

**立法會**  
**Legislative Council**

LC Paper No. CB(1)1263/11-12  
(These minutes have been seen  
by the Administration)

Ref : CB1/BC/11/10/2

**Bills Committee on Securities and Futures (Amendment) Bill 2011**

**Fifth meeting on**  
**Thursday, 24 November 2011, at 4:30 pm**  
**in Conference Room 2A of the Legislative Council Complex**

**Members present** : Hon CHAN Kam-lam, SBS, JP (Chairman)  
Hon Albert HO Chun-yan  
Hon Abraham SHEK Lai-him, SBS, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Hon Jeffrey LAM Kin-fung, GBS, JP  
Hon Andrew LEUNG Kwan-yuen, GBS, JP  
Hon WONG Ting-kwong, BBS, JP  
Hon Ronny TONG Ka-wah, SC  
Hon CHIM Pui-chung  
Hon Starry LEE Wai-king, JP

**Member absent** : Hon James TO Kun-sun  
Hon Paul CHAN Mo-po, MH, JP

**Public officers** : Miss Salina YAN  
**Attending** Deputy Secretary for Financial Services and the  
Treasury (Financial Services) 1

Mr Anthony LI  
Principal Assistant Secretary for  
Financial Services and the Treasury (Financial Services) 2

Ms Sanny CHAN  
Chief Executive Officer (Support)  
Financial Services and the Treasury Bureau

Miss Tiffany CHUNG  
Assistant Secretary for Financial Services and the  
Treasury (Financial Services)(2) 2

Ms Monica LAW  
Senior Assistant Law Draftsman  
Department of Justice

Ms Karmen KWOK  
Senior Government Counsel  
Department of Justice

**Attendance by invitation** : Mr Brian HO  
Executive Director, Corporate Finance Division  
Securities and Futures Commission

Ms Jennifer LEE  
Associate Director, Corporate Finance Division  
Securities and Futures Commission

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

**Staff in attendance** : Miss Winnie LO  
Assistant Legal Adviser 7

Mr Noel SUNG  
Senior Council Secretary (1)5

Ms Haley CHEUNG  
Legislative Assistant (1)5

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## **I Meeting with the Administration**

### Follow-up to issues arising from previous meetings

(LC Paper No. CB(1)433/11-12(02) — Administration's paper on  
"Proposed scope of persons  
covered and liability of 'officers'  
under the PSI regulatory regime"

- LC Paper No. CB(1)261/11-12(01) — List of follow-up actions arising from the discussion at the meeting on 17 October 2011
- LC Paper No. CB(1)433/11-12(01) — List of follow-up action arising from the discussion at the meeting on 7 November 2011
- LC Paper No. CB(1)261/11-12(02) — Administration's paper on "Definition of Price Sensitive Information"
- LC Paper No. CB(1)135/11-12(01) — Administration's paper on "Draft Guidelines on Disclosure of Inside Information"
- LC Paper No. CB(1)100/11-12(01) — Administration's powerpoint presentation materials for the meeting on 17 October 2011
- LC Paper No. CB(3)952/10-11 — The Bill
- LC Paper No. CB(1)17/11-12(01) — Marked-up copy of the Bill prepared by the Legal Service Division)

Discussion

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

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Follow-up actions to be taken by the Administration

2. The Administration was requested to take the following follow-up actions:
- (a) regarding the scope of "officers" adopted for the statutory disclosure regime, explain the relationship between the definition of "officer" under the Securities and Futures Ordinance (Cap. 571) and the relevant supplementary information in the draft Guidelines on Disclosure of Inside Information; the status and effect(s) of the Guidelines in relation to the disclosure proceedings provided under the Bill; and the procedure for making amendments to the Guidelines;

- (b) regarding the definition of price sensitive information (PSI), consider substantiating relevant information in the draft Guidelines on Disclosure of Inside Information, preferably with quantitative criteria, to facilitate compliance by listed corporations with the disclosure requirements;
- (c) regarding the "Note" under proposed sections 307A(2) and 251(1), consider adding a statement in the Bill, as in the case of the Companies Bill, to clarify whether the Notes carried legal effect;
- (d) regarding proposed section 307I, confirm whether there was any time limit for institution of proceedings in the Market Misconduct Tribunal under the provision; and
- (e) regarding proposed section 307L(1), review the drafting of the provision to ensure that the relevant policy intent was clearly reflected by the provision.

