

立法會
Legislative Council

LC Paper No. CB(1)765/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/11/10/2

Bills Committee on Securities and Futures (Amendment) Bill 2011

Second meeting on
Monday, 17 October 2011, 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 Audrey EU Yuet-mee, SC, 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

Members absent : Hon Albert HO Chun-yan
Hon Abraham SHEK Lai-him, SBS, JP
Hon Jeffrey LAM Kin-fung, GBS, 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 Jane LEE
Assistant Secretary for Financial Services and the
Treasury (Financial Services)(2) 1

Mr Paul O'BRIEN
Senior Assistant Law Draftsman
Department of Justice

Ms Karmen KWOK
Senior Government Counsel (Acting)
Department of Justice

Attendance by invitation : Mr Brian HO
Executive Director, Corporate Finance Division
Securities and Futures Commission

Ms Jennifer LEE
Associate Director, Corporate Finance Division
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

Ms Haley CHEUNG
Legislative Assistant (1)5

I Meeting with the Administration

- File Ref: SUB/12/2/2/2, SUB/12/2/3 — Legislative Council Brief issued
& SUB/12/2/5 by the Financial Services and the
Treasury Bureau
- LC Paper No. LS87/10-11 — Legal Service Division Report on
Securities and Futures
(Amendment) Bill 2011
- LC Paper No. CB(1)16/11-12 — Background brief on Securities
and Futures (Amendment) Bill
2011 prepared by the Legislative
Council Secretariat
- 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**).

(Post-meeting note: The powerpoint presentation notes tabled at the meeting were issued to members vide LC Paper No. CB(1)100/11-12 on 17 October 2011.)

Follow-up actions to be taken by the Administration

2. The Administration was requested to provide the following information:
 - (a) the draft of the guidelines to be issued by the Securities and Future Commission to facilitate compliance with the disclosure requirements under the proposed legislation;
 - (b) a table setting out respectively (i) the definition of price sensitive information (PSI); (ii) scope of persons covered under the PSI regulatory regime; (iii) liabilities of listed corporations and officers and the applicable tests/thresholds; and (iv) sanctions, under the existing regulatory regime in Hong Kong, the proposals in the Bill, and the relevant legislation in other comparable jurisdictions;
 - (c) the rationale for the proposed scope of persons covered under the PSI regulatory regime, and response to the concern that the coverage might be too wide;

- (d) elaboration on the liability of an "officer", in relation to the provision containing the wording "ought reasonably to have come to the knowledge of an officer", and whether defence would be available to the "officer" if he/she actually did not have knowledge of the information;
- (e) examples of situations under which information relating to the day-to-day operation of a listed corporation would be classified as PSI and required to be disclosed under the proposed legislation;
- (f) response on the suggestion of laying down quantitative criteria for determining whether a piece of information was PSI; and
- (g) information on prosecutions and convictions of financial analysts relating to release of false, misleading or deceptive information.

II Any other business

Date of next meeting

3. The Chairman reminded members that the next meeting would be held on 24 October 2011, at 4:30 pm to receive views from interested parties and relevant organizations.

4. There being no other business, the meeting ended at 12:45 pm.

Council Business Division 1
Legislative Council Secretariat
4 January 2012

**Proceedings of the
Bills Committee on Securities and Futures (Amendment) Bill 2011
Second meeting on Monday, 17 October 2011, at 10:45 am
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000236 – 000340	Chairman	Introductory remarks	
000341 – 002803	Administration Securities and Futures Commission (SFC)	Briefing by the Administration on the proposals in the Bill.	
002804 – 004123	Mr Andrew LEUNG Administration SFC	<p>Mr LEUNG declared interest as the directors of two listed corporations.</p> <p>On the definition of "price sensitive information (PSI)", Mr LEUNG enquired what types of information would be classified as information which might "materially affect" the price of listed securities, taking into account the safe harbour provided for information which was a trade secret. The Chairman remarked that guidelines with examples of events and circumstances where a disclosure obligation would arise should be provided to facilitate compliance by listed corporations.</p> <p>The Administration explained that the definition of "inside information" was borrowed from the concept of "relevant information" in the insider dealing regime, which had been in use since 1990 and market participants were familiar with it. It referred to certain information which was not generally known to the persons who were accustomed or would be likely to deal in the listed securities of the relevant corporation but would if generally known to them be likely to materially affect the price of the listed securities. Reference could also be made to past cases under the insider dealing regime. Given the different nature, capital sizes and share prices of listed corporations, and the many possible events/circumstances where a disclosure obligation would arise, the Administration considered it not be appropriate to specify in prescriptive and quantifiable terms which types of information were PSI.</p>	

