

**BY FAX AND BY POST**  
**(2521 7929)**

19 March 1999

Our Ref.: C/COG, M1458

Mr. Mark Dickens,  
Executive Director, Enforcement,  
Securities & Futures Commission,  
12th Floor, Edinburgh Tower,  
The Landmark,  
15 Queen's Road Central,  
Hong Kong.

Dear Mr. Dickens,

**Criminalisation of false reporting**

Thank you for your letter of 12 February 1999 on the above subject.

While we understand the rationale for proposing to introduce provisions on the criminalisation of false reporting, and do not disagree with the objective, the Society has reservations about the scope and approach of the proposal as outlined. We consider that it may in fact be counterproductive to the informal approach often adopted by the Securities and Futures Commission when seeking information from companies and their professional advisers. Our Legal Committee, in particular, has expressed the following concerns:

- (a) generally, it is noted that the various regulatory authorities are increasingly requesting information regarding the market, through surveys and questionnaires. In addition, information may be requested orally over the telephone. We are unclear to what extent and how the proposed provisions will relate to these various forms of communication and believe that advisers will be reluctant to continue to provide such information upon request, unless it is made explicitly and clear what is being sought and the degree of verification that is expected. As a result, we feel that unless the scope of the proposal is further clarified and restricted, the outcome may be to undermine the informal exchange of information that now occurs. Professional advisers, such as auditors, are likely to be more guarded and to require considerably more time to respond to requests for information;
- (b) it would be unfair to impose criminal liability on an ill-defined act or omission that could lead to putting many bona fide persons in peril of prosecution. An open-ended, "catch-all" provision on the supply of false or misleading information to the SFC, Exchanges or Clearing House, would create an overly broad and blunt instrument. We suggest that it would be more appropriate to extend the range of specific offences, referred to in paragraph 4 of the note, to target the particular sets of circumstances where false reporting may be a problem;
- (c) although it is indicated that the proposal will not apply to negligent misstatement, it will still apply to the "reckless" provision of information and it is unclear how this may be interpreted. Would it, for example, extend to an off-

the-cuff remark given over the telephone? Currently, professional advisers may be asked by one of the three recipients referred to in the proposal to provide information quickly, where there is no opportunity for proper verification. This raises the question of whether it is intended that liability be limited to persons who should be in a position to provide the correct information, such as the company supplying the information and, possibly, a third party who ought to have known. We believe that an agent who was not in a position to know, either because the means, or, for practical reasons, the opportunity, for verification, was not available, should not incur any liability. However, the intention has not been made clear in the note;

- (d) the second main point under paragraph 11 of the note, that there will be no need to establish that anyone was actually misled by the information, or any detriment suffered as a result of relying on it, appears to set too low a threshold for the imposition of a criminal liability. The information provided need only be misleading (of which no definition is supplied) not false, the provider of the information need only be "reckless", i.e. unconcerned as to whether or not it is misleading (quite possibly because he holds the view that even if it could be construed as being misleading, it is unlikely that anyone would be misled by it) and, ultimately, no-one need actually be misled by it. This also points to another problem, namely, that the proposal appears to draw no distinction between substantive information and information which is relatively unimportant; and
- (e) there are situations in which information is currently required to be supported by a statutory declaration (e.g. where a broker has to make a declaration to the Clearing House in relation to seeking exemption from the T+ 2 settlement requirements) which already carries with it the possibility of criminal sanctions. The SFC's proposals could therefore result in a double jeopardy.

If you require any further information on the above points, please contact Peter Tisman at the Society in the first instance.

Yours sincerely,

LOUIS L.W. WONG  
REGISTRAR  
HONG KONG SOCIETY OF ACCOUNTANTS

LW/PMT/ay