立法會
Legislative Council

LC Paper No. CB(1)2231/06-07
(These minutes have been seen by the Administration)

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Panel on Financial Affairs

Minutes of meeting
held on Monday, 7 May 2007 at 10:00 am
in Conference Room A of the Legislative Council Building

Members present	**:**	Hon CHAN Kam-lam, SBS, JP (Chairman) Hon Bernard CHAN, GBS, JP (Deputy Chairman) Hon James TIEN Pei-chun, GBS, JP Hon Albert HO Chun-yan Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP Hon James TO Kun-sun Hon SIN Chung-kai, JP 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 Ronny TONG Ka-wah, SC Hon CHIM Pui-chung Hon TAM Heung-man
Members absent	**:**	Dr Hon David LI Kwok-po, GBS, JP Hon Andrew LEUNG Kwan-yuen, SBS, JP
Public officers attending	**:**	Agenda Item IV Mr Simon TOPPING, JP Executive Director (Banking Policy) Hong Kong Monetary Authority

Ms Angelina KWAN
Principal Assistant Secretary for Financial Services and the Treasury (Financial Services)5

Mr Parson LAM
Assistant Secretary for Financial Services and the Treasury (Financial Services)

Agenda Item V

Mr John LEUNG
Deputy Secretary for Financial Services and the Treasury (Financial Services)

Ms Selene TSOI
Principal Assistant Secretary for Financial Services and the Treasury (Financial Services)

Mr Gordon William Ewing JONES, JP
Registrar of Companies

Agenda Item VI

Mrs Dorothy MA
Principal Assistant Secretary for Financial Services and the Treasury
(Financial Services)1

Attendance by Invitation : Agenda Item IV

Hong Kong Association of Banks

Mr Peter SULLIVAN
Chairman (also Executive Director and Chief Executive Officer, Standard Chartered Bank (Hong Kong) Limited)

Mr Vincent LI
Country Head of Financial Crime Risk
Standard Chartered Bank (Hong Kong) Limited

滙款代理問題關注組

Ms LO Siu-wan
Convenor

Ms LAU Yan-wing

Mr LEE Hang

Mr WONG Yin

Agenda Item VI

Securities and Futures Commission

Mr Martin WHEATLEY
Chief Executive Officer

Miss Doris PAK
Commission Secretary

Clerk in attendance: Miss Polly YEUNG
Chief Council Secretary (1)5

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

Ms Annette LAM
Senior Council Secretary (1)3

Ms Rosalind MA
Senior Council Secretary (1)8

Ms Sharon CHAN
Legislative Assistant (1)8

Action

I. Confirmation of minutes of meeting

(LC Paper No. CB(1)1477/06-07 — Minutes of meeting on 2 March 2007)

The minutes of the meeting held on 2 March 2007 were confirmed.

II. Information papers issued since the last meeting

(LC Paper No. CB(1)1452/06-07(01) — Seventh progress report on the operation of the Loan Guarantee Scheme for Severe Acute Respiratory Syndrome Impacted Industries

LC Paper No. CB(1)1464/06-07 — Hong Kong Monetary Authority Annual Report 2006)

2. Members noted that the above papers had been issued for the Panel's information.

III. Date of next meeting and items for discussion

(LC Paper No. CB(1)1476/06-07(01) — List of outstanding items for discussion

LC Paper No. CB(1)1476/06-07(02) — List of follow-up actions)

Meeting in June 2007

3. Members agreed that the following items would be scheduled for discussion at the regular meeting to be held on Monday, 4 June 2007:

(a) Briefing on the work of the Hong Kong Monetary Authority (including its 2006 Annual Report); and

(b) Briefing by the Financial Secretary on Hong Kong's latest overall economic situation.

4. Members noted that according to the original schedule, the Panel would receive a briefing on the progress of work of the Financial Reporting Council (FRC) at the Panel meeting in June 2007. In view of the two heavy items in (a) and (b) above scheduled for the June meeting and that there was no urgency for immediate discussion of the item on FRC, the Chairman sought members' views on scheduling the item for discussion in July 2007 instead. While not objecting to the proposed meeting arrangement, Ms Emily LAU recalled that during an earlier meeting with the Chairman of FRC, she was given to note that subsidiary legislation related to the operation of FRC would be tabled at the Legislative Council in due course. Ms LAU therefore suggested that confirmation should be sought from the Administration as to whether the proposed briefing on the work progress of FRC would be time-critical to tie in with the legislative timetable for the relevant subsidiary legislation. The

Chairman directed to the Clerk to seek confirmation with the Administration accordingly after the meeting.

(*Post-meeting note*: The item on "Progress of the work of the Financial Reporting Council" had been scheduled for discussion at the meeting on 5 July 2007 after obtaining the Administration's confirmation that the proposed briefing was not time-critical to the forthcoming subsidiary legislation.)

Other proposed discussion item

5. Mr Albert HO expressed concern about issues related to the cooperation between the securities regulators of Hong Kong and the Mainland, particularly on whether the regulatory frameworks for the two places could be aligned for enhancing enforcement and market operations. He suggested that the Panel should discuss the subject with the Administration and the Securities and Futures Commission. The Chairman suggested and members agreed that the subject be scheduled for discussion at the meeting on 5 July 2007.

IV. Issues related to services provided by banks to money changers and remittance agents

Meeting with the Administration and deputations

(LC Paper No. CB(1)1476/06-07(03) — The Administration's response

LC Paper No. CB(1)1400/06-07(01) — Letter dated 16 April 2007 from Hon Albert HO

LC Paper No. CB(1)1526/06-07(01) — Further information provided by Hon Albert HO

LC Paper No. CB(1)1434/06-07(01) — List of issues related to services provided by banks to money changers and remittance agents prepared by the Secretariat

LC Paper Nos. CB(1)1499/06-07(01) and CB(1)1526/06-07(03) to (10) — submissions from individuals not attending the meeting)

Presentation by representatives of 匯款代理問題關注組 (the Concern Group)

(LC Paper Nos. CB(1)1526/06-07(02) and CB(1)1535/06-07(01) to (03) — submissions)

6. Mr WONG Yin of the Concern Group said that he had been operating the service of a money changer for over ten years, providing cash exchange for Renminbi (RMB) and remittance services. Referring to his personal experience of being refused by banks (the Hongkong and Shanghai Banking Corporation (HSBC) and the Hang Seng Bank) to provide basic banking and insurance services in recent years on grounds that the nature of money exchange and remittance was regarded as high-risk from the viewpoint of preventing money laundering, Mr WONG opined that this was very unfair to remittance agents and money changers (RAMCs). Mr WONG stressed that he had all along conducted his business in compliance with all statutory requirements but was being treated almost as a suspect engaging in illegal transactions. As more and more banks were refusing to provide services to RAMCs, Mr WONG pointed out that this had caused difficulties to their business viability and their livelihood.

