

香港特別行政區政府財經事務局的信頭
**Letterhead of FINANCIAL SERVICES BUREAU, GOVERNMENT OF THE HONG
KONG SPECIAL ADMINISTRATIVE REGION**

電話 TEL.: 2528 9161

圖文傳真 FAX.: 2861 1494

本函檔號 OUR REF.: C9/29C(2000)

Paper No. CB(2)1637/99-00(01)

來函檔號 YOUR REF.:

29 March 2000

The Hon. Ronald Arculli
Chairman of the Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear

Securities (Amendment) Bill 1999

I am writing further to the Bills Committee meeting on 21 March 2000.

In view of the deliberation of the Bills Committee, we have further revised our proposed amendments to the Bill, which we believe should help address the concerns raised. A copy of the draft proposed amendments to the Bill is attached for Members' consideration. The Assistant Legal Adviser and Ms. Pauline Ashall of Linklaters & Alliance have also been consulted and their views have been taken into account when we prepared the revised draft.

We would however wish to draw your attention to the proposed section 80C. In the proposed subsection (3) as originally provided in the Bill, there is a defence of "reasonable excuse" for the

defendants charged with an offence under section 80C(1). In the course of the deliberation of the Bills Committee, members of the industry have expressed concerns that the proposed offence provision imposes a strict liability on the intermediaries and they might be liable to the criminal offence for inadvertent or careless breaches of the requirements. As we have explained to the members of the industry, it is not our policy intention to criminalize breaches of section 80C(1) due to inadvertent or careless mistakes. Having said that, in order to provide additional comfort to the industry, we have agreed to the suggestion of amending subsection (3) so that the offence is committed if the person “knowingly or recklessly” contravenes subsection (1).

However, we have subsequently been advised by the Department of Justice that the draft proposed offence provision will be futile from the prosecution point of view because it would be extremely difficult, if not impossible, for the prosecution to prove the actual knowledge of the defendant. This would render the offence provision ineffective in giving any deterrence and defeat the purpose of the proposed legislation. In view of the latest legal advice, and to ensure the effectiveness of the proposed legislative framework, we have decided to drop the proposed amendment to section 80C(3) and keep the defence of “a reasonable excuse” as originally provided in the Bill.

We note that some members of the industry remain concerned that an inadvertent or careless mistake may not be regarded as a “reasonable” excuse and that they would still be subject to the criminal liability. It would however be useful to note that under the existing section 80, there is a similar defence for the defendant if he, at the time of placing the order, has a honest and reasonable belief that he has a presently exercisable and unconditional right in the relevant securities and the SFC has never prosecuted a person for contravention of section 80(1) on reasons of inadvertent or careless mistakes. We therefore believe that the defence provision, as presently provided in section 80C(3), is still appropriate. If Members find it helpful, we are happy to reiterate our policy intention as well as the prosecution policy of SFC as regards section 80C(3).

We hope the above help address the concerns of the

Members of the Bills Committee.

Yours sincerely

(Bryan P. K. Chan)

for Secretary for Financial Services

Att.

c.c. Mrs. Constance Li, Clerk to Bills Committee

Mr. Kau Kin-wah, Assistant Legal Adviser

Mr. Mark Dickens, Executive Director, SFC

Ms. Stella Leung, Director, SFC

Ms. Stella Chan, Department of Justice