



SECURITIES AND FUTURES COMMISSION
證券及期貨事務監察委員會

**Consultation Conclusions on Proposed
Amendments to the Securities and Futures
Ordinance for Providing Assistance to Overseas
Regulators in Certain Situations**

5 June 2015



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Executive Summary

1. On 19 December 2014, the Securities and Futures Commission (**SFC**) issued a Consultation Paper on Proposed Amendments to the Securities and Futures Ordinance for Providing Assistance to Overseas Regulators in Certain Situations (**Consultation Paper**) for public consultation which ended in mid-January 2015. The Consultation Paper invited comments on some proposed amendments to section 180 (in respect of supervisory powers of the SFC) and section 186 (in respect of assistance that may be provided by the SFC to regulators outside Hong Kong) of the Securities and Futures Ordinance (Cap. 571) (**SFO**) so that a specific form of supervisory assistance could be provided upon request to regulators outside Hong Kong.
2. The current limitation of the SFC's powers under the existing legal framework as well as the reasons for and objectives of the proposals are discussed in detail in the Consultation Paper. In summary, the proposals will enable the SFC to have a more effective and comprehensive supervision of licensed corporations which operate in multiple jurisdictions by being able to engage regulators outside Hong Kong to enter into international supervisory cooperation arrangements including memoranda of understanding (**MOUs**), adhere better to international regulatory standards and, in certain cases, secure access for Hong Kong licensed corporations to certain overseas markets which are only open to jurisdictions that are parties to supervisory cooperation arrangements.
3. During the consultation period, the SFC received eight submissions from various market participants and professional bodies, including industry associations and law firms.
4. The SFC has thoroughly considered all responses and comments and modified the proposals outlined in the Consultation Paper accordingly. Some major comments, as well as the SFC's responses, are as follows:-
 - (a) The majority of respondents agreed with the overall objectives of the proposals including that it is important for global regulators to maintain supervisory cooperation in the regulation of financial corporations.
 - (b)
 - (i) Regarding the comments on the purposes of supervisory assistance and whether it should be limited to ascertaining the risks to and the impact on the stability of the financial system and/or compliance with legal and regulatory requirements, some respondents suggested adding "gravity" and/or "materiality" thresholds so as to limit unwarranted, trivial or "fishing"



requests from regulators outside Hong Kong. Some respondents also suggested that the SFC should not provide assistance where the regulator outside Hong Kong can obtain the information itself.

- (ii) The SFC now proposes an additional requirement that the regulator outside Hong Kong would need to confirm that it has not been and will not be able to obtain the requested information by any other reasonable means and it is unable to ascertain the specified supervisory matters fully without the information sought.
 - (iii) A number of respondents also indicated concerns that the extension of the request to “related corporation” is too broad.
 - (iv) The term “related corporation” is defined in the SFO¹. Such a “related corporation” that is a financial institution regulated by a regulator outside Hong Kong may impact a licensed corporation in Hong Kong (and vice versa). Accordingly, the SFC considers it necessary to extend the request so that the SFC may provide supervisory assistance to regulators outside Hong Kong that regulate a “related corporation” of a licensed corporation so as to facilitate the effective supervision of regulated financial institutions on a group basis. It is clear that material risks stemming from a “related corporation” in one jurisdiction can have significant implications for the group as a whole.
- (c)
- (i) Some respondents raised concerns about legal professional privilege and privilege against self-incrimination.
 - (ii) The SFC wishes to reconfirm that the current proposals in fact do not alter the existing positions regarding legal professional privilege and the privilege against self-incrimination.
 - (iii) Some respondents also asked the SFC to: consider the legality of disclosing certain types of personal data when complying with a supervisory assistance request; and confirm that the SFC has taken into account the personal data privacy issue when formulating the proposals.

¹ The term “related corporation”, which is defined in section 3 of Part 1 of Schedule 1 to the SFO, includes a holding company, a subsidiary and a subsidiary of the same holding company.



