

立法會
Legislative Council

LC Paper No. CB(1)858/13-14
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/12

Bills Committee on Securities and Futures (Amendment) Bill 2013

Fifth meeting on
Tuesday, 12 November 2013, at 10:45 am
in Conference Room 2B 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 WONG Ting-kwong, SBS, JP
Hon CHAN Kin-por, BBS, JP
Hon NG Leung-sing, SBS, JP
Hon Steven HO Chun-yin
Hon SIN Chung-kai, SBS, JP

Members absent : Hon Kenneth LEUNG
Hon Dennis KWOK

Public officers attending : Financial Services and the Treasury Bureau

Miss Ada CHAN
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services) 2

Department of Justice

Ms Rayne CHAI
Acting Senior Assistant Law Draftsman

Hong Kong Monetary Authority

Mr Daryl HO
Head (Market Development)

Ms Polly LEE
Senior Manager (Market Development) 3

Mr Andy CHEUNG
Senior Manager (Banking Policy)A3

Mr Paul YU
Senior Manager (Enforcement) 2E

Attendance by invitation : Securities and Futures Commission

Mr Rico LEUNG
Senior Director (Supervision of Markets)

Ms Daphne DOO
Director (Supervision of Markets)

Ms Thrity MUKADAM
Director (Supervision of Markets)

Mr Derek SHEK
Director (Licensing, Intermediaries)

Mr Eric HO
Associate Director (Licensing, Intermediaries)

Ms Amy LAM
Assistant Counsel (Legal Services)

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 Confirmation of minutes of meeting

(LC Paper No. CB(1)248/13-14 — Minutes of the meeting on 30 September 2013)

The minutes of the meeting held on 30 September 2013 were confirmed.

II Meeting with the Administration

Follow-up to issues arising from previous meetings

(LC Paper No. CB(1)251/13-14(01) — List of follow-up actions arising from the discussion at the meeting on 28 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)

Discussion

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

Follow-up actions to be taken by the Administration
Amendments to Part VIII of the Securities and Futures Ordinance ("SFO")

New Division 3A – Monetary Authority ("MA")'s Powers of Investigation
Section 186A – MA's assistance to regulators outside Hong Kong

3. The proposed section 186A provides that MA may give assistance to overseas regulators in investigation of contravention of legal or regulatory requirements in relation to transactions of over-the-counter ("OTC") derivative products. Subsections (5) and (6) set out the requirements to be met by the overseas regulators before assistance is provided, and subsection (9) requires MA to publish in the Gazette the names of such overseas regulators if it is satisfied that they meet the requirements (but the matter in the Gazette is not subsidiary legislation as provided in subsection (13)). Subsection (7) sets out the conditions MA has to consider in providing the assistance and subsection (8) sets out the issues MA must take into account in providing assistance in a particular case. The Administration was requested to provide information on the following issues –

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- (a) the level of MA officer(s) who will be responsible for making decisions on the provision of assistance to overseas regulators under section 186A;
- (b) the rationale and considerations for the different conditions set out in subsection (7)(a) and (b), i.e. MA must be satisfied that it was desirable or expedient that the assistance should be given in the interests of the investing public or in the public interest; or the assistance will enable or assist the recipient of the assistance to perform the recipient's functions and it is not contrary to the interests of the investing public or to the public interest that the assistance should be given;
- (c) how MA will decide whether to provide assistance to an overseas regulator if such assistance will enable the overseas regulator to perform its regulatory functions and is not contrary to the interests of the investing public or to the public interest but may adversely affect the interests of a local company and its investors;
- (d) how subsections (7) and (8) will operate together;
- (e) the reasons for providing subsection (8) in the Bill (i.e. MA must take into account whether the recipient of the assistance would pay to MA the costs and expenses incurred in giving the assistance, and will be able and willing to give reciprocal assistance to Hong Kong

as subsection (7) has already stipulated the conditions MA has to consider in deciding whether to provide the assistance to the overseas regulator;

