

立法會
Legislative Council

LC Paper No. CB(1)776/15-16
(These minutes have been seen
by the Administration and the
Securities and Futures Commission)

Ref : CB1/BC/8/15/2

Bills Committee on Securities and Futures (Amendment) Bill 2016

Minutes of first meeting
held on Tuesday, 23 February 2016, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex

Members present : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon TAM Yiu-chung, GBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon WONG Ting-kwong, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon Dennis KWOK
Hon Christopher CHEUNG Wah-fung, SBS, JP
Hon SIN Chung-kai, SBS, JP

Public Officers attending : **For item II**

Financial Services and the Treasury Bureau

Miss Salina YAN, JP
Deputy Secretary (Financial Services)1

Ms Joyce HO
Principal Assistant Secretary (Financial Services)1

Securities and Futures Commission

Ms Christina CHOI
Senior Director (Investment Products)

Ms Grace CHAN
Director (Investment Products)

Ms Fiona TSE
Senior Manager (Investment Products)

Ms Mary AHERN
Consultant (Legal Services Division)

Department of Justice

Ms Monica LAW
Senior Assistant Law Draftsman (II)2

Mr Peter SZE
Senior Government Counsel

Companies Registry

Miss Hilda CHANG
Deputy Registry Manager (Registration)

Clerk in Attendance : Ms Angel SHEK
Chief Council Secretary (1)1

Staff in attendance : Miss Rachel DAI
Assistant Legal Adviser 2

Miss Rita YUNG
Senior Council Secretary (1)8

Miss Mandy POON
Legislative Assistant (1)1

Action

I. Election of Chairman

Mr CHAN Kam-lam, the member with the highest precedence among those who were present at the meeting, presided over the election of the Chairman of the Bills Committee. He invited nominations for the chairmanship of the Bills Committee.

Action

2. Mr CHAN Kam-lam was nominated by Mr Andrew LEUNG and the nomination was seconded by Mr WONG Ting-kwong. Mr CHAN Kam-lam accepted the nomination. There being no other nominations, Mr CHAN Kam-lam was declared Chairman of the Bills Committee.
3. Members agreed that there was no need to elect a Deputy Chairman.

II. Meeting with the Administration

(LC Paper No. CB(3)305/15-16	— The Bill
File Ref: SF&C/1/2/22C(2015)	— Legislative Council Brief
LC Paper No. LS31/15-16	— Legal Service Division Report
LC Paper No. CB(1)585/15-16(01)	— Marked-up copy of the Bill prepared by the Legal Service Division (Restricted to Members)
LC Paper No. CB(1)585/15-16(02)	— Background brief prepared by the Legislative Council Secretariat)

Discussion

4. With the aid of a powerpoint presentation, the Administration briefed members on the Securities and Futures (Amendment) Bill 2016 ("the Bill").

(Post-meeting note: A set of the powerpoint presentation materials (LC Paper No. CB(1)603/15-16(01)) was issued to members vide Lotus Notes e-mail on 23 February 2016.)

5. The Bills Committee deliberated (index of proceedings attached at the **Annex**).

Action

Follow-up actions to be taken by the Administration

6. The Administration was requested to provide the following information:

Offering and investment scope of open-ended fund companies

- (a) the differentiation between public offering and private offering of open-ended fund company ("OFC"), and the supervision/enforcement regime to detect/combat circumvention of the regulatory requirements applicable to public offering of OFC (such as by claiming the fund to be or disguising it as privately-offered OFC), with a view to enhancing protection of investors in OFCs;
- (b) the rationale for the proposed amendment to section 103(2)(ga) of the Securities and Futures Ordinance (Cap. 571) (i.e. clause 5 of the Bill) concerning regulation of offers of investment, and information on Part 1 of the Seventeenth Schedule to the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32);
- (c) regulation of the investment scope and strategies of privately-offered OFCs in overseas jurisdictions, highlighting the key differences, if any, from the relevant proposal in the Bill;

Governance and termination of open-ended fund companies

- (d) duties, powers and liabilities of directors in relation to the mode of operation of OFC, in particular the appointment and removal of investment manager (e.g. how to maintain the investment functions of an OFC in the event of resignation or removal of its investment manager); and
- (e) the triggering mechanism for termination of solvent OFCs, including which parties (e.g. individual director, board of directors, investment manager, shareholders) may apply for the termination, whether the consent of other relevant parties has to be sought and if so, the arrangement in case of disagreement among these parties on the termination.

