

立法會
Legislative Council

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by the Administration)

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**Subcommittee on
Securities and Futures Bill**

**Minutes of meeting
held on Friday, 24 September 1999, at 10:45 am
in Conference Room B of the Legislative Council Building**

Members present : Hon Ronald ARCULLI, JP (Chairman)
Hon Albert HO Chun-yan (Deputy Chairman)
Hon Eric LI Ka-cheung, JP
Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong
Hon Ambrose LAU Hon-chuen, JP
Hon FUNG Chi-kin

Member absent : Hon Ambrose CHEUNG Wing-sum, JP
Hon Christine LOH
Hon SIN Chung-kai
Hon Jasper TSANG Yok-sing, JP

**Public officers
attending** : Miss AU King-chi, JP
Deputy Secretary for Financial Services

Mr Mark DICKENS
Executive Director of Supervision of Markets
Securities and Futures Commission

Mr Andrew PROCTER
Executive Director of Intermediaries and Investment Products
Securities and Futures Commission

Mrs Alexa LAM
Chief Counsel of Securities and Futures Commission

Mr James CHAN Yum-min
Principal Assistant Secretary for Financial Services

Clerk in attendance : Ms Estella CHAN
Chief Assistant Secretary (1)4

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

Ms Connie SZETO
Senior Assistant Secretary (1)1

I Briefing by the Administration

Disciplinary Powers of Securities and Futures Commission (LC Paper No. CB(1) 1867/98-99(02))

The Executive Director of Supervision of Markets/Securities and Futures Commission (EDSM/SFC) briefed members on the major proposals in the information paper, inter alia, the introduction of intermediate disciplinary sanctions including civil fines with a proposed maximum limit of the greater of \$10 million or three times the amount of profits made or losses avoided; suspension of part of an intermediary's business and power to prohibit a person from being a "responsible officer" of a regulated intermediary. EDSM/SFC advised that the Bill also provided Securities and Future Commission (SFC) with power to negotiate a settlement. In order to enhance transparency and accountability of the disciplinary decision-making process, a Securities and Futures Appeals Tribunal and a Process Review Panel would be set up. EDSM/SFC also briefed members on comparison between SFC and overseas jurisdictions on their disciplinary powers and levels of fine on misconduct registrants.

2. EDSM/SFC informed members that during the public consultation, the majority of respondents expressed support for the introduction of the additional pecuniary penalty under the proposal. Some respondents had suggested setting different maximum fines for different types of conduct. Taking into consideration that it would be arbitrary to set statutory definitions for different types of conduct, SFC would instead issue guidelines on factors to be considered when deciding on appropriate disciplinary actions. He then invited members to comment on the proposals set out in the information paper.

Action

3. The Chairman enquired about the rationale behind setting a maximum limit of the greater of \$10 million or three times the amount of profit made or losses avoided, instead of borrowing the United States (US) model of setting maximum fine level per violation or per day of misconduct.
4. EDSM/SFC explained that the maximum limit was set to be consistent with that proposed for the Market Misconduct Tribunal. He said that the three times multiple was also used by the US Commodity Futures Trading Commission. He elaborated that as in some cases of unsuccessful attempts in market manipulation where there was no profit gained nor loss avoided, a maximum fine level in absolute monetary terms i.e.\$10 million in the proposal would be required. He advised that the SFC would only use the power to impose fine under special circumstances where a reprimand would be too light and a revocation or suspension of licence too severe.
5. On the criteria for determining and calibrating civil fines, members noted that the size and financial resources of a firm would be a factor of consideration. Mr Ambrose LAU considered such criteria unfair. Mr James TO echoed and commented that this might be used by some dishonest market participants to carry out large scale market manipulation activities through small intermediaries to minimize the possible fines that might be imposed.
6. EDSM/SFC explained that the proposal of introducing pecuniary penalty was to enable the SFC to impose an “intermediate” disciplinary sanction with severity level between that of a reprimand and a suspension or revocation of licence. In the event where the fine was imposed at a level beyond the affordability of the concerned intermediary which ended up with bankruptcy, the sanction would turn out to be a more severe one than a suspension or revocation and this was not the intention of the SFC. He assured that the size and financial resources of the intermediary would only be one of the factors for consideration. Moreover, a set of guidelines would be prepared to list out the criteria and circumstances to be taken into account in deciding the fine level so as to ensure justice in individual cases and consistency of judgement amongst cases. The Administration undertook to consider members' views when drafting the guidelines.
7. In reply to Mr Albert HO's enquiry on SFC's investigation power over a misconduct of cross market nature, EDSM/SFC said that the scope of investigation of a misconduct would depend on circumstances of individual cases. "Memorandum of Understanding" had been signed between Hong Kong and other jurisdictions to enable extra-territorial investigation and exchange of necessary information.
8. Responding to the Chairman's question on the enforcement of disciplinary sanctions outside the territory, EDSM/SFC informed members that the SFC was only empowered to impose disciplinary sanctions on its licensees or registrants and it had no authority over the intermediaries licensed or registered in other jurisdictions.

