

立法會
Legislative Council

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Bills Committee on Securities and Futures (Amendment) Bill 2015

Background brief

Purpose

This paper provides background information on the Securities and Futures (Amendment) Bill 2015 ("the Bill") which aims to enable the Securities and Futures Commission ("SFC") to provide supervisory assistance to regulators outside Hong Kong and to refine certain provisions in the Securities and Futures Ordinance ("SFO") (Cap. 571) ("the legislative proposals"). This paper also summarizes the views and concerns expressed by members of the Panel on Financial Affairs ("FA Panel") on the subject.

Background

2. Currently, SFO contains no explicit provisions to enable SFC to exercise its supervisory powers under section 180 of the ordinance¹ to obtain information for the purpose of assisting regulators outside Hong Kong in non-enforcement related matters. The Government considers it necessary to empower SFC to provide supervisory assistance to regulators outside Hong Kong in certain circumstances upon request as this would enable SFC to engage regulators outside Hong Kong to negotiate more supervisory memorandum of understandings ("MoUs") to enhance SFC's monitoring of the financial stability

¹ SFC may exercise its supervisory powers to enter the premises of licensed corporations ("LCs"), inspect record or document and make enquiries of LCs under section 180 of SFO without the need for it to have reasonable cause to believe that some form of misconduct has taken place as is required before exercising its investigatory powers. However, the supervisory powers under section 180 may only be exercised to ascertain compliance by an intermediary or an associated entity of an intermediary with the specified requirements under SFO.

in Hong Kong and better adhere to international standards², and enable licensed corporations ("LCs") in Hong Kong to have access to overseas markets³.

3. SFC launched a public consultation in December 2014 on the legislative proposals and published the consultation conclusions in June 2015⁴. According to the Administration, the majority of the respondents agreed with the proposals with comments on the details.

The Securities and Futures (Amendment) Bill 2015

4. The Bill was published in the Gazette on 12 June 2015 and introduced into the Legislative Council ("LegCo") on 24 June 2015. The key provisions of the Bill are highlighted in the following –

Allowing SFC to provide supervisory assistance to regulators outside Hong Kong

Scope

- (a) Section 186 of SFO which provides for assistance to regulators outside Hong Kong⁵ will be amended to enable SFC to provide a narrow form of supervisory assistance upon request. The request for supervisory assistance to obtain new information⁶ must be in relation to an LC in Hong Kong that is regulated by SFC and is also regulated by the regulator outside Hong Kong, or a related corporation of an LC which is regulated by the

² Enabling SFC to provide supervisory assistance to regulators outside Hong Kong in certain circumstances upon request will allow SFC to comply with the General Principles Relating to Cooperation in the International Organization of Securities Commissions Report under which authorities should share information to assist each other in fulfilling their respective supervisory and oversight responsibilities for regulated entities operating across borders and information regarding entities of systemic significance or whose activities could have a systemic impact on markets.

³ For example, supervisory cooperation arrangements are required under the Alternative Investment Fund Managers Directive ("AIFMD") for SFC-licensed asset managers to access the European Union market. SFC is unable to meet its full obligations under the AIFMD MoU unless the law is amended as proposed in the Bill.

⁴ The consultation paper and consultation conclusions are hyperlinked in the Appendix.

⁵ Under section 186 of SFO, if SFC receives an enforcement-related request from an regulator outside Hong Kong for assistance in investigating suspected contraventions of certain legal or regulatory requirements, SFC may, amongst other things, investigate the matter by exercising its relevant investigatory powers (for instance by obtaining information and documents requested by the regulator for enforcement purposes) provided that certain conditions are met.

⁶ If the requested information is already in the possession of SFC at the time of the request, SFC may disclose it to a regulator outside Hong Kong through the gateway under section 378(3)(g)(i) of SFO.

regulator outside Hong Kong. The information requested to be obtained must be in relation to the regulated activities supervised by SFC.

- (b) SFC may only provide the supervisory assistance if it receives a written statement confirming that the regulator outside Hong Kong has not been and will not be able to obtain the information by any other reasonable means in order to fully ascertain the following matters –
 - (i) whether the relevant corporation constitutes a risk to, or may affect, the financial stability of the jurisdiction of the regulator; or
 - (ii) compliance by the relevant corporation with legal or regulatory requirements that the regulator administers in relation to transactions or activities regarding securities and futures⁷.

