

立法會
Legislative Council

LC Paper No. CB(1)1134/15-16
(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 third meeting
held on Tuesday, 12 April 2016, at 8:30 am
in Conference Room 2 of the Legislative Council Complex

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

Members absent : Hon TAM Yiu-chung, GBS, JP
Hon Dennis KWOK

Public Officers : **For item II**
attending

Financial Services and the Treasury Bureau

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 Peggy LAU
Registry Manager

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

Action

I. Confirmation of minutes

(LC Paper No. CB(1)776/15-16 — Minutes of the meeting held on
23 February 2016)

The minutes of the meeting held on 23 February 2016 were confirmed.

Action

II. Meeting with the Administration

Matters arising from previous meeting

(LC Paper No. CB(1)773/15-16(02) — List of follow-up actions arising from the meeting on 21 March 2016

LC Paper No. CB(1)773/15-16(03) — Administration's response to the views provided by organizations at the meeting held on 21 March 2016 or in their submissions

LC Paper No. CB(1)691/15-16(03) — Assistant Legal Adviser's letter dated 16 March 2016 to the Administration

LC Paper No. CB(1)773/15-16(01) — Administration's reply to Assistant Legal Adviser's letter dated 16 March 2016

LC Paper No. CB(1)779/15-16(01) — Draft Committee Stage amendments proposed by the Administration)

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

Follow-up actions to be taken by the Administration

3. The Administration was requested to:

- (a) address a member's concern that the proposed legislative framework for open-ended fund companies ("OFCs") under the Bill did not provide for adequate or effective regulation of OFC directors (who were not required to be licensed under the Securities and Futures Ordinance (Cap. 571) ("SFO")), and to consider imposing criminal sanctions on the directors if they, knowingly or recklessly, failed to perform their duties in governing the activities of an OFC (e.g. exercising oversight of the OFC's investment manager);

Action

- (b) in the light of the purpose of the proposed amendments to the new section 112U(3) of SFO as set out in footnote 2 of the Administration's proposed Committee Stage amendments ("CSAs")(LC Paper No. CB(1)779/15-16(01)), address a member's concern that, whether it was intended by proposing this set of amendments to visit upon a director of an OFC any duty that was not falling within subsections (3)(a) and (3)(b); and to review the drafting of the amended new section 112U(3) with a view to clarifying whether any duty other than those stated in subsections (3)(a) and (3)(b) would apply to OFC directors;
- (c) review, in the light of the Administration's reply that it was the Securities and Futures Commission ("SFC")'s established policy to publish the relevant particulars of the investment products as soon as practicable following SFC's authorization, the use of the word "may" in the new section 112G of SFO in relation to publication of particulars of OFCs with a view to reflecting truly the said established policy; and
- (d) review the drafting of the Chinese text of the new sections 112ZK(4)(ga) and 214A(5) of SFO as set out in the Administration's proposed CSAs with a view to enhancing the readability and comprehensibility of the provisions.

(Post-meeting note: The Administration's response was issued to members vide LC Paper No. CB(1)826/15-16(02) on 21 April 2016.)

III. Any other business

Meeting arrangements and legislative timetable

4. The Chairman said that subject to any views members and the Legal Adviser to the Bills Committee might have on the Administration's written response to the issues arising from the meeting, he would decide whether a further meeting was necessary. Members agreed that if no further meeting needed to be held, the Bills Committee would complete scrutiny of the Bill.

(Post-meeting note: The Secretariat had not received by the specified deadline any request from members for holding a meeting to discuss the Administration's written response to the issues raised at the meeting. Members were informed of the cancellation of the meetings scheduled for 26 April, 17 and 30 May 2016 vide LC Paper No. CB(1)836/15-16 on 25 April 2016.)

Action

5. The Administration indicated its intention to resume the Second Reading debate on the Bill at the Council meeting of 25 May 2016. The Chairman informed members that he would report the deliberations of the Bills Committee to the House Committee on 6 May 2016. The deadline for giving notice to move CSAs to the Bill would be 16 May 2016.
6. There being no other business, the meeting ended at 9:55 am.

