

Guide to

Legislative Proposals on

Establishing a Securities and Futures Appeals Tribunal

(to be included in the Securities and Futures Bill)

5th July 1999

Introduction

1. The Securities and Futures Commission (the “Commission” or “SFC”) makes many decisions under the laws it administers that may affect the rights or interests of persons. There are a number of means by which a person may challenge an SFC decision. For example, a person may:
 - apply for judicial review to challenge the legality of the decision;
 - complain to the Ombudsman;
 - appeal a licensing or disciplinary decision under the Securities Ordinance (the “SO”), Commodities Trading Ordinance (the “CTO”) or the Leveraged Foreign Exchange Trading Ordinance (the “LFETO”), or a decision to issue a restriction notice under the Securities and Futures Commission Ordinance (the “SFCO”) or the LFETO, to the Securities and Futures Appeals Panel (the “SFAP”); and
 - appeal a decision under the Hong Kong Code on Takeovers and Mergers to the Takeovers and Mergers Panel and ultimately, in some instances, to the Takeovers Appeal Committee; and
 - appeal a decision to close the stock or futures exchange, or a decision affecting the constitution, management and business of an exchange or clearing house, to the Chief Executive in Council.
2. The Composite Bill will not alter the ability of a person affected by an SFC decision to apply for judicial review or to complain to the Ombudsman. These matters are beyond the scope of the Bill and the Commission welcomes the scrutiny of the courts and the Ombudsman.
3. However, the current operation of the SFAP is subject to certain limitations. The Composite Bill will address these limitations by replacing the SFAP with

an enhanced statutory tribunal, to be called the Securities and Futures Appeals Tribunal (the “SFAT”). The tribunal will be chaired by a full-time High Court judge, and will have clear procedural rules for effective pre-hearing case management as well as adequate resources to handle its caseload.

4. The SFAP currently has jurisdiction to review SFC decisions relating to licensing, revocation or suspension of a registrant’s registration, and restriction of a registrant’s business operations. Certain other SFC decisions are also amenable to full merits review by such a body. The Composite Bill will therefore expand the jurisdiction of SFAT beyond that of the existing SFAP.
5. Amongst the matters that are not amenable to full merits review by the proposed SFAT are decisions the Commission makes during the process leading to its final substantive conclusions. Nevertheless, these decisions can have an impact on the affected persons. To subject the Commission to external scrutiny in this regard, an independent panel will be established to review aspects of the Commission’s internal processes, including investigatory procedures. This panel is more fully described in paragraphs 24 – 25 below.

Securities and Futures Appeals Panel

6. The SFAP is a relatively informal body established under the SFCO with jurisdiction to hear appeals on the full merits of some SFC decisions. It is empowered to confirm, vary or reverse any such decision under appeal. If the SFAP believes a decision is incorrect, it may substitute its own decision for that made by the Commission.

7. The SFAP comprises a Chairman and Deputy Chairman, each of whom must be a barrister or solicitor (in practice a Senior Counsel). Other members of the SFAP are drawn from persons in the community with expertise in the financial services field, usually lawyers, accountants, business people or merchant bankers. All members of the SFAP are appointed by the Chief Executive and are independent of the Commission. Except for the Chairman and Deputy Chairman, who each receives a small payment, members of the panel provide their services without remuneration.
8. As a relatively informal body, the SFAP could be expected to resolve appeals and provide effective redress quickly. Although to some extent this is the case in practice, there are problems with the operation of the SFAP.
9. The SFAP is a part time body. It has proved difficult to set dates for SFAP hearings owing to the commitments of the SFAP's busy members. The SFAP only hears appeals after business hours on weekdays and on weekends. This has caused delays in the determination of appeals contrary to the original aim of the SFAP being a quick and effective mechanism for the review of SFC decisions.
10. The SFAP does not have a clear set of procedural rules governing pre-hearing case management. More importantly, none of the members of the panel can devote sufficient time to act as referee over disputes between the parties on matters of pre-hearing procedures. Consequently, there are often significant delays even before attention turns to the substantive issues on appeal.
11. Delays in SFAP proceedings affect both the applicant as well as the Commission and benefit neither: an applicant's uncertainty about the outcome of an appeal is prolonged; and, for the Commission, timely regulatory action is

difficult as most SFC decisions subject to SFAP appeal cannot take effect until an appeal is determined or withdrawn. The defects in the SFAP's operation are not fair to the applicant and hamper efficient and timely action by the Commission.

Securities and Futures Appeals Tribunal

12. A merits review procedure has obvious advantages. It focuses on the substantive issues at stake and gives an applicant a meaningful remedy. A merits review procedure should, if properly structured and resourced, also be more efficient, timely and cost effective than court proceedings for judicial review. This would benefit applicants, the Commission and the investing public.
13. The Commission benefits from merits review in that a challenge to its decision concentrates on the real issue (*i.e.*, was the decision made the right decision?) rather than technicalities and is resolved relatively quickly. Even if its decision is overturned, the Commission will benefit from learning from its past mistakes and improving its policies and procedures.
14. The Composite Bill will continue to provide a mechanism for full merits review of certain SFC decisions. Indeed, as mentioned earlier, the bill will improve the existing setup by replacing the SFAP with a new statutory tribunal, the SFAT, and rectifying the problems currently experienced in relation to the operation of the panel.

