

**立法會**  
**Legislative Council**

LC Paper No. CB(1)1729/10-11  
(These minutes have been seen  
by the Administration)

Ref : CB1/BC/11/09/2

**Bills Committee on Securities and Futures and Companies Legislation  
(Structured Products Amendment) Bill 2010**

**Sixth meeting on  
Thursday, 20 January 2011, at 8:30 am  
in Conference Room A of the Legislative Council Building**

**Members present** : Hon Starry LEE Wai-king, JP (Chairman)  
Hon James TO Kun-sun  
Hon Miriam LAU Kin-ye, GBS, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Hon WONG Ting-kwong, BBS, JP  
Hon Ronny TONG Ka-wah, SC  
Hon CHIM Pui-chung

**Members absent** : Hon Albert HO Chun-yan  
Hon CHAN Kam-lam, SBS, JP  
Hon Mrs Regina IP LAU Suk-ye, GBS, JP

**Public officers attending** : Financial Services and the Treasury Bureau  
  
Mr Anthony LI  
Principal Assistant Secretary (Financial Services)  
  
Ms Jane LEE  
Assistant Secretary (Financial Services)

Department of Justice

Mr Paul O'BRIEN  
Senior Assistant Law Draftsman

Ms Karmen KWOK  
Government Counsel

**Attendance by invitation** : Securities and Futures Commission

Mr Brian HO  
Executive Director, Corporate Finance

Ms Alice LAW  
Senior Director  
Policy, China and Investment Products

Ms Alexandra YEONG  
Director, Corporate Finance

**Clerk in attendance** : Ms Anita SIT  
Chief Council Secretary (1)5

**Staff in attendance** : Mr KAU Kin-wah  
Assistant Legal Adviser 6

Mr Noel SUNG  
Senior Council Secretary (1)4

Ms Haley CHEUNG  
Legislative Assistant (1)8

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**I Confirmation of minutes and matters arising**

(LC Paper No. CB(1)1088/10-11 — Minutes of meeting on  
6 December 2010)

The minutes of the meeting held on 6 December 2010 were confirmed.

## II Meeting with the Administration

### Follow-up to issues raised at the meeting on 6 January 2011

(LC Paper No. CB(1)1093/10-11(01) — Administration's paper on "Legal backing for the regulatory actions taken by the Hong Kong Monetary Authority on the sale of unlisted investment products by authorized institutions")

### Clause-by-clause examination of the Bill (starting at clause 3)

(LC Paper No. CB(3)877/09-10 — The Bill

LC Paper No. CB(1)199/10-11(01) — Marked-up copy of the Bill prepared by the Legal Service Division

LC Paper No. CB(1)1093/10-11(02) — Summary of views submitted by organizations/individuals on the Securities and Futures and Companies Legislation (Structured Products Amendment) Bill 2010 and the Administration's response

LC Paper No. CB(1)199/10-11(02) — Administration's first batch replies dated 21 September 2010 to the questions raised by Assistant Legal Adviser on Securities and Futures and Companies Legislation (Structured Products Amendment) Bill 2010

LC Paper No. CB(1)199/10-11(03) — Administration's second batch replies dated 4 October 2010 to the questions raised by Assistant Legal Adviser on Securities and Futures and Companies Legislation (Structured Products Amendment) Bill 2010)

2. The Committee deliberated (Index of proceedings attached at the **Appendix**).

Follow-up actions to be taken by the Administration and related parties

3. The Administration and the Securities and Futures Commission (SFC) were requested to take follow-up actions as follows-

- (a) to contrast the protection afforded by the Banking Ordinance (Cap. 155) for investors of unlisted investment products sold by Authorized Institutions and not regulated under the Securities and Futures Ordinance (Cap. 571) (SFO) with the protection afforded by SFO for investors of unlisted investment products regulated under SFO;
- (b) to confirm (i) whether the fees to be charged by SFC for authorization of the offer documents for structured products would be introduced separately as subsidiary legislation for scrutiny by the Legislative Council, or as part of the Bill by Committee Stage amendments (CSAs); and (ii) there was no difference in the consultation process and the need for approval by the Chief Executive in Council under either approach;
- (c) to explain the respective purposes and scopes of the exemption provisions under the various subsections of section 103 of SFO, particularly subsections (2), (5) and (6), and to review the effect of the addition of "excluding unlisted securities that are structured products" to the relevant exemption provisions;
- (d) to review the effect of proposed section 103(11A) of SFO; and
- (e) to explain the concept "offered to the public" with reference to real-life examples.

