

7 April 2000

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Our ref PAA

Your ref

Bryan Chan
Financial Services Bureau
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Dear Bryan

Securities (Amendment) Bill - Section 80C

I am writing to follow up on the previous correspondence and discussions relating to Section 80C, which as drafted would impose criminal liability where a broker input a short selling order to the Exchange and inadvertently failed to mark it as “short”, if the broker had acted “without reasonable excuse”.

I note from your letter of 29 March to the Chairman of the Bills Committee that it is not the Government’s policy intention to criminalise breaches of section 80C(1) arising due to inadvertent or careless mistakes. We note that you had initially agreed to our suggestion of amending sub-section (3) so that the offence is committed only if the person “knowingly or recklessly” contravenes subsection (1).

However, your letter indicates that the Department of Justice (DoJ) has advised against making the amendment, and that as a consequence you propose simply to provide for a defence of “reasonable excuse”.

Bryan Chan

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We appreciate the concern to have an effective and enforceable legislative framework, which must be in the interests of a properly regulated market. However we consider that the DoJ's concern that our proposed change renders the offence "futile" is in fact misconceived. Moreover, we are very concerned that to leave the draft as it currently stands is objectionable as a matter of principle.

As to the first point we understand that the DoJ's objection (underlying its concern as to practical enforceability) is founded upon the premise that it would need to prove "the actual knowledge of the defendant" in order to secure a successful prosecution for knowing or reckless contravention. With respect, however, that premise is flawed. Such a construction leaves the second limb of the test ("recklessness") totally redundant. The concept of recklessness, as it now stands in the criminal law, particularly given the cases following the approach adopted in Caldwell ([1983] 1WLR 939), effectively embraces wilful blindness, or acting in disregard of one's obligations, or even (depending on the context) a degree of carelessness so high as to be morally culpable - such as a failure to direct one's mind to an obvious obligation. Actual knowledge is not required. The test of recklessness indeed is one commonly relied upon in regulatory offences. Accordingly we cannot agree that our formulation will result in the DoJ finding prosecution impossible.

On the other hand, to leave the draft as it currently stands effectively establishes negligence, rather than recklessness, as the basis of liability. Surely this opens up a greater exposure than is intended, and as well as being unnecessary to meet your objectives, is objectionable as a matter of policy.

We are aware of very few crimes punishable by imprisonment in Hong Kong law in which negligence is the gist of the offence. Indeed, there is substantial academic authority for the position that negligence should have no place at all in criminal liability (see, for example, "Negligent Behaviour should be excluded from Penal Liability", Hall, 63 Col LR 632). In this specific context, we cannot accept, and understand that you are not proposing, that negligence reflects a moral fault punishable as a crime.

Where a defence of "without reasonable excuse" is adopted, this is normally in circumstances where

the offence relates to a matter such as on-going retention of records, which should be straightforward to comply with and does not create undue risks of criminal liability for inadvertent errors; or

the offence relates to a one-off matter such as giving documents or information to regulators when requested.

The offence in Section 80(C)(3) does not fall within the above categories. A broker may be handling hundreds of orders each day in the highly-pressured environment of a dealing room. It will be all too easy to make a mistake, and the broker should not be exposed to the risk of criminal liability if the prosecutor or the court do not regard a mistake as a "reasonable" excuse for non-compliance.

We note your comments that it would not be the policy of the SFC to prosecute a person for contravention of section 80C(1) by reason of an inadvertent or careless mistake. However, it is objectionable in principle to have broadly drafted offences with reliance being placed on the discretion of the prosecuting authority to avoid unjust results. It would be far more satisfactory if recklessness were adopted as the test of criminal liability, and recklessness as currently determined under established principles of criminal law appears to us to meet all your regulatory needs.

Bryan Chan

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We note that the DoJ will be attending the Bills Committee meeting on Monday morning, and the Group represented by Linklaters would also welcome the opportunity to attend.

Yours sincerely

Pauline Ashall

cc. Ronald Arculli - Legco

Constance Li - Legco

Paul Fan - Hong Kong Stockbrokers Association