

**Submission of
The Real Estate Developers Association of Hong Kong
("REDA") to the Bills Committee of the Legislative Council**

Proposed Legislation: Residential Properties (First-hand Sales) Bill

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**The Real Estate Developers Association of Hong Kong
16 April 2012**

Section 1
Preamble, purpose and fundamental principles

Purpose of this paper

1. This paper is submitted to **all Members of the Bills Committee** of the Legislative Council established for the purpose of studying the **Residential Properties (First-hand Sales) Bill** (the "**Bill**").
2. The proposed legislation will affect not only developers but also the general public. REDA urges Members of the Bills Committee to take into account the comments and proposals made in this paper and REDA's January Submission (defined in paragraph 9 below) in the Appendix, so as to form a balanced view of the issues involved and to ensure all the issues will be properly debated during the legislative process.
3. This paper therefore serves as an *aide memoire* for the Bills Committee, to assist the Bills Committee to study the Bill.

REDA's position - no objection if reasonable and proportionate

4. REDA has **no objection** in principle to the proposed legislation to regulate the sale of first-hand residential properties if the principles in paragraph 6 are properly reflected in the proposed legislation.
5. A number of the measures proposed in the Bill represent a **substantial infringement** of the **constitutional right** guaranteed by the **Basic Law** and **Hong Kong Bill of Rights** as they severely restrict the legitimate right and freedom of the vendors of first-hand residential properties to deal with (including disposal) their flats.
6. Members are requested to consider the following principles when studying the Bill :-

- (a) The measures must be :-
 - **reasonable, proportionate to, and rationally connected with**, the **legitimate aim and purpose**, i.e. to protect prospective purchasers of first-hand residential flats.
 - **no more than is necessary** to accomplish such aim and purpose.
- (b) The legislative objective must be **sufficiently important** to justify limiting a constitutional right.
- (c) The **burden is on the Government** to prove justifications in terms of the above; it must provide **cogent reasons** to justify the infringement. If **none, insufficient sound justifications or cogent reasons** are provided by the Government to justify the restrictions, then the relevant measures **must be rejected**.
- (d) It is also necessary for the Government to show whether **less intrusive means** are available and, if so, whether the Government has considered the intrusion of those means and, if not, whether they have been rejected for sound reasons. If it fails to show that it has considered, and for sound reasons rejected, less harmful means, it is likely that the proposed measures cannot survive a constitutional challenge.

General public will also be affected by the legislation

7. Members must also take note that not only real estate developers will be subject to the proposed legislation.
8. Given the wide scope of application of the proposed legislation, owners of **any kind** of first-hand residential units¹ and the **general public**² will also be affected by the legislation. Unfortunately, the Legislative Council Brief issued by the Transport and Housing Bureau on 13 March 2012 (the "**Legislative Council Brief**") did not give a full account on this.

REDA's submissions on the Consultation Paper

9. Before the Bill was introduced into the Legislative Council, REDA has, on 27 January 2012, submitted to the Transport and Housing Bureau giving its comments and proposals ("**REDA's January Submission**") to the Consultation Paper released by the Government on 29 November 2011 (the "**Consultation Paper**"). A copy of REDA's January Submission is attached as **Appendix** hereto.
10. However, from the current form of the Bill and the measures proposed therein, the Government did **not** take into account the comments and proposals submitted by REDA. To the extent that REDA does not agree with, or has reservations on, the measures proposed in the Bill and not specifically mentioned in this paper, REDA maintains its view given in REDA's January Submission and requests that the Bills Committee takes into account REDA's January Submission when reviewing the Bill.

Section 2

Scope of application: should not apply to completed flats

Government's proposal

11. According to Clause 10(1) of the Bill, the proposed legislation applies to any residential property in a development in respect of which property no agreement for sale and purchase has ever been entered into and no assignment has ever been made. In other words, the proposed legislation will apply to first-hand uncompleted and completed residential flats.

REDA's position

12. REDA **strongly objects** to the proposal that the proposed legislation also applies to **completed** flats.
13. REDA's submissions on this issue are :-
 - (a) provided in **Annex A (Part A.1)**; and
 - (b) supplemented in **paragraphs 8 to 21 of REDA's January Submission**.

Government's justifications and REDA's comments

¹ e.g. owners of house developments other than in the New Territories

² e.g. provisions relating to misrepresentation and dissemination of false misleading information

14. Government's justifications are provided in paragraph 19 and Annex F of the Legislative Council Brief. Government's justifications and REDA's response thereto are summarised in **Annex A (Part A.2)**.

Section 3

Freedom to disclose accurate and objectively verifiable information on gross floor area ("GFA")

Government's proposal

15. The Bill provides for a standardised definition of "**saleable area**" (in clause 8) and requires that such defined term of "saleable area" shall be the only basis to quote unit prices of residential flats in the sales brochures, price lists and advertisements.
16. Such requirement effectively excludes disclosure of any GFA-related information (such as the GFA per flat) in any promotional materials of a development.

REDA's position

17. REDA **strongly objects** to this proposal as it effectively deprives a vendor's constitutional right and freedom to disclose GFA-related information of a particular flat which can be objectively verifiable.
18. REDA's submissions on this issue are :-
- (a) provided in **Annex B (Part B.1)**; and
 - (b) supplemented in **paragraphs 22 to 42 of REDA's January Submission**.

Government's justifications and REDA's comments

19. Government's justifications are provided in Annex C of the Legislative Council Brief. Government's justifications and REDA's comments thereon are summarised in **Annex B (Part B.2)**.

Section 4

Mandatory requirements to provide minimum number of flats in price lists

Government's proposal

20. Clause 27 (in Division 3) of the Bill provides for a mandatory requirement that owners of a development must provide a price list of flats which covers some *minimum* number of flats for sale.

REDA's position

21. REDA **objects** to this proposal as it effectively deprives a vendor's constitutional right and freedom to hold and deal with (including the right not to dispose of) his flats.
22. REDA's submissions on this issue are :-
- (a) provided in **Annex C (Part C.1)**; and
 - (b) supplemented in **paragraphs 47 to 49 of REDA's January Submission**.

Government's justifications and REDA's comments

23. Government's justifications are provided in paragraphs 7 and 8 of the Legislative Council Brief. Government's justifications and REDA's response thereto are summarised in **Annex C (Part C.2)**.

Section 5

Exemptions to the application of the proposed legislation

Government's proposal

24. The Bill proposes that there are only three situations where the application of the proposed legislation is exempted, namely :-
- (a) Sale of residential properties where 95% or more of the units of the development have been leased out for not less than 36 months.
 - (b) Sale of one first-hand single house with a certificate of exemption is issued under section 5(a) of the Buildings Ordinance (Application to the New Territories) Ordinance (i.e. the New Territories Exempted Houses).
 - (c) Sale of development constructed by the Hong Kong Housing Authority.

REDA's position

25. While REDA welcomes the exemptions granted to the application of the legislation, REDA **objects** to the selective and discriminatory treatment granted to the above three situations only and considers that additional requirements are necessary to secure fair implementation of the exemptions.
26. REDA's submissions on this issue are :-
- (a) provided in **Annex D**; and
 - (b) supplemented in **paragraphs 114 to 125 of REDA's January Submission**.
27. Government's justifications are provided in paragraph 18 of the Legislative Council Brief. However, those justifications still fail to respond to any of REDA's submissions and legitimate concerns.

Section 6

Imposition of criminal liability and sanctions

28. The Bill proposes that contravention of the provisions of the proposed legislation would constitute a **criminal offence** subject to a fine and imprisonment.
29. Given the nature of sale of first-hand residential units in Hong Kong, REDA has **considerable reservations** on the imposition of criminal sanctions for contravention of the proposed legislation, in particular if the relevant provisions involved are minor and administrative in nature.
30. REDA's submissions on this issue are :-
- (a) provided in **Annex E**; and

(b) supplemented in **paragraphs 56 to 98 of REDA's January Submission**.

