

立法會
Legislative Council

LC Paper No. CB(1)1527/05-06
(These minutes have been seen
by the Administration)

Ref : CB1/BC/13/04

Bills Committee on Financial Reporting Council Bill

**Minutes of the fourteenth meeting held on
Monday, 10 April 2006, at 8:30 am
in Conference Room B of the Legislative Council Building**

- Members present** : Hon TAM Heung-man (Chairman)
Hon Albert HO Chun-yan
Hon Bernard CHAN, JP
Hon CHAN Kam-lam, SBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Emily LAU Wai-hing, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Ronny TONG Ka-wah, SC
- Members absent** : Dr Hon LUI Ming-wah, SBS, JP
Hon SIN Chung-kai, JP
- Public officers attending** : Mr Albert LAM
Deputy Secretary for Financial Services and the Treasury
(Financial Services)
- Mr Alan LO
Principal Assistant Secretary for Financial Services and the
Treasury (Financial Services)
- Mr Jackie LIU
Assistant Secretary for Financial Services and the Treasury
(Financial Services)

Mr Gordon JONES, JP
Registrar of Companies

Mr Lawrence PENG
Senior Assistant Law Draftsman
Department of Justice

Miss Selina LAU
Government Counsel
Department of Justice

Clerk in attendance : Miss Salumi CHAN
Chief Council Secretary (1)5

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

Mr Paul WOO
Senior Council Secretary (1)3

Mr Justin TAM
Council Secretary (1)3

I. Confirmation of minutes of meeting
(LC Paper No. CB(1)1255/05-06 — Minutes of eleventh meeting
held on 24 February 2006)

The minutes of the eleventh meeting held on 24 February 2006 were confirmed.

II. Meeting with the Administration

- (LC Paper No. CB(1)1256/05-06(01) — “Follow-up to the eleventh meeting on 24 February 2006” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1256/05-06(02) — “Follow-up to the twelfth meeting on 24 March 2006” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1256/05-06(03) — “Follow-up to the thirteenth meeting on 31 March 2006” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1256/05-06(04) — “Extracts of the papers previously provided by the Administration on clause 14” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1256/05-06(05) — Paper provided by the Administration on “Funding arrangement for the Financial Reporting Council”
- LC Paper No. CB(3)713/04-05 — The Bill
- LC Paper No. CB(1)1127/05-06(01) — Marked-up copy of the Bill showing the draft Committee Stage amendments proposed by the Administration (March 2006)
- LC Paper No. CB(1)1127/05-06(02) — “Summary of outstanding issues of concern and proposed amendments to individual clauses of the Bill (Position as at 22 March 2006)” prepared by the Legislative Council Secretariat

LC Paper No. CB(1)166/05-06(03) — Paper provided by the Administration on “Summary of submissions and Administration’s responses”)

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

Clause 14 – Written directions of the Chief Executive (CE)

The Bills Committee’s deliberations

3. The gist of the Bills Committee’s deliberations on clause 14 was set out in **Appendix**.

Member’s proposed amendments to clause 14

4. Mr Ronny TONG considered that the CE should not be empowered to give written directions to the FRC. However, if the Administration maintained its view that the CE should be given such power, the power should be restricted. In this connection, Mr TONG proposed that the following amendments be moved to clause 14 by the Bills Committee:

- (a) To stipulate in clause 14 that the CE might give written directions to the FRC to undertake an investigation when the FRC was found to have committed serious and obvious faults in handling a complaint or conducting an investigation. In other words, the CE would not be empowered to give written directions to the FRC under other circumstances, e.g. to discontinue an investigation or vary its decisions; and
- (b) To delete clause 14(3).

5. The Chairman put Mr Ronny TONG’s proposal to vote. Of the seven members present, two members voted for and five members voted against the proposal. The Chairman declared that the proposal was not endorsed by the Bills Committee. It would be for individual members to decide whether they would move Committee Stage amendments to clause 14.

