

**立法會**  
**Legislative Council**

LC Paper No. CB(1) 2091/99-00  
(These minutes have been seen  
by the Administration and  
cleared by the Chairman)

Ref: CB1/BC/13/99/2

**Bills Committee on  
Securities and Futures Legislation  
(Provision of False Information) Bill 2000**

**Minutes of meeting held on  
Monday, 5 June 2000, at 2:30 pm  
in the Chamber of the Legislative Council Building**

- Members present** : Hon Ronald ARCULLI, JP (Chairman)  
Hon Albert HO Chun-yan  
Hon SIN Chung-kai  
Hon FUNG Chi-kin
- Members absent** : Hon Eric LI Ka-cheung, JP  
Dr Hon Philip WONG Yu-hong  
Hon Jasper TSANG Yok-sing, JP
- Public officers attending** : Financial Services Bureau  
  
Mr Bryan CHAN  
Principal Assistant Secretary for Financial Services  
  
Mr Howard YAM  
Assistant Secretary for Financial Services  
  
Department of Justice  
  
Miss Monica LAW  
Senior Government Counsel

- Attendance by invitation** : Securities and Futures Commission
- Mr Mark DICKENS  
Executive Director, Supervision of Markets  
Division
- Mrs Alexa LAM  
Chief Counsel
- Mr Eugene GOYNE  
Senior Manager
- The Law Society of Hong Kong
- Mr Alan EWINS  
Chairman of Securities Law Committee
- Mr CHIU Pak-yue, Leo  
Member of Securities Law Committee
- Linklaters & Alliance
- Mr Marc HARVEY
- Ms Pamela ROOT
- Mr Jonathan COLLINS
- Hong Kong Institute of Company Secretaries
- Mr Peter TASHJIAN  
Chief Executive
- Clerk in attendance** : Ms LEUNG Siu-kum  
Chief Assistant Secretary (1)4
- Staff in attendance** : Mr KAU Kin-wah  
Assistant Legal Adviser 6
- Ms Connie SZETO  
Senior Assistant Secretary (1)1
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**I Meeting with the Administration and deputations**

(LC Paper Nos. CB(1) 1730/99-00(01) to (03) -- Submissions from Linklaters & Alliance, the Hong Kong Securities Industry Group, and the Hong Kong Exchanges and Clearing Ltd., 1803/99-00(01) -- Submission from the Hong Kong Bar Association, 1803/99-00(02) -- Administration's responses to the submissions provided by the Hong Kong Securities Industry Group and the Hong Kong Exchanges and Clearing Ltd., 1803/99-00(03) -- Administration's proposed Committee Stage amendments to the Bill.)

The Chairman welcomed representatives from the Administration, the Securities and Futures Commission (SFC), Linklaters & Alliances, the Law Society of Hong Kong, and Hong Kong Institute of Company Secretaries attending the meeting. He drew members' attention to the submission provided by the Hong Kong Bar Association (HKBA) tabled at the meeting which expressed support for the principles of the Bill. On HKBA's suggestion of giving prior warning to the provider of information as to his potential liability for providing false information under the general offence provisions, the Chairman noted that the Administration had incorporated the suggestion into the proposed Committee Stage amendments (CSAs) to the Bill.

Briefing on the proposed CSAs to the Bill

2. The Principal Assistant Secretary for Financial Services (PAS/FS) took members through the Administration's proposed CSAs tabled at the meeting. The salient points of the CSAs were as follows :

- (a) The terms "complete " and "incomplete" would be deleted. The proposed offences would only apply to information that was "false or misleading".
- (b) The references to "does not believe to be true" would be replaced by "reckless".
- (c) The General Reporting offences would be restricted to only apply to documents. The term "record or other document", which was defined in the Securities and Futures Commission Ordinance (SFCO) (Cap. 24) to include electronic documents, would be used. The definition would not include recordings of verbal information made by a regulator without the consent of the person being recorded.
- (d) In respect of the General Reporting offences, SFC or the front-line market operators would further be required to give written warning to a provider of information before he provided the information reminding him of the criminal liability for the

provision of false or misleading information.

- (e) The reference to "relevant to" the performance of a function of the regulator would be removed so that the General Reporting offences would only apply to information that was provided "in connection with" the performance of such a function.
- (f) In securing a conviction of the General Reporting offences, the requirement for SFC or the front-line market operators to prove mere reliance on the information would be changed to "reasonable reliance", or the regulatory authorities had to prove that the defendant intended that SFC or the front-line market operators in question rely on the information.

#### The concept of "recklessness"

3. The Chairman re-iterated his reservation over the replacement of the references to "does not believe to be true" with references to "reckless" in the Bill. He was of the view that the terms "wilful" and "with intent to deceive" used in comparable legislation in Singapore would be more appropriate.

4. Representatives of SFC explained that in the United States, the meaning of "wilful" included "reckless". The state of "recklessness" contemplated by the Bill would include a person who provided the information with reckless disregard of the truthfulness of the information and with the conscious purpose to avoid learning the truthfulness of the information. The proposed use of the term "reckless" in the Bill would not criminalize "carelessness" or "negligence" in the provision of false information which the Australian provisions sought to criminalize.

5. Representatives of the deputations shared the Chairman's concern. They pointed out that the concept of "reckless" although appeared in existing Ordinances, was not defined. There would be uncertainty as how the term might be construed in the circumstances of the Bill. If, as explained by SFC, the mental elements of "reckless disregard" and "conscious effort to avoid learning the truth" in the provision of information were to be considered in securing a conviction of the offences, it would be more appropriate and clearer to redraft the provisions using the terms, such as "conscious disregard" or "deliberate disregard". The adoption of the term "reckless" would extend the scope of the Bill further than the Administration actually intended.