9. On the suggestion of recovering investigation costs from the fines collected, EDSM/SFC said that this suggestion had been considered and concluded to be detrimental to the SFC's impartial role in the investigation. It might give the public a misleading impression that the investigation was not only conducted for public interest. He informed members that the fines would be put under the Government's general revenue. He further explained that under existing practice, investigation costs would only be recovered from fines where investigation of these cases was ordered by the Financial Secretary. This was in line with the practice in other jurisdictions in which investigation costs could be recovered where cases were ordered by a third party for example, a court order.

10. As regards the Chairman's question about the timing for the disciplinary sanction to take effect if an appeal was lodged, the Deputy Secretary for Financial Services (DS/FS) responded that in most cases, the sanctions would not take effect until the appeal was determined or withdrawn. However, certain SFC decisions would have to take immediate effect for the protection of investors' interest. Under such circumstances, the SFC would be empowered to implement the sanctions immediately even an appeal was lodged.

11. Mr Albert HO opined that there should be more transparency in the disciplinary procedures, in particular, for private reprimand which would not be disclosed to the public. The Chairman concurred and said that private reprimand might be unfair to other market participants since they had no information concerning the misconduct of the intermediary under the reprimand.

12. The Executive Director of Intermediaries and Investment Products/Securities and Futures Commission (EDI&IP/SFC) said that private reprimand would be given under special circumstances where the misconduct was of minor nature, investors' interests would not be hampered, and where the concerned intermediary had taken appropriate remedial actions. There would be adequate checks and balances for example, the Process Review Panel in the regulatory mechanism to ensure consistency of SFC's judgement. EDSM/SFC added that the private reprimand issued would be kept on record and would be taken into consideration in case of repeated misconduct.

13. In reply to the Chairman's enquiry about the publicity of negotiated settlements proposed in the paper, EDSM/SFC said that though there was no hard and fast rule on the publicity of the settlements, it was anticipated that majority of the cases would have been made public before reaching settlement. He briefed members on the procedural flow of a disciplinary case from investigation to the announcement of disciplinary decision to the intermediary concerned. The process involved SFC professionals at different levels and this would ensure a fair treatment of every case. According to past records, over 90% of the disciplinary decision were made known to the public.

14. Responding to Mr Albert HO's question on the level of SFC officers with the delegated power to make disciplinary decisions, EDSM/SFC informed members that

disciplinary decisions were normally made at the very senior level, such as the Executive Directors, of the SFC. He said that the resources of the SFC were at present adequate to meet the standard of considering every disciplinary case at the level of Executive Director or Senior Director of Enforcement. EDI&IP/SFC supplemented that this would be a safeguard to ensure that misconduct cases would not be mishandled or closed at the junior level without in-depth investigations.

Establishing a Securities and Futures Appeals Tribunal
(LC Paper No. CB(1) 1867/98-99(03))

15. The Chief Counsel of Securities and Futures Commission (Ch. Counsel/SFC) highlighted the salient points in the information paper. The Securities and Futures Appeals Tribunal (SFAT) would replace the existing Securities and Futures Appeal Panel and its jurisdiction would be expanded to cover all disciplinary decisions of the SFC, including the imposition of civil fines or partial suspension. It would be a full time Tribunal chaired by a High Court judge or deputy judge and assisted by two lay members with appropriate market experience. It would have a set of clear procedural rules and would be able to deal with appeal cases fairly and efficiently. The creation of the SFAT was supported by members of the industry during the public consultation.

