

立法會
Legislative Council

LC Paper No. CB(1)1559/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/11/10/2

Bills Committee on Securities and Futures (Amendment) Bill 2011

Sixth meeting on
Tuesday, 6 December 2011, at 8:30 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 Jeffrey LAM Kin-fung, GBS, 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
- Public officers** : Miss Belinda KWAN
Attending 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 Sanny CHAN
Chief Executive Officer (Support)
Financial Services and the Treasury Bureau

Miss Tiffany CHUNG
Assistant Secretary for Financial Services and the
Treasury (Financial Services)(2) 2

Ms Jenny FUNG
Senior Assistant Law Officer (Civil Law) (Acting)
Department of Justice

Ms Monica LAW
Senior Assistant Law Draftsman
Department of Justice

Ms Karmen KWOK
Senior Government Counsel
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

I Meeting with the Administration

Follow-up to issues arising from previous meetings

(LC Paper No. CB(1)527/11-12(01) — List of follow-up actions arising from the discussion at the meeting on 24 November 2011

LC Paper No. CB(1)527/11-12(02) — Administration's response to issues raised at the meeting on 24 November 2011

LC Paper No. CB(1)433/11-12(02) — Administration's paper on "Proposed scope of persons covered and liability of 'officers' under the PSI regulatory regime"

LC Paper No. CB(1)261/11-12(02) — Administration's paper on "Definition of Price Sensitive Information"

LC Paper No. CB(1)135/11-12(01) — Administration's paper on "Draft Guidelines on Disclosure of Inside Information")

Clauses-by-clause examination of the Bill (starting with proposed section 307N(1)(d))

(LC Paper No. CB(3)952/10-11 — The Bill

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**).

Admin

Follow-up actions to be taken by the Administration

2. The Administration was requested to take the following follow-up actions:

- (a) in relation to the definition of "officers" in the Securities and Futures Ordinance (SFO) (Cap. 571), which was adopted for the proposed price sensitive information (PSI) disclosure regime, -
 - (i) clarify the meaning of the terms "secretary" and "any other person involved in the management of the corporation" referred to in the definition; and
 - (ii) provide guidance on the meaning of the terms in the Guidelines on Disclosure of Inside Information.

- (b) consider setting a time limit for the institution of disclosure proceedings in the Market Misconduct Tribunal;
- (c) in relation to proposed section 307Z, which was modeled on existing section 281 of SFO, -
 - (i) provide information on past cases in which the court had made determination or ruling based on existing section 281; and
 - (ii) provide examples where a person would still incur legal liability despite that it was not fair, just and reasonable in the circumstances of the case that the person should be so liable; and
- (d) review the Chinese drafting of proposed section 307N(1)(d).

Committee Stage Amendments

3. Members noted that the Administration would propose the following Committee Stage amendments (CSAs):

- (a) To add a provision in the Bill to point out that the "Notes" under proposed sections 307A(2) and 251(1) did not carry legal effect;
- (b) To insert a Chinese character "曾" between "可能" and "發生" in the second sentence of the Chinese version of proposed section 19A in Schedule 9, which would then tally with the wording of "may have taken place" in the English version of the provision; and
- (c) To replace the Chinese characters "委任進行的" in section 21 of Schedule 9 with "任何", given that Part 3 of the Bill would be implemented prior to Part 2 of the Bill.

