

立法會
Legislative Council

LC Paper No. CB(1)361/13-14
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/12

Bills Committee on Securities and Futures (Amendment) Bill 2013

Third meeting on
Tuesday, 15 October 2013, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex

- Members present** : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon Christopher CHEUNG Wah-fung, JP (Deputy Chairman)
Hon WONG Ting-kwong, SBS, JP
Hon CHAN Kin-por, BBS, JP
Hon Steven HO Chun-yin
Hon Kenneth LEUNG
Hon Dennis KWOK
Hon SIN Chung-kai, SBS, JP
- Members absent** : Hon James TO Kun-sun
Hon NG Leung-sing, SBS, JP
- Public officers attending** : Miss Ada CHAN
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services) 2
- Mr Alex LEUNG
Assistant Secretary for Financial Services and the
Treasury (Financial Services)(2)2
- Ms Rayne CHAI
Acting Senior Assistant Law Draftsman
Department of Justice

Mr Daryl HO
Head (Market Development)
Hong Kong Monetary Authority

Ms Polly LEE
Senior Manager (Market Development) 3
Hong Kong Monetary Authority

Mr Andy CHEUNG
Senior Manager (Banking Policy) A3
Hong Kong Monetary Authority

Attendance by invitation : Mr Rico LEUNG
Senior Director (Supervision of Markets)
Securities and Futures Commission

Ms Daphne DOO
Director (Supervision of Markets)
Securities and Futures Commission

Ms Thrity MUKADAM
Director (Supervision of Markets)
Securities and Futures Commission

Ms Amy LAM
Assistant Counsel (Legal Services)
Securities and Futures Commission

Clerk in attendance : Ms Connie SZETO
Chief Council Secretary (1)4

Staff in attendance : Miss Winnie LO
Assistant Legal Adviser 7

Ms Angel SHEK
Senior Council Secretary (1)4

I Meeting with the Administration

- (LC Paper No. CB(1)47/13-14(01) — List of follow-up actions arising from the discussion at the meeting on 30 September 2013
- LC Paper No. CB(1)47/13-14(02) — Administration's response to the issues arising from the meeting held on 30 September 2013
- LC Paper No. CB(3)742/12-13 — The Bill
- LC Paper No. CB(1)1584/12-13(01) — Marked-up copy of the Bill prepared by the Legal Service Division (Restricted to Members)
- File Ref: SUB 12/2/7 (2013) — Legislative Council Brief
- LC Paper No. LS71/12-13 — Legal Service Division Report
- LC Paper No. CB(1)1584/12-13(02) — Background brief on the Securities and Futures (Amendment) Bill 2013 prepared by the Legislative Council Secretariat)

Discussion

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

Admin Follow-up actions to be taken by the Administration

Amendments to Schedule 2 to the Organized and Serious Crimes Ordinance (Cap. 455) ("OSCO")

2. The Administration was requested to provide information on the rationale for including the six types of market misconduct (i.e. insider dealing, false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false or misleading information inducing transaction, and stock market manipulation) as offences for making confiscation orders under OSCO, with comparison to the designated predicate offences prescribed by the Financial Action Task Force ("FATF") and the types of market misconduct defined by other FATF members (e.g. the United States, the United Kingdom and the European Commission) for similar purposes.

Drafting matter

3. The Administration was requested to consider members' views to review the use of acronyms (e.g. "SIP" and "CCP") in the definitions in Division 1 – Interpretation of the proposed Part IIIA of the Securities and Futures Ordinance (Cap. 571).

(Post-meeting note: The Administration's written response on paragraph 3 above was issued to members on 25 October 2013 vide LC Paper No. CB(1)149/13-14(02).)

