

立法會
Legislative Council

LC Paper No. CB(1)1931/10-11
(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**

**Eighth meeting on
Tuesday, 1 March 2011, at 4:30 pm
in Conference Room B of the Legislative Council Building**

Members present : Hon Starry LEE Wai-king, JP (Chairman)
Hon James TO Kun-sun
Hon CHAN Kam-lam, SBS, JP
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 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

Mr CHUNG Hing-hing
Director
Intermediaries Supervision Department

Ms Linda YIU
Senior Manager
Intermediaries Supervision Department

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

Staff in attendance : Mr KAU Kin-wah
Senior Assistant Legal Adviser 3

Mr Noel SUNG
Senior Council Secretary (1)5

Ms Clara LO
Legislative Assistant (1)10

I Confirmation of minutes and matters arising

(LC Paper No. CB(1)1262/10-11 — Minutes of meeting on 16 December 2010

LC Paper No. CB(1)1416/10-11 — Minutes of meeting on 6 January 2011)

The minutes of the meetings held on 16 December 2010 and 6 January 2011 were confirmed.

II Meeting with the Administration

Follow-up to issues raised at previous meetings

(LC Paper No. CB(1)1420/10-11(01) — Administration's paper on "Purposes and Effect of Certain Exemption Provisions in Section 103 of the Securities and Futures Ordinance")

Draft Committee Stage amendments to be moved by the Administration

(LC Paper No. CB(1)1420/10-11(02) — Administration's paper on "Proposed Committee Stage Amendments"

LC Paper No. CB(3)877/09-10 — The Bill
(issued on 2 July 2010)

LC Paper No. CB(1)199/10-11(01) — Marked-up copy of the Bill
(issued on 25 October 2010) prepared by the Legal Service Division)

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

Admin

Follow-up actions to be taken by the Administration

3. The Administration was requested to take the following actions:

(a) In relation to the proposed Committee Stage amendment to Clause 15(6), to consider whether the scope of the exclusion for

non-negotiable and non-transferable debentures from the definition of "securities" should be made more restrictive by specifying more clearly the actual types of debentures that were to be excluded; and

- (b) In relation to the different practices of banks and securities companies in making audio recording of the sale process of regulated financial products, the Administration was requested to advise the Bills Committee of its stance on the suggestion of making it a mandatory requirement for all intermediaries to make audio recording of the sales process for certain types of investment products/investors or under certain circumstances; and/or a requirement for intermediaries to advise investors that they might make audio recording of the sales process themselves.

III Any other business

4. The Chairman remarked that the Bills Committee had completed scrutiny of the Bill.
5. There being no other business, the meeting ended at 5:45 pm.

Council Business Division 1
Legislative Council Secretariat
15 April 2011

**Proceedings of the
Bills Committee on Securities and Futures and Companies Legislation
(Structured Products Amendment) Bill 2010
Eighth meeting on Tuesday, 1 March 2011, at 4:30 pm
in Conference Room B of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000053 – 000335	Chairman	Confirmation of minutes of meetings on 16 December 2010 (LC Paper No. CB(1)1262/10-11) and 6 January 2011 (LC Paper No. CB(1)1416/10-11)	
000336 – 000746	Administration	<p>The Administration briefed members on the proposed Committee Stage amendments (CSAs) set out in paper LC Paper No. CB(1)1420/10-11(02)</p> <p><u>I. Clause 2 (Commencement) and New Clause 30 (Fees)</u></p> <p>Members raised no question on the proposed CSAs.</p>	
000747 – 001431	Administration	<p><u>II. Clause 4 (4) and (9) (Exemption for non-securities or non-structured product property businesses)</u></p> <p>Members raised no question on the proposed CSAs.</p>	
001432 – 003843	Administration Mr James TO Securities and Futures Commission (SFC)	<p><u>III. Clause 15(6) (Exemption for non-negotiable and non-transferable debentures)</u></p> <p>Mr James TO expressed concern that where promotional materials of unlisted structured products in the form of non-negotiable and non-transferable debentures which did not form part of a public offer and were provided to private clients by banks, such debentures would be exempted under Clause 15(6).</p> <p>SFC stated that structured products which were not offered to the public would not be covered by the public offer regulatory regime under section 103 of the Securities and Futures Ordinance (Cap. 571) (SFO). This was also in line with the existing policy that non-public offers were not generally required to be authorized under the SFO. Nonetheless, intermediaries were required to discharge suitability obligations under the Code of</p>	The Administration to take action as per paragraph 3(a) of the minutes.

