

**President's ruling on
Committee Stage Amendment to
Securities and Futures (Amendment) Bill 2005
proposed by Hon Margaret NG**

Hon Margaret NG has given notice to move a Committee Stage Amendment ("CSA") to the Securities and Futures (Amendment) Bill 2005 ("the Bill"), if the Bill gets its Second Reading at the Council meeting to be held on 14 June 2006. I am required to rule whether it complies with Rule 57 of the Council's Rules of Procedure. Before making this ruling, I have invited the Secretary for Financial Services and the Treasury ("SFST") to offer his comments on the CSA, and Hon Margaret NG to offer her response. I have also sought the advice of Counsel to the Legislature.

Purpose of the proposed amendment

2. Hon Margaret NG's proposed CSA seeks to add a new clause 1A to the Bill, to repeal section 11 of the Securities and Futures Ordinance ("the Ordinance") (Cap. 571).
3. Section 11 currently provides, inter alia, that after consultation with the Chairman of the Securities and Futures Commission ("SFC"), the Chief Executive ("CE") may, upon being satisfied that it is in the public interest to do so, give the SFC written directions as to the furtherance of any of its regulatory objectives or the performance of any of its functions. If it is repealed, the effect will be that the CE will be deprived of the power to give directions to the SFC.

The Administration's View

4. SFST is of the view that the CSA proposed by Hon Margaret NG does not comply with the requirements of Rule 57(4)(a) of the Rules of Procedure. Rule 57(4)(a) of the Rules of Procedures stipulates that an amendment relating to a bill must be relevant to the subject matter of the bill and to the subject matter of the clause to which it relates.
5. SFST states that the Explanatory Memorandum of the Bill clearly states that the main purpose of the Bill "is to provide for the separation of the role of the chairman of the Securities and Futures Commission from that of the executive directors of the Commission.". The long title of the Bill also states that the Bill seeks, among others, to amend the Ordinance so that the chairman

of the SFC is no longer to be regarded as an executive director of the Commission. To this end, certain statutory functions of the chairman need to be transferred to the proposed Chief Executive Officer (CEO) to ensure proper execution, and SFST has also given notice to propose a number of CSAs to the Bill. These proposed CSAs include an amendment to section 11(1) of the Ordinance (i.e. new clause 1A of the Bill), which seeks to replace the reference to "chairman" by the reference to "chief executive officer", so that the CE shall consult the CEO of SFC (instead of Chairman of SFC under existing provision) prior to giving written directions to the SFC. That amendment does not seek to change the CE's power under section 11.

6. It is clear that the Bill does not raise the issue of whether the CE's reserve power under section 11 should be abolished. Hon Margaret NG's proposed new clause, which seeks to remove that reserve power altogether, is not relevant to the subject matter of the Bill.

Response from Hon Margaret NG

7. Hon Margaret NG does not agree with the Administration. She considers that section 11 of the Ordinance provides as a condition precedent to the exercise of the CE's power to give directions to the SFC that consultation be made of the "Chairman" which is a single and indivisible office. The effect of the Bill and amendments thereto proposed by the Administration is that the condition precedent will no longer be capable of being met. Hence, the power conferred by section 11 can no longer be exercised and is in effect spent. All that she is proposing in her CSA is to repeal a provision that will become spent upon the passage of the Bill. It is therefore a consequential amendment to the Bill.

Advice of Counsel to the Legislature

8. Counsel to the Legislature advises that the objects of the Bill are to provide for the removal of executive director status of the chairman of the SFC, the power of the Chief Executive to appoint a chief executive officer for SFC, an excess of non-executive directors over executive directors on the SFC, and related and incidental matters. The Bill, if passed, would bring about changes in the governance structure of SFC. The purpose, and therefore the subject matter, of the Bill is not to change the substance of the power vested in the Chief Executive by section 11 of the Ordinance to give directions to SFC.

9. Counsel advises that, although the Bill originally does not seek to amend section 11(1) of the Ordinance, SFST's proposed CSA to this section, to add a new clause to the Bill to change the person (from the chairman to chief executive officer of SFC) to be consulted by the CE before he gives a direction

to SFC, is within the scope of the Bill as it is related to the demarcation of the respective functions and roles of the chairman and CEO in the operation of SFC in the context of section 11.

10. In contrast, Hon Margaret NG's proposed CSA seeking to repeal section 11, if passed, would remove the CE's power to give directions to SFC. It does not concern the respective functions and roles of the chairman and CEO of the SFC.

11. On Hon Margaret NG's argument that her proposed CSA, which seeks to repeal a provision in the Ordinance which will be spent (that is, of no legal effect) following the passage of the Bill, with or without amendment, should be considered as relevant to the subject matter of the Bill, Counsel is of the view that a provision in an ordinance may be spent where the ordinance clearly provides the time when, or the condition under which, that provision will have no effect. However, with regard to section 11 of the Ordinance, there are no provisions in the Ordinance or the Bill which would have the effect of rendering the Chief Executive not being able to exercise his power to give directions to SFC in accordance with the conditions prescribed. As the objects of the Bill do not appear to cover the issue of whether or not such power conferred on the Chief Executive should be removed, any proposed amendment with the objective of abolishing it would not be relevant to the subject matter of the Bill.

My opinion

12. I accept the opinion of SFST and Counsel to the Legislature that whilst the CSA proposed by SFST to amend section 11(1) of the Ordinance — to require the CE to consult the CEO of the SFC instead of the chairman, is relevant to the subject matter of the Bill, Hon Margaret NG's proposal to repeal the entire section 11, which will result in depriving the CE of the power to give directions to the SFC, goes beyond the subject matter of the Bill.

13. I should mention that I have earlier admitted the CSA proposed to the Bill by Hon Ronny TONG Ka-wah based on the same consideration given to SFST's CSA relating to the same section of the Ordinance. Hon Ronny TONG Ka-wah's CSA also seeks to bring in a new clause to amend section 11(1) of the Ordinance to require the CE to consult the chairman and the CEO of the SFC before he gives directions to the SFC. The CE's power to give the SFC directions remains even if either of the CSAs proposed by SFST and Hon Ronny TONG Ka-wah is passed.

14. In my opinion, Hon Margaret NG's argument, that the effect of the Bill and amendments thereto is that the power conferred by section 11 of the Ordinance can no longer be exercised and is in effect spent, is untenable.

Ruling

15. I rule that Hon Margaret NG may not move her proposed CSA to the Securities and Futures (Amendment) Bill 2005 as it is not in compliance with Rule 57(4)(a) of the Rules of Procedure.

(Mrs Rita FAN)
President
Legislative Council

13 June 2006