(Post-meeting note: The Administration's response was issued to members vide LC Paper No. CB(1)691/15-16(02) on 17 March 2016.)

Action

Invitation of public views

7. Members agreed to post a notice on the website of the Legislative Council ("LegCo") and write to the 18 District Councils ("DCs") to invite views from the public and DCs on the Bill.

(Post-meeting note: The notice was posted on the LegCo website on 29 February 2016 and letters were sent to DCs and relevant organizations on 1 March 2016.)

Date of next meeting

8. Members agreed to meet with deputations at the next meeting scheduled for 21 March 2016 at 8:30 am.

III. Any other business

9. There being no other business, the meeting ended at 4:28 pm.

Council Business Division 1
Legislative Council Secretariat
8 April 2016

Bills Committee on Securities and Futures (Amendment) Bill 2016

**Proceedings of the first meeting
on Tuesday, 23 February 2016, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
<i>Agenda Item I - Election of Chairman</i>			
000059 – 000206	Mr CHAN Kam-lam Mr Andrew LEUNG Mr WONG Ting-kwong	Election of Chairman Mr CHAN Kam-lam was elected Chairman of the Bills Committee.	
<i>Agenda Item II - Meeting with the Administration</i>			
000207 – 000338	Chairman	Opening remarks	
000339 – 001408	Chairman Administration	Briefing by the Administration on the Securities and Futures (Amendment) Bill 2016 ("the Bill") which sought to introduce the open-ended fund company ("OFC") structure in Hong Kong [Legislative Council Brief (File Ref: SF&C/1/2/22C(2015)) and LC Paper No. CB(1)603/15-16(01)]	
001409 – 001738	Chairman Mr SIN Chung-kai Administration	Mr SIN Chung-kai enquired about the regulatory regime of OFCs. The Administration responded that: (a) in view of an OFC's nature as an investment fund, the Securities and Futures Commission ("SFC") would be the primary regulator responsible for the registration and regulation of OFCs under the Securities and Futures Ordinance (Cap. 571) ("SFO"); (b) the Registrar of Companies ("CR") would be responsible for the incorporation and administration of statutory corporate filings of OFCs; (c) SFC would be empowered by SFO to make subsidiary legislation (i.e. the OFC Rules) and to publish codes and guidelines (i.e. the OFC Code) to regulate and provide guidance on the incorporation, management, operation, and business of OFCs; and	

Time marker	Speaker	Subject(s)	Action required
		(d) the Bill provided for a streamlined termination of solvent OFCs. OFCs (solvent or insolvent) might also be wound up pursuant to the regime under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUMPO").	
001739 – 002418	Chairman Mr SIN Chung-kai Administration SFC	<p>Mr SIN Chung-kai enquired about the differentiation between public offering and private offering of an OFC.</p> <p>The Administration and SFC explained that:</p> <p>(a) both publicly offered and privately offered OFCs would need to be registered with SFC. In line with the existing regulatory regime for public offering of funds in Hong Kong, the offering documents of an OFC would be subject to SFC's authorization unless an exemption applied. Where the issuance of an offering document of an OFC would fall within an exemption (e.g. where the offering documents contained or related to an offer set out in Part 1 of the Seventeenth Schedule to CWUMPO, such as an offer to professional investors or an offer to no more than 50 persons), no authorization of the offering documents by SFC would be required;</p> <p>(b) there were anti-avoidance measures under CWUMPO to prevent abuse of the said exemption; and</p> <p>(c) SFC would investigate into complaints and suspected non-compliance, and take enforcement action as appropriate.</p>	
002419 – 002735	Chairman Mr Christopher CHUENG Administration	<p>Mr Christopher CHEUNG enquired about the reasons for removing the requirement proposed in the public consultation paper on OFCs that at least one director of the OFC board must be a Hong Kong resident.</p> <p>The Administration responded that:</p> <p>(a) some respondents of the public consultation suggested removal of the requirement for at least one Hong Kong-resident OFC board member for reasons such as difficulties in recruiting Hong Kong personnel and no similar requirements in other major overseas</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>fund jurisdictions. Striking a balance between protecting investors and addressing the comments received, the Administration considered it acceptable to remove the requirement; and</p> <p>(b) under the current proposal, an OFC board would be required to have at least two natural-person directors, and each of the non-resident directors of an OFC would be required to appoint a process agent in Hong Kong to accept service of process.</p>	
002736 – 003804	<p>Chairman Mr Christopher CHUENG Administration SFC</p>	<p>Mr Christopher CHEUNG expressed the following views and suggestions:</p> <p>(a) he supported the introduction of the OFC structure to further develop Hong Kong's asset management industry;</p> <p>(b) it might be difficult for securities brokers to ascertain whether shares of a particular OFC would be suitable for sale to individual investors; and</p> <p>(c) the suitability requirements should be relaxed or waived in respect of the sale and purchase of OFC shares.</p> <p>The Chairman suggested SFC consider rating the risks of OFCs to facilitate product matching for investors, while investors should also take responsibility in bearing the investment risks.</p> <p>The Administration and SFC responded that:</p> <p>(a) it would not be appropriate for SFC, being a regulator, to rate the risks of securities and futures products including the shares of OFCs. This was also not an approach commonly adopted in overseas jurisdictions;</p> <p>(b) intermediaries involved in the sale of investment products had to conduct product due diligence, and were subject to the "know your client" requirement and compliance with suitability requirements when promoting any investment products;</p> <p>(c) the offering documents of OFCs would be subject to, among other things, disclosure</p>	