31. Government's justifications are provided in paragraph 21 of the Legislative Council Brief. However, those justifications fail to respond to REDA's submissions and legitimate concerns.

Section 7

Additional requirements of price lists

32. In addition to the minimum number of flats included in the price lists, the Bill further proposes other requirements on the provision of price lists (e.g. mandatory to publish price lists, price lists to be made available at least 3 days before sale).

33. REDA has **considerable reservations** on the implementation of those additional measures.

34. REDA's submissions on this issue are :-

(a) provided in **Annex F**; and

(b) supplemented in **paragraphs 50 to 55 of REDA's January Submission**.

35. Government's justifications provided in the Legislative Council Brief still fail to respond to REDA's submissions and legitimate concerns.

Section 8

Appointment of enforcement authority

36. Part 6 Division 1 regulates the appointment of the enforcement authority to, among other things, ensure effective enforcement of the proposed legislation.

37. REDA's comments on the appointment of enforcement authority are :-

(a) provided in **Annex G**; and

(b) supplemented in **paragraphs 99 to 109 of REDA's January Submission**.

Section 9

Other comments and recommendations

38. In addition to the *specific* comments, concerns and recommendations mentioned above, REDA has comments and recommendations on *other parts* of the Bill as listed in **Annex H**.

39. Most of the comments and recommendations in Annex H were previously raised at the stage of public consultation in REDA's January Submission. However, those comments and recommendations are **not** reflected in the current form of the Bill.

Section 10

Significance of transitional measures

40. No transitional measures are provided in the Bill. REDA considers that (a) the legislation should **not** have retrospective effect and (b) suitable transitional measures must be adopted.
41. REDA has the following proposals for the transitional arrangement :-
- (a) The following **residential developments** should not be subject to the requirements under the legislation :-
- For **Consent Scheme**: the form of agreement for sale and purchase has been approved by the Director of Lands before the date on which the proposed legislation comes into effect.
 - For **Non-Consent Scheme**: the form of agreement for sale and purchase has been annexed to a statutory declaration made by a partner of a solicitors firm and registered at the Land Registry for the purpose of pre-sale before the date on which the proposed legislation comes into effect.
- (b) **Show flats** already constructed by a vendor and, where applicable, opened for viewing by prospective purchasers for sale in compliance with the relevant guidelines of the Consent Scheme or, as the case may be, the Non-Consent Scheme before the date on which the proposed legislation comes into effect should not be subject to the new legislation.
- (c) **Sales brochures** already printed by a vendor in compliance with the guidelines of the Consent Scheme or, as the case may be, the Non-consent Scheme prior to the date on which the proposed legislation comes into effect should not be subject to the new legislation.
42. It is important to have suitable transitional arrangement in order to ensure that the time and resources of the vendors (in particular for those relatively smaller residential developments) will not be wasted. Given that criminal sanctions will be imposed by the proposed legislation, it is important to avoid any unnecessary confusion and uncertainty to the vendors and the public on the application of the proposed legislation to the existing developments.

Section 11 Conclusion

43. For the reasons and analysis given in this paper and in REDA's January Submission, REDA considers that :-
- (a) some of the measures proposed in the Bill represent a **substantial infringement** of the **constitutional rights** guaranteed by the Basic Law and the Bill of Rights because they restrict the legitimate rights and freedom of the owners to dispose of their flats.
- (b) those proposed measures may **not** survive a constitutional challenge because they are **not** reasonable, proportionate to, and rationally connected with, the legitimate aim and purpose to protect the prospective purchasers of first-hand residential flats.
- (c) the Government has a duty to provide justifications that the legislative objective is sufficiently important to justify limiting a constitutional right, but it so far has **not** provided any **cogent reasons** to justify those restrictions.
44. The Government also fails to show whether alternative **less intrusive means** are available :-

- (a) Paragraph 24 of the Legislative Council Brief provides that "*there is no other option*" and "*there is a general public view that the existing administrative measures and practices, namely the Consent Scheme and REDA's guidelines, are insufficient and that consumer protection in respect of the sale of all types of first-hand residential properties should be enhanced through regulation by legislation*".
- (b) However, from the Consultation Paper and the Legislative Council Brief, the Government did not provide any information as to whether *any form of alternative less intrusive means* has ever been considered and, if so, whether there are sound reasons to reject those alternative measures.
45. In the circumstances, REDA considers that some of the clauses of the Bill in their current form (in particular those referred to in this paper) may **not** survive a constitutional challenge.
46. To ensure that the proposed legislation will not unreasonably deprive the legitimate and constitutional rights of vendors of first-hand residential properties, REDA respectfully requests that Members of the Bills Committee take into account the comments and proposals put forward in this paper and in REDA's January Submission.
47. REDA welcomes any comments or enquiries from Members of the Bills Committee on any aspect of this paper and will be happy to assist the Bills Committee by providing further information/ elaboration on the submissions and comments raised in this paper and in REDA's January Submission.
48. The submissions made in this paper and in REDA's January Submission should *not* be regarded as exhaustive views and comments of REDA on the Bill and the proposed legislation. REDA reserves its right to submit further supplemental information and materials (including further comments, detailed analysis and/or legal opinion) to the Bills Committee.

The Real Estate Developers Association of Hong Kong
16 April 2012

Annex A

Scope of application: should not apply to completed flats

A.1 REDA's Submissions

(a)	Completed first-hand flats and second-hand flats are the same	<ul style="list-style-type: none"> • Completed first-hand flats are <u>no different in law and in substance from any private property</u>. • Both first-hand and second-hand flats are in <u>physical existence</u> and <u>can be inspected</u> at any time. • Transfers of both first-hand and second-hand flats are <u>not subject to any restriction</u>, irrespective of whether they are under the Consent or Non-Consent Scheme.
(b)	Unlawful discrimination against owners of first-hand flats	<ul style="list-style-type: none"> • Owners of first-hand units will <u>be deprived of an even playing field with an investor/ speculator</u> who intentionally purchased <i>some</i> flats from the first-hand owners and then re-sells the flats as second-hand immediately, the latter transfers will <u>not</u> be subject to the legislation. • This <u>discriminates</u> against owners of first-hand flats and creates room for <u>abuse by property investors/ speculators</u>.
(c)	Contravention of Basic Law: freedom to disposal of property	<ul style="list-style-type: none"> • Basic Law Article 6: HKSAR "<u>shall protect the right of private ownership of property in accordance with law.</u>" • Basic Law Article 105: HKSAR "<i>shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, <u>disposal</u> and inheritance of property and their right to compensation for lawful deprivation of their property.</i>" • To the extent that the proposed legislation unduly restricts the right of an owner to dispose of its flats in a manner which is discriminatory or compels the owner to dispose of more flats than it would wish to do, the legislation would be unconstitutional for contravention of the Basic Law. • For example, the following requirements imposed on completed flats may be regarded as unconstitutional :- <ul style="list-style-type: none"> ○ Provision of sales brochures (Part 2 Division 2) ○ Minimum number of flats for sale (Part 2 Division 3) - this effectively <i>forces</i> owners to include more than the number of flats that an owner genuinely intends to sell.

