

立法會
Legislative Council

LC Paper No. CB(1)1618/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/11/10/2

Bills Committee on Securities and Futures (Amendment) Bill 2011

Ninth meeting on
Tuesday, 31 January 2012, at 10:45 am
in Conference Room 2A of the Legislative Council Complex

Members present : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon James TO Kun-sun
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
Hon Paul CHAN Mo-po, MH, JP

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

Miss Belinda KWAN
Principal Assistant 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 Monica LAW
Senior Assistant Law Draftsman
Department of Justice

Ms Karmen KWOK
Senior Government Counsel
Department of Justice

Ms Beverly YAN
Senior Assistant Law Officer (Civil Law)
Department of Justice

Mr David LEUNG
Senior Assistant Director of Public Prosecutions
Department of Justice

Attendance by invitation : Mr Ashley ALDER
Chief Executive Officer
Securities and Futures Commission

Mr Mark STEWARD
Executive Director, Enforcement Division
Securities and Futures Commission

Mr Brian HO
Executive Director, Corporate Finance Division
Securities and Futures Commission

Mr Andrew WAN
CFO and Senior Director, Corporate Affairs
Securities and Futures Commission

Mrs Ivy LAI
Director, External Relations
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

I Meeting with the Administration

Follow-up to issues arising from previous meetings

- (LC Paper No. CB(1)942/11-12(01) — List of follow-up actions arising from the discussion at the meeting on 19 January 2012
- LC Paper No. CB(1)942/11-12(02) — Administration's response to issues raised at the meeting on 19 January 2012
- LC Paper No. CB(1)700/11-12(01) — Submission dated 21 December 2011 from the Hong Kong Institute of Certified Public Accountants (HKICPA) (English version only)
- LC Paper No. CB(1)900/11-12(02) — Administration's response to the submission from the Hong Kong Institute of Certified Public Accountants
- LC Paper No. CB(1)900/11-12(03) — Administration's response to issues raised at the meeting on 3 January 2012
- LC Paper No. CB(1)687/11-12(02) — Administration's response to issues raised at the meetings on 6 December 2011 and 24 November 2011
- LC Paper No. CB(1)527/11-12(02) — Administration's response to issues raised at the meeting on 24 November 2011
- 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(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")

Clauses-by-clause examination of the Bill (starting with clause 29)

(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) confirm whether it would further consider the view of the Hong Kong Institute of Certified Public Accountants (HKICPA) regarding the extension of the safe harbour provisions to cover the situation as described by HKICPA;
- (b) review the Chinese wording of the proposed amendments under clause 36 (i.e. amendments to section 109); and
- (c) confirm whether a modification or waiver granted by Securities and Futures Commission under section 134(1) of the Securities and Futures Ordinance (Cap. 571) is subsidiary legislation, and review the proposed amendments under clause 37 (i.e. amendments to section 134(6) and (7)) including the appropriateness of the term "on-line medium".

3. The Assistant Legal Adviser was requested to advise whether the expressions used in the safe harbour proposed by HKICPA, i.e. "acting in good faith", "have exercised judgment", "reasonable prudence", "taken reasonable steps" and "properly considered", were present in other ordinances.

II Any other business

Date of next meeting

4. The Chairman informed members that the next meeting would be held on 14 February 2012, at 10:45 am.
5. There being no other business, the meeting ended at 12:41 pm.