II Any other business

Date of next meeting

4. The Chairman reminded members that the next meeting would be held on Monday, 28 October 2013, at 10:45 am.

5. There being no other business, the meeting ended at 4:30 pm.

Council Business Division 1
Legislative Council Secretariat
20 November 2013

**Proceedings of the
Bills Committee on Securities and Futures (Amendment) Bill 2013
Third meeting on Tuesday, 15 October 2013, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000156 – 000404	Chairman	Introductory remarks	
000405 – 000645	Administration	Briefing by the Administration on its written response to the issues arising from the discussion at the meeting held on 30 September 2013. (LC Paper No. CB(1)47/13-14(02))	
000646 – 001357	Mr SIN Chung-kai Chairman Administration	<p>Mr SIN expressed concern that the proposed inclusion of six types of market misconduct offences in Schedule 2 to the Organized and Serious Crimes Ordinance (Cap. 455) ("OSCO") might exceed the minimum requirements of international standard. He enquired about –</p> <p>(a) the reasons for bringing market misconduct offences under the confiscation regime in relation to money laundering given that market misconduct might not necessarily associate with money laundering; and</p> <p>(b) comparison of the proposal with the standards set by the Financial Action Task Force ("FATF") and the types of market misconduct offences prescribed by other FATF members for similar purposes.</p> <p>The Administration explained that –</p> <p>(a) FATF was an international body with the objectives to set standards and promote effective implementation of measures for combating money laundering, etc. As a member jurisdiction, Hong Kong was obliged to implement the FATF requirements;</p> <p>(b) as proceeds generated from market misconduct offences could be used for illicit purposes including money laundering, it was among the aims of FATF to combat market misconduct as predicate offences and confiscate proceeds gained from such offences;</p>	

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		<p>(c) while FATF had included "insider trading and market manipulation" in its list of designated predicate offences, the specific types of market misconduct offences subject to the confiscation regime were to be determined by individual members of FATF having regard to their own circumstances and domestic law; and</p> <p>(d) the proposed six types of market misconduct offences to be added in Schedule 2 to OSCO were existing offences under the Securities and Futures Ordinance (Cap. 571) ("SFO").</p> <p>The Administration agreed to provide further information after the meeting in response to Mr SIN's enquiries above.</p>	<p>The Administration to take action as per paragraph 2 of the minutes.</p>
001358 – 001810	Mr CHAN Kin-por Administration Chairman	<p>Mr CHAN asked why the proposed amendments to section 303 of SFO only aimed at empowering the criminal court to make a disgorgement order with the same penalty as one made by the Market Misconduct Tribunal ("MMT") under section 257(d) of SFO instead of raising the penalty level of the offence to the higher of \$10 million or three times the gain or loss avoided by an offender as a result of contravention of a requirement as in the case of some existing provisions of SFO so as to enhance the deterrent effect on offences.</p> <p>The Administration explained that the proposed amendments to section 303 of SFO were technical in nature and aimed to enable the criminal courts to make disgorgement orders similar to MMT for the purpose of recouping illegal gains and loss avoided from committing market misconduct offences, and hence the penalty level under section 303 of SFO was proposed to align with that under section 257(d) of SFO. The amendment did not involve a review of the penalty level.</p>	
Clause by Clause Examination of the Bill			
001811 – 002050	Administration Chairman	<p>Members agreed to examine the English text of the provisions first.</p> <p>Long title</p>	

Time Marker	Speaker	Subject(s)	Action Required
002051 – 002159	Administration Chairman	<p>Part 1</p> <p>Preliminary</p> <p><u>Clause 1 – Short title and commencement</u></p>	
002200 – 002421	Administration Chairman Mr SIN Chung-kai	<p>Part 2</p> <p>Amendments to Securities and Futures Ordinance for Regulation of OTC Derivative Transactions</p> <p><u>Clause 2 – Securities and Futures Ordinance amended</u></p> <p><u>Clause 3 – Section 21 amended (duties of recognized exchange company)</u></p> <p>In response to Mr SIN's enquiry, the Administration advised that Schedule 1 - Interpretation and General Provisions of SFO would be amended to include, amongst others, a definition of over-the-counter ("OTC") derivative product as a structured product subject to certain exclusions as provided in the Schedule.</p>	
002422 – 002703	Administration Chairman Mr Kenneth LEUNG Mr SIN Chung-kai Securities and Futures Commission ("SFC")	<p><u>Clause 4 – Section 27 amended (production of records, etc. by recognized exchange company)</u></p> <p>In reply to Mr LEUNG's enquiry, the Administration explained that both local and overseas recognized exchange companies might be designated as central counterparties ("CCP") or trading platforms for clearing/trading OTC derivative products (proposed sections 101I(4) and 101J(4)), subject to their meeting the relevant requirements.</p> <p>Mr SIN enquired whether the London Metal Exchange ("LME") recently purchased by the Hong Kong Exchanges and Clearing Limited ("HKEx") Group would be a recognized exchange company under SFO.</p> <p>SFC advised that LME currently was not a recognized exchange company and if it operated in Hong Kong to provide trading services in the future, it would need to apply to SFC to be a recognized exchange company.</p>	

