

立法會
Legislative Council

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**Paper for the House Committee Meeting
on 26 June 2015**

**Legal Service Division Report on
Securities and Futures (Amendment) Bill 2015**

I. SUMMARY

1. The Bill

The Bill seeks to amend the Securities and Futures Ordinance (Cap. 571) and its subsidiary legislation to provide for supervisory assistance to regulators outside Hong Kong; to adjust provisions regarding printed licences and certificates of registration; to adjust provisions regarding business operations that may be carried on upon revocation or suspension of licences or registrations; to provide for onward disclosure of information disclosed by a recognized exchange company; to enable the delegation of a function of the Securities and Futures Commission (SFC); to provide for the rounding of certain levy amounts; to make minor amendments; to describe voting shares clearly in certain provisions; and to make consequential and related amendments.

2. Public Consultation

According to the Legislative Council (LegCo) Brief, SFC launched a public consultation in December 2014 on the legislative proposal to empower SFC to provide supervisory assistance to regulators outside Hong Kong, and published the consultation conclusions in June 2015. The majority of the respondents agreed with the proposal.

**3. Consultation with
LegCo Panel**

The Panel on Financial Affairs was consulted on 13 April 2015 and members had no objection to the Administration introducing the Bill into LegCo.

4. Conclusion

The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Members may wish to consider whether a Bills Committee should be formed to study the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 24 June 2015. Members may refer to the LegCo Brief (File Ref.: LM to SF&C/1/2/11/4/1C(2015)) issued by the Financial Services and the Treasury Bureau on 10 June 2015 for further details.

Object of the Bill

2. The Bill seeks to amend the Securities and Futures Ordinance (Cap. 571) and its subsidiary legislation to provide for supervisory assistance to regulators outside Hong Kong; to adjust provisions regarding printed licences and certificates of registration; to adjust provisions regarding business operations that may be carried on upon revocation or suspension of licences or registrations; to provide for onward disclosure of information disclosed by a recognized exchange company; to enable the delegation of a function of the Securities and Futures Commission (SFC); to provide for the rounding of certain levy amounts; to make minor amendments; to describe voting shares clearly in certain provisions; and to make consequential and related amendments.

Provisions of the Bill

3. The major proposed amendments in the Bill are summarized below.

Supervisory assistance to regulators outside Hong Kong

4. At present, SFC's powers of obtaining information from licensed corporations in order to cooperate with overseas regulators are limited. Under section 186 of Cap. 571, if SFC receives an enforcement-related request from a regulator outside Hong Kong for assisting in investigating suspected contraventions of certain legal or regulatory requirements, SFC may 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. While SFC can obtain information for its own supervisory purposes under section 180 of Cap. 571¹, there is no express provision in Cap. 571 enabling SFC to exercise its supervisory

¹ Under section 180(1) of Cap. 571, the SFC may enter the premises of licensed corporations, inspect and make enquiries of licensed corporations to ascertain compliance by an intermediary or an associated entity of an intermediary with the relevant Hong Kong requirements specified in section 180(2) of Cap. 571. These Hong Kong requirements include the requirement not to contravene (a) any provision of Cap. 571; (ba) any provision of Part 2 (except section 6) of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615); (b) any notice or requirement given or made under or pursuant to any of the relevant provisions; (c) any of the terms and conditions of any licence or registration under Cap. 571; (d) any other condition imposed under or pursuant to any provision of Cap. 571.

powers to obtain information for the purpose of assisting overseas regulators in non-enforcement related matters.

5. Clause 24 under Part 3 of the Bill seeks to amend Cap. 571 by adding new subsections (2A) to (2E) to section 186 to enable SFC to provide supervisory assistance to regulators outside Hong Kong upon request by directing that the powers under new subsection (4A) of section 180 (added by clause 22) (by requiring the licensed corporation or a related corporation of the licensed corporation to provide records or documents and answer questions relating to any regulated activity carried on by the licensed corporation or any transaction or activity which was undertaken in the course of, or which may affect, any regulated activity carried on by the licensed corporation²) be exercised if certain conditions are met.