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		<p>SFC supplemented that the regulatory bodies in other jurisdictions also considered that it would not be advisable to define PSI in quantifiable terms, as whether a piece of information would materially affect the price of listed securities would depend on the circumstances at the material time. SFC would issue guidelines to facilitate listed corporation to comply with the disclosure requirements, and the guidelines would provide more than 30 examples of events and circumstances where a disclosure obligation might arise. The guidelines would also spell out the factors which the "officers" should consider in determining whether certain information was price sensitive. The Listing Rules had also set out specific situations where listed corporations were obliged to make disclosure.</p> <p>Mr LEUNG said that it was impractical to expect a listed corporation to disclose each and every contract signed with another company. SFC responded that safe harbours were provided for information concerning an incomplete negotiation or proposal, and information which was a trade secret. Once the negotiation of a contract had been completed, the safe harbour would fall away and the listed corporation should disclose the information as soon as reasonably practicable if that information was price sensitive.</p> <p>Regarding Mr LEUNG's enquiry about the waiver application arrangement, SFC pointed out that according to the Bill, the situations under which disclosure waiver would be granted by SFC were very restrictive. While a listed corporation was applying for a disclosure waiver, the corporation should maintain confidentiality of the relevant information.</p>	
004124 – 005722	Mr Paul CHAN Administration Chairman SFC	Mr CHAN requested the Administration to provide the draft of the guidelines to be issued by SFC to facilitate compliance with the disclosure requirements under the Bill, and he remarked that the Bills Committee should make reference to the draft guidelines. Mr CHAN opined that while it might not be appropriate to define PSI in quantifiable terms,	The Administration to take action as per paragraphs 2(a) and 2(g) of the minutes.

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		<p>consideration could be given to specifying in the guidelines the types of events which would give rise to a disclosure obligation, e.g. a significant loss in collateralized debt obligations and currency linked contracts. Mr CHAN said that he would provide examples of announcements made by listed corporations for members' reference.</p> <p><i>(Post-meeting note: The information provided by Mr Paul CHAN was issued to members vide LC Paper No. CB(1)109/11-12 on 18 October 2011.)</i></p> <p>While undertaking to provide the draft guidelines to the Bills Committee for its reference, the Administration advised that the draft guidelines had been posted on the SFC website and had been revised based on responses from the market in the public consultation exercise. SFC would provide informal consultation service for listed corporations on compliance with the disclosure requirements, initially for 24 months.</p> <p>Mr CHAN enquired whether listed corporations were required to respond to financial analysts' reports. The Chairman enquired about the arrangements for regulation of financial analysts.</p> <p>SFC responded that strictly speaking, listed corporations were not required to respond to the comments/reports made by financial analysts and listed corporations should not disclose any inside information to analysts. However, it was good practice for listed corporations to make clarifications in response to false or misleading comments/reports made by financial analysts, provided any clarification was confined to drawing the analyst's attention to information that was already in the public domain. SFC stressed that the facts disclosed by listed corporations should be complete and true.</p> <p>SFC advised that financial analysts were required to be licensed by SFC and they were regulated by SFC. Persons who released false, misleading or deceptive information</p>	

