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Subject: Provision of False Information Bill

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Dear Ms Leung Siu-kum

On behalf of the Hong Kong Securities Industry Group, please find comments on the Securities and Futures Legislation(Provision of False Information)Bill 2000.

Anthony Gallino
Chairman

As you are aware the Securities and Futures Legislation (Provision of False Information Bill) 2000 intends to amend existing securities and futures legislation by inserting a new section in each of the following ordinances:

1. S.56A in the SFC Ordinance
2. S.109A in the Commodities Trading Ordinance
3. S.38A in the Stock Exchanges Unification Ordinance
4. S.15A in the SF (Clearing Houses) Ordinance
5. S.17A in the Amendment of Exchanges and Clearing Houses (Merger) Ordinance

These sections will make the provision of false, misleading and incomplete information a criminal offence whether the person provides the information under a statutory obligation or otherwise. It imposes criminal liability on a wide range of participants in the financial services sector for reporting and supply of information.

If the information was provided in purported compliance with a legal requirement, the offence is punishable with a fine of HK\$1MM and imprisonment for 2 years. If the information was provided in other circumstances, but was

relevant to or was connected with the performance of the regulators' functions, the offence is punishable with a fine of HK\$0.5MM and imprisonment of up to 6 months.

As you also probably know there have been grave concerns expressed by the industry with regards this Bill.

You have asked us to review the Bill and to outline some of the concerns. Briefly these would be:

1. Title/Definition

Why is the title of each new section titled: 'Provision of false information', when it should be 'Provision of false, misleading or incomplete information'? as in the following section it mentions these three together as opposed to just 'false' information in the title. Shouldn't there be an interpretation clause of these terms: false/misleading/incomplete?

Note, the inclusion of 'incomplete' material or information is a criminal offense but if there is an 'omission', it is already 'misleading' (this is a matter of common law). The term 'false or misleading' sufficiently encompasses the SFC's intention without being repetitive.

Apparently the SFC have indicated to the Law Society (see the Law Soc. letter dated May 24 2000), that the term will be redrafted as follows :

"knowingly or recklessly false or misleading in a material particular" which is much clearer.

Irregardless, there is still a risk of prosecution if the information is not 'complete'. So in situations where information is required to be provided at short notice or regulator's enquiries are not clear in the first instance - the responses can carry a risk of prosecution.

2. Applies to anyone

It has a wide scope of applicability, i.e. applies to ANY person. This is unusual and should be limited in scope. Say, to only persons registered with

the SFC or to persons who should be in a position to provide correct information.

3. Double Whammy

The SFC have agreed that the redrafting of the bill will make it clearer that the provisions will not be a back door way of widening existing statutory offences - i.e. a double whammy to offenders.

4. ANY information

The Bill provides that "any information?" is covered. This is wider than those in other comparable jurisdictions.

As drafted, it encompasses oral, written, formal and informal information. The SFC have refused to have the Bill cover written information only. This is disappointing.

This should have been limited to say documents or reports pursuant to a statutory requirement (like financial reports, SFC registration application forms etc.).

The statutory obligation as currently drafted extends to conversations and phone calls (pertinent in the financial services industry). Its implications mean that say, all phone enquiries or responses to the SFC is deemed 'information'.

5. There is no defence

The Bill does not provide for any defence such as if the person had reasonable grounds to believe that the information was true.

6. In the US

The equivalent is S.32 of the Securities Exchange Act : for "wilful" violations of the Act and rules made under it. Also, Title 18 of the US Federal Code on Crimes and Criminal Procedure, s1001 : to "knowingly and wilfully make any false, fictitious or fraudulent statements in respect of matters within the

jurisdiction of any department or agency of the US". This applies to all filings and submissions to the SEC.

Two distinctions here: the limitation to 'statements' only. Also, that the offence does not apply in respect of filings with the NASD or the Exchanges or clearing houses.

7. In the UK

The Financial Services Act 1986 provides that false information to securities regulators is only a criminal offence in specific situations, like applications for registration.

Clause 380 of the proposed Financial Services and Markets Bill provides that the :

- * The offence only applies to information provided in compliance with a specific statutory requirement.
- * It has to be proven that the information is false or misleading in a material particular. It is NOT sufficient to show that the information was not complete in every material particular.
- * The person must have acted knowingly or recklessly.
- * Does not apply to Exchanges or clearing houses.

8. In Australia

S.64 of the Australian Securities and Investments Commission (ASIC) Act 1989, provides that it is an offence to give information or make a statement that is false or misleading in a material particular. There is also a defence if the person giving the information or making the statement believed on reasonable grounds that it was true and not misleading.

It is noted that:

- * The false statement must have been made in an examination or where there is a statutory requirement to provide the relevant information.
- * The information must be false or misleading (not just incomplete) in some material particular.

* The offence applies to information provided to the ASIC - not the Exchanges or clearing houses.

Summary:

In all these 3 jurisdictions, the scope of the legislation is limited in its definition to:

- * information given knowingly or recklessly,
- * false or misleading information, including information that is false or misleading by omission

and is usually aimed at written information given to regulators (not to exchanges and clearing houses).