- (iv) The SFC views that the proposals are consistent with the Personal Data (Privacy) Ordinance (Cap. 486) (**PDPO**). Part 8 of the PDPO provides specific exceptions to several of the data privacy principles that apply to the SFC's powers.
 - (d)
 - (i) Regarding the proposal of obtaining written undertakings from regulators outside Hong Kong as safeguards to enhance the preservation of confidentiality and to limit the use of information for supervisory purposes only, all respondents agreed with the proposals in principle. A number of respondents questioned the effectiveness of these undertakings including the consequences and remedies for breaches of them by a regulator outside Hong Kong.
 - (ii) The SFC notes these concerns. Nevertheless, the current proposal is in line with international practice and requirements for comparable undertakings feature in the legislation in both Australia and Singapore. Further, these undertakings will be reiterated in underlying MOUs and a breach of an undertaking by a regulator would be a very serious matter and would damage its international reputation. In the exceptional event of a breach, the SFC would likely refuse any further assistance to that regulator absent further credible assurance, and other regulators may also refuse to cooperate with that regulator in future.
5. The SFC has recommended that the Government take the above into consideration when drafting the relevant amended provisions under the SFO.
6. The main comments and concerns raised, together with the SFC's responses to these, are discussed in greater detail below. A list of the respondents who sent in submissions is at Appendix A. The full text of the submissions can be viewed on the SFC website at www.sfc.hk. Of the eight respondents who made submissions, none requested that its submission be published anonymously.



Comments received and the SFC's responses

Alternative suggestions to the proposals

7. In the Consultation Paper, the SFC sought alternative suggestions to the proposals which could also achieve the same objectives that the proposed amendments to sections 180 and 186 intend to achieve.

Public comments

8. There were no alternative suggestions made with respect to the proposals.

Proposal with respect to the *purposes and scope of supervisory assistance*

9. It was proposed in the Consultation Paper that the SFC may only provide assistance so that the regulator outside Hong Kong can ascertain:
 - (a) The risks to and the impact on the stability of the financial system in its jurisdiction; and/or
 - (b) 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 that it regulates;

In relation to:

- (c) A licensed corporation, that is regulated by the SFC and the regulator outside Hong Kong; and/or
- (d) A related corporation of a licensed corporation where the related corporation is regulated by the regulator outside Hong Kong.

Public comments

10. Almost all of the respondents agreed that the purposes of supervisory assistance should be limited to those discussed in paragraph 9 above.
11. A number of respondents suggested adding thresholds on “gravity” and “materiality” to limit unwarranted, trivial or “fishing” requests from regulators outside Hong Kong. The respondents cited the Singapore’s Securities and Futures Act and the United Kingdom’s



Financial Services and Markets Act as examples where assistance will only be provided to regulators outside their respective jurisdictions if the information requested is of sufficient importance, gravity and seriousness. The respondents also suggested that the regulators outside Hong Kong should explain in writing why the request is necessary, with details to substantiate the request.

12. Other respondents expressed concern that the scope of information that the SFC may obtain for a regulator outside Hong Kong is too broad. It was therefore suggested that the scope of request should be limited to the activities regulated by the regulator outside Hong Kong and that the SFC should only be able to request sufficient information to address the regulator's need. Some respondents commented that there are no objective criteria and no limits on the scope of information that could potentially be regarded as having a possible impact on, or risk to, a financial system's stability. This would be for the regulator outside Hong Kong to determine. The respondents therefore suggested that a clear definition of "financial system" should be added. It was further suggested that assistance is to be provided only if the SFC is satisfied that a failure to do so would likely pose a threat to the stability of a financial system or if the matter is of sufficient importance to the stability of the financial system.
13. Some respondents suggested the scope of assistance should be confined to licensed corporations which are dual registered in and outside Hong Kong. The respondents were concerned that extending the assistance to information concerning a Hong Kong licensed corporation simply because its related corporation is regulated by the regulator outside Hong Kong may cause unfairness as it could subject licensed corporations to the extraterritorial jurisdiction of the regulators outside Hong Kong and an excessive compliance burden.

