BY FAX & BY HAND

30 January 2001

Legislative Council
HKSAR

Attn : Ms LEUNG Siu-kum, Clerk to Bills Committee

Dear Bills Committee,

Comments to the Securities and Futures Bill introduced to the Legislative Council November 2000 (the "Bill")

With reference to your letter dated 11 December 2000, we write to accept your invitation to make oral representation to the Bills Committee on 3 February 2001 (the "Representation"). Further to the telephone conversation between your Ms Connie Szeto and our Ms Cynthia Lam on 30 January 2001, we write to confirm that the following Directors of our association – The Institute of Securities Dealers Ltd ("ISD Ltd") will attend the Representation : Ms Chen Po Sum, Mr Vincent Lee, Mr Gilbert Chu and Mr Kenneth Lam .

We note the refinements made to the Bill in light of market comments received in response to last year's White Bill. We are against the fact that another regulatory body apart from the Securities and Futures Commission (the "SFC") - The Hong Kong Monetary Authority ("HKMA") - be given the responsibility as front-line regulator for authorised institutions ("AI") as the matter of regulation is on dealing in securities. By having a different regulator to regulate dealing in securities would give the impression that Hong Kong government promotes double standards and possibly duplicating tax payers' resources. Moreover, in order to uphold the spirit of level playing field, banks or AIs should not be provided with exempt status while dealing in securities but should comply with SFC standards while dealing in securities, including compliance with registration requirements etc to ensure protection of investors.

Banks were afforded exempt status historically back in around 1975 when banks only acted as "introducing brokers" – ie they introduced clients to trade in securities with brokers directly and banks do not themselves provide securities dealing or advisory

services. Local brokers benefited then from the securities business referred to them from banks and there was no direct competition. However, recent incidents showed that banks took advantage of their exempt status by promoting price war in securities dealing and created unfair competition in the incident of online application of initial public offerings. Moreover, as securities services were no longer incidental to banking services there is no longer the need to grant exempt status to banks for reason of fair competition. One may further argue that if banks can be exempted from dealing in securities, legislators should provide similar fair grounds for brokers to apply for exempt status in banking activities.

The double standards promoted in the Bill could be the result of regulation by two regulatory bodies. Double standard is exemplified by the fact that employees of AIs or banks currently do not need to be registered to deal in securities which is different from other SFC registered dealers. Subsidiary branches of banks can also bypass similar SFC registration requirements. We question why legislators should continue to allow bank employees who need **not** be registered (according to SFC standards) to give advice relating to dealing in securities for the sake of investor protection. Bank employees should comply similarly with SFC's fit and proper criteria and registration requirements before they could deal in securities thus at least ensuring "quality control". The Bill currently does not cater for such standard.

Another example of unfair treatment between banks and brokers is that the HKMA cannot impose fines to AIs but the Bill provides SFC with such powers. If SFC were to be the sole regulator in securities dealing, the problem could be solved resulting in the promotion of more effective regulation in the area. We further do not believe that the ill-transparent Memorandum of Understanding between the SFC and the HKMA will bring the playing field any leveller. By having two different regulators would only provide an excuse for them to shift their responsibility on to the other and ultimately neither takes blame. Thus for better utilisation of resources and clear division of responsibility from the government's perspective, a single regulator should be responsible for regulating securities dealing and likewise a separate regulator for regulating banking activities.

We hereby pledge the Bills Committee to kindly consider providing a real level playing field by (i) cancelling exemptions to banks; and (ii) having the SFC to be the sole regulator for all securities related dealing.

Other suggestions to the Bill are attached for your consideration. Should you have any questions, please feel free to contact our Director Ms Cynthia Lam at 2903 3311 or the undersigned at 2537 2873.

Yours faithfully,
For and on behalf of
The Institute of Securities Dealers Ltd

CHEN Po Sum
Chairman

CC : Hon SIN Chung-kai (Chairman of Bills Committee)
Hon WU King-cheong
FSB - Ms Vivian Lau

Gilbert Chu

Part II

Page C1519
4. (a) to maintain and promote the fairness, ***efficiency***, competitiveness, transparency and orderliness of the securities and futures industry;

The efficiency of the industry should be a matter of the relevant exchanges. As long as a competitive market is maintained, it should be left to the market to seek the best efficiency. This has always been the free market spirit adopted in Hong Kong.

Page C1531
11. (3) Where any written direction is given under

The overriding power of the Chief Executive directions may be a concern.

Page C1541
19. Recognition of exchange company
….it may, after consultation with the public and then the Financial Secretary, by notice in writing served on a company, recognize the company as an exchange company-

In the merger of the exchanges, we were assured the monopoly of the Stock Exchange Company. We wish this undertaking is maintained. The recognition of any new stock exchange should come from LEGCO, not just the Financial Secretary.

Page C1545
21. (1) (a) so far as reasonably practicable, an orderly, informed and fair market-

the recognized exchange company should promote an efficient and competitive environment which would best enhance market turnover and fair and anti-dominant environment among participants.

Part III

Page C1631
76. Fees to be approved by Commission

Normally, only regulated utilities require approval on fees to be charged. This section

supports that the Stock Exchange Company is a monopoly and recognition of new players should be approved by LEGCO.