7. Mr LEE Hang of the Concern Group said that since the late 1990s, some banks had started to terminate the accounts of RAMCs and the banking sector had stepped up its refusal of service provision to operators of the remittance and money exchange business in recent years on grounds that RAMCs were participating in high-risk business. Mr LEE pointed out that the majority of his customers were Indonesian domestic helpers working in Hong Kong who could hardly use the remittance services provided by banks due to language barrier and time constraint. He said that RAMCs would be unable to continue with their business operations without basic banking services and their means of living would be threatened as a result. Noting that a regulatory mechanism was in place for the registration of RAMCs, Mr LEE urged the Administration to improve the mechanism if it was considered inadequate to regulate the operations of the industry. He also requested the banking sector to continue providing services to law-abiding RAMCs and stop discriminating operators of money exchange and remittance business.

Remarks by the Hong Kong Association of Banks

8. Mr Peter SULLIVAN, Chairman of the Hong Kong Association of Banks (HKAB), said that while appreciated the difficulties faced by RAMCs, he was not in a position to answer on behalf of individual banks in respect of their policies and business decisions. Mr SULLIVAN advised that individual banks had their own policies formulated on the basis of prevailing regulatory requirements. He said that the concerns of RAMCs would have to be dealt with through further discussion on the overall policy and requirements such as documentation requirements for RAMCs to continue their business with banks.

Briefing by the Administration

9. The Principal Assistant Secretary for Financial Services and the Treasury (Financial Services)5 (PAS/FS(5)) briefly explained the regulatory regime on RAMCs. She advised that Hong Kong had been actively participating in the international co-operation network combating money laundering and terrorist

financing activities. Currently, Hong Kong maintained a registration system for RAMCs under the Organized and Serious Crimes Ordinance (Cap. 455) (OSCO) which required a person to notify the Police in writing after becoming a RA or MC. The OSCO also required RAMCs to keep records of transactions amounting to HK$8,000 or above or its foreign currencies equivalent. PAS/FS(5) said that the Administration was undertaking an internal review on the regulatory regime on RAMCs. The Administration would welcome views from the relevant trades and would consult them on any concrete proposals in this regard.

Briefing by the Hong Kong Monetary Authority

10. The Executive Director (Banking Policy), Hong Kong Monetary Authority (ED(BP)/HKMA) advised that while RAMCs played an important intermediary role in the financial system of Hong Kong, there was growing international concern about the high risks of the RAMC business in the context of combating money laundering. As such, banks might have certain unease in their business dealings with RAMCs given that the latter often handled a large amount of cash and there was difficulty for banks to verify the information on the customers of RAMCs. ED(BP)/HKMA advised that the experience in overseas jurisdictions (such as the United States, the United Kingdom and Singapore) showed that measures to strengthen regulation of RAMCs such as enhancing the licensing system for RAMCs and imposing requirements on RAMCs to conduct money laundering checks would help strengthen the confidence of banks in doing business with RAMCs. While HKMA and the Administration were aware of the issues to be resolved, they had to examine further, with input from the relevant industry, the appropriate way forward for the regulation of RAMCs having regard to the need to balance the compliance cost and burden on RAMCs, the development of the money exchange and remittance service business in Hong Kong and the readiness of relevant parties to trade with RAMCs.

Discussion

Extent of the difficulties faced by RAMCs

11. The Chairman sought information on the current position of the provision of banking/account services to RAMCs, i.e. the number of RAMCs among the total of about 1 700 which had been refused services by banks. In response, Mr LEE Hang said that while he did not have in hand complete information, as far as he knew, the Bank of China (BoC) had issued about 200 letters to RAMCs in December 2006 for termination of their accounts within 60 days. Mr Peter SULLIVAN said that HKAB did not have any information in this regard. ED(BP)/HKMA advised that based on the information available to HKMA, many retail banks were still providing services to RAMCs and they had no plans to terminate the accounts of RAMCs. He nevertheless added that some banks might not be very keen in taking on new accounts from RAMCs and some might plan to continue doing business with RAMCs on a selective basis only.

12. Noting that BoC and HSBC had taken action to terminate the accounts of RAMCs in recent years, Mr Albert HO was gravely concerned that the non-provision of banking/account services to the operators of the industry would aggravate. He said that some banks had explained their decision by referring to concerns about reputation risks involved in doing business with RAMCs as the latter was particularly susceptible to money laundering risks. Mr Ho however pointed out that as long as banks complied with the regulatory requirements applicable to their operations, they would unlikely suffer from reputation risks even in the event of illegal activities carried out by their clients. He questioned whether banks had in fact blacklisted any RAMCs for termination of account services. Mr HO also queried whether it was the policy of some banks to discriminate against certain sectors in the provision of services and if so, HKMA/the Administration should critically assess the impact of such discriminatory treatment on the reputation of Hong Kong as an international financial centre (IFC).

13. In response, Mr Peter SULLIVAN said that he would not speculate on banks' business decisions. He was however not aware of any blacklisting of RAMCs by banks, and believed that whether a bank would or would not do business with any particular segment of the community was merely a business decision of individual banks.

14. Noting ED(BP)/HKMA's advice earlier on that many retail banks still maintained business relations with RAMCs, PAS/FS(5) said that the problem was not serious to an extent that the Administration needed to contemplate drastic measures for the time being. The Administration would nevertheless monitor the situation and consider taking appropriate action if there was evidence of any particular industry being discriminated against or unfairly treated in the provision of banking services. PAS/FS(5) said that the Administration had been making efforts in ensuring that the Hong Kong Special Administrative Region Government's regulatory regime for combating money laundering and terrorist financing was in line with international standards and conducive to maintaining the status of Hong Kong as an IFC. The Administration would continue to examine ways to strengthen regulation of RAMCs in accordance with international standards and guidelines so that the concerned industry could continue to grow and develop.