II Any other business

Date of next meeting

4. The Chairman informed members that the next meeting would be held on 19 December 2011, at 4:30 pm.

5. There being no other business, the meeting ended at 10:25 am.

**Proceedings of the
Bills Committee on Securities and Futures (Amendment) Bill 2011
Sixth meeting on Tuesday, 6 December 2011, at 8:30 am
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000635 – 000746	Chairman	Introductory remarks	
000747 – 000959	Administration	Briefing by the Administration on the paper (LC Paper No. CB(1)527/11-12(02)) ("the Paper")	
001000 – 001512	Mr Andrew LEUNG Securities and Futures Commission (SFC) ALA7 Administration	<p>Mr Andrew LEUNG expressed concern that the explanation on the scope of "officers" in the Paper was not the same as the explanation provided by the Administration and SFC at the last meeting.</p> <p>SFC responded that what was said at the last meeting about the scope of "officers" and the relevant explanation in the Paper was the same.</p> <p>In response to Mr Andrew LEUNG's request for clarification, ALA7 explained that based on the definition of "officer" in Part 1, Schedule 1 of the Securities and Futures Ordinance (SFO) (Cap. 571), an "officer", in relation to a corporation, meant "a director, manager or secretary of, or any other person involved in the management of the corporation". The discussion at the last meeting had focused on the meaning of "manager" as set out in the "Guidelines on disclosure of Inside Information" (the Guidelines), while "manager" was only one of the categories of "officers".</p> <p>Mr Andrew LEUNG requested that, in relation to the definition of "officers" in the SFO, which was adopted for the proposed price sensitive information (PSI) disclosure regime, the Administration should clarify the meaning of the terms "secretary" and "any other person involved in the management of the corporation" referred to in the definition; and provide guidance on the meaning of the terms in the Guidelines.</p>	The Administration to take action as per paragraph 2(a) of the minutes.
001513 – 001839	Administration	Briefing by the Administration on the paper (LC Paper No. CB(1)527/11-12(02))	

