

立法會
Legislative Council

LC Paper No. CB(1)1749/05-06
(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 ninth meeting
held on Wednesday, 26 April 2006, at 8:30 am
in Conference Room B 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 CHAN Kam-lam, SBS, JP
Hon Howard YOUNG, SBS, JP
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon WONG Ting-kwong, BBS
Hon CHIM Pui-chung
Hon TAM Heung-man
- Members absent** : Hon Bernard CHAN, JP
Hon KWONG Chi-kin
- 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

Action

I Confirmation of minutes and matters arising

(LC Paper No. CB(1)1308/05-06 - Minutes of meeting held on 22
March 2006

LC Paper No. CB(1)1330/05-06 - Minutes of meeting held on 31
March 2006)

The minutes of the meetings held on 22 and 31 March 2006 were confirmed.

II Meeting with the Administration and the Securities and Futures Commission

- Matters arising from the meeting on 31 March 2006

(LC Paper No. CB(1)1315/05-06(01) - Response of the Administration and the Securities and Futures Commission to issues raised at the meeting on 31 March 2006

LC Paper No. CB(1)1315/05-06(02) - Draft Committee Stage
Amendment to clause 1 of the
Bill prepared by the Legal
Service Division of the
Secretariat)

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

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

3. Some members remained gravely concerned that the existing section 11(1) of SFO, which provided the Chief Executive (CE) with the power to give written directions to the Securities and Futures Commission (SFC), might compromise the independence of SFC. Members noted the Administration's reiteration that giving written directions to SFC was a reserve power not to be used lightly and might only be invoked subject to statutory restrictions embedded in section 11(1) of SFO –

(a) it was in the interest of the public to do so; and

(b) the written direction must be for the furtherance of any of the regulatory objectives of SFC or the performance of any of its functions under the SFO.

4. Some members however doubted whether the above statutory restrictions could ensure that the reserve power under section 11(1) would be properly exercised without abuse, since the expression “public interest” was not defined in the legislation.

5. Members noted that the Administration, having carefully re-examined the proposed amendment (i.e. to amend section 11(1) of SFO to require CE to consult the Chief Executive Officer (CEO) instead of the Chairman before giving written directions to SFC) in consultation with SFC, still considered its proposal of consulting the CEO more desirable and practicable. In anticipation of the dire circumstances where section 11(1) would need to be invoked, 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 CE to consult both the Chairman and the CEO of SFC.

6. Ms Margaret NG requested to put on record that she did not accept the Administration's explanation for the proposed consultation arrangement. Ms Emily LAU reiterated her doubt about the propriety of the consultation arrangement and questioned the justification for not requiring CE to consult the future SFC Chairman, who would lead the SFC Board, before giving written directions to SFC. Mr Ronny TONG was concerned that the inclusion of merely an administrative requirement in the CEO's duty list that he should inform and consult the Chairman and the SFC Board on all matters of significance to SFC was

insufficient. As such, there was no guarantee that the CEO would involve the Chairman and/or the Board when being consulted by CE under the proposed section 11 (1) of SFO.

7. Members noted the view of SFC that the CEO would be in the best position to respond to or advise CE on what was achievable as to the subject of the written directions. On the desirability or otherwise of the subject of the written directions, SFC's view was that the CEO might not be in a position to tender advice to CE without first consulting the Chairman and/or the SFC Board. As such, with regard to both the achievability and desirability of the written directions to be given under section 11(1) of SFO, SFC considered it appropriate for the CEO to act as the channel for consultation by CE.

8. Mr CHIM Pui-chung suggested that section 11 (1) might be amended to impose the obligation for CE to consult the Chairman and/or the CEO before giving written directions to SFC. Nevertheless, some members considered that the use of "and/or" lacked clarity.

9. On whether it was within the scope of the Bill to move a Committee Stage Amendment (CSA) to delete section 11 from SFO, members noted the Assistant Legal Adviser 6 (ALA6)'s advice that the ultimate decision would rest with the President of the Council. He nevertheless pointed out that given the objective of the Bill to implement the splitting arrangement, it would be debatable as to whether the proposed deletion of section 11 would be within the scope of the Bill. As the Administration had proposed a CSA to section 11 (1) of SFO, ALA6 advised that Members' proposal to amend the CSA to section 11(1) to put in place the consultation arrangement which members considered appropriate would be argued to be within the scope of the Bill. Since there was no general agreement on the appropriate consultation arrangement, the Chairman said that the Bills Committee would not move any CSA to section 11(1) in its name. Individual members might consider whether they would wish to move any CSA in this regard in their personal capacity.

10. Referring to the Administration's written response (LC Paper No. CB(1)1315/05-06(01)) to her earlier suggestion of adding a provision in section 11 of SFO to require the Administration to make public announcement of the written directions issued, Ms Emily LAU disagreed with the Administration's view that imposing a legal obligation on CE was outside the scope of the Bill. Ms LAU regretted that the Administration had failed to take on board the reasonable suggestions of members of the Bills Committee.

