

**立法會**  
**Legislative Council**

LC Paper No. CB(1)1416/10-11  
(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**

**Fifth meeting on  
Thursday, 6 January 2011, at 8:30 am  
in Conference Room A of the Legislative Council Building**

**Members present** : Hon Starry LEE Wai-king, JP (Chairman)  
Hon Albert HO Chun-yan  
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  
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  
  
Ms Karmen KWOK  
Government Counsel

Hong Kong Monetary Authority

Ms Meena DATWANI  
Executive Director  
Banking Conduct

Ms Alice LEE  
Acting Head  
Banking Conduct Department

**Attendance by invitation** : Securities and Futures Commission

Mr Brian HO  
Executive Director, Corporate Finance

Ms Alice LAW  
Senior Director  
Policy, China and Investment Products

Mrs Yvonne MOK  
Director  
Intermediaries Supervision

Ms Alexandra YEONG  
Director, Corporate Finance

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

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

Mr Noel SUNG  
Senior Council Secretary (1)4

Ms Haley CHEUNG  
Legislative Assistant (1)8

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## **I Confirmation of minutes and matters arising**

(LC Paper No. CB(1)937/10-11 — Minutes of meeting on 25 November 2010)

The minutes of the meeting held on 25 November 2010 were confirmed.

## **II Meeting with the Administration**

### Follow-up to issues raised at the meeting on 25 November 2010

(LC Paper No. CB(1)788/10-11(01) — List of follow-up actions arising from the meeting on 25 November 2010 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)788/10-11(04) — Administration's paper on "Meaning of 'Advertisement, Invitation or Document' in the Relevant Provisions, and the Scope of Application of the Regulatory Regime in Real Life Situations"

LC Paper No. CB(1)813/10-11(01) — Administration's paper on "Meaning of 'Persons Outside Hong Kong' and Regulatory Arrangements for the Disposal of Unlisted Structured Products to Persons Outside Hong Kong")

### Follow-up to issues raised at the meeting on 16 December 2010

(LC Paper No. CB(1)968/10-11(01) — List of follow-up actions arising from the meeting on 16 December 2010 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)968/10-11(02) — Administration's paper on "Statement regarding the Risks of being treated as a 'Professional Investor'"

- LC Paper No. CB(1)968/10-11(03) — Administration's paper on "Quantitative Analysis of Currency-Linked, Interest Rate-Linked and Currency and Interest Rate-Linked Instruments Issued and/or Sold by Authorized Institutions"
- LC Paper No. CB(1)968/10-11(04) — Administration's paper on "Regulatory Actions taken by the Hong Kong Monetary Authority on the Sale of Unlisted Investment Products by Authorized Institutions"
- LC Paper No. CB(1)968/10-11(05) — Administration's paper on "Practices of Other Comparable Jurisdictions regarding the Requirement on Intermediaries to make Audio Recordings of the Sales Process"
- LC Paper No. CB(1)968/10-11(06) — Administration's paper on "Regulatory Arrangements to Deal with Situations where an Intermediary has a Potential or Actual Conflict of Interest in Providing Services in relation to Investment Products")

Clause-by-clause examination of the Bill

- (LC Paper No. CB(3)877/09-10 — The Bill
- LC Paper No. CB(1)199/10-11(01) — Marked-up copy of the Bill prepared by the Legal Service Division
- LC Paper No. CB(1)199/10-11(02) — Administration's first batch replies dated 21 September 2010 to the questions raised by Assistant Legal Adviser on Securities and Futures and

Companies  
(Structured  
Amendment) Bill 2010  
Legislation  
Products

LC Paper No. CB(1)199/10-11(03) — Administration's second batch replies dated 4 October 2010 to the questions raised by Assistant Legal Adviser on Securities and Futures and Companies (Structured Amendment) Bill 2010  
Legislation  
Products

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

Admin Follow-up actions to be taken by the Administration and related parties

3. The Administration, the Securities and Futures Commission (SFC) and Hong Kong Monetary Authority (HKMA) were requested to take the following actions:

- (a) To provide information on the legal backing for the regulatory actions taken by HKMA on the sale of unlisted investment products by Authorized Institutions, particularly products not regulated under the Securities and Futures Ordinance (Cap. 571) (SFO);
- (b) To consider requiring the intermediaries to remind "professional investors" at regular intervals, such as on an annual basis, of the protection not available to them by virtue of their being treated as a "professional investor", and the option for the investors to opt out as a "professional investor";
- (c) To consider providing the Panel on Financial Affairs with results of the "Mystery Shopper Programme";
- (d) To consider 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;

- (e) To consider introducing amendments to relevant subsidiary legislation separately with respect to the fees to be charged by SFC in connection with the power to authorize structured products, instead of proposing Committee Stage Amendments on the fee arrangements; and
- (f) To consider whether there was a better alternative to the term "approved person" in Part IV of the SFO.

