

**立法會**  
**Legislative Council**

LC Paper No. CB(1)1578/11-12  
(These minutes have been seen  
by the Administration)

Ref : CB1/BC/11/10/2

**Bills Committee on Securities and Futures (Amendment) Bill 2011**

**Eighth meeting on**  
**Thursday, 19 January 2012, at 4:30 pm**  
**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 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 WONG Ting-kwong, BBS, JP  
Hon Ronny TONG Ka-wah, SC

**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

Mr Jerry CHEUNG  
Assistant Secretary for Financial Services and the  
Treasury (Financial Services)(2) 1

Ms Sanny CHAN  
Chief Executive Officer (Support)  
Financial Services and the Treasury Bureau

Ms Monica LAW  
Senior Assistant Law Draftsman  
Department of Justice

Ms Karmen KWOK  
Senior Government Counsel  
Department of Justice

Ms Beverly YAN  
Senior Assistant Law Officer (Civil Law)  
Department of Justice

Mr David LEUNG  
Senior Assistant Director of Public Prosecutions  
Department of Justice

**Attendance by invitation** : Mr Ashley ALDER  
Chief Executive Officer  
Securities and Futures Commission

Mr Mark STEWARD  
Executive Director, Enforcement Division  
Securities and Futures Commission

Mr Brian HO  
Executive 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

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Action

## **I Confirmation of minutes of meetings**

(LC Paper No. CB(1)765/11-12 — Minutes of meeting on  
17 October 2011

LC Paper No. CB(1)766/11-12 — Minutes of meeting on  
24 October 2011)

The minutes of the meetings held on 17 and 24 October 2011 were confirmed.

## **II Meeting with the Administration**

### Follow-up to issues arising from previous meetings

(LC Paper No. CB(1)900/11-12(01) — List of follow-up actions arising  
from the discussion at the  
meeting on 3 January 2012

LC Paper No. CB(1)700/11-12(01) — Submission dated 21 December  
2011 from the Hong Kong  
Institute of Certified Public  
Accountants (English version  
only)

LC Paper No. CB(1)900/11-12(02) — Administration's response to the  
submission from the Hong Kong  
Institute of Certified Public  
Accountants

LC Paper No. CB(1)900/11-12(03) — Administration's response to  
issues raised at the meeting on  
3 January 2012

LC Paper No. CB(1)687/11-12(02) — Administration's response to  
issues raised at the meetings on  
6 December 2011 and  
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 clause 22)

(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

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

Follow-up actions to be taken by the Administration

3. The Administration and the Securities and Futures Commission (SFC) were requested to take the following follow-up actions:

- (a) to further consider the view of the Hong Kong Institute of Certified Public Accountants regarding the extension of the safe harbour provisions to cover certain situations as described by the Institute.
- (b) Regarding the proposal to empower the SFC to institute proceedings before the Market Misconduct Tribunal (MMT) direct and to appoint the Presenting Officers in MMT proceedings, to provide the following information, particularly with regard to the issue of checks and balances:

- (i) a comparison, in tabular form or diagrams, between the existing and proposed procedures for instituting criminal and civil proceedings in respect of market misconduct cases under the Securities and Futures Ordinance (Cap. 571);
  - (ii) the procedures of other local regulatory/statutory bodies for instituting legal proceedings which were comparable to MMT proceedings, including the situations where the consent of other authorities was required to institute the proceedings;
  - (iii) apart from the Hong Kong Bar Association, the views of other parties regarding the proposal; and
  - (iv) how the board of SFC would consider and decide whether a case should be brought before MMT.
- (c) Regarding clause 28(7) which introduced new section 32A, SFC to confirm whether the withdrawal or discontinuation of MMT proceedings would be subject to the agreement of the board of SFC.

#### Committee Stage amendments

4. The Administration would propose the following Committee Stage amendments:

- (a) to substitute "; or" with a comma instead of a full stop under Clause 23 (section 261(2)(b)); and
- (b) to empower MMT to publicize the hearing report direct without having to pass the report "first" to SFC and "then" others under Clause 24 (section 262(2)(a) & (b)).

### **III Any other business**

#### Date of next meeting

5. The Chairman informed members that the next meeting would be held on 31 January 2012, at 10:45 am.

6. There being no other business, the meeting ended at 6:05 pm.

**Proceedings of the  
Bills Committee on Securities and Futures (Amendment) Bill 2011  
Eighth meeting on Thursday, 19 January 2012, at 4:30 pm  
in Conference Room 2A of the Legislative Council Complex**

