

立法會
Legislative Council

LC Paper No. CB(1)1055/13-14
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/12

Bills Committee on Securities and Futures (Amendment) Bill 2013

Sixth meeting on
Friday, 22 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 Kenneth LEUNG
Hon Dennis KWOK
Hon SIN Chung-kai, SBS, JP

Public officers attending : Financial Services and the Treasury Bureau

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

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 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)

Ms Carolyn CHIU
Senior Manager (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

Action

I Confirmation of minutes of meeting

(LC Paper No. CB(1)361/13-14 — Minutes of the meeting on
15 October 2013)

The minutes of the meeting held on 15 October 2013 were confirmed.

II Meeting with the Administration

Follow-up to issues arising from previous meetings

(LC Paper No. CB(1)376/13-14(01) — List of follow-up actions arising
from the discussion at the
meeting on 12 November 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
(issued on 23 July 2013) 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 XVI of the Securities and Futures Ordinance ("SFO")

New Division 1A – Secrecy, etc. Relating to Monetary Authority ("MA")'s Functions under the Specified Provisions

Section 381F – Disclosure of information to overseas persons with similar functions

3. Section 381F provided that MA might disclose information it had received or obtained because of the reporting obligation on over-the-counter ("OTC") derivative transactions to an overseas person. Subsection (2) set out the requirements to be met by the overseas persons before the disclosure could be made and subsection (4) required MA to publish in the Gazette the names of such overseas persons if it was satisfied that they met the requirements (but there was no provision stipulating that the matter in the Gazette was subsidiary legislation). The Administration was requested to take the following actions –

- (a) to provide information on the protection of personal data privacy in the disclosure of information to overseas persons under section 381F, as MA might receive information on OTC derivative transactions conducted by investors who were individuals;
- (b) to examine whether the protection in (a) above would meet the requirements of the Personal Data (Privacy) Ordinance (Cap. 486);
- (c) to provide information on international standards or practices in protecting confidentiality and data privacy in the disclosure of information obtained from mandatory reporting of OTC derivative transactions, in particular if there was prohibition or impediment to disclosure (e.g. privacy provisions) under the laws of certain jurisdictions;
- (d) to provide information on the protocols and related trading agreements adopted by the International Swaps and Derivatives Association, Inc. which facilitated industry's compliance with requirements on data sharing among overseas regulators and trade repositories (e.g. the relevant requirements under the Dodd-Frank Act of the United States and under the European Market Infrastructures Regulation);
- (e) to provide the list of overseas persons which had signed or would sign reciprocal agreements or other legal agreements, e.g. Memorandum of Understanding, with MA on exchange of information in respect of OTC derivative transactions; and

- (f) to consider subjecting the matter under section 381F(4) to negative vetting by the Legislative Council.

Amendments to Schedule 5 to SFO – Regulated Activities

New Part 2A on certain exclusions from the definitions of new regulated activities in respect of OTC derivative transactions

4. Paragraph 1(i) of the new Part 2A provided that the new Type 11 regulated activity of "advising on OTC derivative products" did not include an OTC derivative advising act carried out by a person through (i) a newspaper, magazine, book or other publication that was made generally available to the public; or (ii) a television broadcast or radio broadcast for reception by the public, whether on subscription or otherwise (collectively referred to as "the media" thereafter). The Administration was requested to take the following actions –

- (a) to provide information on the Securities and Futures Commission ("SFC")'s considerations in deciding whether an advising act through the media would constitute a commercial act or a market misconduct, and hence subject to SFC's regulation;
- (b) to provide information on past cases, if any, handled by the Market Misconduct Tribunal on market misconduct acts associated with advising acts through the media;
- (c) given that SFC's Code of Conduct on disclosure of interests when carrying out advising acts only applied to persons licensed by or registered with SFC, SFC was requested to address concerns about the protection for investors in relation to advising acts by non-licensed/registered persons through the media, in particular if such acts would benefit the non-licensed/registered persons; and
- (d) with a view to enhancing investor protection, SFC was requested to review the need of extending the existing legal requirement for licensed/regulated persons to disclose their interests when conducting regulated activities through the media to cover non-licensed/registered persons.

Drafting issue

5. The Administration was requested to review the numbering of the new subsection to be added to section 407 of SFO under clause 49 (i.e. whether the subsection number should be (5) instead of (6)).