A.2 Government's Justifications in the Legislative Council Brief and REDA's Comments

Government's justifications	REDA's comments
<p>(a) <i>"We consider the proposal to regulate the sale of first-hand completed residential properties is likely to be seen as pursuing the legitimate aim of protecting purchasers' interests and the means of regulation are not disproportionate to that aim. Being a Government which respects the protection of human rights and is firmly committed to uphold the rule of the law, we will ensure that any legislation we propose will conform with the Basic Law" (paragraph 19 of Legislative Council Brief).</i></p> <p>(b) <i>"There are no major differences between the sale of uncompleted first-hand residential properties and that of completed first-hand residential properties, since first-hand residential properties are often sold as uncompleted properties first, and those that remain unsold will simply be sold as completed ones. To draw a line between the former and the latter types of properties in terms of legislative control is artificial and not defensible" (paragraph 1 of Annex F of Legislative Council Brief).</i></p>	<p>(a) No justification at all has been given as to why, how and to what extent the proposal to cover completed flats would <i>"be seen as pursuing the legitimate aim of protecting purchasers' interests"</i>. This is a bare assertion.</p> <p>(b) The mere assertion that the Government <i>"respects the protection of human rights and is firmly committed to uphold the rule of the law"</i> and <i>"will ensure that any legislation we propose will conform with the Basic Law"</i> is not a reason to justify the unfair and discriminatory nature of the proposal.</p> <p>(c) No justification has been made by the Government to why and how this discriminatory measure <i>"respects the protection of human rights"</i>.</p> <p>(d) Similarly, the assertion that <i>"first-hand residential properties are often sold as uncompleted properties first, and those that remain unsold will simply be sold as completed ones"</i> is of little assistance. This statement only states the obvious, i.e. the 2-stage arrangement commonly adopted by developers on sale of their first-hand residential flats. REDA does not see why and how such 2-stage arrangement can be a justification to support this unfair and discriminatory measure.</p>

Annex B

Freedom to disclose accurate and objectively verifiable information on gross floor area ("GFA")

B.1 REDA's Submissions

(a)	Long-established market practices	<ul style="list-style-type: none"> It is the long-established market practice to use GFA to quote the property size and property price of residential units in sales brochures, price lists and other promotional materials. GFA is well recognised as the basis for the purpose of submitting general building plans to the Building Authority for approval under the Buildings Ordinance³. There is an objective standard to determine GFA in the context of building law and regulation.
(b)	Contravention of Basic Law and Bill of Rights: freedom of expression	<ul style="list-style-type: none"> Basic Law Article 27: "<i>Hong Kong residents shall have <u>freedom of speech, of press and of publication</u>"</i> Bill of Rights Article 16: <ul style="list-style-type: none"> <i>"(1) Everyone shall have the right to hold opinions <u>without interference</u>.</i> <i>(2) Everyone shall have the right to <u>freedom of expression</u>; this right shall include <u>freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.</u>"</i> The right to disclose GFA-related information falls within the category of freedom of speech and publication. The restriction to disclose GFA-related information constitutes a clear violation of an owner's right to the freedom of expression and publication. So long as the GFA-related information is accurate, correct and objectively verifiable (such as a standardised definition suggested below), the freedom must be respected.
(c)	Enhance prospective purchasers' right to receive information	<ul style="list-style-type: none"> The purpose of providing GFA-related information is to enhance transparency in the sale and provide more details and information to prospective purchasers with respect to the basis of calculating purchase prices. The availability of GFA-related information benefits the public by providing further information with respect to the target flats: enable making of informed decisions and choices. Prohibition against disclosure of GFA-related information effectively deprives the constitutional rights of the prospective purchasers to seek and receive information as guaranteed by Article 16(2) of the Bill of Rights.

³ Example: detailed provisions are provided in sections 21 and 23 of the Building (Planning) Regulations to regulate how the GFA of a building should be determined with reference to, among other things, classification of a site, permissible plot ratio and site coverage.

		<ul style="list-style-type: none"> • Owners of first-hand flats have a duty and obligation to inform prospective purchasers the relevant GFA of the common areas and facilities actually apportioned to each of the flats.
(d)	<p>Double standard: unfair and discriminatory treatment on GFA</p>	<ul style="list-style-type: none"> • Clause 19(1) requires that the sales brochure shall disclose information relating to <u>exemption/ concessions of GFA</u> granted by the Building Authority under section 42 of the Buildings Ordinance or regulations 22 or 23 of the Building (Planning) Regulations. • If information relating to GFA exemption/ concessions shall be disclosed in the sales brochure, then why the relevant GFA apportioned to each particular flat cannot be disclosed? This is particularly the case because the GFA (whether exempted or accountable) are calculated on the <u>same basis</u> in accordance with the <u>same requirements</u> under the Building (Planning) Regulations. • If the owners are required to disclose information relating to GFA exemption/ concessions, then, as a matter of fairness to both owners and purchaser, the owners must also have the right as well as a duty to give a full disclosure of all GFA-related information. • Such selective disclosure of GFA as proposed in the Bill is discriminatory against owners of first-hand flats and will create confusion to the prospective purchasers.
(e)	<p>Prohibition against disclosure of GFA-related information does not fall within permissible restrictions</p>	<ul style="list-style-type: none"> • Article 16(3) of Bill of Rights provides for permissible restrictions to limit freedom of expression. • The restriction to disclose GFA-related information does not fall within any of the permissible restrictions under Article 16(3): <ul style="list-style-type: none"> ○ Not for respect of the rights or reputations of others. ○ Not for the protection of national security or of public order (<i>ordre public</i>). ○ Not for the protection of public health or morals.
(f)	<p>Standardised definition of GFA: accurate, correct and objectively verifiable information</p>	<p>As a fall back position, REDA proposes to adopt a standardised definition of GFA which will address the Government's concern on the alleged different standards and components of GFA. The standardised GFA comprises the following :-</p> <ul style="list-style-type: none"> • Only the GFA of the common areas which serve exclusively the residential part will be included and apportioned to the flats. • Such apportionment will follow the corresponding undivided shares actually allocated to a particular unit, so that :- <ul style="list-style-type: none"> ○ the apportioned GFA will follow the number and percentage of the undivided shares allocated to each particular unit. ○ Such apportionment simply follows the obligations of an individual owner to contribute the management fees of the

	<p>common areas of a development.</p> <ul style="list-style-type: none"> ○ this will ensure that the apportionment will be made on a fair, accurate and objectively verifiable basis. ● Both accountable and non-accountable (or exempted) GFA are to be included, so long as they serve exclusively the residential part. ● A plan identifying the GFA of the common areas which serve exclusively the residential part of the development is to be certified by an Authorised Person appointed under the Buildings Ordinance, so that there will be no uncertainty as to the basis of the calculations. ● This plan is to be included in the sales brochure. ● All other GFA which do not serve exclusively the residential part of the development will not be mentioned in the price list, sales brochure or any other promotional materials.
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B.2 Government's Justifications in the Legislative Council Brief and REDA's Comments

Government's justifications	REDA's comments
<p>(a) No commonly-adopted definition of GFA (paragraphs 3 & 4 of Annex C of Legislative Council Brief) :-</p> <ul style="list-style-type: none"> ● Need to take a considerable time for all relevant stakeholders to agree on a standardised definition on GFA. ● Used of non-standardised GFA will cause confusion rather than enhance the comprehensiveness of information (different vendors may include different items in the constituents of "apportioned share of common 	<p>(a) Government ignores REDA's legitimate concern on the infringement of constitutional right :-</p> <ul style="list-style-type: none"> ● an owner's legitimate right to express and publicise accurate and objectively verifiable information to prospective purchasers is infringed. ● a prospective purchaser's right to seek and receive those information is infringed. <p>(b) No justification or cogent reason has been given as to why GFA-related information, which can be accurate and objectively verifiable, cannot be disclosed.</p> <p>(c) As regards the lack of commonly-adopted definition of GFA :-</p> <ul style="list-style-type: none"> ● REDA already proposes to adopt a standardised definition of GFA (i.e. only the GFA of common areas which serve exclusively the residential part which will be certified by an authorised person). The standardised definition of GFA is accurate and objectively verifiable and will not create confusion.

areas" in their calculation of GFA).