- (f) under subsection (8), whether and under what circumstances MA will accede to a request for assistance if the recipient will not pay the relevant costs and/or if it is unable/unwilling to give the reciprocal assistance;
- (g) whether MA has to enter into a reciprocal or other legal agreements with the overseas regulator concerned to give effect to the provision of assistance; and if not, to consider amending the Bill to provide that MA can only provide assistance to overseas regulators with whom it has entered into agreements;
- (h) how subsection (9) will operate, specifically, whether the gazettal of the name of the overseas regulator will be made on a case-by-case basis upon consideration of each request for assistance, and the mechanism for removing the names of the overseas regulators and factors MA will take into account in doing so;
- (i) the Administration should consider amending subsection (13) to subject the matter under subsection (9) to negative vetting by the Legislative Council;
- (j) the information the Securities and Futures Commission ("SFC")/MA will include in the notices issued to the subject person under investigation by the overseas regulator and/or relevant third parties requiring them to produce information, give explanation, and answer questions relating to the investigation (e.g. names of the overseas regulator and the relevant jurisdiction requesting for assistance, reasons for the investigation), and a sample of such notice;
- (k) the rights and protection for the subject person and relevant third parties involved in investigation conducted by overseas regulator in refusing to produce information, give explanation, and answer questions to SFC/MA on grounds of self-incrimination (in the context of either Hong Kong or the overseas jurisdiction), and the legal procedures and mechanism for making and considering such claim; and

- (1) the list of member agencies of the International Organization of Securities Commissions which had signed the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, including whether Russia or its regulator for the securities market is among the signatories.

4. With regard to sovereign wealth funds ("SWF") of overseas jurisdictions (e.g. the Temasek of Singapore) involving in OTC derivative transactions, the Administration was requested to provide information on –

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- (a) whether such transactions are/will be subject to the mandatory reporting and clearing obligations under the regulatory regime of OTC derivative transactions of the respective jurisdictions; and
- (b) as SWF may have special set-up structures and might be protected by secrecy provisions in their operation, whether SFC/MA's assistance for overseas regulators or information sharing mechanism between SFC/MA and overseas regulators will cover OTC derivative transactions of SWF.

Amendments to Part XVI of SFO

New Division 1A – Secrecy, etc. Relating to MA's Functions under Specified Provisions

Section 381C – Disclosure if MA considers condition satisfied

5. Section 381C provides that MA may disclose information it has obtained in respect of OTC derivative transactions to entities and overseas regulators if it is satisfied that certain requirements and conditions are met. Subsection (1) of section 381C sets out, among others, entities in Hong Kong where disclosure will be made, and subsections (2) to (5) stipulate the requirements and conditions that MA has to consider in disclosing the information. The Administration was requested to take the following actions –

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- (a) to consider including the Equal Opportunities Commission and the Consumer Council in subsection (1);
- (b) to provide information on the considerations for making the disclosure to an overseas regulator, including whether it is a prerequisite that the regulator in question has signed a reciprocal agreement or other legal agreement with MA on exchange of information; and

- (c) to provide information on the overseas regulators which have already signed reciprocal agreements or other legal agreements with MA on exchange of information.

III Any other business

Date of next meeting

6. The Chairman reminded members that the next meeting would be held on 22 November 2013 at 10:45 am.
7. There being no other business, the meeting ended at 12:36 pm.

Council Business Division 1
Legislative Council Secretariat
6 February 2014

**Proceedings of the
Bills Committee on Securities and Futures (Amendment) Bill 2013
Fifth meeting on Tuesday, 12 November 2013, at 10:45 am
in Conference Room 2B of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000059 – 000127	Chairman	Confirmation of minutes of meeting on 30 September 2013 (LC Paper No. CB(1)248/13-14)	
000128 – 000206	Chairman	Introductory remarks	
<u>Clause by Clause Examination of the Bill</u>			
000207 – 000858	Chairman Administration	<p><u>Clause 37 – Part IX, Divisions 4 and 5 added</u></p> <p><i>Division 5—Miscellaneous Provisions Relating to Division 4</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> <p><u>Clause 38 – Part XVI, Division 1 heading amended (secrecy, conflict of interests, and immunity)</u></p> <p><u>Clause 39 – Section 378 amended (preservation of secrecy, etc.)</u></p> <p><u>Clause 40 – Part XVI, Division 1A added</u></p> <p><i>Division 1A—Secrecy, etc. Relating to Monetary Authority's Functions under Specified Provisions</i></p> <p><i>381A. Preservation of secrecy</i></p>	