15. Ms Emily LAU opined that based on the submissions received from RAMCs and the strong views of the deputation expressed at the meeting, RAMCs were facing a real problem in obtaining banking/account services. She therefore cast doubt on HKMA's and the Administration's comment that many banks were still providing account services to RAMCs.

16. Mr WONG Ting-kwong said that he was sympathetic towards the difficulties faced by RAMCs in getting the necessary banking/account services. He urged the Administration to explore effective means to provide assistance to the affected RAMCs so that their business operations could continue. Mr WONG also considered that stringent enforcement actions should be taken against criminal activities such as

money laundering to achieve the necessary deterrent effect. He nevertheless expressed concern that while RAMCs had complained about the termination of accounts by a number of banks, they had apparently chosen to target BoC in the demonstration outside the Legislative Council Building on the day of the meeting. Mr WONG requested the representatives of RAMCs to clarify their position. The Chairman expressed similar view and pointed out that since BoC was being pinpointed at by the demonstrators, the media and the public might get the incorrect impression that BoC was the only bank taking actions to terminate accounts held by RAMCs. Mr Albert HO agreed with Mr WONG and the Chairman that as RAMCs had been facing refusal of services by other banks, it might not be reasonable to pinpoint BoC in the expression of grievances.

17. In clarification, Ms LAU Yan-wing explained that the majority of RAMCs were relying on the services of three major banks, namely, HSBC, BoC and the Hang Seng Bank in the provision of account services. HSBC started to terminate accounts held by RAMCs in 2002 in a gradual manner. At that time, such termination had not caused widespread panic given the smaller scale of termination and the availability of services at BoC and other banks. However, on this occasion, BoC had decided to terminate the accounts of RAMCs in large batches within a short period of time. The operators were therefore gravely concerned about the increasing difficulties in getting banking/account services and were deeply worried about the prospect of their business in the long run if such termination became widespread. Mr WONG Yin confirmed that RAMCs had no intention to target BoC, which was only one of the many banks refusing to provide services to the industry.

18. Mr James TO was concerned that the banking industry might be refusing to provide service to a segment of the community which was engaging in lawful business activities, on grounds of the compliance costs incurred in meeting requirements on anti-money laundering. He pointed out that under the existing regime, law-abiding RAMCs could be easily identified by banks and become targets for refusal of services by virtue of their registration with the Police under OSCO. Non-law abiding RAMCs which chose not to register might however obtain banking services as their identities might not be so readily verifiable. Mr TO considered such an anomalous situation highly unfair. He also cautioned that such an exclusionary practice adopted by the banking sector to avoid high risks and high compliance costs would have an adverse impact on the status of Hong Kong as an IFC. Mr TO was of the view that as the problem was apparently affecting the entire RAMC industry, which was a legitimate component of the financial services market, the Administration should not regard it as a matter between individual RAMCs and banks and evade its policy responsibility. He considered that it was incumbent upon the Administration to play a more proactive role and take up the responsibility to identify measures to resolve the problem which was turning into a systemic one.

19. In reply, PAS/FS(5) advised that while the registration system for RAMCs under OSCO was outside the purview of the Financial Services and the Treasury Bureau (FSTB), the system was introduced in 2000 as the first statutory requirement

on RAMCs. A light-handed regulatory approach had been adopted as a start and no licensing requirements were therefore imposed. In the light of international developments in the policies and requirements on anti-money laundering in recent years, PAS/FS(5) said that the Administration was examining the need or otherwise for strengthening the regulation of RAMCs. On Mr TO's concern about non-compliance by certain RAMCs of the registration requirements under OSCO, PAS/FS(5) highlighted that this would be an offence under OSCO and the Police would take necessary enforcement action against the offenders. She agreed to convey Mr TO's concern to the Police for further monitoring.

Admin

20. Ms LO Siu-wan of the Concern Group pointed out that some 200 RAMCs who had accounts with BoC were facing imminent difficulty in their continued operation, as BoC had only agreed to defer the termination of their accounts upon request of Mr Albert HO up to the date of this meeting. She solicited members' assistance in requesting the banking industry to continue providing account services to RAMCs. Mr Albert HO echoed Ms LO Siu-wan's concern and suggested that pending the completion of the review of the existing regulatory regime on the operation of RAMCs by the Administration/HKMA, banks should continue to provide services to RAMCs. Ms Emily LAU and Miss TAM Heung-man supported Mr Albert HO's suggestion.

21. Mr Peter SULLIVAN noted members' concern and agreed to convey members' suggestion in paragraph 20 above to member banks of HKAB for consideration.

(*Post-meeting note*: Letters dated 19 June and 4 July 2007 from HKAB on paragraph 21 above was issued to members vide LC Paper Nos. CB(1)1978/06-07(01) and CB(1)2080/06-07(01) on 22 June and 10 July 2007 respectively.)

Measures to address concerns of RAMCs in obtaining banking/account services

22. Ms Emily LAU was of the view that HKMA should take immediate action in collaboration with HKAB to initiate discussions with the RAMC industry to identify solutions. She enquired when such discussions could be arranged and the timeframe for implementing necessary measures to strengthen the regulation of RAMCs in order that banks would be more at ease in providing services to RAMCs. Miss TAM Heung-man expressed similar concern about the need for the Administration to take expeditious action to relieve the difficulties of RAMCs in getting banking/account services. Miss TAM however expressed concern that over-regulation of the industry might threaten the survival of RAMCs and result in unfair competition in the money exchange and remittance industry as small-scale RAMCs would be unable to compete with banks due to high compliance costs. She sought the Administration's comment on of the impact of a more stringent regulatory framework for RAMCs.

