

**Bills Committee on
Securities and Futures (Amendment) Bill 2015**

**First meeting on 7 July 2015 (Tuesday) at 2:45pm
in Conference Room 2B of the LegCo Complex**

Opening address

Thank you for this opportunity to speak to Honourable members about the Securities and Futures (Amendment) Bill 2015, which will enable the SFC to align its existing ability to provide supervisory assistance to foreign regulators with international standards. We are also taking the opportunity to address some minor anomalies in the SFO that have emerged during the 12 years the SFC has been administering it.

Given that the supervisory assistance aspect of the Bill has attracted most attention, I will take the time I have today to explain why this small change is nevertheless important to Hong Kong as an international financial centre and why it can also be beneficial for Hong Kong financial intermediaries.

The key point to bear in mind is that Hong Kong's success as an IFC is rooted in its globally open markets. This means that we have a major interest in being able to obtain information from foreign regulators in order to properly supervise overseas-headquartered firms doing business in Hong Kong, and also to do all we can to ensure that our home-grown firms can access overseas markets to expand their businesses.

The first objective depends on our ability to conclude reciprocal agreements to share supervisory information with foreign regulators, where the SFC is both a provider and a recipient of information about globally active firms. Reciprocity means that our ability to reach agreements with foreign regulators can depend on whether we are able to provide information to them which is equivalent to the information that can be provided by them to us. If our ability to obtain and pass on information is more restricted than that of a foreign regulator, particularly if we fall short of international expectations, the foreign regulator may refuse to cooperate.

The second objective – market access – depends on the existence of sufficient gateways to provide information to a foreign regulator so that it is happy to rely on Hong Kong's supervisory oversight of local firms when allowing them to tap markets and investors in the foreign jurisdiction.

It is important to understand that, under the SFO, the SFC already has the ability to share with foreign regulators the large volume of supervisory information already gathered by us for our own purposes. The problem we are now dealing

with is that we don't have the ability to obtain additional information from a licensed corporation which may be of special supervisory interest to a foreign regulator. We would certainly expect that foreign regulators should be able to provide this type of information to us if we request it under similar supervisory arrangements. We believe that this lacuna exists because at the time the SFO was enacted supervisory cooperation had not yet assumed its present international significance. This contrasts with the position on enforcement co-operation which was already well developed, and which differs from supervisory cooperation because it mainly concerns investigations of suspected misconduct with a view to obtaining evidence for use in subsequent legal proceedings.

I should also point out that the information already held by us for our own supervisory purposes is likely to constitute the bulk of material of interest to a foreign regulator. Other requests for additional information under the amended provisions might therefore be infrequent.

Nevertheless, the Bill now before the Committee is designed to fill the gap so that Hong Kong comes into line with international norms and to enable its markets, investors and licensed corporations to benefit from the twin objectives I referred to earlier – reciprocal arrangements for the exchange of information and access to foreign markets.

In fact this proposal was triggered by recent difficulties encountered when negotiating market access arrangements for Hong Kong intermediaries with the EU authorities. These were conditional on the existence of adequate supervisory information arrangements under EU law, including the ability to request firms to provide information not already held by the SFC.

Having set the scene, I'll now focus on the main features of the proposal, including important limitations and safeguards.

The key point is that the information requested by an overseas regulator can only concern a licensed corporation – or its group companies – which is regulated by the SFC and the foreign regulator. This isn't a free-for all for information requests made by any foreign regulators without limitation.

For this reason the proposal should not add to the compliance burden on local brokers and other licensed firms, who are unlikely to be affected if they don't have a physical presence in the foreign jurisdiction or aren't wanting to operate there under a selling or marketing exemption or similar concession falling within the foreign regulator's jurisdiction.

It also follows that this is only about licensed corporations and their group companies; the proposed power has no relevance at all to listed companies or any other unlicensed businesses. And the proposal doesn't allow us to conduct a fishing expedition for any and all information held by a licensed corporation. It only concerns information about regulated activities under the SFO which fall under the SFC's jurisdiction and which we can already obtain for our own purposes under existing powers.

The second point is that requests from foreign regulators will only be acted on by the SFC if the foreign regulator confirms two things:

- First, that it can't obtain the information by other reasonable means.
- Second, that the information is essential to enable the regulator to decide whether the licensed corporation poses a risk to financial stability in the foreign jurisdiction or whether it's in compliance with the legal or regulatory requirements there.

The next point is that, as with all existing information requests, the public interest is a guiding principle and we must also take into account whether the foreign regulator can reciprocate.

Finally, supervisory information gathered at the request of a foreign regulator will be subject to important restrictions on its use by the foreign regulator.

The most important of these is to prohibit the foreign regulator from using information provided to it for any enforcement purposes, including criminal proceedings. Before doing so the regulator would need to initiate an entirely separate investigatory assistance request under the existing SFO procedure. In that case all rights to claim privilege against self-incrimination would apply, and in all cases legal professional privilege and personal data privacy laws would remain unaffected. In other words, all of the existing protections applicable to enforcement assistance would still apply in full. The Bill also makes clear that the foreign regulator must keep the supervisory information provided to it confidential.

All of these new safeguards must be confirmed in a written undertaking given by the foreign regulator before any information is passed to it.

In sum, we believe that the proposal represents the minimum necessary to ensure that Hong Kong can take advantage of the benefits of greater cooperation amongst international regulators.

Before the Bill was introduced into the LegCo, the SFC attended a meeting of the Panel on Financial Affairs on 13 April 2015 to explain the proposed amendments. Some Honourable members at that meeting suggested that a review or appeal mechanism should be available to firms asked to provide information, and parallels were drawn with the local tax information exchange regime.

We looked at this proposal in depth, and whilst we understand the concerns raised by members, we do not believe that the analogy with the tax regime is accurate.

The main point is that the tax information regime only provides an opportunity to check and correct information to be sent to a foreign tax authority; it doesn't enable the taxpayer to challenge the actual decision to share information. Further, the accuracy of information should not be a concern for licensed corporations who receive a supervisory information request, for the simple reason that it can only be sourced from the licensed corporations (or their group companies) themselves, rather than from potentially unreliable third parties. It follows that there is little or no purpose in replicating the tax information mechanism in the Bill.

I should also say that there is no precedent internationally for an appeal or review mechanism for a decision to provide supervisory information about regulated persons to another regulator, including in Australia, Singapore and the UK. And this isn't surprising – to do otherwise would run counter to the prevailing trend towards greater cooperation over the regulation of cross-border market participants.

Further, if a regulator outside Hong Kong decides that it does not have sufficient confidence in the degree of supervisory cooperation available under Hong Kong law because of an appeal or similar procedure, Hong Kong risks being excluded from global regulatory networks enabling greater cross-border market access, thereby affecting its firms and its status as an international financial centre.

To wrap up, the Bill proposes a limited but important SFO amendment to enable Hong Kong to maintain a regulatory regime which ensures that it can operate effectively within today's global markets to its overall benefit. We believe that this objective is firmly in the public interest. This is because it enables Hong Kong firms to have more assured access to overseas markets and also enables the SFC to protect Hong Kong investors and its markets by obtaining more and better supervisory information from foreign regulators about globally active firms through a series of reciprocal arrangements.

We seek your support for the proposal, and are happy to answer any questions.