(b) A vendor will still be required to provide area information on common facilities (e.g. resident's clubhouse) on an **aggregate basis** in the sale brochures. This will still enable prospective purchasers to know **holistically** the types and sizes of common facilities in the development (Paragraph 5 of Annex C of Legislative Council Brief).

• **Government ignores this proposal and did not give any reason why this still is not acceptable.**

(d) REDA does not have concern on the aggregate amount of the area information on those common facilities :-

• Instead, REDA's concern is on the area of those common facilities which would be **apportioned to each particular flat in accordance with the corresponding undivided shares so allocated to each unit.**

• There will be **no confusion or inaccuracy because undivided shares will be used as the basis to determine such apportionment.**

(e) Given (i) the significance of the right to freedom of expression, (ii) the legitimate purpose for an owner to disclose GFA-related information and (iii) the fact that GFA-related information can be objectively verified (e.g. by using the standardised definition of GFA), REDA is unable to see any *cogent reasons* to justify the restrictions.

Annex C
Mandatory requirements to provide minimum number of flats in price lists

C.1 REDA's Submissions

<p>(a) Unlawful infringement of owners' right under the Basic Law</p>	<ul style="list-style-type: none"> • Owners would effectively be <u>forced to offer to sell</u> the relevant number of flats stipulated in the price lists. • This amounts to an <u>unlawful infringement</u> of the owner's rights under <u>Article 105 of the Basic Law</u> :- <ul style="list-style-type: none"> ○ Under Article 105, an owner has the <u>right to use or dispose</u> of the flats it owns, which means that the owner also has the <u>right not to sell</u> the flats and keep it for his own use. ○ To require the owner to publish a price list for a specified number or percentage of the flats in the development, even though it wishes to sell <i>only one or some</i> but not the other flats, is <u>tantamount to requiring him to sell all the flats in the list</u>. ○ To force the owner to sell is a substantial <u>intrusion into an owner's dominion over his own properties</u>. ○ The compulsion unreasonably interferes with the constitutional rights of an owner to <i>own</i> and <i>dispose</i> of his properties and cannot be regarded as a rational or proportionate response to an objective to protect purchasers.
<p>(b) No genuine intention to sell all units, inclusion of those flats effectively forces owners to make false or misleading statement</p>	<ul style="list-style-type: none"> • Owners may intend to sell <u>only part</u> of the flats in a development for immediate profits and to retain the majority part for long-term investment (e.g. leasing) purpose. • Even if an owner is not required to actually sell all the units set out in the price list, the requirement to force an owner to put in the price list more flats than he genuinely wishes to sell will :- <ul style="list-style-type: none"> ○ <u>deprive the owner's legitimate right to retain</u> certain units for long-term investment purpose. ○ <u>force the owner to give a false or misleading statement or misrepresentation in the price list as to the number of flats the owner actually wishes to sell</u>, and provision of false or misleading information and misrepresentation would constitute a criminal offence under Clauses 65 and 66 of the Bill. ○ <u>adversely affect the tax position</u> of the owner because, notwithstanding the owner's true intention to retain certain flats for long-term investment purposes with different tax treatment, there is a real possibility that :- <ul style="list-style-type: none"> ▪ <i>all</i> the flats as set out in the price list will be treated by the tax authority as properties for sale; and

▪ the owner may be deemed to have the intention to sell *all* those flats in the price list.

C.2 Government's Justifications in the Legislative Council Brief and REDA's Comments

Government's justifications	REDA's comments
<p>(a) Paragraphs 7 and 8 of the Legislative Council Brief :-</p> <ul style="list-style-type: none"> • <i>"To enable prospective purchasers to get a fuller picture of the prices of a considerable number of properties in a development through price lists, the minimum number of properties to be covered in each price list will be provided ... Even though a vendor is not obliged to offer to sell all the residential properties covered in a price list, if a vendor sells such a residential property, the vendor must do so at the price set out in the price list ... All these requirements will help enhance price transparency." (paragraph 7).</i> • <i>"The proposed legislation does not require that vendors must offer for sale all the residential properties covered in the price lists. Also, there is a requirement under the proposed legislation that vendors should make public certain key information on sales arrangements including the number of residential properties to be offered for sale at any specific time and what they are. This enables vendors to tell the public without ambiguity how many and which of those residential properties shown on a price list it will offer for sale" (paragraph 8).</i> 	<p>(a) REDA has difficulties in understanding the logic behind the justifications put forward by Government in the Legislative Counsel Brief.</p> <p>(b) If, as Government claimed in paragraph 8, there is "<i>another requirement</i>" to inform that public of "<i>certain key information on sales arrangements</i>" and such information includes "<i>the number of residential properties to be offered for sale at any specific time and what they are</i>", then :-</p> <ul style="list-style-type: none"> • it would be illogical to require the owner to specify in the price list the purchase prices of those units which the owner has no intention to sell if the owner has already informed the public under such "<i>another requirement</i>" that those units are not for sale. • this will further reinforce REDA's argument that it is wrong in principle to stipulate minimum number of flats in price lists. It is because such "<i>another requirement</i>" (i.e. to inform the public that some of those units shown in the price lists are actually not for sale) will be in direct contradiction of the number of units so stipulated in the price lists, as the relevant units not intended for sale will still need to be included in the price list with specific sale prices so specified. • such requirement will therefore only cause unnecessary confusion to the prospective purchasers as to whether or not the relevant units are actually intended to be sold by the vendor. <p>(c) In any event, the Government fails to give <i>any</i> justifications or cogent reasons to explain why, how and to what extent the contravention of the constitutional rights guaranteed by the Basic Law can be justified.</p>

Annex D
Exemptions to application of the proposed legislation

(a) Sale of residential properties to existing tenants	<ul style="list-style-type: none"> • This category of exemptions already presumes that the proposed legislation will also apply to <i>completed</i> residential flats. This is because a flat can be leased out to tenants only after it has been completed. For the reasons given in Section 2 above, REDA objects to the proposal that the proposed legislation should apply to completed residential flats. On this basis, REDA considers that this category of exemption is <u>not</u> applicable. • Entirely without prejudice to the aforesaid position :- <ul style="list-style-type: none"> ○ The proposed duration of 36 months is unduly long and wholly impracticable and should be shortened to 6 months. ○ The proposed percentage of at least 95% of the number of the residential properties for letting is also practically impossible and such percentage should be reduced to over 50%.
(b) Sale of first-hand single house in NTEH	<ul style="list-style-type: none"> • REDA considers that it would not be fair to other owners that this category of exemption is only granted to the sale of NTEH. • REDA suggests that this category of exemption should also apply to sale of <u>other types of house developments in Hong Kong</u>.
(c) Exemption to HKHA	<ul style="list-style-type: none"> • REDA strongly <u>objects to this special treatment granted to the HKHA</u> as this is <u>discriminatory against owners of all other residential developments</u>. • For projects jointly developed by the HKHA and private developers, it is doubtful whether only the HKHA will be exempted from the application of the legislation. If so, then this will lead to the <u>absurd outcome that, in the same development, the HKHA will be exempted from the legislation while the joint venture developer will be subject to the requirements and criminal sanctions imposed by the legislation</u>. • In any event, REDA does not see any legitimate or cogent reasons given by the Government to justify this exemption:- <ul style="list-style-type: none"> ○ The Government maintains that the proposed legislation is not applicable to HKHA because the Home Ownership Scheme constructed by HKHA are <i>subsidised flats</i>. However, having regard to the aim and purpose of the proposed legislation (i.e. to protect individual purchasers of first-hand residential properties), the fact that the Home Ownership Scheme flats are subsidised flats constructed by HKHA is totally irrelevant. ○ The Government mentions that the proposed legislation is not applicable to HKHA because the HKHA already has to follow set parameters to dispose of the flats. However, the first-hand sale of residential properties are also subject to certain mandatory requirements under the Consent Scheme or, as the case may be, the Non-Consent Scheme. Accordingly, the fact that HKHA is subject

