

立法會
Legislative Council

LC Paper No. CB(1)1308/05-06
(These minutes have been seen
by the Administration)

Ref: CB1/BC/6/04/1

**Bills Committee on
Securities and Futures (Amendment) Bill 2005**

**Minutes of the seventh meeting
held on Wednesday, 22 March 2006, at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, JP (Chairman)
Hon Ronny TONG Ka-wah, SC (Deputy Chairman)
Hon Margaret NG
Hon Bernard CHAN, JP
Hon CHAN Kam-lam, SBS, JP
Hon Howard YOUNG, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
- Members absent** : Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon WONG Ting-kwong, BBS
Hon CHIM Pui-chung
Hon KWONG Chi-kin
Hon TAM Heung-man
- Public officers attending** : Mr Kevin HO
Permanent Secretary for Financial Services and the
Treasury (Financial Services)
- Miss Alice CHEUNG
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services)

Miss Aubrey FUNG
Assistant Secretary for Financial Services and the
Treasury (Financial Services)

Ms Shandy LIU
Senior Government Counsel
Department of Justice

Attendance by invitation : Securities and Futures Commission

Mr Martin WHEATLEY
Chairman

Miss Doris PAK
Commission Secretary

Clerk in attendance : Miss Polly YEUNG
Chief Council Secretary (1)3

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Rosalind MA
Senior Council Secretary (1)8

I Confirmation of minutes and matters arising

(LC Paper No. CB(1)1062/05-06 - Minutes of meeting held on
14 February 2006)

The minutes of the meeting held on 14 February 2006 were confirmed.

II Paper issued since last meeting

(LC Paper No. CB(1)911/05-06(01) - Information note on "Informal
meeting between Legislative
Council Members and Mr John
TINER, Chief Executive of the
Financial Services Authority of the
United Kingdom held on 2
February 2006" prepared by the
Secretariat)

2. Members noted the above information note issued since the last meeting.

III Meeting with the Administration and the Securities and Futures Commission

- Issues arising from the meeting held on 14 February 2006

(LC Paper No. CB(1)1088/05-06(01) - Administration's response to the issues raised at the meeting on 14 February 2006

LC Paper No. CB(1)1084/05-06 - Hon Emily LAU's suggestion to enhance accountability of the Securities and Futures Commission

- Clause by clause examination of the Bill

LC Paper No. CB(1)800/05-06(01) - Administration's response to the issues raised at the meeting on 5 July 2005 (with proposed amendments to the Bill attached)

LC Paper No. CB(1)1344/04-05(01) - Marked-up copy of the Bill prepared by the Legal Service Division

LC Paper No. LS43/04-05 - The Legal Service Division Report on the Bill

LC Paper No. CB(3)439/04-05 - The Bill

SUB12/2/1(2005)Pt.5 - The Legislative Council Brief issued by the Financial Services and the Treasury Bureau)

3. The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

Delineation of roles and responsibilities between the future Chairman and the Chief Executive Officer (CEO) of the Securities and Futures Commission (SFC)

4. Referring to the recent row between the senior management and the Chairman of the Kowloon-Canton Railway Corporation (KCRC), some members were of the view that the Administration should critically re-examine its current proposal on splitting the functions of the SFC Chairman, in particular the dire consequences which could result from unclear delineation of responsibilities between the Chairman and the CEO. Members noted the Administration's advice that the split model currently proposed would strengthen the internal checks and balances of SFC and that it did not anticipate any problem of cooperation between the two key personnel under the split model. Notwithstanding the Administration's advice, some members urged the Administration to learn from the experience of the KCRC incident and set out in unequivocal terms the division of roles and responsibilities

between the future Chairman and the CEO to ensure the smooth functioning of SFC.