*(Post-meeting note: The Administration/SFC's responses were circulated to members vide LC Paper No. CB(1)1192/10-11(02) and CB(1)1420/10-11(01) on 28 January 2011 and 25 February 2011 respectively.)*

4. Members noted that the Administration would propose CSAs on sections 1A(2)(f) and 103(2)(e)(iii).

### **III Any other business**

#### Date of next meeting

5. The Chairman reminded members that the next meeting would be held on 31 January 2011.
6. There being no other business, the meeting ended at 10:35 am.

Council Business Division 1  
Legislative Council Secretariat  
28 March 2011

**Proceedings of the  
Bills Committee on Securities and Futures and Companies Legislation  
(Structured Products Amendment) Bill 2010  
Sixth meeting on Thursday, 20 January 2010, at 8:30 am  
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000440 – 000648	Chairman	Confirmation of minutes of meeting on 6 December 2010 (LC Paper No. CB(1)1088/10-11)	
000649 – 000808	Administration	Briefing by the Administration regarding the legal backing for the regulatory actions taken by the Hong Kong Monetary Authority on the sale of unlisted investment products by authorized institutions (LC Paper No. CB(1)1093/10-11(01)).	
000809 – 001605	Chairman Administration Securities and Futures Commission (SFC)	<p>The Chairman said that since currency-linked instruments, interest-rate linked instruments and currency and interest rate-linked instruments (ILCL products), though they were structured products, would not be regulated under the Securities and Futures Ordinance (Cap. 571) (SFO) and their sale by authorized institutions (AIs) would be subject to the regulation under the Banking Ordinance (Cap. 155) (BO), she was concerned whether investors would be afforded adequate protection, given that in contrast to the regulatory provisions under the SFO, the regulatory provisions in the BO were constructed in rather broad terms. Besides, as revealed in the Lehman Brothers Minibonds incident, it was unclear whether the Hong Kong Monetary Authority (HKMA) had the necessary powers to take enforcement actions and impose sanctions on AIs and their staff for non-compliance with HKMA's guidelines in respect of sale of investment products.</p> <p>The Administration responded that the provisions in BO provided a wide range of powers for the Hong Kong Monetary Authority (HKMA) to take all reasonable steps to ensure any business carried on by AIs was carried on with integrity, prudence and appropriate degree of professional competence and generally to maintain the stability of the banking sector, and the BO had proved to be effective in regulating the operation of AIs over the years.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>SFC supplemented that if ILCL products were considered to be banking products then it was appropriate to regulate them under the same regime as other banking products. Such approach was in line with international practices, in that ILCL products were treated as banking products, and regulated in the same manner and together with all other banking products.</p> <p>At the request of the Chairman, the Administration agreed to provide information to address the Chairman's concern about the adequacy of the protection afforded by the BO for investors of unlisted investment products not regulated under SFO and sold by AIs, as compared to the protection afforded by SFO for investors of unlisted investment products regulated under SFO.</p>	<p>The Administration to take action as per paragraph 3(a) of the minutes.</p>
<p>001606 – 002435</p>	<p>Chairman Administration SFC</p>	<p>Regarding the arrangement to legislate for the fees in connection with SFC's power to authorize structured products, the Administration advised that according to the advice of the Department of Justice (DoJ), it was legally in order to effect the fee proposals through Committee Stage amendments (CSAs) to the Bill, as the fee proposals were related to the object of the Bill. However, if the Bills Committee had strong reservations over this arrangement, the Administration was agreeable to the alternative arrangement of introducing the relevant subsidiary legislation separately for negative vetting by the Legislative Council.</p> <p>SFC supplemented that the major market participants had been soft consulted on the proposed fee levels, which were in line with the fee levels in respect of application for SFC's authorization of offer documents under the current regime. The market participants did not express opposing views to the proposed fee levels.</p> <p>The Chairman requested the Administration to inform the Bills Committee at the next meeting of (a) its decision on whether the fees to be charged by SFC for authorization of the offer documents for structured products would be introduced separately as subsidiary legislation for scrutiny by the Legislative Council, or as part of the Bill by CSAs; and (b) that there was no difference in the consultation process and the need for approval by</p>	<p>The Administration to take action as per paragraph 3(b) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		the Chief Executive in Council under either approach.	
002436 – 003258	Chairman SFC ALA6	<p><u>Clause 3 – Section 102 amended (Interpretations of Part IV)</u></p> <p>The Chairman invited SFC to report on its consideration of the availability of a better alternative to the term "approved person".</p> <p>SFC advised that the term "approved person" was introduced in the Securities and Futures (Amendment) Bill 2003, and during the scrutiny of the Bill, DoJ had offered advice on the appropriateness of the term. Under the existing section 104 and the proposed new section 104A, the "approved person" was obligated to inform SFC of any change of his contact so that any notice could be conveyed to the "approved person" in a timely manner. The term "approved person" was already in use in the existing section 104, so for the purpose of the Bill the same should be used for section 104A. SFC remarked that its position on the nomenclature was neutral and was open to suggestions for a review of the term in future when a larger overall review of the SFO was undertaken.</p> <p>ALA6 commented that the use of the term "approved person" was considered appropriate in the context of the current Bill, and any change might have implications on other provisions in the SFO not covered in the current exercise.</p>	
003259 – 005333	ALA6 DoJ Chairman SFC Administration	<p><u>Clause 4 – Section 103 amended (Offence to issue advertisements, invitations or documents relating to investments in certain cases)</u></p> <p>Given that a regulated investment agreement (RIA) was defined as a structured product, ALA6 enquired why reference had to be made to RIA and "other structured products" in section 103(1)(a)(ii).</p> <p>DoJ responded that since RIAs had existed in the market for some years, it was well understood in the market and hence by keeping "RIA" it would assist understanding of the provisions. In addition, as structured products could either be an agreement or an instrument, for grammatical reasons it was necessary to refer separately to RIAs and other structured products in section 103(1)(a)(ii).</p>	