Follow-up actions to be taken by the Administration

Admin 6. At the request of the Bills Committee, the Administration agreed to take the following actions:

Clause 14 – Written directions of the CE

- (a) As agreed, SFST would incorporate in his speech resuming the Second Reading debate on the Bill the gist of paragraphs 13 and 14 of the paper on “Appointment to and Checks and Balances on the Proposed Financial Reporting Council” (LC Paper No. CB(1)166/05-06(02)), including the following points:
- (i) Clause 14 was a tool of last resort for the Administration, through the CE, to implement necessary remedial measures in the most pressing and extreme circumstances;
 - (ii) The CE would take into account all prevailing circumstances, including whether there was any major malfunction on the part of the FRC, whether the reputation of Hong Kong as an international financial centre was at stake, the urgency of remedial actions required of the FRC, and whether other checks and balances were performed effectively at the time; and
 - (iii) No direction had ever been given by the CE in the past in accordance with relevant provisions in other ordinances, as this reserve power was not intended to be used lightly.

Clause 29 – Investigator to consult the relevant authorities before imposing certain requirements on a person

- (b) The Administration was requested to consider a member’s suggestion that the purpose for the investigator to consult the relevant authorities be set out in clause 29.

Clauses 31 and 32 – Failure to comply with the requirements under clauses 25 to 28

- (c) Clause 31 set out the offences for failures to comply with the requirements imposed under clauses 25 to 28, and clause 32 empowered the FRC or the Audit Investigation Board to apply to the Court of First Instance for inquiries into such failures. Members noted the Administration’s advice that under clauses 31(10) and 32(4), a person who did not comply with the relevant requirement was protected from the “double jeopardy” of a criminal prosecution under clause 31 and a court order under clause 32. In other words, if a person who had not complied with a requirement imposed by the investigator was subject to a court order under clause 32, he would not face a separate prosecution

for a non-compliance with the same requirement under clause 31, and vice versa. The legal adviser to the Bills Committee considered that the limitation provided under clause 32(4) should apply only to the non-compliance specified in clause 31(1) (i.e. failure to comply without reasonable excuse), but not to those specified in clause 31(2) to (8) (which involved false representation and intent to defraud). The Administration was requested to re-consider the drafting in the light of the policy intent.

Date of next meeting

7. The Chairman reminded members that the next meeting would be held on Friday, 28 April 2006, at 8:30 am.

III. Any other business

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

Council Business Division 1
Legislative Council Secretariat
19 May 2006

**Proceedings of the fourteenth meeting of the
Bills Committee on Financial Reporting Council Bill
on Monday, 10 April 2006, at 8:30 am
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action Required
000000-000035	Chairman	<i>Confirmation of minutes of meeting</i> (LC Paper No. CB(1)1255/05-06)	
000036-000758	Chairman Administration	<p><i>Matter arising from previous meetings</i></p> <p><u>Clause 14 – Written direction of the Chief Executive (CE)</u></p> <p>The Chairman’s recapitulation of the points of concern raised by members on clause 14 at the last meeting (Items 2 and 3 of LC Paper No. CB(1)1256/05-06(03))</p> <p>The Administration’s verbal response that while the Secretary for Financial Services and the Treasury (SFST) was not available to attend the meeting, he had considered members’ views raised at the last meeting on clause 14. The Administration’s position was as follows:</p> <p>(a) Checks and balances were provided in the Bill to ensure that the CE would exercise his power under clause 14 in an appropriate manner. As set out in clause 14(1), three</p>	

Time marker	Speaker	Subject(s)	Action Required
		<p>conditions must be met before the CE could exercise his power of giving directions to the FRC: The direction must be in the public interest; the CE must first consult the Chairman of the FRC; and the directions must be with respect to the performance of the FRC's function as stipulated in clause 9;</p> <p>(b) There was no provision in the Bill prohibiting the disclosure of the written directions given by the CE to the FRC. The CE would decide whether to make public such written directions, and if so, in what manner, in light of actual circumstances. Given that the nature and content of the written directions could not be anticipated at the present stage, it was not appropriate to mandate the disclosure of the directions;</p> <p>(c) The proposed arrangement under clause 14 was in line with that adopted by some other statutory bodies in the financial services sector, such as the Securities and Futures Commission (SFC). Indeed, the provision in clause 14 was modelled on section 11 of the Securities and Futures Ordinance (SFO) (Cap. 571); and</p>	