Safeguards

- (c) The existing conditions for providing assistance to regulators outside Hong Kong will apply to SFC's provision of supervisory cooperation⁸. In addition, the Bill contains provisions to guard against onward disclosure or unauthorized use by requiring the regulator outside Hong Kong to provide written undertakings to the effect that –
 - (i) it will use the information solely for ascertaining the matters described in paragraph 4(b) above and will not use the information in any proceedings unless the regulator outside Hong Kong has made a separate request for investigation assistance and SFC has agreed to provide such information;

⁷ The transactions or activities cover securities, futures contracts, leveraged foreign exchange contracts, over-the-counter derivative products, collective investment schemes, or other similar transactions or activities that the regulator outside Hong Kong regulates.

⁸ The existing key conditions are - (a) SFC is of the opinion that (i) it is desirable or expedient that the assistance should be provided in the interest of the investing public or in the public interest; or (ii) the assistance will enable or assist the regulator outside Hong Kong to perform its functions and it is not contrary to the interest of the investing public or to the public interest; and (b) SFC is of the opinion that the regulator outside Hong Kong performs a similar function and is subject to adequate secrecy provisions.

- (ii) it will treat the information as confidential and will not disclose it to any other person for any purpose without the consent of SFC;
- (iii) it will inform SFC as soon as reasonably practicable in the event that it receives a legally enforceable demand for disclosure of any of the information and assist in preserving the confidentiality of the information by taking all appropriate measures; and
- (iv) it will cooperate with SFC in any action or proceedings which seek to safeguard the confidentiality of the information.

Refining certain provisions in SFO

- (d) Certain provisions in SFO will be refined with a view to reflecting change of circumstances since commencement of the ordinance in 2003, correcting errors and addressing anomalies that have emerged in the administration of certain provisions⁹. Details of the proposed refinements are set out in paragraphs 9 to 16 of the Legislative Council Brief on the Bill (File Ref: LM to SF&C/1/2/11/4/1C(2015))¹⁰.

Members' views and concerns

5. The FA Panel was consulted on the legislative proposals at the meeting on 13 April 2015. The ensuing paragraphs summarize the major views and concerns expressed by members at the meeting.

⁹ The proposed refinements to SFO include (a) dispensing with printed licences for licensed representatives; (b) enabling improved working of section 203 of SFO upon revocation or suspension of licences or registrations in relation to an LC or a registered institution under the purview of SFC; (c) enabling a recognized exchange company to grant consent to onward disclosure under section 378 of SFO; (d) enabling delegation of the function under section 5(4)(e) of SFO whereby SFC may publish materials indicating to intermediaries the manner in which it proposes to perform any of its functions; (e) minor amendments to levy provisions; and (f) amendments to Part XV of SFO relating to changes made by the new Companies Ordinance (Cap. 622) to voting shares.

¹⁰ The Legislative Council Brief is hyperlinked in the Appendix.

Safeguards in relation to provision of supervisory assistance to regulators outside Hong Kong

6. Members in general stressed the need to guard against collection and disclosure of excessive information when providing supervisory assistance to regulators outside Hong Kong, and to enhance the existing safeguards on information exchange. There was a suggestion that disclosure of information by SFC to regulators outside Hong Kong should be subject to approval by a higher authority such as the Financial Secretary or the Secretary for Financial Services and the Treasury.

7. The Administration advised that under the legislative proposals, SFC could provide supervisory assistance only in a narrow form and under limited circumstances. The existing legal safeguards with respect to SFC's provision of enforcement-related assistance, including the requirement that SFC had to be satisfied that it was desirable or expedient that the assistance be provided in the public interest, would apply to SFC's provision of supervisory cooperation. In addition, the legislative proposals further required written statements and undertakings from the requesting regulator to SFC to justify the information request and safeguard the usage and disclosure of the requested information.

