

立法會
Legislative Council

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(These minutes have been seen
by the Administration and
cleared by the Chairman)

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

**Minutes of meeting held on
Friday, 26 May 2000, at 8:30 am
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Ronald ARCULLI, JP (Chairman)
Hon Albert HO Chun-yan
Hon Jasper TSANG Yok-sing, JP
Hon FUNG Chi-kin
- Members absent** : Hon Eric LI Ka-cheung, JP
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

Mr Howard YAM
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

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

I Meeting with the Administration

(LC Paper Nos. 1699/99-00(01) -- Administration's paper tabled at the meeting, 1699/99-00(02) -- Extracts of relevant sections of comparable legislation of the United States (US), United Kingdom (UK) and Australia provided by the Legal Service Division tabled at the meeting)

International comparison

At the Chairman's invitation, Mr Eugene GOYNE, Senior Manager, Securities and Futures Commission (SFC) gave a detailed account of the salient features of legislation relating to the provision of false information to the securities and futures regulators in the US, UK and Australia as contained in the Administration's information paper tabled at the meeting. He highlighted the common features of the legislation and pointed out that the Bill was broadly in line with the regulatory practices in major international markets. The comparison between the provisions in the Bill and in the overseas legislation was summarized in the following paragraphs.

Common features of the relevant legislation of overseas jurisdictions

2. Mr GOYNE advised that all of the offences of the jurisdictions, other than those in Australia, applied to information given in any form, whether in writing or orally. Except those in the UK legislation, all of the offences applied to information given voluntarily. None of the offences targeted only

at specific categories of persons, nor did they specify who would be held criminally liable when information provided to a regulator was supplied by a third party.

Areas the Bill departed from overseas jurisdictions

3. Mr GOYNE said that while the offences in the US and UK were only applicable to the supply of information to the market regulators, those in the Bill would apply to the supply of information to SFC and the front-line market operators including the exchanges and clearing houses. All of the offences applied to false or misleading information including information that was false or misleading by omission. The Bill however, different from overseas provisions, also covered information that was "incomplete". The Administration was currently considering replacing the references to "complete" and "incomplete" in the Bill by "false or misleading by omission". While offences in all the jurisdictions criminalized the provision of false information knowingly or recklessly to the regulators, the Bill had adopted the mental element of "does not believe to be true". To address the market concern, the Administration was considering using "reckless" instead. Mr GOYNE remarked that if the proposed changes were made, the language used in the Bill would be consistent with that adopted by overseas jurisdictions.

SFC 4. Upon request of the Bills Committee, SFC agreed to provide information on comparable legislation in Canada for members' reference.

Scope of circumstances constituting an offence

5. The Chairman expressed concern about the wide scope of the General Reporting offence. He pointed out that the offence would apply to the provision of information not pursuant to a statutory obligation, for instance, information provided in compliance with the Takeovers and Mergers Code (Takeovers Code), Listing Rules and other non-statutory codes administered by the exchanges or clearing houses. As the Administration had decided not to give the Takeovers Code and Listing Rules the force of law so as to allow them more flexibility to track market development, he considered it inappropriate to introduce criminal sanctions in respect of disclosures of information made pursuant to these rules and codes. Moreover, the provision would provide the exchanges and clearing houses with excessive power over market participants.

6. In response, Mr GOYNE clarified that the General Reporting offence would only criminalize the provision of false information to SFC and the front-line market operators. It would not criminalize any breach of the non-statutory codes or rules which would remain contractual in nature and continue to be administered by the front-line market operators. On the rationale of enhancing the regulatory capabilities of the exchanges and clearing houses, Mr GOYNE stressed that while SFC acted as the overall regulator of the market, front-line market operators were under statutory duty to ensure a fair

and orderly securities market, as well as to minimize risks in the market. The provision of accurate information to these operators would be essential to the effective performance of their regulatory functions and the upholding of the integrity of the market for investor protection. He added that the Australian provisions did cover false information provided to the securities and futures exchanges, as well as the futures clearing houses. In the US, although statutory provisions only covered information supplied to the securities and futures regulator and not the exchanges, it had to be noted that the regulator was in fact responsible for regulating the listed companies where a lot of market information was directly supplied to it. Hence, it was not necessary to provide explicitly in the US legislation to cover false information provided to the exchanges. Furthermore, there was a proposal under the Financial Services Bill in the UK for the Financial Services Authority to take up regulatory functions for the listed companies. It was envisaged that market participants would be required to provide information directly to the Authority instead of the exchanges.