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		<p>(d) At members' request, SFST had agreed that he would incorporate in his speech resuming the Second Reading debate on the Bill the gist of paragraphs 13 and 14 of the paper on "Appointment to and Checks and Balances on the Proposed Financial Reporting Council" (LC Paper No. CB(1)166/05-06(02)), including the points set out in paragraph 6(a)(i) to (iii) of the minutes of this meeting</p>	<p>The Administration to take action under paragraph 6(a) of the minutes</p>
000759-001331	Mr Albert HO Ms Emily LAU	<p>Members' views, as follows:</p> <p>(a) LegCo Members had on a number of occasions expressed concern on the need to empower the CE to give directions to statutory bodies;</p> <p>(b) For this Bill, if the CE was empowered to give written directions to the FRC:</p> <p>(i) The circumstances under which the CE might exercise such power should be set out in the Bill;</p> <p>(ii) In connection with item (i) above, apart from the three conditions set out in clause 14(1), it should be set out clearly in the</p>	

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		<p>Bill that the CE would take into account all prevailing circumstances, including whether there was any major malfunction on the part of the FRC, whether the reputation of Hong Kong as an international financial centre was at stake, the urgency of remedial actions required of the FRC, and whether other checks and balances were performed effectively at the time. While SFST had agreed to incorporate these factors for consideration in his speech resuming the Second Reading debate on the Bill, as the speech did not form part of the Bill, the preferred approach was for the Administration to incorporate these factors for consideration in clause 14; and</p> <p>(iii) The directions should be disclosed, though not immediately when the directions were given but at an appropriate time, so as to enable the public to know what</p>	

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		<p>directions had been given by the CE to the FRC and the circumstances involved</p>	
001332-001757	Mr Ronny TONG	<p>Member's view, as follows:</p> <ul style="list-style-type: none"> (a) Supportive of the suggestions mentioned in item (b) above; (b) As the functions and powers of the FRC were different from those of the SFC, it was not appropriate for the Administration to model clause 14 on the relevant provisions of the SFO. While the SFC, which was a regulator of the securities and futures industry, had a wide range of functions, the FRC mainly performed an investigatory or enquiry function; and (c) It was envisaged that the scope of the written directions to be given by the CE to the FRC might be confined to three aspects, i.e. to direct the FRC: to undertake an investigation; to discontinue or not to undertake an investigation; and to vary its decisions. The second and third aspects were the areas of concern. The public should have the right to know what directions had been given by the CE to the FRC. The 	

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		Administration's view that it was not appropriate to mandate the disclosure of the CE's directions was not convincing	
001758-002500	Mr Jeffrey LAM Dr Philip WONG	<p>Members' views, as follows:</p> <ul style="list-style-type: none"> (a) Supportive of the Administration's proposal to empower the CE to give written directions to the FRC; (b) It was expected that the CE would act in accordance with the requirements in clause 14 and ensure that the three conditions set out in clause 14(1) were met before exercising his power; and (c) It was not possible to set out exhaustively the circumstances under which the CE would exercise his power under clause 14 	
002501-002936	Ms Emily LAU Mr Albert HO Mr Ronny TONG	<p>Members' views and concerns, as follows:</p> <ul style="list-style-type: none"> (a) It seemed that the arrangement for the executive bodies to give directions to statutory bodies was not found in other jurisdictions; and (b) It should be set out in the annual report of the FRC whether the CE had exercised his power under clause 14 	

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002937-003630	Mr Bernard CHAN Administration	<p>A member pointed out that at the meeting of the Panel on Financial Affairs held on 3 April 2006, concern had been raised on how the transparency of the SFC's decisions on not taking any follow-up actions, investigations and/or enforcement actions in respect of possible breaches of the market misconduct provisions under the SFO could be enhanced. He enquired how the Administration could address the concern about the need to enhance the transparency of the written directions given by the CE to the FRC.</p> <p>The Administration advised that under the proposed amendments to clause 35, the FRC might cause an investigation report, or any part of the report, to be published. There was no provision in the Bill prohibiting the disclosure of the CE's written directions in the report. In this connection, in deciding whether or not to cause an investigation report, or any part of the report, to be published, the FRC should take into account the following factors set out in the proposed new subclause (6) of clause 35:</p> <p>(a) whether or not the publication might adversely affect –</p> <p>(i) any criminal proceedings before a</p>	

