct is brought to the attention of the SFC is important. We agree, but do not see the need to elaborate further in the guidelines.
24. One respondent suggested that we move the factor on whether the SFC has issued any guidance in relation to the conduct in question to “the nature and seriousness of the conduct”. We agree and have done so.
25. On the factor of “any punishment imposed or regulatory action taken or likely to be taken by other competent authorities”, submissions were made in relation to the SFC’s approach on imposing fines in cases where a regulated person is convicted and fined by a court or the Market Misconduct Tribunal (MMT), or is penalised by other competent authorities. Whether a fine will still be imposed depends on the circumstances. Our power to discipline in these cases is set out in section 193 which provides that contravention of any relevant provision is deemed to be misconduct, which is a ground under which we may take disciplinary action under sections 194 and 196. Separately, under sections 195 and 197, a license or registration may be suspended or revoked if a licensed person or registered institution is convicted of an offence (other than under the relevant provisions as this is catered for in section 193) which impugns the fitness and properness of the licensed person to remain licensed or registered. We will bear in mind the potential for unfairness or a lack of proportionality in such cases. If a long gaol term or a large fine is imposed already by another competent authority, we will give regard to those factors and impose proportionate sanctions. The SFC is perhaps more likely to use its powers of suspension or revocation to complement the jurisdiction of the criminal courts and the MMT – because suspension and revocation are also important protective remedies. If a person criminally prosecuted is found guilty, we must in the public interest consider whether that person’s conduct is so serious that they should be excluded from the industry. We may, in some circumstances, fine though. We feel that the guidelines have sufficiently taken this into account.

26. On the factor of the results of civil action taken, one respondent pointed out that the nature of a civil action is compensatory while disciplinary action is punitive. There is uncertainty about whether an action will be brought, if so, when, and the timing of the conclusion of the proceedings. We believe that civil actions are not purely compensatory, but also have a deterrent effect. In our view, there would be less need to impose a fine if a person who suffers loss successfully claims damages from the regulated person. Moreover, civil damages will have an effect on a regulated person's financial resources. In such cases, depending on the circumstances, the SFC may consider reducing the fine and possibly imposing other sanctions. We recognise that there will be a limitation in terms of the availability of information, owing to the timing of civil action, which is beyond our control, but we have to consider the effects of a fine on a regulated person.

#### **ISSUES THAT ARE OUTSIDE THE SCOPE OF THE CONSULTATION EXERCISE**

27. The consultation exercise is intended to seek public views on the guidelines. We have received a number of responses that are not directly on the guidelines.

#### **POWER OF THE SFC TO IMPOSE FINES**

28. It was submitted that the power to fine should be limited to market misconduct only, as it was claimed that in the UK the FSA may only fine for "market abuse" which covers conduct similar to the concept of "market misconduct" under the Ordinance. The respondent also suggested that, in the UK, fines will not be imposed if a person has a reasonable defence and that the court is entitled to decide whether such penalty should be imposed. We disagree. The sanction of imposing *disciplinary* fines is for a broad range of conduct which indicates that the regulated person's behaviour does not meet the expected standard of fitness and properness or is guilty of misconduct and therefore should not enjoy the privileged status of dealing with the investing public. The respondent's understanding of the UK position is incorrect. The FSA is empowered to impose financial penalties on a firm that has contravened

a requirement imposed on it, an approved person who is guilty of misconduct, and any person who engages in market abuse activities.<sup>2</sup>

