

香港銀行公會的信頭

Letterhead of THE HONG KONG ASSOCIATION OF BANKS

17 March 2000

Secretary for Financial Services
Financial Services Bureau
18/F Admiralty Centre Tower 1
18 Harcourt Road
Hong Kong

Dear Sir,

Securities and Futures Legislation (Provision of False Information) Bill 2000

We write to give our comments on the above Bill for your kind consideration:

1. “provides any information to the [Commission/Exchange Company etc] that is relevant to or is connected with the performance of a function of the [Commission/Exchange Company etc]”

The draft wording is too vague and can be interpreted to cover any kind of information provided to the regulatory body, whether verbal or written and in whatever capacity, whether statutory, contractual or voluntary. Equally worrisome, the SFC's functions as set out in the SFCO encompass a wide range of activities of the SFC expressed in very broad generic terms, eg. “to safeguard the interests of persons dealing in securities”, “to suppress ... improper practices in dealing in securities”.

Corporate finance transactions present a particular concern, since numerous drafts of prospectuses are prepared and considerable reliance is placed upon information received from clients, especially in the early drafts. It is submitted that the vetting process will become more exhaustive, as will general and routine correspondence with the SFC and others. “Openness” and “candour” will lead to defensiveness and increased correspondence (suitably caveated), since individuals will become increasingly guarded over the phone.

2. “false, misleading or incomplete in a material particular”

Incompleteness should not be an independent “ground”: it should only be material if the incompleteness results in the information being misleading. The references should therefore be to information which is “false or misleading”.

3. “the prosecution shall, ... prove for such conviction that ... (a) the [Commission/Exchange Company etc] has relied on the information ... (but it shall not be necessary to prove that any person has been misled or has suffered any detriment or incurred any loss as a result of the reliance);

As there is no damages requirement for the charge of the offence, it will be left entirely in the hands of the authority to show the information is untrue, misleading or incomplete.

We believe there to be considerable inconsistency between the principle being established that the provision of false or misleading information to these bodies would be detrimental to the marketplace and the investing public - whilst at the same time stating that it will not be necessary to prove that any person was misled by the information or detriment incurred. This would appear to be unnecessarily draconian and places considerable arbitrary power in the hands of the SFC.

4. “the prosecution shall, ... prove for such conviction that ... or (b) the defendant knew the Commission might rely on or intended that the Commission rely on the information or was reckless as to whether the Commission would rely on the information”

This is a lower standard of proof for the charge of the offence than (a) above as the authority needs not to prove that the Commission has relied on the information. It is very difficult to argue against the authority that at the time of submission of the information the Commission might not rely on the information as it is always a possibility for the Commission to rely on the information if it chooses to do so. It is also very difficult to distinguish between negligent and reckless. Since it is difficult to draw the line between “recklessness” and “carelessness/negligence”, the word “reckless” should be deleted

from the amendments or at least statutory defences provided under the SFCO, eg. it is a defence to prove that there is reasonable ground to believe the information provided is in order.

Whilst we appreciate that the terms “recklessly” and “negligently” are different in scope, the term “recklessly” nevertheless implies that a reporting company must not only vet all information provided to the regulators but, for practical purposes, must also maintain an audit trail of the vetting process, perhaps in the form of verification notes. Otherwise, the reporting company will be unable to demonstrate that it did “[care] whether or not the information is untrue or misleading”.

In addition, there is also no statutory defence provided in the Bill, eg. it is a defence to prove that there is reasonable ground to believe the information provided is in order or the information is provided by customers which the provider cannot verify.

5. For the reasons given in (3) and (4) above, we believe it should only constitute an offence if:
 - (a) the person knows the information to be false or misleading, or does not believe it to be true in a material particular; and
 - (b) he intended to mislead the regulatory body with the information.

Although the SFC intends to amend the SFCO only, it appears the amendments will cover any information provided by any person in any capacity. The scope of the amendments should be restricted to the person who provides information in the capacity of Registered Person under the supervision of the SFC. We also note that Registered Persons are themselves already subject to stringent obligations with respect to the provision of false or misleading information (ie. they (potentially) commit an offence punishable with up to 5 years imprisonment).

It should always be the policy of responsible practitioners to co-operate with their regulators in an open and candid fashion. We therefore endorse the need for the regulatory bodies, and the market place in

general, to be confident of the integrity of the information that is supplied to them in the broader interests of the investing public. Moreover, we most certainly do not object to the principle of criminalising false reporting of certain information to the regulatory bodies, but we are, nevertheless, extremely concerned that the proposals as they currently stand will seriously undermine the provision of “bona fide” information in the ordinary course of business, given the extremely broad scope of the proposals as we understand them.

Yours faithfully

David May

Secretary

c.c. Ms Leung Siu Kum, Legco

Deacons (Mr J W C Richardson)