

立法會
Legislative Council

LC Paper No. CB(1) 2094/99-00
(These minutes have been seen
by the Administration and
cleared by the Chairman)

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**Subcommittee on
Securities and Futures Bill**

**Minutes of meeting
held on Tuesday, 20 June 2000, at 10:45 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon Ronald ARCULLI, JP (Chairman)
Hon Eric LI Ka-cheung, JP
Hon SIN Chung-kai
Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, JP
Hon FUNG Chi-kin
- Members absent** : Hon Albert HO Chun-yan (Deputy Chairman)
Dr Hon Philip WONG Yu-hong
- Public officers attending** : Miss AU King-chi, JP
Deputy Secretary for Financial Services

Miss Vivian LAU
Principal Assistant Secretary for Financial Services
- Attendance by invitation** : Mr Mark DICKENS
Executive Director of Supervision of Markets
Securities and Futures Commission

Mrs Alexa LAM
Chief Counsel, Securities and Futures Commission

Linklaters & Alliance

Ms Pauline ASHALL

Mr Andrew CASE

Mr Wilfred YEUNG

Ms Pamela ROOT

Mr Christopher MOORE

Ms Philippa ALLEN

Ms Kathryn TSANG

Mr How Chih LEE

Consumer Council

Mrs CHAN WONG Shui
Chief Executive

Mr Ron CAMERON
Head, Trade Practices Division

Clerk in attendance : Ms LEUNG Siu-kum, Chief Assistant Secretary (1)4

Staff in attendance : Mr KAU Kin-wah, Assistant Legal Adviser 6
Ms Rosalind MA, Senior Assistant Secretary (1)6

I Meeting with the deputations

Briefing on submissions

- (a) Linklaters & Alliance
(LC Paper Nos. CB(1) 1784/99-00 and 1906/99-00(01))
Ms Pauline ASHALL commented that the Securities and Futures Bill (the Bill) was an exceptionally lengthy and complex piece of draft legislation with 385 clauses and ten Schedules. The provisions on disclosure of interests in Part XV of the Bill were incomprehensible. She drew members' attention to the following major issues raised in the joint submission of a group of ten securities houses-

- (i) Many of the offences relating to dealings in securities and futures contracts were with strict liability and limited defences. Unless the defendant could demonstrate that the highest standards of care and diligence had been exercised, he would be guilty of a serious criminal offence. Moreover, some of the penalties imposed were unjustifiably heavy taken into consideration the nature of the offence. For example, a fine of \$200,000 and six months imprisonment would be applicable to administrative matters like failing to notify the Securities and Futures Commission (SFC) within two business days that an individual had ceased to act as a licensed representative. The proposed legislation was too harsh in the sense that it would make many acts of misconduct, such as insider dealing, criminal offences with a maximum penalty of ten years' imprisonment and a fine of up to \$10 million.
- (ii) The provisions relating to market misconduct were unnecessarily complex, with 20 categories of "market misconduct" and two other criminal offences. The categories were widely drawn and might apply to conduct falling short of deliberate misconduct. The new regime was also likely to discourage the conduct of legitimate financial market activities, such as hedging and arbitrage, by international market participants in Hong Kong. The creation of a private statutory right of civil action for damages against market misconduct would expose individuals, companies and their management to unlimited civil actions by investors.
- (iii) The "management liability" concept adopted in the Bill held the "responsible officer" and senior management liable to offences and misconduct committed by the company or its staff. As a result, directors and managers of licensed intermediaries would be exposed to undue risks of criminal, civil and disciplinary sanctions even though they were not personally involved in the wrongdoings.
- (iv) The proposed extension of the concept of "interests" to unissued shares and cash-settled derivatives, the proposed requirement for disclosure of both long and short positions, and the proposed changes in the nature of an interest, were departing from international market practice and made the law immensely complex and onerous to comply with.

(v) Regarding the proposed licensing regime, the extension of licensing requirements to the automated trading services (ATS) providers lacked a clear definition on the scope of activities covered. Moreover, the proposed requirement for providers of ATS which constituted a stock market to become an exchange participant was highly unsatisfactory for overseas exchanges. The proposed requirement for all executive directors of a licensed corporation to be individually licensed by SFC was unnecessary and even unfeasible, especially for those corporations which were based overseas. While the rules for governing the licensing regime were not yet published by SFC, the actual effect of the Bill could hardly be assessed at this stage. SFC should be required to consult the public before making the rules.

(b) Consumer Council
(LC Paper No. CB(1) 1906/99-00(02))

2. Mrs CHAN WONG Shui highlighted the main points in the submission of the Consumer Council (CC) for members' consideration as follows-

- (i) On proposals against market misconduct, CC supported the establishment of a Market Misconduct Tribunal. This would provide an alternative civil route to the existing criminal route in dealing with market misconduct. In addition, CC repeated its suggestion that prohibitions against licensees engaging in anti-competitive conduct, unless specifically exempted by SFC, should also be included within the definition of market misconduct.
- (ii) On the proposals to empower investors to protect themselves, CC welcomed the creation of an express private statutory right of civil action for investors to seek remedies from another persons' market misconduct or disclosure of false or misleading information to the market. CC also called for the creation of a more focused investor support group by SFC, with adequate resources to provide services ranging from advising investors of their eligibility for seeking compensation through civil action, to providing administrative assistance on making claims and possibly some financial assistance in worthwhile cases.
- (iii) On investor compensation, CC supported the setting up of the new independent Investor Compensation Company to deal with investor compensation matters. Noting that a "per investor level" of compensation was proposed under the new compensation scheme, CC stressed that this new arrangement should not reduce the overall level of protection available under

the existing "per broker" compensation arrangement. As to the limit on the amount of compensation payable to a claimant, CC proposed the concept of a tapering method, i.e. a percentage met in full and further percentages met to a lesser amount. This method was presently in use in the United Kingdom. CC urged the Administration to undertake a separate public consultation on the matter of investor compensation before a final decision was made.