16. In response to Mr Eric LI and the Chairman's concern over the structure and composition of the SFAT, Ch. Counsel/SFC said that the SFAT would be a judicial tribunal which was not part of the existing court structure and was independent of the SFC. She explained that an establishment separate from the court structure allowed proceedings to be handled in a flexible manner while the appointment of a High Court judge or a deputy judge as the Chairman facilitated the legal proceedings of the tribunal. She informed members that except for the Chairman and the registry who would be working on a full-time basis, other lay members of the SFAT would be appointed based upon their expertise to assist on a part-time basis on every individual case. The lay members would contribute their expertise on market operations to assist the Chairman in the hearing process while the final decision on the appeal would only be made by the Chairman.

17. In connection with Mr Eric LI's suggestion of appointing a representative from the Hong Kong Society of Accountants (HKSA) to the SFAT, DS/FS pointed out that the SFAT members would be appointed on the basis that they had no conflict of interest with the work of the SFAT and at the same time, possessed adequate market knowledge to advise the Chairman on various aspects of market operations. In this regard, representativeness of any particular professional association or interest group would not be the major concern in the appointment. DS/FS said that views of professional associations would be taken into account when preparing the draft Bill.

18. While supporting the Administration's principle in the appointment of SFAT members, Mr Albert HO opined that the arrangement of not involving lay members in the decision-making of the appeal was unfavourable. DS/FS advised that the

Action

Admin Administration was aware of this concern and would ensure that the draft Bill would allow lay members to participate in the decision making of appeals.

19. DS/FS welcomed Mr Albert HO's suggestion of interlocutory hearing in appeal cases where the appellants subject to immediate suspension of business could have means to defer the suspension pending the result of the appeal. She said that the suggestion would be included in the draft Bill accordingly. Furthermore, she informed members that the types of SFC decisions for the review of the SFAT would be subject to the scrutiny of the Legislative Council by way of subsidiary legislation.

Admin

20. In response to Mr Albert HO's questions on the standard of proof and on evidence requested by the SFAT, Ch. Counsel/SFC informed members that the SFAT would adopt the standard of proof for civil proceedings. Yet the judge could have discretion on whether a higher standard corresponding to the severity of the case should be adopted. She added that the SFAT would carry out merits review of an appeal case and new evidence would not be required unless provided by SFC or the appellant voluntarily.

21. Mr FUNG Chi-kin expressed worries that the establishment of the SFAT could not provide adequate checks and balances to the extended power of the SFC in view of the considerable time and cost required on the part of the appellants. DS/FS stressed that the aim of the reform proposals was to improve the regulatory regime. The extension of the disciplinary power of SFC allowed more proportionate disciplinary sanctions to deter misconduct of different degree of severity. She assured that adequate checks and balances including establishment of an independent and full-time SFAT and the Process Review Panel to ensure fair and consistent judgement in different cases. Moreover, a person aggrieved by an SFC decision could also seek remedy by applying to the courts for judicial review or complaining to the Ombudsman.

22. As to Mr FUNG Chi-kin's suggestion of establishing similar appeal tribunals for other sectors, e.g. the insurance or property sectors, DS/FS replied that this would be subject to the special needs of different sectors and would be a subject for consideration by the relevant regulatory bodies as necessary.

23. Concerning Mr Eric LI's enquiry on the possibility of an aggrieved party to bypass SFAT and put the case directly to court, Ch. Counsel/SFC said that this arrangement was considered undesirable. She explained that the SFAT was established to provide a more speedy and efficient channel for the aggrieved to appeal as compared with court proceedings which would be more costly and time-consuming.

24. While expressing support to the set up of the SFAT to provide for an efficient channel for appeal, Mr Albert HO commented that the procedural rules for the Tribunal should be drafted in consultation with the industry and the concerned associations.

Admin

Action

II. Any other business

Date of next meeting

25. The next meeting would be held on Tuesday, 28 September 1999 at 2:30 pm.

26. There being no other business, the meeting was adjourned at 12:45 pm.

Legislative Council Secretariat

11 February 2000