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		<p>The Chairman enquired whether there was any extension or narrowing down of the exemption granted to investment products as a result of the amendment of section 103(2)(a).</p> <p>SFC responded that the amended section 103(2)(a) had the effect of narrowing down the exemption provision by excluding unlisted securities that were structured products from the exemption. This proposed amendment was necessary to ensure that upon transferring the regulation of public offers of structured products in the form of shares and debentures from the CO to the SFO, there would not be any structured product the public offer of which were regulated under the CO would become exempted from the regulation of the SFO.</p> <p>In response to ALA6's enquiry concerning the proposed definition of "securities" in section 102 and its application in section 103, DoJ advised that the proposed definition of "securities" in section 102 included securities-based structured products but excluded non securities-based structured products, would apply to the whole Part IV including section 103.</p> <p>The Chairman pointed out that some deputations had requested for clarification as to how proposed section 103(2)(e)(iii) was intended to operate in the context of the exclusion in the proposed definition of "structured product" in proposed section 1A(2)(f)(i) of Schedule 1, which excluded any structured products offered to an employee by the employer, regardless of whether such products were in respect of the securities of the employer or employer group of companies (LC Paper No. CB(1)1093/10-11(02)).</p> <p>The Administration responded that it had noted the deputation's comment that the exclusion under the proposed section 1A(2)(f) of Schedule 1 was potentially too wide. The wording in section 1A(2)(f) would be tightened up so that the exclusion would only apply to employee incentive schemes issued by the corporation and referenced to securities of the corporation itself or a related corporation. The wording of section 103(2)(e)(iii) would be also refined to set out more clearly its operation in relation to employee incentive</p>	

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		<p>schemes. The draft CSAs on the above changes would be presented to the Bills Committee for consideration in due course.</p>	
005334 – 005635	Chairman SFC	<p>The Chairman remarked that the Hong Kong Association of Banks had requested that sections 103(3)(h) and (i) of the SFO, which exempted listed products from the offer authorization regime, should be amended to include a reference to "structured products" (LC Paper No. CB(1)1093/10-11(02).</p> <p>SFC responded that sections 103(3)(h) and (i) related to offers of securities that were listed or traded on the recognized stock market. All listed and traded products on the recognized stock market are securities (as defined under sub-sections (a) to (f) of the definition of "securities" in Schedule 1), and therefore the suggested amendment was unnecessary.</p>	
005636 – 013555	Ms Audrey EU ALA6 DoJ SFC Chairman	<p>Ms Audrey EU was concerned about the way proposed sections 103(5)(a) and 103(6)(a) were drafted. She was concerned with the intended scope of the existing provision and the effect of the addition of "excluding unlisted securities that are structured products" to the exemption provisions.</p> <p>SFC responded that it had spent some time studying section 103(5) and understanding its purpose. It appeared that section 103(5) duplicated the exemption in section 103(2). The SFC added that the Protection of Investors Ordinance was largely incorporated into Part IV of the SFO when it was enacted in 2002. However, the Protection of Investors Ordinance did not have a provision similar to section 103(5). It was possible that the intention was to extend to cater for unintended consequences and hence the exemption clauses were extended to cover situations such as those specified in section 103(6) where intermediaries were handling the draft offer documents, and situations in section 103(7) where mere conduits were involved, for example printers, couriers or even universities might possess the offer documents during printing and delivery of the documents, or for teaching purposes.</p> <p>ALA6 explained that section 103(1) referred to the behaviour that constituted an offence. As far as he could recall, during the scrutiny of Securities</p>	