6. The conditions for providing supervisory assistance to requesting regulators outside Hong Kong as set out in new subsections (2A) to (2E) of section 186 are as follows:-

- (a) the regulator outside Hong Kong performs any function similar to a function of SFC or the Registrar of Companies, or regulates, supervises or investigates banking, insurance or other financial services or the affairs of corporations, and is subject to adequate secrecy provisions;
- (b) SFC is satisfied that providing assistance to the regulator outside Hong Kong is in the interest of the investing public or in the public interest; or that 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 interest³;
- (c) the request for supervisory assistance to obtain information must be in relation to (i) a licensed corporation in Hong Kong that is regulated by SFC and is also regulated by the regulator outside Hong Kong; or (ii) a related corporation of a licensed corporation where the related corporation is regulated by the regulator outside Hong Kong;
- (d) the regulator outside Hong Kong is required to provide a written statement to SFC confirming that it has not been and will not be able

² Members may wish to note that SFC is not proposed to be provided with the power to enter the premises of the licensed corporation for the purposes of providing supervisory assistance to regulators outside Hong Kong.

³ Under section 186(4) of Cap. 571, in deciding whether the condition is satisfied, SFC will take into account whether the regulator will pay to SFC any of the costs and expenses incurred in providing the assistance, and be able and willing to provide reciprocal assistance within its jurisdiction in response to a comparable request for assistance from Hong Kong.

to obtain the requested information by any other reasonable means in order to fully ascertain the following matters without the requested information:-

- (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 any securities, futures contract, leveraged foreign exchange contract, over-the-counter (OTC) derivative product, collective investment schemes, or other similar transactions or activities that are regulated by the regulator; and
- (e) the regulator outside Hong Kong is required to provide a written undertaking to SFC to guard against onward disclosure or unauthorized use of information to the effect that:-
- (i) it will use the information obtained from SFC because of the request for assistance solely for ascertaining the matters described in paragraph (d) above;
 - (ii) it will not use the information in any proceedings in its jurisdiction or elsewhere unless it has made a separate request for investigation assistance and SFC has agreed to provide such information;
 - (iii) it will treat the information as confidential and will not disclose it to any other person for any purpose without the consent of SFC;
 - (iv) it will inform SFC as soon as reasonably practicable in the event that it receives a legally enforceable demand under the laws of its jurisdiction for disclosure of any of the information and assist in preserving the confidentiality of the information by taking all appropriate measures; and
 - (v) it will cooperate with SFC in any action or proceedings in its jurisdiction or elsewhere which seek to safeguard the confidentiality of the information.

7. According to paragraphs 2 and 21 of the LegCo Brief, it is important for SFC to be empowered to provide assistance in a manner consistent with international norms to regulators outside Hong Kong on supervisory matters so that it could be in a position to enter into reciprocal supervisory cooperation arrangements with such regulators and obtain information concerning entities they regulate when this is necessary for supervisory purposes here. According to the Administration, this would help maintain Hong Kong's financial stability, bringing about a positive impact on the further development of Hong Kong's financial services industry.

Dispensing with printed licences for licensed representatives

8. Division 1 of Part 2 of the Bill seeks to amend Cap. 571 to dispense with issuing printed licences to individuals licensed under section 120 or 121 of Cap. 571. Consequential and related amendments (in Divisions 2 to 5 of Part 2 of the Bill) are proposed to the Securities and Futures (Licensing and Registration) (Information) Rules (Cap. 571S), the Securities and Futures (Miscellaneous) Rules (Cap. 571U), the Securities and Futures (Fees) Rules (Cap. 571AF) and the Securities and Futures (Amendment) Ordinance 2014 (6 of 2014) (2014 Ordinance)⁴.

9. The new Schedule 11 (which is not yet in operation)⁵ to Cap. 571 to be added by section 55 of the 2014 Ordinance provides for transitional arrangements for deemed licensing and deemed registration of authorized financial institutions in relation to the new and expanded regulated activities (RAs)⁶. Division 5 of Part 2 of the Bill contains amendments to the new Schedule 11 by adding a new Part 5A to the new Schedule 11 to provide for the arrangement that SFC will issue a printed licence/certificate of registration specifying the new and expanded RAs for which the corporation/financial institution is deemed to be licensed or registered during the deemed licensing/registration period. The printed licence/certificate of registration issued under the new Schedule 11 should be returned to SFC when the deemed status ends as a result of withdrawal, refusal or approval of the normal licence application.

⁴ The Securities and Futures (Amendment) Bill 2014 was passed by the Legislative Council on 26 March 2014. Its main object is to establish a statutory framework for the regulation of OTC derivative products.

⁵ By the Securities and Futures (Amendment) Ordinance (Commencement) Notice 2015 (L.N. 95 of 2014), the Secretary for Financial Services and the Treasury has appointed 10 July 2015 as the commencement date for certain provisions of the 2014 Ordinance. The new Schedule 11 to be added by section 55 of the 2014 Ordinance is not included in L.N. 95 of 2014.