*(Post-meeting note: The Administration's response to paragraph 3(a) was circulated to members vide LC Paper No. CB(1)1093/10-11(01) on 18 January 2011.)*

### **III Any other business**

#### Date of next meeting

- 4. The Chairman said that members would be advised of the date of the next meeting in due course.
- 5. There being no other business, the meeting ended at 10:30 am.

Council Business Division 1  
Legislative Council Secretariat  
25 February 2011

**Proceedings of the  
Bills Committee on Securities and Futures and Companies Legislation  
(Structured Products Amendment) Bill 2010  
Fifth meeting on Thursday, 6 January 2011, at 8:30 am  
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000204 – 000449	Chairman	Confirmation of minutes of meeting  Opening remark	
000450 – 000751	Securities and Futures Commission (SFC)	Briefing by SFC on the paper on "Meaning of 'Advertisement, Invitation or Document' in the Relevant Provisions, and the Scope of Application of the Regulatory Regime in Real Life Situations" (LC Paper No. CB(1)788/10-11(04)).	
000752 – 002449	Ms Audrey EU SFC Ms Miriam LAU	<p>Ms Audrey EU was concerned that during the sales process of investment products, an intermediary might use, in addition to the authorized documents, materials (such as staff notes) which did not contain an invitation to the public to enter into an agreement to acquire the products, and as such the intermediary would not be considered as contravening the relevant provisions of the Securities and Futures Ordinance (Cap. 571) (SFO). Ms EU opined that "contains an invitation" was too narrow, and Part IV should apply to an "advertisement, invitation or document" that was presented "in connection with the selling" of securities etc.</p> <p>Ms Miriam LAU pointed out that the authorization regime under the SFO regulated advertisements and documents for public offer of specified financial products, and it would not be practicable to make all the materials used and verbal advice given by an intermediary in the sales process subject to the SFC's prior authorization.</p> <p>SFC responded that in accordance with the authorization regime for offer documents of investment products, the information given by an intermediary to an investor should be based on the offer documents authorized by SFC. The behaviour of an intermediary during the sales process was also subject to regulation as stipulated in the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (Code of Conduct). The financial</p>	

Time Marker	Speaker	Subject(s)	Action Required
		institution concerned was required to ensure that the sales staff were properly briefed and would provide appropriate information to investors to enable the latter to make informed investment decisions.	
002450 – 002625	Mr Albert HO	Mr Albert HO agreed that it would not be practicable to make all the materials used and verbal advice given by an intermediary in the sales process subject to the SFC's prior authorization. He however considered that the advertisements/documents for offer of investment products authorized by SFC were important documents providing the basis for the advice given by an intermediary in the sales process. It would amount to mis-selling if the advice given by an intermediary to an investor deviated markedly from the contents of the authorized documents.	
002626 – 002954	SFC	Briefing by SFC on the paper on "Meaning of 'Persons Outside Hong Kong' and Regulatory Arrangements for the Disposal of Unlisted Structured Products to Persons Outside Hong Kong" (LC Paper No. CB(1)813/10-11(01)).	
002955 – 003328	Mr Albert HO Administration	<p>Mr Albert HO remarked that the credibility of financial products issued in Hong Kong should be protected, even though these products might be sold only to persons outside Hong Kong. Otherwise, Hong Kong's reputation as an international financial centre might be tarnished. For instance, investors located in the Mainland and Taiwan might be interested in buying investment products issued in Hong Kong based on the belief that investors' interests were protected under Hong Kong's regulatory regime. Mr HO said that for the long term benefit of Hong Kong's financial market, it might be desirable to extend the authorization regime to include financial products issued in Hong Kong and sold only to persons outside Hong Kong.</p> <p>The Administration responded that the Administration had discussed with SFC regarding Mr HO's concern. The existing regulatory regime targeted at financial products offered to the public in Hong Kong. This was in line with the practices of other major financial markets. The Administration did not consider it appropriate to extend the regulatory regime to cover financial</p>	