Time Marker	Speaker	Subject(s)	Action Required
		<p>The Administration remarked that it would propose a Committee Stage amendment (CSA) to add a provision in the Bill to state that the "Notes" under proposed sections 307A(2) and 251(1) did not carry legal effect.</p>	<p>The Administration to take action as per paragraph 3(a) of the minutes.</p>
<p>001840 – 002553</p>	<p>Mr Andrew LEUNG Department of Justice (DoJ) SFC</p>	<p>Mr Andrew LEUNG enquired why there was no time limit for institution of proceedings in the Market Misconduct Tribunal (MMT) under proposed section 307L(1).</p> <p>DoJ responded that there was no time limit for institution of proceedings at the MMT because, unlike the courts whose proceedings were "adversarial" in nature, the nature of the MMT proceedings was "inquisitorial", in that the proceedings were to find out whether the accused had breached any of the disclosure requirements. In the <i>Koon Wing-ye</i> case, the Court of Final Appeal had ruled that insider dealing was a serious misconduct, and the MMT proceedings were akin to criminal proceedings. There was no time limit for institution of criminal proceedings, except for some strict liability offences.</p> <p>In response to Mr Andrew LEUNG's enquiry regarding the time limit for institution of civil and criminal proceedings, ALA7 remarked that there was normally a time limit for institution of civil proceedings. There was usually no time limit for institution of criminal proceedings, but in some types of cases, a time limit was set.</p> <p>Mr Andrew LEUNG opined that a balance should be struck between the interests of the enforcement authorities and the interests of listed corporations. Mr LEUNG was of the view that it would be unfair to listed corporations if there was no time limit for institution of disclosure proceedings in the MMT. For instance, listed corporations might have to incur substantial expenses in maintaining and retrieving records in case any disclosure proceedings in respect of an event occurred long time ago might be instituted against them. Mr LEUNG remarked that if a time limit could not be set in the legislation, a reasonable time limit should be set in administrative guidelines.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>SFC responded that there was no time limit for institution of all market misconduct proceedings in the MMT, it would not be appropriate to set a time limit for institution of disclosure proceedings. The setting of a time limit for institution of proceedings in the MMT would involve a major change of policy, and it would be necessary to consult the public and Legislative Council on any such change. The issue might fall outside the purview of the Bill under scrutiny.</p> <p>The Administration was requested to consider setting a time limit for the institution of disclosure proceedings in the MMT.</p>	<p>The Administration to take action as per paragraph 2(b) of the minutes.</p>
002554 – 002905	Mr Paul CHAN DoJ	<p>Mr Paul CHAN sought clarification as to why there was no time limit for institution of MMT proceedings. DoJ reiterated that unlike civil proceedings the nature of which was "adversarial", the nature of the MMT proceedings was "inquisitorial", and therefore a time limit was not set. Based on the <i>Koon Wing-yee</i> case, market misconduct cases were serious cases, and given the nature of such cases, a practice close to that for criminal cases should be adopted, and hence there was no time limit for institution of MMT proceedings. DoJ pointed out that as far as criminal proceedings were concerned, there was normally no time limit, except in some strict liability offence cases, a time limit was set.</p> <p>Mr CHAN opined that based on the principles of natural justice, a time limit should be set for institution of MMT proceedings, as it was unfair to the listed corporations and "officers" concerned that they were required to maintain the relevant records indefinitely in case a MMT proceeding was instituted against them.</p>	
002906 – 003453	Mr Paul CHAN Administration	<p>Mr Paul CHAN expressed concern about the scope of the definition of "officer" for the statutory disclosure regime, since unlike the directors, chief executive officer or deputy chief executive officer of a listed corporation, the senior management staff including the company secretary of a listed corporation were not in a</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>position to decide whether a piece of information related to the corporation should be disclosed. He noted that the Guidelines provided elaboration on the meaning of the term "manager", and queried why a clearer definition of "officer" was not provided in the proposed legislation.</p> <p>The Administration responded that while a disclosure obligation would arise if any inside information had, or ought reasonably to have, come to the knowledge of an officer of a listed corporation, based on proposed section 307G, an "officer" would be held liable only if the breach of a disclosure requirement was a result of the officer's intentional, reckless or negligent conduct, and his failure to take all reasonable measures from time to time to ensure that proper safeguards existed to prevent a breach of a disclosure requirement. The enforcement authorities had to provide evidence to prove that the "officer(s)" concerned had breached the disclosure requirements based on proposed section 307G.</p>	
003454 – 004150	Administration Chairman	<p><u>Clause-by-clause examination of the Bill</u></p> <p><u>Clause 3 Part XIVA added</u></p> <p>307N. Orders of Tribunal</p> <p>In response to Mr Andrew LEUNG's enquiry, the Administration responded that the maximum regulatory fine of \$8 million was set having taken into consideration that the statutory disclosure regime was in principle a civil regime with the imposition of civil sanctions only, and the maximum regulatory fine should not be set at a level too close to the maximum fine of \$10 million for criminal offences related to market misconduct cases. Based on proposed section 307N(1)(d), the regulatory fine would only be applicable to the listed corporation concerned, and/or the directors and chief executive of the corporation. The MMT had to take into account the factors stipulated in proposed section 307N(3) in determining the level of the regulatory fine.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>The Chairman remarked that the Administration should review the Chinese drafting of proposed section 307N(1)(d), e.g. whether the use of a bracket was necessary.</p>	<p>The Administration to take action as per paragraph 2(d) of the minutes.</p>
004151 – 004523	Mr Andrew LEUNG Administration	<p>307N. Orders of Tribunal (1)(e) to (f)</p> <p>Mr Andrew LEUNG expressed concern that there was no upper limit on the amount of costs and expenses payable to the Government or the SFC in relation, or incidental, to the MMT proceedings.</p> <p>The Administration responded that the provisions were modeled on the relevant existing provisions in the SFO on MMT proceedings. The MMT would consider the appropriate level of costs and expenses payable to the Government or the SFC on the merits of individual cases.</p>	
004524 – 004929	Chairman Administration	<p>307N. Orders of Tribunal (1)(g) to (i)</p> <p>The Chairman enquired why, in the Chinese version of proposed subsections (h) and (i) of section 307N, a bracket had to be used to separately specify that the subsections referred to the listed corporation (subsection (h)), and an officer of a listed corporation (subsection (i)), whereas the English version did not use any bracket.</p> <p>DoJ responded that the drafting style of the Chinese version was in line with that for other existing provisions in the SFO. The use of the brackets in the Chinese version aimed to make clear that subsections (h) and (i) were applicable to the listed corporation, and an officer of the listed corporation respectively.</p>	
004930 – 005013	Administration	<p>307N. Orders of Tribunal (2) to (6)</p> <p>Members raised no question on the proposed provisions.</p>	
005014 – 005620	Administration ALA7	307O. Notice and effect of orders of Tribunal (1) to (4)	

