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Report of the Bills Committee on Securities and Futures Legislation (Provision of False information) Bill 2000

Purpose

. This paper reports on the deliberations of the Bills Committee on Securities and Futures Legislation (Provision of False Information) Bill 2000 (“the Bill”).

Background

2. The Financial Secretary announced in early September 1998 a 30-Point Programme to enhance the order and transparency of the securities and futures markets. As the dissemination of accurate information is of utmost importance for enabling investors to make informed decisions and for maintaining a level playing field among market participants, one of the proposed measures in the Programme is to make the providing of false or misleading 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 proposal will bring Hong Kong’s regulatory system in line with the regulatory practices in other major international financial markets including Australia and the United Kingdom.

3. Under the existing law, a statutory requirement to provide information is usually backed up by a specific offence provision making the providing of false or misleading information a criminal offence. Other than these offence provisions, there are no general offence provisions in relation to the providing of false or misleading information to the SFC in other circumstances. For instance, the voluntary giving of false or misleading information to the SFC by companies and their officers or submissions made under the Takeovers and Mergers Code (“Takeovers Code”) is not subject to criminal sanctions. Neither is the providing of false information to the front-line market operators in relation to the disclosure requirements under the Listing Rules or other rules made by these bodies. Although matters would routinely be referred to the appropriate law enforcement agency where there are 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 may often be insufficient to constitute an offence.

4. The lack of general offence provisions for providing false or misleading information to the SFC and the front-line market operators has 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, particularly in the newly established Growth Enterprise Market, and the international trend towards requiring more disclosure of information to promote market transparency and efficiency, the Administration considers it necessary to criminalize the supply of false or misleading information to the SFC and the front-line market operators.

The Bill

5. The Bill seeks to amend several Ordinances relating to the regulation of securities and futures markets to introduce offence provisions in relation to the provision of false information to the relevant regulatory bodies.

6. Part II of the Bill seeks to amend the Securities and Futures Commission Ordinance (Cap. 24) to create offences for providing false, misleading or incomplete information to the SFC or any of the front-line market operators where:

- (a) information is given pursuant to a provision of an ordinance (Statutory Reporting); and
- (b) information is given in circumstances other than (a) (General Reporting).

Part II of the Bill also prescribes penalties for the newly created offences i.e. Statutory Reporting and General Reporting offences.

7. Parts III to VI of the Bill amend the Commodities Trading Ordinance (Cap. 250), the Stock Exchanges Unification Ordinance (Cap. 361), the Securities and Futures (Clearing Houses) Ordinance (Cap. 420) and the Exchanges and Clearing Houses (Merger) Ordinance (12 of 2000) respectively to add to each ordinance provisions similar to those in Part II.

The Bills Committee

8. The House Committee agreed at its meeting on 17 March 2000 to form a Bills Committee to study the Bill. At the first meeting of the Bills

Committee on 19 May 2000, Hon Ronald ARCULLI was elected Chairman. The membership list of the Bills Committee is at **Appendix I**. The Bills Committee has held five meetings including four meetings with the Administration to study the Bill in detail. The Bills Committee has also invited views from market bodies and professional organizations concerned and received their oral representations at two of these meetings. A list of organizations which have submitted views to the Bills Committee is at **Appendix II**.

Deliberations of the Bills Committee

9. The Bills Committee has studied in detail the relevant provisions of comparable legislation in the United States, the United Kingdom, Australia, Canada and Singapore. Members generally are in support of criminalizing those who deliberately provide or make available to the SFC untrue or misleading information. Nevertheless, the Bills Committee shares the concern of the deputations and examines in particular the scope of the circumstances which will constitute a criminal offence and the defences provided in the Bill.

10. A gist of the deliberations of the Bills Committee is given in the following paragraphs.

Scope of circumstances constituting an offence

Statutory Reporting and General Reporting

11. The proposed offence provisions in the Bill apply to both Statutory Reporting and General Reporting. The Bills Committee supports the proposed offences to cover Statutory Reporting. However, members are concerned about the wide scope of coverage under the General Reporting offences which apply to provision of information not pursuant to a statutory obligation such as representations at disciplinary hearings, information provided in compliance with Takeovers Code, Listing Rules and other non-statutory codes. Such open-ended and “catch-all” provisions will put many bona fide persons in peril of being prosecuted.

12. Some members are of the view that since the Administration has decided not to give the Listing Rules and Takeovers Code the force of law so as to allow them more flexibility to track market development, it is inappropriate to introduce criminal sanctions in respect of disclosures of information made pursuant to these rules and codes.

13. Other members of the Bills Committee however accept the Administration’s explanation that the purpose of the Bill is to fill a loophole in existing securities legislation where specific sanctions are absent. Despite the

non-statutory nature of the existing codes and rules, the SFC and the front-line operators have to rely on information provided to them to discharge their public duties effectively. The Bill is a desirable step towards better disclosure of information by market participants, enhanced investor protection and more effective enforcement by regulatory bodies.

Scope of information given

14. The Bills Committee is aware that one of the major concerns of the deputations is the extension of the scope of criminal liability beyond certain defined contexts, such as the compliance with specific statutory requirements or the response to formal investigations or enquiries conducted by the SFC, to all kinds of verbal or written information provided to a regulatory body, whether formally or informally given. Members concur with the deputations that the proposed offences will discourage market participants from volunteering information to the regulators. They consider that the scope of applicability should be limited to documents and not oral information.