(Post-meeting note: The Administration's written response was issued to members on 13 February 2013 vide LC Paper No. CB(1)874/13-14(04).)

III Any other business

Date of next meeting

6. The Chairman reminded members that the next meeting would be held on 10 December 2013 at 2:30 pm.

7. There being no other business, the meeting ended at 12:28 pm.

Council Business Division 1
Legislative Council Secretariat
10 March 2014

**Proceedings of the
Bills Committee on Securities and Futures (Amendment) Bill 2013
Sixth meeting on Friday, 22 November 2013, at 10:45 am
in Conference Room 2B of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000308 – 000336	Chairman	Confirmation of minutes for meeting on 15 October 2013 (LC Paper No. CB(1)361/13-14)	
000337 – 000455	Chairman	Introductory remarks	
<u>Clause-by-Clause Examination of the Bill</u>			
000456 – 000647	Chairman Administration	<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>381D. Restrictions on disclosure by persons to whom information is disclosed</i></p>	
000648 – 001202	Chairman Administration Mr NG Leung-sing	<p><i>381E. Certain information to be given to Commission</i></p> <p>Mr NG enquired whether there were similar provisions for the Securities and Futures Commission ("SFC") to provide information on OTC derivative transactions to the Hong Kong Monetary Authority ("HKMA"), and the meaning of reported "directly" or "indirectly" in subsection (1).</p> <p>The Administration advised that –</p> <p>(a) under the proposed regulatory regime, HKMA would operate a trade repository ("TR") to collect and maintain information of OTC derivative transactions reported by prescribed persons. It would be necessary to provide for the transfer of TR information by HKMA to SFC to enable the latter in maintaining regulatory oversight of prescribed persons under its purview; and</p> <p>(b) OTC derivative transactions could be reported to HKMA directly by the</p>	

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		<p>prescribed persons themselves, or indirectly through an agent which might be an overseas TR for instance. For avoidance of doubt, both "direct" and "indirect" reports were covered in the provision.</p>	
<p>001203 – 002451</p>	<p>Chairman Administration Mr Kenneth LEUNG Deputy Chairman Mr SIN Chung-kai</p>	<p><i>381F. Disclosure of information to overseas persons with similar functions</i></p> <p>Members enquired about the disclosure of information by HKMA to overseas persons, whether such disclosure would only be made upon request, whether the overseas persons had to sign reciprocal agreements with HKMA for the exchange of information, and whether the prescribed persons (or their clients if applicable) involved in the OTC derivative transactions concerned would be notified of the disclosure.</p> <p>The Administration advised that –</p> <ul style="list-style-type: none"> (a) the disclosure would be confined to the data collected by TR, such as the types and amount of derivative transactions, their economic terms, and the counterparties concerned; (b) the disclosure would only be made to overseas persons which met the requirements in subsection (2) (e.g. the overseas person performed a function similar to that of the Monetary Authority ("MA"); (c) due to the global nature of OTC derivative transactions, members of the Group of Twenty Leaders ("G20") had agreed to share the data collected by their respective TRs on a continuous basis to enable more efficient monitoring of systemic risks across markets; (d) relevant international standard-setting bodies were discussing rules on the disclosure of TR information among jurisdictions and the implementation details. Reciprocal agreements, e.g. Memorandum of Understanding, might be signed between jurisdictions to facilitate data sharing; and 	

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		<p>(e) market players were aware of the discussions by G20 and international standard-setting bodies on the subject.</p> <p>Mr SIN queried why the reference "overseas persons" instead of "overseas regulators" was used in section 381F given that the recipients of information would only be overseas regulators.</p> <p>The Administration explained that, as a TR might be operated by a regulator or a commercial entity, it was appropriate to use "overseas persons" in the provision.</p>	
002452 – 003121	Mr Kenneth LEUNG Chairman Administration SFC	<p>Mr LEUNG enquired about the protection for personal data privacy in disclosing information to overseas persons as MA might receive information on OTC derivative transactions conducted by investors who were individuals, and whether the protection measures would meet the requirements of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO").</p> <p>The Administration and SFC advised that –</p> <p>(a) it was expected that mainly institutional investors (e.g. banks, financial institutions and commercial entities who were end-users) rather than individual investors would be involved in OTC derivative transactions given the demanding requirements on the credit quality of potential counterparties and on the trading agreements;</p> <p>(b) international standard-setting bodies were considering ways to overcome prohibition from or impediment to disclosure under the laws of certain jurisdictions in order to, for instance, report transactions with counterparties in jurisdictions with disclosure limitations;</p> <p>(c) the International Swaps and Derivatives Association, Inc. ("ISDA") adopted certain protocols and trading agreements to facilitate industry's compliance with requirements on reporting of OTC derivative transactions, such as those under the</p>	

