

**Securities and Futures and Companies Legislation
(Structured Products Amendment) Bill 2010**

Replies to LegCo Secretariat's Questions of 11 August 2010 (Batch 2)

Clause 10 (1) & (2)

Please clarify the reasons for adding “structured products” in section 182(1)(b)(iii) and (iv) when “securities” should have covered the same ground.

Reply

As explained in Batch 1 of our reply in relation to clauses 11 and 12, not all structured products will fall within the expanded definition of “securities” in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (“SFO”). In particular, non-securities based structured products not offered to the public are not covered. Section 182(1) of the SFO sets out the matters which the Securities and Futures Commission (“SFC”) may investigate. Specifically, the addition of “structured products” to section 182(1)(b)(iii) and (iv) is to enable the SFC to exercise its investigatory powers in relation to offers of or advice in relation to structured products not covered by the expanded definition of “securities”. It also has the effect of empowering the SFC to investigate whether activities in relation to such structured products are not in the interest of the investing public or in the public interest (under section 182(1)(d)). Such investigatory powers may also assist the SFC in taking remedial actions under the amended section 213 of the SFO (as amended by clause 11 of the Bill) in relation to such structured products.

Inconsistency

If there are good reasons for adding “structured products” as is done in clauses 10, 11 and 12 to the respective sections of SFO, please explain why no similar addition is required for the following provisions of SFO: Sections 174(1)(a)(i) and (iii)(A) and (B); 181(1)(b), (c) and (d) and (2)(b) and (c); 186(2)(b) and 257(1)(b).

Reply

Section 174(1)(a)(i) and (iii)(A) and (B)

Generally, these provisions prohibit an intermediary from making or offering to make an agreement with another person to sell or purchase securities, futures contracts or leverage foreign exchange contracts during an unsolicited call (a call otherwise than at the express invitation of the person called upon). The prohibition applies only to intermediaries. The SFC regulates intermediaries only in respect of the regulated activities that they undertake. As structured products that are not in the form of securities and which are not publicly offered will not be included as “securities” under section 1 of Part 1 of Schedule 1 to the SFO (i.e., generally, structured products that are privately placed or offered only to professional investors), the offering of such structured products does not constitute a regulated activity. Accordingly, it would be inappropriate to extend section 174(1)(a)(i) and (iii)(A) and (B) to include these structured products.

Section 181(1)(b), (c) and (d) and 2(b) and (c)

The power under section 181 is generally exercised to obtain information relating to transactions in the listed market (please note that all listed structured products are already covered by the expanded definition of “securities”). Section 181 enables an authorized person to request for information specified in section 181(2) from the persons specified in section 181(1). We do not believe that the information that could be required under section 181(2) is of relevance to transactions in non-securities based structured products transactions and accordingly, it would be unnecessary to extend section 181(1)(b), (c) and (d).

Section 186(1)(b) and (2)

Section 186 sets out the circumstances in which the SFC may provide assistance to overseas regulators. Structured products falling outside the expanded definition of “securities” under section 1 of Part 1 of Schedule 1 to the SFO is not required to be authorized by the SFC and hence, we do not believe the SFC would be in a position to provide assistance in respect of such structured products. Accordingly, it would be inappropriate to extend section 186(1)(b) and (2).

Section 257(1)(b)

Section 257(1)(b) relates to the orders which the Market Misconduct Tribunal (“MMT”) may make at the conclusions of proceedings that it hears. The MMT has jurisdiction to deal with market misconduct. The term “market misconduct” is defined to include certain activities that relate to securities and futures contracts transactions. These activities have no particular relevance to structured products that fall outside the definition of “securities”. Accordingly, it is unnecessary to extend section 257(1)(b).