

Assistance to Overseas Regulators: the SFC's Conclusions

The Securities and Futures Commission ("**SFC**") recently released its consultation conclusions ("**Consultation Conclusions**") on proposed amendments to the Securities and Futures Ordinance ("**SFO**"), expanding the range of circumstances in which the SFC may provide assistance to overseas regulators¹. This briefing summarises the proposed legislative changes and their implications.

Overview

The proposed legislative changes focus on sections 180² and 186³ of the SFO and expand the range of circumstances in which the SFO may assist overseas regulators from the current enforcement-related requests for assistance from overseas regulators to supervisory-related requests. The SFC has emphasised that the proposed amendments are not designed for enforcement purposes.

The Proposals

The Consultation Conclusions follow a process of public consultation which ended in mid-January 2015 on a consultation paper released by the SFC in late 2014⁴. They cover the areas set out below.

Purposes and Scope of Supervisory Assistance

The SFC's stated purposes for the proposals are to enable the SFC to: (i) supervise more effectively and comprehensively licensed corporations which operate in multiple jurisdictions by enabling the SFC to engage overseas regulators to enter into international supervisory co-operation arrangements, (ii) adhere better to international regulatory standards, and (iii) in certain cases, secure access for Hong Kong licensed corporations

¹ "Consultation Conclusions on Proposed Amendments to the Securities and Futures Ordinance for Providing Assistance to Overseas Regulators in Certain Situations", dated 5 June 2015.

A copy of the Consultation Conclusions can be found at <http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/conclusion?refNo=14CP9>

² *Supervision of intermediaries and their associated entities*, s180, SFO.

³ *Assistance to regulators outside Hong Kong*, s186, SFO.

⁴ "Consultation Paper on Proposed Amendments to the Securities and Futures Ordinance for Providing Assistance to Overseas Regulators in Certain Situations", dated 19 December 2014.

to certain overseas markets which are only open to jurisdictions that are parties to supervisory cooperation arrangements.

The SFC proposes that it may only provide assistance to an overseas regulator in relation to a licensed corporation that is regulated by both the SFC and the overseas regulator (and/or where a related corporation is regulated by the overseas regulator), to allow the overseas regulator to ascertain:

- (1) the risk to and impact on the financial stability of the financial system in its jurisdiction; and
- (2) compliance with legal or regulatory requirements that it administers in relation to transactions and activities regarding securities, futures contracts, leveraged foreign exchange contracts, collective investment schemes, over-the-counter derivative products or other similar transactions which it regulates, so as to enable preventative actions to be taken.

The overseas regulator will first have to confirm that, without the requested information, it would be unable to fully ascertain these matters.

Power to Gather Information for Supervisory Assistance

The SFC proposes that it may only provide assistance:

- (1) in the form of obtaining records and documents from licensed corporations or their related corporations that are otherwise unavailable to the overseas regulator and making enquiries about these and related transactions and activities; and
- (2) where the information to be obtained relates to any regulated activity carried on by a 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 corporation.

The overseas regulator would need to confirm in writing that it cannot obtain the requested information by any other reasonable means.

The SFC emphasises that the proposals are consistent with the Personal Data (Privacy) Ordinance and do not alter the existing protections for legal professional privilege and the privilege against self-incrimination.

The fact that the disclosed information cannot be used for enforcement purposes is reinforced by the requirement for the overseas regulator to provide written undertakings to the SFC that the information obtained will not be used in any proceedings⁵. If the disclosed information revealed an apparent breach of the overseas regulator's regulatory regime, and that regulator wished to use the information in regulatory and/or criminal proceedings against the licensed corporation from whom the information was obtained, it would separately have to comply with the current regime in respect of enforcement assistance pursuant to s186 of the SFO.

⁵ The SFC noted public concerns about breaches of such written undertakings but stated that the proposal is in line with international practice and the reputational risk on an overseas regulator arising from any breach of such an undertaking would act as a strong deterrent factor against such breaches.

Implications

The proposals are consistent with the increasing co-operation between international regulators following the 2008 financial crisis including their focus on the stability of financial systems and the development and implementation of resolution regimes for financial institutions (including in Hong Kong)⁶.

Once the above proposals are implemented, Hong Kong licensed corporations can expect to receive supervisory-related requests from the SFC on behalf of overseas regulators, particularly from US, European and UK regulators being (in many cases) the "home regulator" of those entities.

Although these proposals are not intended to affect / enlarge the current enforcement assistance regime, they may have that effect by expanding the material available to overseas regulators obtained through supervisory-related requests. Where such material exposes a regulatory breach, it may be used as a basis for a subsequent request to the SFC for assistance under the current enforcement regime.

⁶ See Clifford Chance client briefings "*Too big to fail? Hong Kong consults on financial institution resolution regime, but it is just the start...*" dated 20 January 2014 and "*(Reform) too big to fail? Second round consultation on resolution regime for financial institutions in Hong Kong*" dated 27 January 2015 which can be found at http://www.cliffordchance.com/briefings/2014/01/too_big_to_fail_hongkongconsultsonfinancia.html and http://www.cliffordchance.com/briefings/2015/01/reform_too_big_tofailsecondroun.html respectively.

Contact



Matthew Newick

Partner

E: Matthew.Newick@CliffordChance.com



Mark Shipman

Partner

E: Mark.Shipman@CliffordChance.com



Edward Johnson

Partner

E: Edward.Johnson@CliffordChance.com



Donna Wacker

Partne

E: Donna.Wacker@CliffordChance.com



Matthias Feldmann

Partner

E: Matthias.Feldmann@CliffordChance.com



Jonathan Denniss

Senior Associate

E: Jonathan.Denniss@CliffordChance.com

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www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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*Linda Widyati & Partners in association with Clifford Chance.