## **CHECKS AND BALANCES OF THE POWER OF THE SFC**

29. Some respondents were concerned about the sufficiency of checks and balances on the SFC's exercise of its disciplinary powers, including imposing fines on regulated persons. We consider that there already are sufficient checks and balances to the SFC's power. Under section 198 of the Ordinance, a regulated person will be advised of the SFC's concerns, its preliminary conclusions and proposed sanction(s), which would include its initial thoughts as to the level of fine, if one is to be imposed. The regulated person is then given a chance to make representations. A written notice of decision will be given, which will include any fine the SFC decides to impose. Under Part XI of the Ordinance, regulated persons that feel aggrieved by disciplinary decisions can appeal to an independent merits review tribunal. The appeal process is designed to be relatively simple, speedy and non-technical. Other options for regulated persons include judicial review and complaining to the Ombudsman. The Process Review Panel, which we understand is a world first for securities regulators, will help ensure that the SFC adheres to proper procedures when imposing a fine.
30. One respondent commented that the SFC does not have certain mechanisms that the FSA has (e.g. the Regulatory Decisions Committee) to check and balance their exercise of power. Different measures are used in different jurisdictions to ensure sufficient checks and balances are in place. In our view, the procedures adopted in Hong Kong work well and are more than adequate to ensure fairness.
31. One respondent asked about who in the SFC decides to impose a fine and whether he/she is involved in the investigation process. The investigators are not involved in the disciplinary process. The decision-makers in disciplinary

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<sup>2</sup> See sections 66, 206, and 123 of the Financial Services and Markets Act 2000.

proceedings are senior SFC directors either not involved or only remotely involved in the investigation process. Moreover, both the current law and the Ordinance have provisions to ensure that there is no conflict of interest in the course of the performance of duties by an SFC director or a staff member.

#### **DISCIPLINARY OR FINING GUIDELINES?**

32. Some respondents proposed that guidelines on imposing other disciplinary sanctions, and the circumstances under which the SFC will impose a fine separately or together with other sanctions should be published. We consider the indicators of seriousness for imposing different sanctions will generally be the same as those stated in the fining guidelines. Whether multiple penalties will be imposed in a case depends on the facts and circumstances of a case.

#### **RELATIONSHIP OF FINES AND OTHER DISCIPLINARY SANCTIONS**

33. We received a submission that strongly supported the imposition of fines as an intermediary sanction between reprimand and suspension. However another respondent considered fines to be not as effective as public reprimands because they thought that the threat of the latter creates sufficient pressure on regulated persons to comply with the relevant rules. We believe fining is an appropriate addition to the SFC's disciplinary sanctions. It is not a matter of one sanction being more effective than another. The sanctions are complements to one another. The introduction of fines enables the SFC to impose disciplinary sanctions that are more closely fitted to the circumstances of the case.
34. One respondent commented that the SFC's position that a fine is an intermediary sanction between a reprimand and a suspension or revocation is not reflected in sections 194 and 196 of the Ordinance. Submissions were also made on whether fines and other penalties are mutually exclusive and whether the SFC intends to impose fines as a stand-alone sanction. As we noted above, we consider that fines round out the disciplinary sanctions we are able to impose so that the SFC can better tailor sanctions to the circumstances of a particular case. Fines and other penalties are not mutually exclusive. A

fine may be the only penalty or one of the penalties to be imposed. The guidelines are consistent with sections 194 and 196 in this respect.

35. Another respondent asked when will the SFC impose a combination of penalties and whether a combination of private censure and fine will be imposed. Whether we will impose a mix of penalties depends on the circumstances of a case. We may impose any sanction(s) proportionate to the circumstances of the case. As explained in paragraph 2 of the guidelines, we consider a fine to be more severe than a reprimand (and obviously a public reprimand more severe than a private reprimand) and, as a matter of policy, publicity will follow from the imposition of a fine. This means that the SFC will not impose both a private reprimand and a fine in a disciplinary case. We have amended the guidelines to clarify this.

