

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

Response to comments raised at the meeting on 14 January 2002

This note sets out our response to the comments made by Members at the Bills Committee meeting on 14 January 2002 relating to a number of clauses of the Securities and Futures Bill.

PART IV

**Clause 106(3)(a)(iv) and (b)(iv)
Clause 107(7)(a)(iv), (b)(iv) and (c)(iv)**

To provide examples illustrating possible application

2. The captioned clauses are modelled on the Protection of Investors Ordinance which has been in operation since 1974. Some Members considered that prima facie, it would appear that omission of a material fact, as referred to in the above clauses, should not have the effect of rendering a forecast misleading or deceptive. We would like to clarify that the reference to “forecast” is intended to cover not only the “final statement”, but the assumptions and other pertinent facts underlying the “final statement”. This is supported by the reference to “any forecast **from which** ... omits a material fact”. In other words, the forecast has a broad meaning and contains not only the “up/down-prediction” but also other pertinent facts and information.

3. The following case illustrates the intended application of the provisions –

“A” proposed to offer its shares to “C”. “B” was appointed by “A” as an adviser. “B”, based on his expert knowledge in financial markets, prepared an *in-depth* and *objective* analytical report covering different aspects in relation to the business prospects of “A”. In the report, “B” indicated that “A” might have a moderate positive growth for the next three to five years after taking into account a number of positive factors. However, “B” also highlighted in the report a number of negative factors which might hinder, if not prevent, such growth.

“A”, in his representation to “C”, intentionally mentioned only the anticipated growth and the underlying positive factors. Though “A” was aware of the importance of the negative factors to “C” in coming to an investment decision, he still chose not to mention them.

4. In the above case, the positive growth for the next five years together with the positive and negative factors **all form part of the forecast**, and should be read together to put the positive growth in perspective. Omission of the negative factors may thus render the forecast misleading/deceptive.

To consider adding the mental element that any intentional/reckless omission should be for the purpose of misleading or deceiving the misrepresentee

5. Clause 106, as it is, already requires the prosecution to prove that the person making the forecast has been aware of a fact, regarded the fact as material and still chosen to omit the information in the case of fraudulent misrepresentation; or has been aware of the probability of omitting a material fact but simply ignore or do nothing about it in the case of reckless misrepresentation.

6. This is already very high burden of proof. To require further proof of the suggested mental element would compromise the effectiveness of the provision. The clause is modelled on the Protection of Investors Ordinance which has been in operation since 1974. The market is used to the construction of the provisions. The inclusion of any additional “mental element” may be viewed as a hurdle in protecting the investing public. Moreover, we have not received any market comment in this respect during the White Bill or Blue Bill consultation exercises.

PART VIII

Clause 172(13)

To provide further information comparing the penalties and offences of those provisions in existing law set out by the Administration (paragraph 9 of LC Paper No. CB(1) 789/01-02)) which are similar to clause 172(13)

7. Extracts of the relevant provisions are at the **Annex** for Members' reference.

Clause 178(1)(b)

To provide examples in existing law where non-compliance with statutory requirements could be treated in the same manner as if the person had been guilty of contempt of court

8. As explained in the Annex to the Supplementary Note dated 4 January 2002 to Paper No. CSA07/01, the court's power to punish for contempt under clause 178(1)(b) complements and adds weight to the court's power to order compliance under

clause 178(1)(a) and does away with the need for separate criminal proceedings under the offence provisions (e.g. clause 172(13)). The policy intent is to ensure effective compliance with SFC's request for information in investigating into corporate misconduct and protect investors on a timely basis.

9. The above objective has been recognized by the courts. For example, in the *Real Grant* case, Rogers J said "...the requirement to comply with notices of the SFC...is a very important requirement... If those upon whom notices are served were to get the impression that they may be ignored with impunity...there would be considerable mischief. It is my view that this court in appropriate cases must and should always impose a severe penalty which will bring home to those the importance with which the court regards this."