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002704 – 002740	Administration Chairman	<u>Clause 5 – Section 38 amended (duties of recognized clearing house)</u>	
002741 – 002829	Administration Chairman Mr SIN Chung-kai	<u>Clause 6 – Section 42 amended (production of records, etc. by recognized clearing house)</u> In reply to Mr SIN, the Administration advised that the books and records that SFC might require recognized clearing houses to produce in relation to OTC derivative transactions would include books and records in electronic form.	
002830 – 003436	Administration Chairman Mr SIN Chung-kai Mr Kenneth LEUNG	<u>Clause 7 – Section 63 amended (duties of recognized exchange controller)</u> On the enquiries of Mr SIN and Mr LEUNG, the Administration explained that the duties of recognized exchange controllers in respect of OTC derivative products were not included in section 63(1)(a) because this part only dealt with duties of recognized exchange controller for securities or futures contracts <u>traded on the stock market or futures market</u> , whereas OTC derivatives were traded outside the markets (i.e. over the counter).	
003437 – 003527	Administration Chairman	<u>Clause 8 – Section 71 amended (production of records, etc. by recognized exchange controller)</u>	
003528 – 004418	Administration Chairman Mr Kenneth LEUNG Mr SIN Chung-kai	<u>Clause 9 – Part IIIA added</u> <i>Part IIIA – OTC Derivative Transactions</i> <i>Division 1—Interpretation</i> <i>101A. Interpretation of Part IIIA</i> In response to Mr SIN's enquiry, the Administration advised that the reference "authorized financial institution" ("AI") in the definition of "prescribed person" meant an authorized institution as defined in section 2(1) of the Banking Ordinance (Cap 155), and generally referred to banks.	
004419 – 005222	Chairman Mr Kenneth LEUNG Mr SIN Chung-kai Administration	Mr LEUNG and Mr SIN expressed concern about the use of acronyms "CCP" and "SIP" for the words "central counterparty" and "systematically important participant" when they first appeared in Division 1, and asked whether the acronyms should also be defined to show their full form.	

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		<p>The Administration explained that the purpose of using acronyms was to facilitate readers. As the acronyms in question were used in expressions like "designated CCP" and "registered SIP", but would not appear as an independent term itself in the substantive provisions, it was not the current practice to define an acronym only because it appeared in a defined term. Also, there was no confusion caused to readers. Nevertheless, the Administration would consider members' views to review the use of acronyms in question.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
<p>005223 – 010049</p>	<p>Administration Chairman Mr SIN Chung-kai</p>	<p><i>Division 2—Reporting, Clearing and Trading Obligations</i> <i>101B. Reporting obligation</i></p> <p>Mr SIN enquired about the respective role of the Hong Kong Monetary Authority ("HKMA") and SFC in relation to mandatory reporting obligation by the prescribed persons, their access to the reported data, and format of the data collected.</p> <p>The Administration advised that –</p> <ul style="list-style-type: none"> (a) SFC would be empowered to make rules with the consent of the Monetary Authority and after consultation with the Financial Secretary ("FS") for prescribed persons to comply with the mandatory reporting obligation; (b) HKMA would develop and operate a trade repository ("TR") for the purpose of mandatory reporting obligation. Prescribed persons would be required to report specified OTC derivative transactions to HKMA, and both HKMA and SFC could access the reported data to maintain regulatory oversight of the prescribed persons under their respective purviews; (c) given that mainly institutional investors (e.g. banks, licensed corporations ("LCs") and fund companies) were involved in OTC derivative transactions, information kept by TR would include data relating to individual OTC transactions conducted by these institutions, such as the types and 	