#### **OPTIONS FOR DISCIPLINARY SANCTIONS/ SETTLEMENT**

36. It was suggested that the SFC may consider the issue of a warning letter and set monitoring periods for which a regulated person may be disciplined. We already issue advisory and warning letters. Monitoring of all regulated persons is ongoing through our inspection programme.
37. One respondent asked whether a regulated person could elect a higher level penalty (e.g. a suspension) if he/she does not want to pay a fine. We will consider all representations made by a regulated person before deciding whether to impose a fine and the amount of the fine. Each case will depend on its own circumstances. We must do justice in the individual case. The fines are tailored to different circumstances and there is scope for negotiated settlement.
38. It was submitted that the SFC could consider settlement with regulated persons without the admission of guilt. Another submission proposed that the SFC should put in place a set of settlement procedures. Section 201(3) of the Ordinance empowers us to settle disciplinary cases against regulated persons. As a matter of practice, we do not settle a matter on a no admission basis. We

can only settle if it is in the interest of the investing public or in the public interest. We consider that there is no need to have a set of public procedures for settlement as too much depends on the circumstances of each case.

39. One respondent suggested that the SFC may consider restitutionary measures as one of its disciplinary powers. We note the comment, but consider the disciplinary sanctions set out in the Ordinance to be sufficient.

#### **GENERAL GUIDANCE FROM THE SFC**

40. A respondent pointed out that both the US Commodity Futures Trading Commission and the UK FSA have mechanisms by which regulated persons can obtain advice or guidance as to whether their conduct amounts to abuse, and specific examples are given by the FSA in its guidelines. We have already issued guidance on standards of conduct to be expected of regulated persons. Whenever possible, we will also provide guidance and an opinion on individual cases. Where the concern is in respect of possible conduct that will lead to disciplinary action, short of criminal breach, the opinions expressed by us in such cases are a sufficient basis for a regulated person to proceed without fear of disciplinary action. However, our opinions on individual matters are limited specifically to the facts in question and are contingent on a full and frank disclosure of all relevant information. We generally encourage regulated persons to seek their own legal advice. Wherever a matter of general market interest or concern arises, we seek to inform the market generally of our views. The guidance we give is necessarily limited where a criminal sanction may also apply because we are not the ultimate prosecuting authority in Hong Kong.

#### **REGULATORY EQUALITY**

41. Two respondents commented that the sanction of fining should also apply to all persons engaged in the same regulated activities including registered institutions (formerly called “exempt persons” in the Blue Bill). The Government proposed this as a Bills Committee stage amendment to the

Ordinance, and the proposed amendments has been passed by the Legislative Council and are reflected in section 196 of the Ordinance.

#### **MISCELLANEOUS/GENERAL ENQUIRIES**

42. One respondent suggested that the appeal process should be a simplified procedure so that the costs of the appeal could stay low. It was also pointed out that legal aid is available for certain aspects of the disciplinary process in the UK. The appeal process is designed to be relatively simple, speedy and much less expensive than court proceedings. There is scope for a person to be represented by a non-lawyer or they may represent themselves. The Securities and Futures Appeals Tribunal (SFAT) has a non-technical jurisdiction. The issues to be considered at appeal include ethical and professional issues, as well as business practices of regulated persons. It is expected that the disputes would usually be factual or policy based rather than legal.
  
43. A couple of submissions were concerned with whether there would be publicity following from the imposition of a fine or after all appeal routes are exhausted. Our view is that publicity is important for the transparency of the process, an important safeguard of consistency and an important aid to the public in protecting their own best interests. Following a Bills Committee stage amendment proposed by the Government and passed by the Legislative Council (section 232), fining decisions will be automatically stayed on appeal. In terms of the appeal process, under section 20 of Schedule 7 of the Ordinance, all sittings of the SFAT will be in public unless the Tribunal determines that it is in the interest of justice that a sitting should be held in private. Generally, it will be our submission before the Tribunal that it should sit in public.
  
44. One respondent commented that the database of our past disciplinary sanctions should be made available for public inspection to promote transparency and to assist regulated persons to decide whether to appeal a decision. On the same issue, another respondent suggested that we refer to the fining decisions on insider dealing cases as a starting point for precedents. Information relevant to our decisions and the type of penalty imposed is included in the press

releases and is available to the public on the SFC's website. Our internal database cannot be made public as it includes confidential operational information for use by us only. We are aware that it will take time to build up the database of our fining decisions. We will consider arranging the press releases on disciplinary actions on our website in a clearer, more accessible manner. We do not think that it is appropriate to use insider dealing cases as precedents because the nature of insider dealing cases and disciplinary actions is quite different.

