

立法會
Legislative Council

LC Paper No. CB(1)857/13-14
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/12

Bills Committee on Securities and Futures (Amendment) Bill 2013

Fourth meeting on
Monday, 28 October 2013, at 10:45 am
in Conference Room 3 of the Legislative Council Complex

Members present : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon Christopher CHEUNG Wah-fung, JP (Deputy Chairman)
Hon James TO Kun-sun
Hon CHAN Kin-por, BBS, JP
Hon NG Leung-sing, SBS, JP
Hon Steven HO Chun-yin
Hon Kenneth LEUNG
Hon Dennis KWOK
Hon SIN Chung-kai, SBS, JP

Member absent : Hon WONG Ting-kwong, SBS, JP

Public officers attending : Miss Ada CHAN
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services) 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 Paul YU
Senior Manager (Enforcement) 2E
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

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

Action

I Meeting with the Administration

Follow-up to issues arising from previous meetings

(LC Paper No. CB(1)149/13-14(01) — Administration's response to the views provided by organizations/individuals in their submissions to the Bills Committee or at the meeting on 30 September 2013

LC Paper No. CB(1)149/13-14(02) — Administration's response dated 25 October 2013 to the issues arising from the meeting held on 15 October 2013

LC Paper No. CB(1)149/13-14(03) — List of follow-up actions arising from the discussion at the meeting on 15 October 2013)

Clause-by-clause examination of the Bill

(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)

Declaration of interests

Mr Kenneth LEUNG declared that he was a senior consultant of Clifford Chance but he did not involve in the business relating to over-the-counter ("OTC") derivative transactions.

Discussion

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

Follow-up actions to be taken by the Administration

Proposed Part IIIA of the Securities and Futures Ordinance (Cap. 571) ("SFO")

Division 5 – Systematically Important Participants ("SIP")
Section 101V – Application to Court of First Instance

Admin 3. The proposed section 101V(3)(a) provides that if the Court of First Instance is satisfied that "there is no reasonable excuse for the registered SIP not to comply with the requirement", it may "order the registered SIP to comply with the requirement..."; but the proposed subsection (3)(b) provides that if the Court of First Instance is satisfied that "the failure was without reasonable excuse," it may "punish the registered SIP...". The Administration was requested to provide information on:

- (a) the background and rationale for adopting different follow-up actions for an inquiry into non-compliance of the requirement by the registered SIP; and
- (b) the background and rationale for using "no reasonable excuse" and "the failure was without reasonable excuse" in the provisions as the considerations for the Court of First Instance in determining the follow-up actions for the non-compliance.

Amendments to Part VIII of SFO

New Division 3A – Monetary Authority ("MA")'s Powers of Investigation

Admin 4. With regard to MA's powers to require a person to give an explanation, particulars, answer or statement ("the requested information") for an investigation under the proposed section 184B, and the comparable powers of the Securities and Futures Commission ("SFC") under relevant provisions of SFO, the Administration was requested to provide information on:

- (a) the rights and protection for the person under investigation in respect of refusal to provide the requested information, for example, on grounds of self-incrimination, legal professional privilege, and subject to secrecy or other legal obligations under a foreign law;
- (b) whether there are express provisions in SFO stipulating the rights and protection referred to in (a) above; and if not, to consider including relevant provisions in the Bill; and
- (c) past actions, if any, taken by SFC or MA in response to the claims referred to in (a) above made by the person concerned.

Admin 5. In relation to the power to be conferred on MA under the proposed section 184C(2) to publish investigation reports, the Administration was requested to provide information on the cases and circumstances under which SFC or MA had exercised similar powers, given the concern that publication of investigation reports before initiation of prosecution and proof of offence might prejudice the prosecution.

Amendments to Division 4 – Miscellaneous

Admin 6. Regarding the assistance by SFC and MA to regulators outside Hong Kong for conducting an investigation under section 186 and the new section 186A, the Administration was requested to provide information on:

- (a) the circumstances under which SFC and MA would exercise the power to assist regulators outside Hong Kong, including the consideration on whether reciprocal assistance would be offered from the regulator concerned; and
- (b) whether SFC or MA had to enter into a reciprocal agreement or other legal agreement with the regulator concerned to give effect to the provision of assistance.