Time Marker	Speaker	Subject(s)	Action Required
		<p>amount of derivative transactions, their economic terms, and the counterparties concerned, etc.; and</p> <p>(d) the regulators would analyze the data to assess OTC derivative positions held by market players and monitor their exposures and hence systemic risks.</p>	
010050 – 010224	Chairman Deputy Chairman SFC	<p>The Deputy Chairman enquired whether "dark pool" trading platforms would be subject to the proposed regulation of OTC derivative transactions.</p> <p>SFC advised that –</p> <p>(a) the proposed mandatory obligations would apply to OTC derivative transactions irrespective of the trading platforms where the transactions were executed (i.e. dark pools or other venues); and</p> <p>(b) currently, dark pools operating in Hong Kong offered trading of securities, and not OTC derivatives. The transactions at dark pools would be caught under the proposed regime if they involved OTC derivative transactions that were subject to the proposed mandatory obligations.</p>	
010225 – 010641	Administration	<p><i>101B. Reporting obligation</i></p> <p><i>101C. Clearing obligation</i></p>	
010642 – 010942	Administration Chairman Mr SIN Chung-kai	<p><i>101D. Trading obligation</i></p> <p>In reply to Mr SIN, the Administration confirmed that to be in line with the international developments on implementation of trading requirements, the mandatory trading obligations for OTC derivative transactions would not be implemented at the outset. Relevant provisions on mandatory trading obligations would not commence at the same time as with other proposed mandatory reporting and clearing obligations under the Bill.</p>	
010943 – 011123	Administration Chairman Mr SIN Chung-kai	<p><i>101E. Application by Commission to Court of First Instance for contravention of obligations</i></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<i>101F. Application by Monetary Authority to Court of First Instance for contravention of obligations</i>	
011124 – 011706	Administration Chairman Mr Kenneth LEUNG Mr SIN Chung-kai SFC	<p><i>101G. Exemptions from obligations</i></p> <p>In reply to Mr LEUNG and Mr SIN's enquiries on exemptions from the mandatory obligations for OTC derivative transactions, the Administration and SFC advised that –</p> <p>(a) the procedures for making application for exemption from obligations would be set out in subsidiary legislation, and conditions (e.g. the effective date) could be imposed on the exemptions granted, which would be submitted to the Legislative Council ("LegCo") for negative vetting;</p> <p>(b) public organizations (e.g. Hong Kong Mortgage Corporation Limited) undertaking OTC derivative transactions, if any, would be subject to the mandatory obligations but not the case for HKMA as it was part of the Government and was exempted from regulation of SFO; and</p> <p>(c) SFC would be required to publish on the Internet particulars that it considered appropriate of an exemption granted, suspended or withdrawn.</p>	
011707 – 011802	Administration	<i>101H. Guidelines on exemptions</i>	
011803 – 012326	Administration Chairman Mr SIN Chung-kai	<p><i>Division 3—Designation of Central Counterparties and Trading Platforms</i></p> <p><i>101I. Designation of central counterparties</i></p> <p>In reply to Mr SIN, the Administration advised that –</p> <p>(a) a person might be designated as a CCP if at the time of designation, the person was a recognized clearing house, or a person authorized under section 95(2) of SFO to provide automated trading services, and the requirements prescribed by the designation rules had been met;</p>	

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		<p>(b) a person outside Hong Kong or in Hong Kong might be designated as a CCP; and</p> <p>(c) subject to SFC's approval, HKEx would commence operation of a local CCP as a recognized clearing house and eventually a designated CCP for clearing of OTC derivative transactions.</p>	
012327 – 012610	Administration	<i>101J. Designation of trading platforms</i>	
012611 – 013940	Administration Chairman Mr SIN Chung-kai Mr Kenneth LEUNG	<p><i>Division 4—Rule Making Powers on Obligations and Designations</i></p> <p><i>101K. Rule making power—reporting obligation</i></p> <p><i>101L. Rule making power—clearing obligation</i></p> <p>In response to Mr SIN and Mr LEUNG's enquiries on the rules on mandatory reporting and clearing obligations, the Administration advised that –</p> <p>(a) the rules would be made by SFC (with the consent of HKMA and after consultation with FS) in the form of subsidiary legislation subject to the negative vetting procedure of LegCo; and</p> <p>(b) HKMA and SFC would jointly conduct a public consultation on the relevant subsidiary legislation, which was expected to commence in late 2013 or early 2014.</p> <p><i>101M. Rule making power—trading obligation</i></p>	
013941 – 014342	Administration Mr Kenneth LEUNG Chairman SFC	<p><i>101N. Rule making power—designations</i></p> <p>In reply to Mr LEUNG on the authority and process to amend the "Code of Conduct For Persons Licensed by or Registered with the Securities and Futures Commission" ("the Code"), SFC advised that –</p> <p>(a) the Code was not subsidiary legislation, and amendments to it would not require LegCo's approval;</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) to tie in with the proposed regulatory regime for OTC derivative transactions to be conducted by SFC's licensed corporations and persons, SFC would revise the existing provisions of the Code, or introduce new provisions; and</p> <p>(c) to avoid regulatory arbitrage, HKMA would introduce requirements similar to those set out in the Code to authorized financial institutions.</p>	
014343 – 015257	Administration	<p><i>Division 5—Systemically Important Participants</i></p> <p><i>101O. Persons who must notify positions in OTC derivative transactions</i></p> <p><i>101P. Commission to maintain register</i></p> <p><i>101Q. Registration in SIP register</i></p>	
015258 – 015735	Assistant Legal Adviser 7 ("ALA7") Mr Kenneth LEUNG Administration	<p><i>101R. Notification not required after registration for specific class</i></p> <p>In response to the views of ALA7 and members on the drafting of the proposed section 101R(3) which used the word "Also" at the beginning of the sub-section to connect sub-section (2), the Administration advised that the usage in question was in line with the initiatives of the Department of Justice to use plain language in drafting in order to make provisions more comprehensible and to facilitate readers.</p>	
015736 – 020023	Administration	<i>101S. Deregistration</i>	
020024 – 020130	Chairman	Date of next meeting	