

立法會
Legislative Council

LC Paper No. CB(1)425/07-08
(These minutes have been seen
by the Administration)

Ref : CB1/SS/3/07/1

**Subcommittee on
Securities and Futures (Contracts Limits and Reportable
Positions)(Amendment) (No.2) Rules 2007**

**Minutes of the first meeting
held on Friday, 16 November 2007, at 10:45 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, SBS, JP (Chairman)
Hon Margaret NG
Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
- Member absent** : Hon CHAN Kam-lam, SBS, JP
- Public officers attending** : Miss Alice CHEUNG
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services)
- Mr Paul CHEUNG
Assistant Secretary for Financial Services and the
Treasury (Financial Services)
- Ms CHAN Wing-yan
Senior Government Counsel
Department of Justice
- Attendance by invitation** : Securities and Futures Commission
- Mr Keith LUI
Executive Director
Supervision of Markets Division

Mr Rico LEUNG
Director
Supervision of Markets Division

Ms Thrity MUKADAM
Associate Director
Supervision of Markets Division

Ms Mary AHERN
Legal Consultant
Legal Services Division

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

Staff in attendance : Ms Connie FUNG
Assistant Legal Adviser 3

Ms Rosalind MA
Senior Council Secretary (1)8

Mr Justin TAM
Council Secretary (1)3

Ms Sharon CHAN
Legislative Assistant (1)8

Action

I Election of Chairman

Ms Margaret NG, the member present who had the highest precedence in the Council among all members of the Subcommittee, presided over the election of the Chairman of the Subcommittee. She invited nominations for the chairmanship of the Subcommittee.

2. Mr SIN Chung-kai was nominated by Ms Margaret NG and seconded by Mr CHIM Pui-chung. Mr SIN accepted the nomination. There being no other nominations, Mr SIN Chung-kai was elected the Chairman. Mr SIN took over the chair.

II Meeting with the Administration and the Securities and Futures Commission

- (LC Paper No. CB(1)254/07-08(01) — Paper provided by Securities and Futures Commission (SFC)
- LC Paper No. CB(1)254/07-08(02) — Marked-up copy of Securities and Futures (Contracts Limits and Reportable Positions) (Amendment) (No.2) Rules 2007 as amended by L.N. 198 of 2007
- L.N. 198 of 2007 — Securities and Futures (Contracts Limits and Reportable Positions) (Amendment) (No.2) Rules 2007
- LC Paper No. CB(1)254/07-08(03) — Letter dated 9 November 2007 from the Assistant Legal Adviser (ALA) to SFC
- LC Paper No. CB(1)254/07-08(04) — SFC's reply dated 13 November 2007 to ALA's letter of 9 November 2007
- LC Paper No. LS7/07-08 — Legal Service Division's Report on the subsidiary legislation
- LC Paper No. LS12/07-08 — Legal Service Division's further Report on the subsidiary legislation
- Legislative Council Brief issued by SFC
- LC Paper No. CB(1)253/07-08 — Background brief on the subsidiary legislation prepared by the Legislative Council Secretariat)

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

Follow-up actions to be taken by the Administration/SFC

4. Members expressed concern about the propriety of the amendments to section 4 of the Securities and Futures (Contracts Limits and Reportable Positions) Rules (the Rules) which empowered SFC to authorize exchange participants or their affiliates to hold or control specified contracts in excess of the statutorily prescribed

limits but up to a limit specified by SFC by notice published in the Gazette which, according to the new section 4(11), was not subsidiary legislation and hence would not be subject to the scrutiny of the Legislative Council, The Administration/ SFC were requested to:

