

PRIME MINISTER

FINANCIAL SERVICES BILL: STATUS AND POWERS OF THE DESIGNATED AGENCY

Mr Channon's letter, below, makes proposals on Backbench amendments to the Financial Services Bill which were carried against the Government during Committee stage.

The aim of these amendments was to make the Securities and Investment Board (SIB) more like the American SEC. Mr Channon now proposes to give the SIB statutory recognition, to make it possible for the SIB to prosecute for less complex or serious cases, and to allow it to have investigative powers. But it would remain a private body, the Secretary of State would not be bound to give those powers to the SIB (he could later give them to another body if he chose, or he could choose not to delegate them), and it would not become another SEC (which may or may not be an advantage).

The Policy Unit believe these proposals seem likely to improve the efficiency of the SIB to a minor extent.

I draw this to your attention because this is potentially an important shift if the Secretary of State does in the end delegate the powers which the Bill would enable him to, but there seems no need for you to intervene.

George Hamilton
Duty Clerk

pf
DAVID NORGROVE
18 April 1986

*This is a fundamental
change - especially as it
creates a new prosecuting body.
Are there any other prosecuting
bodies with prosecuting*

*power?
no*

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17 April 1986

The Rt Hon Nigel Lawson MP
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Prime Minister 4

The proposals here would give the Securities and Investments Board (SIB) statutory recognition, make it a prosecuting authority for less complex or serious cases, and strengthen its investigative powers. But it would remain a private body

Dear Chancellor,

FINANCIAL SERVICES BILL: STATUS AND POWERS OF THE DESIGNATED AGENCY

We need to decide before Report Stage in the Commons how to deal with various backbench amendments which were carried against the Government during Committee Stage. These amendments were tabled by Anthony Nelson and Tim Smith. On the basis of conversations which Michael Howard has held with them, it appears that their support for the main provisions in the Bill would be secured if the Government bring forward amendments on the lines described below.

My first proposal concerns amendments passed to clause 96, which were intended to be the first steps towards turning the private sector designated Agency into a statutory commission set up under the Bill. We were able to defeat other steps designated to this end and it would be a key element in our understanding with Messrs Nelson and Smith that they would support the Government in resisting any attempt to reopen those issues or to create a statutory commission.

The modest concession I propose on Clause 96 would be to name the Securities and Investments Board in the Bill. If it appeared to meet the existing criteria in the Bill, it would be the only body to which the Secretary of State would be able to transfer his powers when the first delegation order is made. The Secretary of State would still have discretion as to the extent of the transfer. The Secretary of State would, moreover, be free to transfer powers to any body in any subsequent delegation order (which he would not be free to do under the Nelson/Smith amendments). Thus any power

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not included in the first order could be given to another body, as could any power which were resumed from SIB. (The Secretary of State would also have the hypothetical option of giving powers to another body in the first delegation order, if at that time the SIB did not appear to meet the criteria.)

... A copy of the draft amendment prepared by Counsel is attached.

This approach would confer statutory recognition on the SIB, but it would remain a private sector body and would not be a body created by the statute. This corresponds to the reality of the current situation since there is in practice little real prospect for an alternative body being in a position to seek powers in the first instance. The Secretary of State would also retain the option of keeping some or all of the powers. The provision would restore the option of giving some or all of the powers to a fresh body if SIB fails to continue to comply with the criteria set out in the Bill. That would reinforce the accountability of SIB and would also enable powers to be split between bodies if we were to decide that further developments in the marketplace or other reasons made this necessary. It was the elimination of this flexibility which led to the greatest concern at the implication of the amendment to Clause 96 which was carried in Standing Committee.

The other two amendments concern the extent to which the Secretary of State's powers may be transferred to a designated Agency. The first would enable the Securities and Investments Board to prosecute for offences under the Bill and the other would give the Board powers to investigate persons who are not authorised to carry on investment business.

