

立法會
Legislative Council

LC Paper No. CB(1)1588/05-06
(These minutes have been seen
by the Administration)

Ref : CB1/BC/13/04

Bills Committee on Financial Reporting Council Bill

**Minutes of the fifteenth meeting held on
Friday, 28 April 2006, at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon TAM Heung-man (Chairman)
Dr Hon LUI Ming-wah, SBS, JP
Hon Bernard CHAN, JP
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** : Hon Albert HO Chun-yan
Hon CHAN Kam-lam, SBS, JP
Hon SIN Chung-kai, JP
Dr Hon Philip WONG Yu-hong, GBS
- Public officers attending** : Mr Albert LAM
Deputy Secretary for Financial Services and the Treasury
(Financial Services)
- Mr Jackie LIU
Acting Principal Assistant Secretary for Financial Services
and the Treasury (Financial Services)
- Mr Gordon JONES, JP
Registrar of Companies

Ms May LEE
Assistant Official Receiver (Legal Services)

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

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- I. Confirmation of minutes of meeting**
(LC Paper No. CB(1)1363/05-06 — Minutes of twelfth meeting held
on 24 March 2006)

The minutes of the twelfth meeting held on 24 March 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)1364/05-06(01) — “Follow-up to the fourteenth meeting on 10 April 2006” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1364/05-06(02) — Paper provided by the Administration on “Follow-up actions arising from the eleventh to fourteenth meetings”
- LC Paper No. CB(3)713/04-05 — The Bill
- LC Paper No. CB(1)1127/05-06(01) — Marked-up copy of the English text of the Bill showing the draft Committee Stage amendments proposed by the Administration (March 2006)
- LC Paper No. CB(1)1364/05-06(03) — Marked-up copy of the Chinese text of clauses 1 to 32 of the Bill showing the draft Committee Stage amendments proposed by the Administration (April 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**).

Follow-up actions to be taken by the Administration

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

Admin

Clause 51 – Preservation of secrecy

- (a) Having noted the Administration’s draft proposed Committee Stage amendments (CSAs) to clause 51 (Annex A to LC Paper No. CB(1)1364/05-06(02)), members considered that the draft proposed CSAs should be refined to address the concern that the Official Receiver (OR) might, through the disclosure gateway under subclause (3)(b)(ix), obtain information from the Financial Reporting Council (FRC) about the situation of a company which was under investigation by the FRC (“Company A”) and then use the information to facilitate the performance of his duties as the liquidator of another company (“Company B”), which was one of the creditors of “Company A”, thus gaining an unfair advantage over other creditors of “Company A”. The Administration was requested to make it clear in clause 51 that the OR should not use the information disclosed to him by the FRC under subclause (3)(b)(ix) to facilitate the performance of his statutory duties as the OR in the capacity of a liquidator/provisional liquidator under the Companies Ordinance (Cap. 32).
- (b) Clause 51(2)(c) set out the condition under which a specified person might disclose information to counsel, a solicitor or other professional adviser, and clause 51(5) provided that the person to whom the information was disclosed or any other person obtaining or receiving the information from that person should not disclose the information to any other person. However, pursuant to clause 51(6)(c), the counsel or solicitor or professional adviser to whom the information was disclosed

might disclose the information to any other person if the disclosure was for the purpose of seeking advice from, or giving advice by, counsel, a solicitor or other professional adviser. A member requested the Administration to explain the policy intent of these provisions at the next meeting to be held on 12 May 2006.

Remuneration arrangement for members of FRC/Audit Investigation Board (AIB)/Financial Reporting Review Committee (FRRC)

- (c) To facilitate the Bills Committee's consideration of the funding arrangement for the FRC in due course, the Administration was requested to provide written response to members' views and concerns, as follows:
- (i) Members reiterated their concerns raised at the meeting on 7 October 2005 that given the complexity of the issues involved in FRC's investigation or enquiry, it might be necessary for members of FRC/AIB/FRRC to spend considerable time and efforts on FRC's work, and consideration should therefore be given to providing these members with remuneration; and
 - (ii) Whether remuneration was provided for the members of the Insider Dealing Tribunal; and if yes, the amount of remuneration.