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		<p>Conduct for SFC licensed and registered intermediaries.</p> <p>The Administration also referred to the existing definition of "securities" under the SFO and explained that currently, it already excluded non-negotiable and non-transferable debentures. SFC elaborated that the current amendment was intended to specify that the exclusion did not apply if the non-negotiable or non-transferrable debentures in question were structured products that were offered to the public. SFC added that the prospectus regulatory regime under the Companies Ordinance (Cap. 32) (CO) would continue to apply to non-negotiable and non-transferrable debentures which were not structured products and were offered to the public.</p> <p>In response to SFC's examples of some non-negotiable and non-transferable debentures which were not publicly offered would include those issued by schools and private clubs, and also private transactions between institutional investors, Mr TO acknowledged that an exemption for such debentures was appropriate. He suggested that the exemption under the definition of "securities" in the SFO should thus be limited to such types of debentures. He also opined that as a matter of general policy, certain types of non-publicly offered structured products should nonetheless be subject to authorization.</p> <p>The SFC reiterated that the objective of the current Bill was to transfer the regulation of structured products in the form of debentures from the CO to the SFO. The discussions as to the regulation of non-public offers of non-negotiable and non-transferable debentures and whether these should be 'securities' for the purposes of the SFO fell outside the current exercise. Such discussions would require a holistic review and market-wide consultation as it would have substantial impact on the entire financial industry. As the Hong Kong Bar Association pointed out at the deputation's presentation, the policy angle upon which the offers of investments regime in the SFO as well as the CO prospectus regime was premised was to govern the regulation of offers to the public. The subject matter raised by Mr. James To should more appropriately be examined when a wholesale review of the SFO was undertaken.</p>	

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003844 – 003953	Administration	<p><u>IV. Clause 15(7) (Currency and interest rate-linked instrument)</u></p> <p>Members raised no question on the proposed CSA.</p>	
003954 – 004603	Mr James TO SFC	<p><u>V. Clause 15(8) (Exemption for employees incentive schemes)</u></p> <p>Mr James To remarked that a corporation with ulterior motives might abuse the exemption for employees incentive schemes and offer structured products to its employees. Mr TO enquired whether the exemption could be restricted to listed corporations only.</p> <p>The Chairman expressed that it might be difficult to limit the exemption to only listed corporations because other corporations should also be entitled to offer employees incentive schemes.</p> <p>SFC responded that if the exemption was provided for listed corporations only, local employees of unlisted international companies might be deprived of the benefits of employee incentive schemes if the corporations considered it cumbersome and were unwilling to seek SFC's authorization for introduction of the employee incentive schemes.</p>	
004604 – 005256	SALA3 SFC	<p><u>VI. Clause 4(3) (Exemptions under Section 103(2)(e))</u></p> <p>SALA3 queried as a matter of drafting whether there was need for the proposed CSA to section 103(2)(e) to mention structured products "that are securities" as this should be clear in the context and might raise a doubt as to whether structured products that were not "securities" were exempted. SALA3 also enquired whether the exemption under section 103(2)(e) in respect of securities offered to employees employed by the corporation or related corporation was necessary, as exemption was already provided for employee incentive schemes.</p> <p>SFC responded that under the proposed CSAs, if a "structured product" would not be entitled to the exemption provided under section 103(2)(e) in any event. If the structured product was issued as an employee incentive scheme by an employer corporation and was referenced to the employer's securities or securities of the employer's related</p>	

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		<p>corporation, that product would be excluded from the definition of "structured product". The exemption in section 103(2)(e) needed to be retained in respect of securities that were not structured products as plain vanilla products like shares could be offered as incentive schemes. The existing section 103(2)(e) covered not only employee incentive schemes, but also offers to holders of securities of the corporation or a related corporation, creditors and agents.</p>	
005257 – 005456	SALA3 SFC	<p>Clause 12(3)</p> <p>With reference to Clause 12(3), SALA3 enquired whether it was the policy intention to widen the scope of coverage of section 379(2)(a) "to exchange the securities or structured product or to convert the securities or structured product to another form of securities or structured product".</p> <p>SFC responded that under the existing provisions, "securities" could be exchanged or converted into another form of securities, and it was the policy intention to allow "securities" or "structured products" to be exchanged or converted into another form of securities or structured product for the purpose of clause 12(3).</p>	
005457 – 005719	SFC	<p>SFC briefed members on the purposes and effect of certain exemption provisions in section 103 of SFO (LC Paper No. CB(1)1420/10-11(01))</p>	
005720 – 010049	Chairman SALA3 SFC	<p>The Chairman enquired why the exemption in section 103(2)(a) was not extended to cover unlisted structured products.</p> <p>SALA3 enquired whether the exclusion of unlisted structured products from the exemption under section 103(2)(a) was to ensure that the public offer of unlisted structured products was regulated by the relevant regulatory code.</p> <p>The SFC responded that if the exemption was extended to unlisted structured products, then such products would not be required to meet the structural requirements under the SFC's Code on Unlisted Structured Investment Products.</p> <p>SFC added that the exercise would help align the treatment of structured products in different forms. Currently the exemption under section 103(2)(a)</p>	

