Securities and Futures Legislation
(Provision of False Information) Bill 2000 ("Bill")
A submission to
the Legislative Council Bills Committee for the Bill ("Committee")

1. This paper is prepared by the Securities and Futures Commission ("SFC") at the request of the Government to address points raised in the various submissions to the Bills Committee for the Securities and Futures Legislation (Provision of False Information) Bill 2000 ("Bill") by Linklaters & Alliance ("Linklaters") (made on behalf of a number of international intermediaries operating in Hong Kong), the Hong Kong Law Society, the Hong Kong Society of Accountants, the Hong Kong Association of Banks and the Institute of Company Secretaries. The paper will also refer to comments made by these bodies and by Legislative Council Members during the course of the Committee hearing on Thursday 25 May 2000 ("Hearing").

2. The general policy behind the Bill is described in the Legislative Council Brief on the Bill and during the course of the Hearing, so this paper will not discuss the policy except in relation to specific comments on aspects of the Bill made in submissions and during the Hearing.

3. Before further discussing the points made in submissions and during the Hearing, it should be noted that the Government is presently considering:

   - whether to replace the references in the Bill to "complete" and "incomplete" with "false or misleading by omission" and
   - whether to replace the references in the Bill to not believing that information is true, accurate or complete in every material particular with references to recklessness.

4. For simplicity, this paper will generally refer to those changes as having been adopted, except where useful to make a point. However, it should be noted that they are still awaiting legal clearance by the Department of Justice and policy approval by the Secretary for Financial Services and, should they not be approved, some of the statements in this paper would need to be revised.

International comparison

5. The Legislative Council Brief on the Bill says that "the proposal is in line with the regulatory practices in other major international financial markets including Australia, the US and the UK." Some submissions have questioned this assertion.

6. Extracts from the relevant US, UK and Australian legislation are attached in that order at the rear of this paper.

United States

7. The US legislation which the Government and SFC has referred to is s 1001 *18 USC*, the *US Federal Code on Crimes and Criminal Procedure*. Also relevant is s 32 of the *Securities Exchange Act* ("*SEA*"). Please refer to Attachment A.

8. Section 1001 *18 USC* is a very broad provision applying to any information given to any US Federal Government department or agency and so applies to the SEC. Section 32 *SEA* is a narrower provision which makes any "wilful" violation of the *SEA* and the extensive and detailed rules made under it a criminal offence. As there are many obligations to give very detailed information to the SEC in the *SEA* and rules made under it and requirements that the information not be false or misleading, s 32 makes the giving of false or misleading information to the SEC an offence in many instances. The other statutes the SEC administers have provisions substantially similar to s 32 of the *SEA*. However, s 1001 of *18 USC* is a broader offence and is commonly relied upon where s 32 of the *SEA* does not apply. In this respect, it is like the proposed offences in the Bill which will apply in the absence of specific offences.

9. We will restrict our discussion to s 1001 of *18 USC*. A US court has observed that the purpose of the provision is to "protect the authorized functions of government departments and agencies from the perversion which might result from the deceptive practices described [i.e. knowingly or recklessly giving false or misleading information]".[1][2] This could equally be said of the proposed offences under the Bill. The following points should be noted:

    - the offence applies not only to a person who has the mental element of knowledge, but also a person with a mental element of recklessness in that it has been held in US case law that the offence applies to those who "make a statement with reckless disregard of the truthfulness of the statement and with the conscious purpose to avoid learning the truthfulness of the statement."[3]

    - the offence applies to information that is false or misleading including information that is so owing to an omission in that it applies to concealing or covering up a material fact by any trick, scheme, or device

    - the offence applies to information given in any context or form, whether in writing or orally, whether pursuant to a request or volunteered, whether under statutory compulsion or otherwise. Indeed, the US Supreme Court has observed that "Congress could not have 'considered it more serious for one to informally volunteer an untrue statement to an FBI agent than to relate the same story under oath before a court of law.'"[4] (FBI agents generally do not have the power to force a person to give information as

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[1] *United States v Gilliland*, 312 US 86, 93 (1941)

[2] Words in square brackets added.

[3] *United States v Evans*, 559 F.2d 244, 246 (5th Cir 1977), *cert denied*, 434 US 1015, citing cases; cf *United States v DeVeau*, 734 F2d 1023, 1028 (5th Cir 1984), *cert denied sub nom. Drobny v United States*, 469 US 1158, in which a conviction was sustained on wilful blindness

[4] *United States v Rodgers*, 466 US 475, 482 (1984)

the SFC does and rely upon voluntary co-operation and traditional police powers.)

- the offence does not identify categories of person to whom it applies – it applies to anyone who gives information.

These are features that the offence shares in common with the proposed offences in the Bill.

10. Section 1001 *18 USC* is different from the proposed offences in the Bill in that:

    - it does not refer to a mental element of "does not believe". However, the possible amendment of the Bill to refer to "recklessness" currently being considered by the Government would bring the Bill and s 1001 into closer harmony in this respect
    - it does not refer to information being "complete" or "incomplete". However, again, the possible amendment of the Bill to refer to information that is "false or misleading by omission" would bring the Bill and s 1001 into closer harmony in this respect
    - it does not apply to US exchanges and clearing houses (this will be addressed later).

United Kingdom

11. The relevant legislation that the Government and SFC has referred to is s 201 of the *Financial Services Act* and s 393 of the proposed Financial Services and Markets Bill. Please refer to Attachment B.

12. Both the existing and proposed offences are generally similar. It should be noted that the offences apply to:

    - both false or misleading information, including (by implication) information that is false or misleading by omission
    - the knowing or reckless giving of such information
    - anyone and do not identify categories of person to whom the offences should apply
    - information given in any form, including orally.

    Again, these are features that the offences share with the proposed offences in the Bill.

13. The offences are different from the proposed offences in the Bill in that:

    - they only apply to information given under statutory compulsion and not to information given voluntarily
    - they do not apply to information given to an exchange or clearing house.

Australia

14. The relevant legislation that the Government and SFC has referred to is s 64 of the *ASIC Act* ("*ASICA*") and ss 1308 and 1309 of the *Corporations Law* ("*CL*"). Please refer to Attachment C.

15. Section 64 of the *ASICA* is an offence that basically deals with giving false or misleading information in connection with an inquiry, investigation or hearing. Sections 1308 and 1309 of the *CL* create broader offences.

16. As the offence under s 62 of the *ASICA* is similar to the existing offences in the *Securities and Futures Commission Ordinance* ("*SFCO*") (except interestingly in that it is a strict liability offence with a reverse onus defence of believing on reasonable grounds that the information was true and not misleading), we will restrict our discussion to ss 1308 and 1309 of the *CL* which are closer in nature to the offence proposed in the Bill. It should be noted that the offences:

- apply to information given to the ASIC (equivalent to the SFC), the stock exchange (it should be noted that the Australian stock exchange is a listed private enterprise much like HKEx will become), futures exchange and futures clearing houses. The offences are like the proposed offences in the Bill in this regard. However, the Australian offences do not apply to information given to a securities clearing house. It is not clear why this is so given that futures clearing houses are covered. We presume that it is an oversight given the piecemeal development of the Australian provisions rather than a deliberate policy choice as there seems no sensible policy reason why this should be so
- all the offences apply to information that is false or misleading, including by omission
- vary in the mental element required:
  - which is knowledge or negligence for information given to the ASIC, the stock exchange or an officer of the stock exchange
  - which is knowledge for information given to the futures exchange or a futures clearing house

  It is not clear why the mental element required varies in this respect and we cannot discern a clear policy reason why this is so. It is interesting to note that the Australian legislation adopts a far stricter approach to false or misleading information though in that negligence is criminalised in relation to information given to the ASIC and stock exchange
- vary as to the form of information they apply to:
  - for the ASIC only documents are covered (document is defined in the CL to include electronic information including pictures and sounds etc)
  - for information given to the stock exchange or any officer thereof, information in any form is covered
  - for information given to the futures exchange or a futures clearing house, information in the form of a "statement" is covered. ("[S]tatement" is not defined for the purposes of the relevant offence, but its definition in another context suggests that it includes information in a form other than writing as long as it conveys a message.)

Again, it is not clear why the application of the offences to various forms of information varies in this respect and we can discern no clear policy rationale for why this is so.

- apply to information voluntarily given, in common with the proposed offences under the Bill.

Observations from international comparison

17. First, it should be observed that it is difficult to discern a simple prevailing trend in the foreign markets surveyed. Each market's legislation is unique and presumably drafted with the conditions of that particular market, its customs and its legal and political circumstances in mind. However, the following common features emerge:

    - offences in all the jurisdictions surveyed criminalise information given knowingly or recklessly (the Australian offences go so far as to criminalise negligence, which the Bill's offences do not)
    - all the offences examined apply to false or misleading information, including information that is false or misleading by omission
    - all of the offences examined, other than the Australian offence applying to information given to their securities regulator, apply to information given in any form, whether in writing or orally
    - all of the offences examined other than the UK offences apply to information given voluntarily
    - none of the offences contain provisions that indicate who will be liable when a person gives information to a regulator that another person has supplied to that person, rather they rely on the general terms of the offence and general legal principles.