### Committee Stage Amendments

3. The Administration advised that it would propose Committee Stage amendments to:
  - (a) delete subsection (3) of section 307F; and
  - (b) amend the Chinese translation of "disclosure proceedings" in section 307I(1) and (2) from "有關披露的研訊程序" to "關於披露的研訊程序".

## **II Any other business**

### Date of next meeting

4. The Chairman informed members that the next meeting would be held on 6 December 2011, at 8:30 am.
5. There being no other business, the meeting ended at 6:25 pm.

**Proceedings of the  
Bills Committee on Securities and Futures (Amendment) Bill 2011  
Fifth meeting on Thursday, 24 November 2011, at 4:30 pm  
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000340 – 000412	Chairman	Introductory remarks	
000413 – 001050	Administration	Briefing by the Administration on the paper "Proposed scope of persons covered and liability of 'officers' under the PSI regulatory regime" (LC Paper No. CB(1)433/11-12(02))	
001051 – 002011	Mr Jeffrey LAM Administration Securities and Futures Commission (SFC)	<p>While supporting the proposed codification of the price sensitive information (PSI) disclosure requirements, Mr Jeffrey LAM expressed concern about the scope of the definition of "officers" adopted for the proposed disclosure regime. Mr LAM enquired whether a clearer definition of "officers" could be formulated based on the responsibilities and duties of the persons concerned.</p> <p>The Administration responded that according to Part 1, Schedule 1 of the Securities and Futures Ordinance (SFO) (Cap. 571), an "officer", in relation to a corporation, meant "a director, manager or secretary of, or any other person involved in the management of the corporation". In considering whether a person was a "manager", the person's actual responsibilities were more important than the person's formal title. A "manager" normally referred to a person who performed executive duties under the immediate authority of the board of directors.</p> <p>SFC drew members' attention to paragraph 52 of the draft "Guidelines on disclosure of Inside Information" (the Guidelines) which stated that a "manager" normally referred to a person who, under the immediate authority of the board, was charged with management responsibility affecting the whole of the corporation or a substantial part of the corporation.</p>	
002012 – 002828	Mr WONG Ting-kwong Administration	Noting that under Hong Kong law, there was no distinction between the duties and responsibilities of executive and non-executive	

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		<p>directors, Mr WONG Ting-kwong expressed concern that all directors of a listed corporation might be held responsible for any breach of the disclosure requirements, even though some directors might not have the knowledge of the PSI concerned. Mr WONG enquired whether in taking enforcement action against a listed corporation on a breach of a disclosure requirement, the whole board of directors or only the individual director(s) involved would be held liable for the breach.</p> <p>The Administration pointed out that based on the proposed section 307G, an "officer" would be held liable only if the breach of a disclosure requirement was a result of the officer's intentional, reckless or negligent conduct, and his failure to take all reasonable measures from time to time to ensure that proper safeguards existed to prevent a breach of a disclosure requirement. The enforcement authorities had to provide evidence to prove that the "officer(s)" concerned had breached the disclosure requirements based on proposed section 307G.</p> <p>SFC supplemented that based on proposed section 307G, a director (executive or non-executive director) who had no knowledge about the PSI concerned would not be in breach of the disclosure requirements, provided that the director had taken all reasonable measures from time to time to ensure that proper safeguards existed to prevent a breach of a disclosure requirement in relation to the corporation.</p>	
002829 – 004057	Mr Andrew LEUNG ALA7 SFC Administration	<p>Mr Andrew LEUNG was concerned that given that the definition of PSI was unclear, it was difficult for the "officers" to fulfill their duty stipulated under proposed section 307G, and the directors of listed corporations might easily be held liable for any breach of the disclosure requirements if a quantitative criterion for PSI was not provided for compliance by listed corporations.</p> <p>Given that SFC had advised that based on paragraph 52 of the Guidelines, a "manager" normally referred to a person who, under the</p>	