Council Business Division 1
Legislative Council Secretariat
17 April 2012

**Proceedings of the
Bills Committee on Securities and Futures (Amendment) Bill 2011
Ninth meeting on Tuesday, 31 January 2012, at 10:45 am
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000140 – 000348	Chairman	Introductory remarks	
000349 – 001626	Administration Securities and Futures Commission (SFC)	Briefing by the Administration on LC Paper No. CB(1)687/11-12(02)	
001627 – 003058	Mr Andrew LEUNG ALA7 SFC	<p>Mr Andrew LEUNG asked ALA7 whether the expressions used in the safe harbour proposed by the Hong Kong Institute of Certified Public Accountants (HKICPA) were present in other ordinances. ALA7 said that she would check the ordinances and provide relevant information to members later.</p> <p>Mr Andrew LEUNG was concerned that in the absence of specific and/or quantitative criteria for defining price sensitive information (PSI), the directors, in particular the non-executive directors, would have difficulty in setting up an effective internal control system for reporting and disclosure of PSI. Mr LEUNG was concerned that non-executive directors might not be informed of the PSI and yet they would equally be held responsible for any breach of the disclosure requirements as the executive directors of the listed corporation.</p> <p>SFC responded that a director would not be held liable for breaching the PSI disclosure requirements if he had ensured that proper safeguards were put in place in the listed corporation to prevent a breach of the disclosure requirement, and if he had no knowledge of the PSI. SFC supplemented that given the different types of businesses of listed corporations and their different modes of operation, it would be impossible to lay down quantitative criteria for defining PSI. The Guidelines to be issued by SFC would specify the criteria for setting up the internal control procedures for compliance with the PSI disclosure requirement. Non-executive directors had the obligation to ensure that an</p>	ALA7 to take action as per paragraph 3 of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
		<p>effective internal control system was in place for reporting and disclosure of PSI. In performing their duties, non-executive directors should regularly check that the internal control system was operating effectively and PSI was reported timely to the board of directors. The executive directors should discuss with the non-executive directors if there was doubt as to whether a piece of information should be disclosed. SFC remarked that the Guidelines to be issued by SFC should be able to help listed corporations in complying with the disclosure requirement.</p>	
003059 – 003408	Mr Abraham SHEK	<p>Mr Abraham SHEK declared interest as the non-executive director of a number of listed corporations.</p> <p>Mr SHEK opined that it was important to lay down quantitative or numerical criteria for PSI so that listed corporations could set up an effective internal control system for compliance with the disclosure requirements. Mr SHEK pointed out that the board of directors of a listed corporation might only meet occasionally, and thus non-executive directors might not be informed of PSI. Yet under the proposed legislation, the non-executive directors would be held equally liable as the executive directors in the case of a breach of the PSI disclosure requirement. A quantitative criterion would facilitate non-executive directors in monitoring the reporting of PSI to them.</p>	
003409 – 003748	Mr Paul CHAN	<p>Noting that the safe harbour proposed by HKICPA was also available in Australia and Canada, although not in the context of a PSI disclosure regime, Mr Paul CHAN opined that the Bills Committee should discuss further regarding the safe harbour proposed by HKICPA, based on the information to be provided by ALA. Mr CHAN requested that the Administration should provide discussion papers for the Bills Committee earlier.</p>	
003749 – 004037	Mr CHIM Pui-chung	<p>Mr CHIM Pui-chung opined that the legislation imposing the PSI disclosure requirement should be specific and clear to enable compliance by the listed corporations.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>Otherwise, the regulator(s) might abuse its powers in enforcing the legislation. Given the difference in the remuneration for executive and non-executive directors in a listed corporation, there should be clear demarcation between the liabilities of executive and non-executive directors. Otherwise qualified persons might be discouraged to act as non-executive directors, which might lead to the deterioration of the corporate governance of listed corporations. Mr CHIM was of the view that in making reference to the practices in other stock markets, the proposed legislation should aim to protect the interest of participants in the local stock market.</p>	
004038 – 004341	Mr Jeffrey LAM	<p>Mr Jeffrey LAM opined that it was unfair to the non-executive directors if they were held equally liable as the executive directors for any breach of the PSI disclosure requirement. In proposing the statutory disclosure requirement, the Administration and SFC should give thorough consideration to compliance and enforcement issues. He requested that further consideration be made regarding the safe harbour proposed by HKICPA. Mr LAM also requested that the Administration should provide the relevant papers earlier.</p> <p>The Administration was requested to confirm whether it would further consider the view of HKICPA regarding the extension of the safe harbour provisions to cover the situation as described by HKICPA.</p>	The Administration to take action as per paragraph 2(a) of the minutes.
004342 – 010058	Mr Andrew LEUNG Jeffrey LAM Administration SFC	<p>Mr Andrew LEUNG opined that compared to the existing procedure, there would be fewer checks and balances in the proposed procedure for SFC to institute proceedings with the Market Misconduct Tribunal (MMT) direct. Mr LEUNG was also concerned that the Administration only pointed out that the Hong Kong Bar Association supported the Bill, without making reference to the dissenting views expressed by many other respondents. Mr Jeffrey LAM shared Mr LEUNG's concern. Mr LAM pointed out that apart from other stakeholders, some lawyers also did not support the proposal to empower SFC to institute proceedings with the MMT direct.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>The Administration responded that the Government had assessed the views of different respondents in the public consultation, and worked out the proposals in the Bill. SFC supplemented that there were adequate checks and balances in the system for SFC to institute proceedings with the MMT direct. All market misconduct cases had to be considered and endorsed by the board of directors of SFC before they would be presented to the MMT, and the majority of the board of SFC comprised independent non-executive directors. The MMT had the power to seek additional information in hearing of the market misconduct cases. SFC would put its credibility at stake if it lost in most of the cases presented to the MMT.</p>	
010059 – 010150	Mr Paul CHAN	<p>Mr Paul CHAN declared interest as a non-executive director of a number of listed corporations. Mr CHAN said that he supported the proposal to empower SFC to institute proceedings with the MMT direct, as there were adequate checks and balances in the system. Mr CHAN opined that as an international financial centre, Hong Kong needed to be seen as being able to deal with market misconduct cases in an efficient manner.</p>	
010151 – 010213	Mr Jeffery LAM	<p>Mr Jeffrey LAM declared interest as a non-executive director of several listed corporations. Mr LAM also declared interest on behalf of Mr Andrew LEUNG.</p>	
010214 – 010405	Chairman	<p>The Chairman remarked that members' views on issues such as the definition of PSI, the responsibilities of non-executive directors and the MMT procedures had been clearly conveyed to the Administration. As the Administration was not prepared to propose amendments relating to the issues, members might consider proposing Committee Stage amendments (CSAs) by themselves if necessary. The Bills Committee would consider any proposed CSAs at the next meeting.</p>	