SFC's response

14. The SFC now proposes to make clear that the regulator outside Hong Kong would need to confirm that it would be unable to fully ascertain the matters set out in paragraphs 9(a) or (b) without the requested information. With regard to a written explanation of the reasons for the request from a regulator outside Hong Kong to substantiate its request, the SFC notes that such terms are usually found in MOUs and not in legislation.
15. In view of the respondents' concerns about the lack of a definition of "financial system", the SFC suggests revising the draft wording to "financial stability".



16. The SFC notes the respondents' concerns that the supervisory request may extend to licensed corporations which are not directly supervised by the requesting authority. The proposed scope is to cover requests in relation to a licensed corporation that is also regulated by the regulator outside Hong Kong or a related corporation that is regulated by the regulator outside Hong Kong. Given that the activities of such related corporations can create material risks for one another, including those in other jurisdictions, the SFC considers that the current proposal is appropriate.

Proposal with respect to the *power to gather information for supervisory assistance*

17. It was proposed that the SFC may only provide assistance:
- (a) In the form of obtaining from a licensed corporation or a related corporation of a licensed corporation records and documents (subject to sub-paragraph (b) below) that are otherwise not available to the regulator outside Hong Kong and making enquiries about these and related transactions and activities; and
 - (b) 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.

Public comments

18. Some respondents suggested making it clear that the SFC shall not provide assistance where the regulator outside Hong Kong can obtain the information itself. They further suggested that the regulator outside Hong Kong should undertake in writing that this is the case.
19. While some respondents believe that the power to gather information under the proposal is too broad, a respondent sought to clarify if "regulated activity" is confined to those activities regulated under the SFO and the kind of records or documents that will be obtained from the related corporation.
20. Some respondents expressed concerns about legal professional privilege, privilege against self-incrimination, and protection of personal data. In particular, it was suggested that a licensed corporation should be given the right to consider whether the kind of supervisory information that the SFC requested is ultimately potentially self-incriminating



and if this is the case, to be able to challenge such a request and refuse to provide such information.

SFC's response

21. The SFC agrees that the SFC should not provide assistance where the regulator outside Hong Kong could obtain the information itself through reasonable means. The SFC will revise the proposal so that the requesting regulator would need to provide a written confirmation to that effect.
22. Separately, the SFC wishes to clarify that given that the proposed amendments would be made to the SFO, "regulated activities" in the amendments would follow the definitions of the term in Schedule 5 to the SFO.
23. Furthermore, the SFC would like to emphasise that the current proposals do not alter the existing positions regarding legal professional privilege and the privilege against self-incrimination. Nonetheless, the SFC would like to take this opportunity to reconfirm these issues as follows:-
 - (a) The SFC notes that legal professional privilege is expressly preserved by operation of sections 380(4) and (5) of the SFO. Section 380(4) unequivocally provides that nothing in the SFO "*affects any claims, rights or entitlements which would, apart from the Ordinance, arise on the ground of legal professional privilege*". In addition, legal professional privilege is protected under Article 35 of the Basic Law so nothing in this legislative exercise could affect that right on constitutional grounds. As a result, legal professional privilege would amount to a "reasonable excuse" for the purpose of section 180(14) of the SFO².
 - (b) With respect to the issue of privilege against self-incrimination, the SFC notes that the objective of the proposal is to obtain certain information otherwise not available locally for supervisory purposes in order to assess the risk to the financial stability of a jurisdiction or the status of compliance so as to enable preventive actions to be taken. It is not designed for enforcement purposes. Under the current proposal, the fact that the information cannot be used for enforcement purposes is reinforced by the requirement for the regulator outside Hong Kong to provide written undertakings to the SFC that the information

² Section 180(14) of the SFO stipulates that "A person who, without reasonable excuse, fails to comply with a requirement imposed on him by an authorized person under this section commits an offence and is liable (a) on conviction on indictment to a fine of \$200000 and to imprisonment for 1 year; or (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months."



