

立法會
Legislative Council

LC Paper No. CB(2)2527/99-00
(These minutes have been seen by
the Administration and cleared
with the Chairman)

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**Bills Committee on
Securities (Amendment) Bill 1999**

**Minutes of Meeting
held on Monday, 10 April 2000 at 9:00 am
in the Chamber of the Legislative Council Building**

- Members Present** : Hon Ronald ARCULLI, JP (Chairman)
Dr Hon David LI Kwok-po, JP
Hon NG Leung-sing
Dr Hon Philip WONG Yu-hong
Hon FUNG Chi-kin
- Member Absent** : Hon Eric LI Ka-cheung, JP
Hon Christine LOH
Hon CHAN Yuen-han
Hon SIN Chung-kai
Hon Jasper TSANG Yok-sing, JP
- Public Officers Attending** : Mr Bryan CHAN
Principal Assistant Secretary for Financial Services
- Mr Howard YAM
Assistant Secretary for Financial Services
- Mr Mark DICKENS
Executive Director of Supervision of Markets
Securities and Futures Commission

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Ms Stella LEUNG
Director of Supervision of Markets
Securities and Futures Commission

Mr Geoffrey FOX
Senior Assistant Law Draftsman
Department of Justice

Ms Stella M F CHAN
Government Counsel, Department of Justice

Attendance by Invitation : Group of 14 financial institutions, Hong Kong Securities Industry Group and Pan Asia Securities Lending Association

Ms Pauline Ashall

Ms Pamela Root

Mr Roger Dunphy

Clerk in Attendance : Mrs Constance LI
Chief Assistant Secretary (2) 2

Staff in Attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Miss Betty MA
Senior Assistant Secretary (2) 1

I. Meeting with deputation and the Administration

[Paper Nos. CB(2)1559/99-00(01) to (02), CB(2)1637/99-00(01) to (02) and CB(2)1437/99-00(02)]

Defence provision under section 80C

The Chairman said that the meeting was convened to discuss the revised amendments proposed by the Administration to the Securities (Amendment) Bill 1999 [Paper No CB(2)1559/99-00(01)]. He drew members' attention that the Administration had reverted to the use of "reasonable excuse" instead of "knowingly and recklessly" in the defence clause under the new section 80C(3).

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He recapitulated that the Administration had previously agreed to provide a defence of "knowingly and recklessly" for defendants charged with an offence under section 80C(1) in view of the industry's serious concern about the criminal liability of breaches of the disclosure requirements due to inadvertence or carelessness. However, the Administration had reversed the decision on the advice of the Department of Justice that the proposed defence provision would give rise to enforcement difficulties and would defeat the purpose of the Bill.

2. The Chairman then drew members' attention to the letter from the group of 14 financial institutions and the Pan Asia Securities Lending Association commenting on the revised amendments to the defence provision under section 80C [Paper No. CB(2)1637/99-00(02)]. The Chairman said that some other stockbrokers had also suggested deleting section 80C altogether and replacing the proposed legislative framework by a Code of Practice.

3. Principal Assistant Secretary for Financial Services (PAS(FS)) explained that the Prosecution Division of the Department of Justice had advised after the meeting on 21 March 2000 that the proposed defence provision was unacceptable from the prosecution point of view because it was almost impossible to prove the mens rea of "knowingly or recklessly" in the absence of voluntary confession.

4. With regard to the proposal of deleting the entire section 80C, PAS(FS) said that without section 80C, the proposed legal framework for regulating short selling transaction would become meaningless, as contravention of the disclosure requirements would then be subject to only disciplinary action of the Securities and Futures Commission (SFC). The proposal would mean status quo and was considered insufficient from the Administration's point of view. PAS(FS) said that it was difficult to strike an appropriate balance between providing an effective offence provision and addressing the industry's concern. In view of the latest legal advice, the Administration decided to retain the original version of the defence of "reasonable excuse". He stressed that the Administration had no intention to hold a person criminally liable for breaching section 80C on grounds of inadvertence or carelessness. The Administration could make clear its policy intention again during resumption of the Second Reading debate of the Bill.

5. Ms Pauline ASHALL representing the Group was of the view that it might not be very difficult to prove recklessness in a criminal offence as there were precedents on such cases. Alternatively, consideration could also be given to introducing a civil remedy under the Rules of the Stock Exchange of Hong Kong for minor breaches. She considered that criminal liability should only be imposed for serious offence which included the mens reas of recklessness.

6. The Chairman expressed reservation about the Administration's reversion to the use of "reasonable excuse" instead of providing a "lawful excuse" to cover recklessness as a defence under section 80C. He said that it was not the first time

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that the concept of recklessness was introduced into the common law system and he saw no reason why inadvertence should not be included as a reasonable excuse.

7. Dr Philip WONG concurred with the Chairman. He considered it absurd if the Administration's proposal was only to facilitate prosecutions.