Amendments to Part IX of SFO

New Division 4 – Disciplinary Action by MA

Admin 7. On the disciplinary sanction of imposing a pecuniary penalty of the greater of \$10,000,000, or three times the amount of the profit gained or loss avoided by the person as a result of contravention of the mandatory obligations for OTC derivative transactions, the Administration was requested to provide information on:

- (a) when the said level of pecuniary penalty was first adopted in SFO and the rationale for setting the penalty level;
- (b) past cases, if any, whereby the pecuniary penalty imposed by SFC on regulated persons exceeded \$10,000,000; and
- (c) the comparison with the penalties imposed on other offences under SFO.

II Any other business

Date of next meeting

8. The Chairman reminded members that the next meeting would be held on 12 November 2013 at 10:45 am.
9. There being no other business, the meeting ended at 12:28 pm.

Council Business Division 1
Legislative Council Secretariat
6 February 2014

**Proceedings of the
Bills Committee on Securities and Futures (Amendment) Bill 2013
Fourth meeting on Monday, 28 October 2013, at 10:45 am
in Conference Room 3 of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000510 – 000644	Chairman	Introductory remarks	
000645 – 001347	Administration Chairman Mr SIN Chung-kai	<p>Briefing by the Administration on its written responses to comments given by organizations/individuals in their submissions to the Bills Committee or at the meeting on 30 September 2013. (LC Paper No. CB(1)149/13-14(01))</p> <p>Mr SIN enquired about the circumstances for exempting entities/persons from the reporting obligation when such reporting was prohibited by conflicting laws.</p> <p>The Administration and the Securities and Futures Commission ("SFC") responded as follows –</p> <p>(a) Flexibility was given under the Bill for SFC, with the consent of Hong Kong Monetary Authority ("HKMA"), to make rules for granting exemptions to entities/persons from complying with the reporting obligation. Such rules would be subsidiary legislation subject to the negative vetting procedure of the Legislative Council.</p> <p>(b) In considering the granting of exemptions, the regulators would take into account the development of relevant industry protocol as well as the development in other major jurisdictions in dealing with trade reporting issues such as conflicting laws and confidentiality issue. Before these jurisdictions amended their laws which were in conflict with the reporting obligation, it would be necessary to provide exemptions for overseas entities/persons from the mandatory reporting.</p>	

Time Marker	Speaker	Subject(s)	Action Required
001348 – 001818	Administration Chairman Mr Kenneth LEUNG SFC	<p>Declaration of interest by Mr LEUNG</p> <p>In response to Mr LEUNG's enquiry about application of licence for undertaking the new Type 11 regulated activity ("RA") (i.e. dealing in or advising on over-the-counter ("OTC") derivative products), SFC explained that if an institution was based overseas but provided services to Hong Kong market participants in relation to OTC derivative transactions, it might need to obtain a licence for undertaking the new Type 11 RA. Whether the institution would need to apply for a licence would depend on the circumstances of individual cases, such as whether the services were actively promoted to the Hong Kong market participants.</p>	
001819 – 002432	Administration Chairman Mr CHAN Kin-por	<p>Mr CHAN enquired how HKMA/SFC would consider whether a systematically important participant ("SIP") would pose systemic risks to the financial system of Hong Kong, and what actions they could take to address the risks.</p> <p>The Administration explained that the regulators had power under the proposed section 101T of the Securities and Futures Ordinance (Cap. 571) ("SFO") to require SIPs to provide information on their activities and transactions in OTC derivative products. Assessment of the potential systemic risks posed by activities of SIPs would be conducted on a case-by-case basis. In order to manage potential risks posed by SIPs, the regulators would be provided with power under the proposed section 101U to require SIPs to take certain action (e.g. reducing their positions in an OTC derivative product).</p> <p>Members noted that the Administration might make committee stage amendments ("CSAs") to the Bill taking into account the views and suggestions made by the deputations as appropriate. The Administration would revert to the Bills Committee on the draft CSAs.</p>	
002433 – 002623	Chairman Administration	<p>Briefing by the Administration on its written responses to item 2 of the list of follow-up actions arising from the discussion at the meeting on 15 October 2013 (LC Paper No. CB(1)149/13-14(02))</p>	