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		<p>and Futures Bill, the exemption clauses in subsections (5) (6) and (7) were included in order to cater for persons other than the issuer, involved in the process of issuing of the offer documents, such as printers and couriers. The then intention was to exclude those passive service providers and persons acting as mere conduits in the process. Ms EU responded that if the intention of those subsections was indeed as related by ALA6, then it would only be right that the same exemptions should be provided in respect of "unlisted securities that are structured products".</p> <p>The Administration was requested to explain the respective purposes and scopes of the exemption provisions under the various subsections of section 103 of SFO, particularly subsections (2), (5) and (6), and to review the effect of the addition of "excluding unlisted securities that are structured products" to the relevant exemption provisions.</p>	<p>The Administration to take action as per paragraph 3(c) of the minutes.</p>
<p>013556 – 014737</p>	<p>ALA6 Mr James TO SFC</p>	<p>ALA6 was concerned that the scope of exemption granted under the existing section 103(2)(i) was too wide as the exemption only referred to the business of the person, namely the selling and purchasing property other than securities in the course of that business. The presence of a possible loophole was not rectified by the proposed addition of "or structured products" to the provision and the proposed new section 103(11A).</p> <p>SFC responded that there was no loophole in the existing section 103(2)(i). The existing provision was to enable property developers to offer rental guarantees as part of their business of buying/selling property. The proposed amendments were simply to preserve the exemption for such transactions. In addition, as agreed by members in previous meetings, the Bills Committee would not take the current exercise as a full review of Part IV of the SFO, and would not review the various existing terms and provisions in the SFO that were merely touched upon by the proposals. The purpose of the current Bill was to transfer the regulation of public offers of structured products in the form of shares and debentures from the prospectus regime of the CO to the offers of investments regime of the SFO. The Administration therefore did not review the need or otherwise to narrow the scope of exemption under</p>	

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		<p>existing section 103(2)(i), although for the purpose of investor protection, the new section 103(11A) was proposed to exclude "unlisted structured products" from the exemption,</p> <p>In relation to Mr James TO's concern regarding the application of proposed section 103(11A) to persons unintentionally involved in the offer of structured products, the Administration and SFC were requested to review the effect of proposed section 103(11A).</p>	<p>The Administration to take action as per paragraph 3(d) of the minutes.</p>
<p>014738 – 015335</p>	<p>Ms Audrey EU DoJ SFC Mr James TO</p>	<p><u>Clause 5 – Section 104A added</u></p> <p><i>104A – Commission may authorize structured products</i></p> <p>In response to Ms Audrey EU's enquiry, DoJ confirmed that while there were some differences in drafting between existing section 104 and proposed section 104A, with more modern language used for the latter, the drafting differences per se would not result in differences in legal effect.</p> <p>In response to Ms Audrey EU's enquiry, SFC confirmed that proposed new section 104A sought to empower SFC to authorize structured products, and SFC would consider the products in the authorization process in light of the relevant requirements specified in the Code on Unlisted Structured Investment Products issued in June 2010.</p> <p>In response to Mr James TO's concern about the granting of an authorization for issue of a structured product to a person and that person might pass away after the authorization, SFC responded that based on the Code on Unlisted Structured Investment Products, the applicant for authorization could only be an incorporated company.</p>	
<p>015336 – 020536</p>	<p>Mr James TO SFC</p>	<p>In response to Mr James TO's enquiry about the increase in workload for authorization of structured products, SFC responded that it was hard to state an exact figure, but roughly estimated that the number of applications for authorization might grow by over 10%.</p>	

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		<p>Mr James TO cited scenarios of the sale of investment products, which were not widely publicized and the relevant documents were not on public display, by bank staff to selected customers, and queried whether such investment products offered to a bank's own clients only would be regarded as being "offered to the public".</p> <p>SFC agreed to provide information to explain the concept "offered to the public".</p>	<p>The Administration to take action as per paragraph 3(e) of the minutes.</p>
020537 – 020557	Chairman	Date of next meeting	

Council Business Division 1  
Legislative Council Secretariat  
28 March 2011