8. Mr FUNG Chi-kin opined that under the current market operation, a short selling transaction would only be made known at the end of the trading day even though the stockbrokers reported such activities in accordance with SFC rules. In the absence of any concrete plan to enhance the transparency of the existing market operation on short selling, he doubted that the legislative proposal could effectively achieve its objective. Since naked short selling was already illegal under the Securities Ordinance, Mr FUNG suggested to delete the whole section 80C or defer the enactment of this section pending an overall review of the short selling transactions.

9. PAS(FS) disagreed with Mr FUNG's comments and pointed out that at present covered short selling was also subject to regulation such as the up-tick rule of SFC.

10. To address members' concerns on the defence clause in section 80C, Senior Assistant Law Draftsman (SALD) proposed to further amend section 80C(3) as follows -

- (a) to delete the reference to "A person who, without reasonable excuse," in subsection (3) and substitute "Subject to subsection (4), a person who"; and
- (b) to add a new subsection (4) as "In proceedings for an offence under subsection (3) it shall be a defence for the person charged with the offence to prove that the contravention of subsection (1) concerned was neither committed knowingly nor recklessly."

SALD said that under the proposed amendments, it would be a defence if the prosecution was satisfied that the accused was not breaching the requirements knowingly or recklessly.

11. The Chairman disagreed with SALD's proposed amendments as these would mean transferring the burden of proof from the prosecution to the defendant. He considered that the prosecution should have the responsibility to prove that the accused did not have any reasonable excuse for breaching the requirements. Mr David LI agreed with the Chairman.

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12. SALD explained that it would be impossible for the prosecution to know the excuses of the defendant, although the prosecution would definitely provide evidence to support the charge.

13. Assistant Legal Adviser 6 (ALA6) advised that SFC statistics showed that there were reports on omission of input of the short selling indicators due to inadvertence. He suggested that the defence clause in section 80C could be amended so that no prosecution should be brought under subsection (3) if SFC was satisfied that the contravention was due to inadvertence.

14. SALD responded that the mens reas of reasonable excuse would include the element of inadvertence in the context of criminal law. However, to address the industry's concern, he proposed to expand the scope of "reasonable excuse" in subsection (3) to include inadvertence, negligence and carelessness.

15. The Chairman pointed out that the proposed expansion of the scope of "reasonable excuse" in section 80C(3) might give rise to inconsistencies in the interpretation of the term under other sections of the Securities Ordinance. He therefore suggested to replace "reasonable excuse" in section 80C with "lawful excuse" which could include inadvertence, carelessness and negligence.

16. Ms Pauline ASHALL considered that the Chairman's proposal would be able to address the industry's concern.

17. Mr FUNG Chi-kin maintained the view that inadvertent mistakes should not be regarded as an offence in the first place. He would not, as a matter of principle, agree to the proposed section 80C even with the "lawful excuse" amendment.

18. PAS(FS) said that he saw no problem with the Chairman's proposal from the policy angle. Nevertheless, he would have to consult the Department of Justice and revert to the Bills Committee later.

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(Post-meeting note : The Administration provided a written response on 9 May 2000, after consulting the Department of Justice, eventually agreeing to the Chairman's proposed amendments.)

Administration's proposed amendment to section 80B

19. PAS(FS) said that the industry had expressed concern that when intermediaries traded under full discretionary authority from their clients, it would be impractical and inappropriate to treat them as agents and to require them to obtain instruction or confirmation from their clients on each occasion. To address this concern, the Administration now proposed a modification to section 80C(3B) to the effect that a person who sold securities under full

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discretionary authority for and on behalf of his clients or beneficiaries would be regarded as selling as a principal. The revised section would be renumbered as section 80B(7).

20. While agreeing with the proposal in general, the Chairman inquired whether it was necessary to include the word "full" before "discretionary authority" as there might be certain contractual conditions of the discretionary authority. Executive Director of Supervision of Markets, Securities and Futures Commission explained that such contractual conditions were usually on the buying rather than the selling of securities.

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21. SALD agreed to consider improving the drafting and provide a revised version of the amendment.

Way forward

22. In concluding the discussion, the Chairman said that the Bills Committee had thoroughly discussed all issues related to the Bill although members did not have consensus about the proposed defence clause in section 80C(3). The Chairman advised that no further meeting would be scheduled and the Committee Stage amendments (CSAs) to be provided by the Administration would be circulated to members for consideration. He said that members might consider moving amendments to the Bill in their name if necessary. On receipt of the Administration's written response and the revised CSAs, the Chairman would report to the House Committee on the Bills Committee's deliberation.

(Post-meeting note : The Bills Committee reported its deliberations to the House Committee on 12 May 2000.)

II. Any other business

23. There being no other business, the meeting ended at 10 am.

Legislative Council Secretariat

26 July 2000