10. As the punishment for contempt is at the courts' discretion, the provisions also provide a flexible means of punishing non-compliance proportionate to the circumstances. In the *Real Grant* case, the court demonstrated that it would have regard to the sanctions under the criminal provisions for the same conduct when punishing as if for contempt.

11. We consider that the courts can be trusted to act fairly and with great restraint in exercising their power to punish for contempt. In addition, under clause 178(1)(b), the court must first inquire into the case and be satisfied that the non-compliance was without reasonable excuse. It has been demonstrated by the past (in the *Cheung Ka Kim* case) that the courts would not act lightly in punishing a person under existing provisions of the SFC Ordinance.

12. Clause 178(1)(b) is modelled on section 32 of the existing SFC Ordinance. There are many similar provisions in our statute which empower the Court to punish a person for non-compliance of investigatory requests. Examples of such provisions are set out below -

- section 145(3) of the Companies Ordinance (Cap. 32) (production of documents and evidence on investigation)
- section 152(4) of the Companies Ordinance (Cap. 32) (power of company to appoint inspector) ¹
- sections 8 and 9 of the Commissions of Inquiry Ordinance (Cap. 86) (contempts to be offences and contempts dealt with by Commission)
- sections 32(4), (5) and (7) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (investigation)

¹ The inspector needs not be a public officer and is appointed by a company's members by special resolution. The court is empowered to punish non-compliance with investigatory requests made by a privately appointed inspector.

13. Under sections 177(1) and (2) of the UK Financial Services and Markets Act 2000, the court is also empowered to deal with a person who failed without reasonable excuse to comply with the requirement of an investigator as if the person were in contempt. We understand that such provisions are not uncommon in the UK.

Securities and Futures Commission
Financial Services Bureau
29 January 2002

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Section of Enactment

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Chapter: 155 Title: BANKING ORDINANCE Gazette Number:
Section: 118 Heading: Powers of the inspector and offences in connection with the investigation Version Date: 30/06/1997

- (1) Subject to this section, the inspector may determine the manner in which an inquiry under section 117 is to proceed.
- (2) If the inspector thinks it necessary for the purposes of his investigation, he may also investigate the affairs, business and property of any company which is or has at any relevant time been-
- a holding company or subsidiary of the body whose affairs, business and property is under investigation;
 - a subsidiary of a holding company of that body; or
 - a holding company of a subsidiary of that body.
- (3) It shall be the duty of every director, manager, employee, or agent of a company whose affairs, business and property is under investigation (whether by virtue of section 117(2) or subsection (2)) and any person who has in his possession books, papers or information relevant to the investigation-
- to produce to the inspector all books and papers relating to the company concerned which are in his custody or power;
 - to attend before the inspector when required to do so; and
 - to answer truthfully and to the best of his ability any questions which may be put to him by the inspector and which are relevant to the investigation:
- Provided that an inspector shall not require the disclosure by a solicitor or counsel of any privileged communication, whether oral or written, made to or by him in that capacity.
- (4) Anything said by any person in answer to a question put by the inspector under subsection (3)(c) shall be inadmissible in any criminal proceedings other than criminal proceedings brought under this section.
- (5) Any director, manager, employee or agent of a company and any other person who-
- without reasonable excuse fails to produce any books or papers which it is his duty to produce under subsection (3); or
 - without reasonable excuse fails to attend before the inspector when required to do so under this section; or
 - fails to answer to the best of his ability any question which is put to him by an inspector with respect to any affairs, business and property which are or is under investigation under section 117 or to the affairs, business and property of any body corporate which are or is being investigated by virtue of subsection (2),
- commits an offence and is liable on conviction upon indictment or on summary conviction to a fine at tier 4 and to imprisonment for 6 months. (Amended 4 of 1997 s. 27)
- (6) In this section-
- "inspector" (審查員) means a person appointed under section 117(2);
 - any reference to a director, manager, employee or agent of a company includes a reference to a person who has

been but no longer is a director, manager, employee or agent of that company;

(c) "agent" (代理人) in relation to a company whose affairs, business and property are or is under investigation includes its bankers and solicitors and any persons, whether officers of the body or not, who are employed as its auditors.

