

**立法會**  
**Legislative Council**

LC Paper No. CB(1) 2088/99-00  
(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  
Thursday, 25 May 2000, at 2:30 pm  
in Conference Room A of the Legislative Council Building**

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

**Attendance by invitation** : Securities and Futures Commission

Mrs Alexa LAM  
Chief Counsel

Mr Eugene GOYNE  
Senior Manager

The Law Society of Hong Kong

Mr Alan EWINS  
Chairman of the Securities Law Committee

Ms Pauline ASHALL  
Member of the Securities Law Committee

Linklaters & Alliance

Mr Marc HARVEY

Mr Christopher MOORE

Ms Pamela ROOT

Ms Liz HOWELL

Mr Jonathan COLLINS

Ms Philippa ALLEN

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 deputations**

(LC Paper Nos. CB(1) 1632/99-00(03), 1677/99-00(01)-(03), 1688/99-00(01)-(03))

Members noted that the Bill sought to amend several ordinances relating to the regulation of securities and futures markets making the provision of false, misleading or incomplete information to the Securities and Futures Commission (SFC) and the front-line market operators (i.e., the Exchanges and Clearing Houses) a criminal offence. The proposed offence provisions would apply when a person was providing the information under a statutory obligation (Statutory Reporting) as well as in other circumstances (General Reporting).

2. The Chairman informed the meeting that a total of 18 industry bodies and professional organizations had been invited to give views on the Bill. Five organizations had provided submissions so far and representatives of the Law Society of Hong Kong, Linklaters and Alliance (presenting a group of international financial institutions), and the Hong Kong Institute of Company Secretaries would attend the meeting to present their views.

3. The Chairman invited representatives from the three organizations to present their views. Members noted that the organizations in general supported the underlying principles of the Bill. Their concerns which had been detailed in the written submissions were summarized in the following paragraphs.

Type of information

4. The Bill drew no distinction between the types of information to be covered under the provisions and the degree of formality involved in its provision. In short, the Bill covered all types of information no matter it was oral or written; given formally or informally. Unlike existing securities legislation where criminal offences were only prescribed for the provision of false or misleading information under specific statutory requirements to supply information and provided in formal contexts, the Bill would extend the scope of criminal liability very substantially to include the provision of information generally and information provided voluntarily to the regulators. The Bill would jeopardize the frank communication between regulators and market participants and discourage the free flow of information to the regulatory authorities making it more difficult for them to obtain market information and hence prejudicing the effectiveness of the regulatory regime.

"Belief" in truth, accuracy and completeness

5. It would be an offence under the Bill to provide information which was "incomplete" or which the person "does not believe to be true". The first concept was unusual in common law. Moreover, "incomplete" information as a consequence of any omission from that information should have already been caught by the words "false or misleading". The adoption of "does not believe

to be true" was also inconsistent with international common practices. It was unusual to criminalize the making of a statement in the absence of positive belief in its truth.

The offence could be committed by any person

6. The proposed offence might catch a person who is merely passing on information. It would be unfair that a person could be held liable for an offence if the information provided by him to the regulator was supplied by a third party.

Relationship with existing offences

7. The Bill provided that the new offence provisions would not apply where an existing statutory provision which imposed an obligation to provide information had a specific criminal sanction for providing false or misleading information. The new provisions would therefore be "catch-all" provisions covering all information which did not currently attract criminal liability. There were significant differences between the wording and scope of the existing offences and the proposed new offence. As the new offence provisions required lower threshold for establishing criminal liability than the existing provisions, the Bill would have the effects of creating new obligations for provision of information and widening existing offences.

Inconsistency with other jurisdictions

8. Similar provisions in other comparable jurisdictions usually imposed criminal sanctions for false or misleading information provided to regulators in purported compliance with specific statutory requirements. The Bill went much further in attracting such liability to the provision of any information as long as it was "relevant to" or "connected with" the performance of the functions of the regulators. Moreover, while in overseas jurisdictions offences were applicable only to information provided to the regulators, the Bill would extend to information provided to front-line market operators including the exchanges and clearing houses.

9. The deputations put forward the following proposals for redrafting the Bill:

- (a) The new offence provision should only apply to the provision of false or misleading information provided to the regulators in written form under formal contexts. Oral information should be excluded.
- (b) The usual test for criminal liability in relation to the provision of false information should be whether the person knowingly provided the false or misleading information instead of the absence of belief that the information was true as the Bill was

presently drafted. The Administration's consideration of replacing the references to "complete" and "incomplete" by "false or misleading by omission", as well as "does not believe" by "reckless" was welcomed by the deputations.

- (c) It was unsatisfactory that offences stipulated in the Bill could target at any person. Offences should be applied to "generators" only and not mere "conveyors" of the information.
- (d) The Bill should be accompanied by extensive guidelines on various concepts, such as what constituted false or misleading information, in order to avoid interpretation problems and to provide certainty for market participants.

## **II Meeting with the Administration**

(LegCo Brief Ref: SU B48/2, LC Paper No. CB(3) 658/99-00 -- the Bill)

### Members' views

10. Members generally supported the Bill which would help strengthening the capabilities of market regulators and upholding the integrity of the market for investor protection. They however shared some of the concerns of the deputations.

11. In respect of the wide scope of the Bill, some members concurred with the deputations that in order to avoid discouraging market participants from volunteering information to the regulator, criminal liability should be limited to written information. As regards information provided on informal occasions, they suggested adding in the Bill a requirement for the regulator to give warning to the person concerned prior to his provision of information to remind him of the criminal liability under the proposed provisions.

