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Dear

Consultation on

“Proposals to Enhance the Financial Dispute Resolution Scheme”

Thank you for your letter dated 3 October 2016 inviting the Department of Justice (“DoJ”) to participate in the consultation exercise on enhancing the Financial Dispute Resolution Scheme.

The DoJ is generally supportive of the various proposals mentioned in the consultation paper entitled “Proposals to Enhance the Financial Dispute Resolution Scheme”. Our detailed responses and comments on the specific questions raised in the consultation paper are set out in the Note annexed to this letter. Kindly be informed that the Secretary for Justice’s views have been incorporated in the Note.

We apologize for not being able to submit our responses earlier and hope it would not cause you too much inconvenience.

We look forward to receiving the FDRC’s report on the result of the consultation exercise.

Yours sincerely,

(Miss Ada Chen)

Commissioner for Joint Dispute Resolution Strategy Office

**Consultation Paper on
Proposals to Enhance The Financial Dispute Resolution Scheme
(“Consultation Paper”)**

**Department of Justice (DoJ)’s Responses to the
List of Questions for Consultation**

Question 1 1.1 *Do you agree with the proposed amendment to raise the upper claimable limit to HK\$3,000,000? Please state your reasons.*

1.2 *If not, what would be your suggestion of a suitable upper claimable limit?*

__HK\$1,000,000; __HK\$2,000,000; __Others (please specify)

Please state the reasons for your selection.

DoJ’s Response:

- (i) Agree that the upper claimable limit should be raised in view of the feedback from financial consumers and other stakeholders. The amount of HK\$3,000,000 is acceptable.
- (ii) Based on FDRC’s complaint enquiries data in 2012 to 2015, every year FDRC received about 1,000 complaint enquiries. About 270 of these enquiries could not be proceeded further as they were over the maximum claimable limit of \$500,000. Of these 270 enquiries, 85% of them concern cases with claim amount not exceeding HK\$3,000,000. By changing the maximum claimable amount from \$500,000 to \$3,000,000, it should cover most of the cases.
- (iii) The FDRS came into operation in 2012. Since then, there has been appreciation in asset value as evidenced by various economic indices and indicators. In view of the high success rate of settlement through mediation services offered by FDRC as cited in the Consultation Paper, wider access to FDRS is supported.

- (iv) The increased claimable limit is also consistent with the proposed revision to the jurisdictional limit of the District Court and the proposal in Question 5 of the Consultation Paper to provide ADR service for cases with ongoing litigation proceedings.

Question 2 2.1 *Do you agree that a single maximum claimable amount continues to be applicable for the banking and the securities industries? If not, why?*

2.2 *If there are two different maximum claimable amounts, what would be your suggestion of suitable upper claimable limits for the banking and securities industries respectively?*

Please state the reasons for your suggestion.

DoJ's Response:

- (i) Agree that a single maximum claimable amount should continue to be applicable for the banking and the securities industries.
- (ii) Given the growing similarity in the financial products offered by the banking and securities sectors, it does not appear that there are cogent justifications for setting different claimable amounts for the banking and securities industries. Besides, a single maximum claimable amount has the beauty of simplicity.

Question 3 3.1 *Do you agree to extend the limitation period for lodging Claims to 36 months? Why or why not?*

3.2 *Do you have other suggestions?*

__12 months; __24 months; __48 months; __60 months; __72 months; __Others (please specify) _____

Please explain your choice.

DoJ's Response:

- (i) Agree to the suggestion of extending the limitation period for lodging Claims to 36 months.

- (ii) Based on FDRC's data from 2012 to 2015, out of a yearly average of 140 complaint enquiries with losses having occurred for more than one year, 65% of such enquiries concern losses occurring more than 2 years. Extending the limitation period would facilitate greater access to the FDRS.
- (iii) The extended time period of 3 years apparently strikes the right balance between (a) limiting the negative impact of deterioration of memory caused by lapse of time on the one hand, and (b) enhancing access to justice by parties on the other hand.

Question 4

4.1 Do you agree with the proposal to extend the service scope to cover Claims from SEs (as defined in paragraph 2.33 of this Consultation Paper)? Why or why not?

DoJ's Response:

- (i) Agree to the proposal to extend the scope of services to cover claims from SEs as defined in the Consultation Paper. These SEs may not have adequate financial means to resolve their disputes with FIs through litigation.
- (ii) Further, as investors become more sophisticated, incorporated entities have increasingly been used as investment vehicles. Investors should not be deprived of access to the FDRS due to deployment of such investment vehicles. The proposal is also broadly in line with overseas practice.