8. Some members expressed concern that regulators outside Hong Kong might breach their undertakings given to SFC and use the provided information to pursue legal proceedings and remedies such as derivative suits and class actions in their jurisdictions. They enquired whether the legislative proposals would incorporate provisions on the rights to claim privilege against self-incrimination and legal professional privilege ("LPP") in respect of the information provided by SFC to regulators outside Hong Kong.

9. The Administration advised that the Bill would include explicit provisions for a requesting regulator to give written undertakings to the effect that it would not use the information in any proceedings without SFC's prior consent. If an overseas regulator intended to use the information obtained from SFC under supervisory cooperation in legal proceedings, it had to make a separate application to SFC, in which case a different set of legal protections and safeguards under SFO would apply. The Administration further advised that it was an existing provision under SFO that nothing in the ordinance could affect any claim to LPP. Where a person claimed privilege against self-incrimination in relation to any explanation or answer to a question, SFC was not permitted to give the relevant information to a regulator outside Hong Kong for use in criminal proceedings against the person in the jurisdiction of that regulator.

10. As regards the concern that regulators outside Hong Kong might breach their undertakings given to SFC in relation to usage and disclosure of information, the Administration pointed out that international supervisory or enforcement cooperation was essentially built on mutual trust and assistance. If a regulator breached its undertakings pertaining to supervisory or enforcement cooperation, it would jeopardize the regulator's international reputation and adversely impact on its future dealings with regulators in other jurisdictions.

Appeal mechanism

11. Some members held a strong view that the Administration and SFC should consider putting in place an appeal mechanism, similar to the existing one provided for exchange of tax information under the Inland Revenue Ordinance (Cap. 112), for an LC to appeal against SFC's decision to provide supervisory information to regulators outside Hong Kong.

12. The Administration explained that similar to the existing arrangements under SFO in respect of enforcement cooperation, the legislative proposals did not include an appeal mechanism pertaining to assistance to regulators outside Hong Kong for supervisory purposes. However, the overarching protections under SFO, such as provisions pertaining to preservation of secrecy, LPP and privilege against self-incrimination, would apply. Besides, there would be adequate legal safeguards and limitations in the legislative proposals to ensure that information provided by SFC to regulators outside Hong Kong was relevant and confined to the supervisory context of the jurisdictions of the regulator concerned.

MoU on supervisory cooperation

13. Members stressed the need to ascertain whether a regulator was able and willing to provide reciprocal assistance to Hong Kong and the relevant requirements should be incorporated in the legislative proposals. Some members enquired whether SFC would need to enter into an MoU with a regulator outside Hong Kong before it could exercise the new powers conferred on it under the legislative proposals to provide supervisory assistance.

14. The Administration advised that SFC would not exercise its powers to assist a regulator outside Hong Kong in supervisory matters unless it had entered into a relevant MoU or equivalent protocol with the regulator, and the legislative proposals would enable SFC to enter into such MoU/protocol on the basis of international standards and reciprocity. In line with the existing requirements under SFO on enforcement cooperation, SFC had to take into

account whether a regulator outside Hong Kong would be able and willing to provide reciprocal assistance when considering whether to provide supervisory assistance to it.

Latest development

15. At the House Committee meeting on 26 June 2015, Members agreed to form a Bills Committee to study the Bill.

Relevant papers

16. A list of relevant papers is in the **Appendix**.

Council Business Division 1
Legislative Council Secretariat
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List of relevant papers

Date	Event	Paper/Minutes of meeting
19 December 2014 to 16 January 2015	Public consultation conducted by the Securities and Futures Commission ("SFC") on proposed amendments to the Securities and Futures Ordinance (Cap. 571) ("SFO") for providing assistance to overseas regulators in certain situations	Press release Consultation paper
13 April 2015	Meeting of the Panel on Financial Affairs	Administration's paper (LC Paper No. CB(1)696/14-15(02)) Minutes (LC Paper No. CB(1)962/14-15)
5 June 2015	SFC released consultation conclusions on proposed amendments to SFO for providing assistance to overseas regulators in certain situations	Press release Consultation conclusions
24 June 2015	Introduction of the Securities and Futures (Amendment) Bill 2015 into the Legislative Council	The Bill Legislative Council Brief (File Ref: LM to SF&C/1/2/11/4/1C(2015)) Legal Service Division report (LC Paper No. LS74/14-15)