Composition and Procedure

15. Under the Composite Bill, any party affected by an SFC decision that is appealable to the SFAT may lodge an appeal with the SFAT, generally within 14 days of that decision being communicated to the affected party. The main categories of SFC decisions that will be appealable to the SFAT are set out in paragraph 21 below.
16. In most cases, an SFC decision that is appealable to the SFAT will not take effect until the time for making an appeal expires or, if an appeal is made, until the appeal is determined or withdrawn. However, certain SFC decisions will need to have immediate effect in the interest of investor protection, such as in the case of a decision imposing conditions on a licensed person concerning dealings in relation to its property or assets or a decision restricting the business activities of a licensed person.
17. In comparison with the SFAP, the SFAT will be a body of superior status. It will be headed by a full-time High Court judge or deputy judge. The two other members who will make up a tribunal to hear an appeal will be chosen as appropriate in any given case because of their expertise in the fields of business, financial services, law or accountancy.
18. One of the intentions behind establishing the SFAT is to create a body with procedures adapted to the swift and precise identification of issues so that appeals can be resolved quickly by concentrating only on those matters essentially in dispute. To this end, the SFAT will have a set of clear procedural rules to provide for efficient case management. These rules will be made under the authority of the Chief Justice and subject to the usual consultation process in respect of such rules. More importantly, the presence on the tribunal of a judge who can preside over pre-hearing conferences and

directions hearings will ensure that the rules are followed, and that disputes between the parties over procedures are resolved quickly and sensibly.

19. The SFAT will have appropriate powers to allow it to function (*e.g.*, to call witnesses, demand production of evidence, administer oaths etc.). The tribunal may exercise these powers on its own motion or at the request of one of the parties.
20. A decision of the SFAT will not have any binding precedent value but will obviously have a significant effect on SFC procedure and policy. An SFAT decision will be final as to questions of fact and will only be appealable on a question of law to the Court of Appeal. The SFAT may also refer a question of law arising during its proceedings to the Court of Appeal, whether on its own motion or on the application of one of the parties.

Jurisdiction

21. The SFAT will continue to review all those decisions on which the SFAP presently has jurisdiction to hear appeals, namely, decisions relating to licensing, discipline and issuance of restriction notices. However, as mentioned earlier, certain other SFC decisions are (or will be under the Composite Bill) also amenable to full merits review by such a body. Accordingly, the SFAT's jurisdiction will be extended to cover a wider range of SFC decisions, including:
 - a decision to reprimand a licensed person;
 - a decision to fine a licensed person;

- a decision to refuse to authorise the registration of a prospectus in respect of an unlisted company (sections 38D and 342C of the Companies Ordinance);
- a decision not to grant a waiver of requirements in relation to a prospectus of an unlisted company (sections 38A and 342A of the Companies Ordinance);
- a decision not to grant an exemption from one or more disclosure of interests requirements;
- a decision not to declare a person to be exempt from compliance with licensing requirements;
- a decision not to widen the range of regulated activities that a licensed person may engage in (under the proposed single-license regime as explained in detail in *Consultation Paper on Review of Licensing Regime*, published in June 1999);
- a decision not to approve an accredited representative to act as a responsible officer (pursuant to a proposed new requirement as explained in *Consultation Paper on Review of Licensing Regime*);
- a decision to appoint auditors to examine, audit, and report on the affairs of a licensed person;
- a decision not to modify the operation of the Financial Resources Rules as applied in a particular case; and
- a decision not to authorise (or a decision to withdraw authorisation for) advertisements, invitations, or other documents made in respect of any securities, other property, or collective investment scheme.

22. A number of factors are relevant in determining whether a particular type of SFC decision is amenable to full merits review by the SFAT. These factors include: (examples cited in brackets are not amenable to full merits review and will not be appealable to the SFAT.)
- whether the decision has significant conclusive implications for an affected person, and does not involve broader policy considerations (*e.g.*, decisions that are made by the Financial Secretary or the Chief Executive or on which they are consulted as required by law);
 - whether the decision is subject to other specialised review mechanism (*e.g.*, the Takeovers and Mergers Panel and the Takeovers Appeal Committee);
 - whether full merits review will render regulation ineffective or will impede the provision of immediate protection to investors when such is necessary. (The Commission’s decision-making process in this regard will be reviewed by the new Process Review Panel, as described in paragraph 24 below.)
23. The type and range of SFC decisions that will be subject to SFAT review is broadly comparable with the situation in the United States, United Kingdom and Australia under their merits review procedures. A person aggrieved by an SFC decision will also continue to enjoy the other remedies of being able to apply for judicial review or complain to the Ombudsman.

Process Review Panel

24. As mentioned earlier, decisions the Commission has to make in the course of the process for arriving at the final substantive conclusions can nevertheless have an impact on the affected persons. To subject the Commission to

external scrutiny in this regard, an independent panel will be established, separately from the Composite Bill, to review aspects of the Commission's internal processes, including investigatory procedures, to ensure impartiality, consistency and accountability in this regard.

25. As currently envisaged, the panel will comprise a majority of independent, prominent public persons, to be appointed by the Chief Executive, as well as some non-executive directors of the Commission. The panel will make its report to the Financial Secretary.

Public Consultation

26. The Government and the Commission strongly believe that the Commission should be accountable to the public, and its exercise of authority subject to appropriate checks and balances. The proposals detailed in this Guide for establishing a Securities and Futures Appeals Tribunal with jurisdiction to review many important decisions of the Commission, together with the creation of a Process Review Panel, will contribute significantly to achieving this objective.
27. We believe that, ultimately, these proposals will improve our regulatory framework and put it on a par with the best of international standards, thereby enhancing Hong Kong's competitiveness as an international financial centre. Comments and views are sought from the financial community and general public. Please write to the Securities and Futures Commission, 12th floor, Edinburgh Tower, The Landmark, 15 Queen's Road, Central, Hong Kong or e-mail to <newbill@hksfc.org.hk>. In view of the tight legislative timetable,

we would be grateful if your comments and suggestions could reach the Commission before 6 August 1999.