



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF :

本函檔號 OUR REF : LS/B/24/13-14

電話 TELEPHONE : 3919 3511

傳真 FAX : 2877 5029

電郵 E-MAIL : wkyick@legco.gov.hk

By Fax (2529 2075)

27 August 2014

Ms Ada CHAN
Principal Assistant Secretary for Financial Services
and the Treasury (Financial Services)
Financial Services and the Treasury Bureau
Financial Services Branch
Financial Services Division
24/F, Central Government Offices,
2 Tim Mei Avenue,
Tamar, Hong Kong

Dear Ms CHAN,

**Securities and Futures and Companies Legislation
(Uncertificated Securities Market Amendment) Bill 2014**

We are scrutinizing the legal and drafting aspects of the captioned Bill and have the following questions for your clarification-

Amendments to the Securities and Futures Ordinance (Cap. 571)

Uncertificated Securities Market System

- (a) Please clarify whether the Electronic Transactions Ordinance (Cap. 553) (or any part of it) would apply to an uncertificated securities market system (USM System) provided in the new Part IIIAA of the Securities and Futures Ordinance (Cap. 571). If so, how would Cap. 553 (or any part of it) apply to an USM System? If not, should there be provisions in the Bill excluding the application of Cap. 553 (or any part of it) to an USM System?

- (b) Is there any relation (or connection) between an USM System and the Automated Trading Services (ATS) which is provided in Division 7 of Part III of Cap. 571? Is it intended that the services provided under an USM System would supersede all or part of the existing services provided under ATS? If so, will there be any transitional arrangements when the USM System comes into operation? Should provisions be made to provide for these arrangements?

New section 101 AAC

According to the new section 101AAC of Cap. 571, an USM System will enable title to prescribed securities to be evidenced and transferred **without an instrument**. For the avoidance of doubt or dispute as to whether an "instrument" may exist in electronic or digital form, would the Administration consider defining the term "instrument" under the new section 101AA so as to confine the meaning of this term to an "instrument" in paper or physical form?

Use of Notes in Cap. 571

Please clarify whether the Notes under the new sections 101AAD and 101AAE of Cap. 571 are intended to have legal effect. If not, should a provision similar to section 2(6) of Companies Ordinance (Cap. 622) be added to Cap. 571?

New section 101AAD

If it is the Administration's intention that the application of the new section 101AAD should be subject to the new sections 101AAE and 101AAF, which are referred to in the Note under the new section 101AAD, should this be stipulated expressly in the new section 101AAD?

New section 101AAG

Please clarify why a decision not to grant an approval to a recognized clearing house (RCH) made by the Securities and Futures Commission (SFC) under the new section 101AAG would not be subject to appeal?

New section 101AAH

Under new section 101AAH, SFC may impose, amend or revoke conditions with regard to an approval granted to a RCH. Would the RCH

affected by SFC's decision under this section be given an opportunity to be heard? if not, why. Please also clarify why the decision made by SFC under this section would not be subject to appeal?

New sections 101AAI and 101AAK

- (a) Regarding the powers granted to SFC by the new sections 101AAI and 101AAK (the power to withdraw an approval granted to a recognized clearing house (RCH) to operate and maintain an USM system and the power to direct a RCH to cease operating an USM system), please explain under what circumstances SFC would withdraw an approval granted to a RCH instead of directing it to cease operating the USM system, and vice versa.
- (b) What is the main difference in practice between withdrawing an approval under the new section 101AAI and directing a RCH to cease to operate an USM system under the new section 101AAK? Is it intended that a RCH which has been directed to cease operating an USM system may apply to SFC for resumption of its operation of the USM system after the RCH is able to rectify certain problems that have been identified by SFC? If so, should provisions be made to cover such circumstances?
- (c) It is noted that according to the new section 101AAI(7), the SFC's decision to withdraw an approval which is subject to appeal must not take effect until the appeal is withdrawn, abandoned or determined. Should a provision similar to section 101AAI(7) be made in respect of the SFC's directions made under the new section 101AAK so that the directions to cease operation of the USM system would be suspended pending the determination (or abandonment) of the appeal which may be lodged under the new section 101AAN(2)?

Sanctions for non-compliance

- (a) Please clarify why no offence or sanction is proposed for operating an USM system without SFC's approval under the new section 101AAG?
- (b) Please clarify why the Bill does not provide for any sanction or penalty on a RCH or a recognized exchanged controller respectively for their failure to discharge the duties imposed by the Bill under the new sections 38(1A) and 63(1A) of Cap. 571?

Uncertificated Securities Market Rules

In view of the complexity and significance of the Uncertificated Securities Market Rules (USMRs) to be made by SFC under the new section 101AAO of Cap. 571, and in order to let the Legislative Council have sufficient time to scrutinize USMRs in detail, would the Administration consider making USMRs subject to the positive vetting procedure under section 35 of the Interpretation and General Clauses Ordinance (Cap. 1)?

New section 1AC of Schedule 1

Please clarify whether the term "a person" in new section 1AC(1) refers to a natural person only or to both a natural person and a corporation.

Amendments to the Companies Ordinance (Cap. 622)

Amendments to section 152

- (a) The Note proposed under section 152 of Cap. 622 refers readers to USMRs for the power of the Court to make an order for the registration of a transfer of participating shares effected under USMRs made under the new section 101AAO of Cap. 571. Is there any reason for providing for such power in subsidiary legislation instead of in the principal Ordinance. As you know, the Court's power to order a participating company to give a notice to the USM System operator for registration of allotment of its shares in uncertificated form is specifically provided in the new section 143B of Cap. 622. Should a similar approach be adopted for registration of transfer of participating shares?
- (b) It is further noted that the new section 101AAO of Cap. 571 does not specifically authorize SFC to make rules which would empower the Court to make orders for registration of a transfer of participating shares in a company. In the absence of express statutory authority, what is the legal basis for SFC to make rules to empower the Court to make the relevant orders? For the avoidance of doubt, should such empowering provision relating to Court's power be specifically set out in the principal Ordinance (i.e. Cap. 571 or Cap. 622)?

Amendments to section 633

- (a) The Note proposed under section 633 of Cap. 622 indicates that USMRs would deal with the Court's power to order a participating

company (or other person) to pay damages for any loss caused by **any other act or omission** of a system operator of an USM System. However, the new section 101AAO of Cap. 571 does not specifically authorize SFC to make rules relating to such power of the Court. Should the Court's power referred to in the Note be specifically provided in the principal Ordinance instead?

It is appreciated that your reply in both languages could reach us as soon as possible, preferably by 3 October 2014.

Yours sincerely,



(YICK Wing-kin)
Assistant Legal Adviser

c.c. DoJ (Attn.: Ms Frances HUI, Sr Asst Law Draftsman (Acting))
(By Fax: 2869 1302)
Mr Manuel NG, Sr Govt Counsel (Acting)
(By Fax: 2845 2215))

LA
SALA1
Clerk to Bills Committee