Time Marker	Speaker	Subject(s)	Action Required
		<p>products offered only to persons outside Hong Kong.</p> <p>Mr HO said that Members belonging to the Democratic Party would consider moving Committee Stage Amendments (CSA) in this regard.</p>	
003329 – 003414	Chairman	Members noted the list of follow-up actions arising from the meeting on 16 December 2010 prepared by the Legislative Council Secretariat (LC Paper No. CB(1)968/10-11(01)).	
003415 – 003543	SFC	Briefing by SFC on the paper on "Statement regarding the Risks of being treated as a 'Professional Investor'" (LC Paper No. CB(1)968/10-11(02)).	
003544 – 003703	Chairman SFC	The Chairman suggested that SFC should consider requiring intermediaries to remind "professional investors" at regular intervals, such as on an annual basis, of the protection not available to them by virtue of their being treated as a "professional investor", and the option of opting out from being treated as a "professional investor". SFC undertook to consider the proposal.	The Administration to take action as per paragraph 3(b) of the minutes
003704 – 003814	HKMA	Briefing by HKMA on the paper on "Quantitative Analysis of Currency-Linked, Interest Rate-Linked and Currency and Interest Rate-Linked Instruments Issued and/or Sold by Authorized Institutions" (LC Paper No. CB(1)968/10-11(03)).	
003815 – 004130	Chairman HKMA	At the request of the Chairman, the Administration would provide information on the legal backing for the regulatory actions taken by HKMA on the sale of unlisted investment products by Authorized Institutions (AIs), particularly products not regulated under the SFO.	The Administration to take action as per paragraph 3(a) of the minutes.
004131 – 004649	HKMA	Briefing by HKMA on the "Regulatory Actions taken by the Hong Kong Monetary Authority on the Sale of Unlisted Investment Products by Authorized Institutions" (LC Paper No. CB(1)968/10-11(04)).	
004650 – 004930	Mrs Regina IP HKMA	In response to Mrs Regina IP's enquiry about independent reviewers (IRs), HKMA responded that the IRs were independent auditors who should not be engaged in the general audit duties for the	

