

Date: 19 March 2001

**Securities & Futures Bill
(Section XV)**

SUBMISSION
OF THE
SECURITIES LAW COMMITTEE
OF THE
LAW SOCIETY OF HONG KONG

INTRODUCTION

The Securities Law Committee of the Law Society note the concerns raised by the Panel on Administration of Justice and Legal Services on the drafting of the Chinese text of the White Bill.

We support any effort which makes our statute law more easily understood. We do not believe that literal translations are easily understood by a reader who is not bilingual.

We have found that the Chinese text has improved in various sections as compared to the previous Chinese text of the Securities (Disclosure of Interests) Ordinance. A few examples are set out in Schedule 1.

We also do not have objection to the Administration adopting a drafting approach whereby the Chinese text may contain less details than the English text so long as the two texts have the same result. However, we would be concerned if such an effort results in words used in the English text not being fully reflected in the Chinese text to an extent which may give rise to a different interpretation of the Chinese and the English text of the Bill.

This paper sets out the Committee's findings in a review undertaken in relation to the Chinese text of section XV only of the Bill (relating to the disclosure of interests in securities). We have run two tests in our exercise:

- (i) Would a reading of the Chinese text alone result in a disclosure obligation that is different from that of the English text alone?
- (ii) Would it result in a different sanction for non-disclosure?

SECTION XV – DISCLOSURE OF INTEREST

General observations

We do not find generally a reading of the Chinese text to have resulted in a materially different disclosure obligation or non-disclosure sanction when compared to the English text.

However, we find certain areas that are particularly difficult to understand without referring to the English text or which may give rise to uncertainty as to their meaning.

Interpretation concerns

✧ Section 301(5) of the English text reads as follows:

“Where a person has a short position in shares comprised in the relevant share capital of a listed corporation at the commencement of this Part, then in the circumstances specified in section 304(5), he comes under the duty of disclosure.”

The Chinese text of this section reads as:

“凡任何人在本部生效時，擁有某上市法團有關股本中的股份權益，則在第 304(5)條指明的情況下，該人有披露責任。”

According to the Chinese text of section 301(5), a person will come under a duty of disclosure when he has an interest in the shares in the listed corporation’s relevant share capital and not when he has a short position as in the English text.

We suggest that the word “權益” be changed to “淡倉”。

✧ Section 302(2) in the English text begins with the following sentence:

“In subsection (1), a reference to interests in shares comprised in the relevant share capital of the listed corporation concerned includes a reference to interests in shares so comprised, which are the underlying shares of equity derivatives, that a person has, or ceases to have, by virtue of - ”

In the Chinese text, the section starts with:

“在第(1)款中凡提述股份權益，包括提述任何人憑藉以下情況而擁有(或不再擁有)的上述股份中屬股本衍生工具的相關股份的股份權益--”

We find it hard to identify what “上述股份” (i.e. the aforesaid shares) means as the earlier part of the sentence refers to “an interest in shares” only. We suggest amending the Chinese text as follows:

“在第(1)款中凡提述上市法團有關股本中的股份權益，包括提述任何人憑藉以下情況而擁有(或不再擁有)該有關股本中屬股本衍生工具的相關股份的股份權益 - ”

We have found a similar situation in section 333(2) and we recommend that similar amendments be made to that section. We have also found a similar problem in other sections of this Part of the Bill where we have difficulty in finding or identifying the subject matter. These are set out in Schedule 2 of this paper.

✧ Section 304(11)(b)(ii) states that a reference to a change in the nature of a person’s interest in shares does not include a change arising in the following circumstances:

“due to a change in the terms on which rights under any equity derivatives may be exercised resulting from a change in the number of the underlying shares in issue;”

Under the Chinese text, that provision reads as follows:

“他擁有的該等股份權益的性質改變，而該項改變是在任何股本衍生工具下的權利的行使條款改變所致，而該條款的改變，則是由於有關的相關股份的發行數目有所改變而引致的；”

The word “發行” can be interpreted as a noun, meaning in issue (as in the English text) as well as an adjective, meaning issuable (which will then result in a different disclosure obligation from the English text).

