



Calf Company Limited

Professional Compliance Consultancy

Responses to Securities and Futures Commission's Consultation Paper on
Proposed Amendments to the Securities and Futures Ordinance for
Providing Assistance to Overseas Regulators in Certain Situations

15 January 2015

**Securities and Futures Commission’s Consultation Paper on
Proposed Amendments to the Securities and Futures Ordinance for
Providing Assistance to Overseas Regulators in Certain Situations
(“Consultation Paper”)**

Submissions

On 19 December 2014, Hong Kong Securities and Futures Commissions issued the Consultation Paper, which proposes to provide supervisory assistance to overseas jurisdictions by providing information in circumstances unrelated to investigation.

We have reviewed the Consultation Paper and has the following submissions. The submissions are set out in responses to four questions on page 12 of the Consultation Paper.

About the submitter and the author

The submitter, Calf Company Limited, is a compliance consultancy firm which provide compliance consultation and licence application services to investment and insurance companies.

The author, Mr. Wilson LEUNG, was admitted as a solicitor and barrister of New Zealand. He obtained his law degree from the University of London and science degree (Mathematics, Economics and Finance) from the University of Hong Kong. Mr. Leung has worked in financial compliance industry since 2004. He had held the position of Assistant Vice President (Legal and Compliance) of a Hong Kong insurance company before he started his own business. Since 2013, Mr. Leung has been appointed by the Chief Justice as the panel member of a Tribunal. Currently, he is the managing director of Calf Company Limited.

General Comments

1. We welcome the concepts of international supervisory cooperation and meeting international standards, while Hong Kong should be mindful that providing information overseas for non-investigation purposes may have practical difficulties.

Responses to Question 1: Do you have any alternative suggestions to the proposals in the Consultation Paper which could also achieve the same objectives that the proposed amendments to sections 180 and 186 intend to achieve?

2. It is doubtful whether those objectives in the Consultation Paper should be achieved. The Consultation Paper sets out three jurisdictions as examples (ie.

Australia, Singapore and the United Kingdom). It appears that the proposed supervisory assistance mechanism may not be accepted by majority financial zones, including the United States and Eurozone. Further, the suggested benefit of market access¹ is uncertain and not guaranteed.

3. As an alternative to the proposed amendments, an overseas regulator may request, or even compel, a regulatee in its jurisdiction to provide information of the latter's related company(ies) in Hong Kong. A regulatee will rarely choose to refuse a regulator's request since such information is not related to investigation. An overseas regulator should request amendment to its own legislations and extends its powers if relevant information is actually possessed by the overseas regulatee but access by overseas regulator is not available² due to legitimate reasons (e.g. legal professional privilege). The suggested amendment to Securities and Futures Ordinance³ ("SFO") may be abused if an overseas regulator circumvents legal requirements in its own jurisdiction and get information via the suggested regulator-to-regulator information sharing mechanism.

Responses to Question 2: Do you have any comments on the proposal that the purposes of supervisory assistance should be limited to those discussed in paragraph 25(b) above?

4. Even if providing investigation unrelated information to overseas may be justified (we doubt), it is submitted that a blanket application to all jurisdictions is not appropriate. Different overseas jurisdictions have different level of legal system development and personal data protection mechanism. Provision of information should be limited to those overseas jurisdictions that have equivalent level of legal development, in particular person data protection legislation, and has a long established tradition of rule of law.
5. While the Legislative Council is subject to the public's scrutiny and has transparency in decision making (e.g. publication of minutes and Hansard), it is suggested that: (a) whether an overseas jurisdiction is regarded as equivalent jurisdiction should be subject to Legislative Council's scrutiny; and (b) equivalent jurisdictions should be listed in SFO and may be amended from time to time by Legislative Council.

Responses to Question 3: Do you have any comments on the proposal that the power to gather information for supervisory assistance purposes should be limited to those discussed in paragraphs 25(a) and (c) of the Consultation Paper?

¹ See the Consultation Paper, paragraph 6

² Ibid, paragraph 10

³ Cap. 571

6. In respect of ascertaining stability of financial system⁴, it appears that financial information (e.g. aggregate volume of open position) and statistic data, but not personal data, is relevant. It follows that the information provided under this limb should be limited to financial information and statistic data only.
7. The proposed amendment may cause potential conflict with personal data protection obligations imposed by the Personal Data (Privacy) Ordinance⁵ (“PDPO”). A licence corporation may have compliance difficulties that, according to its Personal Collection Statements (“PICS”), it does not collect personal information from clients for the purpose of transferring to overseas regarding matters unrelated to investigation, but it is compelled to do so under the proposed new legislations, leading to potential criminal liabilities under PDPO. Relevant licensed corporation(s) may need to get separate prescribed consent from clients if such information transfer action is not covered in PICS, leading to practical difficulties and tipping-off risks. It follows that the provision of non-investigation related information should be limited to the condition that relevant licensed corporation(s) is/are notified about the nature of such overseas information transfer.
8. Further, a Hong Kong licensed corporation may, but has no obligation, to assist overseas regulator on matters unrelated to investigation. It may not be reasonable if a Hong Kong licensed corporation has no right to refuse information provision.
9. If an overseas regulator requests for continuing provision of non-investigation related information, a licensed corporation may need to supply information to SFC over a period of time, leading to a high administration cost. While a licensed corporation may charge reasonable administration fees for personal data access request, the licensed corporation cannot charge for additional administration work in case of information supply to SFC as a result of overseas regulator’s request.

Responses to Question 4: Do you agree that there is a need to have the legal pre-requisite of obtaining written undertakings from the overseas regulators? Do you have any comments on the scope of the undertakings discussed in paragraph 25(d) of the Consultation Paper?

10. We have no objection of obtaining written undertakings, but even if written undertakings is obtained, the effectiveness of such undertakings is called into question. Most Hongkongers should know that a country has just breached an international treaty in relation to sovereignty change of a British colony 17 years ago. It seems there is no effective mechanism to ensure performance of the proposed undertakings should the counterparty is not a trustworthy jurisdiction.

⁴ Ibid, paragraph 25(b)(i)

⁵ Cap. 486

11. It is submitted that additional safeguards are needed for undertakings enforcement. For example, the undertaking may state that, if it is breached, relevant evidence cannot be admitted to the overseas Court. Further, relevant licensed corporation(s) should have rights to get a copy of the overseas regulator's undertaking if it is suspected that the undertaking has been breached.
12. It may be helpful for further consideration if the number of supervisory data access request from overseas regulators in the past, as well as costs and impact, are disclosed.

Conclusion

13. Hong Kong should carefully strike a balance between risk and benefits, where the latter appears uncertain.
14. It is submitted that amendment to the existing SFO in respect of assistance to overseas regulators is unnecessary unless there are more compelling reasons and supporting evidence that may suggest the contrary.

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