- (a) respond to a member's query that the new arrangement of specifying the contract(s) in question and the upper limit in excess of the statutorily prescribed limits by Gazette notice which was not subsidiary legislation as provided under the Securities and Futures (Contracts Limits and Reportable Positions)(Amendment)(No. 2) Rules 2007 (the Amendment Rules) might be ultra vires, given that the rules to be made by SFC under section 35(1) of the Securities and Futures Ordinance (Cap. 571) were subsidiary legislation;
- (b) assuming that the Amendment Rules had come into operation, the sanctions or penalties that could be imposed on a person in breach of the upper limit specified in the Gazette notice;
- (c) re-consider the feasibility of adopting SFC's original proposal that went to consultation, namely, specifying in the Rules (which were subsidiary legislation) the 50% upper limit in excess of the prescribed limits of which an exchange participant (or his affiliate) authorized by SFC might hold or control; and
- (d) consider an alternative approach suggested by members at the meeting, i.e. instead of giving SFC a discretionary power to authorize the holding or controlling of futures contracts or stock options contracts in excess of the prescribed limits, a more desirable approach would be to prescribe a higher limit in the relevant Rules and to empower SFC to impose a lower limit on the number of contracts which could be held or controlled by a person under specified circumstances.

5. The Administration/SFC noted the Assistant Legal Adviser's comments on the bilingual texts of the new section 4(7)(a) and section 4(8) and would re-examine whether the relevant texts should match as far as possible in terms of the language used.

(Post-meeting note: The Administration/SFC's response to concerns in paragraphs 4 and 5 above was circulated to members vide LC Paper No. CB(1)318/07-08(02) on 23 November 2007.)

Legislative timetable

6. Members noted that the scrutiny period of the Amendment Rules would expire on 28 November 2007. To allow sufficient time for scrutiny and for the

Administration/SFC to respond to the views and concerns in paragraphs 4 and 5 above, members agreed that a motion be moved at the Council meeting on 21 November 2007 to extend the scrutiny period to 19 December 2007.

III Any other business

Arrangements for the next meeting

7. Members agreed to schedule the next meeting on 23 November 2007 at 2:45 pm (or immediately after the House Committee meeting, whichever was later).

(Post-meeting note: As the Subcommittee on Unsolicited Electronic Messages Regulation (Commencement) Notice had also scheduled a meeting at the same time-slot and there was an overlap of chairmanship and membership, the Chairman had directed that the next meeting be re-scheduled to Tuesday, 27 November 2007 at 8:30 am having regard to members' availability. Members were informed of the revised meeting arrangements vide LC Paper No. CB(1)276/07-08 on 19 November 2007.)

8. There being no other business, the meeting ended at 11:55 am.

Council Business Division 1
Legislative Council Secretariat
11 December 2007

**Proceedings of the
Subcommittee on Securities and Futures (Contracts Limits and Reportable
Positions)(Amendment) (No.2) Rules 2007
First meeting on Friday, 16 November 2007, at 10:45 am
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000224	Ms Margaret NG Mr SIN Chung-kai Mr CHIM Pui-chung	Election of Chairman	
000225 – 001118	Chairman Administration Securities and Futures Commission (SFC)	(a) Briefing by the Administration and SFC on the Securities and Futures (Contracts Limits and Reportable Positions) (Amendment) (No.2) Rules 2007 (the Amendment Rules)	
001119 – 001829	Chairman ALA3 Ms Margaret NG	(a) ALA3's advice that SFC's original proposal which went to consultation was to specify in the Rules per se the 50% upper limit on the excess position which an exchange participant or his affiliate might be authorized to hold or control. She drew members' attention to SFC's revised proposal to specify the upper limit by Gazette notice instead. The notice concerned was not subsidiary legislation and would therefore not be subject to scrutiny of the Legislative Council (LegCo) under section 34 of Cap. 1. ALA3 highlighted that members might wish to consider whether the need for a degree of flexibility whilst still providing certainty for the market was a justifiable or desirable ground for SFC to adopt this legislative approach instead of its original proposal. (b) Ms Margaret NG's view that as a matter of general	

Time Marker	Speaker	Subject(s)	Action Required
		<p>principle, a notice which was intended to have legislative effect should be subsidiary legislation and therefore subject to the scrutiny of LegCo.</p> <p>(c) In reply to Ms Margaret NG's enquiry about the legal basis for making amendments to the Securities and Futures (Contracts Limits and Reportable Positions) Rules (Cap. 571 sub. leg. Y) (the Rules), ALA3's advice that section 35(1) of the Securities and Futures Ordinance (SFO) (Cap. 571) provided that SFC might make rules to prescribe limits on the number of futures contracts and options contracts which might be hold or controlled by a person.</p>	
001830 – 002722	Mr Ronny TONG SFC Administration	<p>(a) Mr Ronny TONG's enquiry on the following:</p> <p>(i) whether SFC was empowered under section 35(1) of SFO to prescribe the upper limit on the excess amount by Gazette notice</p> <p>(ii) sanctions or penalties to be imposed for non-compliance with the specified percentage of upper limit, assuming that the Amendment Rules had come into operation</p> <p>(iii) whether the flexible regime was proposed in the light of operational needs such as the anticipated need for very</p>	The Administration/SFC to take follow up actions as requested in paragraph 4(b) of the minutes.