23. In reply, ED(BP)/HKMA considered that the problem was not systemic at the moment as a number of banks were still providing banking/account services to RAMCs. However, as HKMA was aware, overseas experience had revealed that the situation might get worse. HKMA and the Administration had started the process some time ago to examine whether measures were needed to address banks' unease over doing business with RAMCs in the light of the requirements on combating money laundering and terrorist financing. However, he stressed that in formulating any solution, it was necessary to strike a right balance between stepping up regulation on RAMCs and ensuring that no undue compliance burden would be imposed on them.

24. PAS/FS(5) further advised that the subject matter was not entirely within the purview of FSTB and it also straddled the purviews of several other bureaux including the Security Bureau. The Administration would consult the RAMC industry in devising the regime. The discussion was in progress within the Government. She added that overseas experience and the characteristics of the industry would be taken into account in the process. So far, no concrete proposals or proposed timeframe for implementation of enhanced measures had been worked out. PAS/FS(5) nevertheless pointed out that the introduction of enhanced regulatory requirements on RAMCs, if any, would have to be effected by legislation, which could not be possibly completed within a few months' time. However, the Administration would explore whether any other measures could be introduced to alleviate the concern of the RAMC industry in the interim.

25. Ms LAU Yan-wing of the Concern Group urged the banking industry to respond positively to the calls of RAMCs for provision of banking/account services. Referring to banks' concern about doing business with RAMCs, Ms LAU pointed out that while RAMCs handled large amount of cash in their business transactions, they would comply with the existing statutory requirements of record keeping in respect of large amount transactions and would be cooperative in complying with other additional regulatory requirements, if introduced, to strengthen control of their business operation for combating money laundering and terrorist financing. Ms LAU said that the RAMC industry was planning to set up an association to represent the industry to negotiate with the Administration, HKAB and HKMA. In this connection, Ms Emily LAU urged the RAMCs to expedite the formation of the association so that the interests of the industry could be better represented in the negotiation with the relevant parties.

26. Noting that more time would be required to work out measures, if any, to strengthen regulation of RAMCs, Mr SIN Chung-kai called on the Administration/HKMA to respond to the complaints and concerns of RAMCs in a more proactive manner. He was of the view that instead of giving a subjective comment that the problem was not a systemic one, the Administration/HKMA should conduct a thorough examination and analysis of the problems faced by RAMCs through receiving complaints, analyzing and collating information on the complaint

cases (such as whether banks had violated the Code of Banking Practices by unfair treatment of their customers).

27. ED(BP)/HKMA advised that the major role of HKMA as the regulator of the industry was to promote the stability of the banking sector rather than to intervene in the business relations between banks and their individual customers. According to information obtained by HKMA, the majority of retail banks were still maintaining accounts for RAMCs. To address the crux of the problem, HKMA had actively liaised with banks and had been given to understand that banks were also concerned about the difficulties in obtaining information from RAMCs as well as the insufficient anti-money laundering checks undertaken by RAMCs. Responding to Mr SIN Chung-kai's further view that HKMA should maintain dialogue with the complainants from the RAMC industry in order to get a full picture of the problem, ED(BP)/HKMA said that HKMA was aware of the concerns of RAMCs through individual complaints and the submissions from RAMCs forwarded by the Panel before the meeting. He pointed out that in taking forward the issues related to the provision of banking/account services to RAMCs, HKMA believed that the most constructive approach was to ensure that no structural problem was involved and there was no impediment for the banking industry to open new accounts with RAMCs.

28. The Chairman noted that RAMCs had indicated their cooperation and willingness to comply with enhanced regulation to address the concerns of banks in doing business with them. While appreciating the concern of banks to minimize their exposure to risks of money laundering, the Chairman was of the view that banks should distinguish law-abiding RAMCs from those entities involved in high-risk activities, instead of applying an across-the-board termination of accounts on all 1 700 RAMCs. Moreover, the banking industry should provide sound justification for refusal to provide banking/account services to customers and should not refuse to provide personal account services to individuals operating RAMC business or their family members. Pointing out that the business of money exchange and remittance service formed an important part of the financial system underpinning the status of Hong Kong as an IFC, the Chairman urged the Administration to explore ways to address the concern of RAMCs so that legitimate business operators would not be driven out of business by the policy decision of banks.

29. Mr CHIM Pui-chung also concurred that RAMCs properly registered under OSCO and undertaking lawful business should not be forced out of business by unreasonable decisions of banks. He was of the view that banks' refusal to provide account services without concrete evidence that the customer concerned was engaged in illegal activities such as money laundering was unjustified and that the Panel should follow up with the Administration/HKMA on actions taken to assist RAMCs. Mr CHIM questioned the role of HKMA in ensuring the provision of banking services to all sectors of the community in a fair manner.

30. ED(BP)/HKMA said that while RAMCs were registered under OSCO, there was at present no licensing requirements and no regulator to oversee the operations of RAMCs, unlike the case of other intermediaries in the financial market such as securities brokers and insurance agents. He fully appreciated the important role of RAMCs in the provision of intermediary financial services in Hong Kong and believed that banks had no intention to drive RAMCs out of the market. While the unease of banks was not caused by the policies of HKMA on anti-money laundering, HKMA was keenly aware of the issues involved and was actively examining ways to assist the parties concerned, such as through formalization of the control and regulation of the operation of the RAMC industry.

The way forward

Admin/ HKMA/ HKAB

31. Summing up, the Chairman invited the Administration, HKMA and HKAB to follow up members' concerns over the issues related to the alleged refusal of banks to provide services to RAMCs, including:

(a) to initiate discussions with representatives of RAMCs as soon as possible with a view to devising effective interim measures to address the concerns of banks and RAMCs; and

(b) to review the existing regulatory regime on the operation of RAMCs and the operation of banks in their business relationship with RAMCs to see if additional safeguards should be introduced to strengthen banks' confidence in providing services to RAMCs.

Admin/ HKMA

32. To facilitate further consideration, the Panel requested the Administration/HKMA to provide a report to the Panel on the outcome and progress of discussions with RAMCs and HKAB in two to three months' time.