45. Other general enquires were made on the burden of proof in disciplinary cases, the composition of the SFAT, the usage of the fines, and whether fines will be covered by insurance. The burden of proof is on the SFC in disciplinary proceedings. The composition of the SFAT is set out in Part XI of the Ordinance. Fines collected will be paid into the Government's general revenue. Whether fines will be covered by insurance is a matter of contract between the insurer and the insured, but we think it is unlikely that an insurer would insure against statutorily imposed penalties.

## **CONCLUSION**

46. As stated above, we have amended the guidelines taking into account the comments of the respondents. Revised guidelines indicating the changes that have been made to the draft issued for public consultation can be found at Appendix B.

## **Securities and Futures Bill**

### **Draft SFC disciplinary fining guidelines**

1. Attached are draft guidelines on how the SFC proposes to exercise its power to fine under the Securities and Futures Bill (Bill) now being scrutinised by the Legislative Council (Fining Guidelines). The draft Fining Guidelines are also available on the SFC's internet website at <http://www.hksfc.org.hk>.
2. The SFC is now seeking comment on the draft Fining Guidelines from the securities and futures industry, professional bodies concerned and the public in general.
3. Under clause 187(2) of the Bill, the SFC will be able to fine a "regulated person" up to a maximum of \$10 million or 3 times the profit made or loss avoided, whichever is the higher, as a result of their improper conduct. A "regulated person" is a licensed corporation, a licensed representative or a person involved in the management of a licensed corporation including a responsible officer. Fines have been primarily proposed as an intermediate sanction between a reprimand and the suspension or revocation of a person's licence, this is because a reprimand may be too light and suspension or revocation too severe, particularly against a corporation in the latter case when many innocent parties may be adversely affected. However, the SFC may fine in any circumstances it considers appropriate and may do so in other suitable circumstances (e.g. in cases where an intermediary has profited from their conduct). The proposed fining power will allow the SFC to tailor disciplinary sanctions to more closely fit the circumstances of a particular case. Before fining a person, the SFC must tell that person why it is considering fining them and how much it intends to fine them. The person is then granted a chance to make representations. If, after considering the person's representations, the SFC decides to impose a fine, it must give the person written notice of the decision and the reasons for the decision. Both the decision to fine and the level of fine will be appealable to the independent merits review body, the Securities and Futures Appeals Tribunal (**SFAT**) under Part XI of the Bill.
4. To give some guidance about the relevant factors in deciding the amount of a fine, clause 187(7) of the Bill requires the SFC to publish, in the

Gazette and in any other appropriate manner, guidelines on the manner in which it proposes to exercise its fining power. Without such guidelines, fines cannot be imposed.

5. The draft Fining Guidelines are general as the SFC considers that all the circumstances of a particular case are the best guide to what level of fine to impose, if any. The draft Fining Guidelines therefore emphasise as a starting point that all a case's circumstances must be considered and describe important relevant considerations including:
  - the nature and seriousness of the conduct
  - the amount of profits accrued or loss avoided
  - the size, financial resources and other circumstances of the firm or individual and
  - other relevant factors.
6. The US Commodity Futures Trading Commission (**CFTC**) which may fine intermediaries it licences takes a similar approach. The UK Financial Services Authority (FSA), which will be empowered to impose unlimited fines upon intermediaries it regulates when the Financial Services and Markets Act comes into operation, also proposes to take this approach in drawing up fining guidelines in most instances. The CFTC and FSA guidelines have acted as references for the proposed Fining Guidelines.
7. An alternative approach would be to list the types of conduct for which a person may be disciplined and set certain levels of fine for each type of conduct. However, the SFC considers that the grounds for which disciplinary conduct can be taken are too varied to allow for precise categorisation or conclusive itemisation. If such an approach were adopted, the SFC considers that it would necessarily be arbitrary and there would always be scope for argument as to whether certain conduct was excluded and, if not, an artificial approach of likening a regulated person's particular conduct to categories of listed conduct would have to be adopted. The SFC considers this undesirable from a policy perspective as it leads to arbitrary results and obscures the real issue of setting a fine suited to an individual firm's or person's conduct.
8. To help make more consistent disciplinary decisions, the SFC's keeps a non-public database of details of all its past disciplinary decisions irrespective of whether or not a penalty was imposed. When a decision is made on the penalty to be imposed in disciplinary proceedings, details of past like cases are given to the decision maker for comparison with a