The Bill as introduced reserved prosecutions (with one exception) to the Secretary of State, the DPP or the DPP for Northern Ireland. I now propose that the Secretary of State should be able to transfer his prosecution power to a designated Agency. This approach echoes the provisions for transferring the majority of his other powers in the Bill to an Agency. He should be able to transfer the prosecution power in whole or in part, and to make the transfer subject to whatever conditions or restrictions he may impose from time to time. Any powers transferred would be exercisable concurrently by the Secretary of State.

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Provided that the Agency is in due course able to satisfy us that it is capable of undertaking prosecutions, giving it this power would have considerable practical advantage. In many cases the Agency will be the first to detect that an offence has been committed and will also be able to decide whether to prosecute and/or take any regulatory action which may be needed to protect investors.

We envisage that the Agency would prosecute the more straightforward cases, particularly those relating to maintaining the integrity of the regulatory system. More complex or serious cases would be handled elsewhere, and there would have to be suitable arrangements for bringing in at an early stage the DTI or DPP (or the new Unified Fraud Organisation if we set that up).

I do not believe that the prosecution role is inconsistent with the private sector status of the agency: many offences can be prosecuted by private bodies. It is clear that there is a substantial body of opinion in favour of widening the agency's powers in this way.

I hope that the Attorney General in particular will agree that my proposals in this area are justified on their own merits. They are also part of the package designed to secure the support of Messrs Nelson and Smith.

The proposal would not of course apply to prosecutions in Scotland, which fall to the procurator fiscal.

The principal investigation powers in the Bill appear in Clause 92 and enable the Secretary of State to investigate the affairs of anyone (with minor exceptions) who is carrying on investment business. At present Clause 96(5) limits the extent to which these powers may be transferred to a designated Agency. Broadly speaking the Agency would only be able to investigate an authorised investment business and when doing so would not be able to obtain information from a third party unless he was also an authorised business or connected to such a business. I propose to remove these limitations so that it would be possible for the Secretary of State's power to be transferred in full to the Agency. This would make the powers easier to use in practice, avoiding duplication of effort between the Secretary of State and the Agency and making it possible to provide the Agency with investigation powers to back up the prosecution role I envisage for it.

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These proposals on prosecution and investigation powers do not extend the scope of the powers available under the Bill in any way: they are purely concerned with the distribution of those powers between the Secretary of State and the designated Agency. The proposals would make it possible for the powers to be fully transferred to the Agency, but the Secretary of State would retain discretion as to how far the powers should be transferred, and that transfer would require approval by both Houses of Parliament. In practice it may be sensible to transfer the powers in stages as the Agency builds up its expertise.

There is a risk that extending the list of powers which are capable of transfer to the Agency will strengthen the hand of the Opposition, who are arguing in favour of a public sector statutory commission. I believe we can meet that by pointing out that it is not uncommon for private bodies to be able to prosecute. My proposals would increase the effectiveness of the new regime under the Bill and should therefore help to secure support for it. Tony Nelson and Tim Smith have been canvassing support for their original approach, and I am convinced that if we can bring forward amendments which satisfy them we can expect a greater degree of support from the Conservative backbenchers on Report, which may in turn help us in the Lords.

I would like to be able to table the necessary amendments for Report Stage and I fear I must therefore ask for comments by lunchtime on Monday 21 April.

I am copying this letter to the Prime Minister, the Lord President, the Lord Chancellor, the Home Secretary, the Attorney-General, the Lord Privy Seal, the Chancellor of the Duchy of Lancaster, the Lord Advocate, the Chief Whip, Lord Denham, the Minister of State (Privy Council Office), the Governor of the Bank of England and Sir Robert Armstrong.

Yours sincerely,

Michael Gilbertson

PAUL CHANNON

[Approved by the Secretary of State and signed in his absence]

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DRAFT AMENDMENT TO CLAUSE 96

After subsection (1) (as in the introduction, not the amended, print), insert:

"(1)(A) The body to which functions are transferred by the first order made under subsection (1) above shall be the body known as The Securities and Investments Board Limited if it appears to the Secretary of State that it is able and willing to discharge them, that the requirements mentioned in paragraph (b) of that subsection are satisfied in the case of that body and that he is not precluded from making the order by the provisions of this section or Chapter XII of this part of this Act."

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