7. Mrs Alexa LAM, Chief Counsel, SFC stressed that the purpose of the Bill was not to provide the codes or rules with legal backing. The issue of providing non-statutory codes or rules with the force of law would be dealt with under the composite Securities and Futures Bill.

8. The Chairman expressed his view that persons giving false or misleading information to SFC or the market operators would no longer be regarded as "fit and proper" persons and would be sanctioned by the regulators in any event. Mrs LAM said that the "fit and proper" criteria only applied to licensees of SFC. Currently, many market participants who provided information to the regulators voluntarily were neither SFC registrants nor exchange participants, hence they were not subject to the "fit and proper" criteria.

9. Some members expressed concern that the General Reporting offence, which would apply to information provided to the regulators informally, would discourage market participants from volunteering information. Mr Albert HO Chun-yan opined that the Administration should consider limiting the scope of applicability to documents and not oral information.

10. In response, Mrs LAM said that false information, no matter it was written or verbal, would be equally damaging to the effective performance of the regulatory functions of SFC and the front-line market operators. She added that while SFC could request market participants to provide written information in some instances, such as disciplinary hearings, oral representations would also be taken into consideration and would form part of the basis for arriving at the decision of a case. Mr GOYNE supplemented that if the scope of the Bill were to be limited to provision of written document, the communication process between the regulators and market participants could be seriously delayed. Moreover, it would be very difficult to obtain

agreement from market participants on written records produced on hearings or interviews held with the regulators. He added that the experience of overseas jurisdictions indicated that extending the scope of offences to include informal information had not chilled the communication between regulators and market participants. Nor had it led to the problem of increasing "lawyerization" where market participants would seek to provide information through legal professionals, thus delaying the process of communication.

SFC

11. Given the extremely wide scope of the Bill and its serious impact on the market, the Chairman urged the Administration to re-consider the need to include the General Reporting offence provision in the Bill. In order to demonstrate the need for the provision, the Chairman requested SFC to give examples where SFC had failed in prosecution taken against the provision of false information not pursuant to a statutory provision, as well as examples where SFC had been misled by oral information in circumstances where the giving of the information was non-statutory and no criminal sanction was imposed.

Defence provided under the Bill

12. The Chairman raised concern about the lack of statutory defence in the Bill. He remarked that the proof for the charge of the General Reporting offence could be easily established as under the proposed section 56A(3) of the Securities and Futures Commission Ordinance (Cap. 24), the prosecution was only required to prove that it had relied on the information. Mr TSANG Yok-shing also raised concern about the absence of the damage requirement for the charge of the offence where SFC would not be required to prove any loss incurred as a result of the reliance on the information for securing a conviction of the offence.

13. In response, Mrs LAM said that when making a prosecution under the General Reporting offence provision, the prosecution, besides proving that the information provided was false, misleading or incomplete, had to satisfy the Court that the information was relevant to or connected with the performance of a function by SFC or the front-line market operators, and SFC or the market operators had relied on the information given, or the person had intended that they relied on that information. The elements of "reliance" on the part of the regulators and the "intention" of the information provider would place additional burden on the prosecution and SFC or the market operators would only apply the offence to conscious and deliberate acts, not careless ones. In short, there would be adequate mens rea requirements for the offence. The provisions in overseas jurisdictions were stricter than the current proposed provisions in a sense that prosecution did not require proof of reliance on the information or that anyone had been misled.

14. As regards the concern about the absence of the need for SFC or the market operators to prove loss or damage incurred as a result of the reliance on

the false information, Mrs LAM explained that the concept of "loss" or "detriment" was used in civil liabilities context related to compensation matters which were not the subject of the Bill. Moreover, it was difficult for SFC or a market operator to demonstrate that it had suffered any loss as a result of false information provided by market participants. Hence, under the proposed provisions SFC was not required to prove any loss for the charge of the offence. She added that provisions in all overseas jurisdictions also did not require the proof of loss arising from the reliance on false information.

II Any other business

15. Members were reminded that the next meeting would be held on 30 May 2000, at 10:45 am.

16. The meeting ended at 10:35 am.

Legislative Council Secretariat

3 October 2000