(Amended 49 of 1995 s. 35)

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Chapter: 528 Title: COPYRIGHT ORDINANCE Gazette Number:
Section: 124 Heading: Obstruction of investigating officers Version Date: 30/06/1997

- (1) Without prejudice to any other Ordinance, any person who-
- (a) wilfully obstructs an authorized officer in the exercise of his powers or the performance of his duties under this Ordinance;
 - (b) wilfully fails to comply with any requirement properly made to him by any such authorized officer; or
 - (c) without reasonable excuse, fails to give such authorized officer any other assistance which he may reasonably require to be given for the purpose of exercising his powers or performing his duties under this Ordinance, is guilty of an offence and is liable on conviction to a fine at level 4 and to imprisonment for 3 months.
- (2) Any person who, when required to give information to an authorized officer in the exercise of his powers or the performance of his duties under this Ordinance, knowingly gives false or misleading information to any such authorized officer is guilty of an offence and is liable on conviction to a fine at level 4 and to imprisonment for 3 months.
- (3) Nothing in this section requires any person to give any information which may incriminate him.

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Chapter:	544	Title:	PREVENTION OF COPYRIGHT PIRACY ORDINANCE	Gazette Number:	L.N. 46 of 2001
Section:	33A	Heading:	Obstruction of authorized officers	Version Date:	01/04/2001

- (1) Without prejudice to any other Ordinance, any person who-
- (a) wilfully obstructs an authorized officer in the exercise of his powers or the performance of his duties under this Ordinance;
- (b) wilfully fails to comply with any requirement properly made to him by any such authorized officer;
- (c) without reasonable excuse, fails to give such authorized officer any other assistance which he may reasonably require to be given for the purpose of exercising his powers or performing his duties under this Ordinance; or
- (d) breaks or interferes with a seal affixed by an authorized officer under section 18(5), commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 1 year.
- (2) Any person who, when required to give information to the Commissioner or an authorized officer in the exercise of his powers or the performance of his duties under this Ordinance, knowingly gives false or misleading information commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 1 year.
- (3) Nothing in this section requires any person to give any information which may incriminate him.
- (4) No person commits an offence under subsection (1)(d) if he breaks or interferes with a seal affixed by an authorized officer under section 18(5)-
- (a) in the bona fide belief that it is necessary immediately to break or interfere with the seal in order to prevent injury being suffered by any person or damage being incurred to any premises, place, machinery, equipment or other thing; or
- (b) in the exercise of his duties as a public officer.

(Added 64 of 2000 s. 33)

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Chapter: 485 Title: MANDATORY PROVIDENT FUND SCHEMES ORDINANCE Gazette Number: L.N. 68 of 1999; L.N. 70 of 1999
Section: 32 Heading: Investigation Version Date: 03/08/1999

(1) The Authority may, by written notice served on the approved trustee of a registered scheme, notify that trustee that the Authority intends to investigate the matters specified in the notice on the ground that the Authority reasonably believes that-

- (a) a person has contravened this Ordinance with respect to the scheme; or
- (b) circumstances may exist that could prejudice the interests of scheme members; or
- (c) the trustee is failing, or has failed, to fulfil the trustee's duties with respect to the scheme. (Replaced 4 of 1998 s. 2)

(1A) The Authority must, as soon as practicable after serving such a notice, investigate the matters specified in the notice. (Added 4 of 1998 s. 2)

(2) The Authority may appoint one or more competent persons to be inspectors to conduct an investigation under this section.