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		<p>immediate authority of the board of directors, was charged with management responsibility affecting the whole of the corporation or a substantial part of the corporation, Mr Andrew LEUNG sought ALA7's comment as to whether the definition of a "manager" in the Guidelines was compatible with the definition of an "officer" in SFO. In view that the definition of a "manager" in the Guidelines was narrower than that provided in SFO for definition of an "officer", Mr LEUNG enquired whether the Guidelines carried any legal effect.</p> <p>ALA7 replied that according to Part 1, Schedule 1 to the SFO, the term "officer" in relation to a corporation meant "a director, manager or secretary of, or any other person involved in the management of the corporation". In the case of an unincorporated body, an "officer" meant any member of the governing body of the unincorporated body. The reference made by SFC regarding the definition of "manager" was based on the supplement provided in the draft Guidelines. ALA7 pointed out that the Guidelines were issued by SFC and did not form part of SFO.</p> <p>SFC responded that paragraph 52 of the Guidelines elaborated on the definition of an "officer" in Part 1, Schedule 1 of SFO and the reference to "manager" was made to supplement the definition in SFO. SFC pointed out that section 399 of SFO empowered SFC to draw up guidelines for the furtherance of its regulatory objectives, and the Guidelines were drawn up based on SFO and could be referred to in court proceedings.</p> <p>Upon enquiry from Mr Andrew LEUNG, ALA7 supplemented that section 399 of SFO stated that SFC might publish, in the Gazette and in any other manner it considered appropriate, such codes and guidelines as it considered appropriate for providing guidance. Subsection (6) of section 399 stated that a failure on the part of any person to comply with the provisions set out in any code or guideline published under this section (section 399) that applied to him should not by itself</p>	

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		<p>rendered him liable to any judicial or other proceedings, but in any proceedings under this Ordinance (i.e. SFO) before any court the code or guideline should be admissable in evidence, and if any provision set out in the code or guideline appeared to the court to be relevant to any question arising in the proceedings, it should be taken into account in determining that question. Subsection (8) of section 399 also stated that any code or guideline published under this section (i.e. section 399) was not subsidiary legislation.</p> <p>In relation to the scope of the definition of "officers" adopted for the statutory disclosure regime, the Administration was requested to explain (a) the relationship between the definition of "officer" under the SFO and the relevant supplementary information in the Guidelines; and (b) the status and effect(s) of the guidelines in relation to the disclosure proceedings provided under the Bill.</p>	<p>The Administration to take action as per paragraph 2(a) of the minutes.</p>
004058 – 004425	Chairman Administration	<p>Regarding members' request for consideration of setting quantitative criteria for PSI, the Administration responded that the proposed definition of "inside information" was in line with the practice of other major stock markets in the world, namely the information was related to the listed corporation and its securities and was not generally available/known, and if available/known, would likely to materially affect the price of the listed securities. Despite the provision of a quantitative criterion in the Mainland for making profit/loss warnings by listed corporations, there were no quantitative criteria for disclosure of other PSI. The Government did not consider it appropriate to specify quantitative criteria, including in terms of ranges, in the legislation for determining what information was price sensitive due to implementation and principled difficulties. The Government might consider providing further elaborations on the definition of PSI in the Guidelines.</p>	
004426 – 004650	Mr Andrew LEUNG	<p>Mr Andrew LEUNG said that while he considered it acceptable not to specify quantitative criteria in the legislation for</p>	<p>The Administration to take action as per</p>

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		determining what information was price sensitive, the Administration should consider substantiating relevant information in the Guidelines, preferably with quantitative criteria, to facilitate compliance by listed corporations with the disclosure requirements.	paragraph 2(b) of the minutes.
004651 – 005305	Administration	<p><b><u>Clause-by-clause examination of the Bill</u></b></p> <p><b>Part 1</b></p> <p><b>Preliminary</b></p> <p><u>Clause 1 – Short title and commencement</u></p> <p><b>Part 2</b></p> <p><b>Disclosure of Inside Information</b></p> <p><b>Division 1 – Amendments to Securities and Futures Ordinance</b></p> <p><b>Subdivision 1 – Enactment Amended</b></p> <p><u>Clause 2 – Securities and Futures Ordinance amended</u></p> <p>Members raised no question on clauses 1 and 2.</p> <p><b>Subdivision 2 – Part XIVA Added</b></p> <p><u>Clause 3 – Part XIVA added</u></p>	
005306 – 005402	Mr Andrew LEUNG Administration	<p><b>Part XIVA</b></p> <p><b>Disclosure of Inside Information</b></p> <p><b>Division 1 – Interpretation</b></p> <p>307A. Interpretation of Part XIVA</p> <p>Mr Andrew LEUNG asked whether the definitions of the terms under section 307A were the same as the definitions of the same terms in other parts of SFO. The Administration replied in the affirmative.</p>	
005403 – 010027	ALA7 Department of Justice (DoJ)	ALA7 drew members' attention to the "Note" included under proposed section 307A(2), which made reference to another section in the	

