

**Progress Report on the  
Motion on “Reviewing the functions of the Securities and Futures  
Commission”  
as moved by Hon Tommy Cheung  
at the Legislative Council meeting of 23 October 2013**

**Purpose**

At the Legislative Council meeting of 23 October 2013, the motion “Reviewing the functions of the Securities and Futures Commission” amended by Hon Christopher Cheung and Hon Dennis Kwok was passed. This report informs Members of the Administration’s follow-up actions on the matter.

**Checks and Balances in relation to the Securities and Futures Commission (“SFC”)**

2. When the SFC exercises its regulatory and statutory powers, including its prosecution powers, it is subject to a number of checks and balances. Many of these are built into the Securities and Futures Ordinance (“SFO”) and govern both the SFC’s executive structure and the way in which it may perform its statutory functions. In addition, SFC has developed internal administrative procedures to supplement these. All these measures aim to ensure that the SFC is subject to a high degree of accountability, as well as to ensure the SFC can carry out its regulatory duties in a fair, just and impartial manner.

3. Any major policies, including regulatory policies and key enforcement actions, must be endorsed at the SFC’s board. As set out in the SFO, the number of non-executive directors appointed by the Administration must exceed the number of executive directors. This is to ensure that SFC’s board will be able to oversee the SFC executive. Secondly, for a large range of the SFC’s regulatory decisions, such as licensing, disciplinary actions and restriction notices, aggrieved parties can appeal to the Securities and Futures Appeals Tribunal.

4. Also, the Process Review Panel for the SFC (“PRP”) is responsible for reviewing the SFC’s operational procedures, including reviewing whether the SFC adheres to its internal procedures and operational guidelines. The PRP will also make recommendations to the SFC. The PRP’s work contributes to ensuring that the SFC exercises its regulatory powers in a fair and consistent manner. The review scope of PRP includes the licensing of intermediaries, inspection of intermediaries, authorisation of investment products, handling of complaints, and processing of listing applications etc. The PRP published its most recent annual report, covering its work in 2012-13, on 25 October 2013. In the past year, the PRP has reviewed selected cases with a view to assessing the SFC’s internal operation procedures extensively, and has made a number of observations and recommendations to the SFC in its annual report. Key observations and recommendations made by the PRP and follow up actions taken by the SFC are set out at **Annex**.

#### **SFC’s criminal prosecution responsibilities**

5. Section 388(1) of the SFO provides that the SFC may prosecute in its own name offences created under the SFO and some other specified ordinances where the venue of trial is the Magistrates’ Courts. However, section 388(3) of the SFO makes it clear that this power on the part of the SFC does not derogate from the powers of the Secretary for Justice (“SJ”) in respect of the prosecution of criminal offences. Against the backdrop that the SFC should at all times respect Article 63 of the Basic Law, which provides that the *“The Department of Justice... of the Hong Kong Special Administrative Region (“DoJ”) shall control criminal prosecutions, free from any interference”*, together with section 388(3) of the SFO, the SFC may prosecute cases in its own name at the Magistrates’ Courts. In addition, by virtue of the provisions cited above, the DoJ has an overriding prosecutorial authority over SFC’s prosecution power and provides appropriate checks and balances.

6. It is necessary for the SFC to adhere to all the relevant obligations and standards when it seeks to prosecute in its own name pursuant to section 388 of the SFO. In practice, the SFC refers all market misconduct cases to the DoJ for advice on sufficiency of evidence

and trial venue. Where the DoJ decides that a case should be prosecuted on indictment, the DoJ will conduct the prosecution in the higher courts. Alternatively, where the DoJ decides that a case should be prosecuted summarily, the SFC will conduct the prosecution in the Magistrates Court. Whilst the views of the SFC on venue are taken into account and given their due weight, it is the DoJ's decision that takes supremacy. The above arrangement demonstrates that the DoJ's constitutional role under Article 63 of the Basic Law is respected.

7. The existing regulatory regime as enshrined in the SFO has served the financial market well. In particular, the enforcement arrangements have enabled the SFC to perform its functions effectively in preserving the integrity of our financial system and ensuring an open, fair and orderly security market. The Administration therefore has no plan to suggest any changes to section 388 of the SFO.

## **Conclusion**

8. The Administration attaches importance to the sustainable development of the securities industry. To this end, we fully recognise the need for our regulatory regime to evolve with the development of securities market. We therefore have adopted multi-pronged measures to support the growth of the securities industry, enhancing market quality and promoting good conduct among industry practitioners. These will all contribute to Hong Kong as an international financial centre. We will continue to engage the industry and other stakeholders in pursuing our work in this regard.

**Financial Services and the Treasury Bureau**  
**January 2014**

**Key observations and recommendations made by  
the Process Review Panel (“PRP”) and follow up actions taken by the  
Securities and Futures Commission (“SFC”)**

**Key observations and recommendations made by PRP**

***(i) Authorization of Investment Products***

The PRP observed that there were multiple rounds of written comments between the SFC and an applicant during the authorization process, and recommended the SFC to streamline the workflow and engage the applicant through meetings to resolve outstanding issues and also formulate a performance pledge for completing the authorization process and review the 12-month application lapse policy.

***(ii) Investigation and Enforcement***

2. The PRP reviewed a suspected market manipulation case of which the SFC took two years to complete the investigation. Nine months were spent on waiting for the legal advice from the SFC’s in-house legal advisor and an external counsel. The SFC subsequently closed the case with no action taken. The PRP considered a nine-month waiting time for legal advice was totally unreasonable and recommended the SFC to review.

***(iii) Handling of Public Complaints***

3. The PRP commented that there was a lack of transparency in the SFC’s replies to complainants and recommended the SFC to devise a better complaint handling mechanism.

***(iv) Licensing***

4. The PRP invited the SFC to review its performance pledge on processing of licensing applications for responsible officers. The current pledge is ten weeks.

## **Follow up actions taken by the SFC**

5. In response to the PRP's concerns and suggestions, SFC undertook to streamline workflow, review current performance pledges and enhance communication with applicants in view of the PRP's observations and recommendations. For example, SFC issued a circular on 29 November 2013, announcing the revisions to the application lapse policy for authorisation of SFC-authorized Investment Products from 12 to 6 months. The new regime would come into effect from 1 January 2014. SFC hoped that the revised application lapse policy initiative would encourage applicants to respond to requisitions in a timely fashion as well as result in a shorter turn-around time on our part, so that an overall more expedient process can be achieved.

**(Translation)**

**Motion on  
“Reviewing the functions of the Securities and Futures Commission”  
moved by Hon Tommy CHEUNG  
at the Council meeting of 23 October 2013**

**Motion as amended by Hon Christopher CHEUNG and Hon Dennis KWOK**

That, as the society has divergent views on the functions and operating mechanism of the Securities and Futures Commission (‘SFC’), this Council urges the Government to expeditiously conduct a review in this regard, including the arrangements for criminal and non-criminal investigations, enforcement and prosecution work, and even the investigation technique of front-line officers, etc. of SFC, thereby achieving separation of powers and checks and balances, so as to protect the legitimate rights and interests of practitioners in the securities industry and ensure SFC’s impartiality and independence, and to make SFC’s work more transparent and better accord with the public interest; this Council also urges the Government to require that SFC must abide by the Prosecution Code in handling criminal prosecutions, and to allow the Department of Justice to have sufficient oversight of SFC’s criminal prosecution work, and to retain the Department of Justice’s ultimate control over all criminal prosecutions in Hong Kong, so as to comply with the constitutional requirement under Article 63 of the Basic Law.