Section 11(1) of the Securities and Futures Ordinance (Cap. 571) (SFO)

5. Some members expressed grave concern that the existing section 11(1) of SFO which provided the Chief Executive (CE) with the power to give written directions to SFC, might compromise the independence of SFC. While noting the Administration's explanation that the provision was a reserve power and a tool of last resort for the Government to implement necessary remedial measures in the most pressing and extreme circumstances, some members maintained their reservation on whether the provision of such a reserve power over the regulator was necessary and in line with the international practice. Some members recapped their concern that section 11(1) should be deleted altogether to remove any possibility of Government intervention in the regulation of the securities and futures market. In this connection, the Administration was requested to provide information on whether a similar reserve power over the regulator was given to the executive government under the legislation of other jurisdictions. Mr CHAN Kam-lam however considered the provision of the reserve power acceptable as the Government should be equipped with the necessary power to deal with the most extreme and pressing circumstances.

6. In connection with the KCRC incident, some members asked whether, in resolving the dispute, CE had exercised any reserve power comparable or similar to section 11(1) of SFO. The Administration was requested to give its advice in this regard. Members also requested the Administration to advise whether it was contemplated that section 11(1) of SFO would be invoked by CE to deal with similar disputes that might arise between the senior management and the SFC Chairman in the future.

7. On the Administration's proposal to amend section 11(1) of SFO to require CE to consult the CEO instead of the Chairman before giving written directions to SFC, some members remained unconvinced by the Administration's reasons put forward in its paper (LC Paper No. CB(1)1088/05-06(01)). They stressed that as the written directions would only be given under very exceptional circumstances, the future Chairman of SFC, being the head of the Commission and responsible for the overall policies and directions of SFC, should be consulted before CE gave any written directions to SFC. It would be illogical and unreasonable to relegate the consultation requirements to the level of the CEO. Moreover, these members further pointed out that as the written direction would likely concern matters of great importance, the consultation requirement might even need to be further strengthened by requiring CE to consult both the Chairman and the CEO as well as the SFC Board before giving directions to SFC.

8. Members noted the Administration's explanation that the reserve power under section 11(1) of SFO would not be used lightly and would only be exercised judiciously for unforeseen and extreme scenarios, such as when there were possible threats to the financial stability of Hong Kong and its status as an international financial centre. Extending the consultation requirement to the Chairman or/and the SFC Board would take time, add complications and restrain the flexibility of CE in issuing timely directions to SFC during emergencies. Moreover, being the head of the executive arm, the CEO was considered by SFC to be in the best position to

respond to or advise CE on what was achievable as to the subject of the written directions under section 11(1) of SFO. The Administration considered it more appropriate to impose an administrative obligation on the CEO to consult the Chairman and any other member(s) of the Commission as appropriate, instead of imposing a legal obligation on the CE to consult both the Chairman and the CEO, or the SFC Board as a whole. Mr CHAN Kam-lam considered the proposed requirement for CE to consult only the CEO before giving written directions to SFC under section 11(1) acceptable.

Safeguards against conflict of interests

9. Referring to the additional safeguard to be imposed on the future SFC Chairman, i.e. He/she should not have any material interest in any principal business activity or be involved in any material business dealing with a listed company or any person or institution engaged in activities regulated by SFC (paragraph 23(ii) of LC Paper No. CB(1)1088/05-06(01)), the Chairman enquired about the circumstances which constituted “material interest” and “material business dealing”, such as reference to precedent cases under the Companies Ordinance (Cap. 32). In particular, the Chairman sought the Administration’s advice on whether a conflict of interests would arise if the future SFC Chairman was a partner of a law firm whose client was a listed company regulated by SFC. He was also concerned whether the additional safeguard would be effective in avoiding conflict of interests and ensuring the independence of the future Chairman given that it was not a statutory requirement and failure to comply with the requirement would not be an offence. He requested the Administration to explain why the requirement was not to be provided in the legislation.

Accountability of the future Chairman and the CEO of SFC

10. To enhance the accountability of the Chairman and the CEO of SFC to the legislature, the Administration was requested to consider Ms Emily LAU’s suggestion of including a provision in the current Bill with reference to the relevant provisions in the Urban Renewal Authority (URA) Ordinance (Cap. 563) (section 9) and the KCRC Ordinance (Cap. 372)(section 6A) requiring the Chairman and the CEO of these bodies to attend meetings of committees and subcommittees of the Legislative Council when requested. Members noted the Administration’s initial response that given the differences in the objectives of the corporations, it might not be appropriate for the provisions applicable to URA and KCRC to be extended to SFC. Moreover, the Administration pointed out that SFC had all along been cooperative with the Legislative Council (LegCo) in arranging its representatives to attend meetings of committees and subcommittees of the LegCo. The LegCo was also provided with the power to order attendance of witnesses under the Legislative Council (Powers and Privileged) Ordinance (Cap. 382). The Chairman requested the Administration to provide its response in writing for members’ consideration.