Time Marker	Speaker	Subject(s)	Action Required
000859 – 004643	Mr James TO Mr SIN Chung-kai Chairman Administration Securities and Futures Commission ("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>Mr TO's enquiries as follows –</p> <p>(a) the rationale and considerations for the different conditions set out in section 186A(7)(a) and (b), i.e. the Monetary Authority ("MA") must be satisfied that it is desirable or expedient that the assistance should be given in the interests of the investing public or in the public interest; or the assistance will enable or assist the recipient of the assistance to perform the recipient's functions and it is not contrary to the interests of the investing public or to the public interest that the assistance should be given;</p> <p>(b) whether the "investing public" referred to individual investors involved in a particular case or the investing public in general; and</p> <p>(c) how MA would decide whether to provide the assistance if such assistance would enable the overseas regulator to perform its regulatory functions and was not contrary to the interests of the investing public or to the public interest <u>but</u> might adversely affect the interests of a local company and its investors, e.g. the assistance might lead to prosecution of the company by the overseas regulator.</p> <p>The Administration advised that –</p> <p>(a) reference had been made to similar provisions in section 186(3)(a) and (b) of the Securities and Futures Ordinance (Cap. 571) ("SFO") in respect of SFC's assistance to regulators outside Hong Kong in drafting the proposed section 186A(7)(a) and (b);</p> <p>(b) subsection (7)(a) focused on the interests of the investing public or the public interest whereas the considerations in subsection (7)(b) was that the assistance would enable the overseas regulator to perform its</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>functions as long as the interests of the investing public or the public interests were not impaired, even if there might not be any benefits for the interests of the investing public or the public interest in providing the assistance;</p> <p>(c) in line with the usage in other parts of SFO, "investing public" under subsection (7)(a) and (b) referred to the investing public in general, and not a particular group of investors; and</p> <p>(d) in considering whether the conditions for providing assistance were satisfied in a particular case, SFC/HKMA would give regard to the regulatory objectives laid down in SFO and the circumstances of individual cases.</p> <p>Mr TO opined that there might be discrepancies between the interests of the investing public at large and those of groups of investors, and the public and investors might have concern about the regulators' considerations in giving assistance to overseas regulators.</p> <p>Mr SIN enquired about –</p> <p>(a) the reasons for providing subsection (8) to stipulate the factors that MA must take into account (i.e. whether the recipient of the assistance would pay to MA the costs and expenses incurred in giving the assistance, and would be able to give reciprocal assistance to Hong Kong) as subsection (7) had already stipulated the conditions MA had to consider in deciding whether to provide assistance to an overseas regulator;</p> <p>(b) whether and under what circumstances MA would accede to a request for assistance if the recipient would not pay the relevant costs and/or if it was unable/unwilling to give the reciprocal assistance; and</p> <p>(c) whether SFC/MA had to enter into reciprocal or other legal agreements with the overseas regulator concerned to give effect to the provision of assistance.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>The Administration and SFC advised that –</p> <ul style="list-style-type: none"> (a) reference had been made to similar provisions in section 186(4)(a) and (b) of SFO in respect of SFC's assistance to regulators outside Hong Kong in drafting subsection (8); (b) subsections (5) and (7) were prerequisite conditions MA must consider in providing the assistance whereas subsection (8) stipulated the matters MA must take into account in considering whether the conditions in subsection (7) were satisfied in a particular case. MA could consider other matters and exercise its judgment with regard to the actual circumstances of individual case; (c) SFC had signed the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information ("MMOU") of the International Organization of Securities Commissions ("IOSCO") on exchange of information for regulatory enforcement regarding securities market; (d) due to restrictions in their local laws, some member agencies of IOSCO could not sign MMOU. IOSCO would encourage these jurisdictions to amend their laws enabling them to sign MMOU; and (e) HKMA was in negotiation with some overseas regulators (e.g. the United States) on signing bilateral agreements for mutual cooperation and information exchange in the regulation of OTC derivative transactions. <p>Mr SIN and Mr TO pointed out that unlike SFC which had already signed the MMOU, there was no comparable basis for MA to ensure reciprocal assistance from its overseas counterparts in the investigation of contravention of mandatory obligations under the OTC derivative regulatory regime. Mr TO suggested that the Administration should consider amending the Bill to provide that MA could only provide assistance to overseas regulators with whom it had entered into reciprocal agreements.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>At the request of Mr TO and Mr SIN, the Administration/SFC agreed to provide the list of member agencies of IOSCO which have signed the MMOU, including whether Russia or its regulator for the securities market was among the signatories, and further information in response to their enquiries and suggestions above.</p>	<p>The Administration to take action as per paragraph 3(a) to (g) and (l) of the minutes.</p>
004644 – 005105	Mr James TO Chairman Administration	<p>Mr TO's enquiries –</p> <p>(a) whether the OTC derivative transactions of sovereign wealth funds ("SWF") were/would be subject to the mandatory reporting and clearing obligations under the regulatory regime of OTC derivative transactions of the respective jurisdictions; and</p> <p>(b) as SWF might have special set-up structures and might be protected by secrecy provisions in their operation, whether SFC/MA's assistance for overseas regulators or information sharing mechanism between SFC/MA and overseas regulators would cover OTC derivative transactions of SWF.</p> <p>The Administration advised that it was an international practice to regard SWFs as commercial entities, which would also be subject to regulation of OTC derivative transactions. The Administration would provide further information in response to Mr TO's enquiries.</p>	<p>The Administration to take action as per paragraph 4 of the minutes.</p>