Merits of the proposed split model

11. Ms Margaret NG expressed reservation towards the effectiveness of the Bill in enhancing the independence of SFC. Referring to a report on an interview with Mr Martin WHEATLEY, the incumbent Chairman of SFC, published in the "Asiamoney", Ms Emily LAU sought clarification from Mr WHEATLEY on his views towards the splitting proposal. Ms LAU said that according to the report, it appeared that Mr WHEATLEY regarded the proposed appointment of a

non-executive SFC Chairman politically driven rather than market driven and that he expressed worry about unclear accountability line with the SFC Chairman acting as a shield against the organization.

12. Members noted the response of Mr Martin WHEATLEY that he had not read the interview report, that he was fully aware of the proposed split model when taking up the chairman post in 2005 and that as far as he knew, the split model was initiated by the Administration rather than from any strong market urge. Mr WHEATLEY advised that since taking up his current post, he had engaged in constructive discussion with the SFC Board on the delineation of roles and responsibilities between the future Chairman and CEO with a view to achieving a workable arrangement under the split. He believed that with the preparatory work done for the implementation of the proposed split, the new governance structure would be effective.

Accountability of the future Chairman and CEO of SFC

13. Members noted that, having considered members' suggestion of including a provision in the current Bill requiring the Chairman and the CEO of SFC to attend meetings of committees and subcommittees of the Legislative Council (LegCo) when requested, the Administration had instead proposed to include the requirement in the respective duty list of the Chairman and the CEO, which would be attached to their appointment letters. Some members questioned whether the Chairman and the CEO would be in breach of the terms of their appointment if they did not comply with the requirement for attendance. Members noted the Administration's advice that whether or not the officers had breached the terms of appointment would need to be considered in the light of the actual circumstances such as whether arrangement had been made for SFC officers at the appropriate level to attend the meetings concerned. Mr Ronny TONG considered that a mere requirement in the duty lists of the SFC Chairman and the CEO was ineffectual because such a requirement could not be enforced by law.

14. Members considered the draft CSA to clause 1 of the Bill prepared by the Legal Service Division of the LegCo Secretariat (LC Paper No. CB(1)1315/05-06(02)). Some members agreed that the attendance requirement should be stipulated in the legislation as in the case of the Urban Renewal Authority Ordinance (Cap. 563) and the Kowloon-Canton Railway Corporation Ordinance (Cap. 372). Some other members however supported the Administration's proposal of including the attendance requirement in the duty lists of the Chairman and the CEO and shared the view that flexibility should be allowed for SFC to decide on the appropriate level of representation. The Chairman concluded that as there was no consensus among members on the draft CSA, the Bills Committee would not move the CSA in its name but individual members might consider doing so.

15. Ms Emily LAU pointed out that although the Administration had rejected the suggestion to include the attendance requirement in the Bill, this should not be taken to imply that as a matter of future practice, such a requirement should not or would not be included in the governing legislation of a statutory body.

Legislative timetable

16. The Chairman concluded that the Bills Committee had completed its work and that members would not object to the resumption of the Second Reading Debate on the Bill. Members noted the Administration's intention to resume the Second Reading Debate at the Council meeting on 7 June 2006. The Bills Committee would report to the House Committee on 19 May 2006 and the deadline for giving notice of CSA would be 27 May 2006. The Chairman advised that Bills Committee members who intended to propose CSAs to the Bill in their names were invited to forward such proposed CSAs to the Secretariat as soon as practicable for onward circulation to all members of the Bills Committee for their information. After discussion, members agreed that it would not be necessary to convene a meeting to consider the CSAs, if any, proposed by individual member.

17. In this connection, Ms Margaret NG remarked that in view of the Bills Committee's decision, it would not be fair for members at the resumption of the Second Reading Debate to state their objection to the CASs proposed by individual members solely on the ground that the Bills Committee had not held a meeting to discuss them.

(Post-meeting note: The Administration subsequently advised that the Second Reading Debate of the Bill would be resumed on 14 June 2006. The date for the Bills Committee to report to the House Committee and the deadline for giving notice of CSA would be 2 and 5 June 2006 respectively. Members were informed of the updated legislative timetable vide LC Paper No CB(1)1433/05-06 issued on 8 May 2006.)

III Any other business

18. There being no other business, the meeting ended at 9:50 am.

Council Business Division 1
Legislative Council Secretariat
13 June 2006

**Proceedings of the ninth meeting of the
Bills Committee on Securities and Futures (Amendment) Bill 2005
on Wednesday, 26 April 2006, at 8:30 am
in Conference Room B of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000052	Chairman	(a) Confirmation of minutes (b) Introductory and welcoming remarks	
<i>Matters arising from the meeting held on 31 March 2006</i>			
000100 – 000724	Administration	The Administration's briefing on its response to the issues raised at the meeting on 31 March 2006 (LC Paper No. CB(1)1315/05-06(01)).	
000725 – 000802	Ms Margaret NG	Ms Margaret NG's view that the reserve power under section 11(1) might compromise the independence of SFC. She did not accept the Administration's explanation for the proposed consultation arrangement.	
000803 – 001401	Ms Emily LAU SFC Chairman	(a) Ms Emily LAU's comment that she would not agree with the Administration's view that imposing a legal obligation on CE to make public announcement of the written directions given to SFC under section 11(1) of SFO was outside the scope of the Bill. (b) Referring to the report on an interview with the SFC Chairman published in the "Asiamoney", Ms Emily LAU sought clarification from SFC Chairman. (c) SFC Chairman's explanation that he was fully aware of the proposed split model when taking up the chairman post in 2005.	