15. Noting the concerns of the Bills Committee and the deputations, the SFC assures that the offences will only apply to conscious and deliberate acts, not careless ones. Nevertheless, to further address the grave concerns of the deputations, the Administration agrees that the scope of the Bill will be trimmed down by excluding provision of oral information from the General Reporting offences. Such offences will only apply to records or other documents including electronic documents. The meaning of “record or other document” will be the same as that in section 2 of the Securities and Futures Commission Ordinance.

16. The Bills Committee also notes that to address concerns of the deputations over information being provided on informal occasions, the Administration will move CSAs to add a requirement in respect of the General Reporting offences that a written warning be given to the person concerned reminding him of the criminal liability under the proposed provisions before information is provided by him.

Potential criminal liabilities beyond deliberate providing of false information

17. Under the Bill, in both Statutory Reporting and General Reporting situations, an offence is committed when a person provides any information that he either:

- (a) knows the information to be false, misleading or incomplete in a material particular; or
- (b) does not believe the information to be true, accurate and complete in every material particular.

18. In respect of circumstances (a) above, the Bills Committee notes the concern of deputations that criminalization of the giving of “incomplete” information will give rise to practical problems. Information provided to regulators often takes the form of a summary of extensive and complex data and is often provided at short notice. A person should not be exposed to the risk of criminal liability because the regulators do not consider that the summary was sufficiently detailed or the person did not complete a full investigation of the facts before the information was provided. To address this concern, the Administration agrees to move Committee Stage amendments (CSAs) to delete the use of the terms “complete” and “incomplete” in the Bill to the effect that the proposed offences would only apply to information that is “false or misleading”. Information that is false or misleading by omission are covered by implication.

19. In respect of circumstances (b) above, the Bills Committee shares the concern of the deputations that the adoption of “does not believe” is inconsistent with international common practice. Such a test for liability is also unusual in Hong Kong ordinances. It is practically difficult to say a person positively believed the information to be true and accurate unless the information concerned is wholly within his personal knowledge or if he has taken positive steps to verify the accuracy of the information. The proposed provision would impose an entirely unreasonable burden on anyone who is responsible for providing to a regulator information supplied by third parties, or relating to matters outside his immediate personal knowledge. A member has suggested to the Administration the use of the term “wilful” in the Bill. As a compromise, the Administration agrees to use the term “reckless” to replace the original phrase “does not believe”. In the United States, the meaning of “wilful” includes “reckless” as commonly understood in common law jurisdictions.

20. On the basis of the considerations summarized in paragraphs 18 and 19 above, the CSAs which the Administration agrees to move will have the effect that an offence is committed when a person provides any information that he either -

- (a) knows the information to be false or misleading in a material particular; or
- (b) is reckless as to whether the information is false or misleading in a material particular.

21. The Bills Committee also notes that the information falling within the scope of General Reporting offences needs to be relevant to” or “connected with” the performance of a function of the SFC or the front-line market operator in question under the relevant ordinances. Some of the deputations consider that the scope of application of the provision regarding information

“relevant to” or “connected with” the performance of the regulator in question is too wide. In this respect, the Administration will move CSAs to delete all references of “relevant to” from the Bill so that only information “connected with” the performance of a function by the SFC or the front-line market operator in question would be caught under the Bill.

Defences

22. In respect of defences, the Bills Committee notes that some deputations are concerned about the lack of statutory defence in the Bill. The Bills Committee however accepts the Administration's explanation that there are adequate mens rea requirements for the offences. The Bills Committee also agrees that by introducing the CSAs mentioned in paragraphs 15, 20 and 21 above, the concern of the deputations will be addressed.

23. However, the Bills Committee shares the concern of the deputations that as one of the conditions for securing a conviction of the General Reporting offences, it will be too easy for the prosecution to prove mere reliance of SFC or the front-line market operator in question. The Administration agrees to move CSAs to the effect that the prosecution is required to prove that “the SFC or the front-line market operator in question has reasonably relied on the information given or the defendant intended that the SFC or the front-line market operator in question rely on the information”.

Parties to whom the offences apply

24. The Bills Committee notes that the proposed offences may be committed by any person and is not limited to specific categories of people or entities. The deputations have suggested that it would not be right that a person would be guilty of an offence if the information provided to a regulator by him was supplied to him by a third party. The SFC is of the view that giving false or misleading information to a regulator is wrong irrespective of the original source of the information. The most important element of the offence in determining who is liable would be the intention. 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. The Administration maintains its view that the legislation would not be effective if the offences only apply to originators or generators of false information because evasion would be easy. The Bills Committee has accepted the Administration's explanation.

Committee Stage amendments

25. A full set of CSAs to be proposed by the Administration is at **Appendix III**. The Bills Committee has not proposed any CSAs.

Consultation with the House Committee

26. The House Committee at its meeting on 16 June 2000 supported the recommendation of the Bills Committee to resume the Second Reading debate on the Bill on 26 June 2000.

Prepared by
Council Business Division 1
Legislative Council Secretariat
19 June 2000

Appendix I

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

Membership list (as at 25 May 2000)

Hon Ronald ARCULLI, JP (Chairman)
Hon Albert HO Chun-yan
Hon Eric LI Ka-cheung, JP
Hon SIN Chung-kai
Dr Hon Philip WONG Yu-hong
Hon Jasper TSANG Yok-sing, JP
Hon FUNG Chi-kin

Total : 7 Members

Appendix II

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

List of organizations which have submitted views to the Bills Committee

1. Hong Kong Association of Banks
2. Hong Kong Bar Association
3. Hong Kong Exchanges and Clearing Ltd.
4. Hong Kong Institute of Company Secretaries
5. Hong Kong Securities Industry Group Ltd.
6. Hong Kong Society of Accountants
7. Linklaters & Alliance
8. The Law Society of Hong Kong