4.2 Besides the proposed definition of SEs in paragraph 2.33 of this Consultation Paper, do you have any other suggestions to define the size of a small business? Please provide elaborations on your suggestions.

DoJ's Response:

No comment.

4.3 *Do you agree that an FI qualifying as an SE could file a Claim as an EC against another FI? Please explain.*

DoJ's Response:

- (i) Agree.
- (ii) If an FI qualifies as an SE as defined in the Consultation Paper, it should be allowed to file a claim as an EC against another FI. This is fair and reasonable and the FI should not be prejudiced from the service (since they can also be a client of another FI) simply due to the nature of their business.

Question 5 5.1 *Do you agree that the FDRC should deal with cases under current court proceedings without the claimant withdrawing the case from the Court? Why or why not?*

DoJ's Response:

- (i) Agree to the proposal that FDRC should be allowed to deal with cases under current court proceedings without the claimant withdrawing the case from the Court, provided such an arrangement should not prejudice the relevant court proceedings.
- (ii) In principle, parties to a legal action may at any time agree to settle the dispute during the course of the legal proceedings. Extending FDRC to cases under current court proceedings would provide claimants with an alternative channel to resolve their disputes at any stage of court proceedings at affordable fees, thus saving time and costs. This proposal is also consistent with (a) the Government's initiative to promote the use of mediation and arbitration to resolve disputes, (b) the objectives of Civil Justice Reform and PD31, namely to facilitate settlement of disputes and to encourage parties to resolve their disputes through alternative dispute resolution procedures, and (c) the aim of saving court resources so that cases can be dealt with more efficiently.
- (iii) Having said that, we suggest that consideration should also be

given to the proper disposal of the court proceedings. For instance, consideration should be given as to whether there should be a stay of the court proceedings by consent of the parties or at least proper notification to the court. Thoughts should also be given to address possible practical problems when multiple parties are involved in the “parallel proceedings” of the dispute resolution process administered by FDRC and the legal proceedings before courts.

5.2 *For PD31 cases, do you agree that the maximum claimable amount be set at an amount in tandem with the future monetary jurisdiction of the District Court? Please give your reasons.*

DoJ’s Response:

- (i) Yes.
- (ii) This proposal, if implemented, would effectively mean that all financial disputes between FIs and the ECs falling within the jurisdiction of the District Court and to which PD 31 apply could benefit from the enhanced scheme of FDRS. We also agree that as with other cases under the FDRS, cases under PD31 would need to follow the rule of “mediation first, arbitration next”. Hence, the EC could have a further choice of arbitration, if mediation fails.

5.3 *Do you agree that parties to the mediation in PD31 cases at the FDRC can be legally represented as elaborated in paragraph 2.43 of this Consultation Paper? Please explain.*

DoJ’s Response:

- (i) Agree.
- (ii) This is consistent with the practice as pointed out in the Consultation Paper. Mediation is a flexible and consensual process. Unless otherwise agreed by the parties, participation of legal representatives should be allowed.

Question 6

Do you agree that, subject to a prior mutual agreement between an FI and a claimant, the FDRC could consider handling disputes which exceed its certain amended Intake Criteria as specified in paragraph 3.1(a) and (b) of this Consultation Paper? Why or why not?

DoJ's Response:***I. Paragraph 3.1(a) of the Consultation Paper***

(i) In principle, parties to a financial dispute, irrespective of the value of the claim, should be encouraged to use means other than litigation to resolve their dispute. We also note that under the proposal, even if the mutual consent of both parties are given, the FDRC may decline to accept an application if:

- the case involves complex or novel legal issues;
- multi-party claims are involved;
- the case is of precedential value or significant legal principle is involved;
- allegations of fraud or criminal activities have been made.

(ii) However, the claimable amount may indicate the financial condition of a claimant. There may be concern that claimants in cases where the amount being claimed exceeds HK\$3,000,000 may have relatively stronger financial strength than claimants of lower value claims. The limited resources of FDRC should be reserved for those who are more in need. Consideration should be given whether this proposal to extend the FDRS to cases with claimable amounts exceeding \$3,000,000 subject to parties' consent should be implemented initially for a limited period (e.g. of 3 years) such that the impact of the proposal on resources allocation of FDRC can be reviewed after the period. An assessment can then be made whether there are justifications for implementing the proposal as a permanent measure.