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		<p>Dodd-Frank Act of the United States and under the European Market Infrastructures Regulation. Such protocols and trading agreements usually included provisions on a counterparty's consent to the disclosure of information; and</p> <p>(d) HKMA would endeavour to ensure that the standards of reporting and data sharing would be in line with international requirements (e.g. the principles on authorities' access to TR data issued by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions (i.e. CPSS-IOSCO)).</p> <p>At members' request, the Administration and SFC agreed to provide supplementary information, including information on the protocols and related trading agreements adopted by ISDA, to address data privacy concerns; and examine whether the protection measures would meet the requirements of PDPO.</p>	<p>The Administration to take action as per paragraphs 3(a) to (d) of the minutes.</p>
003124 – 003727	Mr SIN Chung-kai Chairman Administration	<p>In response to the enquiry of Mr SIN, the Administration advised that the "overseas persons" to be published in the Gazette under section 381F(4) would mainly be overseas TRs (e.g. the Global Trade Repository of the Depository Trust and Clearing Corporation) with whom HKMA would share OTC derivative transactions data.</p> <p>On Mr SIN's suggestion to subject the matter under section 381F(4) to negative vetting by the Legislative Council ("LegCo"), the Chairman considered that it might not be necessary for LegCo to scrutinize the matter as the overseas persons would likely be recognized overseas regulators or trade repositories. He was concerned that there would be complications if LegCo objected to the gazettal of certain overseas persons but HKMA had already signed reciprocal agreements with such parties.</p>	

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		<p>At members' request, the Administration agreed to provide further information in response to Mr SIN's enquiries and suggestion.</p>	<p>The Administration to take action as per paragraph 3(e) and (f) of the minutes.</p>
<p>003728 – 004520</p>	<p>Administration Chairman</p>	<p><u>Clause 41 – Section 385A added</u></p> <p><i>385A. Power of Monetary Authority to intervene in proceedings</i></p> <p><u>Clause 42 – Section 388 amended (prosecution of certain offences by Commission)</u></p> <p><u>Clause 43 – Section 388A added</u></p> <p><i>388A. Prosecution of offences by Monetary Authority</i></p> <p><u>Clause 44 – Section 389 amended (limitation on commencement of proceedings)</u></p> <p><u>Clause 45 – Section 392 amended (Financial Secretary to prescribe interests, etc. as securities, etc.)</u></p> <p><u>Clause 46 – Section 392A added</u></p> <p><i>392A. Financial Secretary to prescribe markets, instruments etc.</i></p> <p><u>Clause 47 – Section 398 amended (general provisions for rules by Commission)</u></p>	
<p>004521 – 004724</p>	<p>Administration Deputy Chairman Chairman</p>	<p><u>Clause 48 – Section 399 amended (codes or guidelines by Commission)</u></p> <p>The Deputy Chairman expressed concern about the compliance burden on the securities industry arising from the numerous rules, codes or guidelines issued by SFC, and considered that there should be sufficient checks and balances to avoid over regulation in the industry.</p> <p>The Administration advised that the Administration and SFC, as appropriate, would conduct public consultation on subsidiary legislation to be made under SFO.</p>	