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		<p>AI concerned. HKMA would assess the relevant qualifications, experience, set-up and responsibilities of the IRs before approving the appointment.</p> <p>At the request of Mrs Regina IP, HKMA agreed to consider providing information to the Panel on Financial Affairs on the results of the "Mystery Shopper Programme" in due course.</p>	<p>The Administration to take action as per paragraph 3(c) of the minutes.</p>
004931 – 005115	Chairman HKMA	<p>The Chairman enquired about the percentage of time spent on checking the sales documents for unlisted investment products during on-site examinations.</p> <p>HKMA responded that the majority of the time was spent on checking documentation and the audio records on the sales process. HKMA's officers conducting the on-site examinations would also discuss with the staff of AIs regarding the sales procedures if necessary.</p>	
005116 – 005242	SFC	<p>Briefing by SFC on the paper on "Practices of Other Comparable Jurisdictions regarding the Requirement on Intermediaries to make Audio Recordings of the Sales Process" (LC Paper No. CB(1)968/10-11(05)).</p>	
005243 – 010356	Mr Albert HO HKMA SFC	<p>In response to Mr Albert HO and Mr James TO's enquiry, HKMA remarked that before the Lehman Brothers Minibonds Incident, banks did not normally make audio recording of the sales process of investment products. Based on the guidelines issued by the HKMA after the Lehman Brothers Minibonds Incident, banks had designated specific areas for sale of investment products, and would make audio recording of the sales process for each transaction involving unlisted structured products.</p> <p>SFC explained the differences between mandatory order recording (an existing requirement under the Code of Conduct) and mandatory audio recording of the selling process. SFC responded that during the consultation exercise on proposals to enhance the protection for the investing public conducted in September 2009, the majority of the respondents did not consider that audio recording should be made a mandatory requirement on intermediaries for the sale of investment products, as the existing</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>record keeping requirements of SFC were considered adequate for regulatory purposes.</p> <p>Mr James TO and Mr Albert HO were concerned that there were different regulatory requirements on AIs and other financial institutions for the sale of unlisted structured products. They pointed out that the experience of the Lehman Brothers Minibonds Incident showed that audio records were useful for investors to prove mis-selling of investment products by banks and to claim compensation.</p> <p>Mr James TO opined that consideration should be given to requiring all financial institutions to make audio recording of the sales process for certain high risk investment products, for certain categories of investors and/or under certain circumstances. Mr TO also suggested the alternative arrangement that intermediaries should be required to advise the investors that they might make audio recording of the sales process themselves.</p> <p>The Chairman said that the Administration/SFC could consider members' views and re-consider the suggestion regarding the audio recording requirement.</p>	<p>The Administration to take action as per paragraph 3(d) of the minutes.</p>
<p>010357 – 010826</p>	<p>Administration SFC HKMA</p>	<p>Briefing by the Administration, SFC and HKMA on the paper on "Regulatory Arrangements to Deal with Situations where an Intermediary has a Potential or Actual Conflict of Interest in Providing Services in relation to Investment Products" (LC Paper No. CB(1)968/10-11(06)).</p>	
<p>010827 – 010928</p>	<p>Mrs Regina IP</p>	<p>Mrs Regina IP remarked that the intermediaries should be required to disclose to the investors the fees charged by different parties concerned in the sale of investment products. Mrs IP added that investor education should be enhanced as many investors did not understand the role of different parties and the terms of the agreements entered into in acquiring investment products.</p>	
<p>010929 – 012004</p>	<p>Mr Albert HO SFC Mr James TO</p>	<p>Mr Albert HO opined that it would be impractical to require an intermediary to protect the interest of investors if the intermediary was in a conflict of interest situation, even though the intermediary had disclosed the conflict of interest situation to his</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>customers. Mr HO remarked that the disclosure requirement alone was inadequate for protecting the interest of investors.</p> <p>SFC responded that the regulatory arrangements regarding avoidance and declaration of conflict of interest were based on guidelines issued by International Organization of Securities Commissions (IOSCO). The IOSCO had looked into the issue of conflict of interest and considered that the disclosure requirement was adequate for the regulation of the conduct of intermediaries, and there was no suggestion of banning intermediaries from taking an opposite position in a transaction. The revised Code of Conduct to be implemented in June 2011 would require that an intermediary should disclose to the client concerned whether he was affiliated to the issuer concerned, and the amount or percentage of monetary and/or other benefits he would receive in the relevant transaction. Disciplinary actions would be taken against the company and/or the individual concerned if they breached the Code of Conduct. The new disclosure requirement was implemented one year after the conclusion of the public consultation in mid-2010 so that the relevant companies could revise their management system and procedures in order to comply with the new disclosure requirements.</p> <p>The Chairman remarked that Hong Kong should keep abreast of the international developments in this regard. At this stage, it might not be appropriate to take too big a stride in tightening the regulatory requirements with regard to situations involving actual or potential conflict of interest.</p> <p>Mr James TO opined that in situations where an intermediary had a material interest in a transaction, it would be all the more important to make audio recording of the sales process.</p>	
