

**Bills Committee
on Securities and Futures Bill and Banking (Amendment) Bill 2000**

**Part IX – Definition of “misconduct”
under the disciplinary regime**

INTRODUCTION

At the Bills Committee meeting on 30 March 2001, in the discussion of the definition of “misconduct” under the disciplinary regime enshrined in Part IX of the Securities and Futures Bill (SF Bill), Members asked the Administration to consider whether the reference to “in the opinion of the [Securities and Futures] Commission (SFC)” in clause 186(1)(d) should be retained. Members also asked us to advise them on whether, as safeguard measures, guidance would be given to parties concerned as to how the SFC comes up with its opinion and whether SFC’s decisions based on such an opinion are subject to appeal. This paper sets out our views on the above matters.

Clause 186(1)(d)

2. Clause 186(1)(d) defines “misconduct” as “an act or omission relating to the carrying on of any regulated activity for which a person is licensed or exempt which, *in the opinion of the Commission*, is or is likely to be prejudicial to the interest of the investing public or to the public interest”.

3. The making of a decision by any person or body inevitably involves forming of an “opinion” on the situation to which the decision relates. When the SFC makes a disciplinary decision, it must do so professionally and impartially. Clause 189 of the Blue Bill and the common law grounds of judicial review require the SFC to form its opinion in an informed and transparent manner based on relevant considerations to reach a proportional outcome. A person, the subject of an SFC disciplinary decision based on “misconduct”, may appeal that decision to the Securities and Futures Appeals Tribunal (SFAT).

4. To exercise its disciplinary powers, the SFC as the statutory regulator *needs to form an opinion* as to whether any relevant act or omission is or is likely to be prejudicial to the interest of the investing public or to the public interest. This is part of the SFC’s statutory functions which cannot be passed on

to other parties. Indeed, the legislation gives the SFC the powers to license, supervise licensees and their management, and regulate their ongoing conduct. As such, the SFC sets standards for their continuing conduct and is the appropriate expert body to judge whether those standards have been breached and what action, if any, is appropriate as a consequence.

5. Some Members have expressed the view that the words “in the opinion of...” have the effect that a court judicially reviewing an SFC disciplinary decision based on misconduct would be more likely to accept even a poorly reasoned SFC decision, as long as the SFC formed its opinion on the matter in good faith. We anticipate that a court judicially reviewing an SFC disciplinary decision based on misconduct would review the decision to ensure that the SFC had granted procedural fairness and acted without bias, had only considered relevant considerations, had sufficient evidence for its findings, had acted reasonably and proportionately and had not made the decision as an abuse of power.

6. The SFC must act professionally and impartially if its decisions are to withstand judicial scrutiny. This is safeguarded by the availability of appeal to the SFAT on the merits of an SFC decision. Appeal to the SFAT is intended to provide a much more powerful remedy to those affected by SFC decisions, which are suited to such a review mechanism, than judicial review can provide. The SFAT will be able to review both the merits of an SFC decision (i.e. was the right decision in the circumstances) and its procedural regularity and legality. The SFAT will be able to substitute its own decision for the decision of the SFC and appeals will be de novo – the SFAT will step into the SFC’s shoes as decision maker and can entirely rehear the matter if it wishes. Further, SFAT proceedings should be speedier and cheaper than judicial review.

7. As such, we believe that the Bill already contains sufficient safeguards to ensure that the SFC acts professionally and impartially and makes reasoned, proportionate decisions.

8. The SFC has issued extensive guidance about the standards of ongoing conduct it expects of licensed persons (e.g. Code of Conduct, Fit and Proper Criteria, Management, Supervision and Internal Control Guidelines, Revised Guidance Note on Money Laundering). In effect, this guidance is a statement by the SFC of what conduct the SFC believes is necessary to ensure that the public interest or the interest of the investing public is not prejudiced. The SFC forms its opinion as to whether “misconduct” has occurred in light of this guidance.

9. The situation is the same in overseas jurisdictions. Sections 205 and 206 of the UK Financial Services and Markets Act 2000 both provide that: “*If the [Financial Services] Authority considers that an authorised person has contravened a requirement imposed on him by or under this Act, the Authority may...[either publish a statement to that effect/fine the authorised person, respectively]. In the United States, for example, section 15(b)(4) of the Securities Exchange Act 1934 provides that: “The [Securities and Exchange] Commission, by order, shall censure, place limitations on the activities, functions or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest...”* Other Hong Kong regulators also have statutory powers premised on the regulator forming an opinion (see sections 7L, 7K, 7M, 7N and 35A of the Telecommunications Ordinance (Cap.106) and sections 13, 14 and 41 of the Broadcasting Ordinance (Cap.562) as examples).

CONCLUSION

10. By including “in the opinion of”, clause 186 makes transparent the reality that the SFC must form an opinion and does not materially prejudice the interest of a person the subject of an SFC disciplinary decision. The SFC is obliged to act professionally and impartially and make reasoned, proportionate decisions. If a person the subject of an SFC decision is dissatisfied, they have a powerful remedy through appeal to the SFAT supplemented by the availability of judicial review and complaint to the Ombudsman. Moreover the process and procedures by which the SFC decision was made is subject to the scrutiny of the newly established Process Review Panel to ensure that they are adhered to by the SFC.

Securities and Futures Commission
Financial Services Bureau
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