	<p>to another set parameters to dispose of the flats is also irrelevant.</p> <ul style="list-style-type: none"> ○ Those parameters which the HKHA has to follow (e.g. determination of the target group, setting of sale price and determination of the flat selection priorities among eligible applicants etc) do not have any conflicts whatsoever with the measures and requirements as currently proposed in the Bill. ● Even if HKHA may be exempted from the relevant measures and arrangements regulating the sale of first-hand units (e.g. sales brochures, price lists, etc. as proposed in Part 2 of the Bill), there is <u>no logical reasons why the HKHA should also be exempted from other parts (e.g. Parts 3 to 6) of the proposed legislation.</u> There is <u>no justification at all for HKHA to be exempted from,</u> for example :- <ul style="list-style-type: none"> ○ The specific requirements on <u>advertisements</u> in Part 3. ○ Criminal liability for <u>misrepresentation and dissemination of false or misleading information</u> in Part 4. ○ The relevant <u>administrative measures</u> in Part 6 Division 1. ○ The <u>investigation and supervision</u> by the enforcement Authority in Part 6 Division 2.
(d)	<p>Other special circumstances which justify exemption</p> <ul style="list-style-type: none"> ● The exemptions for three situations are too limited. There are <i>other</i> exceptional situations which justify non-application of the proposed legislation. For example :- <ul style="list-style-type: none"> ○ A family which owns a whole residential building wishes to distribute the residential units only to their family members by way of notional sale or otherwise. ○ For group restructuring, a developer may wish to conduct internal transfer of some or more of the residential properties from one subsidiary to another subsidiary company by way of intra-group transfer under section 45 of the Stamp Duty Ordinance.

Annex E
Imposition of criminal liability and sanctions

(a)	<p>Underlying principles</p> <ul style="list-style-type: none"> • REDA's position on the underlying principles is as follows :- <ul style="list-style-type: none"> ○ Criminal penalty should only be imposed where there is an element of <u>dishonesty or recklessness</u>. ○ All proposed offences must be clearly defined, with <u>no ambiguity</u>. ○ <u>Presumption of guilt and shifting of the burden of proof</u> to the defence must be <u>avoided</u>. ○ To maintain consistency in our legislation so as to <u>avoid any anomaly</u> in our laws, and to compare similar offences before determining any penalty. ○ Reference should be made to <u>existing legislations and other jurisdictions</u>. • The threat of criminal prosecution may be <u>exploited by litigious flat purchasers who are looking to rescind agreements for sale and purchase</u>, particularly during a downturn in the property market. • Must not move away from one of the most important pillars of our criminal justice system - that save in very exceptional cases and with good justification, the burden of proof in criminal cases should rest on the prosecution.
(b)	<p>Non-compliance which are minor and regulatory in nature</p> <ul style="list-style-type: none"> • While REDA has no objection in principle to the imposition of a fine of a reasonable amount proportionate to the relevant non-compliance in question, REDA <u>objects to the imposition of criminal sanction on non-compliance which are minor or purely regulatory in nature</u>. • Criminal penalty must be imposed <i>only</i> where there is an element of <u>dishonesty or recklessness</u>. • Where civil remedies are available and appropriate for the non-compliance which are minor or regulatory in nature (such as a failure to provide building plans for public inspection), criminal sanction is not a legitimate and proportionate measure to be introduced.
(c)	<p>Lowering the penalty levels</p> <ul style="list-style-type: none"> • The proposed penalty levels range from a fine at level 6 (HK\$100,000) to HK\$5,000,000 plus imprisonment up to a maximum of 6 months to 7 years. • The legislation should use the <u>Trade Description Ordinance (the "TDO")</u> as the reference for the proposed legislation as <u>the nature and purpose of the TDO (that is, to prohibit false trade descriptions, false, misleading or incomplete marks and the like in respect of the goods provided in the course of trade or by suppliers of goods) are similar</u> to what the proposed legislation seeks to achieve.

	<ul style="list-style-type: none"> Under section 18 of the TDO, the normal maximum penalty for offences committed in respect of trade descriptions and trademarks is :- <ul style="list-style-type: none"> on conviction on indictment, a fine of HK\$500,000 and imprisonment for 5 years; or on summary conviction, a fine at level 6 (HK\$100,000) and imprisonment for 2 years. REDA suggests that :- <ul style="list-style-type: none"> the TDO should be used as the reference for the proposed legislation; and the penalty levels of a number of offences proposed in the proposed legislation should be <i>lowered</i>.
(d)	<p>Liability of corporate officers</p> <ul style="list-style-type: none"> It is normal for developers to set up special purpose vehicles in the form of limited companies for individual projects. Clause 72 regulates the liability of company officers for offence committed by the company. Clause 72(1) provides that if a company commits an offence under the proposed legislation, an officer shall also be guilty of such offence if :- <ul style="list-style-type: none"> "<i>the commission of the offence is aided, abetted, counselled, procured or induced by an officer of the company ...</i>" or "<i>the offence is committed with the consent or connivance of, or is attributable to any recklessness on the part of, such an officer ...</i>" Under section 89 of the Criminal Procedure Ordinance ("CPO"), a corporate officer may be convicted along with the company of an offence by aiding, abetting, counselling or procuring the offence. Under this section, in order that the officer can be convicted, there must be proof of actual participation by the officer in the commission of the offence, i.e. the officer has helped, supported or assisted the company or that there were acts of encouragement, incitement, instigation or the like on the part of the officer. Section 101E of the CPO states: "<i>Where a person by whom an offence under any Ordinance has been committed is a company and it is proved that the offence was committed with the consent or connivance of a director or other officer concerned in the management of the company, or any person purporting to act as such director or officer, the director or other officer shall be guilty of the like offence.</i>" On the face of it, Clause 72 mirrors and combines the provisions of sections 89 and 101E of the CPO. However, REDA notes the following :- <ul style="list-style-type: none"> <u>No justification has been given by the Administration in the Consultation Paper as to why it is considered necessary to provide for separate provisions in the proposed legislation when the existing legislation has already covered the same situation.</u> The elements of "<u>inducement</u>" and "<u>recklessness</u>" are not provided in the existing provisions of the CPO. The inclusion of these new elements will expand the scope of the criminal sanctions. It is wrong to promote <i>unnecessary</i> new legislation. Over legislation must be avoided, as this will only create unnecessary confusion and inconsistency.
(e)	<p>Burden of</p> <ul style="list-style-type: none"> There is a <u>presumption of innocence</u> and the normal rule is that the <u>burden of proof lies on the prosecution</u> :-