<b>Time Marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action Required</b>
001037 – 001234	Chairman	Confirmation of minutes of meetings on 17 and 24 October 2011.  Introductory remarks	
001235 – 001427	Administration	Introductory remarks by the Administration	
001428 – 001520	Mr James TO Chairman	Clarification on the proposed procedure for appointing the Presenting Officers	
001521 – 001747	Securities and Futures Commission (SFC)	Briefing by SFC on LC Paper No. CB(1)900/11-12(02)	
001748 – 001853	Chairman Administration	In response to the Chairman's request, the Administration agreed to provide the Hong Kong Institute of Certified Public Accountants (HKICPA) with a response to HKICPA's submission.	
001854 – 003313	Mr Andrew LEUNG ALA7 Mr Jeffery LAM SFC Administration Chairman	Mr Andrew LEUNG said that he concurred with the HKICPA regarding the extension of the safe harbour provisions to cover the situations as described in HKICPA's submission. He opined that the Administration should further consider HKICPA's suggestion.  Mr LEUNG and Mr Jeffrey LAM enquired whether the test under proposed section 307B(2)(b) and that under HKICPA's proposed safe harbour were the same.  ALA7 remarked that from the wording in its submission, HKICPA had not specified the principle(s) on which the proposed safe harbour was based. SFC had pointed out that according to proposed section 307B(2)(b), an objective test, namely a "reasonable officer" test, would be applied in determining whether a piece of information was "inside information". The wording used in proposed section 307B(2)(b) and that used in HKICPA's proposed safe harbour were not the same, and the principles used might be different.	The Administration to take action as per paragraph 3(a) of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
		<p>SFC remarked that the "reasonable man" test was a common provision in legislations to test the culpability of a person, and MMT would judge whether an officer should be held liable for any breaches of the price sensitive information (PSI) disclosure requirements based on the objective test. SFC stated that it would be difficult to implement the safe harbour proposed by HKICPA as the elements included in the safe harbour were rather confusing and might be open to interpretation. SFC remarked that the guidelines for the PSI disclosure regime should be able to help officers to consider the appropriate course of action in specific situations in order to comply with the PSI disclosure requirements.</p>	
003314 – 003355	Mr Paul CHAN Administration	<p>Mr Paul CHAN expressed concurrence with Mr Andrew LEUNG regarding HKICPA's suggestion. He also requested the Administration to provide its papers in time for future meetings.</p>	
003356 – 004406	SFC	<p>Briefing by SFC on LC Paper No. CB(1)900/11-12(03)</p>	
004407 – 005707	Mr Andrew LEUNG Administration SFC	<p>Mr Andrew LEUNG was concerned about the provision of checks and balances in the procedures for institution of MMT proceedings. Mr LEUNG disagreed that the arrangement for the Chief Executive to appoint the Chairman and two members of the MMT provided adequate check and balance in the MMT proceedings. Mr LEUNG said that he was particularly concerned about the provision of adequate checks and balances, and requested the Administration to provide the following information:</p> <ul style="list-style-type: none"> <li>(a) a comparison, in tabular form, between the existing and proposed procedures for instituting criminal and civil proceedings in respect of market misconduct cases under the Securities and Futures Ordinance (Cap. 571);</li> <li>(b) the procedures of other local regulatory/statutory bodies for instituting legal proceedings which were comparable to MMT proceedings, including the situations where the consent of other</li> </ul>	<p>The Administration to take action as per paragraph 3(b)(i), (ii) and (iii) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>authorities was required to institute the proceedings; and</p> <p>(c) apart from the Hong Kong Bar Association, the views of other parties regarding the proposal for SFC to institute MMT proceedings direct.</p> <p>The Administration briefed members on the procedures for prosecution of criminal offences relating to market misconduct, based on paragraph 3 of the Annex to LC Paper No. CB(1)900/11-12(03). SFC supplemented that the existing arrangements for instituting MMT proceedings were undesirable in that three arms of the Administration were involved in processing the cases, viz. (a) SFC was responsible for investigation and preparation of the evidence; (b) the Department of Justice prepared the cases for prosecution and appointed the Presenting Officers; and (c) the Financial Secretary's consent was required for institution of the MMT proceedings. SFC pointed out that for market misconduct cases which did not involve indictment and were heard in magistracies, SFC was directly responsible for the prosecution process, including the appointment of the prosecutors.</p>	
005708 – 010153	Mr Paul CHAN Administration	<p>Mr Paul CHAN opined that as an international financial centre, Hong Kong should be seen to be taking speedy and decisive actions in dealing with market misconduct cases, and the proposal to empower SFC to institute proceedings before MMT direct was a move in the right direction. He supported the proposal in principle.</p> <p>The Administration confirmed that under the proposed procedure, the decision to commence MMT proceedings would continue to be made by the board of SFC which comprised independent non-executive directors, and the Chairman and members of the MMT would continue to be appointed by the Chief Executive.</p> <p>Mr CHAN said that the checks and balances set out in paragraph 17, 21 and 22 of the paper should be able to effectively prevent abuse of the proposed procedure by SFC.</p>	