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		<p>affecting the prices of securities would also be subject to civil and/or criminal liabilities under the Securities and Futures Ordinance (SFO) (Cap. 571).</p> <p>At Mr CHAN's request, SFC agreed to provide information on prosecutions and convictions of financial analysts relating to release of false, misleading or deceptive information.</p>	
005723 – 010438	Mr CHIM Pui-chung Chairman SFC Administration	<p>Mr CHIM declared interest as a holder of the shares of a number of listed corporations.</p> <p>Mr CHIM enquired about the criteria for determining whether a piece of information was PSI and disclosure should be made on such information. Mr CHIM pointed out that the professional service providers in a court case concerning a tycoon from Shanghai were acquitted on appeal on charges relating to failure to make disclosure on PSI, whereas a listed corporation was suspended for trading for nearly one year after making disclosure of company information. Mr CHIM enquired why enforcement action was not taken against a number of listed corporations involved in repeated splitting and subscription in shares.</p> <p>SFC responded that the cases quoted by Mr CHIM were not related to the proposed legislation on PSI disclosure. The court case mentioned by Mr CHIM involved fraud whereas the suspension of the corporation concerned involved whether the corporation met the listing criteria for trading, e.g. the requirement on "sufficient operation". SFC pointed out that all applications for splitting and subscription in shares were regulated by the Stock Exchange of Hong Kong based on the Listing Rules. The Administration supplemented that the Listing Committee from time to time, reviewed the Listing Rules, including matters relating to splitting and subscription in shares, taking into consideration comments from market participants.</p>	
010439 – 011601	Ms Audrey EU Administration SFC	Ms EU requested that the Administration to provide the following information:	The Administration to take action as per

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		<p>(a) a table setting out respectively (i) the definition of PSI; (ii) scope of persons covered under the PSI regulatory regime; (iii) liabilities of listed corporations and officers and the applicable tests/thresholds; (iv) sanctions, under the existing regulatory regime in Hong Kong, the proposals in the Bill, and the relevant legislation in other comparable jurisdictions;</p> <p>(b) the rationale for the proposed scope of persons covered under the PSI regulatory regime, and response to the concern that the coverage might be too wide; and</p> <p>(c) examples of situations under which information relating to the day-to-day operation of a listed corporation would be classified as PSI and required to be disclosed under the proposed legislation.</p> <p>Noting that the term "inside information" was borrowed from the concept of "relevant information" in the insider dealing regime, Ms EU enquired whether there was any difference between "insider information" under the insider dealing regime and "inside information" in the Bill.</p> <p>The Administration responded that the term "officer" was already defined in the SFO, which meant a director, manager or secretary of, or any other person involved in the management of, the corporation. While the term "inside information" was borrowed from "relevant information" in the insider dealing regime, "inside information", instead of "insider information" was used so that emphasis would be placed on the relevant circumstances rather than persons. Examples of situations where information was required to be disclosed during the day-to-day operation of a listed corporation were included in the guidelines (e.g. orders received from customers, their cancellation or important changes).</p> <p>SFC supplemented that the label "inside information" was more self-explanatory in the</p>	<p>paragraphs 2(b), 2(c) and 2(e) of the minutes.</p>

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		<p>context of the Bill, while the definition of such would be the same as "relevant information" in the insider dealing regime. SFC pointed out that the "officers" of a listed corporation, as defined in the SFO, would be in the best position to determine whether certain information arising from the day-to-day operation of the listed corporation should be disclosed. For example, the loss of, say, one-third of the business of the corporation due to the termination of the business relationship with a major client should be disclosed.</p>	
<p>011602 – 013143</p>	<p>Mr James TO SFC</p>	<p>Mr James TO remarked that based on the Administration's presentation notes, a listed corporation should, as soon as reasonably practicable after any inside information had come to its knowledge, disclose such information to the public, whereas the listed corporation was allowed to verify the facts, conduct assessment of the matter and its likely impact and seek professional advice as appropriate and reasonable. Mr TO was concerned that a listed corporation might take time to verify the details of facts and defer the disclosure and enquired at what juncture of an incident a listed corporation should disclose the PSI. He opined that once the information met the criteria of PSI, namely the specific information was not generally known and would likely to materially affect the price of listed securities, the listed corporation concerned should make the disclosure. The verification of detailed data and assessment of public relations implications should not be valid grounds for delayed disclosure.</p> <p>SFC responded that according to the Bill, a listed corporation should disclose inside information as soon as reasonably practicable, and the information should be accurate and complete in all material respects. This notwithstanding, the listed corporation should make the disclosure once the basic facts had been ascertained. While the listed corporation might seek legal advice to ascertain its disclosure obligation, it should not await for verification of detailed data or assessment of public relations implications before making the disclosure.</p>	