recommended penalty. Fining decisions will benefit from this database when a number of fining decisions have been made. As fining decisions will also be appealable to the SFAT, SFAT decisions will also form an important guide to the level of fine to impose. The SFC hopes that the SFAT will, in practice, also refer to the Fining Guidelines when considering appeals from fining decisions. However, as the SFAT will be independent, the SFC cannot oblige it to do so. The public can find press releases about the SFC's past disciplinary decisions in which a penalty other than a private reprimand has been imposed on the SFC's internet website at <http://www.hksfc.org.hk>.

9. The SFC invited a Working Group of intermediary directors and compliance staff, a solicitor and a representative of the Consumer Council to advise the SFC on the draft Fining Guidelines. The Working Group met twice in November and December 2000 and the SFC has incorporated many of their suggestions into the draft Fining Guidelines.
10. Please submit your comments before 11 May 2001 by sending them to:  
SFC Disciplinary Fining Guidelines  
Level 12 Edinburgh Tower  
The Landmark  
15 Queen's Road, Central  
Hong Kong  
or to:  
[fining-guidelines@hksfc.org.hk](mailto:fining-guidelines@hksfc.org.hk)

**Securities and Futures ~~Bill~~ Ordinance**  
**Considerations relevant to the level of a disciplinary fine**

These guidelines are made under ~~clause section 199(1)(a)~~ ~~[191A(1)(a)]~~<sup>87(7)</sup> of the Securities and Futures ~~Ordinance~~ ~~Bill~~ to indicate the manner in which the Securities and Futures Commission (SFC) will perform its function of imposing a fine on a regulated person under ~~clause section 194(2) or 196(2)~~ ~~[187(2) or 189A(2)]~~. ~~Clause Section 199(1)(b)~~ ~~[191A(1)(b)]~~ requires the SFC to have regard to these guidelines in performing its function of fining under ~~clause section 194(2) or 196(2)~~ ~~[187(2) or 189A(2)]~~. ~~Clause Section 199(2)~~ ~~[191A(2)]~~ sets out some factors that the SFC should take into account in exercising its fining power among other factors that the SFC may consider. These factors are included in the considerations set out below.

Under ~~clause section 194 or 196~~ ~~[187 or 189A]~~ of the Ordinance, the SFC may impose a fine either on its own or together with other disciplinary sanctions. ~~In determining the appropriate disciplinary action to take, t~~ ~~The SFC regards a fine as a more severe sanction than a ~~public or private~~ reprimand (and a public reprimand more severe than a private reprimand).~~ ~~And The SFC~~ will not impose a fine if the circumstances of a particular case only warrant a ~~private or~~ public reprimand. As a matter of policy, the SFC will publicise all fining decisions. This means that the SFC will never impose both a fine and a private reprimand.

When considering whether to impose a fine under ~~clause section 194(2) or 196(2)~~ ~~[187(2) or 189A(2)]~~ and the size of any fine, the SFC will consider all the circumstances of the particular case, including the Specific Considerations described below.

A fine should deter non-compliance with regulatory requirements so as to protect the public.

Although sections 194(2)(ii) and 196(2)(ii) clauses ~~[187(2)(ii) and 189A(2)(ii)]~~ state that one alternative maximum level of fine that can be imposed is three times the profit made or secured, or loss avoided or reduced, the SFC will not automatically link the fine imposed in any particular case with the profit made or secured, or loss avoided or reduced.