#### Statutory and non-statutory information

6. The Chairman said that the proposed CSAs could not fully address his concern that the Bill would give non-statutory codes or rules the force of law which could hamper their flexibility and effective enforcement.

7. In response, PAS/FS re-iterated that it was not the purpose of the Bill to provide legal backing to non-statutory codes or rules. He stressed that non-provision of information by market participants in response to a non-statutory requirement would not attract criminal liability. The Bill would only criminalize the provision of false or misleading information under non-statutory requirement. In order to address the concern of the Bills Committee and deputations about the inclusion of non-statutory information in the Bill, the Administration had agreed to move CSAs to trim down the scope of the General Reporting offences to include only documents and exclude oral information. Moreover, CSAs would be made to require the regulatory authorities to give written warning to the information provider on the potential criminal liability under the proposed offences before the provision of non-statutory information. Coupled with the mens rea test of "reckless" for the offences, the Administration considered that the concerns of the industry had been addressed.

8. Mr Albert HO Chun-yan and Mr SIN Chung-kai conveyed the support of the Democratic Party for the Bill. They were of the view that although the non-statutory codes or rules did not have the force of law, SFC and the front-line market operators did rely on the information provided by market participants in compliance with these codes to discharge their public duties effectively. It would be of utmost importance that information provided to the regulatory authorities was true. The Bill would ensure dissemination of accurate information for enhancing investor protection and maintaining a level playing field among market participants. These two members said that the Administration's proposed CSAs had allayed their previous concerns about inclusion of oral information and voluntary provision of information in the Bill. They also accepted SFC's explanation that the term "reckless" was the appropriate mental element for the offences and that adequate mens rea tests had been provided for in the Bill.

Parties to whom the offence applied

9. The Chairman expressed concern that the conveyors rather than the generators of the false or misleading information would be caught by the Bill. It would put an unreasonable burden on the conveyors to check every detail of the information before submitting it to the regulator.

10. In response, representatives of SFC said that if the offences were only to be applied to the generators of information, evasion would be easy and the legislation would not be effective. They stressed that there would be adequate mens rea tests for the proposed offences. If the conveyor of information did not know that the information was false or misleading in a material particular and was not reckless as to the same, he would not be liable for the offences. Comparable legislation of overseas jurisdictions also did not identify specific

categories of persons for application of the offences. Offences were applied to anyone who provided information.

Examination of the proposed CSAs

11. Members noted that the Administration had tabled a copy of the revised draft section 56A of SFCO at the meeting. If the amendments were acceptable to the Bills Committee, appropriate CSAs would be introduced to other parts of the Bill in respect of the exchange companies, clearing houses and recognized exchange controllers.

12. The Chairman opined that for the sake of brevity, the proposed new section 56A(1) of SFCO could be streamlined by condensing the words about the mens rea of the person in paragraphs (a) and (b) to “knowingly or recklessly”. The provision would then read “A person who knowingly or recklessly provides information that is false ...”.

13. The Law Draftsman explained that although the present provision was wordier, it could however prevent people from arguing that the knowledge related to the provision of information. The present structure made it clear that the knowledge related to the falsehood of the information and was preferred to though the provision was thus longer.

14. The Administration agreed to consider the Chairman's suggestion of replacing the words "it may be false" by "it is false" in the proposed new section 56A(1)(b) of SFCO.

15. The Chairman expressed reservation about the need to add section 56A(5) to SFCO to provide that a record of verbal information made by SFC with the consent of the person concerned shall be regarded as information provided by the person to SFC under the General Reporting provisions in subsection (3). He opined that as CSAs would be moved to exclude verbal information from the scope of the General Reporting offences, it would not be necessary to provide subsection (5). Mr Mark DICKENS, Executive Director, Supervision of Markets Division, SFC advised that the provision had been added at the request of the deputations. The provision was meant to qualify "record and other document" used in the proposed subsection (3) and to reassure the industry that SFC would not hold a person criminally liable for providing false or misleading verbal information if the record was produced by SFC without the consent of the concerned person. He said that SFC had no objection to deleting subsection (5).

16. Some representatives of the deputations were concerned that in the absence of subsection (5), recordings of verbal information made by SFC with the consent of the person concerned could be regarded as information provided by the person. Hence, instead of deleting the provision, they suggested

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amending it to provide the concerned person with an opportunity to review and confirm the content of a record produced by SFC with his consent before it was taken as information provided by the person. The Chairman requested the Administration to consider the suggestion.

*(Post-meeting note: The Administration explained in its letter circulated to members vide LC Paper No. CB(1) 1811/99-00 that as the proposed new section 56A(3) of SFCO would only cover record and other document "provided" by a person to a regulator, it was therefore clear that verbal information recorded by a regulator would not be covered under subsection (3), unless that record was given to the person and he subsequently provided it to the regulator. Hence, the Administration considered it unnecessary to provide subsection (5).)*

## **II Any other business**

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17. The Bills Committee completed its deliberation on the Bill. The Administration undertook to provide members with a copy of the finalized CSAs as soon as possible.

18. Members agreed that the Bills Committee would not propose any CSAs. The Chairman said that it was up to individual members to decide whether they would like to move CSAs in their own capacity. He informed members that the Administration intended to resume the Second Reading debate on the Bill on 26 June 2000. The Bills Committee would report to the House Committee on 16 June 2000 which was also the deadline for giving notice for moving CSAs.

19. The meeting ended at 4:15 pm.

Legislative Council Secretariat  
3 October 2000