II. Paragraph 3.1(b) of the Consultation Paper

(iii) Agree.

- (iv) Under the Limitation Ordinance (Cap. 347), legal action founded on simple contract and tort can be brought within 6 years after the cause of action has accrued. Hence, although 3 years might have lapsed, litigation of a financial dispute based on breach of contract or claim in tort is still possible and the service offered by FDRC can still help the parties.

Question 7 *7.1 Do you agree that when there is a financial dispute between an EC and an FI, the FI may refer the financial dispute to the FDRC, subject to the consent of the EC? Why or why not?*

DoJ's Response:

- (i) Agree.
- (ii) If there is consensus between the parties, it should not matter whether it is the FI or EC who takes the initiative to refer the matter to FDRC. However, all other Intake Criteria should equally apply to the FI.

7.2 Do you agree that when there is a Claim by an EC against an FI, the FI with a counterclaim may lodge the counterclaim to the FDRC, subject to the consent of the EC? Why or why not?

DoJ's Response:

- (iii) Agree.
- (iv) When Claims and Counterclaims can be dealt with altogether in one go in arbitrations or mediation, parties' time, costs and emotional stress could be reduced. This could also save the FI instituting separate court action against the EC and the EC being required to defend himself/herself in such court action while at the same time engaging in resolution of dispute out-of-court on a closely related matter. In other words, multiplicity of action or proceedings can be avoided. As the EC's consent has to be given before the counterclaim can be lodged by the FI, there will not be any concern of raising bogus counterclaim by the FI to stifle the EC's application to the FDRC. We support this suggestion.
- (v) However, clear pre-set criteria for determining what constitutes "counterclaim" should be devised and published. In this regard,

reference can be made to the Rules of High Court. It is also necessary to clarify who will be given the authority to determine whether the criteria have been met.

7.3 *Do you agree with the arrangement that the FI can pay for the mediation and/or arbitration fees for their customers if the FI so wishes? Why or why not?*

DoJ's Response:

- (i) Agree.
- (ii) It is not uncommon for one party to pay for the mediation and/or arbitration fees of the other party.

Question 8

8.1 *Do you agree that options of “mediation only” and “arbitration only” in addition to the original “mediation first, arbitration next” be offered to the parties with mutual agreement? Please state your reasons.*

DoJ's Response:

Agree that the options of “mediation only” and “arbitration only” in addition to the original “mediation first, arbitration next” be offered to the parties with mutual agreement. This may be helpful in circumstances where contracts between FIs and their customers are subject to arbitration clause (*dispute is to be resolved solely by arbitration*) in case of dispute. We support this proposal because the proposed expansion of FDRS would provide an option to the ECs to refer their disputes to arbitration (or mediation then arbitration) thus giving them a fast, efficient and court free procedure to have their disputes resolved. The option of “mediation only” could be offered to the parties with mutual agreement to cater for PD31 cases. If mediation fails, the parties may resume the litigation. At the end of the day, it is important to remember that both arbitration and mediation are consensual proceedings.

8.2 *Do you agree that such “mediation only” or “arbitration only” option should not be available for “normal” cases under the FDRS? Why or why not?*

DoJ's Response:

It is not entirely clear from the Consultation Paper as to what “normal” cases mean. Paragraph 4.1 of the Consultation Paper mentions that more flexible rules and procedures could be considered for “cases that are beyond the Intake Criteria and subject to mutual agreement”. We are not sure if such cases are cases referred to in paragraph 3.1(a) to (d) of the Consultation Paper while “normal” cases is intended to mean cases that satisfy the Intake Criteria. However, in principle, there seems to be little reason to limit the “mediation only” or “arbitration only” option to a particular category of cases only. See answer to Question 8.1.

Question 9 *Do you agree with the proposed revised fee scale for dispute resolution services of the FDRC? Please provide your comments and/or suggestions.*

DoJ’s Response:

DoJ is not a mediation service provider and not in the position to comment on the fee scale, save to say that the fee scale should be fixed in such a way that would not be prohibitive to the end-users.

Question 10 *Do you agree that the FDRC could re-consider the rejected applications if they now fall within the amended Intake Criteria? Why or why not? Please give your reasons.*

DoJ’s Response:

Yes. If the previously rejected applications now fall within the amended Intake Criteria, to maximise the number of recipients of the services provided by FDRC, these claimants should be allowed to submit fresh applications for consideration.