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	Mr Andrew LEUNG	<p>Bill. ALA7 remarked that members might consider whether it was necessary to include the "Note" under the definition, the criteria for making a "Note" in relevant sections, and whether any other relevant provisions in the Bill should be covered under the "Note". ALA7 pointed out that in the case of the Companies Bill, a provision was included in the Bill to indicate that the "Notes" did not carry any legal effect, and members might consider whether such a provision should be included in this Bill.</p> <p>DoJ responded that the inclusion of a "Note" under relevant sections was a more recent law drafting practice. A provision was usually included in the relevant Bill to indicate that the "Note" did not carry any legal effect. After reviewing the arrangement, the need for inclusion of such a provision would be assessed on a case-by-case basis for individual Bills. DoJ pointed out that there were only two "Notes" in the Bill, i.e. the one made under proposed section 307A(2) and the other under Clause 6(1), and these "Notes" served to draw the attention of the reader to other relevant provisions in the Bill, and obviously did not carry any legal effect. Hence, unlike the Companies bill, a provision was not included in the current Bill to state that the "Notes" did not carry any legal effect.</p> <p>Mr Andrew LEUNG suggested that, for the sake of consistency, the Administration should consider adding a provision in the Bill, as in the case of the Companies Bill, to clarify whether the "Notes" carried any legal effect.</p>	The Administration to take action as per paragraph 2(c) of the minutes.
010028 – 010239	Mr Andrew LEUNG Administration	<p><b>Division 2 – Disclosure of Inside Information</b></p> <p>307B. Requirement for listed corporations to disclose inside information</p> <p>Mr Andrew LEUNG enquired how a piece of inside information was considered "ought reasonably to have come to the knowledge of an officer of the corporation".</p> <p>The Administration responded that a piece of inside information was considered "ought to</p>	

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		<p>have come to the knowledge of an officer" if the officer should have access to the information during the course of performing the functions as an officer of the corporation. The intention of including the phrase "ought reasonably to have" was to avoid listed corporations evading from the disclosure obligation by arguing that the PSI had been channelled to the officers but had not been read, or deliberately keeping PSI away from being accessed by the officers of the listed corporation. The Administration pointed out that proposed section 307B(2) was similar to the relevant provision used in Australia, and was more specific than the provision used in the United Kingdom.</p>	
<p>010240 – 010900</p>	<p>Mr Andrew LEUNG Administration SFC Chairman</p>	<p>Mr Andrew LEUNG was concerned that SFC might amend the Guidelines at its own discretion at any time, including the guideline on the coverage of the term "manager".</p> <p>SFC responded that the information on the coverage of the term "manager" in the Guidelines was drawn up with reference to the interpretation of the term under the common law and comparable concepts adopted in other major jurisdictions. SFC took it very seriously in making any amendment of the Guidelines.</p> <p>Mr Andrew LEUNG requested that the Administration and SFC should provide information regarding the procedures for making amendments to the Guidelines.</p>	<p>The Administration to take action as per paragraph 2(a) of the minutes.</p>
<p>011000 – 011120</p>	<p>Mr Andrew LEUNG Administration</p>	<p>307C. Manner of disclosure</p> <p>Mr Andrew LEUNG was concerned that information might not be able to be disclosed in a timely manner in case the electronic publication system of the Stock Exchange of Hong Kong had broken down.</p> <p>The Administration responded that the Hong Kong Exchanges and Clearing Limited had prepared contingency measures, e.g. provision of an electronic bulletin board, to facilitate the dissemination of PSI in case of disruption of the HKExnews service. The enforcement</p>	