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		<p>requirements including disclosure of product risks; and</p> <p>(d) SFC was currently reviewing the need to give more guidance on the suitability requirements, including fund offerings in connection with the development of an exchange distribution platform for funds.</p>	
003805 – 004600	Chairman Mr Dennis KWOK Administration SFC	<p>Mr Dennis KWOK noted that during the public consultation, there were views that the proposed investment scope of OFCs might be overly restrictive by precluding OFCs from investing in asset classes other than securities, futures and over-the-counter derivatives. He enquired:</p> <p>(a) whether the restrictive investment scope would render the OFC less attractive as a Hong Kong-domiciled investment fund vehicle, and whether greater flexibility could be given to the investment scope of privately offered OFCs in particular; and</p> <p>(b) the estimated number of funds to be attracted to domicile in Hong Kong after the introduction of the OFC structure.</p> <p>The Administration and SFC responded that:</p> <p>(a) the primary purpose of an OFC would be to operate as an investment fund, and not a corporate entity for the purposes of general commercial business or trade;</p> <p>(b) publicly offered OFCs might invest in asset classes in accordance with SFC's product code requirements and authorization conditions;</p> <p>(c) for privately offered OFCs, the investment scope should align with Type 9 regulated activity, i.e. mainly in securities, futures and over-the-counter derivative products, with a 10% <i>de minimis</i> limit to invest in other asset classes. Cash deposits and currencies, which were not inconsistent with Type 9 regulated activity, would be permissible asset classes not subject to the 10% <i>de minimis</i> limit;</p> <p>(d) the definition of securities, futures and over-the-counter derivative products was very wide and able to accommodate a broad range of</p>	

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		<p>asset classes;</p> <p>(e) the proposed investment scope aimed to ensure the current regulatory handle of SFC in terms of licensing, supervision and enforcement would also apply to the investment managers of OFCs; and</p> <p>(f) while it would be difficult to estimate the number of funds to be attracted to domicile in Hong Kong after the introduction of the OFC structure, a number of fund managers had already indicated interest to establish OFC funds in Hong Kong.</p> <p>At Mr Dennis KWOK's request, the Administration undertook to provide written information on the regulation of the investment scope and strategies of privately offered OFCs in overseas jurisdictions, highlighting the key differences, if any, from the relevant proposal in the Bill.</p>	<p>Admin (paragraph 6(c) of the minutes refers)</p>
<p>004601 – 005634</p>	<p>Chairman Mr SIN Chung-kai Administration SFC</p>	<p>Mr SIN Chung-kai enquired about the regulatory requirements on the custodian of an OFC, and the offering of OFC shares.</p> <p>SFC responded that:</p> <p>(a) the custodians of OFCs would be subject to basic eligibility requirements similar to those for the custodians of other SFC-authorized publicly offered funds. For example, the custodians would have to be substantial financial institutions such as banks or their subsidiaries, and the custodians should have minimum issued and paid-up capital and non-distributable capital reserves of HK\$10 million; and</p> <p>(b) intermediaries engaged in the sale of OFC shares would be required to be licensed by or registered with SFC for Type 1 regulated activity (i.e. dealing in securities) and subject to SFC's Code of Conduct.</p> <p>In reply to Mr SIN Chung-kai's enquiry about OFC director's duties, powers and liabilities, SFC explained that:</p> <p>(a) an OFC board would be subject to the same statutory and fiduciary duties owed to a</p>	