Time Marker	Speaker	Subject(s)	Action Required
<u>Clause by Clause Examination of the Bill</u>			
002624 – 002855	Chairman Administration	<p><u>Clause 9 – Part IIIA added</u></p> <p><i>Part IIIA – OTC Derivative Transactions</i> <i>Division 5 – Systemically Important Participants</i></p> <p><i>101T. Power to require information from registered SIPs</i></p>	
002856 – 003312	Administration Chairman Mr Kenneth LEUNG SFC	<p><i>101U. Power to require registered SIPs to take certain action</i></p> <p>Mr LEUNG enquired whether –</p> <p>(a) "systemic risk" to be posed by SIPs' activities or transactions in OTC derivatives would be measured by quantifiable or qualitative factors; and</p> <p>(b) auditors of a SIP had obligation to report to SFC irregularities identified in the SIP's reporting or risk management systems in respect of OTC derivative transactions.</p> <p>SFC advised that –</p> <p>(a) if a person's position in a specific class of OTC derivative transaction exceeded the specified threshold (to be set by the subsidiary legislation), the person would be required to notify SFC and to be registered as a SIP;</p> <p>(b) to facilitate understanding by market participants, enhance efficiency of the reporting process, and taking into account industry's views, it was decided that the notification in (a) above would only base on quantifiable thresholds to be specified for different classes of OTC derivative transactions, and would not include qualitative considerations;</p> <p>(c) it would be the responsibility of the SIP to comply with the notification requirement, and the Bill would not impose obligations on the auditor in this regard; and</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(d) for risk assessment and monitoring after the notification, SFC might require a registered SIP to provide further information on its activities and transactions in OTC derivative products, risk management systems, and any other matters as prescribed by the notification rules.</p>	
<p>003313 – 003844</p>	<p>Administration Chairman ALA7 SFC Mr Dennis KWOK</p>	<p><i>101V. Application to Court of First Instance</i></p> <p>ALA7 noted that, like certain existing provisions in SFO, the proposed section 101V(3)(a) provided that if the Court of First Instance was satisfied that "there is no reasonable excuse for the registered SIP not to comply with the requirement", it might "<u>order the registered SIP to comply</u> with the requirement..."; but subsection (3)(b) provided that if the Court of First Instance was satisfied that "the failure was without reasonable excuse," it might "<u>punish the registered SIP...</u>". ALA7 and Mr KWOK enquired about –</p> <p>(a) the background and rationale for adopting different follow-up actions for an inquiry into non-compliance of the requirement by the registered SIP; and</p> <p>(b) the background and rationale for using "no reasonable excuse" and "the failure was without reasonable excuse" in the provisions as the considerations for the Court of First Instance in determining the follow-up actions for the non-compliance.</p> <p>The Administration and SFC advised that reference had been made to existing similar provisions of SFO (e.g. sections 133, 185 and 211) so as to achieve consistency. Other ordinances including Cap. 485, 588 and 615 also contained similar provisions. The Administration/SFC undertook to provide further information in response to the above enquiries.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
<p>003845 – 004511</p>	<p>Administration Chairman</p>	<p><i>101W. Rule making power—notifications etc.</i></p> <p><u>Clause 10 – Section 109 amended (offence to issue advertisements relating to carrying on of regulated activities, etc.)</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p><u>Clause 11 – Section 116 amended (corporations to be licensed for carrying on regulated activities)</u></p> <p><u>Clause 12 – Section 119 amended (registered institutions)</u></p> <p><u>Clause 13 – Section 120 amended (representatives to be licensed)</u></p> <p><u>Clause 14 – Section 145A added</u></p> <p><i>145A. Commission may vary financial resources rules for particular licensed corporations</i></p>	
004512 – 005050	Administration Chairman ALA7	<p><u>Clause 15 – Section 178 amended (interpretation of Part VIII)</u> (Part VIII relates to supervision and investigations)</p> <p>In reply to ALA7's enquiry, the Administration explained that the newly added definition of "MA investigator" (i.e. person directed/appointed by the Monetary Authority ("MA") to investigate any matter <u>under section 184A</u>) would avoid confusion with the existing definition of "investigator" (i.e. person directed/appointed to investigate any matter <u>under section 182(1)</u>). The existing definition of "investigator" would be amended to exclude "MA investigator".</p>	
005051 – 005607	Administration Chairman Mr NG Leung-sing SFC	<p><u>Clause 16 – Section 181 amended (information relating to transactions)</u></p> <p>Mr NG enquired whether the penalties imposable by SFC and HKMA under SFO (e.g. for offences under section 181 in respect of provision of information to SFC, under section 184 in respect of investigations by SFC and the proposed section 184A in relation to investigations by HKMA) were aligned between the two regulators, and the criteria for setting the relevant penalty level.</p> <p>The Administration advised that the penalty for offences relating to provision of information in respect of OTC derivative transactions or offences relating to investigation of such transactions followed the existing penalty levels for comparable offences under SFO, and were aligned between the two regulators in order to achieve consistency and maintain a level-playing</p>	