Date of next meeting

4. The next meeting would be held on Friday, 12 May 2006, at 8:30 am.

III. Any other business

5. There being no other business, the meeting ended at 10:45 am.

Council Business Division 1
Legislative Council Secretariat
26 May 2006

**Proceedings of the fifteenth meeting of the
Bills Committee on Financial Reporting Council Bill
on Friday, 28 April 2006, at 8:30 am
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action Required
000000-000022	Chairman	<i>Confirmation of minutes of meeting</i> (LC Paper No. CB(1)1363/05-06)	
000023-000448	Chairman Administration Ms Emily LAU Assistant Legal Adviser 6 (ALA6)	<p><i>Outstanding issues arising from the 11th to 14th meetings</i></p> <p><u>Protection of informers' identity</u> (Paragraph 2 and pages 9 to 11 of Annex A to LC Paper No. CB(1)1364/05-06(02))</p> <p>(a) Briefing by the Administration that the common law provided a degree of protection for informers generally and that this protection arguably extended to "informers" or "whistle-blowers" providing information to the Financial Reporting Council (FRC). Notwithstanding this, the Administration agreed to propose a Committee Stage amendment (CSA) to add a new clause 51A on protection of informers' identity. The new clause was modelled on section 30A of the Prevention of Bribery Ordinance (Cap. 201) and section 57 of the Dangerous Drugs Ordinance (Cap. 134)</p> <p>(b) ALA6's view that the drafting</p>	

Time marker	Speaker	Subject(s)	Action Required
		of the new clause 51A was legally in order	
000449-003450	Chairman Administration Ms Emily LAU ALA6 Mr Ronny TONG	<p><u>Clause 51 – Preservation of secrecy</u> (Paragraphs 3 to 7 and pages 3 to 8 of Annex A to LC Paper No. CB(1)1364/05-06(02); & LC Paper No. CB(1)1127/05-06(02))</p> <p>(a) Briefing by the Administration on its response to members’ concerns raised at the meeting on 24 February 2006 about disclosure of information to the Official Receiver (OR) by the FRC, and the Administration’s draft proposed CSAs to clause 51 to:</p> <p>(i) restrict the scope of the FRC’s disclosure so that the FRC might only disclose information on a listed corporation under investigation or enquiry to the liquidator of that corporation; and</p> <p>(ii) provide that any disclosure to the relevant liquidator under clause 51(3)(c) would be subject to the same safeguards under clause 51(4)</p> <p>(b) Members’ concern that the OR might, through the disclosure gateway under clause 51(3)(b)(ix), obtain information from the FRC about the situation of a company which</p>	

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		<p>was under investigation by the FRC (“Company A”) and then use the information to facilitate the performance of his duties as the liquidator of another company (“Company B”), which was one of the creditors of “Company A”, thus gaining an unfair advantage over other creditors of “Company A”</p> <p>(c) The Administration’s advice that:</p> <p>(i) case law had established that a liquidator, in exercising his function in administering insolvent estate, should serve not only the interests of the insolvent company and its creditors but also the public interest. The OR was required to observe this principle when performing the duties of a liquidator; and</p> <p>(ii) in recent years, the OR had outsourced the administration of most liquidation cases to private-sector insolvency practitioners</p> <p>(d) Members’ request for the Administration to make it clear in clause 51 that the OR should not use the information disclosed to him by the FRC under clause 51(3)(b)(ix) to</p>	<p>The Administration to take action under paragraph 3(a) of the minutes</p>

Time marker	Speaker	Subject(s)	Action Required
		<p>facilitate the performance of his statutory duties as the OR in the capacity of a liquidator/provisional liquidator under the Companies Ordinance (Cap. 32)</p>	
003451-010024	<p>Chairman Administration Mr Ronny TONG</p>	<p><u>Clause 52 – Avoidance of conflict of interests</u> (Paragraphs 8 to 12 and pages 11 to 17 of Annex A to LC Paper No. CB(1)1364/05-06(02); & LC Paper No. CB(1)1127/05-06(02))</p> <p>(a) Briefing by the Administration on its response to members’ concerns raised at the meeting on 24 February 2006 on clause 52, and the Administration’s draft proposed CSAs</p> <p>(b) The Chairman’s advice that it seemed that the paper provided by the Administration had not fully addressed the following concerns raised by members at the meeting on 24 February 2006:</p> <p>(i) Details about the FRC’s interest disclosure regime, such as the kinds of interest that required to be disclosed and the circumstances under which disclosure should be made, should be clearly set out in writing, such as in the form of a code of conduct or</p>	

