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Securities (Amendment) Bill

We refer to your fax of today's date, together with the fax sent to the Chairman of the Bills Committee, both of which have been copied to the Group of financial institutions represented by this firm. The comments of the Group are as follows.

It is deeply disappointing that the Government has dropped the amendment which required a person to have acted "knowingly or recklessly" before an offence would be committed under Section 80C(3). As the legislation is drafted, this means that an inputting error would result in criminal offence being

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committed unless the defendant could demonstrate that the mistake was a reasonable one to have made. We note your comments about the prosecuting policy which would be followed by the SFC, but the Group does not believe that industry participants carrying out their legitimate day to day business should be at risk of criminal liability at all, unless they have deliberately or recklessly contravened the statutory requirements applying to them.

We also have a drafting point on Section 80B(3B). This applies where an “investment adviser” or trustee sells securities at discretion. “Investment adviser” is defined in Section 2 of the Securities Ordinance. The definition is wide enough to include managers and investment advisers based outside Hong Kong, and therefore not registered with the SFC as investment advisers. However, the definition excludes Hong Kong licensed banks, solicitors and accountants, securities dealers and exempt investment advisers. In practice, it is the SFC’s policy that investment managers who hold client money and assets be registered as securities dealers rather than merely as investment advisers. There will continue to be a problem for persons falling within these excluded categories who exercise investment discretion for their clients, and brokers who take orders from such persons, since those persons would be “agents” and assurances would need to be obtained from their principals”.

If the term “investment adviser” is to be used in Section 80B(3B), it would be better to state that, for this purpose, the definition of investment adviser in the Ordinance is to be construed without regard to sub-paragraphs (i)-(vii) of that definition.

Yours sincerely

Pauline Ashall