18. These features might be regarded as "common practice" in the foreign jurisdictions surveyed, which are representative of well-regulated common law jurisdictions.

19. The Government and SFC has had regard to false and misleading information offences in comparable jurisdictions and the proposal in the Bill is broadly in line with "common practice" in those jurisdictions surveyed.

20. The ways in which the proposed offences depart from what may be regarded as "common practice" in the jurisdictions surveyed are that the proposed offences:

    - refer to information that is "complete" or "incomplete". As mentioned, this is under review by the Government, which is considering using "false or misleading by omission" instead, which is in line with international "common practice".
    - refer to a mental element of "does not believe…" Again, as mentioned, this is under review by the Government, which is considering using "recklessness" instead which is in line with international "common practice."

      (If these two proposals that are being considered are adopted, the language used in the Bill should almost entirely be familiar to those from the US,

UK and Australia except in relation to specific Hong Kong terms such as "recognised exchange" and so on.)

- apply to information given to exchanges and clearing houses.

  However, the Australian offences provide a legislative precedent for this application of the criminal law. These offences are uncontroversial in Australia and have not had the effect of chilling informal, voluntary communication with the Australian regulators. (Indeed, in at least one respect, the Australian offences impose a higher standard in that they criminalise negligence in relation to information given to the stock exchange.) The Government and SFC note the concern of the Committee about applying the proposed offences to the exchanges and clearing houses in that they are commercial entities and will be listed. Yet, the Australian exchanges and clearing houses are also commercial entities and the Australian stock exchange is a listed entity.

  It is considered that there are good policy reasons for extending the proposed offences to the exchanges and clearing houses, in that these bodies provide important public infrastructure that is essential to the integrity and order of Hong Kong's markets and the protection of the investing public. The quasi-public nature of the exchanges and clearing houses has already been given some recognition in that they are public bodies for the purposes of the Prevention of Bribery Ordinance and that Ordinance's harsher "public sector" bribery and corruption offences apply to them. An analogy could also be made with statutory provisions such as ss 46 and 46A of the *Tai Lam Tunnel and Yuen Long Approach Road Ordinance* under which it is an offence in one instance to give false information to staff of the tunnel operating company. The company, like the exchanges and clearing houses, is a profit making monopoly which operates important public infrastructure and the legislature has seen fit to make it an offence to give false information to that body in connection with its role of providing that infrastructure. The exchanges and clearing houses provide infrastructure far more important to Hong Kong than a toll road and tunnel and these bodies are far more dependent on the integrity of information than a tunnel and toll road operating company.

21. It should be noted that this international comparison does not support various assertions and drafting suggestions made in submissions to the Committee for the amendment of the Bill, including:

- that the proposed offences should not apply to recklessness
- that the proposed offences should not apply to information given voluntarily (only the UK offence requires that information be given under compulsion)
- that the proposed offences should only apply to various categories of person or entity (only the Australian offence concerning information given to a stock exchange or one of its officers does this and it is not clear why given the broader reach of their similar offences relating to the ASIC and the futures exchange and clearing house which do not make such distinctions)

- that the proposed offences should not apply to information given orally (only the Australian offence concerning information given to the ASIC applies to documents).

Suggested problems with the Bill

Type of information provided – oral or written, "formally" or "informally" given

22. Some submissions have suggested that the proposed offences in the Bill should not apply to oral information. It is also suggested that the proposed offences should not apply in "informal" situations. These matters are strictly separate issues, but appear to be viewed together in that it seems to be thought that oral information is usually given "informally". As such, this paper will deal with the issues together. The submissions variously suggest that:

    - a person giving information will not know or realise that information given orally or "informally" will not be relied upon
    - the application of the offences in this manner will "chill" the informal communication process between regulators and the regulated and their advisers, decreasing the information informally available to the regulators, forcing an increased reliance on compulsory powers and increasing "lawyerisation"

23. In response to these points:

    - it is a departure from international "common practice" for false or misleading information offences not to apply to oral information, information given voluntarily or information otherwise given in an "informal" context
    - The quote from the US case referred to above is salient: "Congress could not have 'considered it more serious for one to informally volunteer an untrue statement to an FBI agent than to relate the same story under oath before a court of law.'"[5]
    - there is no valid policy reason to distinguish between information given orally or in writing as each is equally damaging – the harm sought to be prevented by the proposed offences is giving false or misleading information to a regulator as the regulator may rely on that information to discharge its important regulatory functions in the wrong manner or in the wrong circumstances. For example, the SFC and the Exchange regularly rely on oral information:
        - in responses to queries from officers of the Takeovers Executive or Stock Exchange Listing Division in performing their important respective functions to supervise and approve takeovers or the listing of companies
        - during meetings of the Takeovers Panel, Listing Committee of the Stock Exchange, the Committee on Unit Trusts and so on

      unreliable oral information in these situations is potentially terribly damaging to regulatory integrity and, hence, market integrity and the

[5] *United States v Rodgers*, 466 US 475, 482 (1984)

investing public. It is not always practical to ask for information in writing in these situations. Ironically, to do so would have the consequence of slowing and formalising the communication process, contrary to the aims expressed in the submissions.

- similarly the degree of "formality" with which the information is given should not matter either. What is relevant is the nature of the information – is it true and not misleading? It should be noted that the proposed offences do not criminalise mere carelessness. Further, they also only apply when the information is given pursuant to a statutory provision or is relevant to a regulator's statutory function. Giving false or misleading information knowingly or recklessly in such a situation is a very serious matter. While the terms "lie" and "half-truth" may be emotive and crude, they serve to illustrate the seriousness of what the proposed offences will criminalise. The offences would apply to conscious and in many instances deliberate acts, not negligent ones. To characterise such situations as "informal" grossly mischaracterises the seriousness of such communications. Indeed, a person giving information in such circumstances will or should know that such a regulator will rely on the information. To underscore this point, in their application to information not given under a statutory requirement but in relation to a regulator's statutory function, the proposed offences all require either proof of reliance on the information given or that the person giving the information intended that the regulator rely on it. These additional requirements should screen out inadvertent, non-material and casual communications.

- suggestions that the effect of the proposed offences will be to inhibit frank "informal" communications between the regulators and those they regulate should be evaluated carefully. That it is suggested that this is the experience in the US and Australia where the offences apply to "informal" communications. False or misleading information are of no value to a regulator and in fact harm the discharge of its functions, whether given orally, in writing, "formally" or "informally". There will be no harmful effect to communication with a regulator if persons are inhibited from knowingly or recklessly lying or telling half-truths. If anything, the integrity of communication will be improved.

- claims of increasing lawyerisation, should also be carefully evaluated. Many listed companies and intermediaries retain not only retain external lawyers but also employ internal lawyers or para-legal compliance staff. It is the experience of the SFC at least that many important communications, even if "informal" or volunary, are vetted by lawyers before being made or made with lawyers present. Further, the proposed offences in effect embody relatively simple moral principles in language that should be familiar to most who operate in financial markets and even those who do not. Except in those few grey cases, it should usually be relatively apparent to even a layman when he may be criminally liable under the provisions, particular if the offences are amended as the Government is presently considering.

Incomplete information

24. Several of the submissions suggest that it is a problem that the proposed offences would criminalise the giving of information that is incomplete in a material particular. They suggest that the proposed offences should only apply to information that is false or misleading (including by omission). As mentioned, the Government is presently considering this suggestion. However, even if not amended, it should be noted that the proposed offences would only apply where a person knew that information was incomplete in a material particular or did not believe it to be complete in every material particular. The proposed offences would not impose a strict or objective standard – a mental element requiring either knowledge or the lack of a subjective belief would be required i.e. the question would be what an accused person believed or thought, not what anyone else did or would have believed or thought. Furthermore, the information would have to incomplete in a material particular i.e. in an important respect.

25. The Linklaters' submission posits scenarios relevant to this issue.

26. Scenario 2 in the Linklaters' submission involves a person responding to a Stock Exchange request to explain share price movements and the person hesitating to respond because they suspect that there may be reasons other than those that they can readily explain, which would require research to explain and hence refraining from answering because they fear their answer would be "incomplete". The Linklaters' submission suggests that, in this scenario, the Stock Exchange would probably prefer to receive a timely partial answer that could later be supplemented by further information than no answer at all or a late answer. This ignores that the person providing the information controls the information that they provide and may always qualify the information they give and that whether information is "incomplete" must be judged in the circumstances. If such a person were to explain that there were several reasons for the share price movement that they could immediately explain but that there may be other reasons, which they had not analysed at that time, which may further explain the movement, they most likely could not be held criminally liable. In the circumstances, this would most likely be a complete answer.

27. Scenario 3 in the Linklaters' submission involves a summary of complex information provided at short notice and suggests that this might attract criminal liability because a regulator to which the summary is given considers it insufficiently detailed. First, it is the criminal courts and not the regulator that would decide whether information is incomplete under the proposed offences. Secondly, again the circumstances and the ability of the information giver to qualify the information given come into play. In these circumstances, it is most likely sufficient for a person to state that what is provided is a summary of information and is therefore not complete in every detail. Lastly, it should be noted that omissions would have to be material to attract liability and the nature of a summary in and of itself implies that some material is omitted. Criminal liability would most likely only arise if there were a material omission from the summary that, given the nature of the information as a summary, detracted materially from the completeness of the information given.