005106 – 010059	Mr James TO Chairman ALA7 Administration	<p>In reply to Mr TO, ALA7 advised that the gazettal under section 186A(9) of the name of the overseas entity or the companies inspector outside Hong Kong was not a subsidiary legislation as provided in subsection (13).</p> <p>Mr TO enquired about the operation of subsection (9), specifically, whether the gazettal of the name of the overseas regulator was made on a case-by-case basis upon consideration of each request for assistance; and the mechanism for removing the names of the overseas regulators and factors MA would take into account in doing so.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>The Administration explained that –</p> <ul style="list-style-type: none"> (a) the purpose of gazetting the names of overseas regulators to which HKMA/SFC would provide assistance and which met the requirements for providing assistance was to enhance transparency of the process. To facilitate response to overseas regulators' requests in an efficient manner, the matter to be gazetted would not be subsidiary legislation; (b) in practice, MA would gazette the names of the entities if they met the conditions in subsections (5) and (6), then review their status when they put forth a request for assistance, and consider the request based on its own merits and having regard to subsections (7) and (8); (c) unless there were changes to the name and functions of the overseas regulators, the list would remain in force, i.e. no gazettal would be needed for each request made by the same regulator; and (d) MA might amend or remove the names of the overseas regulators from the Gazette. <p>Mr TO suggested that the Administration should consider amending subsection (13) to subject the matter under subsection (9) (i.e. publication of the names of the relevant entities on the Gazette) to the negative vetting by the Legislative Council ("LegCo").</p> <p>The Chairman opined that the suggestion might give rise to operational problems as LegCo might object to the overseas regulators published in the Gazette.</p> <p>At the request of Mr TO, the Administration agreed to provide written responses to his enquiries and suggestion on section 186A(9) above.</p>	<p>The Administration to take action as per paragraph 3(h) and (i) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
010100 – 011405	Deputy Chairman Mr James TO Chairman Administration SFC	<p>The Deputy Chairman expressed concern about the legal protection for the subject person and relevant third parties involved in the investigation by overseas regulators, in particular whether SFC would explain the reasons for them to provide the information requested by the overseas regulators.</p> <p>Referring to the mechanism for exchange of information on tax matters with other jurisdictions, Mr TO stressed the need to protect the interests of the subject person and the relevant third parties as the provision of information to the overseas regulators might lead to self-incrimination of the subject person and the relevant third parties.</p> <p>The Administration and SFC advised that –</p> <p>(a) when invoking investigatory powers under section 186A, MA would issue a notice to the subject person and relevant third parties requiring them to produce information, give explanation, and answer questions relating to the investigation. The notice would include information on the name of the overseas regulator and the relevant jurisdiction requesting for assistance, reasons for and general description of the subject of the investigation, etc., and</p> <p>(b) the subject person and relevant third parties involved in investigation could claim privilege on grounds of self-incrimination so that information provided by him could not be used against him in criminal proceedings as provided by sections 186(6) and 187.</p> <p>At the request of Mr TO, the Administration and SFC agreed to provide a sample of the notice referred to in (a) above, and further information on the rights and legal procedures and mechanism for making and considering the claims in (b) above.</p>	The Administration to take action as per paragraph 3(j) and (k) of the minutes.
011406 – 011903	Mr SIN Chung-kai Chairman Administration ALA7	<p><u>Clause 40 – Part XVI, Division 1A added</u></p> <p><i>Division 1A—Secrecy, etc. Relating to Monetary Authority's Functions under Specified Provisions</i></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p><i>381A. Preservation of secrecy</i></p> <p>In response to Mr SIN's enquiry on section 381A(5), the Administration advised that whether an offence would be prosecuted by indictment or on summary would depend on the circumstances of the case, and prosecution by summary procedures would usually be applied to minor offences.</p> <p>Upon Mr SIN's enquiry, ALA7 advised that a fine at level 6 was \$100,000 under the Criminal Procedures Ordinance (Cap. 221).</p>	
011904 – 012759	Mr SIN Chung-kai Chairman Administration	<p><i>381B. Disclosure by Monetary Authority</i></p> <p>The Administration advised that it would make technical amendments to the proposed section 381B(1)(b) arising from the commencement of the new Companies Ordinance in 2014.</p> <p>Mr SIN enquired –</p> <p>(a) whether the disclosure by MA to an auditor of an authorized institution or an approved money broker under section 381C(1)(t) would be limited to the auditor authorized to sign the audit report; and</p> <p>(b) the rationale for MA to disclose information to a former auditor.</p> <p>The Administration advised that –</p> <p>(a) in general, MA would disclose information to the auditor authorized to sign the audit report, and might impose conditions on the authorized auditor in the further disclosure of the information to other auditors involved in a particular audit; and</p> <p>(b) in order to facilitate MA's investigation, it would be necessary to disclose information to a former auditor if the audit on a previous OTC derivative transaction was performed by a former auditor.</p>	
012800 – 013058	Mr NG Leung-sing Chairman Administration	Referring to the proposed section 381B(4), Mr NG enquired whether MA would develop guidelines or standard report format to facilitate	