	<ul style="list-style-type: none"> ○ Basic Law Article 87: "anyone who is lawfully arrested shall ... be <u>presumed innocent until convicted</u>". ○ Bill of Rights Article 11(1): "everyone charged with a criminal offence shall have the <u>right to be presumed innocent until proved guilty</u>". ○ This is so even under the general provision in section 390(1) of the SFO which states: "(1) <i>Where the commission of an offence under this Ordinance by a corporation is proved to have been aided, abetted, counselled, procured or induced by ...</i>" ● The Steering Committee also recommended in the Consultation Report (paragraph 14.13) that, to ensure the presumption of innocence, the phrase "it is proved" should be included to ensure that the burden of proof shall lie on the prosecution. ● However, this recommendation was <u>not</u> incorporated into the Bill. The taking away of the express requirement for the prosecution to prove its case will create <u>uncertainty that there is a presumption of guilt and shifting the burden of proof from the prosecution to the defence</u>.
<p>(f) Division 1 - Defence of reasonable precautions and due diligence</p>	<ul style="list-style-type: none"> ● Clause 67 of the Bill provides that "<i>if a person is charged with an offence under Part 2 or 3 (other than section 60), it is a defence to prove that the person took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by that person</i>". ● The "<u>due diligence</u>" defence should apply to <u>all</u> offences :- <ul style="list-style-type: none"> ○ In line with the Steering Committee's recommendations in paragraphs 14.10 and 14.14 of the Report that appropriate defence provisions such as the <u>general defence of "due diligence"</u> should be available for a person charged under the proposed legislation. ○ It is <u>too restrictive to confine the scope of this general due diligence defence to Parts 2 and 3</u>. ○ No justification has been given as to why this general defence should not apply to the offence under Clause 60 (i.e. advertisement must not contain false or misleading information). ● "<u>Absence of knowledge</u>" element :- <ul style="list-style-type: none"> ○ The provisions imposing liability on corporate officers modelled, among others, on the legislation such as the TDO. ○ Under section 20 of the TDO, it is a defence available to the officer of a company that he shall not be guilty of an offence if "<i>he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the commission of the offence</i>". ○ Given the nature of conveyancing transactions in first-hand sale of residential properties in Hong Kong and the voluminous information involved, <u>the "absence of knowledge" element should be included</u> in this general defence and, in any event, <u>should be available to the officers of the company</u>.

	<ul style="list-style-type: none"> • Joint venture developments where the grantees of the land (such as MTRC and URA) are not developers <ul style="list-style-type: none"> ○ It is a common form of joint venture development projects that developments are co-operated between private developers (to actually undertake and carry out the development) and grantees of the land (e.g. residential developments situated on top of existing MTRC station, development with URA). ○ In those projects, developers are <u>not</u> grantees of the land. Relevant <u>land related matters</u> (e.g. lease modifications, application for Lands Department consent, submission of master layout plans, etc.) are usually <u>dealt with by the grantees only and the developers may not be involved or have prior knowledge of those matters.</u> ○ In those circumstances, it is important to ensure that the "absence of knowledge" element is available to developers, so as to ensure that the developers shall not be liable for an offence due to the fact that information on the land related matters have not been provided by the land owners to the developers in a timely manner.
(g)	<p>Division 2 - Defence for offences in relation to false or misleading information</p> <ul style="list-style-type: none"> • This defence is only available to two specific offences, namely, Clause 66(1) (for disseminating, or authorizing or being concerned in the dissemination, of false or misleading information) and Clause 60 (publishing or causing to be published an advertisement containing any information that is false or misleading in a material particular). • <u>SFO is an inappropriate model</u> - The structure and criteria of the proposed defences mirror those stipulated in the Securities and Futures Ordinance (Cap. 571) (the "SFO"). SFO is an inappropriate model because :- <ul style="list-style-type: none"> ○ SFO regulates the highly complex securities and futures industry for the protection of investors; ○ securities and futures contracts are constituted by highly complicated financial instruments; ○ fraud could easily be committed in the securities and futures industry and is difficult to detect; ○ the very nature of the securities and futures industry call for extensive powers to be vested in the regulatory authority and heavy penalties to be imposed on offenders; ○ none of the above features are applicable to the sale of flats by owners. • <u>Scope of application of the defences</u> <ul style="list-style-type: none"> ○ The scope of application of the defences (which is confined to three scenarios, namely, issue or reproduction of the information/ advertisement, re-transmission of the information/ advertisement and live broadcast of information/ advertisement) is too restrictive.

		<ul style="list-style-type: none"> ○ The scope of application of the defences under Division 2 should be expanded to more scenarios and circumstances. ● <u>Elements of defences too complicated</u> <ul style="list-style-type: none"> ○ The criteria/ elements of the defences in Division 2 are complicated and are considered disproportionate to the nature of sale of first-hand residential units. The complicated elements of defences should be applicable to the highly complex securities and futures industry for the protection of investors under the SFO, but <u>not</u> applicable to the sale of residential properties. ○ Need to <u>thoroughly review the criteria/ elements of the defences to simplify the same</u>, so as to make them proportionate to the very nature of the sale of first-hand residential units. References should be made to similar defences under the TDO. For example :- <ul style="list-style-type: none"> ▪ Section 27 of TDO (Innocent publication of advertisements) provides that, in proceedings for an offence under this Ordinance committed by the publication of an advertisement, it shall be a defence for the person charged to prove that he :- <ul style="list-style-type: none"> ➢ is a person whose business is to publish or arrange for the publication of advertisements; and ➢ received the advertisement for publication <u>in the ordinary course of business and did not know and had no reason to suspect</u> that its publication would amount to an offence under the TDO. ▪ Section 13C(4) of the TDO (false or misleading representation as regards seller's connection with another person) provides that it is a defence for a person charged to prove that he <u>did not know and has no reason to believe</u> that the relevant representation made by him was false.
(h)	Indictable offences	<ul style="list-style-type: none"> ● Clause 73 of the Bill provides that proceedings in respect of an offence under the Proposed Ordinance, <i>other than an indictable offence</i>, may be brought within 3 years after the commission of the offence. ● The following offences are categorised as <i>indictable</i> offences :- <ul style="list-style-type: none"> ○ Publication of an advertisement containing information which is false or misleading in a material particular - Clause 60 ○ Fraudulent or reckless misrepresentation for the purpose of inducing another person to purchase a specified residential property - Clause 65 ○ Dissemination of false or misleading information that is likely to induce another person to purchase a specified residential property - Clause 66 ○ Failure to comply with the requirements of investigations conducted by the enforcement authority for suspected contravention - Clauses 79 and 80

	<ul style="list-style-type: none"> • The effect of the above is that the above four offences are not subject to the time limit for prosecution. • Indictable offences are more serious offences and may be dealt with summarily only where the prosecution has expressed its consent to such a course. Having regard to (i) the underlying purpose of the proposed legislation is to regulate sale of first-hand residential properties and to protect individual purchasers and (ii) the nature and degree of the offences proposed, REDA considers that :- <ul style="list-style-type: none"> ○ it is sufficient that criminal sanctions are imposed on those offences; and ○ it is inappropriate to categorise the above four offences as indictable offences because this is <i>disproportionate</i> to the legitimate purpose which the Administration intends to achieve by introducing the proposed legislation. • Accordingly, REDA suggests the following :- <ul style="list-style-type: none"> ○ References to "conviction on indictment" should be removed from the above four offences. ○ The penalties imposed on the above four offences should be reduced to those proportionate to <i>summary</i> offences and the relevant non-compliance in question. ○ All offences should be subject to the same time limit for prosecution suggested below.
(i)	<p>Prosecution time limit</p> <ul style="list-style-type: none"> • Clause 73 provides that proceedings may be brought within 3 years after the commission of offence. • Most of the offences under the Bill are similar to the offences as stated under the TDO. According to section 19 of the TDO, the time limit for prosecution of an offence is :- <ul style="list-style-type: none"> ○ 3 years from the date of commission of the offence; or ○ the expiration of 1 year from the date of discovery of the offence by the prosecutor, whichever is the earlier. • Given that the nature of the offences proposed in the Bill are easily ascertainable by the prosecutor, a shorter period for prosecutions should be similarly imposed in the Bill in order to remove any uncertainty of the criminal liability imposed on the relevant persons, which should not be dragged on for unduly long period of time. • Since the nature of the TDO (that is, to prohibit false trade descriptions, false, misleading or incomplete marks and the like in respect of the goods