(3) For the purpose of conducting an investigation, an inspector may do any of the following-

- (a) enter premises (other than premises referred to in subsection (3A)) if the inspector reasonably believes that it is necessary to enter those premises because they may have some connection with a registered scheme;
- (b) inspect those premises and make copies of records found on the premises that the inspector reasonably believes may relate to the financial or other affairs of the scheme;
- (c) require the trustee of the scheme or any other person who the inspector reasonably believes has custody of records relating to the affairs of the trustee or the scheme to produce the records to the inspector;
- (d) require the trustee or any other person who the inspector reasonably believes has information concerning the affairs of the scheme-

- (i) to give all reasonable assistance to the inspector in connection with the investigation; and
- (ii) to appear before the inspector at a time and place specified by the inspector in writing to be examined with respect to the matters relating to the affairs of the trustee or the scheme and to answer questions that the inspector may put to the trustee or other person. (Replaced 4 of 1998 s. 2)

(3A) If premises are being used as private dwelling, an inspector may enter and search those premises only under the authority of a warrant issued under subsection (3B). (Added 4 of 1998 s. 2)

(3B) A magistrate may, on an application made by or on behalf of an inspector, issue a warrant authorizing the inspector to enter and search premises referred to in subsection (3A) if satisfied by information made on oath that there are reasonable grounds for suspecting-

- (a) that the premises may have some connection with a particular registered scheme; and

(b) that there may be on the premises records relating to the affairs of the trustee or the scheme. (Added 4 of 1998 s. 2)

(3C) An inspector who enters premises under the authority of a warrant issued under this section may take possession of any records that the inspector reasonably believes relate to the affairs of the trustee or the scheme. (Added 4 of 1998 s. 2)

(4) If an inspector is satisfied that any person has, without reasonable excuse, failed to comply with any reasonable request in respect of his investigation or any requirement made under this Ordinance in respect of that investigation, the inspector may, by complaint made to the Court, certify the failure of that person to so comply.

(5) On the receipt of a certificate made under subsection (4), the Court may inquire into the case and, after hearing any statement that may be offered by way of an explanation by the person who is the subject of the complaint, may accept that explanation or alternatively punish that person in the same way as a person who is found guilty of a contempt of court.

(6) A person is not excused from answering a question that may be put to him by an inspector under this section on the ground that the answer may tend to incriminate him but, if the person claims, before answering the question, that the answer may tend to incriminate him, neither the question put to him by the inspector nor the answer of the person is admissible in evidence against the person in criminal proceedings other than in proceedings relating to a charge of perjury in respect of the answer.

(7) Any person who fails to produce any document or record required to be produced under subsection (3) with the intention of obstructing, delaying or otherwise frustrating the commencement, progress or completion of an investigation under this section commits an offence and is liable on summary conviction to a fine at level 6 and to imprisonment for 1 year.

(8) On the completion of an investigation by an inspector under this section, the inspector shall prepare a report setting out his findings concerning the circumstances or other matters investigated by him and any other relevant matters arising out of the investigation that the inspector reasonably believes should be included in the report and shall submit that report to the Authority.

(9) On receiving a report of an investigation conducted under this section, the Authority must provide a copy of the report to the approved trustee of the registered scheme concerned. The Authority may also do either or both of the following-

(a) provide a copy of the report to any person who appears to the Authority to have an interest in the scheme;
(b) publish the report or any part of it in such publication as it considers appropriate. (Replaced 4 of 1998 s. 2)

(10) Nothing in this section requires disclosure to an inspector appointed under subsection (2)-

(a) by a solicitor of any privileged communication made to him in that capacity, except as respects the name and address of his client; or

(b) by an authorized institution within the meaning of the Banking Ordinance (Cap 155) relating to the affairs of a customer unless-

(i) that customer is a person who the inspector reasonably believes may be able to give information relevant to the investigation; and

(ii) the Authority is satisfied that the disclosure is necessary for the purposes of the investigation and certifies in writing that this is the case.

(Enacted 1995. Amended 4 of 1998 s. 2)

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