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		<p>conventional company by its directors under the law, including the duty to exercise reasonable care, skill and diligence. The board would be legally responsible for all the affairs of the OFC (e.g. oversight of investment managers) and accountable to the OFC shareholders. Part of its duties would include ensuring proper succession of investment manager upon removal with reasonable procedures; and</p> <p>(b) the basic requirements concerning appointment and removal of OFC's investment manager would be provided in the OFC Code.</p> <p>The Administration would provide supplementary information on the duties, powers and liabilities of directors in relation to the mode of operation of an OFC, in particular the appointment and removal of the investment manager.</p>	<p>Admin (paragraph 6(d) of the minutes refers)</p>
005635 – 010048	<p>Chairman Mr Christopher CHEUNG Administration SFC</p>	<p>Mr Christopher CHEUNG suggested the Administration/SFC consider mandating the appointment of at least two responsible officers ("RO") for the investment managers of an OFC, similar to the existing requirement of at least two ROs for each SFC-regulated activity conducted by a corporation. He also suggested appointing two investment managers.</p> <p>SFC responded that as the investment manager of an OFC must be licensed by or registered with SFC for carrying out Type 9 regulated activity, it was already subject to the said RO requirement. The suggestion of appointing at least two investment managers for an OFC would unduly increase its operational costs.</p>	
010049 – 011413	<p>Chairman Mr SIN Chung-kai Administration SFC</p>	<p>Mr SIN Chung-kai expressed concern about possible circumvention of the regulatory requirements applicable to public offering of OFCs by claiming the fund to be or disguising it as privately offered OFCs. For instance, the fund originator might make repeated offers of OFC shares to not more than 50 investors (who were not professional investors) each time so as to obviate the need for SFC's authorization.</p> <p>SFC stressed that investor protection measures (e.g. SFC-registration of OFCs, licensing requirements and suitability obligations on intermediaries) were</p>	

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		<p>in place for all collective investment schemes including OFCs. SFC would investigate into complaints or suspected cases of non-compliance. If disputes arose as to whether an OFC was privately offered or not, it would be for the court to decide having regard to the circumstances of individual cases.</p> <p>The Administration was requested to provide written response to address Mr SIN's concerns and to elaborate on the differentiation between public offering and private offering of OFCs, and the supervision/enforcement regime to detect/combat circumvention of the regulatory requirements applicable to public offering of OFCs.</p>	<p>Admin (paragraph 6(a) of the minutes refers)</p>
011414 – 012006	<p>Chairman Mr SIN Chung-kai SFC</p>	<p>In reply to Mr SIN Chung-kai's enquiry about the investment scope of OFCs and protection of investors, SFC explained that the investment scope of OFCs would allow for investment in derivatives and noted that the OFC would have to comply with relevant requirements such as disclosure requirements and applicable investment restrictions.</p> <p>Also, in reply to Mr SIN Chung-kai's question on the sale of privately offered funds, SFC explained that there were licensing requirements on the intermediaries, and intermediaries were subject to suitability requirements, including assessing investors' investment experience, knowledge and whether the product corresponded to the risk appetite of investors as well as the nature of the investment products being promoted.</p>	
012007 – 012728	<p>Chairman Mr SIN Chung-kai Administration SFC</p>	<p>In reply to Mr SIN Chung-kai's enquiry about winding-up of OFC, the Administration and SFC explained the mechanism for termination and winding up of OFCs as set out in paragraphs 13 to 14 of the Legislative Council Brief, pointing out that:</p> <p>(a) the terms and initiating parties for the streamlined termination would be laid down in the OFC Code, and disclosed in the OFC's constitutional and offering documents. SFC's approval would be required for streamlined termination; and</p> <p>(b) if an OFC was wound up due to insolvency or negative equity, the remaining assets of the</p>	