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004725 – 004838	Administration Chairman Mr SIN Chung-kai	<p><u>Clause 49 – Section 407 amended (savings, transitional, consequential and related provisions, etc.)</u></p> <p>The Administration was requested to review the numbering of the new subsection to be added to section 407 of SFO under clause 49 (i.e. whether the subsection number should be (5) instead of (6)).</p>	The Administration to take action as per paragraph 5 of the minutes.
004839 – 004910	Administration Chairman	<p><u>Clause 50 – Section 408 amended (provisions of Part XVII, etc. not to derogate from section 23 of Interpretation and General Clauses Ordinance)</u></p> <p><u>Clause 51 – Section 409 amended (amendment of Schedule 10)</u></p>	
004911 – 010520	Administration Chairman Mr SIN Chung-kai Mr NG Leung-sing SFC	<p><u>Clause 52 – Schedule 1 amended (interpretation and general provisions)</u> (Schedule 1 to the Securities and Futures Ordinance (Cap. 571) ("SFO"))</p> <p>In response to members' enquiries, the Administration advised that –</p> <p>(a) the definition of "structured product" was given in section 1A of Schedule 1. The new section 1B was added to provide for the definition of "OTC derivative product"; and</p> <p>(b) the Administration had made reference to international approach in drafting the definition of OTC derivative product which had set out the definition in general terms. New section 1B(3) specified that an OTC derivative product included a product prescribed by notice under section 392(1)(a)(vii) of SFO (i.e. the Financial Secretary may prescribe a product to be regarded as an OTC derivative product by way of notice which was subsidiary legislation subject to negative vetting by LegCo). The approach would cater for new developments in the market so that new OTC derivative products could be covered by the regulatory regime.</p>	

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010521 – 013608	Administration Chairman Mr SIN Chung-kai Mr Kenneth LEUNG SFC	<p><u>Clause 53 – Schedule 5 amended (regulated activities)</u></p> <p>Mr SIN enquired about –</p> <p>(a) the rationale for excluding OTC derivative advising acts carried out by a person through newspapers, magazines, books or other publication; or television or radio broadcasts (collectively referred to as "the media" thereafter) from the scope of new Type 11 regulated activity ("RA") of "advising on OTC derivative products" (i.e. section 1(i) of Part 2A of Schedule 5);</p> <p>(b) as persons not licensed by or registered with SFC could make investment analyses and commentaries on financial products through the media, and such acts might benefit the persons, whether such acts were regarded as "advising acts" subject to SFC's regulation, and how SFC would protect investors in this regard; and</p> <p>(c) whether the requirement for investment advisers to disclose their interests (e.g. trading in the relevant securities prior to giving related analyses or comments) when carrying out an advising act through the media was applicable to non-licensed/registered persons.</p> <p>The Administration and SFC advised that –</p> <p>(a) the exclusion in section 1(i) of Part 2A of Schedule 5 had made reference to existing exclusions under SFO in respect of advising on securities or futures contracts after considering factors, including the right to freedom of speech and press freedom;</p> <p>(b) in considering whether an advising act through the media would constitute a RA or market misconduct, SFC would take into account whether it involved a commercial act. If the act was found to be in breach of the market misconduct provisions, it might be referred to the Market Misconduct Tribunal ("MMT");</p>	

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		<p>(c) the disclosure requirements under SFC's Code of Conduct were only applicable to persons licensed by or registered with SFC;</p> <p>(d) given that mainly institutional investors (and not retail investors) were involved in OTC derivative transactions, it was envisaged that advising acts on OTC derivative products through the media targeting at the general investing public would not be prevalent; and</p> <p>(e) investor protection in relation to advising acts through the media could be enhanced by SFC's ongoing initiatives on investor education.</p> <p>Mr LEUNG opined that it might be difficult to prove that the analyses and commentaries given by analysts or commentators through the media contained false information if they were personal opinions without referring to specific market or research data.</p> <p>Mr SIN said that SFC should review the need of extending the disclosure requirements to cover non-licensed/registered persons carrying out advising acts on OTC derivative products, securities or futures contracts with a view to enhancing investor protection.</p> <p>The Administration and SFC agreed to provide written responses to enquiries/views raised by Mr SIN and Mr LEUNG and provide information on past cases, if any, handled by MMT on market misconduct acts associated with advising acts through the media.</p>	<p>The Administration to take action as per paragraph 4(a) to (d) of the minutes.</p>
<p>013609 – 014332</p>	<p>Administration Mr NG Leung-sing SFC</p>	<p>Mr NG enquired about the meaning of "adequate cooperative arrangements or agreements" in relation to comparable overseas jurisdiction in section 5 in Part 2A of Schedule 5, and whether the list of comparable overseas jurisdictions would be made known to the industry or published in the Gazette.</p> <p>SFC advised that it would determine whether the cooperative arrangements or agreements were adequate in the light of experience of past cooperation with the jurisdictions. SFC would</p>	

Time Marker	Speaker	Subject(s)	Action Required
		release the list of comparable overseas jurisdictions when appropriate and would not publish the list in the Gazette.	
014333 – 014347	Chairman	Date of next meeting	

Council Business Division 1
Legislative Council Secretariat
10 March 2014