We recommend that the last sentence of that provision be amended as “則是由于有關的相關股份的已發行數目有所改變”。

We recommend that similar amendments be made to section 332(5)(b)(ii).

✧ Section 304(11)(b)(iii)(B) states that a reference to a change in the nature of a person's interest in shares does not include the following:

“where the person is a qualified stock borrower and lender, if he –

(A) borrows the shares under a securities borrowing and lending agreement for the purposes of his business as a qualified stock borrower and lender from another person (other than a related corporation of the qualified stock borrower and lender); and”

In the Chinese text, that provision reads as:

“他擁有的該等股份權益的性質改變，而他是合資格證券借用人及借出人，且——

(A) 為其作為合資格證券借用人及借出人的業務而根據證券借貸協議向另一人(須不是合資格證券借用人及借出人的有連繫法團)借用該等股份；及”

The term “合資格證券借用人及借出人” can mean a related corporation of any qualified stock borrower and lender and not just the qualified stock borrower and lender concerned.

We suggest that the term “合資格證券借用人及借出人” be amended as “該合資格證券借用人及借出人”.

✧ In section 307(2) of the English text:

“For the purpose of this Division and Divisions 3 and 4, a person is taken –

(a) to be interested in any shares in which a corporation is interested; and
(b) to have a short position in any shares in which the corporation has a short position,

if –

(i) that corporation or its directors are accustomed or obliged to act.....; or

(ii)

In the Chinese text, the provision runs as follows:

“為施行本分部及第 3 及 4 分部，如任何法團 ——

(a) 擁有任何股份權益; 或

(b) 持有任何股份的淡倉，

而 ---

(i) 該法團; 或

(ii)

則該人須視為擁有該等權益或持有該等淡倉(視屬何情況而定)。”

The Chinese text suggests that if certain corporation has either an interest in shares or a short position, then the person concerned will be taken to be interested in the shares or the short positions that that corporation has. The Chinese text does not seem to cover situations where that corporation has both an interest in shares and a short position.

We suggest that the section be amended in the following manner:

“為施行本分部及第 3 及 4 分部，如任何法團 ——

(a) 擁有任何股份權益; 及/或

(b) 持有任何股份的淡倉，

而 —

(i) 該法團; 或

(ii)

則該人須視為擁有該等權益 及/或持有該等淡倉(視屬何情況而定)。”

✧ We have reservations in the use of the term “假手於” in section 307(5)(b)(ii) which reads as “by reference to” in the English text:

“ when performing its function as an investment manager, custodian or trustee, the power of that corporation to invest in, manage, deal with or hold interests in those shares is exercised by that corporation independently **without any reference to the person**”

In the Chinese text, the term “假手於” is used as follows:

“該法團因其投資經理、保管人或受託人的身分，以致有任何權利或權力就該等股份投票，而該項權利或權力可由該法團獨立行使而無須假手於該人”

We cannot find any defined meaning for the term “假手於” from the Chinese-English Glossary of Legal Terms. The term suggests that the corporation does not need to exercise those powers through that person or in that person’s name. It is however unclear if the corporation needs to get that person’s acknowledgement or consent before it exercises those powers. We are concerned that the term “假手於” may have a more restricted meaning when compared to the term “by reference to”. Such term is also used in section 307(5)(b)(iii). We suggest to use the term “理會”.

✧ The English text for section 310(3) runs as follows:

“The relevant particulars to be notified under subsection (2) are the number of shares (if any) comprised in the relevant share capital of the target corporation which the person giving the notification would be required to state as his interest if he were under the duty of disclosure with respect to that interest (apart from the agreement) immediately after the time when the duty to give notification under subsection (2) arose.”

The following is the Chinese text:

“假如有責任根據第(2)款作出具報的人在緊接責任產生後，亦有責任披露他在有關協議以外擁有的目標法團有關股本中的股份權益(如有的話)，而他需要述明的權益為該等股份的數目的話，則根據第(2)款須具報的有關詳情為該股份數目。”

When reading this Chinese text alone, we find it difficult to conclude when a duty of disclosure will arise as we are unable to identify when and how the condition to that duty i.e. “而他需要述明的權益為該等股份的數目的話” (meaning if he is required to disclose those number of shares as his interest) can be satisfied.