V. Progress update on the Companies Ordinance rewrite exercise

(LC Paper No. CB(1)1228/06-07(05) — Paper provided by the Administration

LC Paper No. CB(1)1274/06-07 — Rewrite of the Companies Ordinance — Consultation Paper on "Accounting and Auditing Provisions" provided by the Administration

LC Paper No. CB(1)1230/06-07 — Background Brief on the "Companies Ordinance rewrite exercise" prepared by the Secretariat)

Briefing by the Administration

33. At the invitation of the Chairman, the Deputy Secretary for Financial Services and the Treasury (Financial Services) (DSFST) gave a power-point presentation outlining the objectives and key considerations in rewriting the Companies Ordinance (CO) (Cap.32). He also updated members on the progress of the CO rewrite exercise, including the timeframe, the work of the dedicated Companies Bill Team (CBT), the four Advisory Groups (AGs), the Standing Committee on Company Law Reform (SCCLR), the Steering Committee on Companies Ordinance Rewrite (Steering Committee), and the topical public consultations that had been and would be conducted. He highlighted the following points:

(a) A complete rewrite and restructuring of the CO was considered necessary to enhance Hong Kong's competitiveness and attractiveness as a major international business and financial centre and to modernize Hong Kong's company law in the light of the experiences of comparable common law jurisdictions. The CO rewrite aimed to encourage the wider use of information technology, improve the structure of CO and modernize its language, as well as enhance corporate governance and compliance. By streamlining and modernizing regulation and simplifying the procedures for the conduct of company businesses, the company law of Hong Kong would better cater to the needs of small and medium enterprises (SMEs). The CO rewrite would also provide an opportunity for Hong Kong to benchmark itself against and leverage on company law developments taking place in major common law jurisdictions such as the United Kingdom (UK), Australia and Singapore.

(b) Given the extent and the complexity involved, the rewrite exercise would be taken forward in two phases. Phase I of the CO rewrite exercise would cover 22 parts focusing mainly on the core provisions affecting the daily operation of some 600,000 live companies. The Administration's tentative plan was to introduce the new Companies Bill (CB) into LegCo in the third quarter of 2010. Prior to that, a White Bill covering all Phase I provisions would be issued for public consultation in mid-2009. Those parts of the existing CO relating to winding-up and other insolvency-related provisions would be dealt with in Phase II of the rewrite exercise.

(c) Following the Finance Committee's approval of resources for Phase I rewrite on 13 January 2006, a dedicated CBT (comprising 14 officers from the Financial Services and the Treasury Bureau and the Companies Registry) and supported by 7 legal officers from the Department of Justice and an external legal consultant had been set up in mid-2006 to take forward the rewrite exercise.

(d) On the consultation mechanism, the SCCLR, established in 1984 to advise the Financial Secretary on, inter-alia, amendments to the CO, played an important role in keeping an overview of the exercise and advising on all major rewrite proposals including recommendations by the AGs. To engage relevant stakeholders at an early stage, four AGs comprising members from relevant professional bodies and business organizations, company law academics, SCCLR members, and government representatives were formed to advise on specific areas of the CO. The four AGs had commenced work in phases since October 2006 and had so far conducted 18 meetings during which 11 subjects had been discussed. A Steering Committee had also been formed within the Administration to oversee and steer the entire rewrite exercise.

(e) On the review of the accounting and auditing provisions of the CO, proposals had been recommended by the Joint Government/Hong Kong Institute of Certified Public Accountants (HKICPA) Working Group. The aim was to improve the disclosure and transparency of the information in annual accounts (e.g. introducing a business review in directors' report), to enhance compliance with relevant requirements (e.g. enhancing rights of auditors to access relevant audit information), and to reduce compliance and business costs incurred by companies (e.g. making the summary financial reports provisions more user-friendly).

(f) Several topical public consultation exercises would be conducted to gauge the views of the public and the industry on the rewrite exercise. The first topical consultation exercise on the proposals to improve the accounting and auditing provisions was launched on 29 March 2007 and scheduled to end on 29 June 2007. Consultation on other subjects, such as share capital, distribution of profits and assets and company charges, was expected to take place in early 2008.

Discussion

Topical public consultations on accounting and auditing provisions

34. Miss TAM Heung-man expressed concern that although the three-month topical public consultation on accounting and auditing provisions of the CB had

commenced on 29 March 2007, the accounting profession was not fully aware of the content of the proposals. While noting that a seminar would be held in conjunction with the HKICPA to gauge the industry's views, Miss TAM considered a single seminar insufficient and enquired whether the Administration would also consult and invite views from other accounting bodies as well as related professions and business organizations in order that the recommendations would have the broad support of the key industry sectors and relevant stakeholders.

35. In response, DSFST advised that given the complexity and the far-reaching implications of the reform of accounting and auditing provisions, the Administration was mindful of the importance of conducting consultation on a broad basis to seek views from all the key sectors. A public consultation forum would be held on 4 June 2007 to solicit the views of the public, related stakeholders, and other relevant professional bodies. He said that after the consultation was launched in late March 2007, the Administration had sent letters to relevant organizations and professional groups to invite their views and had also made clear the Administration's readiness to attend any seminars and meetings held by the organizations to present its proposals and receive views. He added that the Administration would be prepared to arrange additional briefing and consultation sessions for the organizations at their request before the close of consultation on 29 June 2007.

36. Responding to Miss TAM's further enquiry on how the Administration would take the matter forward after completion of consultation and how the Administration would handle differences in views, DSFST said that following the public consultation on the proposed accounting and auditing provisions, other topical consultations covering share capital, distribution of profits and assets, and company charges would be launched in early 2008. On the basis of the comments received, a detailed analysis would be made to map out the way forward. He advised that before introducing the new CB into LegCo tentatively scheduled for the third quarter of 2010, a White Bill covering all Phase I provisions would be issued for public consultation in mid-2009.

37. In response to Mr SIN Chung-kai's enquiry on whether the part of CO relating to companies incorporated outside Hong Kong would be covered in the current CO rewrite exercise, DSFST confirmed that the rewrite would also encompass the part relating to oversea companies, the details of which would be set out in the White Bill for public consultation. He advised that the Companies (Amendment) Ordinance 2004 enacted in July 2004 contained legislative amendments, among other things, to improve the registration requirements for oversea companies. The relevant provisions concerning oversea companies would be brought into operation after an Order to amend the fees concerning oversea companies had been made by the Secretary for Financial Services and the Treasury after the necessary modifications to the Companies Registry's computer information system had been completed.

