



Securities and Futures Ordinance

HKSI 30 July 2002



Discipline



Existing system

- ◆ SFC may discipline licensed securities, commodities and leveraged foreign exchange corporations, their licensed staff (representatives), supervisory directors and others involved in management

- ◆ For not being “fit and proper” (s 129) or for “misconduct” (s 193(1) def’n)

- ◆ Through:
 - reprimands
 - suspensions
 - revocations
 - (ss 56, 121S, 121U & 121V SO, s 36 CTO, s 12 CTO³)



Existing system

- ◆ Discipline usually follows investigation, but if not voluntary inquiry
- ◆ Told grounds for discipline, preliminary conclusions and proposed penalty in writing (“letter of mindedness”)
- ◆ Can request underlying evidence
- ◆ Make written representations or meet with SFC
- ◆ Written decision with reasons (“notice of decision”)
- ◆ Right of appeal if suspended or revoked (s 19 SFCO), judicial review, Ombudsman



Regulatory gaps

- ◆ Inequality between licensed corporations and banks securities businesses as to jurisdiction
- ◆ Inflexible sanctions
- ◆ No formal recognition of settlements
- ◆ Reprimands not appealable



SFO highlights

- ◆ New sanctions for added flexibility
- ◆ Greater regulatory equality with discipline for banks' securities businesses
- ◆ Formal settlement power
- ◆ New safeguards



Need more flexible sanctions

- ◆ Existing sanctions sometimes too light (reprimand) or too harsh (revocation/suspension)
- ◆ Big problem with corporations (innocent employees, customers, shareholders(?) v. insufficient penalty)
- ◆ Insufficient flexibility
- ◆ Need more flexible sanctions:
 - fines
 - partial suspension/revocation



Fines

- ◆ SFO will allow for fines up to maximum of \$10m or 3 times profit or loss whichever higher (s 194(2))
- ◆ Alternative or additional to other sanctions
- ◆ SFC must publish and adhere to fining guidelines (public consultation conducted) (s 199)
- ◆ Guidelines will to general rather than tariff (“final” guidelines released in April 2002)
- ◆ Fines paid into general revenue (s 194(6))



Partial suspension or revocation

- ◆ At present must be total except through settlement
- ◆ SFO will allow for partial suspension or revocation (s 194(1)(i))
- ◆ Gives greater flexibility (eg just suspend warrant issuing business or proprietary trading)
- ◆ Minimises unintended harm to third parties
- ◆ Important given “single licence” proposal (Part V)



Prohibition orders

- ◆ Now no power to stop application for licence other than by refusal
- ◆ New sanction of prohibition orders to stop applications for a licence, registration or for other approval or consents for a period (s 194(1)(iv))
- ◆ Corrects technical gap in disciplinary regime
- ◆ Eliminates need to accord procedural fairness for futile applications



Banks

- ◆ SFO will extend discipline to banks' securities businesses ("registered institutions"), their frontline staff ("relevant individuals"), their supervisory staff ("executive officers") and others involved in management

- ◆ Grounds and process same as for licensees

- ◆ Sanctions split between SFC and HKMA:
 - SFC fines, reprimands, revokes/suspends registered institution, prohibition orders (s 196)
 - HKMA suspends/revokes relevant individuals and executive officers (ss 58A & 71C BO after BAB)



Banks

- ◆ SFC will investigate after consulting HKMA (s 182(1)(e))
- ◆ SFC must consult HKMA before disciplining (s 198(2))
- ◆ HKMA must consult SFC before disciplining (s 58A(1) & 71C(4) BO after BAB)
- ◆ New SFC-HKMA MOU to smooth operation of dual regulation being drafted



Settlements

- ◆ SFC already settles many disciplinary actions
- ◆ But SFO will give SFC formal settlement power
- ◆ Settlement must be in interest of investing public or public interest (ss 201(3) & (4))
- ◆ SFC doesn't generally settle on no admissions basis
- ◆ Settlements usually publicised



Safeguards

- ◆ Existing procedural and safeguards kept
- ◆ New:
 - fining guidelines (s 199)
 - reprimands and fines appealable (Pt XI and Sch 8)
 - consultation with HKMA on banks (s 182(4) & 198(2))
 - SFC expressly obliged to refer to codes of conduct and other guidance when disciplining for misconduct not in public interest (s 193(3))
 - Process Review Panel



Miscellaneous changes

- ◆ SFC may order transfer of client records to client or their nominee if intermediary suspended or revoked (s 202)
- ◆ SFC may allow continued business operation after suspension or revocation to protect client (revocation) or business (suspension) interests (s 203)



Transition

- ◆ If powers exercised before SFO commences, old SO etc provisions continue to apply (s 64 Sch 10 Pt 1)
- ◆ If circumstances giving rise to exercise of power arise before SFO, but discovered after SFO commences, old SO etc provisions continue to apply (s 64 Sch 10 Pt 1)
- ◆ Where old licence/exemption suspended or revoked, deemed licence/registration also suspended or revoked on same terms (s 65 Sch 10 Pt 1)