Time Marker	Speaker	Subject(s)	Action Required
		<p>ALA7 pointed out that subsection (4) of proposed section 307O made reference to section 307N(1)(a) to (c) only, although there were other subsections (i.e. sections (d) to (i)) under section 307N(1).</p>	
005621 – 010223	Administration	<p>307P. Costs</p> <p>Members raised no question on the proposed provisions.</p>	
010224 – 010325	Chairman SFC	<p>307Q. Report of Tribunal</p> <p>With reference to 307Q(3), the Chairman enquired whether "public interest" covered the situation where an investor could make use of the whole or part of the MMT's report for seeking compensation.</p> <p>SFC responded that various provisions in the SFO made reference to "public interest", and the case quoted by the Chairman could be taken as a case for making available the whole or part of the MMT's report to the public based on "public interest".</p>	
010326 – 011713	Administration	<p>307R. Form and proof of orders of Tribunal</p> <p>307S. Registration and filing of orders of Tribunal</p> <p>307T. Stay of execution of orders of Tribunal</p> <p>307U. Appeal to Court of Appeal</p> <p>307V. Powers of Court of Appeal on appeal</p> <p>307W. No stay of execution on appeal</p> <p>307X. Rules by Chief Justice</p> <p>Division 4 – Civil Liability for Breach of a Disclosure Requirement</p> <p>307Y. Interpretation and application</p> <p>Members raised no question on proposed sections 307R to 307Y</p>	

Time Marker	Speaker	Subject(s)	Action Required
011714 – 012138	Mr Ronny TONG Administration	<p>307Z. Civil liability for breach of a disclosure requirement</p> <p>Mr Ronny TONG doubted whether 307(Z)(2) was superfluous as a person would not be held liable if the circumstances were unfair, unjust and unreasonable to hold the person liable.</p> <p>The Administration responded that 307Z(2) mirrored the existing section 281 of the SFO and aimed to specify the principles based on which a person would be held liable to pay compensation.</p> <p>Mr Ronny TONG requested the Administration to provide the following information:</p> <ul style="list-style-type: none"> (a) past cases in which the court had made determination or ruling based on existing section 281; and (b) examples where a person would still incur legal liability despite that it was not fair, just and reasonable in the circumstances of the case that the person should be so liable. 	The Administration to take action as per paragraph 2(c) of the minutes.
012139 – 014822	Administration	<p>307ZA. Evidentiary provisions</p> <p>Members raised no question on proposed section 307ZA</p> <p>Subdivision 3 – Consequential Amendments</p> <p><u>Clause 4 – Section 182 amended (Investigations)</u></p> <p><u>Clause 5 – Section 245 amended (Interpretation of Part XIII)</u></p> <p><u>Clause 6 – Section 251 amended (Market Misconduct Tribunal)</u></p> <p><u>Clause 7 – Section 257 amended (Orders, etc. of Tribunal)</u></p> <p><u>Clause 8 – Section 258 amended (Further orders in respect of officers of corporation)</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p><u>Clause 9 – Section 285 amended (Interpretation of Part XIV)</u></p> <p><u>Clause 10 – Section 303 amended (Penalties)</u></p> <p><u>Clause 11 – Schedule 1 amended (Interpretation and general provisions)</u></p> <p><u>Clause 12 – Schedule 2 amended (Non-delegable functions of Commission)</u></p> <p>Members raised no question on clauses 4 to 12</p>	
014823 – 014919	ALA7	<p><u>Clause 13 – Schedule 9 amended (Market Misconduct Tribunal)</u></p> <p>ALA7 informed members that as discussed with the Administration, a Chinese character "曾" would be inserted between "可能" and "發生" in the second sentence of the Chinese version of proposed section 19A of Schedule 9, which would then tally with the wording "may have taken place" in the English version of the provision.</p> <p>The Administration confirmed that it would propose a CSA to amend the Chinese version.</p>	The Administration to take action as per paragraph 3(b) of the minutes.
014920 – 015226	ALA7 DoJ	<p><u>Clause 13 – Schedule 9 amended (Market Misconduct Tribunal)</u></p> <p>DoJ remarked that, as discussed with ALA7, the Administration would propose a CSA to replace the Chinese characters "委任進行的" in section 21 of Schedule 9 with "任何", given that Part 3 of the Bill would be implemented prior to Part 2 of the Bill.</p>	The Administration to take action as per paragraph 3(c) of the minutes.
015227 – 015721	Administration	<p><u>Clause 14 – "Inside information" substituted for "relevant information"</u></p> <p>Members raised no question on Clause 14</p>	

Time Marker	Speaker	Subject(s)	Action Required
015722 – 015800	Chairman	Date of next meeting	

Council Business Division 1
Legislative Council Secretariat
12 April 2012