Time Marker	Speaker	Subject(s)	Action Required
010406 – 010643	Administration	<p><u>Clause-by-clause examination of the Bill</u></p> <p>Part 4</p> <p>Investor Education</p> <p><u>Clause 29 – Securities and Futures Ordinance amended</u></p> <p><u>Clause 30 – Section 4 amended (Regulatory objectives of Commission)</u></p> <p>Members raised no question on clauses 29 and 30.</p>	
010644 – 012117	Ms Audrey EU Administration SFC Chairman	<p><u>Clause 31 – Section 5 amended (Functions and powers of Commission)</u></p> <p>Given that the proposed Investor Education Council (IEC) would be a wholly owned subsidiary of SFC, Ms Audrey EU was concerned about the independence of the IEC. Ms Audrey EU further enquired about the staff strength and estimated expenditure of the IEC.</p> <p>The Administration responded that in addition to taking over the current investor education responsibilities from SFC on securities and futures products, the IEC would also undertake investor education work in relation to other financial products such as credit cards and insurance products. Although a non executive director of SFC would be appointed as the Chairman of the Board of the IEC, members of the Board would include representatives from other relevant regulatory bodies, the financial sector and the Education Bureau. The establishment of IEC as a wholly owned subsidiary of the SFC would enhance the accountability and transparency of the IEC in its performance and expenditure on investor education. The Administration remarked that the initial annual operating costs for the IEC would be about \$50 million. The IEC would have about 20 staff.</p> <p>SFC supplemented that the Board of the IEC would decide the scope and strategy of work of the IEC. The initial cost of \$50 million would be largely used on investor education work and</p>	