Council Business Division 1
Legislative Council Secretariat
15 July 2016

Bills Committee on Securities and Futures (Amendment) Bill 2016

**Proceedings of the third meeting
on Tuesday, 12 April 2016, at 8:30 am
in Conference Room 2 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
<i>Agenda Item I — Confirmation of minutes</i>			
000407 – 000426	Chairman	The minutes of the meeting held on 23 February 2016 (LC Paper No. CB(1)776/15-16) were confirmed.	
<i>Agenda Item II — Meeting with the Administration</i>			
000427 – 000539	Chairman	Opening remarks	
000540 – 000712	Chairman Administration	Briefing by the Administration on its responses to the views provided by organizations at the meeting held on 21 March 2016 or in their submissions [LC Paper No. CB(1)773/15-16(03)] Members raised no queries.	
000713 – 000820	Chairman Administration	Briefing by the Administration on its reply to Assistant Legal Adviser ("ALA")'s letter dated 16 March 2016 [LC Paper No. CB(1)773/15-16(01)]	
000821 – 001009	Chairman ALA Securities and Futures Commission ("SFC")	ALA sought clarification on how the legal provisions under the Bill would ensure that all the requirements for registration were met before SFC registered a proposed open-ended fund company ("OFC"). SFC responded that: (a) it would not register a proposed company as an OFC before it was satisfied that the OFC would fulfill all the registration requirements upon incorporation; (b) after SFC was satisfied that the proposed company was capable of meeting the registration requirements and decided to register it as an OFC, it would notify the Registrar of Companies ("CR") by way of a notice of registration; and (c) the registration of the proposed company would only take effect on the day of issue of the certificate of incorporation in respect of it by CR.	

Time marker	Speaker	Subject(s)	Action required
001010 – 001309	Chairman ALA Administration SFC	<p>ALA considered that the use of the word "may" in the new section 112G of the Securities and Futures Ordinance (Cap. 571) ("SFO") could not reflect that SFC would, in line with established policy, publish the particulars of OFCs.</p> <p>The Chairman expressed concern that the phrase "may publish" would appear to mean that the SFC might decide to publish or might decide otherwise.</p> <p>The Administration and SFC responded that:</p> <p>(a) notwithstanding the use of the word "may" in similar existing provisions in relation to the authorization of investment products, for transparency purpose, it was SFC's established policy to publish the relevant particulars of the investment products as soon as practicable following SFC's authorization;</p> <p>(b) similar to existing practice, SFC in general would publish on its website the names of registered OFCs and the date of registration as soon as practicable after the registration had taken effect; and</p> <p>(c) the use of the word "may" would allow flexibility to be retained, where appropriate, with regard to the publication of the OFC's particulars by SFC.</p> <p>The Administration was requested to review the use of the word "may" in the new section 112G of SFO with a view to reflecting truly the established policy as explained above.</p>	Admin (paragraph 3(c) of the minutes refers)
001310 – 001529	Chairman ALA Administration	Discussion on the drafting of the Chinese text of the new section 112C(3) of SFO	
<p>Examination of the Administration's proposed Committee Stage amendments to the Bill [LC Paper No. CB(1)779/15-16(01)]</p>			
001530 – 002116	Chairman Administration SFC	<p>The Bills Committee examined the Administration's proposed Committee Stage amendments ("CSAs") to the Bill.</p> <p><u>CSAs in relation to the Securities and Futures Ordinance (Cap. 571)</u></p>	