This condition does not exist in the English text and we suggest that the condition be deleted from the Chinese text. Further, for clarity purpose, we suggest that the last sentence of the Chinese text should be amended so that the whole paragraph should read as follows :

“假如有責任根據第(2)款作出具報的人在緊接責任產生後，亦有責任披露他在有關協議以外擁有的目標法團有關股本中的股份權益(如有的話)，他根據第(2)款須具報的有關詳情為該股份權益所涉及的股份數目。”

✧ The English text of section 313(5) reads as follows:

“(5) A person is taken to have an interest in shares if ----
(a) he enters into a contract for their purchase by him (whether for cash or other consideration)”

The Chinese text reads as follows:

“(5) 任何人如有以下情況，須視為擁有股份的權益---
(a) 他訂立購買(不論以現金或其他代價)該等股份的合約”

The words “購買(不論以現金或其他代價)該等股份的合約” refers to a contract for the purchase of shares and have a narrower meaning when compared to a contract for the purchase of an interest in shares in the English text.

We suggest that “購買(不論以現金或其他代價)該等股份的合約” be amended as “購買(不論以現金或其他代價)該等股份權益的合約”.

✧ In section 332(1)(d) of the English text:

“(1) A director or chief executive of a listed corporation comes under a duty of disclosure on the occurrence, while he is a director or chief executive of the listed corporation, of any of the following events –

(d) the grant to him by another corporation, being an associated corporation, of a right to subscribe for shares in or debentures of that associated corporation, the exercise of such a right granted to him and the assignment by him of such a right so granted;”

The Chinese text runs as follows:

“(1) 如在上市法團的董事或最高行政人員任職期間內---

- (d) 屬相聯法團的另一法團授予他認購該相聯法團的股份或債權證的權利，而他行使該項權利或將該項權利轉讓；”

The Chinese text provides that a director or chief executive of a listed corporation will come under a duty of disclosure only when he exercises or assigns the option but not when the option was granted to him. Under the English text, a director or chief executive of a listed corporation will come under such duty both when he receives the option and when he exercises or assigns it.

We suggest that the word “而” be removed from subsection (d).

✧ The English text for section 349 runs as follows:

“(1) If an inspector considers it necessary for the purposes of his investigation to investigate also ---

- (a) the ownership of shares in or debentures;
- (b)

he shall have the power to do so

The Chinese text reads as follows:

“(1) 如任何審查員認為就有關上市法團(“前者”)進行調查的目的，有需要調查 ---

- (a) 屬或曾屬前者的相關法團的另一法團(“後者”)的股份或債權證的擁有權；
- (b)

則該審查員有權如此調查

The phrase “有權如此調查” means a right to investigate in a particular manner but we are unable to identify what manner of investigation it is referring to. The English text of this section does not refer to any particular manner of investigation.

We suggest replacing the word “如此” with “作出此等”。

✧ An “offender” in section 352(3)(b), being a person who refuses to produce records requested or to answer inquiries raised by an inspector appointed under section 347 or 348 is being referred to as an “犯罪者” in the Chinese text. We believe the word “違反者” would better reflect the meaning of the word “offender”.

✧ Section 347(1) runs as follows:

“347(1) If it appears to the Financial Secretary that there are reasonable grounds to do so, he may appoint one or more inspectors.....for the purpose of determining the true person who are or have been financially interested in the success or failure (real or apparent) of the listed corporation

The following is the Chinese text:

“司長如覺得有合理理由，可委任一名或多於一名審查員.....以斷定誰人真正對該法團的成敗(不論是真實的或是表面的)有或曾有經濟上的利害關係.....”

Section 353(3)(b)(v) is as follows:

“any other person whose financial interests appear to the Financial Secretary to be affected by the matters dealt with in the report....”

The Chinese text is as follows:

“司長覺得財務權益受到該報告所處理的事情影響的任何其他人...”