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		<p>OFC would be sold and the liabilities on the shareholders would be limited to the capital they had invested in the OFC.</p>	
<p>012729 – 013024</p>	<p>Chairman Mr SIN Chung-kai Administration</p>	<p>Mr SIN Chung-kai sought elaboration on the legislative framework for introducing the OFC structure.</p> <p>The Administration advised that:</p> <ul style="list-style-type: none"> (a) the enabling provisions to introduce the OFC structure in Hong Kong were set out in the Bill, while the detailed operational and procedural matters would be provided in the OFC Rules to be made by SFC and subject to negative vetting by the Legislative Council; (b) the new section 112ZK of SFO set out in details matters which might be provided for in the OFC Rules. Separate public consultation on the OFC Rules would be conducted by SFC; and (c) the OFC regulatory regime under the Bill, if enacted, would not commence operation without the OFC Rules being put in place. 	
<p>013025 – 013323</p>	<p>Chairman Mr SIN Chung-kai Administration SFC</p>	<p>Mr SIN Chung-kai sought elaboration on the protected cell regime of an OFC.</p> <p>The Administration and SFC responded that:</p> <ul style="list-style-type: none"> (a) an OFC might divide its scheme property into separate parts, with each part forming a sub-fund. An OFC might also be created as an umbrella fund meaning that the OFC could consist of a number of separately pooled sub-funds and each sub-fund would have a pool of assets that was managed in accordance with the investment objectives and policies for that particular sub-fund; and (b) a protected cell structure would be made available for an OFC, such that the assets of a sub-fund of an umbrella OFC belonged exclusively to that sub-fund and should not be used to discharge the liabilities of or claims against the umbrella OFC or any other sub-funds. 	

Time marker	Speaker	Subject(s)	Action required
013324 – 013844	Chairman Mr SIN Chung-kai Administration SFC	At the request of Mr SIN Chung-kai, the Administration would provide information on the triggering mechanism for termination of solvent OFCs, including which parties (e.g. individual director, board of directors, investment manager, shareholders) might apply for the termination, whether the consent of other relevant parties had to be sought and if so, the arrangement in case of disagreement among these parties on the termination.	Admin (paragraph 6(e) of the minutes refers)
<p>Clause-by-clause examination of the Bill [The Bill (LC Paper No. CB(3)305/15-16)] [Marked-up copy of the Bill prepared by the Legal Service Division (LC Paper No. CB(1)585/15-16(01))]</p>			
013845 – 014629	Chairman Administration Mr SIN Chung-kai SFC	<p>Part 1 – Preliminary</p> <p><u>Clause 1 – Short title and commencement</u></p> <p><u>Clause 2 – Enactments amended</u></p> <p>Members raised no queries.</p> <p>Part 2 – Amendments to Securities and Futures Ordinance</p> <p><u>Clause 3 – Section 36 amended (rules by Commission)</u></p> <p>Mr SIN Chung-kai enquired about the reason for the proposed amendment to replace the references to "companies" by "corporations".</p> <p>The Administration and SFC responded that:</p> <p>(a) "company" under SFO meant a company formed and registered under the Companies Ordinance (Cap. 622) ("CO") or an existing company;</p> <p>(b) while the proposed OFC was structured in corporate form with characteristics similar to a conventional limited company, it was not proposed to be incorporated under CO but would be registered with SFC under SFO as amended by the Bill; and</p> <p>(c) it was therefore necessary to adopt the reference "corporation" in SFO to broadly cover a company or other corporation incorporated (whether under CO or not) either</p>	

Time marker	Speaker	Subject(s)	Action required
		in Hong Kong or elsewhere so as to cover OFCs.	
014630 – 014949	Chairman Administration Mr SIN Chung-kai SFC	<u>Clause 4 – Section 56 amended (property deposited with recognized clearing house)</u> Discussion on the paragraphing of the proposed amendment to section 56(3) of SFO.	
014950 – 015720	Chairman Administration Mr SIN Chung-kai SFC	<u>Clause 5 – Section 103 amended (offence to issue advertisements, invitations or documents relating to investments in certain cases)</u> At the request of Mr SIN Chung-kai, the Administration agreed to provide information on: (a) the rationale for the proposed amendment to section 103(2)(ga) of SFO concerning regulation of offers of investment, and (b) Part 1 of the Seventeenth Schedule to CWUMPO referred to in the said amendment.	Admin (paragraph 6(b) of the minutes refers)
015721 – 015924	Chairman Mr SIN Chung-kai	Invitation of public views Meeting arrangements	