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		<p>court or magistrate;</p> <p>(ii) any proceedings before the Market Misconduct Tribunal; or</p> <p>(iii) any proceedings under Part V of the Professional Accountants Ordinance (Cap. 50), that had been or were likely to be instituted;</p> <p>(b) whether or not the publication might adversely affect any person named in the report; and</p> <p>(c) whether or not the report, or that part of the report, should be published in the interest of the investing public or in the public interest</p>	
003631-003710	Chairman Registrar of Companies	In response to the Chairman, the Registrar of Companies advised that he, in his capacity as a member of the Council of the Hong Kong Institute of Certified Public Accountants (HKICPA), was not aware that clause 14 was an issue of concern to the Institute	
003711-004002	Mr CHAN Kam-lam Mr Jeffrey LAM	Members expressed reservations on the proposal to mandate the disclosure of the CE's written directions, as the disclosure might have adverse impacts on the market and the parties concerned	

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004003-005008	Ms Emily LAU Administration	<p>(a) Member’s suggestion that the conditions set out in the proposed new subclause (6) of clause 35 be adopted for clause 14 to the effect that the CE’s written directions should be disclosed if the disclosure would not adversely affect any relevant proceedings that had been or were likely to be instituted and any person concerned, and the disclosure would be in the interest of the investing public or in the public interest</p> <p>(b) The Administration’s advice that clause 14 was modelled on the relevant provisions of SFO. Given that the current arrangement under SFO had been working well, it was appropriate to adopt the same arrangement for the FRC. The Administration’s stance was that the CE’s written directions might be disclosed if circumstances permitted. However, given that the nature and content of the written directions could not be anticipated at the present stage, it was not appropriate to mandate the disclosure of the directions</p> <p>(c) The Administration’s advice that the arrangement for empowering the CE to give written directions to some statutory bodies in the</p>	

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		<p>financial services sector was made to cater for the circumstances in Hong Kong and the same arrangement was not particularly found in other jurisdictions. Such an arrangement had not affected Hong Kong's status as an international financial centre</p> <p>(d) Member's view that no adverse impact of the arrangement had been identified because the CE had so far not exercised his power under the SFO and other relevant ordinances to give written directions. However, if the same arrangement was adopted for the FRC, when the CE decided to exercise his power to give written directions but not to disclose the directions, the public would never know that the CE had given the directions and the impact of such directions. The member was concerned that the proposed arrangement under clause 14 was not in line with international practices and was not conducive to the development of a good business environment in Hong Kong</p> <p>(e) The Administration's advice that different jurisdictions had different frameworks governing the operation of</p>	

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		<p>market regulators. The different frameworks adopted by other jurisdictions might enable them to use other means of control or influences over the market regulators. Nevertheless, the proposed arrangement under clause 14 was the same as that under the SFO and other relevant ordinances, which had been working well in Hong Kong for some years. Clause 14 was the last resort of the Administration, and the CE would not use the power under the clause lightly</p>	
005009-010021	Mr Ronny TONG Mr CHAN Kam-lam	<p>(a) A member's view that the CE should not be empowered to give written directions to the FRC. However, if the Administration maintained its view that the CE should be given such power, the power should be restricted. The member proposed that the following amendments be moved to clause 14 by the Bills Committee:</p> <p>(i) To stipulate that the CE might give written directions to the FRC to undertake an investigation when the FRC was found to have committed serious and obvious faults in handling a complaint or</p>	

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		<p>conducting an investigation. In other words, the CE would not be empowered to give written directions to the FRC under other circumstances, e.g. to discontinue an investigation or vary its decisions; and</p> <p>(ii) To delete clause 14(3).</p> <p>(b) Another member's view that clause 14(1), (2) and (3) should be read as a whole. Clause 14(1) provided that three conditions must be met before the CE could exercise his power of giving written directions to the FRC. The proposed amendments mentioned in item (a) above would make the power too restrictive</p>	
010022-011109	Ms Emily LAU Administration	<p>(a) Member's reiteration of her concerns that the proposed arrangement under clause 14 was not in line with international practices, and that if there were rumours spreading around that the CE had given written directions to the FRC and yet the directions were not disclosed, it might also have adverse impacts on the market and the parties concerned</p> <p>(b) The Administration's</p>	