Time Marker	Speaker	Subject(s)	Action Required
010154 – 010513	Chairman Department of Justice (DoJ)	In response to the Chairman's request for clarification on the proposed MMT procedure, DoJ explained that based on the proposed procedures, SFC would conduct a preliminary assessment as to whether a market misconduct case merited criminal prosecution. Upon receipt of the case from SFC, the Prosecutions Division of DoJ would consider whether the evidence available was adequate for criminal prosecution, and the court suitable for hearing of the case. If a case was to be heard in a District court or above, DoJ would handle the prosecution work. If a case was to be heard in a magistracy, SFC would handle the prosecution work, through briefing out the case to an appointed lawyer. If DoJ considered that there was insufficient evidence to justify a criminal prosecution, the Secretary for Justice would give consent for SFC to institute MMT proceedings direct.	
010514 – 011030	Mr Andrew LEUNG DoJ Chairman	<p>In response to Mr Andrew LEUNG's enquiry regarding the status of MMT, DoJ remarked that a judge from the Court of First Instance would normally be appointed as the Chairman of the MMT.</p> <p>Mr Andrew LEUNG was concerned that even criminal cases heard at the District Court were handled by DoJ whereas the Bill proposed that SFC could institute proceedings direct with the MMT which was chaired by a judge from the Court of First Instance. Pointing out that the involvement of the Prosecutions Division of DoJ under the existing MMT procedure provided an important check and balance, Mr LEUNG requested the Administration to provide information on how the board of SFC would consider and decide whether a case should be brought before MMT.</p> <p>The Chairman suggested that the Administration used diagrams to illustrate the differences between the existing and the proposed MMT procedures.</p>	The Administration to take action as per paragraph 3(b)(iv) of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
011031 – 011311	Administration	<p><b><u>Clause-by-clause examination of the Bill</u></b></p> <p><u>Clause 22 – Section 257 amended (Orders, etc. of Tribunal)</u></p> <p>Members raised no question on clause 22.</p>	
011312 – 011415	ALA7 DoJ	<p><u>Clause 23 – Section 261 amended (Contempt dealt with by Tribunal)</u></p> <p>In response to ALA7's enquiry, DoJ remarked that a Committee Stage amendment would be made to substitute "; or" with a comma instead of a full stop under section 261(2)(b).</p>	The Administration to take action as per paragraph 4(a) of the minutes.
011416 – 011710	Mr Andrew LEUNG Administration	<p><u>Clause 24 – Section 262 amended (Report of Tribunal)</u></p> <p>Mr Andrew LEUNG opined that MMT should publicize the hearing report direct without having to pass the MMT report "first" to SFC and "then" others. The Administration agreed to propose a Committee Stage amendment based on the arrangement proposed by Mr LEUNG.</p>	The Administration to take action as per paragraph 4(b) of the minutes.
011711 – 011835	Administration	<p><u>Clause 25 – Section 266 amended (Appeal to Court of Appeal)</u></p> <p><u>Clause 26 – Section 307 amended (No further proceedings after Part XIII market misconduct proceedings)</u></p> <p>Members raised no question on clauses 25 and 26.</p>	
011836 – 012042	Mr Paul CHAN DoJ	<p><u>Clause 23 – Section 261 amended (Contempt dealt with by Tribunal)</u></p> <p>Mr Paul CHAN enquired why the reference to sections 257(10) and 258(10) was proposed to be removed from section 261. DoJ explained that the two sections were related to breaches of the disqualification orders, cold shoulder orders and cease and desist orders of the MMT. Currently, a breach of any of these orders might either be punished by the MMT as contempt under section 261 or prosecuted as an offence under section 257(10) or 258(10). If the SFC was given a direct access to the MMT in the</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>future, instituting contempt proceedings before the MMT to deal with breaches of such orders would pre-empt Secretary for Justice's power to prosecute and thus had implications under Article 63 of the Basic Law. As DoJ considered that breaches of such orders were serious wrongful acts which should be prosecuted, the Administration proposes to remove the MMT contempt route by deleting the reference to section 257(10) and 258(10) in section 261.</p>	
012043 – 012342	Administration	<p><u>Clause 27 – Schedule 2 amended (Non-delegable functions of Commission)</u></p> <p>Members raised no question on clause 27.</p>	
012343 – 013249	Mr Andrew LEUNG	<p><u>Clause 28 – Schedule 9 amended (Market Misconduct Tribunal)</u></p> <p>With reference to clause 28(7) which introduced new section 32A under Schedule 9, Mr Andrew LEUNG requested that SFC should confirm whether the withdrawal or discontinuation of MMT proceedings would be subject to the agreement of the board of SFC.</p>	<p>The Administration to take action as per paragraph 3(c) of the minutes.</p>
013250 – 013336	Chairman	Date of next meeting	