28. Scenario 4 in the Linklaters' submission involves the submission of a draft document to a regulator for clearance (e.g. a takeover announcement to the Executive or prospectus to the Stock Exchange). The Linklaters' submission asks whether the submission of draft documents is to attract criminal liability given that draft documents are necessarily incomplete.

29. Again, whether information is incomplete in a material particular depends on the circumstances. The submission of a document that is clearly marked draft and taken as a draft by a regulator in and of itself implies that the information is incomplete in some respects. It is most unlikely in these circumstances that a court would hold a person criminally liable for information that was incomplete in a manner that was not in some sense knowingly contrived. However, it is a very different matter were an attempt to be made to obtain approval to an incomplete final document on the basis of a deliberately incomplete draft. The SFC has experience of instances in which market participants have sought to define their disclosure obligations by reference to questions asked by the SFC rather than by the market participant's own knowledge. This is most improper and damages market integrity and investor protection. To deal with such situations, it is necessary that the proposed offences apply to the submission of draft documents to a regulator which will approve those documents.

Absence of belief in truth, accuracy and completeness

30. Some submissions have noted that, under the Bill, it would be an offence to give information to a regulator if the person giving the information did not believe that information to be true, complete and accurate in every material particular. This is correct. However, as mentioned, the Government is reviewing this element of the proposed offences. Nevertheless, we consider it useful for clarity to respond to some of the assertions made in the submissions about this element of the proposed offenes.

31. Scenario 5 in the Linklaters' submission refers to an instance in which a dealing director of a registered dealer submits to the SFC a Financial Resources Rules report which he did not prepare himself. It is suggested that the dealing director would not be able to believe that the information was true, complete and accurate unless the information were within his personal knowledge or he had taken positive steps to verify the information.

32. This is not correct. The belief required under the proposed offences is a subjective one, not an objective one and that belief neither requires enquiry into the information nor that all the information is within a person's own knowledge. A useful analogy is a religious belief. One may hold a religious belief without having all the information relating to that belief within one's knowledge and without taking steps to verify that belief. Indeed, by its very nature, a religious belief is impossible to verify. However, such a belief may be very genuinely and strongly held. A belief as to information which might be given to a regulator is, of course, not so difficult to verify as a religious belief. But, the analogy illustrates the fallacy that requiring a belief that information is true, complete and accurate necessitates personal knowledge of all the information or some form of due diligence inquiry to check its veracity. In the scenario proposed, it would be sufficient if the dealing director believed the information

was true, complete and accurate on the basis of the assertion of their subordinate and nothing within the dealing director's knowledge put them on inquiry to suspect that this was not the case so that he could not believe the assurance.

The offences apply to everyone

33. Some submissions note that the proposed offences may be committed by any person and do not apply to specific categories of people or entity. It has been suggested that there would be uncertainty as to who would be guilty of an offence (if anyone) if a person gave information to a regulator that another person had supplied to him.

34. As noted, most of the foreign offences examined apply to anyone and do not identify specific categories of person or entity to whom they apply. So, in this regard, the proposed offences are in line with international "common practice".

35. Indeed, the proposed offences have been drafted in this regard as the wrong sought to be prevented is the giving of false or misleading information to a regulator. This is a wrong irrespective of who has given the information. It would be illogical for it to be a crime for a company officer or lawyer to give false or misleading information to a regulator but not, for example, the secretary of such a person. The identity of the person giving the information does not define the wrong, rather the nature of the information and the mental state with which it is given do.

36. It was considered that if the offences only applied to specific groups of person or entity that it would be easily evaded and that it would not be as effective.

Liability of multiple parties, corporations and their officers

37. Some submissions suggest that the proposed offences are uncertain in their application when one person supplies information provided to that person by another or when a corporation and their officers or employees are involved.

38. The proposed offences do not pose any problems with respect to determining liability if more than one person is involved in the giving of information that may attract liability. The most important element of the offence in determining who is liable in such circumstances would be the mental element. If a person involved in the supply of information did not know that the information was false or misleading and was not reckless as to the same, they would not be criminally liable. This does not change no matter how many people are possibly involved in giving or creating the information. Further, the general criminal law has well established principles governing questions of liability in the event of the participation of more than one person (the laws concerning aiding and abetting, accessories and conspiracy). The general criminal law also has well established principles governing questions of the liability of a corporation for the act of an employee or officer. These principles apply to the proposed offences just as they apply to any other offence. Further, some of the Ordinances into which the proposed offences would be inserted contain express

provisions concerning the liability of a corporation's officers and directors for an offence committed by that corporation.[6]

39. Scenario 6 in Linklaters' submission raises two separate situations relevant to these questions.

40. In the first situation, a professional adviser such as a lawyer or financial adviser passes on to the SFC information supplied by a client. In this instance, both the adviser and the client could be regarded as having provided information to the SFC, one directly and the other indirectly. Whether each would be liable would depend on their respective mental states. Presuming that the potential liability of the client is not controversial, the liability of the adviser merely depends on whether the adviser knew that the information given to them by their client was false or misleading or was reckless as to the same. Making the adviser liable if they knew the information was false or misleading should not be controversial. Turning to recklessness, an adviser will not be reckless as to whether information given to them by a client is true and not misleading as long as there is nothing within their knowledge that puts them on inquiry as to the information and makes them doubt that it is true and not misleading. In the absence of such knowledge, an adviser would not be under a duty to inquire into the veracity of the information under the proposed offences, nor would all the information have to be within their personal knowledge. It is submitted that this is the appropriate standard to adopt for the criminal liability of advisers and that it is generally consistent with the approach traditionally taken towards such issues.

41. In the second situation, a director of a company provides information to the SFC. In this situation, whether the company is liable depends on whether the director could be said to be the directing mind and will of the company according to the common law principles on attributing criminal acts of a company officer or employee to a company. Whether the director would be personally liable would depend on both his mental state under the proposed offences and the operation of s 57 SFCO. It is possible that both the director and company could be liable or that the director could be liable without the company being liable. However, the proposed offences pose no novel questions in this regard that are not faced with any offence under the general criminal law or under the Ordinances to which the proposed offences would be added.

42. Given these conclusions, it is thought unnecessary to clarify how the offences apply to multiple parties or to corporations and their officers. Most offences do not clarify their operation in these respects and no need is seen to identify the proposed offences in the Bill for unique treatment.

Right to legal advice

43. One submission suggested that it was necessary to clarify whether the proposed offences affect the ability of a person to seek legal advice. The right to legal advice is constitutionally guaranteed in the Basic Law, which the Bill is subject to. As such, no need is seen to clarify this.

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[6] Section 57 SFCO and s 110 Commodities Trading Ordinance

Compulsion to provide information

44. One submission suggested that it was necessary to clarify whether the proposed offences give rise to new obligations to provide information. The Bill clearly only criminalises the giving of information in certain circumstances and does not create any new obligation to give information.

Privilege against self-incrimination

45. Some submissions referred to the availability of the privilege against self-incrimination (e.g. in the context of s 33 of the *Securities and Futures Commission Ordinance* ("*SFCO*")) and suggested that the proposed offences do not preserve the privilege or that it should be made clear that the offences do not prejudice the privilege. In addressing this matter, we will refer to s 33 of the *SFCO* by way of example to give some focus. The situation is generally the same with respect to the privilege under the SFC's other powers.

46. Section 33 of the *SFCO* is the SFC's main investigatory power and empowers the SFC to conduct compulsory interviews, amongst other things. During an interview, a person must answer questions truthfully and to the best of their ability. However, if a person claims privilege against self-incrimination before answering a question, the question and answer may not be used against that person in criminal proceedings other than proceedings for giving false or misleading information during the interview, for making a false statutory declaration or for perjury. The proposed offences in the Bill do not compel anyone to give any information to anyone. Indeed, the protection of privilege against self-incrimination under s 33 of the *SFCO* does not protect against compelled incriminating answers to questions being tendered for the purposes of prosecuting false or misleading information offences, much like those in the Bill.

47. Another submission made in this regard suggested that the preservation of the privilege should be clarified in the Bill. As stated, the relevance of the privilege to the Bill is not apparent, but, in any event, the privilege is constitutionally guaranteed in the Basic Law to which the Bill is subject. Therefore there is no need to refer to the privilege in the Bill.

Relationship with other offences

48. Some submissions have pointed out that the proposed offences in the Bill would not apply if some existing offence concerning false or misleading information also applied. This is correct. This stance was taken to avoid the situation in which a person could commit several false or misleading offences at once with one act. These submissions then go on to point out that the proposed offences are inconsistent in some respects with the existing offences in legislation administered by the SFC relating to false or misleading information.

49. That the proposed offences are in some instances not the same as the existing offences is perhaps inevitable given that the policy brief for the Bill was a limited one to criminalise the giving of false or misleading information where it was not presently an offence, not to amend all similar existing offences. However, even among the existing offences, there are also some inconsistencies. It is anticipated that, if enacted, the provisions of this Bill will be included in the

Securities and Futures Bill. It is intended that, if the Securities and Futures Bill is passed, offences concerning false or misleading information in that Bill will largely be standardised.