Quorum for meetings of the Commission

11. Members noted that the Administration had not stipulated in the legislation that the future SFC Chairman was non-executive. Referring to existing section 16 of Part 1 of Schedule 2 of SFO, members noted the observation of the Assistant Legal

Adviser 6 (ALA6) that the attendance of the future SFC Chairman at meetings of the Commission would not be counted for the purpose of forming a quorum for the meeting. In this connection, the Administration was requested to consider the feasibility of revising the aforesaid section of SFO to the effect that for the purpose of a quorum, the attendance of the future SFC Chairman might count.

12. The Bills Committee completed clause by clause examination of the Bill. The Chairman invited members who intended to propose Committee Stage Amendments (CSAs) to the Bill to forward such proposed CSAs to the Secretariat before the next meeting of the Bills Committee to facilitate members' consideration.

(Post-meeting note: The information required in paragraphs 5, 6, 9, 10 and 11 above provided by the Administration and SFC was issued to members vide LC Paper No. CB(1)1200/05-06(02) on 29 March 2006.)

IV Any other business

Date of the next meeting

13. Members agreed that the next meeting of the Bills Committee would be held on Friday, 31 March 2006 at 3:00 pm (or immediately after the House Committee meeting, whichever was later).

14. There being no other business, the meeting ended at 10:30 am.

Council Business Division 1
Legislative Council Secretariat
18 April 2006

**Proceedings of the seventh meeting of the
Bills Committee on Securities and Futures (Amendment) Bill 2005
on Wednesday, 22 March 2006, at 8:30 am
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000725	Chairman	(a) Confirmation of minutes (b) Introductory and welcoming remarks	
<i>Issues arising from the meeting held on 14 February 2006 (LC Paper No. CB(1)1088/05-06(01))</i>			
000726 – 001128	Administration	The Administration's briefing on its response to the issues raised at the meeting on 14 February 2006 (LC Paper No. CB(1)1088/05-06(01)).	
001129 – 004636	Ms Audrey EU Administration Chairman Margaret NG Mr Ronny TONG Mr CHAN Kam-lam	(a) The view shared by Ms Audrey EU, Ms Margaret NG and Mr Ronny TONG that the Administration should re-examine its current proposal on splitting the functions of the SFC Chairman in the light of the recent row between the senior management and the Chairman of KCRC. (b) The Administration's advice that the split model would strengthen the internal checks and balances of SFC. It did not anticipate any problems of cooperation between the two under the split model. (c) Concern shared by Ms Margaret NG and Mr Ronny TONG that section 11(1) of SFO which provided CE with the power to give written directions to SFC, might compromise the independence of SFC. (d) The Administration's explanation that the provision was a reserve power and a tool of last resort for the Government to implement	

