



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



立法會 LEGISLATIVE COUNCIL

胡鴻鈞議員 Hon. Henry K. C. Wu

(By Fax and by post)

16th March 2001

Ref: LC-01/035

Hon. Sin Chung Kai
Chairman
Securities and Futures Bills Committee
3/F, Citibank Tower
3 Garden Road
Central, Hong Kong

Dear Mr. Sin,

Re: Parts VI and Part VIII of the Securities and Futures Bills

Further to my letter dated 28th February I would like to further express my view on the captioned parts of the Bills on the following issues:

Part VI

1. Regarding the Financial Resources Rules, section 142(1) provides that a licensed corporation ("stockbroker") shall "on the day" on which it becomes aware of its inability to maintain, or to ascertain whether it maintains, financial resources in accordance with the specified amount requirements that apply to it to notify the Securities and Futures Commission ("the Commission"). Furthermore, section 142(3) provides notification shall be made "within one business day" for inability to comply with, or to ascertain whether it complies with, all or any of the requirements of the financial resources rules that apply to it. Operational experience, of which the Commission is fully aware of, showed that the time so specified is impractical and unreasonable harsh. There are a lot of factors outside

香港中區政府合署西座 420 室 Room 420, West Wing, Central Government Offices, Hong Kong.

☎ 3110-8808, 2869-9514, 2869-9538

☎ 3110-8809

胡鑑昌 副秘書長
Office of Henry K. C. Wu

- the control of the "stockbroker" (such as notification by banks or clients after office hours with regard to dishonoured cheque, overseas fund/asset transfer, etc.) which could marginally affect the financial resources. In view of the impracticality of such time requirement, the Administration should re-examine and indeed relax the time requirement to a practical and reasonable time frame. Furthermore, insertion of a clause enabling reasonable excuse be admitted in case of unintended breach.
2. Sections 143(4) provide that the Commission may amend any of the conditions imposed on a licensed corporation in accordance with subsection (3)(b) by notice "whether orally or in writing". It is to my knowledge that the White Bills contains no such "oral" provision. Although it was pointed out that such oral provision may be for the benefit of the "stockbroker" who was suspended and subsequently permitted to carry on the business, such oral provision also applied to the permission to carry on the business with conditions. Obviously if the permission is unconditional, the oral provision would be acceptable. However, should there be condition attached, the oral provision could create unnecessary argument should the conditions given orally is different than the subsequent written confirmation [section 143(5)]. Please note also that there would be a substantial time difference between the oral and written confirmation which would be provided by the Commission "as soon as practicable". In such respect, such oral provision should be removed.
 3. Sections 145(2)(k), 147(2)(d) and 148(2)(f) require a person who becomes aware of any of the specified situation provided by the sections to notify the Commission within the specified time. Hence, such person would still be liable for committing the offences provided under the respective sections. I am of the opinion that the Administration shall re-consider these provisions as they go contrary to the common law principle against self-incrimination. Even so, different sections [i.e., 145, 147, and 148] should be considered separately for its significance, that is, keeping of accounts and records (section 147) and provision of contract notes, receipts (section 148), are issues of much minor consequence than handling clients money (section 145).
 4. Section 155(4) provides where an auditor is appointed under subsection (1), the Commission may by notice in writing direct a licensed corporation or an associated entity to pay a specified amount, being the whole or a part of the costs and expenses of the examination and audit, whether before or after the appointment. Is there any justification for ordering payment in advance and whether such payment can be rebated in full or in part if the alleged wrongdoing(s) is not found?

胡錫昌 鄭志文
Office of Henry K. C. Wu

5. Section 156 provides the Commission may appoint an auditor to examine and audit, "either generally or in respect of any particular matter", the accounts and records of a licensed corporation and any of its associated entity upon application in writing by a person with regard to any failure to account to the person for any client asset (subsection (1)(a)) or to act in accordance with "instructions" given by the person (subsection (1)(b)). It is to my great concern that subsection (1)(b) is a new provision with potential far-reaching consequences on the securities profession. It would be unfair and unreasonable that any allegation(s) made by a client may give rise to such extensive examination of accounts and records by the Commission. There is also the possibility that a client may thus try to rely on this provision, in particular during times of intense market fluctuations, to force a stockbroker to compensate him for any alleged loss or profit. I recommend this subsection to be removed.
6. Section 159 makes no reference to the time frame and a person may thus commit the offence for merely carrying out routine or normal deletion or alteration of accounts, records or documents before an auditor is appointed. Besides, in the absence of evidence to the contrary, a person was "presumed to have done so with intent" to prevent, delay or obstruct the carrying out of any examination and audit under section 159(3). This provision also goes contrary to the common law principle of presumed innocent. In comparison, section 67 of the Australian Securities Commission Act provides the timing for committing the offence relating to concealing books relevant to investigation is restricted to where "the Commission is investigating or is about to investigate". Furthermore, there is no presumption of intent under the Australian law. Indeed, a defence of lack of requisite intent is provided under subsection (2).

Part VIII

7. Section 173(1)(c)(iii) provides that an authorized person may make inquiries of "any other person, whether or not connected with the intermediary or the associated entity", whom the authorized person has reasonable cause to believe has information relating to, or is in possession of, any record or document referred to in paragraph (b). I still believe that the term and scope of "any other person" may be too wide and would ask the Administration to review such scope.
8. An authorized person may require a wide range of person to furnish him any of the information specified, "within the time and in the form specified by him" under section 174(1). And it is an offence under subsection (7) if a person, without

胡錕昌 副立法

Officer Henry K. C. Wu

reasonable excuse, fails to comply with a requirement imposed on him. I would like to know whether there is any check and balance on the reasonableness of the specified time and form requirement?

9. Concerning the conduct of investigation, section 176(1) provides a person under investigation shall produce any record or document, give explanation or further particulars, answer any question and give all assistance in connection with the investigation. I am of the opinion that the power of the investigator may be too extensive.
10. With reference to paragraph 21 of the Administration's explanatory paper (CB(1)770-01(01)), section 180 will provide expressly that the information given in relation to explanations and further particulars given in respect of documents sought, and answers to questions posed is admissible in proceedings under the market misconduct regime in Part XIII in relation to any category of market misconduct and not just insider dealing. In the footnote numbered 2 that under Article 11(2)(g) of the Bill of Rights Ordinance (Cap.383) that "a person shall not be compelled to testify against himself or to confess guilt, in the determination of any criminal charge against him", I am doubtful whether the Administration can enact a law which will contravene the Bills of Rights and which is contrary to the criminal law principle on privilege against self-incrimination.

I sincerely hope that you can forward this letter to the Administration and secure their reply at the earliest convenience. Thank you very much for your kind attention and assistance.

Yours sincerely,



Henry K. C. Wu

Cc: Clerk to Bills Committee

HW/ct