

立法會
Legislative Council

LC Paper No. CB(1) 2090/99-00
(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
Tuesday, 30 May 2000, at 10:45 am
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Ronald ARCULLI, JP (Chairman)
Hon Albert HO Chun-yan
Hon FUNG Chi-kin
- Members absent** : Hon Eric LI Ka-cheung, JP
Hon SIN Chung-kai
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
- 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

(LC Paper No. CB(1) 1730/99-00(01) -- Submission provided by Linklaters & Alliance tabled at the meeting, LC Paper No. CB(1) 1730/99-00(02) -- Paper provided by the Securities and Futures Commission tabled at the meeting)

Members noted that the Securities and Futures Commission (SFC) had tabled a paper at the meeting. The paper gave examples in which SFC had taken prosecution against persons who gave false information to a regulator where there was no specific offence on the provision of false information. The paper also gave examples of statutory and non-statutory information which would fall within the scope of the Bill, as well as provided information on comparable legislation in Canada.

2. Members also noted that Linklaters & Alliance had provided a submission tabled at the meeting on the amendments to the Bill proposed by the Administration.

Scope of the Bill

3. The Chairman re-iterated his concern about the wide scope of coverage under the General Reporting offences which would criminalize the provision of

false information in any form, including written and verbal, voluntarily and statutorily required, under the circumstances where currently there was no criminal liability. Referring to the extensive list of examples of statutory and non-statutory information to be covered by the Bill which included representations at disciplinary hearings, information provided in compliance with the Takeovers and Mergers Code, Listing Rules, and Exchange Rules, the Chairman was concerned that the open-ended and "catch-all" provisions would put many bona fide persons in peril of being prosecuted and would give legal backing to non-statutory codes or rules.

4. In response, Mr Mark DICKENS, Executive Director, Supervision of Markets Division, Securities and Futures Commission (SFC) stressed that the purpose of the Bill was to fill a loophole in existing securities legislation where specific sanctions for the provision of false information to the regulators were absent. Although prosecution could be made where there were grounds to suspect that an offence under the general criminal law might have been committed, in many such instances, the provision of false or misleading information alone might often be insufficient to constitute an offence. The lack of general offence provisions for providing false or misleading information to SFC and the front-line market operators had undermined the effectiveness of the performance of the regulatory functions of these bodies.

5. On the concern that the Bill would have the effect of providing non-statutory codes or rules with the force of law, Mr DICKENS clarified that this was not the purpose of the Bill. The current proposal aimed at sending a clear message to the market that persons who provided false information deliberately and with the intention to mislead SFC and the front-line market operators would be criminalized. He added that although disciplinary sanctions, such as public reprimand and revocation of registration with SFC, could be imposed on individuals who provided false information to a regulator, these actions did not carry any criminal liability and therefore did not have adequate deterrent effect.

6. The Chairman had reservation over the approach of codifying common law offences in the Bill in order to overcome the difficulty in securing a conviction of the offences under the general law. Mr Albert HO Chun-yan remarked that there were similar provisions in existing legislation criminalizing the provision of false information given to the Housing Authority and the Immigration Authority. He was more concerned about the wide scope of the general offence provisions and considered that their applicability should be limited to documents and not oral information.

7. Mrs Alexa LAM, Chief Counsel, SFC replied that in response to the deputations' concern about the negative effect of the Bill on the relationship between the regulators and market participants, SFC was prepared to restrict the scope of the general offence provisions to cover only documentary information. As such, there would be time for market participants to prepare

or to enquire about the truthfulness of the information before submitting it to the regulators. As regards the concern over the voluntary provision of information, Mrs LAM said that there were defence provisions in the Bill providing safeguards for a person charged with the offence. Firstly, the regulator had to establish that the information provided was relevant to or connected with the performance of its functions. Secondly, the regulator had to prove beyond reasonable doubt that the person knew that the information was false or misleading, or he intended the regulator to rely on the information, or he was reckless as to whether or not the regulator would rely on the information.

8. Regarding the deputations' concern about the references in the Bill to "complete" and "incomplete" in respect of the information provided, Mr DICKENS said that SFC had agreed to delete the references so that the offences would only apply to information that was "false or misleading". Information that was false or misleading by omission would be covered by implication. Moreover, the references to "does not believe to be true" in the Bill would be replaced by "reckless".

9. Referring to comparable provisions in Singapore set out in the submission from Linklaters & Alliance, the Chairman opined that it would be more appropriate to replace the term "reckless" by "wilful" or "with intent to deceive" as adopted in the Singaporean provisions to narrow the scope of the offence provisions.

10. In response, Mr DICKENS said that "reckless" was a more appropriate term to be adopted in the Hong Kong context. It was the mental element required for prosecution of most of the common law offences. He said that SFC, after studying the provisions in overseas jurisdictions, considered that the Bill had provided market participants with sufficient defence by imposing stringent mens rea requirements for the offence. The offence provisions in Canada and Australia were even tougher where they criminalized negligence.

Parties to whom the offence applied

11. The Chairman also raised concern that the Bill could target at the "conveyor" rather than the "generator" of false information. It would be unfair that professionals such as lawyers, accountants and advisers, acting on behalf of market participants, could be criminalized for giving to the regulators false information which was in fact provided by their clients.

12. Mrs LAM said that the legislation would not be effective if the offences only applied to the generators of false information as evasion would be easy. She re-iterated that there were adequate mens rea requirements for the offences. The most important element in determining who was liable for an offence would be the intention. The Bill would target at persons,

regardless of whether they were the generators or conveyors of the information, who had the intention to mislead the regulators. Mr Eugene GOYNE, Senior Manager, SFC supplemented that provisions in the United States, United Kingdom, Australia and Canada also applied to any person and did not identify specific categories of person to whom they applied.

13. The Chairman was unconvinced of the Administration's explanation. He reiterated his concern about the wide coverage of information under the Bill. In view of the significant impact of the Bill on the market, he opined that the Bill should be examined carefully by the Legislative Council (LegCo). As the current term of LegCo would end by the end of June 2000, he urged the Administration to consider deferring the Bill to the next LegCo term.

14. In response, the Principal Assistant Secretary for Financial Services said that the Bill was part of the 30-point programme announced by the Financial Secretary in early September 1998 with a view to enhancing the order and transparency of the securities and futures markets. The Administration had noted the concerns expressed by the industry and professional groups during the consultation period and had taken into consideration their views in finalizing the Bill. As a result, the scope of the Bill had been refined. Moreover, the Administration had agreed to move Committee Stage amendments (CSAs) to address the concerns expressed by the Bills Committee and various deputations during the scrutiny of the Bill. With the proposed amendments, the Administration considered that the Bill should be enacted as soon as possible.

15. The Chairman pointed out that as revealed in the submission provided by Linklaters & Alliance, the Administration's proposed amendments could not allay all the concerns of the industry. He suggested that the Administration and SFC meet with the deputations again with a view to resolving their differences. He also requested the Administration to provide the draft CSAs for examination by the Bills Committee at the next meeting.

Admin/
SFC

II Any other business

16. Members agreed to hold the next meeting on 5 June 2000, at 2:30 pm. Deputations which had given their views to the Bills Committee would be invited to attend the meeting.

17. The meeting ended at 12:15 pm.

Legislative Council Secretariat

3 October 2000