

香港特別行政區政府財經事務局的信頭

電 話 TEL.: 2528 9161

圖文傳真 FAX.: 2866 9821

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22 September 1998

Clerk to Bills Committee
(Attn: Ms. Odelia Leung)
Legislative Council Building
8 Jackson Road
Central
Hong Kong.

Dear Ms. Leung

Bills Committee on Securities (Amendment) Bill 1998
Second meeting on 23 September 1998

Thank you for your letter dated 16 September. As regards Members' concerns raised in your letter, our replies are as follows -

Amendment to section 121A of Securities Ordinance (Cap. 333)

Member asked whether section 121A of the Securities Ordinance ("SO") should be amended to enable the Securities and Futures Commission ("SFC") to exercise the power of the committee of the Stock Exchange of Hong Kong (SEHK) in relation to Part X of the SO if the latter proposes an amount of compensation unacceptable to the SFC.

It is a question that concerns in a general sense the checks and balances of the power of the SEHK under Part X of the SO. As we noted at the last meeting of the Bills Committee, at present, section 121A already specifies that the SFC may exercise all or any of the powers, functions and duties of the SEHK committee under Part X of the Ordinance if the SFC is

satisfied that the SEHK has either failed or refused to exercise its functions, or that the SEHK has unreasonably delayed the making of determination of the claims. Furthermore, any claimants may appeal to the Court under section 115 of the SO if their claims have been disallowed or only partially allowed by the SEHK.

In a more general context, section 50 of the SFC Ordinance also empowers the SFC to serve restriction notices on the Exchange Company where the SFC is satisfied that it is in the interest of the investing public or in the public interest, or that it is appropriate to do so for the protection of investors or for the proper regulation of an Exchange Company. Such restriction notices may -

- (a)(ii) require the Exchange Company to take such action relating to the management, conduct or operation of its business as may be so specified; or
- (b) prohibit the Exchange Company doing or causing to be done, during a period so specified, such act or other thing relating to the management, conduct or operation of its business as shall be so specified.

According to our legal advice, such power does cover, inter alia, the performance of the function by the SEHK under Part X of the Securities Ordinance and in our view already provides necessary checks and balances of the power of the SEHK.

The Administration is however not adverse to the proposal that section 121A be amended to the effect that the SFC may also substitute itself for the SEHK committee should the latter exercise its functions under Part X unreasonably.

Charging Effect

Member would like to know whether an amendment to the Bill to provide for the maximum payment level exceeding \$150,000 per eligible claimant will have charging effect. Our legal advice on this subject is as follow.

Clause 2 of the Bill inserts a new section 99(2) in SO empowering the SFC, with the approval of the Financial Secretary, to pay into the compensation fund from its reserves such sum of money as it thinks fit. Clause 3 inserts a new section 101(1)(aa) which adds to the money constituting the compensation fund all money paid by the commission under section 99(2); and Part VII of the SFC Ordinance provides for the Commission to be funded from a combination of levies on share transactions (section 52), appropriation out of the general revenue (section 53), and fees and other charges (section 54). It follows that money injected by the SFC from its reserves under section 92(2) of SO may include money appropriated from the General Revenue.

Accordingly, it is considered that the proposed amendment that individual claimants be compensated with any fixed amount under section 113(5A) may require a disposal of public revenue. Equally, the proposed amendment may entail a charge upon the General Revenue since an obligation to pay individual claimants a fixed amount irrespective of the considerations presently referred to in section 113(5A) may lead to a greater depletion of the compensation fund than would otherwise have been the case. This may require the SFC to inject sums from its reserves into the fund under section 99(2) which in turn may require appropriation out of the General Revenue for the purposes of the SFC under section 53 of SFC Ordinance. Member may wish to note that Rule 57(6) of the Legislative Council Rules of Procedure is worded in terms of an amendment which “may” charge the revenue, thus, in the legal opinion we receive, it is not necessary for any disposal of or charge on the revenue to be forecast with accuracy.

From administration perspective, Members will also appreciate that the \$150,000 upper limit for the C. A. Pacific clients is determined taking into accounts circumstances and factors particular to the case and may not necessarily suit those of the others. Fixing a definite amount in law, be it the minimum or maximum compensation amount, will inevitably limit the flexibility in determining claims and may not be conducive to the interest of the claimants at large.

Questions by Hon. Tsang Yok-shing

The Hon. TSANG Yok-shing inquired in writing about, as I understand it,

- (a) if there are any conflict between the claimants' right to compensation under section 109 of the SO and the surrogation right of the SFC under section 118 of the same Ordinance; and
- (b) the implication of clause 6(c) of the Bill on claimants' rights.

Section 109 of the SO specifies the conditions under which a person, including a client of the defaulting stockbroker, may be entitled to claim compensation from the compensation fund. Subsection 5 also specifies the ceiling of compensation payable from the UECF (\$8 million) per a single defaulting stockbroker.

On the other hand, section 118 enables the SFC to recover the payments made from the UECF through subrogation rights until either such recoveries or the subrogation rights are exhausted. The recovered monies may be paid out again as compensation to the outstanding claims up to the first \$8 million so recovered as provided for under section 109(3) as proposed to be amended. The mechanism allows the compensation ceiling to be exceeded to the extent of the recoveries through the subrogation right and thereby enable the claimants' claims to be met as far as such "recycling" process allows. SFC's subrogation right under, for instance the liquidation process, has to precede that of the claimant from whom the subrogation right derives so as to ensure that claimants will not receive from both the UECF and the liquidation process more than what they are entitled to as well as to preserve the perogative of the UECF over its own resources.

As regards clause 6(c) of the Bill, the purpose of the amendment is to clarify that once all eligible claimants have received payment from the compensation fund under the new arrangement and the apportionment payment has been made under section 120(2), their rights to claims for compensation under section 109 of the SO could be considered absolutely discharged, regardless of whether an individual claimant may or may not receive further payment out of the apportionment payment. The amendment aims to prevent any possible abuse of any ambiguity in the existing provision in such cases that a claimant who has already been fully compensated by discretionary payment under section 113(5A) may continue to seek further compensation under the apportionment process. Clause 6(c) seeks to remove

any such ambiguity while preserving claimants' right as before where discretionary payment is not involved.

It could also usefully be added that the new arrangements would allow all eligible claimants to receive part or all of their compensation in much shorter timeframe than previously. Like previous arrangements, the compensation is made irrespective of the claimants' potential recovery from the liquidation process. Through subrogation, the risk of non-recovery under the liquidation process is transferred from the claimants to the UECF to the extent of the compensation made. Where the liquidation process returns assets less than a claimant's allowed claim, the UECF will in fact have to make a net payout from its funds to that claimant.

I hope the above addresses Members' questions. Enclosed please also find the attendance from the Administration and the DoJ at the next meeting of the Bills Committee at 8:30am, 23 September.

Yours sincerely,

(Bryan P K Chan)
for Secretary for Financial Services