Role of various parties involved in the rewrite exercise

38. Referring to the various parties involved in the rewrite, such as the CBT, the SCCLR, the four AGs and the Steering Committee, Ms Emily LAU was concerned about possible overlap of their work and sought elaboration on the delineation of roles and duties among them. In reply, DSFST said that each group had its own specific scope of work and responsibilities. The CBT set up in mid-2006 was responsible for conducting relevant research and public consultations to take forward the rewrite exercise. In view of the wide range of some 26 issues involved in the rewrite exercise, a two-tier consultation mechanism was considered necessary. The SCCLR, comprising representatives of the Securities and Futures Commission, the Hong Kong Exchanges and Clearing Limited, and the Hong Kong Monetary Authority, played a key role in keeping an overview of the rewrite and advising on all major recommendations arising from the rewrite. The four AGs comprising mainly representatives from relevant professional bodies, major chambers of commerce, and company law academics had been formed to engage relevant stakeholders at an early stage to advise on specific areas of the CO. The Steering Committee made up of senior Government officials from relevant bureaux and departments was an internal working group of the Administration to steer the entire rewrite exercise and to oversee the implementation. As such, DSFST stressed that there was no overlap in roles and responsibilities.

Timeframe and cost for the rewrite exercise

39. While supporting the need for a CO rewrite, Ms Emily LAU expressed regret at the long time taken for the rewrite exercise and the high cost involved. Noting that under the proposed time-frame, Phase I of the rewrite exercise would only be completed by the third quarter of 2010, she called on the Administration to expedite the rewrite exercise.

40. DSFST assured members that the Administration was committed to completing the rewrite as early as practicable to maintain Hong Kong's regulatory framework on par with international development. As the rewrite involved a complete overhaul of the existing CO, the proposed time-frame was reasonable. He further pointed out that given the complexity of the issues involved, similar reviews in other countries such as the UK, Australia, Singapore and New Zealand had also taken a long period of time to complete. Referring to the review of the company law of the UK which started in 1998, DSFST informed members that it had taken eight years for the Company Law Reform Bill to be introduced into the Parliament in November 2005 and subsequently enacted as the Companies Act 2006 in November 2006. While some of the UK provisions had commenced in January 2007, the remaining parts would only come into force by October 2008.

41. Ms Emily LAU noted with concern that approximately $10 million had already been spent by the end of February 2007, and considered that the total estimated cost of about $100 million for the rewrite exercise was on the high side. On

the cost of the consultancy study, Ms LAU enquired about the selection procedures for engaging Dr Maisie Ooi from the National University of Singapore as the Consultant for the Consultancy Study on the Rewrite of the CO and also for engaging the experts from the UK, New Zealand and Singapore.

42. In reply, DSFST advised that the consultancy study had been awarded to Dr Ooi in accordance with the established Government tendering procedures. Dr Ooi, in her capacity as the lead consultant, was assisted by company law academics from the UK, New Zealand and Singapore. He pointed out that having regard to the expertise required for the CO rewrite and the need for extensive legal research on subjects that were highly technical and complex, the three-year Consultancy Study at a fee of $15 million was considered reasonable. He added that given the complexity of the tasks involved in the rewrite and the far-reaching implications on the community, the total estimated cost of $91 million which would be spent over a few years was a reasonable and well-justified provision.

43. Noting that the review of the UK Companies Act 2006 was completed in November 2006 and that similar reviews had been conducted in Australia, Singapore and New Zealand, Ms Emily LAU called on the Administration to make reference to developments in these countries and to adopt practices where appropriate to enhance the cost-effectiveness of the rewrite exercise. As Hong Kong's company law was largely modeled on the UK legislation, Ms LAU considered that the UK experience could provide useful reference for the CO rewrite and that the Administration should capitalize on such developments in taking forward the rewrite exercise. She also urged the Administration to expedite the CO rewrite to keep pace with international developments. Noting her concern, DSFST advised that references had been made to the other major common law jurisdictions to leverage on the experience of their recent company law reforms.

Way Forward

44. The Chairman requested the Administration to take note of members' views expressed at the meeting, to expedite the rewrite exercise and update the Panel on the progress of the rewrite exercise in due course.

VI. Issues related to section 378 of Securities and Futures Ordinance (Cap.571)

(LC Paper No. CB(1)1476/06-07(04) — Paper provided by the Securities and Futures Commission

LC Paper No. CB(1)1476/06-07(05) — Further request dated 27 April 2007 from Hon James TO (Chinese version only)

LC Paper No. CB(1)1317/06-07(01) — List of issues to be addressed prepared by the Secretariat)

Background information

(LC Paper No. CB(1)531/06-07(01) — Consolidated comments from the Securities and Futures Commission and the Stock Exchange of Hong Kong in response to issues raised at the special meeting on 23 November 2006

LC Paper No. LS25/06-07 — Paper on "The Obligation of the Securities and Futures Commission and the Hong Kong Exchanges and Clearing Limited to Preserve Secrecy under section 378 of the Securities and Futures Ordinance (Cap.571)" prepared by the Legal Services Division)

Past minutes

(LC Paper No. CB(1)1609/05-06 — Minutes of meeting on 3 April 2006

LC Paper No. CB(1)798/06-07 — Minutes of special meeting on 23 November 2006)

Application of the secrecy provisions under section 378 of the Securities and Futures Ordinance (Cap. 571)

45. Mr James TO was concerned that SFC had all along refused to comment or disclose information on cases of alleged market misconduct despite widespread public concern on the grounds that it was bound by the secrecy obligation under section 378 of the Securities and Futures Ordinance (Cap. 571) (SFO). Nevertheless, Mr TO noted the observation of the Assistant Legal Adviser of the Legislative Council (LegCo) Secretariat (LC Paper No. LS25/06-07) and doubted whether SFC was under an obligation of total secrecy pursuant to section 378 of SFO. In this connection, Mr TO referred to section 5(1)(g) of SFO which provided that one of the functions of SFC was "to maintain and promote confidence in the securities and futures industry in such manner as it considers appropriate, including by the exercise of its discretion to disclose to the public any matter relating or incidental to the performance of any of its functions". To inspire public confidence in the securities and futures industry and facilitate investor protection, Mr TO considered that SFC

should enhance its transparency through disclosing necessary information on cases of wide public interest instead of applying section 378 to maintain strict confidentiality for all cases across-the-board. In Mr TO's view, SFC's confirmation that it was conducting an inquiry or investigation into a case of wide public concern and/or disclosure of information on the outcome of the investigation would be crucial to inspiring public confidence in the impartiality and credibility of SFC, in particular where there were allegations of unfair treatment of different companies by SFC in its investigation.