50. Finally, it is suggested that the main areas in which the giving of false or misleading information might pose a regulatory problem are already covered. It is correct that some important areas are covered, including giving false or misleading information in response to a regulatory or investigatory request from the SFC and in connection with statutory licensing applications. However, serious gaps remain, most notably in relation to:

- the regulation of takeovers, mergers and share repurchases
- the exchanges' and clearing houses' administration of their rules, including most importantly the listing rules
- information voluntarily given to a regulator to persuade that regulator to exercise a power or perform a function or refrain from doing so and
- answers to queries where the person asked a question is not compelled to answer, but should know that the information will be used by the regulator in question to exercise a power or perform a function
- false or misleading complaints.

51. The proposed offences are intended to cover these gaps and others as well as providing an offence that will cover new instances of giving information to a regulator as the legislation and rules of the various regulators are amended.

Proposals for redrafting of the Bill

52. Various submissions contain proposals for redrafting the Bill. As mentioned, the Government is considering whether the Bill should be redrafted to adopt recklessness as a mental element and to use false or misleading by omission instead of complete and incomplete.

The use of "provides"

53. One submission expressed concern about the use of the term "provides" in the Bill, suggesting it was too broad. We do not understand the concern about the use of this term given that the proposed offences are constrained in other respects through the use of a subjective mental element and as the body making the submission seemed to accept that the proposed offences should apply to information given voluntarily, informally and orally (although if we are wrong on this point, we stand to be corrected). The word used to convey the notion that the information is passed from a person to a regulator must necessarily be broad to cover the many means in which information can be given. None of the possible alternatives to "provides" that come to mind, such as "furnishes", "makes available" and "gives" seem to have a narrower connotation than "provides", and, in our view, it is questionable whether the term used should have a narrower connotation. Again, the essential wrong is the nature of the information provided – is it true and not misleading – not the manner in which it is provided.

"Statements" as opposed to "information"

54. One submission questioned the use of "information" suggesting that it may be too broad and preferred "statement" as used in some provisions of the *Companies Ordinance* e.g. s 41A. It is considered that the term used to cover the material conveyed to a regulator must be suitably broad to cover different forms of information, whether in writing, orally or otherwise. "[I]nformation" seems to be the most direct way to do this. As "statement" is not defined in the *Companies Ordinance* or the *Interpretation and General Clauses Ordinance*, we presume that, if it were used, it would bear its ordinary meaning and we do not see a substantial difference between "information" and "statement" other than it may exclude e.g. pictorial information. Pictorial information may be highly psychologically persuasive and either false or misleading, e.g. as may be the case in the context of an advertisement or prospectus. It is felt that it would be inappropriate to exclude pictorial information from the scope of the offences.

Section 41A Companies Ordinance

55. Finally, one submission suggested that the proposed offences should make use of s 41A of the *Companies Ordinance* which deems:

- a statement included in a prospectus to be untrue if it is misleading in the form and context in which it is included and
- a statement to be included in a prospectus if it is contained therein or in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

56. As to the first limb of s 41A, if it is accepted that the proposed offences apply to information that is misleading, while incorporating a provision similar to s 41A is one means of drafting the proposed offences, the same can be achieved by simply referring explicitly to "misleading" and "misleading by omission". As to the second limb of s 41A, ultimately the question of what information is given to a regulator is a common sense one for a court to determine. While the deeming effect of s 41A with respect to material incorporated in a prospectus by reference may be useful in the highly formal area of prospectuses, it may not be equally applicable in relation to the many categories of often less formalised forms of information which the proposed offences would cover.

Ends.

26 May 2000

Attachment A

Attachment B

Attachment C

Articles and Speeches

An Analysis of the Proposed Legislation to Criminalise the Provision of False Information

Appendix 1

International Comparison

Hong Kong	UK	Australia	US
Applies to information given in any form	Applics to information given in any form	Applies to information given in writing to the ASIC and futures exchanges and clearing houses, but information given in any form to a securities exchange	Applies to information given in any form
Information must be false, misleading, defective or incomplete in a material particular - will apply to information that is false or misleading by omission. The information must be given under a statutory requirement or be relevant to the functions of the body to which it is given	Information must be false or misleading in a material particular - should apply to information that is false or misleading by omission	Information must be false or misleading in a material particular - specifically applies to information that is misleading in a material particular by omission	Applies to false and apparently misleading information - apparently a so applies to information that is false or misleading by omission (applies, among other things, to concealing or covering up a material fact)
Covers information given to the SFC, securities and futures exchanges and clearing houses and recognized exchange controllers	Covers information given to the FSA but does not apply to information given to exchanges or clearing houses	Covers information given to the ASIC, securities or futures exchanges or futures clearing houses	Covers information given to any US federal government body i.e. including the SEC (securities regulator) and the CFTC (futures regulator) - but not securities and futures exchanges and clearing houses
Mental element required is knowledge or "recklessness" (presently defined) - i.e. giving information known to be false, misleading, defective or incomplete or information which the giver does not believe to be true, accurate and complete	Mental element required is knowledge or recklessness, which is not defined	Mental element required varies. Mental element required when information is given to the ASIC is knowledge or negligence. Mental element required when information is given to an exchange or clearing house is knowledge	Mental element required is knowledge or recklessness

An Analysis of the Proposed Legislation to Criminalise the Provision of False Information

Appendix 1 (Cont'd)

International Comparison

Hong Kong	UK	Australia	US
Covers information given voluntarily	Only applies to information given "in purported compliance" with a requirement under the Financial Services and Markets Bill - therefore probably doesn't apply to volunteered information in the absence of a statutory requirement to give information or a process of applying for an official permission or authority	Appcars to cover information given voluntarily (particularly so with exchanges and clearing houses)	Appears to cover information given voluntarily
No need to prove that anyone misled or that reliance on information or loss arising from use except in relation to information not given under statutory requirement which requires reliance or that defendant intended reliance or reckless as to whether reliance or not	No need to prove that anyone misled or that reliance on information or loss arising from use of information	No need to prove that anyone misled or that reliance on information or loss arising from use of information	No need to prove that anyone misled or that reliance on information or loss arising from use of information
Maximum penalty - statutory information: indictment, $1 million fine and/or two years' jail; summary, $100,000 fine and/or one year's jail; other information: indictment, $500,000 fine and/or six months' jail; summary, $50,000 fine and/or six months' jail	Maximum punishment is a fine, on conviction on indictment, to a fine (not known), and on summary conviction, a lower fine not exceeding the statutory maximum (also not known)	Various penalties for various offences up to a maximum of A$10,000 fine and/or two year's jail	Maximum punishment US$10,000 fine and/or five years' jail

Attachment A

The Securities Lawyer's Deskbook

Suggestions

Securities Exchange Act of 1934

Section 32 -- Penalties

a. Any person who willfully violates any provision of this title (other than section 30A), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $1,000,000 or imprisoned not more than 10 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $2,500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

b. Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 15 of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

c.

1.

A. Any issuer that violates section 30A(a) shall be fined not more than $2,000,000.

B. Any issuer that violates section 30A(a) shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

2.

A. Any officer or director of an issuer, or stockholder acting on behalf of such issuer, who willfully violates section 30A(a) shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

B. Any employee or agent of an issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such issuer), and who willfully violates section 30A(a), shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

C. Any officer, director, employee, or agent of an issuer, or stockholder acting on

behalf of such issuer, who violates section 30A(a) shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

c. Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

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B. Criminal Prosecution

b. RICO

We have also earlier described the relation of the Racketeer Influenced and Corrupt Organizations (RICO) statute to the federal securities laws.[27] Criminal RICO sanctions include fine, imprisonment, and forfeiture.[28]

c. Perjury and False Statements

There is no question that perjury[29] can be predicated upon false testimony given even in *ex parte* investigations under the SEC statutes.[30] The interesting development has been the

[27]See supra at 3419-3421, 4456-4466.

[28]18 U.S.C. § 1963.

[29]18 U.S.C. § 1621.

There can be prosecution also under 18 U.S.C. § 1505, which covers "[w]hoever corruptly, or by threats or force, or by any threatening letter or communications influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States. . . ." See generally Annot., Construction and Application of 18 U.S.C. § 1505 Making It a Federal Offense to Obstruct Proceedings before Federal Departments or Agencies or Congressional Committees, 8 ALR Fed. 893. See United States v. Alo, 439 F.2d 751 (2d Cir. 1971), where the Second Circuit applied this statute to a defendant's *own* testimony. The court was not troubled by the fact that a perjury conviction must conform to the "two witness rule," while this conviction did not. "Alo's profession of forgetfulness was not so much false testimony as a refusal to testify at all." Id. at 754.

The Section can apply also to submission of a false document. See, e.g., United States v. Vixie, 532 F.2d 1277 (9th Cir. 1976); United States v. Tallant, 547 F.2d 1291 (5th Cir. 1977), *cert. denied*, 434 U.S. 889; United States v. Laurins, 857 F.2d 529, 536 (9th Cir. 1988), *cert. denied*, 492 U.S. 906.