Parts XI

Securities and Futures Appeals

Tribunal



Introduction

- ◆ Existing appeal body Securities and Futures Appeals Panel (SFAP) (ss 18-22 SFCO)
- ◆ Part time body (senior counsel and two other lay members) with unclear procedures (s 18 SFCO & SFAPPR)
- ◆ Merits review body (confirm, vary, reverse SFC decision) (s 21(7) SFCO)
- ◆ Limited jurisdiction (s 19 SFCO/ss 56-57A):
 - licensing decisions
 - discipline decisions
 - restrictions on licensed intermediaries



Proposals

- ◆ Upgrade SFAP into judge led statutory tribunal
- ◆ Make full time body
- ◆ Make procedures clearer and more focused on quickly resolving issues
- ◆ Expand jurisdiction to other SFC decisions suitable for merits review by such a body



Composition and procedures

- ◆ Statutory tribunal with judicial chairman and 2 lay members independent of government (s 216)
- ◆ Full time body with adequate registry resources
- ◆ Judge presides and decides matters of law and may decide some matters alone (Pt 1 Sch 8 ss 18, 19, 31 and 32)
- ◆ Procedures focused on fast identification/resolution of issues (preliminary conferences, consent orders and judge can sit alone) (Pt 1 Sch 8 ss 25-35)



Composition and procedures

- ◆ Proceedings to be public unless in interests of justice in private (Pt 1 Sch 8 s 20)
- ◆ SFAT will be able to punish contempt itself (s 221)
- ◆ SFAT will be able to stay decisions (most decisions automatically stayed by appeal until appeal heard or withdrawn (licence conditions and restriction notices) (ss 227 & 232)
- ◆ Appeals to Court of Appeal on point of law (s 229) but CA may on appeal, allow or dismiss appeal or vary or set aside and substitute decision or remit to SFAT with directions (s 229)



Composition and procedures

- ◆ Appeal period to be reduced from 30 to 21 days, but appeals outside time if good cause (ss 217(3)-(5))
- ◆ Only those subject of decision may appeal (s 217(1))
- ◆ SFAT may confirm, vary or set aside SFC decision and substitute own decision in its place or remit matter to SFC with directions (ss 218(2)-(4))
- ◆ Otherwise procedures largely the same
(eg SFAT has power to call for evidence, SFAT may operate inquisitorially, rights to legal representation, may appear unrepresented or represented by non-lawyer with leave, etc)



Jurisdiction

- ◆ SFAT jurisdiction expanded over SFAP's - may review specified decisions (ss 217(1), 215 “specified decision” and Pt 2 Sch 8)
- ◆ Specified decisions listed - 64 decisions, including:
 - requirements to pay the costs of imposing a suspension order on a recognised exchange company under Part III
 - various decisions relating to approval to operate an automated trading service (ATS) under Part III



Jurisdiction

- various decisions relating to collective investment decisions and promotion of investment opportunities under Part IV
- many licensing decisions under Part V
- various decisions relating to permission to carry on business despite being in breach of the Financial Resources Rules under Part VI
- various decisions relating to the appointment of an auditor to conduct of an audit of a licensed intermediary or one of its associated entities under Part VI
- all the SFC's decisions to discipline licensed intermediaries and responsible officers including fines and reprimands under Part IX



Jurisdiction

- the SFC's decisions to intervene in a licensed intermediary's business to impose restrictions under Part X
- decisions relating to exemptions from the disclosure of interest in listed corporation provisions under Part XV and
- to impose conditions on any approval the SFC may give under the Bill under Part XVI.



Jurisdiction

- ◆ Jurisdiction chosen on basis of number of considerations:
 - must be decision with substantial, conclusive effect
not purely internal SFC decision
 - not policy decisions
 - not subject to existing specialised review mechanism



Jurisdiction and PRP

- ◆ Decision made in light of other administrative review mechanisms (eg Ombudsman, judicial review)
- ◆ CE in Council may change SFAT jurisdiction (s 234)
- ◆ Process Review Panel (PRP) to fill gaps
- ◆ PRP established by CE as advisory committee under Interpretation and General Clauses Ordinance



PRP

- ◆ Majority (9 of 12) prominent independent persons with some ex-officio members (S for J, SFC Chairman and NED)
- ◆ PRP reviews SFC's compliance with its procedures after the fact and may recommend changes to procedures
- ◆ Will report to Financial Secretary with secretariat in Financial Services Bureau
- ◆ Report to be made public to extent possible given SFC secrecy requirements



Transition

- ◆ SFAP appeal already in progress before commencement continues under old law (ie before SFAP) (Pt 1 Sch 10 s 70)
- ◆ Similarly for appeal period that started before commencement but that hasn't expired under old law (ie before SFAP) (Pt 1 Sch 10 s 71)
- ◆ SFAP continues in existence for these purposes (Pt 1 Sch 10 s 72)
- ◆ Appeals under old law for transitional provision purposes (eg for discipline under Part IX transitionals) can be made to SFAT (Pt 1 Sch 10 ss 66 & 68)