12. On the practical problems associated with the giving of "incomplete" information and the adoption of the concept of absence of positive belief, members opined that the Administration should explore proposals to improve the drafting of the provisions to ensure that they would be consistent with international practices and easily understood by market participants.

13. Concerning providing front-line market operators with statutory power to penalize market participants for the provision of false information, the Chairman expressed concern about the possible role conflict of the Hong Kong Exchanges and Clearing Limited (HKEx) being a front-line market operator regulating market participants and a market participant itself when it became a listed company by mid 2000.

Responses from the Administration

14. The Principal Assistant Secretary for Financial Services (PAS/FS) explained that under the existing law, a statutory requirement to provide information was usually backed up by a specific offence provision making the provision of false or misleading information a criminal offence. The lack of general offence provisions for providing false or misleading information to the Securities and Futures Commission (SFC) and the front-line market operators had undermined the effectiveness of the performance of the regulatory functions of these bodies. With the increasing reliance on information disclosure as a safeguard of investor interests and the international trend towards requiring more disclosure of information to promote market transparency and efficiency, the Administration considered it necessary for SFC and other front-line market operators to have the capability to ensure accurate reporting. It was therefore necessary to criminalize the supply of false or misleading information to SFC and the front-line market operators. The Administration had consulted selected industries and professional groups when developing the legislative proposal and had taken into account their views in finalizing the Bill. PAS/FS stressed that apart from the comments on the drafting of the Bill, no organization had raised objection to its underlying principles.

15. On the concern about the criminalization of the provision of false or misleading information in circumstances other than those in statutory reporting, Mrs Alexa LAM, Chief Counsel, SFC explained that the criminal provisions on general reporting were necessary to fill existing gaps where the voluntary giving of false or misleading information by market participants or submissions made under non-statutory codes or rules, such as the Takeovers and Mergers Code, Listing Rules, and Clearing Rules, were not subject to criminal sanctions. In these circumstances, the provision of false or misleading information alone was often not sufficient to constitute an offence under the general criminal law. On the other hand, although no statutory requirements were made for disclosure of information under these rules, SFC or the market operators would rely on such information in making some important decisions, for instance, the granting of a waiver to a requirement or whether to conduct an inquiry into a matter. Hence, the dissemination of accurate information was of utmost importance. Mrs LAM remarked that SFC had decided not to create a new statutory obligation on market participants to provide specific information whenever SFC needed to obtain and not to impose criminal sanctions for non-compliance with the requirement under non-statutory rules. Rather, the Bill was to ensure that the information would be true and accurate whenever it was provided. By introducing the Bill, a level playing field would be maintained among market participants.

16. Concerning the types of information to be covered under the Bill, PAS/FS further explained that the Bill did not seek to modify existing requirements on provision of information nor to create any new obligation for

providing information. It should be stressed that the Bill would cover all types of information relevant to the performance of the functions of the regulators as they would rely upon the information obtained to discharge their duties.

17. As regards concerns about the concepts of "incomplete" and "does not believe to be true", PAS/FS re-iterated that the Administration was considering the suggestions of substituting the references to "complete" and "incomplete" by "false or misleading by omission" and replacing the concept of absence of positive belief by the term "reckless". The Administration would ensure that the drafting of the provisions would be in line with international common practices and adopt language familiar to market participants.

18. On the concern that the offence would be applied to everyone, PAS/FS said that the giving of false or misleading information to a regulator was wrong irrespective of the original source of the information. The imposition of criminal liability would be determined by the mens rea test. If a person involved in the supply of information did not know that the information was false or misleading and was not reckless as to the same, he would not be held criminally liable.

19. As regards the concern that the Bill would provide front-line market operators with excessive regulatory power, PAS/FS responded that although these bodies were commercial entities, they were vested with important public functions to maintain a fair and orderly market. The dissemination of accurate information to these bodies would be important in upholding the integrity of the market. Regarding the concern about possible conflict of interest on the part of HKEx, PAS/FS said that there were provisions to check against the problem under the Exchanges and Clearing Houses (Merger) Ordinance (Ord. 12 of 2000). He added that comparable legislation in Australia also covered information given to the securities and futures exchanges as well as the futures clearing houses.

20. As to the query that the Bill was inconsistent with existing provisions of comparable jurisdictions, Mr Eugene GOYNE, Senior Manager, SFC said that when developing the present proposal SFC had studied relevant provisions of major international financial markets including the markets in the United States (US), United Kingdom (UK) and Australia. The Bill was broadly in line with common practices of these jurisdictions. He then briefed members on the important features of the relevant legislation relating to the provision of false or misleading information of the three jurisdictions. He concluded that notwithstanding that provisions in each jurisdiction were unique, they did share some common features. For instance, in most jurisdictions, criminal offences were applied to the supply of false or misleading information given in any form, whether in writing or orally, irrespective of the fact whether it is provided voluntarily. Offences in all of the jurisdictions criminalized information given knowingly or recklessly and applied to information that was false or misleading by omission. All of the offences made no distinction between the generator

and the conveyor of the information. They applied to every provider of information.

Admin

21. Upon members' request, the Administration undertook to provide extracts of the relevant legislation of the US, UK and Australia for members' reference and written responses to the various concerns raised by the deputations at the next meeting.

### **III Any other business**

22. Members were reminded that the next meeting had been scheduled for 26 May 2000, at 8:30 am.

23. The meeting ended at 4:30 pm.

Legislative Council Secretariat  
3 October 2000