An administrative investigation is a proceeding within the meaning of § 1505. See, e.g., United States v. Vixie, 532 F.2d at 1278; United States v. Batten, 226 F. Supp. 492 (D.D.C. 1964). The statute has been construed to include also falsification of records in anticipation of an agency subpoena. United States v. Tallant, 407 F. Supp. 878, 888 (N.D. Ga. 1975).

The specific intent required for obstruction of justice. under § 1505 is simply that the defendant must have acted with the purpose of obstructing justice. United States v. Mitchell, 877 F.2d 294, 298-299 (4th Cir. 1989). "Concealing documents falls within this definition." United States v. Laurins, 857 F.2d at 536-537.

[30]Woolley v. United States, 97 F.2d 258 (9th Cir. 1938), *cert. denied*, 305

resort in SEC cases to the false statements Section of the Criminal Code, which dates in substantially its present form from the time when the Secretary of the Interior was seeking aid in the enforcement of regulations on the transportation of "hot oil" under the National Industrial Recovery Act:[31]

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or

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U.S. 614; see also United States v. Mascuch, 111 F.2d 602 (2d Cir. 1940), *cert. denied*, 311 U.S. 650; Boehm v. United States, 123 F.2d 791 (8th Cir. 1941), *cert. denied*, 315 U.S. 800; United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971) (perjury conviction affirmed without mention of the point); United States v. Geller, 154 F. Supp. 727 (S.D.N.Y. 1957) (Chapter X investigation); United States v. Marcus Schloss & Co., Inc., 710 F. Supp. 944, 958 (S.D.N.Y. 1989).

At the same time "[a] perjury indictment following an *ex parte* inquiry or investigation in which the defendant has been the subject of the investigation demands close judicial scrutiny." United States v. Thayer, 214 F. Supp. 929, 932 (D. Colo. 1963); see also United States v. Parrott, 248 F. Supp. 196, 201 (D.D.C. 1965). The *Thayer* court quoted Professor McNaughton's characterization of the perjury defendant's position as "the three horns of the triceratops — harmful disclosure, contempt, perjury." 8 Wigmore, Evidence § 2251 (McNaughton ed. 1961). The holding in *Thayer* was that a witness' testimony at an SEC investigation in which he was recalled after an examination of his earlier testimony revealed inconsistencies with other testimony was inadmissible at a perjury trial if the Government was substantially certain before the second session that the witness would give false answers and did not advise him that a perjury charge was being contemplated. A mere warning that false answers could result in perjury would not be sufficient: "[T]he investigating agency can not be allowed to 'zero-in,' so to speak, on the witness without advising him that if he persists he will be prosecuted for perjury. An indictment charging an offense which is entirely the work product of the Government cannot be upheld." 214 F. Supp. at 933. Quite apart from possible violation of the Fifth Amendment, there is the doctrine in McNabb v. United States, 318 U.S. 332 (1943), that, in the federal courts at least, the observance of minimum constitutional requirements may not be sufficient and the courts should be guided by considerations of justice and fair play in formulating rules for the reception of evidence.

[31]United States v. Gilliland, 312 U.S. 86, 93-95 (1941). On the earlier history of the statute, going back to 1863, see United States v. Bramblett, 348 U.S. 503 (1955); United States v. Stark, 131 F. Supp. 190 (D. Md. 1955).

> document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.[32]

This Section is of greater significance than the perjury statute, since it "does not limit the offense to formal statements, to written statements, or to statements under oath."[33] The perjury

[32]18 U.S.C. § 1001. Anomalously, the maximum fine for perjury is only $2,000. 18 U.S.C. § 1621.

> It is well established that this section encompasses within its proscription two distinct offenses, concealment of a material fact and false representations. The objective of both offenses may be the same, to create or foster on the part of a Government agency a misapprehension of the true state of affairs. What must be proved to establish each offense, however, differs significantly. False representations, like common law perjury, require proof of actual falsity; concealment requires proof of wilful nondisclosure by means of a "trick, scheme or device."

United States v. Diogo, 320 F.2d 898, 902 (2d Cir. 1963) (citations omitted).

On this approach, since the word *material* modifies only the offense of concealment, the Second Circuit has not read a requirement of materiality, which is fundamental to a perjury prosecution, into the false statements part of the Section. United States v. Mahler, 363 F.2d 673, 678 (2d Cir. 1966) (false testimony before SEC investigators); see also United States v. Rinaldi, 393 F.2d 97, 99-100 (2d Cir. 1968), *cert. denied*, 393 U.S. 913; United States v. Bilzerian, 926 F.2d 1285, 1299 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 63 ("Under our decisions, materiality of the statement is not an element of the offense").

This, however, is a minority view. Cf. United States v. Di Fonzo, 603 F.2d 1260 (7th Cir. 1979), *cert. denied*, 444 U.S. 1018, citing cases; see generally Annot., What Constitutes a "Material" Fact for Purposes of 18 USCS § 1001, Relating to Falsifying or Concealing Facts in Matter within Jurisdiction of United States Department or Agency, 49 ALR Fed. 622.

When materiality *is* required, the alleged concealment or misrepresentation need not have actually deceived or influenced the actions of the agency. It is required only that the fraud in question "have a natural tendency to influence, or be capable of affecting or influencing, a governmental function." United States v. Markham, 537 F.2d 187, 196 (5th Cir. 1976), *cert. denied*, 429 U.S. 1041. See also United States v. Goldfine, 538 F.2d 815, 820 (9th Cir. 1976) (a statement may be "material" even though the investigators to whom it was made knew the correct answer and were not misled by the falsity); United States v. Di Fonzo, supra.

[33]Marzani v. United States, 168 F.2d 133, 142 (D.C. Cir. 1948), *aff d by equally divided Court*, 335 U.S. 895 (1948), *reaff'd by equally divided Court*, 336 U.S. 922 (1949); United States v. Adler, 380 F.2d 917, 922 (2d Cir. 1967), *cert. denied*, 389 U.S. 1006. As to oral statements, see also United States v. Meyer,

corroboration or two witness rule[34] has been held not to apply.[35] And since the elimination of the "cheating and swindling" phrase in the 1934 amendment,[36] it is no longer necessary to show a pecuniary or proprietary loss to the Government[37] or an attempt to gain a monetary advantage.[38]

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140 F.2d 652, 655 (2d Cir. 1944); United States v. Mahler, 363 F.2d 673, 678 (2d Cir. 1966) (false testimony before SEC investigators).

Accordingly a verdict of acquittal on a perjury count is no basis for setting aside a conviction on a false statements count. Stein v. United States, 363 F.2d 587, 589 (5th Cir. 1966), *cert. denied*, 385 U.S. 934.

To support a violation of § 1001 in those jurisdictions requiring proof of materiality the Government must establish that the defendant (1) made a false statement (2) of material fact with (3) fraudulent intent and (4) in relation to a matter within the jurisdiction of a department or agency of the United States. United States v. Lang, 766 F. Supp. 389, 392 (D. Md. 1991), citing United States v. Race, 632 F.2d 1114, 1116 (4th Cir. 1980); United States v. Sprecher, 783 F. Supp. 133, 157 (S.D.N.Y. 1992). Cf. United States v. Bilzerian, 926 F.2d 1285, 1299 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 63.

[34]Weiler v. United States, 323 U.S. 606 (1945).

[35]Fisher v. United States, 231 F.2d 99, 105-106 (9th Cir. 1956), *on appeal from conviction at new trial*, 254 F.2d 302, 303-304 (9th Cir. 1958), *cert. denied*, 358 U.S. 895; United States v. Killian, 246 F.2d 77, 82 (7th Cir. 1957); Neely v. United States, 300 F.2d 67, 70 (9th Cir. 1962), *cert. denied*, 369 U.S. 864; United States v. McCue, 301 F.2d 452, 456 (2d Cir. 1962), *cert. denied*, 370 U.S. 939; United States v. Marchisio, 344 F.2d 653, 665 (2d Cir. 1965); United States v. Erhardt, 381 F.2d 173 (6th Cir. 1967).

[36]48 Stat. 996 (1934).

[37]United States v. Gilliland, 312 U.S. 86, 93 (1941); Pitts v. United States, 263 F.2d 353, 358 (9th Cir. 1959), *cert. denied*, 360 U.S. 935.

[38]United States v. Meyer, 140 F.2d 652, 655 (2d Cir. 1944).

The Supreme Court has held that the term "jurisdiction should not be given a narrow or technical meaning for purpose of § 1001 [citing cases.] A statutory basis for an agency's request for information provides jurisdiction enough to punish a fraudulent statement under § 1001." Bryson v. United States, 396 U.S. 64, 70-71 (1969). Again: "Section 1001 expressly embraces false statements made 'in *any* matter within the jurisdiction of *any* department or agency of the United States.'" United States v. Rodgers, 466 U.S. 475, 479 (1984). The Court rejected the interpretation that the phrase "within the jurisdiction" referred only to "the power to make final or binding determination" in a case in which the Court concluded that "[a] criminal investigation surely falls within the meaning of 'any matter' and the FBI and Secret Service surely qualify as 'department[s] or agenc[ies],' of the United States." Id. at 479, 482.