Time Marker	Speaker	Subject(s)	Action Required
		field for entities/persons overseen by SFC and HKMA.	
005608 – 005822	Administration Chairman	<p><u>Clause 17 – Part VIII, Division 3 heading amended (powers of investigations)</u></p> <p><u>Clause 18 – Section 182 amended (investigations)</u></p> <p><u>Clause 19 – Section 184 amended (offences in relation to investigations)</u></p>	
005823 – 010238	Administration Chairman Mr SIN Chung-kai	<p><u>Clause 20 – Part VIII, Division 3A added</u></p> <p><i>Division 3A—Monetary Authority's Powers of Investigation</i></p> <p><i>184A. Investigations by Monetary Authority</i></p> <p>On Mr SIN's enquiry about the reason for providing MA with the power to appoint person(s) to conduct investigations, HKMA explained that having regard to the division of work between HKMA and SFC under the regulatory regime of OTC derivative transactions, MA would need power to investigate into non-compliance of mandatory obligations on OTC derivative transactions undertaken by authorized institutions or approved money brokers. This was in line with SFC's new investigation power for non-compliances by licensed corporations and other prescribed persons engaged in OTC derivative activities.</p>	
010239 – 011051	Administration Chairman Mr Dennis KWOK SFC Mr Kenneth LEUNG	<p><i>184B. Conduct of investigations</i></p> <p>With regard to MA's powers to require a person to give an explanation, particulars, answer or statement ("the requested information") for an investigation, and the comparable power of SFC under SFO, Mr KWOK and Mr LEUNG enquired about –</p> <p>(a) the rights and protection for the person under investigation in respect of refusal to provide the requested information, for example, on grounds of self-incrimination, legal professional privilege ("LPP"), and subject to secrecy or other legal obligations under a foreign law;</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) whether there were express provisions in SFO stipulating the rights and protection referred to in (a) above; and if not, the Administration should consider including relevant provisions in the Bill; and</p> <p>(c) past actions, if any, taken by SFC or MA in response to the claims referred to in (a) above made by the person concerned.</p> <p>The Administration and SFC advised that –</p> <p>(a) the provisions in section 184B followed the existing provisions of SFO in respect of comparable investigation power for SFC;</p> <p>(b) the person under investigation could claim privilege from self-incrimination by virtue of section 187 so that the information provided to MA could not be used in criminal proceedings against him; and</p> <p>(c) SFC would check whether there was any express provision on LPP in SFO, and if no express provision existed, it would also consider members' suggestion to make express provision in this regard. Similarly, SFC would clarify how investigation powers were exercised where compliance might result in a breach of foreign law.</p> <p>Mr KWOK emphasized the need to provide sufficient legal protection for the persons under investigation. At the request of Mr KWOK, the Administration undertook to provide supplementary information on his enquiries and suggestion.</p> <p>In reply to Mr LEUNG, SFC supplemented that the investigation powers of SFC/MA would override the rights conferred on a person under the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") (in that the PDPO would not operate so as to prevent the SFC's exercise of its investigation powers).</p>	<p>The Administration to take action as per paragraph 4 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
011052 – 011303	Administration Chairman Mr Dennis KWOK SFC	<p><i>184C. Investigation reports</i></p> <p>In relation to the power for MA to publish investigation reports under section 184C(2), Mr KWOK expressed concern that it might prejudice the prosecution if the investigation reports were published before initiation of prosecution and proof of offence.</p> <p>In response, the Administration undertook to provide information on the cases and circumstances under which SFC/MA had exercised similar powers in the past.</p>	The Administration to take action as per paragraph 5 of the minutes.
011304 – 011628	Administration Chairman	<p><i>184D. Offences relating to investigations</i></p> <p><i>184E. Recovery of costs of investigation</i></p> <p><u>Clause 21 – Section 185 amended (application to Court of First Instance relating to non-compliance with requirements under section 179, 180, 181 or 183)</u></p> <p><u>Clause 22 – Section 186 amended (assistance to regulators outside Hong Kong)</u></p>	