46. In response, the Principal Assistant Secretary for Financial Services and the Treasury (Financial Services)1 (PAS/FS(1)) advised that the secrecy provision under section 378 of SFO and the policy considerations underlying SFC's application of the provision had been set out in SFC's paper for the meeting. She pointed out that financial regulators in overseas jurisdictions were also bound by similar confidentiality requirements under their respective laws. The secrecy provision under section 378 had been thoroughly debated by LegCo Members back in 2001 during the scrutiny of the Securities and Futures Bill and Members were aware of the need for the regulator to operate to a certain extent in confidence for the protection of the privacy and proper business interests of those regulated.

47. The Chief Executive Officer of SFC (CEO/SFC) recapped that SFC had all along observed the secrecy provision with regard to information coming to its knowledge in the performance of its functions. Nevertheless, SFC had, on a number of occasions, decided that the circumstances warranted the disclosure of the fact that it was conducting an investigation into a company and had accordingly disclosed information in this regard. Such disclosure was decided on a case-by-case basis in the light of the functions and objectives of SFC under SFO. Where SFC had disclosed that investigation was underway on a case, it would, at a subsequent date, disclose the outcome of the investigation, be it regulatory actions taken or cessation of investigation. He pointed out that the disclosure regime of SFC was on par with those applicable to financial regulators in overseas jurisdictions such as the United Kingdom, Australia and the United States. He added that the current section 378 of SFO had also addressed Members' concern that SFC's obligation to preserve secrecy should not be too relaxed.

48. While agreeing with the need to provide SFC with necessary statutory powers for the performance of its regulatory functions, Mr Albert HO was concerned that the strict application of section 378 might have vested SFC with excessive powers comparable to that exercised by secret police. Noting that SFC would disclose the outcome of an investigation if it had made public the fact that an investigation was being conducted, Mr HO was concerned about the criteria adopted by SFC in deciding on disclosure or otherwise.

49. In response, CEO/SFC advised that section 378 of SFO contained clear provisions on circumstances or matters which were not covered by the secrecy obligation, including the disclosure of information in accordance with a court order.

In 2006, SFC had on a few occasions, disclosed the fact that it was conducting investigation into cases of alleged misconduct, including three cases of misappropriation of clients' assets by broker firms. He reiterated that the disclosure of the fact that a case was or was not under investigation was decided on a case-by-case basis in the light of the functions and objectives of SFC under SFO. CEO/SFC further informed members that disclosure or otherwise of the fact that an inquiry or investigation was underway must be decided by at least two Executive Directors of SFC in consultation with the CEO.

50. Mr Albert HO was of the view that to inspire public confidence in the credibility and impartiality of SFC in its regulatory and investigative functions, SFC should improve its transparency by providing to the investing public and the industry SFC's guidelines on the circumstances under which it would disclose information on individual cases, instead of merely making known the general principles or criteria for decision making. Mr HO considered that if SFC adopted certain criteria for disclosure of information, then, such criteria should be subject to consultation with the investing public and the industry. He pointed out that investors might have suffered financial losses in cases of market misconduct and it was their legitimate expectation to be informed of the actions taken by SFC as the regulator after its investigation. He was of the view that the current application of section 378 of SFO could not meet public expectation on the transparency with which SFC performed its functions.

51. CEO/SFC re-affirmed that SFC had always endeavoured to operate in an open and transparent manner and would disclose information on the penalty or sanctions imposed for breaches or market misconduct. Where SFC had not taken any regulatory action or where breaches or market misconduct could not be substantiated, SFC would not disclose information on the cases concerned as such disclosure might not serve any good public interest.

52. Mr Albert HO did not subscribe to CEO/SFC's view and highlighted the importance of disclosure of the outcome of inquiry or investigation by SFC, even when no regulatory action was taken, to reassure investors and the general public that SFC had discharged its functions in an equitable and effective manner. He urged the Administration/SFC to review the application of the secrecy provision under section 378 of SFO with regard to disclosure of information. Mr James TO shared Mr HO's concern.

53. Mr SIN Chung-kai shared a similar view and pointed out that in the case of other enforcement agencies such as the Independent Commission Against Corruption (ICAC), the parties being investigated would be informed of the outcome of investigation. To improve the transparency and public accountability of SFC, Mr SIN considered that SFC should seriously consider disclosing information where there was widespread unfounded speculation on the cases, and where the parties being investigated did not object to such disclosure.

54. Ir Dr Raymond HO opined that given market sensitivity to information and the objectives of SFC to maintain and promote confidence in the securities and futures industry, as well as to protect the interests of the investing public, SFC should enhance its transparency and public accountability by disclosing necessary information on its investigative work, such as informing the public of the underlying considerations for arriving at the outcome of the investigation. Ir Dr HO urged the Administration/SFC to give further consideration to the importance of transparency in the application of section 378 of SFO.

55. Responding to members' concerns, CEO/SFC reiterated SFC's existing channels of publicizing its regulatory actions taken. He confirmed that a general duty of confidentiality was imposed on SFC but information disclosure was permissible under certain exceptional circumstances. The exceptions provided under section 378 of SFO had addressed the concerns of LegCo Members during the scrutiny of the Securities and Futures Bill, including the view that SFC's obligation to preserve secrecy should not be too relaxed. To ensure transparency, SFC would disclose necessary information on cases of breaches or those under inquiry or investigation where circumstances so warranted and where permissible under the law. However, it might be inappropriate or improper for SFC to disclose information merely in response to rumors or media speculation. CEO/SFC advised that the policy of SFC in the application of the secrecy provision was comparable to that adopted by regulators in developed overseas markets, except the United States where the regulator would not even make any public statement on whether or not an inquiry or investigation was underway.