obtained under supervisory cooperation will not be used in any proceedings. However, in the event that such information disclosed an apparent breach of the regulatory regime administered by a regulator outside Hong Kong and that regulator wished to use the information in regulatory and/or criminal proceedings against the person from whom such information was obtained, it would separately have to satisfy the legal requirements that apply to enforcement assistance and to commence a separate information request pursuant to the existing SFO provisions governing enforcement related assistance. In these circumstances, the usual protections under that separate process would apply. For example, there are safeguards in section 186(6) of the SFO enabling a person to claim the privilege against self-incrimination eg, with respect to an answer to a question. Where the person does so, the SFC is not permitted to disclose either the question or the answer to a regulator outside Hong Kong for use in criminal proceedings against the person in that jurisdiction.

24. Regarding the comments relating to personal data privacy considerations and the legality of disclosing certain types of personal data when complying with a supervisory assistance request, the SFC views that the proposals are consistent with the PDPO. The SFC notes that there are already exceptions under Part 8 of the PDPO to several of the data privacy principles that apply to the SFC's powers, such as section 60B of the PDPO. Disclosing client information to the SFC when complying with the SFC's request, therefore, would not be in breach of the PDPO.

Proposal with respect to *the safeguards for providing supervisory assistance*

25. It was proposed that the SFC may only provide assistance subject to certain safeguards to prevent abuse and to preserve the confidentiality of the information obtained by the SFC for the regulator outside Hong Kong in supervisory cooperation. For example, the regulator outside Hong Kong would be required to provide written undertakings to the SFC to the effect that the regulator will:
 - (a) Use the information obtained from the SFC because of the request for assistance solely for ascertaining the matters described in paragraph 9 above and will not use the information in any proceedings unless the authority or regulatory organisation has sought and the SFC has agreed to provide such information in accordance with section 186(1) of the SFO;



- (b) Treat the information as confidential and not disclose it to any other person for any purpose without the consent of the SFC;
- (c) Inform the SFC as soon as reasonably practicable in the event that it receives a legally enforceable demand for disclosure of any of the information and assist in preserving the confidentiality of the information by taking all appropriate measures; and
- (d) Cooperate with the SFC in any action or proceedings which seek to safeguard the confidentiality of the information.

Public comments

26. All respondents agreed that safeguards should be put in place and that the SFC may only provide assistance subject to the proposed safeguards. Some respondents questioned the effectiveness of undertakings and requested more explanation on the consequences as well as remedies for breaches of written undertakings by the regulator outside Hong Kong. A respondent also suggested that regulators outside Hong Kong should be required to notify the SFC of any breach of the undertaking as a mitigation strategy.

SFC's response

27. The SFC notes the concerns about breaches of written undertakings by the regulator outside Hong Kong. This proposal is in line with the current international practice. The substance of the undertakings will also be reiterated in the MOUs and a breach of such undertaking (which would also be a breach of the MOU) would be a very serious matter and would damage the international reputation of any regulator that did so. The reputational risk is a strong deterrent factor and it is uncommon for a reputable regulator to breach its undertakings. In the exceptional event of breach, the SFC would likely refuse any further assistance to that regulator absent further credible assurance and this may also result in other regulators refusing to cooperate with it in the future.

Conclusion and way forward

28. Having considered the responses received and the regulatory objectives of the proposals, the SFC has recommended to the Government to take the above into consideration when making the necessary legislative changes.



29. The SFC would like to take this opportunity to thank all respondents who sent in submissions for their time, effort and contribution.



Appendix A

List of respondents

(in alphabetical order)

1. Calf Company Limited
2. CompliancePlus Consulting Limited
3. Herbert Smith Freehills
4. Hong Kong Securities Association
5. Kinetic Partners (Hong Kong) Limited
6. Linklaters
7. The Alternative Investment Management Association Limited (AIMA)
8. The Law Society of Hong Kong