⁶ New RAs in relation to OTC derivative products refer to (a) a new Type 11 RA to cover the activities of dealers and advisers and (b) a new Type 12A to cover the activities of clearing agents. Expanded activities refer to (a) Type 9 RA (asset management) and Type 7 RA (provision of automated trading services) to cover OTC derivative portfolios and transactions respectively.

Carrying on business operations upon revocation or suspension of licence or registration

10. Clause 25 under Part 4 of the Bill seeks to amend section 203 of Cap. 571 to empower SFC to permit an intermediary and an individual named by SFC to carry on business operations that are essential for closing down the relevant business or for protecting the interests of the clients of the intermediary after the revocation or suspension of the licence or registration of the intermediary. The amendments make it clear that the intermediary and the personnel involved (responsible officer, licensed representative, executive officer or registered individual (as the case may be)) have to comply with the relevant provisions as defined in section 1 of Part 1 of Schedule 1 to Cap. 571 when they carry on the essential business operations.

Disclosure of information by recognized exchange company

11. Under section 378 of Cap. 571, onward disclosure of information by the recipient of the information (e.g. the Stock Exchange of Hong Kong Limited, being a recognized exchange company) is prohibited unless there is consent from SFC for onward disclosure or it is excepted for grounds as provided in section 378(7) of Cap. 571. Clause 27 under Part 5 of the Bill seeks to amend section 378 of Cap. 571 to provide that for those information disclosed to a recognized exchange company by SFC, either SFC or the recognized exchange company may consent to onward disclosure of the information.

Delegation of SFC's function

12. Under section 5(4)(e) of Cap. 571, SFC may publish or otherwise make available materials indicating the manner in which it proposes to perform its functions. The function under section 5(4)(e) is non-delegable pursuant to section 2 of Part 2 of Schedule 2 to Cap. 571. Clause 28 under Part 6 of the Bill seeks to amend that Schedule to remove the function under section 5(4)(e) from the list of non-delegable functions.

Rounding of levy amounts

13. Clauses 29 and 32 under Part 7 of the Bill seek to add new provisions to the Securities and Futures (Levy) Order (Cap. 571Z) and the Securities and Futures (Investor Compensation – Levy) Rules (Cap. 571AB) respectively to provide for the rounding of levy amounts to the nearest cent.

14. Clauses 30 and 31 under Part 7 of the Bill seek to amend sections 10(b)(i) and (ii) and 13(b)(i) and (ii) of Cap. 571Z by substituting a fixed levy amount of "\$0.10" for "\$0.108" for the sale and purchase of certain futures contracts.

Describing voting shares clearly

15. Part XV of Cap. 571 provides for a disclosure of interests regime which is based on the number of voting shares in which a person is interested. The Schedule to the Bill seeks to amend certain references to shares in Part XV of Cap. 571 and the Securities and Futures (Disclosure of Interests – Exclusions) Regulation (Cap. 571AG) by substituting it with "voting shares" as defined by section 308(1) of Cap. 571.

Minor amendments

16. Amendments are also proposed to be made to section 307(1) of Cap. 571 and section 11(6) of the Securities and Futures (Contract Notes, Statements of Account and Receipts) Rules (Cap. 571Q) to correct some minor errors.

Commencement

17. The Bill, if passed, would come into operation on the day on which it is published in the Gazette.

Public Consultation

18. According to paragraph 22 of the LegCo Brief, SFC launched a public consultation in December 2014 on the legislative proposal to empower SFC to provide supervisory assistance to regulators outside Hong Kong and published the consultation conclusions in June 2015. SFC has received a total of eight written submissions. The majority of the respondents agree with the proposal, with some comments on the details of the proposal.

Consultation with LegCo Panel

19. As advised by the Clerk to the Panel on Financial Affairs (the Panel), the Panel was consulted on the proposals to allow SFC to provide supervisory assistance to regulators outside Hong Kong and to refine certain provisions in Cap. 571 at its meeting on 13 April 2015. Members did not raise objection to the proposals. Members made enquiries on the safeguards on information disclosure in providing supervisory assistance to regulators outside Hong Kong and reciprocal assistance provided by overseas regulators in cross-border supervisory cooperation. Some members suggested putting in place an appeal mechanism for parties to appeal against SFC's decisions in providing information relevant to them to regulators outside Hong Kong.

Conclusion

20. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Members may wish to consider whether a Bills Committee should be formed to study the Bill in detail.

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