In United States v. Bilzerian, 926 F.2d 1285, 1300 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 63, the Second Circuit held that statements made in Schedules 13D and 14D-1 were within the Commission's "jurisdiction" for

B. Criminal Prosecution

The purpose of the amendment was neither more nor less than "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described."[39] Moreover falsehood cannot be justified by a collateral attack on the agency's authority as long as the authority is at least colorable.[40]

As with § 32(a) of the Securities Exchange Act, § 1001 applies only to those who "knowingly and willfully" make false statements to the Government.[41] The burden is on the Government to prove beyond a reasonable doubt that the defendant willfully made the statement with knowledge of its falsity.[42] The Government, however, is not required to prove that the defendant had actual knowledge of federal agency jurisdiction.[43] Nor need it "be shown that the statement was actually submitted to a department or agency of the United States, but only that it was contemplated that the statement was to be utilized in a matter within the jurisdiction of such a department or agency."[44] Moreover § 1001 can be satisfied if the defendant authorized another to submit the false statement.[45]

At one time there was considerable doubt whether § 1001

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purposes of § 1001. See also United States v. Lang, 766 F. Supp. 389, 394 (D. Md. 1991) (same result with Form 10-Q filed under Sec. Ex. Act § 13(a)).

[39]United States v. Gilliland, 312 U.S. 86, 93 (1941).

[40]United States v. Barra, 149 F.2d 489, 490 (2d Cir. 1945).

[41]United States v. Rodgers, 466 U.S. 475, 483 (1984); regarding § 32(a), see supra at 4690-4693.

The lower courts have extended § 1001 to those "who make a statement with reckless disregard of the truthfulness of the statement and with the conscious purpose to avoid learning the truthfulness of the statement. . . ." United States v. Evans, 559 F.2d 244, 246 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015, citing cases; cf. United States v. DeVeau, 734 F.2d 1023, 1028 (5th Cir. 1984), *cert. denied sub nom.* Drobny v. United States, 469 U.S. 1158 (conviction sustained where "willful blindness").

[42]United States v. Yermian, 468 U.S. 63, 64-65 (1984).

The Government is not required to prove evil intent. McBride v. United States, 225 F.2d 249, 254-255 (5th Cir. 1955), *cert. denied*, 350 U.S. 934, supra at 4691 n.12; United States v. Simon, 425 F.2d 796, 808 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006.

[43]United States v. Yermian, 468 U.S. 63, 69-70 (1984).

[44]United States v. Sprecher, 783 F. Supp. 133, 157 (S.D.N.Y. 1992), citing United States v. Candella, 487 F.2d 1223, 1227 (2d Cir. 1973), *cert. denied*, 415 U.S. 977.

[45]United States v. Blazewicz, 459 F.2d 442 (6th Cir. 1972).

applied to *oral* statements made to government investigators.[46]

[46]See, e.g., Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962); Friedman v. United States, 374 F.2d 363 (8th Cir. 1967); United States v. Bedore, 455 F.2d 1109 (9th Cir. 1972). See also Note, Criminal Liability for False Statements to Federal Law Enforcement Officials, 63 Va. L. Rev. 451 (1977).

Concern that § 1001 would not reach false statements made in informal investigations presumably was responsible for the infrequent use initially made of § 1001 in securities cases. In 1956, for example, the Commission reported to a committee of Congress that the statute had figured in only five indictments, the earliest dated in late 1950 except for one in 1942. Amendments to Securities Act of 1933 (Exemptions), Hearings before Subcomm. on Commerce & Finance of House Comm. on Interstate & Foreign Commerce on H.R. 5701, Promotional Securities and H.R. 9319, 84th Cong., 1st & 2d Sess. 763 (1955-1956). Each of these early cases involved statements made, apparently orally, to SEC investigators, except for one which alleged that the defendant, after notification by the Commission's Regional Administrator that no further sales of stock should be made without registration, had falsely stated in a letter to the Administrator that no stock had been sold since receipt of his letter. United States v. Bechhold, Litig. Rel. 661 (S.D. Fla. 1951).

There were a larger number of convictions under § 1001 after these hearings. See, e.g., United States v. Mahler, 363 F.2d 673 (2d Cir. 1966); United States v. Koss, 506 F.2d 1103, 1110 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (false documents in course of investigation). See also United States v. Re, 1961-1964 Fed. Sec. L. Rep. (CCH) ¶91,174 (S.D.N.Y. 1962) (motion to dismiss indictment *denied*). However these cases usually involved false statements that had been made under oath or in documents in the course of a formal investigation, as did a number of the other cases. United States v. Vitale, Litig. Rel. 1787 (E.D. Mich. 1960); United States v. Steel, Litig. Rel. 3266 (S.D.N.Y. 1965), *aff'd*, 359 F.2d 381 (2d Cir. 1966); see also United States v. Powell, Litig. Rel. 2734 (S.D.N.Y. 1963) (use of a forged and altered document in a broker-dealer revocation *hearing*). But most of these cases involved false filings. See, e.g., United States v. Jacobson, Litig. Rel. 1234 (D. Neb. 1958); United States v. Talenfeld, Litig. Rel. 2078 (W.D. Pa. 1961) (false proxy statements and affidavits in connection with market manipulation); United States v. Noonan, Litig. Rel. 2078 (W.D. Pa. 1961) (false proxy statements and affidavits in connection with market manipulation); United States v. Sylk, Litig. Rel. 2510 (S.D. Fla. 1963); United States v. Brenek, Litig. Rel. 2802 (W.D. Wash. 1963) (false financial information furnished SEC with respect to liquid assets of then registered broker-dealer corporation controlled by defendant, who was found not guilty as to other counts charging him with fraud in sale of the corporation's securities); United States v. Howard, Litig. Rel. 2872 (D. Colo. 1964) (convicted under § 1001 though acquitted under Sec. Act § 17(a)); United States v. Weiner, Litig. Rel. 3641 (E.D. Pa. 1967) (conversion and embezzlement in violation of Inv. Co. Act § 37 and furnishing false letter to SEC in that connection).

B. Criminal Prosecution

In 1984, however, the Supreme Court upheld the application of § 1001 to false oral statements made to the Federal Bureau of Investigation. The Court rejected the argument that this result should not be countenanced, because "Congress could not have 'considered it more serious for one to informally volunteer an untrue statement to an F.B.I. agent than to relate the same story under oath before a court of law.'"[47] Necessarily several earlier lower court holdings were validated such as those to the effect that the mere fact that a false statement was made without any legal obligation to speak is no defense, as in the case, for example, of a false statement made to an Assistant United States Attorney to induce action against a third person,[48] or a signed statement given by a taxpayer at the request of a Treasury agent conducting an income tax investigation.[49]

The courts have also permitted prosecution under§ 1001 despite the existence of other overlapping and more specific false statement statutes.[50]

[47]United States v. Rodgers, 466 U.S. 475, 482 (1984). The Court observed that "the only difference between the [penalties for perjury and for§ 1001] lies in the maximum possible fine." Id. at 482 n.3. Title 18 U.S.C. § 1621 sets the general penalty for perjury at a fine of not more than $2,000 or imprisonment for not more than five years or both. Section 1001 provides a fine of not more than $10,000 or imprisonment for not more than five years or both. See also United States v. Cherif, 943 F.2d 692, 700-701 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1564.

Cf. United States v. Woodward, 469 U.S. 105 (1985) (falsely checking "no" on customs form asking whether respondent or any family member was carrying over $5,000).

[48]United States v. Van Valkenburg, 157 F. Supp. 599 (D. Alaska 1958).

[49]Cohen v. United States, 201 F.2d 386, 391-392 (9th Cir. 1953), *cert. denied*, 345 U.S. 951; Neely v. United States, 300 F.2d 67, 71 (9th Cir. 1962), *cert. denied*, 369 U.S. 864; cf. Brandow v. United States, 268 F.2d 559 (9th Cir. 1959).

[50]United States v. Bilzerian, 926 F.2d 1285, 1300 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 63; United States v. Lang, 766 F. Supp. 389, 393 (D. Md. 1991), citing cases.

The Supreme Court has also permitted a prosecution both under§ 1001 and under 31 U.S.C. § 1058 (willfully failing to report carrying in excess of $5,000 into the United States) when the same conduct formed the basis of each count. United States v. Woodward, 469 U.S. 105 (1985).

Attachment B

(b) if within that period proceedings to which the documents are relevant are commenced against any person for any criminal offence, until the conclusion of those proceedings.

History

S. 199(5)(b) substituted by CA 1989, s. 76(1), (4) as from 21 February 1990 (see S.I. 1990 No. 142 (C. 5), art. 4); s. 199(5)(b) formerly read as follows:

"(b) if within that period proceedings to which the documents are relevant are commenced against any person for an offence under this Act or section 1, 2, 4 or 5 of the said Act of 1985, until the conclusion of those proceedings."

199(6) [Offence, penalty] Any person who intentionally obstructs the exercise of any rights conferred by a warrant issued under this section or fails without reasonable excuse to comply with any requirement imposed in accordance with subsection (3)(d) above shall be guilty of an offence and liable—

(a) on conviction on indictment, to a fine;

(b) on summary conviction, to a fine not exceeding the statutory maximum.