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		<p>guideline; and</p> <p>(ii) Clause 52 seemed to imply that a member of the FRC/Audit Investigation Board (AIB)/Financial Review Reporting Committee (FRRC) should not participate in the FRC/AIB/FRRC's investigation or enquiry if conflict of interest was involved. This policy should be expressly stated in the Bill. While clause 52(5) provided that a member who had disclosed the nature of any interest in a matter should not participate in the FRC/AIB/FRRC's deliberations and take part in any of its decision with respect to the matter, such a provision could only be invoked after the member had disclosed his interest. If the member did not disclose his interest, clause 52(5) could not serve its purpose</p> <p>(c) A member's views that:</p> <p>(i) a stringent interest disclosure mechanism for the FRC/AIB/FRRC should be put in place to ensure due and timely declaration of interest so</p>	

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		<p>as to minimize the risk of the investigation or enquiry being challenged on ground of failure to disclose interest in the matter which was the subject of the investigation or enquiry; and</p> <p>(ii) In connection with item (i) above, the preferred approach was to set out expressly in the Bill that a member of the FRC/AIB/FRRC should not participate in its investigation or enquiry if conflict of interests was involved. If such approach was not adopted, it should be set out in the Bill that if a member of the FRC, AIB, or FRRC had disclosed interest in a matter which was the subject of an investigation or enquiry but the FRC considered that the member should be allowed to participate in the investigation or enquiry, the parties under investigation or enquiry should be informed of such disclosure of interests and the FRC's decision immediately</p> <p>(d) The Administration's response, as follows:</p>	

Time marker	Speaker	Subject(s)	Action Required
		<p>(i) Under the proposed arrangement, a person should disclose his interest in a matter if the matter related to the items/persons set out in clause 52(3). Given the wide scope of disclosure, flexibility should be allowed for the FRC to decide whether the person concerned should participate in the investigation or enquiry;</p> <p>(ii) The proposed arrangement under clause 52 was modelled on the current arrangement under the Securities and Futures Ordinance (Cap. 571), and no problem had been identified in the current arrangement;</p> <p>(iii) The FRC was required under clause 52(4) to keep a record of the particulars of any disclosure made. It would be for the FRC to decide whether the particulars should be recorded separately in the investigation or enquiry reports, and whether, and if so to what extent, such reports should be published in accordance with the considerations set</p>	

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		<p>out in clauses 35 and 47;</p> <p>(iv) The Administration agreed to propose a CSA to add a new subclause (6A), which expressly required the FRC to notify the relevant auditor/entity of the FRC's determination under clause 52(5) that the FRC/AIB/FRRC member was not to be excluded from participating in the investigation or enquiry notwithstanding his disclosure of interests</p>	
010025-011330	<p>Ms Emily LAU Chairman Administration ALA6 Mr Ronny TONG</p>	<p>(a) A member's view that it should be set out in the Bill the factors which the FRC should take into account in determining whether or not the relevant FRC/AIB/FRRC member should be excluded from participating in an investigation or enquiry notwithstanding his disclosure of interests</p> <p>(b) The Administration's response that given the wide scope of the investigations or enquiries and the nature of the interest in any matter which might be disclosed, it would not be possible to set out exclusively in the Bill the factors to be considered by the FRC in determining whether or not the relevant member should be</p>	

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		<p>excluded from participating in the deliberation of the FRC/AIB/FRRC and take part in any decision with respect to the matter in question. It would be more preferable for the FRC to be given the latitude to make its own judgment and decision, with due observance of the established guidelines and having fully taken into account the facts and circumstances of the case</p> <p>(c) ALA6's view that notwithstanding the absence of express provisions, the FRC would be under a legal duty to decide in a fair manner whether or not to exclude a member, who had disclosed the nature of an interest in a matter being considered by the FRC/AIB/FRRC from being present at the relevant deliberation and taking part in any decision with respect to the matter</p>	
011331-011421	Ms Emily LAU Administration	The Administration's advice that clause 52(7) set out the penalties for failure to disclose the nature of an interest in accordance with clause 52(2)	
011422-011712	Ms Emily LAU Chairman Administration	<p><u>Remuneration for members of FRC/AIB/FRRC</u></p> <p>(a) The Administration's advice that the remuneration arrangement would be largely</p>	