It is unclear why the word “financially interested” in section 347(1) appears as “經濟上的利害關係” in the Chinese text when a similar term “financial interest” in section 353(3)(b)(v) appears as “財務權益”.

✧ The following sentence, which appears in the definition of “underlying shares” in section 299, does not appear in the English text:

“而就本部而言，凡股份是股本衍生工具的相關股份，該等工具即屬以該等股份為相關股份的股本衍生工具”

We are not clear what this additional Chinese sentence is intended for and suggest that this Chinese sentence be deleted or the English text be clarified.

Securities Law Committee Of The Law Society Of Hong Kong

Date: 19th March 2001

Schedule 1

✧ Section 314(2) which reads as follows:-

“A person is not taken to be interested in shares under section 313(5)(b) by reason only that he ——

- (a) has been appointed as a proxy to vote at a specified meeting of the listed corporation or of any class of its members and at any adjournment of that meeting; or
- (b) has been appointed by a corporation to act as its representative at a meeting of the listed corporation or of any class of its members.”

“任何人不得僅因有以下情況而視為根據第 313(5)(b)條擁有股份權益——

- (a) 他獲委任在某上市法團或其任何類別成員的某指明會議上，以及在該會議的延會上，以代表身分投票；或
- (b) 該人獲任何法團委任在某上市法團或其任何類別成員的會議上，以該法團的代表身分行事。”

The equivalent section, being section 14(2) of the Securities (Disclosure of Interests) Ordinance reads as follows:-

“A person is not by virtue of section 13(4)(b) taken to be interested in shares by reason only that he has been appointed a proxy to vote at a specified meeting of a listed company or of any class of its members and at any adjournment of that meeting, or has been appointed by a corporation to act as its representative at any meeting of a listed company or of any class of its members.”

“不會僅因以下理由而憑藉第 13(4)(b)條而視任何人為擁有股份的權益，即因獲委任在一間上市公司(或該公司的任何類別成員)的某一指明會議上及該會議的延會上作為代表進行表決，或因獲某法團委任在一間上市公司(或該公司的任何類別成員)的任何會議上作為該法團的代表。”

✧ Section 308 which reads as follows:-

“This section applies in relation to an agreement between 2 or more persons which includes provisions for the acquisition by any one or more of them of interests in shares comprised in the relevant share capital of a particular listed corporation (“the target corporation”), if —”

“如多於一人訂立協議，而該協議中有條文訂定由其中一人或多於一人取得某特定上市法團(“目標法團”)的有關股本中的股份權益，並且——”

The equivalent section, being section 9 of the Securities (Disclosure of Interests) Ordinance reads as follows:-

“This section applies to an agreement between 2 or more persons which includes provision for the acquisition by any one or more of them of interests in shares of a particular listed company (“the target company”), being shares comprised in the relevant share capital of that company if —”

“如 2 人或多於 2 人締結協議，協議包括條文，規定由其中 1 人或多於 1 人取得某間指定的上市公司(“目標公司”)有關股本中的股份的權益，而又有以下各項情況時，則本條適用於該協議——”

Schedule 2

Section Number	Existing Chinese text (and its English text equivalent)	Subject matter of concern	Proposed Chinese text
311(2)(c)(i)	<p>他藉參照某種人的該等股份權益或該等股份的淡倉而根據第 307 或 309 條視為擁有該等權益或持有該等淡倉(視屬何情況而定)，而擁有該等股份權益或持有該等股份的淡倉的<u>另一人</u>成為或不再是該種人</p> <p>by virtue of the fact that the other person who is interested, or has a short position, in those shares becomes or ceases to be a person by reference to whose interests or short positions (if any) he is taken to have an interest or short position (as the case may be) under section 307 or 309</p>	另一人	憑藉另一個持有該等股份權益或該等股份淡倉屬某種人而根據第 307 或 309 條視為擁有該等權益或持有該等淡倉的該另一人，成為或不再是該種人
312(b)	<p>如任何人授權另一人(“代理人”)代他---</p> <p style="padding-left: 40px;">(a) 取得.....</p> <p style="padding-left: 40px;">(b)</p> <p>他須確保凡該代理人代他如此行事，而上述作為會導致或可能導致披露責任.....</p>	如此行事	<p>如任何人授權另一人(“代理人”)代他---</p> <p style="padding-left: 40px;">(a) 取得.....</p> <p style="padding-left: 40px;">(b)</p> <p>他須確保凡該代理人進行上述作為，而該作為會導致或可能導致披露責任.....</p>