Time Marker	Speaker	Subject(s)	Action Required
		related manpower costs, as the IEC would be located in SFC's premises and SFC would provide support services for the IEC. The seven existing staff of SFC engaged in investor education work would be transferred to the IEC.	
012118 – 012155	Administration	<p><u>Clause 32 – Section 10 amended (Delegation and sub-delegation of Commission's functions)</u></p> <p><u>Clause 33 – Schedule 2 amended (Non-delegable functions of Commission)</u></p> <p>Members raised no question on clauses 32 and 33.</p>	
012156 – 012228	Chairman	The Chairman requested the Administration to brief the Panel on Financial Affairs in due course on the detailed arrangements for setting up the IEC.	
012229 – 012454	Administration	<p>Part 5</p> <p>Miscellaneous Amendments</p> <p>Division 1 – Miscellaneous Amendments to Securities and Futures Ordinance</p> <p><u>Clause 34 – Securities and Futures Ordinance amended</u></p> <p><u>Clause 35 – Section 10 amended (Delegation and sub-delegation of Commission's functions)</u></p> <p>Members raised no question on clauses 34 and 35.</p>	
012455 – 013110	Ms Audrey EU Mr Ronny TONG	<p><u>Clause 36 – Section 109 amended (Offence to issue advertisements relating to carrying on of regulated activities, etc.)</u></p> <p>Ms Audrey EU opined that with the proposed amendments to the Chinese text, section 109 was difficult to comprehend. Mr Ronny TONG shared Ms EU's concern. The Administration was requested to review the proposed amendments under Clause 36.</p>	The Administration to take action as per paragraph 2(b) of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
013111 – 013625	Ms Audrey EU Administration	<p><u>Clause 37 – Section 134 amended (Modification or waiver of requirements)</u></p> <p>In response to Ms Audrey EU's enquiry on the appropriateness of using the term "on-line medium" instead of "Internet" in the proposed amendments to section 134(6) and (7), the Administration undertook to review the appropriateness of the term "on-line medium".</p>	The Administration to take action as per paragraph 2(c) of the minutes.
013626 – 014218	Mr CHIM Pui-chung Ms Audrey EU Administration ALA7	<p>Mr CHIM Pui-chung doubted the legitimacy of authorizing SFC to publish the notice of a modification or waiver of listing, registration and/or licence requirements granted under section 134(1) on the Internet instead of in the Gazette. Ms Audrey EU shared Mr CHIM's concern and sought clarification on whether such modification or waiver involved subsidiary legislation.</p> <p>The Administration was requested to confirm whether a modification or a waiver granted by SFC under section 134(1) of the Securities and Futures Ordinance (SFO) (Cap. 571) was subsidiary legislation.</p>	The Administration to take action as per paragraph 2(c) of the minutes.
014219 – 014856	Administration	<p><u>Clause 38 – Section 185 amended (Application to Court of First Instance relating to non-compliance with requirements under section 179, 180, 181 or 183)</u></p> <p><u>Clause 39 – Section 194 amended (Disciplinary action in respect of licensed persons, etc.)</u></p> <p><u>Clause 40 – Section 196 amended (Disciplinary action in respect of registered institutions, etc.)</u></p> <p><u>Clause 41 – Section 378 amended (Preservation of secrecy, etc.)</u></p> <p><u>Clause 42 – Section 387A added</u></p> <p><i>387A. Civil proceedings by Commission</i></p> <p><u>Clause 43 – Schedule 2 amended (Non-delegable functions of Commission)</u></p> <p><u>Clause 44 –Schedule 10 amended (Savings, transitional, consequential and related provisions, etc.)</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>Division 2 – Business Day Amendments</p> <p>Subdivision 1 – Enactments Amended</p> <p><u>Clause 45 – Enactments amended</u></p> <p>Subdivision 2 – Securities and Futures Ordinance (Cap. 571)</p> <p><u>Clause 46 – Schedule 1 amended (Interpretation and general provisions)</u></p> <p>Subdivision 3 – Securities and Futures (Client Securities) Rules (Cap. 571 sub. leg. H)</p> <p><u>Clause 47 – Section 8A amended (Repledging Limit)</u></p> <p>Subdivision 4 – Securities and Futures (Contracts Limits and Reportable Positions) Rules (Cap. 571 sub. leg. Y)</p> <p><u>Clause 48 – Section 2 amended (Interpretation)</u></p> <p><u>Clause 49 – Section 6 amended (Notice of reportable positions)</u></p> <p>Members raised no question on clauses 38 to 49.</p>	
014857 – 015546	ALA7 Ms Audrey EU Administration	<p><u>Clause 37 – Section 134 amended (Modification or waiver of requirements)</u></p> <p>ALA7 clarified that the proposed amendments under section 134(6) were related to the means through which SFC would publicize the modification and/or waiver of requirements granted upon an application from a listed corporation and/or an applicant for licence, and the relevant provision did not involve the question of subsidiary legislation.</p> <p>The Administration remarked that it would confirm whether a modification or a waiver granted by SFC under section 134(1) of the SFO was subsidiary legislation.</p>	

Time Marker	Speaker	Subject(s)	Action Required
015547 – 015712	Mr James TO	In relation to the safe harbour proposed by the HKICPA, Mr James TO remarked that he considered that the justifications provided by the Administration for maintaining the safe harbour provisions in the Bill should be accepted.	
015713 – 015726	Chairman	Date of next meeting	

Council Business Division 1
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17 April 2012