012005 – 012445	Administration Mr WONG Ting-kwong	<p><u>Clause-by-clause examination of the Bill</u></p> <p>Members agreed that the Bills Committee would first scrutinize the English version of the Bill.</p> <p><u>Long Title</u></p> <p>Mr WONG Ting-kwong enquired whether the Long Title of the SFO had to be revised to reflect</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>that the offer documents of structured products would be regulated under the SFO.</p> <p>The Administration responded that public offers of investment products were already subject to the regulation of the SFO. At present, public offers of structured products in the form of shares and debentures were exempted from the regulation of the SFO if the offering documents were authorized under the Companies Ordinance (Cap. 32). The Bill aimed to transfer the regulation of public offers of structured products in the form of shares and debentures from the prospectus regime of the Companies Ordinance to the offers of investments regime of the SFO. The proposed transfer would not affect the current object of the SFO and hence no revision to the long title of the SFO would be necessary.</p>	
012446 – 013022	Mr James TO Administration SFC	<p>In response to Mr James TO's enquiry, the Administration advised that the offers of investments regime of the SFO regulated, among other things, collective investment schemes (CIS) including unit trusts. This would not be affected by the Amendment Ordinance. SFC added that intermediaries involved in the activity of selling securities, which included interests in CIS, needed to obtain a licence from SFC, e.g. Type 1 licence. Hence the activity was regulated whether or not the securities were authorized.</p> <p>The SFC also confirmed that the transfer proposed under the Bill would not render offering documents of investment products currently regulated by SFC falling out of SFC's regulatory remit.</p>	
013023 – 013313	Administration ALA6 Ms Miriam LAU	<p><b>Part 1</b></p> <p><b>Preliminary</b></p> <p><u>Clause 1 – Short title</u></p> <p><u>Clause 2 – Commencement</u></p> <p>The Administration advised that the original intention was for the Secretary for Financial Services and the Treasury to appoint a commencement date for the Amendment Ordinance after the enactment of the Bill so as to tie in with the Legislative Council's negative vetting of the</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>relevant subsidiary legislation for setting the fees in connection with SFC's power to authorize structured products pursuant to the Amendment Ordinance. To enable early implementation of the proposals in the Bill, the Administration now planned to propose CSA to the Bill to effect the aforesaid fee proposals.</p> <p>In reply to ALA6's enquiry, the Administration advised that with the CSA, the intention was for the Amendment Ordinance to take effect upon its enactment and promulgation in the Gazette.</p> <p>In response to Ms Miriam LAU's enquiry, the Administration remarked that a CSA would be proposed to amend Clause 2 so that appointment of a commencement date would not be required.</p>	
013314 – 014253	Mr James TO Administration ALA6 The Chairman	<p>In response to Mr James TO's enquiries, the Administration advised that after the Bill had been gazetted, the Administration and SFC had worked out the mechanism and structure of the fees to be charged by SFC in connection with the power to authorize structured products, and hence the Administration would propose CSAs to the Bill to amend the relevant subsidiary legislation to incorporate the fee arrangements.</p> <p>Mr James TO was concerned whether the proposed arrangement was in order.</p> <p>The Administration responded that the authority for setting the fee levels vested with the Chief Executive-in-Council, and the fee arrangements were relevant to the scope of the Bill. Hence, it was appropriate to incorporate the fee arrangements into the Bill through CSAs.</p> <p>ALA6 remarked that according to the Administration, the fee arrangements for SFC's authorization of structured products were subsidiary legislation. Since subsidiary legislation was subject to the scrutiny of the Legislative Council, the Administration's proposal of introducing amendments to the Bill and the relevant subsidiary legislation in one go for consideration by the Legislative Council was in order.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>Mr James TO opined that the principle of due process should be followed. Since the Chief Executive-in-Council had not approved the fees structure in the original Bill, and the stakeholders had to be consulted on the fees structure, it would be more appropriate for the Administration to propose separately amendments to the relevant subsidiary legislation on the fees structure for scrutiny by the Legislative Council. The Chairman remarked that having regard to Mr TO's view, the Administration should review the arrangement.</p>	<p>The Administration to take action as required in paragraph 3(e) of the minutes.</p>
<p>014254 – 015709</p>	<p>Administration Mr James TO Mr Albert HO Ms Miriam LAU SFC</p>	<p><b>Part 2</b></p> <p><b>Amendments to Securities and Futures Ordinance</b></p> <p><u>Clause 3 – Section 102 amended (Interpretations of Part IV)</u></p> <p>In response to Mr James TO's enquiry, SFC explained that the appointment of an "approved person" in respect of a structured product was to facilitate SFC in serving its notices and decisions for the product. The approved person was nominated by the issuer of the structured product and the approved person's address should be in Hong Kong. The responsibility of the approved person was to act as a receiving agent on behalf of the issuer. The appointment was for administrative purposes but not in the context of a regulated activity. The term "approved person" was introduced in the 2003 Amendment Bill and was accepted after some discussion of whether there was a better alternative term.</p> <p>Mr Albert HO opined that the term "approved person" appeared to be inappropriate if the person only acted on behalf of the issuer as a recipient of correspondence from SFC, and the general practice was that an address, rather than a person, was registered as the contact point of an issuer.</p> <p>In response to Ms Miriam LAU's enquiry, SFC remarked that the responsibilities for an approved person under a collective investment scheme and under the proposed regime for structured products were similar, as specified in section 104 and the proposed section 104A.</p>	

<b>Time Marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action Required</b>
		<p>Members remarked that the Administration and SFC should consider whether there was a better alternative to the term "approved person".</p> <p>Members agreed that the Bills Committee should not take the current exercise as a full review of Part IV of the SFO, and should not review the various existing terms and provisions in the SFO that were merely touched upon by the proposals.</p>	<p>The Administration to take action as required in paragraph 3(f) of the minutes.</p>
015710 – 015729	Chairman	Date of next meeting	

Council Business Division 1  
Legislative Council Secretariat  
25 February 2011