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		<p>authorities would take into account the availability of electronic publication systems at the material time for disclosure of PSI by listed corporations.</p>	
011121 – 011633	Administration	<p>307D. Exceptions to disclosure requirement</p> <p>Members raised no question on proposed section 307D.</p>	
011634 – 011813	Administration	<p>307E. Waiver</p> <p>Members raised no question on proposed section 307E.</p>	
011814 – 012010	ALA7 DoJ	<p>307F. Commission may make rules to prescribe circumstances in which disclosure requirement does not apply</p> <p>ALA7 pointed out that the circumstance in subsection (3) had already been specified in subsection (1) of proposed section 307F and could be deleted. DoJ responded that a Committee Stage amendment would be proposed to delete subsection (3) of proposed section 307F.</p>	<p>The Administration to take action as per paragraph 3(a) of the minutes.</p>
012011 – 012130	Administration	<p>307G. Duty of officers of listed corporations</p> <p>Members raised no question on proposed section 307G.</p>	
012131 – 012329	Administration	<p><b>Division 3 – Disclosure Proceedings in Market Misconduct Tribunal</b></p> <p>307H. Jurisdiction of Tribunal under this Part</p> <p>Members raised no question on proposed section 307H</p>	
012330 – 012859	Mr Andrew LEUNG	<p>307I. Institution of disclosure proceedings</p> <p>307J. Object and conduct of disclosure proceedings</p> <p>Mr Andrew LEUNG requested that the Administration and SFC should confirm whether there was a time limit for institution of proceedings at the Market Misconduct Tribunal (MMT) under the proposed section 307I.</p>	<p>The Administration to take action as per paragraph 2(d) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>In response to Mr Andrew LEUNG's enquiry regarding the appeal channel for MMT cases, the Administration remarked that persons who felt aggrieved by the decision of the MMT might appeal to the Court of Appeal.</p> <p>DoJ remarked that in order to be consistent with other provisions in the Bill, the Chinese translation of "disclosure proceedings" in proposed section would be amended from "有關披露的研訊程序" to "關於披露的研訊程序".</p>	<p>The Administration to take action as per paragraph 3(b) of the minutes.</p>
012900 – 012950	Administration	<p>307K. Right to be heard</p> <p>Members raised no question on proposed section 307K</p>	
012951 – 014637	<p>Mr Andrew LEUNG Administration DoJ Mr Ronny TONG Mr Albert HO</p>	<p>307L. Use of evidence received for purposes of disclosure proceedings</p> <p>Mr Andrew LEUNG queried whether the Chinese version of proposed section 307L was consistent with the English version.</p> <p>DoJ responded that the way the Chinese version of section 307L was drafted was consistent with that of other provisions in the SFO, and the Chinese version was an accurate translation of the English version although they adopted different presentation styles.</p> <p>Mr Ronny TONG queried the need for the words "brought by or against the person" in subsection 1(b) of proposed section 307L, and pointed out that it was unreasonable that records or documents or information produced by a person to the MMT would be used as evidence against the person in criminal proceedings "brought by the person".</p> <p>Mr Albert HO was concerned that the evidence produced at the MMT was not admissible in other proceedings against a person who had breached the disclosure requirements.</p> <p>The Administration responded that the evidence produced at the MMT was admissible in evidence in those proceedings specified in subsection (2) of proposed section 307L.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>In response to Mr Ronny TONG's enquiry as to whether proposed section 307L was modeled on the relevant provisions in the legislation relating to insider dealing, the Administration responded that proposed section 307L(1) (b) and (2) were copied from existing section 255 of SFO.</p> <p>The Administration was requested to review the drafting of section 307L(1) to ensure that the provision clearly reflects the relevant policy intent.</p>	<p>The Administration to take action as per paragraph 2(e) of the minutes.</p>
014638 – 014823	ALA7 DoJ	<p>307L Use of evidence received for purposes of disclosure proceedings</p> <p>ALA7 drew members' attention to subsection (1) of proposed section 307L that while the English text mentioned about "given, provided, produced or disclosed", the Chinese version only mentioned "提供, 交出或披露".</p> <p>DoJ responded that in line with the Chinese version for other provisions in the SFO, the words "given, provided" were translated into one single Chinese term, i.e. "提供".</p>	
014824 – 015129	Administration	<p>307M. Privileged information</p> <p>Members raised no question on proposed section 307M</p>	
015130 – 015419	Mr Ronny TONG Administration	<p>307N. Orders of Tribunal</p> <p>Mr Ronny TONG questioned about the reason for including subsection (1)(c) in proposed section 307N.</p> <p>The Administration responded that since all orders of MMT could be registered in a Court, a person who breached the order might be charged for contempt of the Court.</p>	
015420 – 015442	Chairman	Date of next meeting	