Time Marker	Speaker	Subject(s)	Action Required
		<p>parties to provide information on OTC derivative transactions.</p> <p>The Administration advised that information collected by MA from mandatory reporting of OTC derivative transactions (e.g. the overall positions held by market players for a particular OTC derivative during a reporting period) would be useful to the market. The proposed section 381B(4) would enable MA to share information with market participants in the form of a summary without disclosing the particulars of individual business/person.</p>	
013059 – 013316	Mr NG Leung-sing Chairman Administration	<p><i>381C. Disclosure if Monetary Authority considers condition satisfied</i></p> <p>In response to Mr NG's enquiry, the Administration advised that the list in section 381C(1) was meant to include public officers or entities which performed functions that would likely require information from MA, and the Administration would consider Mr NG's suggestion to include the Equal Opportunities Commission and the Consumer Council in the list.</p>	The Administration to take action as per paragraph 5(a) of the minutes.
013317 – 015135	Mr SIN Chung-kai Chairman Administration	<p>In reply to Mr SIN, the Administration explained the differences between the proposed sections 186A and 381C –</p> <p>(a) the purpose of disclosure of information by MA under section 186A was to assist overseas regulators in their investigation into contravention of legal or regulatory requirements, whereas section 381A imposed a general obligation on MA to preserve secrecy in carrying out its functions but section 381C allowed MA to disclose information to parties under certain circumstances; and</p> <p>(b) disclosure under section 381C(2) would be made if MA considered conditions satisfied, i.e. the relevant authority or regulatory organization performed functions similar to the functions of MA in respect of financial services, and which was subject to adequate secrecy provisions of their home jurisdictions.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>At the request of Mr SIN and the Chairman, the Administration was requested to provide information relating to section 381C on –</p> <p>(a) the considerations for making the disclosure to an overseas regulator, including whether it was a prerequisite that the regulator in question had signed a reciprocal agreement or other legal agreement with MA on exchange of information; and</p> <p>(b) the overseas regulators which had already signed reciprocal agreements or other legal agreements with MA on exchange of information.</p>	<p>The Administration to take action as per paragraph 5(b) and (c) of the minutes.</p>
015136 – 015155	Chairman	Date of next meeting	