	<p>Where a person authorises another person (“the agent”) ---</p> <p>(a) to acquire</p> <p>(b)</p> <p>he shall secure that the agent notifies him immediately of acquisitions or disposals of interests, or having or ceasing to have short positions, effected by the agent which will or may give rise to any duty of disclosure</p>		
332	<p>如在上市法團的董事或最高行政人員任職期間內---</p> <p>(a) 發生任何事件，而由于該事件的發生，以致他.....</p> <p>A director or chief executive of a listed corporation comes under a duty of disclosure on the occurrence, while he is a director or chief executive of the listed corporation, of any of the following events ---</p> <p>(a) any event in consequence of which he becomes, or ceases to be</p>	他	<p>如上市法團的董事或最高行政人員在其任職期間內---</p> <p>(a)</p>
335(3)	Similar to section 332 above		

335(4)(a)	<p>任何人根據第(3)款---</p> <p>(a) 就一項權利的授予作出具報，則如他在獲得屬相聯法團的另一法團授予他認購該法團的股份或債權證的權利時，須根據第 338 條具報某些資料；</p> <p>A notification required by subsection (3) shall provide ---</p> <p>(a) in the case of the grant of a right, the like information as is required by the director or chief executive on the grant to him by another corporation, being an associated corporation, of a right to subscribe for shares in or debentures of that associated corporation;</p>	任何人	<p>任何上市法團的董事或最高行政人員根據第(3)款---</p> <p>(a) 就一項權利的授予作出具報，須提供一如他在獲得屬相聯法團的另一法團授予他認購該法團的股份或債權證的權利時，根據第 338 條所需具報的資料；</p>
335(4)(b) and (c)	Similar to section 335(4)(a)		
350(1)(b)	<p>(1) 當有審查員根據第 347 或 348 條獲委任---</p> <p>(a) 有關上市法團的所有高級人員及代理人; 及</p> <p>(b) 在---</p> <p>(i) 另一法團的股份或債權證的權益；</p>	Subject matter in subsection (b)	<p>(1) 當有審查員根據第 347 或 348 條獲委任，---</p> <p>(a) 有關上市法團的所有高級人員及代理人; 及</p> <p>(b) 在下述情況下，另一法團的所有高級人員及代理人---</p> <p>(i) 該法團的股份或債權證的權益根據第 349 條受</p>

	<p>(ii) 擁有或曾擁有另一法團的股份或債權證的權益的人，或持有或曾持有另一法團的股份的淡倉的人；或</p> <p>(iii) 擁有或曾擁有以另一法團的股份為相關股份的股本衍生工具的權益的人，</p> <p>根據第 349 條受調查的情況下，該另一法團的所有高級人員及代理人，均有責任---</p> <p>(1) When an inspector has been appointed under section 347 or 348, it is the duty of ---</p> <p>(a) all officers and agents of the listed corporation concerned; and</p> <p>(b) all officers and agents of any other corporation, if ---</p> <p>(i) the ownership of shares in or debentures of the other corporation;</p> <p>(ii) persons who have or had an interest or short position in the shares in, or an interest in the debentures of, the other corporation; or</p>		<p>到調查；</p> <p>(ii) 擁有或曾擁有該法團的股份或債權證的權益的人，或持有或曾持有該法團的股份的淡倉的人根據第 349 條受到調查；或</p> <p>(iii) 擁有或曾擁有以該法團的股份為相關股份的股本衍生工具的權益的人根據第 349 條受到調查，</p> <p>均有責任---</p>
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	<p>(iii) where the shares in the other corporation are the underlying shares of any equity derivatives, persons who have or had an interest in those equity derivatives,</p> <p>are investigated under section 349, to ---</p>		
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