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		<p>modelled on that adopted by the Hong Kong Institute of Certified Public Accountants (HKICPA)</p> <p>(b) In connection with item (a) above, the Chairman's view that some members of the accountancy profession assisted in HKICPA's work on a pro bono basis as a kind of public service</p> <p>(c) A member reiterated her concern that given the complexity of the issues involved in FRC's investigation or enquiry, it might be necessary for members of the FRC/AIB/FRRC to spend considerable time and efforts on FRC's work, and consideration should therefore be given to providing these members with remuneration. The Administration was requested to provide a written response to facilitate the Bill Committee's consideration of the funding arrangement for the FRC in due course</p>	<p>The Administration to take action under paragraph 3(c)(i) of the minutes</p>
011713-011944	Ms Emily LAU Administration Chairman	<p><u>Clause 52 - Avoidance of conflict of interest</u></p> <p>In response to a member's enquiry, the Administration advised that the disclosure particulars of a FRC/AIB/FRRC member might or might not be recorded in the relevant investigation or enquiry reports. In</p>	

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		<p>deciding whether or not to cause an investigation or enquiry report, or any part of the report, to be published, the FRC should take into account the considerations set out in clause 35(6)</p>	
011945-012110	<p>Chairman Administration Ms Emily LAU</p>	<p><u>Consequential amendments to the Professional Accountants Ordinance (Cap. 50) (PAO)</u> (Paragraph 13 and pages 17 and 18 of Annex A to LC Paper No. CB(1)1364/05-06(02))</p> <p>The Administration’s advice that it agreed to members’ suggestion to amend the PAO to provide that the HKICPA, upon receipt of a complaint concerning a “relevant irregularity” of a listed entity, should refer such a complaint to the FRC. The Administration would propose a CSA to amend the PAO to that effect. The Administration had consulted the HKICPA, which accepted the proposed amendment.</p>	
012111-012152	<p>Chairman Administration</p>	<p><u>Referral of cases to specified authorities</u> (Paragraphs 14 and 15 of LC Paper No. CB(1)1364/05-06(02))</p> <p>Briefing by the Administration on its written response</p>	
012153-012321	<p>Chairman Administration</p>	<p><u>Legal professional privilege</u> (Paragraphs 16 to 18 of LC Paper No. CB(1)1364/05-06(02))</p> <p>Briefing by the Administration on its written response</p>	

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012322-012451	Chairman Administration	<p><u>Right to legal representation of a relevant person</u> (Paragraphs 19 and 20 of LC Paper No. CB(1)1364/05-06(02))</p> <p>Briefing by the Administration on its written response</p>	
012452-012605	Chairman Administration	<p><u>Double jeopardy provisions in clauses 31 and 32</u> (Paragraphs 21 and 22 of LC Paper No. CB(1)1364/05-06(02))</p> <p>Briefing by the Administration on its written response</p>	
012606-012639	Chairman Administration	<p><u>Other miscellaneous matters</u> (Paragraph 23 of LC Paper No. CB(1)1364/05-06(02))</p> <p>Briefing by the Administration on its written response</p>	
012640-012907	Chairman	<p>The Chairman's advice that the Administration had provided the marked-up copy of the Chinese text of clauses 1 to 32 of the Bill showing the draft CSAs proposed by the Administration (LC Paper No. CB(1)1364/05-06(03)). The Chinese text would be considered by ALA6 in tandem with the English text to ensure that the two were consistent with each other</p>	
012908-013014	Administration	<p><i>Clause-by-clause examination of the Bill with draft CSAs proposed by the Administration</i> (LC Paper Nos.</p>	