Page C1655
93. Additional powers of Commission---suspension orders
…it may, after consultation with the Financial Secretary….

The suspension of an exchange should come from the Chief Executive, not just in consultation with the Financial Secretary.

Page C1711
111. (1) (b) (iii) sent by electronic mail transmission to the last electronic mail address

Many of our market participants have not yet adopted e-mail system or properly maintain a e-mail system. Delivery of e-mail messages may not be properly received by the recipients.

Kenneth Lam

Part Read: V to VIII P. C113 TO 1903

Comments are as follows:

General

(i) As layman, we are not sure whether the levels of fine presented ie level 3, 4, 5, 6, 7 etc are excessive or not, we would appreciate comparison and clarification.
(ii) Legislators should also consider how much discretion, in name of public interest protection and speediness of action, be entrusted to SFC vs the possible abuses. It is suggested that supplementary guidelines be issued to clarify this point.

Specifics

Part V

PC1717.115.2(c).
Please note the requirement to operate business with proper record keeping area. We should request clarifications guidelines.

C1719 4 (a).
The imposition of collateral/security should be a guided measure: uniform to all registered entities rather than on a case by case basis.

(5).
We would ask the legislature to judge on the wide discretion to be granted. Any guidelines/note in the exercise of the discretion? In the name of “public interest” could be too wide.

C1721 2 (d).
What is the purpose of the 24 months?

C1723(1) (A).
"Security.” Please see C 1719 4 (a) above.

(B)ii.
Please define “at all times”. We cannot agree to 24 hours, 365 days a year. We should propose, “at least one responsible officer during working days available to

supervise and at least reachable by available communication means”

C1725 (2).
This panel should be a ready panel, not only limited to subsection (1)(b) but also other matters related to the exercise of the discretion of SFC. Members should be chosen also from the securities professional.

C1743 (2)(b)(iii).
The SFC shall be given the discretion to consider matters of the licensed person on basis of the link up between him and the other group companies, officers and substantial shareholders of the same group. This may have a wide implication on judging the fit & proper criteria of innocent person because of some loose unknown relationship for undefined purpose.

C145 130.
(1) Is there a definition of “substantial”

(2) Whereas a licensed person is part of the activities of a conglomerate, particularly as part of a listed entity, how an acquiring substantial shareholder be able to balance the approval application and the commercial aspects of negotiations & completion?

C1761 136.
Would it be better to ascertain the official title “Registered” (broker, advisor, dealer) etc, than to be so specific towards what the title should be. One example is, say at 136 (4), where a person can only be called “securities adviser”, “securities consultant”, and “stock adviser”, what if someone called himself another misleading title of “Stocks Consultant”?

C1773 4 (a).
Very vague requirement. Need supplementary guidelines.

C1777 143.
It is absolutely unfair to impose imprisonment when there is no public damage created.

C1779 (8).
The term “imprisoning a licensed corporation” could well be putting the employee in question as the subject. Do we mean the Executive Director? Or other employees

sharing the responsibility. We certainly would appreciate some guidelines there to eliminate the fear of any employees violating the law without knowledge but indicting imprisonment.

C1799 150 (1).
One business day is very short notice, especially the fine is at level 5. Does this section specifically refers only to the "removal of an auditor" before the expiry of its term?

(2).
We need to be clarified on the diligence levied on the licensed corporation, for the same subject of auditor removal, that any associated company is also the reporting responsibility of the licensed corporation. What is the definition of "associated entity"? What if the associated entity has different major shareholders and management?

C1807 (2).
It is not within the power of the licensed corporation to enforce the rules imposed on the auditors.

C1811 to C 1825.
Section 156 - 158 reappointment of auditors. We are not objecting to the necessity of appointing auditors at necessary time. However, we are extremely concerned to about the possible abuse that may arise from it.

Questions are:

(i) Licensed corporation should first make cash deposits to SFC for their costs of auditor. What is the amount in question? The deposit itself may already be a disruption/penalty to the normal course of business before the verdict. (C1813 (4)(5)(6)) There should be a limit to the amount, say up to 200K?

(ii) There is no recovery of expense by the LC should they come out clean after the audit. Why?

(iii) C1817 at 158 (1) (a) Auditors are not lawyers, nor securities professional. How could they be given power to examine on oath?

(iv) C1823 (3) allows the delegation of SFC's inquiring power to the auditors, we have strong reservation towards such transfer of authority. We do not even think the police department enjoys such power.

C 1825 159 (3) We need clarification on the drafting of this section. What exactly is meant by "it is proved…but … in the absence of evidence to the contrary, be presumed to have done". Either the person is proved to have done, or he should be assumed innocent. Why is he "presumed"?

Part VIII

C1855 onwards It is not entirely appropriate for the securities brokers to comment on behalf of listed corporate. However, something in general:

(i) There is a difference in the authority of SFC in enquiring into normal listed corporate ((1861), and an authorized Financial Institution (1863 (9)). Why?