History

In s. 199(6) the word "intentionally" inserted by CA 1989, s. 76(1), (5) as from 21 February 1990 (see S.I. 1990 No. 142(C.5), art 4).

199(7) [Functions relevant for sec. 114] The functions to which section 114 above applies shall include the functions of the Secretary of State under this section; but if any of those functions are transferred under that section the transfer may be subject to a reservation that they are to be exercisable by the Secretary of State concurrently with the designated agency and, in the case of functions exercisable by virtue of subsection (1) above, so as to be exercisable by the agency subject to such conditions or restrictions as the Treasury may from time to time impose.

History

In s. 199(7) the words "subsection (1) above" substituted for the former words "subsection (1)(a) above" by CA 1989, s. 76(1), (6) as from 21 February 1990 (see S.I. 1990 No. 142 (C. 5), art. 4); and the word "Treasury" substituted for the former words "Secretary of State" by the Transfer of Functions (Financial Services) Order 1992 (S.I. 1992 No. 1315), art. 10(1) and Sch. 4, para. 3 as from 7 June 1992.

199(8) [Scotland] In the application of this section to Scotland for the references to a justice of the peace substitute references to a justice of the peace or a sheriff, and for the references to information on oath substitute references to evidence on oath.

History

S. 199(8) substituted by CA 1989, s. 76(1), (7) as from 21 February 1990 (see S.I. 1990 No. 142 (C. 5), art. 4); s. 199(8) formerly read as follows:

"199(8) In the application of this section to Scotland the references to a justice of the peace shall include references to a sheriff and for references to the laying of information on oath there shall be substituted references to furnishing evidence on oath; and in the application of this section to Northern Ireland for references to the laying of information on oath there shall be substituted references to making a complaint on oath."

199(9) ["Documents"] In this section **"documents"** includes information recorded in any form.

History

In s. 199(9) the words "and, in relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form" formerly appearing at the end omitted by CA 1989, s. 76(1), (8) as from 21 February 1990 (see S.I. 1990 No. 142 (C. 5), art. 4) and repealed by CA 1989, s. 212 and Sch. 24 as from 1 March 1990 (see S.I. 1990 No. 355 (C. 13), art. 5(1)).

CCH Note

The above omission and repeal were obviously intended to coincide in S.I. 1990 No. 142 (C. 5), art. 7 purportedly attempting to effect a non-existent repeal in FSA 1986, s. 199(1) as from 21 February 1990; this clearly should have referred to s. 199(9) and the incorrect reference to s. 199(1) was revoked by S.I. 1990 No. 355 (C. 13), art. 16

SEC. 200 False and misleading statements

200(1) [Furnishing false information] A person commits an offence if—

(a) for the purposes of or in connection with any application under this Act; or

(b) in purported compliance with any requirement imposed on him by or under this Act,

he furnishes information which he knows to be false or misleading in a material particular or recklessly furnishes information which is false or misleading in a material particular.

200(2) [False description of person] A person commits an offence if, not being an authorised person or exempted person, he—

(a) describes himself as such a person; or

(b) so holds himself out as to indicate or be reasonably understood to indicate that he is such a person.

200(3) [False description of status] A person commits an offence if, not having a status to which this subsection applies, he—

(a) describes himself as having that status, or

(b) so holds himself out as to indicate or be reasonably understood to indicate that he has that status.

200(4) [Application of sec. 200(3)] Subsection (3) above applies to the status of recognised self-regulating organisation, recognised professional body, recognised investment exchange or recognised clearing house.

200(5) [Penalty for sec. 200(1) offence] A person guilty of an offence under subsection (1) above shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both;

(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.

200(6) [Penalty for sec. 200(2), (3) offences] A person guilty of an offence under subsection (2) or (3) above shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the fifth level on the standard scale or to both.

200(7) [Maximum fine in sec. 200(6) if public display] Where a contravention of subsection (2) or (3) above involves a public display of the offending description or other matter the maximum fine that may be imposed under subsection (6) above shall be an amount equal to the fifth level on the standard scale multiplied by the number of days for which the display has continued.

200(8) [Defence re sec. 200(2), (3) offences] In proceedings brought against any person for an offence under subsection (2) or (3) above it shall be a defence for him to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

SEC. 201 Prosecutions

201(1) [Proceedings other than under sec. 133, 185] Proceedings in respect of an offence under any provision of this Act other than section 133 or 185 shall not be instituted —

(a) in England and Wales, except by or with the consent of the Secretary of State or the Director of Public Prosecutions; or

(b) the false or misleading impression is created there.

(7) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine, or both.

(8) "Relevant agreement" means an agreement—

(a) the entering into or performance of which by either party constitutes an activity of a specified kind or one which falls within a specified class of activity; and

(b) which relates to a relevant investment.

(9) "Relevant investment" means an investment of a specified kind or one which falls within a prescribed class of investment.

(10) Schedule 2 applies for the purposes of subsection (9), with references to section 20 being read as references to that subsection.

(11) Nothing in Schedule 2, as applied by subsection (10), limits the power conferred by subsection (9).

(12) "Investment" includes, any asset, right or interest.

(13) "Specified" means specified in an order made by the Treasury.

Misleading the Authority: residual cases.

393.—(1)A person who, in purported compliance with any requirement imposed by or under this Act, knowingly or recklessly gives the Authority information which is false or misleading in a material particular is guilty of an offence.

(2) Subsection (1) applies only to a requirement in relation to which no other provision of this Act creates an offence in connection with the giving of information.

(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to a fine.

Misleading the Director General of Fair Trading 1998 c. 41

394. Section 44 of the Competition Act 1998 (offences connected with the provision of false or misleading information) applies in relation to any function of the Director General of Fair Trading under this Act as if it were a function under Part I of that Act.

Bodies corporate and partnerships

Offences by bodies corporate etc.

395.—(1)If an offence under this Act committed by a body corporate is shown—

(a) to have been committed with the consent or connivance of an officer, or

(b) to be attributable to any neglect on his part, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

Attachment C

(b) the book, or a part of the book, is kept or prepared by recording or storing matters (including that matter) by means of a mechanical, electronic or other device;

a written reproduction of that matter as so recorded or stored is prima facie evidence of that matter.

(6) A writing that purports to reproduce a matter recorded or stored by means of a mechanical, electronic or other device shall, unless the contrary is established, be deemed to be a reproduction of that matter.

SECT 1307 Falsification of books

1307(1)An officer, former officer, member or former member of a company who conceals, destroys, mutilates or falsifies any securities of or belonging to the company or any books affecting or relating to affairs of the company is guilty of an offence.

(2) Where matter that is used or intended to be used in connection with the keeping of any books affecting or relating to affairs of a company is recorded or stored in an illegible form by means of a mechanical device, an electronic device or any other device, a person who:

(a) records or stores by means of that device matter that the person knows to be false or misleading in a material particular;

(b) destroys, removes or falsifies matter that is recorded or stored by means of that device, or has been prepared for the purpose of being recorded or stored, or for use in compiling or recovering other matter to be recorded or stored by means of that device; or

(c) having a duty to record or store matter by means of that device, fails to record or store the matter by means of that device:

(i) with intent to falsify any entry made or intended to be compiled, wholly or in part, from matter so recorded or stored; or

(ii) knowing that the failure so to record or store the matter will render false or misleading in a material particular other matter so recorded or stored;

contravenes this subsection.

(3) It is a defence to a charge arising under subsection (1) or (2) if the defendant proves that he, she or it acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

(4) In this section, "officer", in relation to a company, includes a receiver of property of the company who is not also a manager.

PART 9.4—OFFENCES

PART 9.4 COMMENTARY

Even if the DPP(Cth) cannot refer a point of law to the Court of Criminal Appeal under (for example) the Criminal Code (Qld) s 669A, the point can be referred under the *Judiciary Act* 1903 (Cth) s 68(2).[32]

Division 1—Specific offences

SECT 1308 False or misleading statements

1308(1)A corporation must not advertise or publish:

(a) a statement of the amount of its capital that is misleading; or

32 *R v Cook* (1996) 14 ACLC 947, 20 ACSR 618.

(b) a statement in which the total of all amounts paid and unpaid on shares in the company is stated but the amount of paid up capital or the amount of any charge on uncalled capital is not stated.

(2)A person who, in a document required by or for the purposes of this Law or lodged with or submitted to the Commission, makes or authorises the making of a statement that to the person's knowledge is false or misleading in a material particular, or omits or authorises the omission of any matter or thing without which the document is to the person's knowledge misleading in a material respect, is guilty of an offence.

(3)A person who makes or authorises the making of a statement that is based on information that to the person's knowledge:

(a) is false or misleading in a material particular; or

(b) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect;

shall, for the purposes of subsection (2), be deemed to have made or authorised the making of a statement that to the person's knowledge was false or misleading in a material particular.

(3A)A person is not liable to be proceeded against for an offence in consequence of a regulation made under section 28 of the *Corporations Act* 1989 of the Commonwealth, as that regulation applies for the purposes of the Corporations Law of this jurisdiction, as well as for an offence against subsection (2) of this section.