Time marker	Speaker	Subject(s)	Action required
		<p><i>CSAs to the new sections 112A, 112ZA(5), 112ZF, 112ZG and 112ZJ</i></p> <p>Members raised no query.</p> <p><i>CSA to the new section 112U(3)</i></p> <p>In response to the Chairman's enquiry, SFC explained that the duty of an OFC director to exercise reasonable care, skill and diligence was basically the same as that owed by a director of an ordinary company to an ordinary company under section 465 of the Companies Ordinance (Cap. 622) ("CO").</p>	
002117 – 002706	Chairman Administration ALA	<p><i>CSA to the new section 112ZK</i></p> <p>ALA suggested and the Administration agreed to review the drafting of the Chinese text of the new section 112ZK(4)(ga) of SFO as set out in the proposed CSA with a view to enhancing the readability and comprehensibility of the provision.</p> <p><i>CSA to the new section 213(3A) and (3B) and consequential amendments</i></p> <p>Members raised no query.</p>	Admin (paragraph 3(d) of the minutes refers)
002707 – 004954	Chairman Administration Mr SIN Chung-kai Mr Andrew LEUNG Mr Alan LEONG SFC ALA	<p><i>CSA to the proposed amended Schedule 8 to SFO</i></p> <p>Members raised no query.</p> <p><i>CSA to the new section 214A</i></p> <p>Mr SIN Chung-kai expressed grave concern about the potential delay caused to, or other adverse impact on the applications under the new section 214A of SFO for orders against an authorized financial institution, etc. (in particular if the orders under application involved prosecutions or other criminal proceedings) if SFC inadvertently omitted the step to consult the Monetary Authority ("MA") before making the applications.</p> <p>The Administration and SFC responded that:</p> <p>(a) the consultation provision was in line with the existing section 214(3) of SFO;</p> <p>(b) the purpose of the orders in question was to make remedies in case of unfair prejudice, etc. to the interests of shareholders of OFCs if it appeared to</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>SFC that at any time since the incorporation of an OFC, the business or affairs of the company had been conducted, for instance, in a manner oppressive or unfairly prejudicial to its shareholders. These orders might not necessarily involve or give rise to criminal proceedings;</p> <p>(c) SFC would need to consult MA only if the order to be applied for was against an authorized financial institution; or against a corporation that, to the knowledge of SFC, was a controller of an authorized financial institution or had as its controller an authorized financial institution or had a controller that was also a controller of an authorized financial institution; and</p> <p>(d) SFC had generally maintained close contact with MA on an ongoing basis.</p> <p>The Chairman noted that if an order was made against a bank, there might be potential impact on the financial system. It would therefore be appropriate for SFC to liaise with MA accordingly in line with the suggested section 214A(2A).</p> <p>Mr Alan LEONG noted that the drafting of section 214A(2A) was essentially the same as the existing section 214(3) in SFO, and considered that the suggested requirement for SFC to consult the MA acceptable. Members raised no further query in this regard.</p> <p>Separately, ALA suggested and the Administration agreed to review the drafting of the Chinese text of the new section 214A(5) of SFO as set out in the proposed CSA with a view to enhancing the readability and comprehensibility of the provision.</p> <p><u>CSAs in relation to the Stamp Duty Ordinance (Cap. 117)</u></p> <p><u>CSAs in relation to the Banking Ordinance (Cap. 155)</u></p> <p><u>CSAs in relation to the Financial Reporting Council Ordinance (Cap. 588)</u></p> <p>Members raised no query.</p>	<p>Admin (paragraph 3(d) of the minutes refers)</p>
004955 – 010610	Chairman Mr SIN Chung-kai Administration	Mr SIN Chung-kai expressed concern that the proposed legislative framework for OFCs did not provide for adequate or effective regulation of OFC	

Time marker	Speaker	Subject(s)	Action required
	SFC	<p>directors (who would not be required to be licensed under SFO). He considered that criminal sanctions should be imposed on the directors if they, knowingly or recklessly, failed to perform their duties in governing the activities of an OFC (e.g. exercising oversight of the OFC's investment manager).</p> <p>The Administration and SFC explained the regulatory framework over directors of an OFC, including SFC's powers to apply for various court orders to seek remedies against or impose sanctions on the directors.</p> <p>The Administration was requested to provide a written response to address Mr SIN Chung-kai's concern and suggestion.</p>	Admin (paragraph 3(a) of the minutes refers)
010611 – 012241	Chairman Mr Alan LEONG Administration SFC	<p>Mr Alan LEONG enquired about whether the proposed CSA to the new section 112U(3) was intended to visit upon a director of an OFC any duty that was not falling within subsections (3)(a) and (3)(b).</p> <p>The Administration and SFC responded that:</p> <p>(a) the proposed CSA was not intended to impose upon a director of an OFC any duty that was not falling within the revised new section 112U(3)(a) or (3)(b);</p> <p>(b) section 112U(3) was meant to impose upon an OFC director the overarching duties of the fiduciary duties under the common law, and the duty to exercise reasonable care, skill and diligence (which was to be identical to that under section 465 of CO); and</p> <p>(c) specific operational matters of an OFC that the directors had to assist with would be set out in the OFC Rules.</p> <p>The Administration was requested to provide a written response to address Mr Alan LEONG's concern, and to review the drafting of the amended new section 112U(3) with a view to clarifying whether any duty other than those stated in section 112U(3)(a) and (3)(b) would apply to OFC directors.</p>	Admin (paragraph 3(b) of the minutes refers)

Time marker	Speaker	Subject(s)	Action required
<i>Agenda Item III — Any other business</i>			
012242 – 012638	Chairman Administration	Meeting arrangements and legislative timetable	

Council Business Division 1
Legislative Council Secretariat
15 July 2016