

**Letterhead of Hong Kong Special Administrative Region of the People's Republic of
China**

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立法會 LEGISLATIVE COUNCIL
胡經昌議員 Hon. Henry K.C. Wu

(By Fax and by post)

27th March 2001

Ref: LC-01/044

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

Dear Mr. Sin,

Re: Part VII and Part IX of the Securities and Futures Bills

Further to my letter dated 16th March I would like to further express my views on the captioned parts of the Bills on the following issues:

Part VII

1. The Securities and Futures Commission ("the Commission") was given power to make rules relating to business conduct of intermediaries and their representatives under section 163, which may give rise to criminal liability under subsection (4). As I mentioned before as a general principle, rules made by the Commission shall not create criminal liability, in particular the subject matter concerned merely business conduct. By comparison, section 151(I) of the Financial Services and Markets Act 2000 of the United Kingdom expressly provides that "A person is not guilty of an offence by reason of a contravention of a rule made by the Authority".

2. I notice that intermediaries and their representatives are under a duty to "take specified steps" to "**ensure**" the compliance of various practices and standards specified in section 163. However, some of the requirements are impracticable. For example, subsection (2)(e) stipulates the duty to ensure the "suitability" of information and advice provided to the client. The problem is of particular imminence in case of "Initial Public Offering" where intermediaries may give advice in relation to subscription. I am of the opinion that the Administration shall re-examine these requirements and at least subsection (2)(e) shall be removed.
3. The requirement relating to avoidance of conflict of interest under section 163(2)(j) is difficult to comply with and indeed sometimes unavoidable in the operational sense. For example, almost all stockbrokers hold the HKEx's share (No.388). In such circumstances, are they so restricted that they can never give any trading advice in relation to this particular shares?
4. As the offence of money laundering is already covered by other specific ordinance, section 163(2)(m) is thus not necessary. Besides, the Commission already issued guidelines on how the intermediaries should act in suspicious circumstances.
5. Short selling is a criminal offence under section 165. It is doubtful whether it would contravene Article 7 of Bill of Rights that "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation." Moreover, short selling is an activity where a healthy market shall incorporate. Hence, it shall not give rise to criminal liability in principle unless it is coupled with the intent of market manipulation.
6. Section 169 governs the so-called "cold call" activities. Subsection (6) provides a client may rescind the agreement "within 28 days after the date on which he becomes aware of the contravention". The period of 28 days is a significant long time, especially during which there is serious risk of market fluctuations. Furthermore, securities and futures contracts are not ordinary consumer products. In order to balance the need for consumer protection and proper business operation, I suggest a period of 5 trading days after the transaction should be introduced instead.
7. Furthermore, it has come to my attention that "cold call" activities by authorized financial institution is again exempted under subsection (4). Besides, the definition of "client" under subsection (7) is more favourable to banks that engaged in more wide ranging retail services in the course of their business.

Part IX

8. Regarding the power of the Securities and Futures Appeal Tribunal, I am concerned that **not all** of the Commission's decisions are appealable. However, by comparison, section 55 of the Financial Services and Markets Act 2000 of the United Kingdom provides that an applicant or an authorized person who is aggrieved by the Authority's decision may refer the matter to the Tribunal.
9. Section 186(1)(d) provides misconduct can be construed solely **"in the opinion of the Commission"** whose power is obviously too wide and uncertain and probably against natural justice. Besides, I notice that the notion of "in the opinion of the Commission" or "the Commission is of the opinion that" appear several times in the Bills. In view of such notions provides too extensive and unfair power to the Commission, I would ask the Administration to review each and everyone of such notions in the Bill and advise its justification.
10. The stock broking profession queried what is the rationale for a licensed corporation or "a person involved in the management of the business" be **responsible for "any neglect" on the part of his employee** (a licensed person) under section 186(2)?
11. Section 187(2) provides the Commission may order a pecuniary penalty up to an amount of 10 million as a result of a disciplinary action of misconduct. However, I would ask the Administration to explain why any power involving the imposition of a pecuniary penalty shall be vested in the Commission but not the courts of the HKSAR. Please also advise, under what circumstances, if any, the Hong Kong Monetary Authority currently has on similar power in relation to any disciplinary action of misconduct of banks.
12. Section 188(1)(b) provides the Commission may revoke a licensed corporation's licence if "any of the directors" has been found to be (vi) "mentally incapacitated" or (vii) "is convicted of an offence". I am of the opinion that the Commission shall rather revoke the licence if any of the person concerned but not that of the corporation as a matter of fairness.
13. The details of the procedural requirements under section 189(2) in respect of the exercise of powers under section 187 and 188 should be subject to appeal. It has also come to my attention that the procedural requirements designed for the exempt person is different under section 191.

14. Section 193(1) provides the Commission may have regard to any information or material in its possession, which is relevant to the decision "regardless of how the information or material has come into its possession". I concern that this provision may give the Commission draconian power and will lead to abuse and injustice as the Commission is **not bound** by the rule that evidence shall be obtained properly and fairly.

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