- (iv) CC supported the proposal of the Bill to empower SFC to intervene in a licensed person's business by requiring that custody of certain property be transferred to it or to its appointee. CC considered this a proper measure to protect the clients' assets from dissipation. The proposals concerning the concept of management responsibility and SFC's power to access the audit working papers of a listed corporation under inquiry were also supported by CC.
- (v) For enhancement of the competitiveness of Hong Kong brokers in the international financial market, CC urged the Administration to remove the minimum brokerage commission rules, although it recognised that such rules were not prescribed by law. Moreover, it suggested that the monopoly status of the Stock Exchange of Hong Kong and the Hong Kong Exchanges and Clearing Limited should be reviewed at a later date.

Discussion with members

3. Mr FUNG Chi-kin sought clarification of CC's view as expressed in paragraph 11 of its submission. He enquired about how CC formed the view that more and more Hong Kong people were investing in the stock market and relying on such investment to secure their retirement and long-term income plans.

4. Mrs CHAN WONG Shui explained that with the implementation of the Mandatory Provident Fund (MPF) in Hong Kong, more people would invest in the securities and futures market through their participation in the MPF schemes and they would become more interested in getting update and accurate market information. The Chairman agreed that improvements should be made in the disclosure of market information so that investors could make informed investment decisions.

5. The Deputy Secretary for Financial Services (DS/FS) informed members that consultation on the White Bill would last until end June. The Administration looked forward to receiving public comments and would be happy to consider comments which helped enhance the effectiveness of the

proposed regulatory regime, and those which helped strike a more reasonable balance between market development and investor protection. The Administration believed that if market participants shared the vision of developing Hong Kong into the leading international financial centre in the Asia time zone, there would be a common ground to refine the white Bill and the Administration did not expect anything which could not be resolved. DS/FS stressed the importance of integrating into international regulatory norms for a fair, orderly and transparent market in enhancing Hong Kong's competitiveness in meeting the challenges presented by globalization.

6. DS/FS said that the Administration had been meeting market participants in the past few months for exchange of views on the White Bill. The Administration had not received any submissions on the White Bill except the two partial submissions from the deputations present at the meeting. In the circumstances, DS/FS said that the Administration was not in a position to give its considered views on these two partial submissions at this stage. A few points of clarification made at the meeting were as follow -

- (i) The provisions relating to the liability of responsible officers and senior management of licensed intermediaries would only be applicable to serious offences such as those relating to the financial management of the intermediaries and the management of their clients' asset.
- (ii) Seen in a positive light, the concept of "management responsibility" was introduced as an effective means to encourage licensed intermediaries to set up proper internal control mechanism. The ultimate objective of the proposals was not meant to be punitive. Drafting of the provisions in this regard could be refined taking into account market views.
- (iii) With the dual criminal and civil routes to deal with market misconduct, the Administration had tried to draft the Bill in a user-friendly manner, trying to provide as much clarity as possible and minimise the need for cross references. Most offences would require that a mental element be established.
- (iv) Regarding the proposed requirement for the executive directors of licensed intermediaries to be individually licensed by SFC, flexibility and discretion would be exercised by SFC in considering cases where the licensed intermediaries were international companies based in overseas jurisdictions.

7. DS/FS said that the Administration appreciated the concern of market participants about the detailed proposals of the new regulatory regime. It was working hard to draft those subsidiary legislation, codes and guidelines to be

made under the Bill and which were of most concern to the market. The Administration expected drafts of such priority instruments to be ready for public comment when the draft Bill was introduced into the Legislative Council in October to November 2000. While the Administration was fully aware of the complexity of the Bill and that more time might be required for the Legislative Council and the market participants to consider the draft and give their comments, she appealed to members for early enactment of the Bill so that the financial market of Hong Kong could benefit from the modernized regulatory regime at the earliest possible instance. This would be crucial to the competitiveness of Hong Kong in the international financial market. The Administration would endeavour to secure early enactment of the Bill in April 2001.

8. The Chairman said that in view of the complexity of the Bill, there might not be sufficient time for Legislative Council members and political parties to furnish their submissions to the Administration before the deadline of the consultation period on 30 June 2000. To facilitate members in their consideration of the Bill at the Bills Committee stage, he advised the Administration to give members an overall view of the proposed changes to the existing regime. He also suggested that deputations present their submissions to the future Bills Committee when it was formed, with comparisons between the existing and the proposed regime.

9. Mr SIN Chung-kai agreed that the Bill was a huge and complex piece of legislation. The Democratic Party might not be able to submit its views to the Administration before end June 2000. He also commented that the time required for the future Bills Committee to consider the Bill after it was introduced to the Legislative Council might be much longer than what the Administration expected. He thought that it might take more than one year for the Bill to be enacted. Mr FUNG Chi-kin also pointed out that market participants were working hard in preparing their submissions to the Administration before the deadline. He urged the Administration to appreciate their difficulties in studying the complex Bill and accept late submissions, if any.

II Any other business

Way forward

10. Members agreed that the work of the Subcommittee should come to an end. It would recommend to the House Committee that a Bills Committee be formed to study the Bill after the Bill had been introduced to the Legislative Council in the next session.

(Post-meeting note: The report of the Subcommittee was endorsed at the House Committee meeting held on 23 June 2000.)

11. The meeting ended at 11:47 am.

Legislative Council Secretariat

3 October 2000