The more serious the conduct, the greater the likelihood that the SFC will impose a fine and that the size of the fine will be larger.

In determining the seriousness of conduct, in general, the SFC views some considerations as more important than others. The General Considerations set out below describe conduct that would be generally viewed as more or less serious. In any particular case, the General Considerations should be read together with the Specific Considerations in determining whether or not the SFC will impose a fine and, if so, the amount of the fine.

### ***General considerations***

The SFC generally regards the following conduct as more serious:

- conduct that is intentional or reckless
- conduct that damages the integrity of the securities and futures market
- conduct that causes loss to, or imposes costs on, others
- conduct which provides a benefit to the firm or individual engaged in that conduct ~~and their related parties~~ or any other person.

The SFC generally regards the following conduct as less serious and so generally deserving a lower fine:

- ~~inadvertent~~negligent conduct – however, the SFC will impose disciplinary sanctions including fines for negligent conduct in appropriate circumstances

- conduct which only results in a technical breach of a regulatory requirement or principle in that it:
  - + causes little or no damage to market integrity and
  - + causes little or no loss to, or imposes little or no costs on, others
- conduct which produces little or no benefit to the firm or individual engaged in that conduct and their related parties.

These are only general considerations. These considerations together with and will not bind the SFC: the other circumstances of each individual case including the Specific Considerations described below will be determinative.

### *Specific considerations*

The SFC will consider all the circumstances of a case, including:

#### *The nature and seriousness of the conduct*

- the impact of the conduct on the integrity of ~~financial~~ the securities and futures markets
- whether significant costs have been imposed on, or losses caused to others, especially clients, market users or the investing public generally
- whether the conduct was intentional, ~~or~~ reckless or negligent, including whether prior advice was sought on the lawfulness or acceptability of the conduct either by a firm from its advisors or by an individual from his or her supervisors or relevant compliance staff of the firm or group that employs him or her
- the duration and frequency of the conduct
- whether the conduct is widespread in the relevant industry (and if so, for how long) or there are reasonable grounds for believing it to be so widespread
- whether the conduct was engaged in by the firm or individual alone or whether as part of a group and the role the firm or individual played in

that group

- whether a breach of fiduciary duty was involved
- in the case of a firm, whether the conduct reveals serious or systematic weaknesses, or both, in respect of the management systems or internal controls in relation to all or part of that firm's business
- whether the SFC has issued any guidance in relation to the conduct in question

*The amount of profits accrued or loss avoided*

- a firm or individual and related parties should not benefit from the conduct
- ~~a fine should deter non-compliance with regulatory requirements so as to protect the public~~

*~~The size, financial resources and o~~Other circumstances of the firm or individual*

- a fine should not have the likely effect of putting a firm or individual in financial jeopardy. In considering this factor, the SFC will take into account the size and financial resources of the firm or individual. However, if a firm or individual takes deliberate steps to create the false appearance that a fine will place it, him or her in financial jeopardy, eg by transferring assets to third parties, this will be taken into account.
- whether a firm or individual brings its, his or her conduct to the SFC's attention in a timely manner. In reviewing this, the SFC will consider whether the firm or individual informs the SFC of all the conduct of which it, he or she is aware or only part, and the manner in which the disclosure is made and the reasons for the disclosure.—
- the degree of cooperation with the SFC and other competent authorities
- 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 future

- the previous disciplinary record of the firm or individual, including an individual or firm's previous similar conduct particularly that for which it, he or she has been disciplined before or previous good conduct
- in relation to an individual, his or her experience in the industry and position within the firm that employed him or her

*Other relevant factors, including*

- ~~whether the SFC has issued any guidance in relation to the conduct in question~~
- what action the SFC has taken in previous similar cases – in general similar cases should be treated consistently
- any punishment imposed or regulatory action taken or likely to be taken by other competent authorities
- the 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.