(i)	<p>Clause 60 (Advertisement must not contain false or misleading information)</p>	<p>provided in the course of trade or by suppliers of goods) are very similar to what the proposed legislation seeks to achieve, Clause 73 should be drafted in more or less the same way as in section 19 of the TDO.</p> <ul style="list-style-type: none"> • References to "<i>material particular</i>" in Clause 60(1)(a) and (b) will create uncertainty as to the actual scope and degree of gravity in determining whether a person commits an offence. • Although references to "<i>material particular</i>" are found in some other legislation which impose criminal sanctions on provision of false or misleading information, having regard to the special nature of conveyancing transactions in first-hand sale of residential properties, the voluminous information, publication and advertisements involved and the vulnerability of the property market, it is <u>not appropriate to mechanically adopt the same criteria and standard in criminalising the conduct under Clause 60.</u> • It would only be fair and reasonable that a <u>higher degree of threshold</u> be imposed to criminalise the conduct contemplated under Clause 60. REDA proposes that a person may be regarded as committing an offence if the person :- <ul style="list-style-type: none"> ○ publishes or causes to be published an advertisement containing information that is false or misleading in a <u>significant and substantial</u> particular; and ○ the person knows that, or is reckless as to whether, the information is false or misleading as to the <u>significant and substantial</u> particular.
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Annex F
Additional requirements on price lists

(a) General exemption for sale of residential flats/apartments with special characteristics	<ul style="list-style-type: none"> • Entirely without prejudice to REDA's primary position mentioned that it is wrong in principle to require owners to set out <i>minimum number</i> of flats for sale in the price list, REDA considers that even if this requirement is to be implemented, there should be a general exemption to the sale of residential properties which are of special characteristics with special considerations which are different from the sale of ordinary residential properties in the market. • They include, among other things, sale of house developments, large-size apartments and special units in a multi-storey building which are generally large in size (e.g. penthouse, duplex units). <ul style="list-style-type: none"> ○ Given the relatively smaller scale of house developments and the limited number of large-size apartments and special units, the target purchasers and market orientation are generally different from those of sale of ordinary residential flats in multi-storey buildings. ○ It is legitimate that, as a matter of commercial decision and market conditions, the owners of house developments and those large-size apartments and special units may not wish to offer to sell all the houses/ units at the same period of time. ○ For large-size apartments and special units :- <ul style="list-style-type: none"> ▪ The target purchasers are different from those of the sale of ordinary residential units. Given the special characteristics and size of these units, the potential purchasers will generally require more time in making informed decisions as compared with the sale of ordinary units in the same building. ▪ Due to limited supply and lack of comparables, owners will need more time to determine the target prices which will accurately reflect the true market value. ▪ To provide an <i>objective</i> standard to determine large-size apartments, reference can be made to the valuation and classification of private domestic units by the Rating and Valuation Department. The flats should be regarded as large-size special units if the flat size is 160 sq. m. or 1,722 sq. ft. or above (i.e. "Class E" under the Rating and Valuation Department's classification of private domestic units).
(b) Price list to be made available at least 3 days before the sale	<ul style="list-style-type: none"> • The Bill proposes that the price list must be made available to the general public at least 3 days before a date of the sale. • REDA considers that such a requirement is impracticable and undesirable in that :- <ul style="list-style-type: none"> ○ it will unreasonably limit the number of flats that can actually be made available for sale immediately when there are strong demands. This is against freedom of market.

○ it will **delay sale** and **cause inconvenience to the prospective purchasers** who would need to wait for 3 days.

○ it will make it **impossible for those overseas purchasers** who would need to depart from Hong Kong within the next 3 days.

● This requirement is undesirable in the **adverse market condition**. Given the vulnerability of the market in the sale of residential properties, the requirement to wait for 3 days to sell the flats in adverse market condition would **seriously affect the opportunity for owners to minimise their loss by disposing of their units as fast as possible**.

● REDA suggests the following :-

○ This **3-day rule** should not be implemented and, in any event, the number of days should be reduced.

○ This requirement should not apply to a subsequent price change in case the price is lowered.

Annex G
Appointment of enforcement authority

(a) Appointment of enforcement authority	<ul style="list-style-type: none"> • REDA has no objection to the establishment of an enforcement authority to ensure effective implementation of the legislation provided that the powers conferred to it are proportionate to the protection of purchasers in first-hand residential properties. • Having regard to (i) the wide power conferred to the enforcement authority under the proposed legislation and (ii) the proposal that failure to comply with the relevant requests/ requirements of the enforcement authority commits an offence and is liable to a fine of HK\$5,000,000 and to imprisonment for 7 years, REDA has the following suggestions :- <ul style="list-style-type: none"> ○ To ensure the independence and impartiality to discharge its functions, the appointment of a public officer as the enforcement authority should be an <u>interim measure</u> only and for a <u>short transitional period</u>. ○ The enforcement authority should be <u>transformed into an independent statutory body</u> within a <u>specified time limit</u>. REDA and members of the public should be consulted of such specified time limit. ○ During such transitional period, the enforcement authority should be headed by a <u>senior directorate grade officer</u> and comprise a <u>multi-disciplinary team</u> with professional knowledge and experience in the relevant fields and should be fully funded by Government revenue.
(b) Issue of guidelines	<ul style="list-style-type: none"> • The Bill proposes that the enforcement authority may issue guidelines indicating the manner in which the enforcement authority proposes to perform any function or exercise any power, or providing guidance on the operation of the legislation. • REDA suggests that other requirements and criteria in relation to the issuance of guidelines under other similar legislation⁴ should also be incorporated in the proposed legislation. For example :- <ul style="list-style-type: none"> ○ The requirement that guidelines "<i>not inconsistent with this Ordinance</i>" should be expressly incorporated in the proposed legislation. ○ Express requirement that the guidelines should have <i>general</i> application to all vendors and other parties affected by, or subject to, the legislation. ○ The guidelines, and any amendments or revocation thereof, should be published in the <i>Gazette</i>.
(c) Wide investigation powers	<ul style="list-style-type: none"> • The provisions relating to the investigation powers under Part 6 Division 2 of the Bill make reference to the provisions in section 183 of the SFO. Given the different nature and purpose of the SFO, the powers conferred to the investigator appointed by the Securities and Futures Commission under the SFO are excessive and should <u>not</u> apply to the sale of first-hand flats.

⁴ Example: section 13 of the Financial Reporting Council Ordinance (Cap.588), section 8 of the Deposit Protection Scheme Ordinance (Cap.581) and section 6H of the Mandatory Provident Fund Schemes Ordinance (Cap.485)

- As compared with the offences under the SFO, many offences imposed by the proposed legislation are relatively *minor* and *regulatory* in nature (e.g. a failure to provide building plans for free public inspection, and failure to deposit sales brochures with specified authorities within the required timeframe).
- Given the differences in the nature of the offences targeted by the SFO and the proposed legislation, it is **highly inappropriate** to :-
 - confer such a wide power to the enforcement authority as currently proposed in the Bill to conduct investigations.
 - impose heavy penalties (i.e. on conviction on indictment to a fine of HK\$5,000,000 and to imprisonment for 7 years; or on summary conviction to a fine of HK\$1,000,000 and to imprisonment for 3 years) on, say, a corporate officer who fails to produce a particular document or record requested by the enforcement authority in relation to a technical breach which is minor or regulatory in nature.
- The wide power and heavy penalties are *disproportionate* to the legitimate purpose of the proposed legislation and will unreasonably deprive developers and owners of their freedom to dispose of their properties.
- REDA suggests that the following should be included :-
 - Sufficient **advance notice** shall be given to the persons under investigation. The enforcement authority shall **inform in writing** the persons under investigation the **reasons and justifications** for which the investigation is conducted in relation to him as early as possible.
 - More "**reasonableness**" **requirements** should be provided. For example, the persons under investigations should be given *reasonably sufficient* time to produce the relevant record, document and/or response; the time and place to be specified in the requirement should also be subject to the same *reasonable* requirement.
- Since the nature and degree of activities and offences are similar to those under the Estate Agents Ordinance, reference should be made to the provisions relating to investigations conducted by the investigator appointed by the Estate Agents Authority under section 28 of the Estate Agents Ordinance.