011629 – 012343	Administration Chairman Mr NG Leung-sing Mr Kenneth LEUNG SFC	<p><u>Clause 23 –Section 186A added</u></p> <p><i>186A. Monetary Authority's assistance to regulators outside Hong Kong</i></p> <p>In response to the enquiries of Mr NG and Mr LEUNG regarding the assistance by SFC and MA to regulators outside Hong Kong for conducting an investigation under section 186 and the new section 186A, the Administration agreed to provide information on –</p> <p>(a) the circumstances under which SFC and MA would exercise the power to assist regulators outside Hong Kong, including the consideration on whether reciprocal assistance would be offered from the regulator concerned; and</p> <p>(b) whether SFC or MA had to enter into a reciprocal agreement or other legal agreement with the regulator concerned to give effect to the provision of assistance.</p>	The Administration to take action as per paragraph 6 of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
012344 – 012638	Administration Chairman Mr Dennis KWOK	<p><u>Clause 24 – Section 187 amended (use of incriminating evidence in proceedings)</u></p> <p><u>Clause 25 – Section 190 amended (inspection of records or documents seized, etc.)</u></p> <p><u>Clause 26 – Section 191 amended (Magistrate's warrants)</u></p>	
012639 – 012806	Administration Chairman	<p><u>Clause 27 – Section 193 amended (interpretation of Part IX)</u></p> <p><u>Clause 28 – Part IX, Division 2 heading amended (discipline, etc.)</u></p>	
012807 – 013138	Administration Chairman Mr Kenneth LEUNG	<p><u>Clause 29 – Section 197A added</u></p> <p><i>197A. Disciplinary action for non-compliance by registered SIPs</i></p> <p>Mr LEUNG enquired about the rationale for setting the pecuniary penalty for contravention of the mandatory obligations for OTC derivative transactions and a number of existing offences under SFO at the greater of \$10,000,000, or three times the amount of the profit gained or loss avoided by the person as a result of the contravention.</p> <p>The Administration advised that non-compliance with requirements by registered SIPs might give rise to systemic risks in the financial market. In view of the serious consequence, it was necessary to set a relatively heavier penalty as compared to the less serious offences under SFO.</p>	
013139 – 014254	Administration Chairman	<p><u>Clause 30 – Part IX, Division 3 heading amended (miscellaneous)</u></p> <p><u>Clause 31 – Section 198 amended (procedural requirements in respect of exercise of powers under Part IX)</u></p> <p><u>Clause 32 – Section 199 amended (guidelines for performance of functions under section 194(2) or 196(2))</u></p> <p><u>Clause 33 – Section 200 heading amended (effect of suspension under Part IX)</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p><u>Clause 34 – Section 201 amended (general provisions relating to exercise of powers under Part IX)</u></p> <p><u>Clause 35 – Section 202 amended (requirement to transfer records upon revocation or suspension of licence or registration)</u></p> <p><u>Clause 36 – Section 203 amended (permission to carry on business operations upon revocation or suspension of licence or registration)</u></p> <p><u>Clause 37 – Part IX, Divisions 4 and 5 added</u></p> <p><i>Division 4—Disciplinary Action by Monetary Authority</i></p> <p><i>203A. Disciplinary action by Monetary Authority</i></p> <p><i>Division 5—Miscellaneous Provisions Relating to Division 4</i></p> <p><i>203B. Procedural requirements for exercise of disciplinary powers</i></p> <p><i>203C. Guidelines for performance of functions under section 203A(1)(c)</i></p> <p><i>203D. General provisions relating to exercise of powers under Division 4</i></p> <p><i>203E. Recovery and payment of pecuniary penalty</i></p> <p><i>203F. Application to Court of First Instance relating to non-compliance with prohibition under section 203A</i></p>	
014255 – 014334	Mr NG Leung-sing Administration Chairman	<p>In reply to Mr NG's enquiry on MA's disciplinary sanction of the greater of \$10,000,000, or three times the amount of the profit gained or loss avoided by the person as a result of contravention of the mandatory obligations for OTC derivative transactions, the Administration was requested to provide information on –</p> <p>(a) when the said level of pecuniary penalty was first adopted in SFO and the rationale for setting the penalty level;</p>	The Administration to take action as per paragraph 7 of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
		(b) past cases, if any, whereby the pecuniary penalty imposed by SFC on regulated persons exceeded \$10,000,000; and (c) the comparison with the penalties imposed on other offences under SFO.	
014335 – 014353	Chairman	Date of next meeting	

Council Business Division 1
Legislative Council Secretariat
6 February 2014