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		<p>reiteration of its advice that the proposed arrangement under clause 14 was the same as that under the SFO and other relevant ordinances, which had been working well in Hong Kong for some years. Clause 14 was the last resort of the Administration, and the CE would not use the power under the clause lightly</p> <p>(c) Member's view that even if the CE's written directions were not disclosed, it should at least be disclosed that the CE had given written directions to the FRC. The Administration's advice that there was no provision in the Bill prohibiting the CE from doing so</p>	
011110-011226	Dr Philip WONG	Purpose of the Bill	
011227-011352	Chairman Ms Emily LAU	Voting on Mr Ronny TONG's proposal for the Bills Committee to move the amendments to clause 14 as set out in paragraph 4(a) and (b) of the minutes of this meeting	
011353-011819	Chairman Ms Emily LAU Clerk Administration Assistant Legal Adviser 6 (ALA6)	Anticipated timeframe for concluding scrutiny of the Bill and deadline for giving notice of Committee Stage amendments	

Time marker	Speaker	Subject(s)	Action Required
011820-012335	Administration Ms Emily LAU Chairman	<p><i>Matter arising from previous meetings</i></p> <p><u>Funding arrangements for the FRC</u> (LC Paper No. CB(1)1256/05-06(05))</p> <p>(a) The Administration's proposals that discussion on the paper be deferred until the Bills Committee had completed clause-by-clause examination of the Bill, and that HKICPA be invited to join the discussion</p> <p>(b) Members' agreement to the Administration's proposals mentioned in item (a) above</p> <p>(c) A member's view that sufficient funding should be made available to the FRC for the effective performance of its functions. Where necessary, additional funding contribution beyond the proposed commitments should be sought from the relevant parties, i.e. the Hong Kong Exchanges and Clearing Limited, HKICPA, the SFC and the Administration</p>	

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012336-014409	Administration Ms Emily LAU Mr Bernard CHAN ALA6	<p><i>Clause-by-clause examination of the Bill with draft CSAs proposed by the Administration</i> (LC Paper Nos. CB(1)1127/05-06(01) & (02), CB(1)166/05-06(03))</p> <p><u>Clause 29 – Investigator to consult the relevant parties before imposing certain requirements on a person</u></p> <p>(a) The Administration’s advice that by requiring the FRC to consult the Monetary Authority, the Insurance Authority, the SFC and the Mandatory Provident Fund Schemes Authority before imposing certain requirements on a person, clause 29 would enable these regulatory authorities to take appropriate coordination measures in collaboration with the FRC where necessary</p> <p>(b) A member’s request for the Administration to consider setting out the purpose for the investigator to consult the relevant authorities in clause 29</p>	The Administration to take action under paragraph 6(b) of the minutes
014410-014551	Administration	<p><u>Clause 30 – Use of incriminating evidence in proceedings</u></p> <p>Briefing by the Administration on</p>	

Time marker	Speaker	Subject(s)	Action Required
		clause 30	
014552-015828	Administration ALA6 Ms Emily LAU	<p><u>Clauses 31 and 32 – Failure to comply with the requirements under clauses 25 to 28</u></p> <p>(a) Briefing by the Administration on clauses 31 and 32</p> <p>(b) Briefing by the Administration on its responses to the views of Mr Simon YOUNG and the Association of International Accountants (Hong Kong Branch) on clause 31 (LC Paper No. CB(1)1127/05-06(02))</p> <p>(c) The Administration’s advice that under clauses 31(10) and 32(4), a person who did not comply with the relevant requirement was protected from the “double jeopardy” of a criminal prosecution under clause 31 and a court order under clause 32. In other words, if a person who had not complied with a requirement imposed by the investigator was subject to a court order under clause 32, he would not face a separate prosecution for a non-compliance with the same requirement under clause 31, and vice versa</p> <p>(d) ALA6’s view that the</p>	

Time marker	Speaker	Subject(s)	Action Required
		<p>limitation provided under clause 32(4) should apply only to the non-compliance specified in clause 31(1) (i.e. failure to comply without reasonable excuse), but not to those specified in clause 31(2) to (8) (which involved false representation and intent to defraud)</p> <p>(e) Request for the Administration to re-consider the drafting in the light of the policy intent</p>	<p>The Administration to take action under paragraph 6(c) of the minutes</p>
015829-015912	Chairman	Date of next meeting	

Council Business Division 1
Legislative Council Secretariat
 19 May 2006