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		<p>CB(1)1127/05-06(01) and (02), & CB(1)166/05-06(03))</p> <p><u>Clauses 33 – Inspection of records or documents seized, etc.</u></p> <p>Briefing by the Administration on clause 33</p>	
013015-013635	<p>Administration ALA6 Chairman Ms Emily LAU</p>	<p><u>Clause 34 – Magistrate’s warrants</u></p> <p>(a) Briefing by the Administration on clause 34</p> <p>(b) Briefing by the Administration on its draft CSA to clause 34(4) to address the concern previously raised by members that given the need to keep the records or documents for investigation, the six-month retention period provided under clause 34(4)(a) might not be sufficient for the purpose (LC Paper No. CB(1)1127/05-06(02)). The proposed CSA provided that the records or documents removed under a magistrate’s warrant might be retained for such longer period as might be necessary for the purpose of (i) any criminal proceedings; (ii) any proceedings before the Market Misconduct Tribunal; or (iii) any proceedings under the FRC Ordinance or Part V of the PAO</p> <p>(c) In response to ALA6’s enquiry, the Administration advised that</p>	

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		<p>where the six-month retention period under clause 34(4)(a) had expired and it was still necessary to retain the records or documents for purposes other than those set out in clause 34(4)(b), the FRC would have to apply to the Magistrate again for issue of a warrant under clause 34(1) to take possession of the records or documents</p>	
013636-014302	Administration Ms Emily LAU	<p><u>Clause 35 – Investigation reports</u></p> <p>(a) Briefing by the Administration on its proposed CSA to rewrite clause 35 to address the concerns of members and some deputations on the admissibility of the investigation/enquiry reports (use of hearsay evidence) in criminal proceedings as evidence of the facts stated therein</p> <p>(b) In response to a member’s enquiry, the Administration advised that under the proposed clause 35(7), the scope of the proceedings before a court in which the investigation/enquiry reports were admissible as evidence of the facts stated therein was narrowed from “any proceedings” to “any civil proceedings”</p>	
014303-014516	Administration	<p><u>Clauses 36 – Council’s powers to close case, suspend investigation and follow up, etc.</u></p>	

Time marker	Speaker	Subject(s)	Action Required
		Briefing by the Administration on clause 36 and the draft proposed CSA	
014517-014627	Administration Mr Ronny TONG Ms Emily LAU	<p><u>Clause 37 – Costs and expenses of investigation</u></p> <p>(a) Briefing by the Administration on clause 37</p> <p>(b) The Administration’s advice that in view of clause 37, consequential amendment would be made to the PAO to provide that where the disciplinary proceedings were instituted as a result of an investigation under the FRC Ordinance, the FRC would be paid the sum that the Disciplinary Committee of the HKICPA considered appropriate for the costs and expenses in relation or incidental to the investigation reasonably incurred by the FRC</p>	
014628-014804	Mr Ronny TONG Ms Emily LAU Administration	Members’ request for the Administration to provide written response on whether remuneration was provided for the members of the Insider Dealing Tribunal; and if yes, the amount of the remuneration	The Administration to take action under paragraph 3(c)(ii) of the minutes
014805-015834	Administration Ms Emily LAU	<p><u>Part 4 of the Bill</u> <u>Clauses 38 to 50</u></p> <p>Briefing by the Administration on clauses 38 to 50 and the draft proposed CSAs</p>	

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015835-020529	Administration Mr Ronny TONG	<p><u>Clause 51 – Preservation of secrecy</u> (Annex A to LC Paper No. CB(1)1364/05-06(02))</p> <p>(a) Briefing by the Administration on its draft proposed CSAs to clause 51 (Annex A to LC Paper No. CB(1)1364/05-06(02))</p> <p>(b) A member pointed out that clause 51(2)(c) set out the condition under which a specified person might disclose information to counsel, a solicitor or other professional adviser, and clause 51(5) provided that the person to whom the information was disclosed or any other person obtaining or receiving the information from that person should not disclose the information to any other person. However, pursuant to clause 51(6)(c), the counsel or solicitor or professional adviser to whom the information was disclosed might disclose the information to any other person if the disclosure was for the purpose of seeking advice from, or giving advice by, counsel, a solicitor or other professional adviser. The Administration was requested to explain the policy intent of these provisions at the next meeting</p>	The Administration to take action under paragraph 3(b) of the minutes

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020530-021145	Chairman Ms Emily LAU Clerk Mr Ronny TONG Administration	Meeting schedule for the Bills Committee	
021146-021426	Mr Ronny TONG Ms Emily LAU Chairman	A member's advice that he planned to move a CSA to clause 14 of the Bill, which would be provided to the Bills Committee as soon as possible	

Council Business Division 1
Legislative Council Secretariat
26 May 2006