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		<p>did not cover regulated investment agreements (RIAs), and since structured products could be in the form of RIAs, the exemption under section 103(2)(a) could not currently be applied to them. In addition, once the CO prospectus regime ceased to apply to structured products in the form of debentures, there might be an increased reliance on the exemption under section 103(2)(a) if the exemption (in section 103(2)(a)) was not limited. The amendment was therefore necessary to ensure that the public offer of structured products, which could be in the form of debentures, would be subject to SFC's authorization.</p>	
010050 – 010254	Chairman SFC	<p>The Chairman enquired about the Administration's response to members' suggestion that intermediaries should be required to advise, on a regular basis or say, once a year, clients who were classified as "professional investors" about the protections that would not be available to them. The Chairman remarked that steps should be taken to ensure that clients were alerted, and reminded on a regular basis, of the consequences if they agreed to be classified as "professional investors", and their right to withdraw from being classified as "professional investors".</p> <p>SFC responded that under the existing Code of Conduct, intermediaries were already required to obtain the written and signed declarations from clients concerned that the consequences of being treated as "professional investors" and their right of withdrawing their consent from being treated as "professional investors" had been explained to them and that the clients wished to be treated as "professional investors". Intermediaries were also required to put in place procedures to enable them to carry out confirmation exercise annually so as to ensure that the relevant clients who chose to be treated as "professional investors" continued to fulfill the requisite requirements under the Securities and Futures (Professional Investor) Rules. In view of members' comments, SFC would remind intermediaries for compliance with the requirements under the Code of Conduct, and that when they carried out the annual confirmation envisaged by the Code of Conduct, they had to remind clients of the consequences of being treated as a "professional investor" and the option for them to opt out as a "professional investor".</p>	

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010555 – 011320	Chairman SFC Administration	<p>The Chairman enquired about the Administration's response regarding members' suggestion that securities companies should be required to make audio records of the sales process of regulated financial products, taking into account that the Hong Kong Monetary Authority had already made it a mandatory requirement for Authorized Institutions (AIs) to make audio records of the sale process of structured products.</p> <p>SFC responded that SFC had carefully considered members' suggestion and concluded that the existing record keeping requirements were appropriate and in line with international practice, e.g. intermediaries were required to document the information given to clients and the rationale of recommendations, including queries raised by the client and the responses given by the intermediary. The majority of the respondents to the public consultation conducted in 2009 considered the existing record keeping requirements appropriate, and they did not support making audio recording of the sale process mandatory. However, SFC would continue to keep in view market development and monitor the need for audio recording of the sale process.</p> <p>The Chairman enquired whether intermediaries would be required to advise their clients that they had the option of making audio records of the sale process on their own.</p> <p>SFC responded that SFC considered the existing record keeping requirements were appropriate. The SFC would keep in view the practices of major overseas jurisdictions and any other relevant factors such as the environment under which audio recording would be taken.</p> <p>The Chairman enquired about the Administration's stance on the issue. The Administration responded that the different regulatory requirements had taken into account the different client profile and operating environment in securities companies and banks.</p> <p>The Chairman requested the Administration to provide a written response regarding its stance on the issue.</p>	<p>The Administration to take action as per paragraph 3(b) of the minutes.</p>

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011321 – 011527	Chairman Administration SALA3	<p>SALA3 reported that he had raised a drafting point in relation to the Chinese version of the Bill. The point had been addressed by a proposed CSA. He noted that the actual text of the proposed CSAs had yet to be made available to the Bills Committee.</p> <p>The Administration responded that the draft CSAs, in the format to be submitted to the Legislative Council, would be provided to the Bills Committee as soon as possible. The Chairman remarked that SALA3 would check whether the proposed CSAs in correct format were the same as those marked up on the copy draft bill.</p> <p>The Administration stated that it would liaise with the Legislative Council Secretariat regarding the timing for resumption of the Second Reading debate on the Bill.</p>	

Council Business Division 1
Legislative Council Secretariat
15 April 2011