(ii) C1877 (3) to (7) Given the wide power of enquiry, and testaments are to be made also in statutory declaration, Is it appropriate that this authority could be given to "any body"? (5)

C1899 181. Is this only a disclaimer? Need there be an acknowledgment by the police?

Charles Sin

Comments on Parts 9, 10 and 11 of the Securities and Futures Bill (the Bill)

The comments following are made with the object of affording fairness to participants (formerly called members) of SEHK, who for convenience will be referred to as stock brokers.

Part 9 of the Bill

This chapter deals with the disciplinary functions and powers of the SFC and is said to base on 2 considerations : -

(1) To protect investors by ensuring that intermediary licensed by the SFC conduct themselves properly and do not abuse their privileged position.

(2) To put in safeguards to ensure SFC will exercise its powers fairly, transparently and consistently.

Comments

Section 193(1) of the Bill is objectionable and is contrary to the above stated consideration (2). It says the Commission in reaching a decision under the sections therein referred to (dealing with disciplinary action) can have regard to any information or material in its possession regardless of how the information or material has come into its possession.

Such wide and drastic powers if given to the Commission will allow it to use

evidence which its officers had obtained by unlawful means such as threats, deceit, false imprisonment or even torture. Evidence obtained by such means is not admissible in a court of law. Even the police in the investigation of a murder which is considered to be the worst crime cannot use unlawful means to obtain evidence. Why then should the Commission be given such wide and drastic powers. The rights of our citizens must be protected against abuse. This sub-clause must be deleted.

Part 10 - no comment

Division 2 of Part 11 of the Bill

Deals with the establishment of a Securities & Futures Appeals Tribunal (SFAT). SFAT is established to review a wide range of SFC decisions (but not all decision) that may affect a person's rights. It can only review decisions set out in Part 2 of Schedule 7.

The composition of SFAT is : -

(a) a Judge, and

(b) 2 lay members.

Comments

(1) The Tribunal should have power to hear and review all decisions of SFC so that any stock broker aggrieved by the decision of the SFC can appeal

against the decision.

(2) The persons to be appointed to the appeal penal of lay members should have a majority in number of stock brokers. The reason is that stock brokers are the persons who know the real life working of stock brokers, they understand market practice and the professional standard a stock broker is expected to maintain. In other professions such as doctors and lawyers those who sit on disciplinary hearings are mainly from the same profession. The 2 lay members who hear appeals by a stock broker should be stock brokers.

(3) Under Section 211 the time for appeal is 21 days there is no provision that the SFAT can extend time even on good cause shown. Power to extend time should be given to the SFAT, after all whether to grant extension or not remains to be decided by the SFAT.

We read in the white bill that there was to be a Process Review Panel to scrutinize the internal operation of SFAT but cannot find such a section in the Bill for the setting up of a Process Review Panel and we would like to know the reason for not setting up such a Panel. This Panel was intended to be a part of the mechanism of checks and balance.

Vincent Lee

Securities and Futures Bill

Part XIII Market Misconduct Tribunal

Under paragraph XIII of the Securities and Futures Bill (Market Misconduct Tribunal), we found that paragraph 245, 246 and 259 to be objectionable.

Paragraph 245 sub-section (1)(a) *"receive and consider any material by way of oral evidence, written statements, documents or otherwise, even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law"*

If approved, this would represent a major step backward in our legal system towards the protection of the civil liberty of our citizens. The fact that certain materials would not be admissible as evidence in civil or criminal proceedings in a court of law is to protect the integrity of our civil rights. This paragraph is totally against the legal system of Hong Kong and should be deleted.

Under paragraph 246 Further powers of Tribunal concerning evidence

This whole paragraph removes an individual's right to remain silent. It forces a person to provide statement or evidence even if it is self-incriminating. A person who would not self-incriminate himself will be committing an offence under this section, which is subject to a fine and/or imprisonment terms. This is contrary to protection of civil liberty of people in Hong Kong. It should not be allowed.

Under paragraph 259 No stay of execution on appeal

Under this paragraph, an "innocent appellant" will not have the right of a stay of execution despite the fact that he may have been wrongly accused in the first place.

It is grossly unfair especially in the case where a business may have to be terminated as a result of a decision by the Tribunal. Even though such decision may be wrong and later overturned by the Court of Appeal, the damage done would be irreparable. We suggest that the Court of Appeal should be given the power to grant a stay of execution if it deems appropriate.

Part XIV Offences Relating to Dealings in Securities and Futures Contracts, etc.

Under part XIV, we found paragraph 291 Offence of stock market manipulation paragraph (2) to be questionable.

Vincent Lee

This paragraph deals with person manipulating stock market prices on a relevant overseas market. We are of the opinion that we should only be concerned with offences involving stock market manipulation in Hong Kong and not outside our jurisdiction for reason that it is neither practical nor cost effective for us to monitor and enforce. We should leave the policing of foreign market by those concerned with that market.

In addition, transactions that may be considered an offence in Hong Kong may not be considered an offence in other relevant markets. For example, it is quite common to have market makers in the United State whose sole businesses are to maintain or stabilize the prices of any securities that they specialized. Such activity would be considered an offence under 291 (2)(c).