Time Marker	Speaker	Subject(s)	Action Required
		<p>circumstances. Mr CHAN considered the proposed requirement for CE to consult only the CEO before giving written direction to SFC under section 11(1) acceptable.</p>	
004637 – 005216	Chairman Administration	<p>The Chairman’s request for information on the circumstances which constituted “material interest” and “material business dealing” under the additional safeguard to be imposed on the future SFC Chairman as stipulated in paragraph 23(ii) of LC Paper No. CB(1)1088/05-06(01). The Chairman’s query on why the requirement was not to be provided in the legislation.</p>	<p>The Administration to take follow-up actions as required in paragraph 9 of the minutes</p>
005217 – 010225	Mr Ronny TONG Ms Margaret NG Administration Mr CHAN Kam-lam	<p>(a) Mr Ronny TONG’s view that the Administration should learn from the experience of the recent row between the senior management and the Chairman of KCRC and set out in unequivocal terms the division of responsibilities between the future Chairman and the CEO of SFC.</p> <p>(b) The Administration’s advice that a clear delineation of roles and responsibilities between the future Chairman and the CEO of SFC had been worked out.</p> <p>(c) Ms Margaret NG reiterated her concern about the provision of the reserve power under section 11(1) of SFO. Given that the Administration could not anticipate the circumstances under which the power would be invoked, Ms NG queried the need for a such a power in the legislation.</p> <p>(d) The Administration’s advice that according to section</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>11(1), CE might only give written direction to SFC upon being satisfied that it was in the public interest to do so.</p> <p>(e) Mr CHAN Kam-lam believed that CE would only use the power provided under section 11(1) under the most pressing and extreme circumstances and in the interest of the community. Mr CHAN's view that the Administration should ensure a clear delineation of roles and responsibilities between the future Chairman and the CEO in the light of the recent KCRC incident.</p>	
010226 – 011111	Chairman Administration Ms Audrey EU	<p>(a) The Chairman referred to Ms Emily LAU's suggestion of including a provision in the current Bill with reference to the relevant provisions in the URA Ordinance (section 9) and the KCRC Ordinance (section 6A) to enhance accountability of SFC to the LegCo (LC Paper No. CB(1)1084/05-06).</p> <p>(b) The Administration's initial response that such explicit provisions might not be necessary as LegCo was already empowered to order attendance of witnesses under the Legislative Council (Powers and Privileged) Ordinance. Moreover, SFC had all along been cooperative in attending meetings of committees of LegCo</p>	The Administration to take follow-up actions as required in paragraph 10 of the minutes
<i>Clause by clause examination of the Bill (Annex B to LC Paper No. CB(1)800/05-06(01))</i>			
011112 – 011799	Administration	Long title and clauses 1 to 2	

Time Marker	Speaker	Subject(s)	Action Required
011800 – 015429	Chairman Administration Mr CHAN Kam-lam Mr Bernard CHAN ALA6 Ms Audrey EU	<p>The following issues were raised during the examination of clause 3:</p> <p>(a) Given that the future Chairman would be non-executive and would not be involved in the day-to-day operation of SFC, the concern of Mr CHAN Kam-lam and Mr Bernard CHAN about the appropriateness or otherwise that either an executive director or a non-executive director (NED) could act as the future SFC Chairman in the latter’s temporary absence.</p> <p>(b) As the future Chairman was non-executive in nature, depending on the circumstances, the Chairman might not be “unable to act” due to minor illness or temporary absence from Hong Kong. Hence, an acting arrangement might not be necessary. In the circumstances that the Chairman was really unable to act and an Acting Chairman was required, the Administration’s policy thinking was for the CEO to act as Chairman. In the event that the Chairman was unable to act for a relatively long period, consideration would be made for a NED to act as Chairman. If circumstances warranted, consideration would be made for the Chief Executive to appoint a new Chairman.</p> <p>(c) ALA6’s concern that whether the power of the Commission to assign functions to the Chairman, Deputy Chairman and the CEO provided under proposed section 9D of the Bill would result in functions assigned being in conflict</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>with the terms of appointment of the Chairman and the CEO.</p> <p>(d) The Administration's advice that the functions of the Chairman and the CEO to be assigned by SFC would be subject to the provisions of SFO and would not conflict with the principles as set out in the proposed roles and responsibilities of the Chairman and CEO, copies of which would be attached to their appointment letters.</p> <p>(e) ALA6's observation that under section 16 of Part 1 of Schedule 2, the attendance of the future SFC Chairman at meetings of the Commission would not be counted for the purpose of forming a quorum for the meeting</p> <p>(f) Ms Audrey EU's request for the Administration to consider revising the aforesaid section of SFO to the effect that for the purpose of a quorum, the attendance of the future SFC Chairman might count.</p> <p>ALA6's observation that the Chairman would have no control over personnel of SFC, must share the power of convening meetings with the CEO and could have his functions being re-assigned by SFC. He queried how effective the Chairman would be able to perform his intended leadership.</p>	<p>The Administration to take follow-up actions as required in paragraph 11 of the minutes</p>
015430 – 015835	Chairman	Date of next meeting	