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		<p>frequent adjustments of the limits</p> <p>(b) Referring to the existing prescribed limits under Schedules 1 and 2 to the Rules, SFC's response that the prescribed limits had not been adjusted very frequently in the past few years.</p> <p>(c) The explanation of the Administration and SFC that under the existing Rules, SFC was already empowered to authorize a person to hold or control futures contracts or stock options contracts in excess of the prescribed limits if special circumstances existed which warranted the excess position. Currently, there was no limit on the amount of excess that might be authorized. The Amendment Rules only sought to introduce a new category of authorization.</p> <p>(d) SFC's response that specifying the upper limit on the excess amount in the Rules, which were subsidiary legislation subject to vetting and amendment by LegCo, would not provide the same degree of flexibility required to respond to and cope with market developments in a timely manner.</p>	
002723 – 003741	Mr CHIM Pui-chung Chairman SFC Ms Margaret NG	(a) Mr CHIM Pui-chung's view that to cope with rapid market developments in a more effective manner, SFC should consider adopting an alternative approach by specifying higher prescribed limits for futures contracts and stock options contracts in the	

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		<p>Rules themselves, instead of seeking a discretionary power to authorize a person to hold or control specified contracts in excess of the prescribed limits. His view that the prevailing regulatory requirements on exchange participants could adequately safeguard against risks of excessive holding or controlling of contracts.</p> <p>(b) The Chairman and Ms Margaret NG indicated support for Mr CHIM's suggestion as a more desirable approach. Their view that consideration might be given to prescribing a higher limit in the Rules, while empowering SFC to impose a lower limit on the number of contracts that could be held or controlled by a person under specified circumstances.</p> <p>(c) SFC's response that the existing position limits stipulated in Schedules 1 and 2 to the Rules were adequate to meet the business needs of most market participants. The amendments in question would introduce flexibility for SFC to authorize excess holding or controlling by market participants to conduct hedging and/or arbitrage activities to facilitate the provision of services to their clients. SFC would monitor the operation of the existing position limits and review the need or otherwise for upward adjustments in the light of market development.</p> <p>(d) Ms Margaret NG 's concern that conferring on SFC the</p>	<p>The Administration/SFC to take follow up actions as requested in paragraph 4(d) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>discretionary power to authorize the holding or controlling of futures contracts or stock options contracts in excess of the prescribed limits and not subjecting such power to legislative scrutiny by way of subsidiary legislation might not be consistent with the policy intent of section 35(1) of SFO.</p> <p>(e) SFC's explanation that existing section 4(4)(a) of the Rules already empowered SFC to authorize a person to exceed the prescribed limits if special circumstances existed which warranted the excess position. The Amendment Rules sought to introduce a new category of authorization under which SFC could authorize exchange participants to exceed the prescribed limits for specified contracts where the excess was for a relevant business need.</p> <p>(f) Ms Margaret NG's view that the authorization for exceeding the prescribed limits was provided under the Rules (which were subsidiary legislation) and the upper limit for the excess should also form part of the Rules and be subject to the scrutiny of LegCo.</p> <p>(g) The Chairman's view that the new arrangement involves a policy change in regulating position limits and should be given careful consideration.</p>	
003742 – 004513	Mr CHIM Pui-chung SFC	(a) Mr CHIM Pui-chung's view that upward adjustments of	