Annex H
Other comments and recommendations

(a)	<p>Interpretation of "vendor"</p> <ul style="list-style-type: none"> • Clause 7(2) of the Bill provides that if an owner engages a person to "<i>co-ordinate and supervise the process of designing, planning, constructing, fitting out, completing and marketing the development of phase</i>", then a reference to "vendor" in most of the situations contemplated by the proposed legislation will include both or either of the owner and such person so engaged. • It seems that the purpose of Clause 7(2) is to ensure that, for developments undertaken by way of joint venture between (a) <i>the developer</i> and (b) <i>the land owner</i> (e.g. MTRC, KCRC, URA, etc), the <i>developer</i> will also be subject to the regulations and control under the proposed legislation. • While REDA has no strong objection to this arrangement, the wording adopted in Clause 7(2) is far from satisfactory:- <ul style="list-style-type: none"> ○ The scope of the phrase "<i>co-ordinate and supervise the process of designing, planning, constructing, fitting out, completing and marketing the development of phase</i>" is too wide. No elaboration has been given as to how and to what extent a person will be regarded as <u>co-ordinating and supervising</u> the relevant process of a development. ○ This will create uncertainty and ambiguity as to who should be liable for the relevant contravention. ○ The scope is sufficiently wide to include developers and other persons or professionals involved in different stages of a development (e.g. architects, authorised persons, surveyors, main contractors, sub-contractors, sales managers, marketing managers, sales agent, etc.). • A clear and unambiguous meaning or interpretation must be provided for the relevant persons who are intended to be included by Clause 7(2).
(b)	<p>Provision of a "layout plan" in sales brochure</p> <ul style="list-style-type: none"> • Clause 18(2)(i) of the Bill provides that the sales brochure for a development must set out, among other things, a layout plan of the development. Schedule 1 Part 1 Section 9 also provides that the layout plan must satisfy certain requirements prescribed in Section 9(a), (b) and (c) thereof. • Since no definition of "layout plan" is provided in the Bill, it is uncertain as to whether the term refers to the "master layout plan" which is required to be prepared by a grantee under the land grant and/or the "master layout plan" required to be submitted by an owner for the purpose of obtaining planning application under the Town Planning Ordinance. • If it is the intention that the term "layout plan" used in the Bill <i>only</i> refers to the master layout plan for the purpose of the land grant and outline zoning plan, then such "layout plan" will not be available for residential developments where :- <ul style="list-style-type: none"> ○ there is no requirement under the land grant to prepare master layout plan ○ a developer is not required to apply for planning approval under the applicable outline zoning plan • However, since it is a mandatory requirement under the Bill (the word "must" is used) to set out a layout plan, the owners of developments which do not have any master layout plan would be regarded as committing an offence.

	<ul style="list-style-type: none"> • A clear definition for the term "layout plan" should be provided. If an owner of a development is not required under the land grant or the applicable outline zoning plan to prepare the master layout plan, then such owner shall be exempted from the requirement to set out the layout plan.
(c)	<ul style="list-style-type: none"> • Aerial photos Clause 18(2)(g) provides that the sales brochure for a development must set out the latest aerial photo of the development as at the date on which the sales brochure is printed. Schedule 1 Part 1 Section 7(2) provides that the aerial photo of the development to be provided in the sales brochure must be the Survey and Mapping Office of the Lands Department at a flying height below 7,000 feet. • The proposed requirement for an aerial photo showing the development is not supported :- <ul style="list-style-type: none"> ○ to the extent the owner is required to take or commission the photo, it is too onerous, particular for small developers or small developments. ○ to the extent that the photo is obtained from the Survey and Mapping Office of the Lands Department, there will necessary be a time gap between the taking of the photographs and publication of the sales brochures which may render the aerial photograph misleading or incorrect due to changes in the neighbourhood. ○ aerial photo of a particular area at which the development is situated may not be available at the Survey and Mapping Office. • REDA suggests the following :- <ul style="list-style-type: none"> ○ The requirement to set out aerial photo in the sales brochure should be dispensed with. ○ Even if this requirement is to be retained, owners of a development should be given the option of taking their own aerial photo instead of those prepared by the Survey and Mapping Office of the Lands Department so long as the basic requirements are met.
(d)	<ul style="list-style-type: none"> • Contents of, and entries in, Register of Transactions REDA has the following comments and recommendations on the requirements of the register of transactions proposed in Clause 52 of the Bill :- <ul style="list-style-type: none"> ○ Clause 52(2): time limit be increased from 24 hours to 48 hours after signing preliminary agreement for sale and purchase. ○ Clause 52(3): time limit be increased from 1 working day to 2 working days after signing agreement for sale and purchase. ○ Clause 52(4): time limit of the 4th working day be extended to the 5th working day after the date on which the preliminary agreement for sale and purchase is entered into. ○ Clause 52(5): time limit should be increased from 1 working day to 2 working days after the date on which the agreement for sale and purchase is terminated.
(e)	<ul style="list-style-type: none"> • Contents of sales brochure: Schedule 1 Part 1 Section 15(2)(f) provides that the lease conditions that are onerous to a purchaser shall be summarised and provided in the sales brochure.

	summary of land grant	<ul style="list-style-type: none"> • REDA has considerable concern on the ambiguous definition of the word "onerous", because what is considered as <i>onerous</i> by the enforcement authority could be very different from that by the owners of a development. • Given the serious consequence in failing to summarise the required lease provisions in the sale brochure (i.e. criminal sanction), it is necessary to avoid such unclear and ambiguous definition. A clear and unambiguous definition of "<i>onerous</i>" should be provided. For example, an exhaustive list of those <i>onerous</i> lease conditions should be specified.
(f)	Street number of the development	<ul style="list-style-type: none"> • Clause 63(2)(c) and Schedule 1 Part 1 Section 1 provide that an advertisement and sales brochure must state the street number allocated by the Commissioner of the Rating and Valuation for the purpose of distinguishing the development. • Such street number for the new development may <u>not</u> be available from the Commissioner of the Rating and Valuation at the time when the sales brochure is printed. • This requirement is applicable only if the street number of the development has been allocated by the Commissioner of the Rating and Valuation.
(g)	Show flats requirements	<ul style="list-style-type: none"> • Clause 36(5) provides that if the floor-to-ceiling of the show flats is less than the corresponding projected height of the residential property, then the vendor must display in the show flat a notice stating the difference between those heights. • Clause 36(5) only deals with the floor-to-ceiling height of the show flats. REDA considers that it is also necessary to deal with the situation where there is a difference in floor surface level. REDA therefore suggests the following :- <ul style="list-style-type: none"> o The words "or floor surface level" should be added after the words "<i>floor-to-ceiling height</i>" at the first sentence of Clause 36(5). o The words "or levels (as the case may be)" should be added after the words "<i>those heights</i>" at the end of Clause 36(5).
(h)	Floor plans of specified residential property showing furniture	<ul style="list-style-type: none"> • Clause 46(1)(b) provides that if furniture is shown on the floor plan of any specified residential properties, then the dimensions of the furniture must also be shown on the floor plan. • In view of the relatively small size of the floor plans, REDA considers that it is highly impracticable to set out all such dimensions in the floor plans. This said requirement would only cause unnecessary confusion to prospective purchasers when viewing the floor plans.