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013144 – 013826	Mr Andrew LEUNG Administration	<p>Mr LEUNG was concerned that whether a piece of information relating to the day-to-day operation of a listed corporation was PSI might be open to different interpretations, and "officers", especially the independent non-executive directors who were not directly involved in the daily operation of the corporation, might be unfairly held liable for non-disclosure of PSI.</p> <p>The Administration responded that according to the Bill, an "officer" would only be held liable if the relevant listed corporation was in breach and that (a) his intentional, reckless or negligent conduct had resulted in that breach or (b) he had not taken all reasonable measures from time to time to ensure that proper safeguards existed to prevent the breach in relation to the corporation.</p>	
013827 – 015100	Mr Ronny TONG Administration SFC	<p>Mr Ronny TONG opined that it would be difficult to lay down quantitative criteria to determine whether a piece of information was PSI. Mr TONG enquired whether, in case of doubt as to whether certain information was PSI, a listed corporation should go for disclosure. Pointing out that "ought reasonably to have come to the knowledge" was not a fact and was subject to an objective test, Mr TONG asked whether the Administration/SFC would consider adding a defence provision in the Bill such that an "officer" would not be held liable if he/she actually did not have knowledge of the information and he could prove that he had not committed any unpardonable mistake.</p> <p>The Administration and SFC responded that the Bill already provided that an "officer" would only be held responsible if the relevant listed corporation was in breach and that (a) his intentional, reckless or negligent conduct had resulted in that breach or (b) he had not taken all reasonable measures from time to time to ensure that proper safeguards existed to prevent the breach in relation to the corporation. In other words, if an "officer" genuinely did not have knowledge of the information and he had taken all reasonable measures from time to time to ensure that</p>	

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		proper safeguards existed to prevent a breach, he would not be liable. If a listed corporation had doubt as to whether a piece of information was PSI, it should still make a disclosure.	
015101 – 015350	Mr Wong Ting-kwong	Mr WONG Ting-kwong opined that in order to facilitate listed corporations to comply with the disclosure requirements, quantitative criteria should be set for determining whether a piece of information was PSI.	The Administration to take action as per paragraphs 2(f) of the minutes.
015351 – 015545	Mr Andrew LEUNG Administration	Mr Andrew LEUNG requested the Administration to provide information on the liability of an "officer" in relation to the provision containing the wording "ought reasonably to have come to the knowledge of an officer", and advise whether defence would be available to the "officer" if he/she actually did not have knowledge of the information.	The Administration to take action as per paragraph 2(d) of the minutes.
015546 – 015754	Ms Starry LEE Administration	<p>Ms Starry LEE opined that a clear definition of PSI was necessary in order to enable listed corporations to comply with the statutory disclosure requirements. In respect of the definition of PSI and the applicable test/threshold for the liabilities of listed corporation and officers, Ms LEE requested the Administration to provide information on the relevant legislation in other comparable jurisdictions.</p> <p>The Administration responded that the definition of PSI and the applicable tests/threshold for the liabilities of listed corporations and officers in the Bill were proposed having regard to the existing regulatory regime, the feedback from respondents in the public consultation exercise, and relevant international practice.</p>	The Administration to take action as per paragraph 2(b) of the minutes.
015755 – 015850	Chairman	Date of next meeting	