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	Chairman	<p>the prescribed limits in the Rules would better cope with rapid growth of the market than the current arrangement provided in the Amendment Rules.</p> <p>(b) SFC's response that as a regulator, it was necessary to balance the need for market stability on the one hand and the need for flexibility on the other. A general increase in the prescribed limits might however give rise to concerns about the risks of over-holding or over-exposure to unsecured risks.</p> <p>(c) The Chairman's view that SFC might minimize risks resulting from higher prescribed limits through measures such as scaling up the capital requirements on exchange participants proportionate to their position holding.</p> <p>(d) SFC's preliminary response that the suggested approach would give rise to operational complexity and difficulties as SFC would need to justify its restrictions imposed for each case.</p>	
004514 – 005340	Ms Margaret NG ALA3 SFC	(a) Ms Margaret NG's query that the arrangement under the Amendment Rules of specifying by Gazette notice which was not subsidiary legislation the upper limit in excess of the statutorily prescribed limits might be ultra vires, given that the Rules to be made by SFC	The Administration/SFC to take follow up actions as requested in paragraph 4(a) of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
		<p>under section 35(1) of SFO were subsidiary legislation.</p> <p>(b) Responding to Ms Margaret NG's query about the legal basis for the making of the Amendment Rules, ALA3's advice that according to SFC's reply, the Amendment Rules were made by the Commission at its meeting on 29 August 2007 and notice of the making of the Amendment Rules was given by way of a notice published in the Gazette which was signed by the Chief Executive Officer (CEO) of SFC on behalf of the Commission.</p> <p>(c) SFC's further advice that the post of CEO was established under the Securities and Futures (Amendment) Ordinance (15 of 2006), the commencement of which transferred the executive responsibilities of the Chairman to the CEO; such responsibilities included the signing and notification of the rules made by the Commission. Moreover, pursuant to section 52 of the Interpretation and General Clauses Ordinance (Cap. 1), the exercise of any power vested in a body might be signified either by the chairman or by any person from time to time authorized by such body to signify the exercise of such power.</p> <p>(d) Ms Margaret NG's view that the Chairman should oversee the policy of SFC and the making of the Rules involves policy consideration rather than executive duties.</p>	

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		<p>Hence, the Chairman, instead of the CEO, should sign the Amendment Rules on behalf of the Commission.</p> <p>(e) Responding to Ms Margaret NG's comment that application of section 52 of Cap. 1 required formal authorization by the body concerned, (i.e. the Commission), SFC's response that the Commission would, at its meeting on 19 November 2007, ratify the CEO's authority to sign the Amendment Rules on behalf of the Commission.</p>	
005341 – 010313	<p>Chairman Clerk ALA3 SFC Mr Ronny TONG Ms Margaret NG</p>	<p>(a) The Chairman's view that in the light of members' concerns, the Amendment Rules had to be further examined.</p> <p>(b) In response to the Chairman's enquiry about the legislative timetable, the Clerk's advice that to allow time for scrutiny and for the Administration/SFC to respond to members' views and concerns, members might consider moving a motion to extend the scrutiny period to 19 December 2007.</p> <p>(c) ALA3's advice that amendments to the Amendment Rules could be proposed by the Administration or by members.</p> <p>(d) Members agreed that arrangement would be made to extend the scrutiny period to 19 December 2007.</p> <p>(e) The Administration was</p>	<p>The</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>requested to re-consider the feasibility of adopting SFC's original proposal that went to consultation (i.e. specifying the upper limit on excess position that could be authorized by SFC in the Rules per se).</p> <p>(f) Arrangements for the next meeting.</p>	<p>Administration/SFC to take follow up actions as requested in paragraph 4(c) of the minutes.</p>
010314 – 010822	<p>Administration Chairman Mr Ronny TONG Ms Margaret NG ALA3</p>	<p>(a) In reply to the Chairman, the Department of Justice's advice that there was no discrepancy in the legal meaning of the bilingual texts of the new section 4(7)(a) and 4(8). It was nevertheless a matter for SFC to decide whether to revise the drafting of the relevant provisions.</p> <p>(b) In response to the Chairman, ALA3's comments that the Chinese text contained more details which were not found in the English text. While the English text of the new section 4(7)(a) and 4(8) referred to "...the excess for which authorization is sought...", the corresponding Chinese text contained the meanings of "holding" or "controlling".</p> <p>(c) The Administration/SFC were asked to re-examine whether the relevant texts should match as far as possible in terms of the language used.</p>	<p>The Administration/SFC to take follow up actions as requested in paragraph 5 of the minutes.</p>