Time Marker	Speaker	Subject(s)	Action Required
001402 – 004112	Mr Ronny TONG SFC Chairman Administration Chairman Ms Emily LAU Mr CHIM Pui-chung Ms Margaret NG ALA 6	<p>(a) Mr Ronny TONG’s concern that the requirement for the CEO to inform and consult the Chairman and the SFC Board on all matters of significance to SFC in the duty list of the CEO imposed no legal obligation. As such, there was no guarantee that the CEO would involve the Chairman and/or the Board when being consulted by CE under the proposed section 11 (1).</p> <p>(b) SFC’s view that as the CEO would be in the best position to respond to or advise CE on what was achievable as to the subject of the written directions. On the desirability or otherwise of the subject of the written directions, the CEO would likely need to consult the Chairman and/or the SFC Board before giving advice to CE.</p> <p>(c) Concern shared by Ms Emily LAU and Ms Margaret NG that the SFC Chairman was not required by law to be consulted by CE before he gave written directions to SFC.</p> <p>(d) The Administration’s reiteration that giving written directions to SFC was a reserve power not to be used lightly and might only be invoked subject to the statutory restrictions embedded in section 11(1) of SFO.</p> <p>(e) The need for the Administration to respond to exceptional circumstances in a timely manner.</p> <p>(f) Mr Ronny TONG’s doubt about the statutory restrictions embedded in section 11(1).</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(g) Mr CHIM Pui-chung's suggestion that section 11(1) might be amended to impose an obligation on CE to consult the Chairman and/or the CEO before giving written directions to SFC.</p> <p>(h) Members' view that the use of "and/or" lacked clarity.</p> <p>(i) ALA6's advice that whether the proposed deletion of section 11 was within the scope of the Bill would need to be decided by the President of the Council.</p> <p>(j) ALA6's advice that it could be argued that it was in order to propose an amendment to the CSA to section 11(1) to put in place the consultation arrangement which members considered appropriate, given that the Administration had proposed to move a CSA to the section.</p>	
004113 – 010035	<p>Chairman Ms Emily LAU Administration ALA6 Mr Ronny TONG Ms Margaret NG Mr Howard YOUNG Mr Jeffrey LAM Mr CHAN Kam-lam</p>	<p>(a) Ms Emily LAU's concern whether the Chairman and the CEO would be in breach of the terms of their appointment if they did not comply with the requirement to attend meetings of committees and subcommittees of the LegCo as set out in their duty lists.</p> <p>(b) The Administration's advice that it would be necessary to examine the circumstances of each case.</p> <p>(c) View shared by Ms Emily LAU and Mr Ronny TONG that the statutory requirement for the Chairman and the CEO to attend meetings of the committees and subcommittees of LegCo would be an</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>enhancement to the accountability of SFC to the legislature.</p> <p>(d) View shared by Mr Howard YOUNG, Mr Jeffrey LAM and Mr CHAN Kam-lam that the Administration’s proposal of including the attendance requirement in the duty lists of the Chairman and CEO was acceptable. Their view that it would be for individual members to propose CSAs to put in place such an attendance requirement.</p> <p>(e) Ms Emily LAU’s remark that, although the Administration had rejected the suggestion to include the attendance requirement in the Bill, this should not be taken to imply that as a matter of future practice, such a requirement should not or would not be included in the governing legislation of a statutory body.</p>	
10036 – 011224	<p>Chairman Administration Ms Margaret NG Clerk Mr Ronny TONG Mr CHIM Pui-chung Mr CHAN Kam-lam Mr Andrew LEUNG</p>	<p>(a) Mr CHIM Pui-chung’s suggestion that section 11(1) might be amended to impose the obligation for CE to consult the Chairman and/or the CEO before giving written directions to SFC.</p> <p>(b) View shared by Mr Ronny TONG, Mr CHAN Kam-lam and Ms Margaret NG that the use of “and/or” lacked clarity</p> <p>(c) Members discussed and agreed that it would not be necessary to schedule another meeting to consider proposed CSAs to be moved by individual members in their own names, if any.</p> <p>(d) Ms Margaret NG’s remark that she hoped that no members</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>would oppose to the CSAs proposed by individual members simply on the ground that these had not been considered by the Bills Committee at a meeting.</p> <p>(e) Legislative timetable</p>	

Council Business Division 1
Legislative Council Secretariat
13 June 2006