56. In this connection, Mr James TIEN was of the view that there should be room for SFC to exercise discretion under circumstances unique to Hong Kong as the policy intention of the secrecy provision under section 378 of SFO was to protect the privacy and proper business interests of those regulated, rather than the interest of SFC as the regulator. Given that SMEs were usually more susceptible, Mr TIEN pointed out that SMEs were usually more keenly concerned about the progress and outcome of SFC's investigation on them. He therefore enquired whether SFC would consider disclosing information upon the request of the parties being investigated, or respond to their written enquiries on the progress of investigation.

57. In reply, PAS/FS(1) advised that in general, SFC would be bound by the secrecy obligation under section 378 of SFO. Noting members' concern about the application of section 378, PAS/FS(1) said that the Administration could consider the matter further with SFC to see whether the existing arrangements should be finetuned to better address members' concerns.

Checks and balances on the powers of SFC

58. Mr SIN Chung-kai cast doubt on the adequacy of the existing checks and balances on the regulatory and investigative powers of SFC since its procedures would only be subject to review by the non-statutory Process Review Panel (PRP).

He referred members to the work of the Operations Review Committee (ORC) which was an independent advisory committee appointed by the Chief Executive to oversee the work of the investigative arm of ICAC. Mr SIN called on the Administration to review the checks and balances mechanism on the powers of SFC by making reference to the ORC of ICAC.

59. CEO/SFC advised that PRP was an independent panel established to review the internal operational procedures of SFC and to determine whether SFC had followed its internal procedures, including procedures for ensuring consistency and fairness and to make recommendations to SFC in relation to these objectives. PRP could have access to all the closed files of SFC and decide on its own accord the cases to be reviewed. Information on PRP's work was available in its annual report. He added that SFC's decisions were also subject to appeals to the independent Securities and Futures Appeal Tribunal and to judicial review.

60. Mr James TO was of the view that PRP could not provide adequate checks and balances on the powers of SFC, given that it was not comprised of representatives from a diversity of background and political affiliations and its practice of only selectively reviewing cases handled by SFC. Mr SIN Chung-kai expressed a similar view. In this regard, PAS/FS(1) recalled that the composition of PRP had been drawn up in consultation with LegCo and it was the Administration's intention to appoint members to PRP from different sectors and background (including LegCo Members and industry representatives etc.). On the operation of PRP, PAS/FS(1) advised that it would not be practicable for PRP to review each and every case handled by SFC given the large number of cases involved. Bearing in mind the significant differences in functions and scope of work between SFC and ICAC, a direct comparison of the mechanisms on checks and balances applicable to them might not be appropriate. Whilst it was not practicable for PRP to review all cases handled by SFC, efforts had been made, where practicable, to examine cases which were more representative or with a longer processing time. Transparency of the operation of PRP was achieved by way of publication of annual reports giving a summary of its work and the recommendations for improvement of SFC's operational procedures. It should be noted that PRP was also required to preserve secrecy and would not disclose particulars of individual cases.

61. Mr James TO maintained his view that the operation of PRP could not adequately address concerns about SFC's non-disclosure of information on cases attracting widespread public concern. In this connection, Mr SIN Chung-kai pointed out that ICAC also handled a large number of cases annually which was comparable to that handled by SFC. The members urged the Administration to review the operation, terms of reference and composition of PRP with reference to ORC. Mr SIN recalled that during the scrutiny of the Securities and Futures Bill, LegCo Members had expressed concern about the importance of putting in place adequate checks and balances on the powers of SFC. Given that PRP had been in operation since 2000, Mr SIN considered it timely for the Administration to conduct a review on the operation of PRP.

Process of investigation

62. While noting that a major reason for imposing the secrecy obligation on SFC was to protect the privacy and proper business interests of those regulated, Mr James TIEN observed that the existing arrangements could not adequately safeguard the privacy of companies being investigated by SFC as their identities were often revealed or speculated by media reports without any official confirmation. Where the investigation dragged on for years, such speculation might intensify, thereby causing undue disruption or damage to the companies concerned. In this connection, Mr TIEN enquired about the timeframe, if any, for SFC to complete its investigation.

63. In response, CEO/SFC advised that there was no cut-off line for SFC to automatically cease investigation of a case after a fixed period of time. However, it would be in the interest of SFC and the parties being investigated to conclude the investigation within the shortest possible timeframe. In this connection, he said that normally, SFC would aim to complete investigation of a case within six months to one year, depending on its complexity.

64. Mr James TIEN expressed concern about the adverse impact of lengthy investigation on the parties concerned. Ir Dr Raymond HO was of the view that a lengthy investigation process might give rise to concerns about the propriety or otherwise of the operational procedures of SFC. In response, CEO/SFC advised that highly complex and exceptional cases would entail lengthy investigation. Nevertheless, he said that SFC had adequate manpower resources to perform its investigative functions and manpower constraint was not a cause for the relatively long investigation undertaken in some cases. At the request of Mr James TIEN and the Chairman, SFC undertook to provide statistics and relevant information on the number of cases investigated by SFC in the past five years and the time taken in completing the investigation.

(*Post-meeting note*: The required information in paragraphs 57, 61 and 64 above was circulated to members vide LC Paper No. CB(1)1898/06-07(01) on 14 June 2007.)

Concluding remarks

65. Summing up, the Chairman urged the Administration to take note of members' concerns and to keep under ongoing review the application of the secrecy provision under SFO in respect of the disclosure of information on the regulatory and investigative work of SFC so as to inspire public confidence in the impartiality and credibility of SFC. The Chairman pointed out that the transparency of SFC was important to the effective performance of its regulatory role and the maintenance of Hong Kong's position as an international financial centre. He opined that SFC should strike a proper balance between the disclosure of information in the public interest and the privacy and business interests of parties being investigated. On the

checks and balances on the powers of SFC, the Chairman said that it would be desirable for the Administration to make reference to the mechanisms adopted by other enforcement agencies, such as ICAC.

VII. Any other business

66. There being no other business, the meeting ended at 12:48 pm.

Council Business Division 1
Legislative Council Secretariat
2 August 2007