(4)A person who, in a document required by or for the purposes of this Law or lodged:

(a) makes or authorises the making of a statement that is false or misleading in a material particular; or

(b) omits or authorises the omission of any matter or thing without which the document is misleading in a material respect;

without having taken reasonable steps to ensure that the statement was not false or misleading or to ensure that the statement did not omit any matter or thing without which the document would be misleading, as the case may be, is guilty of an offence.

(5)A person who makes or authorises the making of a statement without having taken reasonable steps to ensure that the information on which the statement was based:

(a) was not false or misleading in a material particular; and

(b) did not have omitted from it a matter or thing the omission of which would render the information misleading in a material respect;

shall, for the purposes of subsection (4), be deemed to have made or authorised the making of a statement without having taken reasonable steps to ensure that the statement was not false or misleading.

(6)For the purposes of subsections (2) and (4), where:

(a) at a meeting, a person votes in favour of a resolution approving, or otherwise approves, a document required by or for the purposes of this Law or required to be lodged; and

(b) the document contains a statement that, to the person's knowledge, is false or misleading in a material particular, or omits any matter or thing without which the document is, to the person's knowledge, misleading in a material respect;

the person shall be deemed to have authorised the making of the statement or the omission of the matter or thing.

(7)For the purposes of this section, a statement, report or other document that:

(a) relates to affairs of a company or of a subsidiary of a company;

(b) is not itself required by this Law to be laid before the company in general meeting; and

(c) is attached to or included with a report of the directors sent under section 314 to members of the company or laid before the company at an annual general meeting of the company;

shall be deemed to be part of the report referred to in paragraph (c).

(8)A person shall not, in connection with an application for a securities licence or futures licence:

(a) make a statement that is false or misleading in a material particular knowing it to be false or misleading; or

(b) omit to state any matter or thing knowing that because of that omission the application is misleading in a material respect.

SECTION 1308 COMMENTARY

s 1308: Subsection (2): If a dutiable loan agreement is executed only by the borrower in December, and then replaced with a non-dutiable bill facility in January which is back dated to December, and only the latter is lodged under s 263, there is no breach of s 1308(2) because the date is not material. But if the lender also executed the December agreement, the January facility is void and unenforceable.[33]

Obviously a director who either prepares the document, or has somebody else type it, "makes" the document. Equally obviously, a typist who has no input as to what is to be typed is not the "maker". But whether an accountant, or more so an accountant employed by the company, who prepares a document which is favourable to the company, but is not completely true, is also a "maker" is not certain. In a tax case, the accountant was not the "maker" of a tax return: only the signatory could "make" a tax return.[34] But in a s 1308 case, the court held that an accountant may be convicted under s 1308 if he or she has a material role in deciding what information goes into the document. This must be correct.[35]

SECT 1309 False information etc

1309(1)An officer of a corporation who makes available or furnishes information, or authorises or permits the making available or furnishing of information, to:

(a) a director, auditor, member, debenture holder or trustee for debenture holders of the corporation;

(b) if the corporation is taken for the purposes of Chapter 2M to be controlled by another corporation—an auditor of the other corporation; or

(c) a securities exchange in Australia or elsewhere or an officer of such a securities exchange;

being information, whether in documentary or any other form, that relates to the affairs of the corporation and that, to the knowledge of the officer:

(d) is false or misleading in a material particular; or

(e) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect;

is guilty of an offence.

(2)An officer of a corporation who makes available or furnishes information, or authorises or permits the making available or furnishing of information, to:

(a) a director, auditor, member, debenture holder or trustee for debenture holders of the corporation;

(b) if the corporation is taken for the purposes of Parts 3.6 and 3.7 to be controlled by another corporation—an auditor of the other corporation; or

33 *Linter Group Ltd v Goldberg* (1992) 10 ACLC 739 at 750-4, 7 ACSR 580 at 642-648 [CC s 563 1989].

34 *Grapsas v Unger* (1986) 161 CLR 327 [ITAA s 230 1986].

35 *Corporate Affairs Commission v Singleton* (1988) 6 ACLC 677, 13 ACLR 385 [CC s 563 1987].

(c) a securities exchange in Australia or elsewhere or an officer of such a securities exchange;

being information, whether in documentary or any other form, relating to the affairs of the corporation that:

(d) is false or misleading in a material particular; or

(e) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect;

without having taken reasonable steps to ensure that the information:

(f) was not false or misleading in a material particular; and

(g) did not have omitted from it a matter or thing the omission of which rendered the information misleading in a material respect;

is guilty of an offence.

(3)The references in subsections (1) and (2) to a person making available or furnishing, or authorising or permitting the making available or furnishing of, information relating to the affairs of a corporation include references to a person making available or furnishing, or authorising or permitting the making available or furnishing of, information as to the state of knowledge of that person with respect to the affairs of the corporation.

(4)Where information is made available or furnished to a person referred to in paragraph (1)(a), (b) or (c) or (2)(a), (b) or (c) in response to a question asked by that person, the question and the information shall be considered together in determining whether the information was false or misleading.

(5)A person shall not, for the purposes of this Law, lodge with a futures exchange, a clearing house for a futures exchange, or a futures association, a document that contains a statement that, to the person's knowledge, is false or misleading.

SECTION 1309 COMMENTARY

s 1309: Subsection (1): The mental element involved here is knowledge that the information is false or misleading in a material particular, and there is no need to prove an intention to deceive.[36] This includes a circular sent by de facto directors to members in connection with a s 246 requisition.[37]

SECT 1310 Obstructing or hindering Commission etc

1310 A person shall not, without lawful excuse, obstruct or hinder the Commission, or any other person, in the performance or exercise of a function or power under this Law.

Division 2—Offences generally

SECT 1310A Offences under 2 or more Corporations Laws

1310A Where:

(a) an act or omission constitutes an offence under the Corporations Law of this jurisdiction and the Corporations Law of another jurisdiction; and

(b) the offender has been punished for that offence under the law of the other jurisdiction;

the offender is not liable to be punished for the offence under the law of this jurisdiction.

36 *Roget v Flavel* (1989) 7 ACLC 1077, 15 ACLR 741 [CC s 564 1986].

37 *Browne v Panga Pty Ltd* (1995) 13 ACLC 853, 17 ACSR 88 [CL s 1309 1995].

62(3) [Protection of person summoned] Subject to this Law, a person who is required by a summons under section 58 to appear at a hearing, or a witness at a hearing, has the same protection as a witness in a proceeding in the High Court.

History
S 62(3) amended by No 110 of 1990, Sch 7 (effective 1 January 1991).

Division 7—Offences

SECTION 63 NON-COMPLIANCE WITH REQUIREMENTS MADE UNDER THIS PART

14, 296; SIA 10

63(1) [Offences relating to sections 19, 21(3), 30, 31, 32, 32A, 33, 34, 37(9), 38 and 39] A person shall not, without reasonable excuse, fail to comply with a requirement made under section 19, subsection 21(3), section 30, 31, 32, 32A, 33 or 34, subsection 37(9) or section 38 or 39.

Penalty: 100 penalty units or imprisonment for 2 years, or both.

History
S 63(1) amended by No 48 of 1998, Sch 2, Pt 1 (effective 1 July 1998).

S 63(1) amended by No 104 of 1994, Sch 6 (effective 16 October 1995).

63(2) [Offences relating to sections 41, 42, 43, 44, 45 and 46] A person shall not, without reasonable excuse, fail to comply with a requirement made under section 41, 42, 43, 44, 45 or 46.

Penalty: 50 penalty units or imprisonment for 12 months, or both.

History
S 63(2) amended by No 104 of 1994, Sch 6 (effective 16 October 1995).

63(3) [Offence relating to sections 21(1), 29(2), 24(2)(a), 49(3), 58(1), 58(2) and 58(4)] A person shall not, without reasonable excuse, fail to comply with a requirement made under subsection 21(1) or 29(2), paragraph 24(2)(a) or subsection 49(3) or 58(1), (2) or (4).

Penalty: 10 penalty units or imprisonment for 3 months, or both.

History
S 63(3) amended by No 104 of 1994, Sch 6 (effective 16 October 1995).

63(4) [Offence relating to sections 23(2) or 48(2)] A person shall comply with a requirement made under subsection 23(2) or 48(2).

Penalty: 5 penalty units.

History
S 63(4) amended by No 104 of 1994, Sch 6 (effective 16 October 1995).

SECTION 64 FALSE INFORMATION

14, 296; FIA 15, 25; SIA 10, 12, 19; NC 39

64(1) [Offence relating to false information] A person shall not:

(a) in purported compliance with a requirement made under this Part; or
(b) in the course of an examination of the person;

give information, or make a statement, that is false or misleading in a material particular.
Penalty: 100 penalty units or imprisonment for 2 years, or both.

History
S 64(1) amended by No 104 of 1994, Sch 6 (effective 16 October 1995).

64(2) [Offence relating to false evidence] A person shall not, at a hearing, give evidence that is false or misleading in a material particular.
Penalty: 10 penalty units or imprisonment for 3 months, or both.

History
S 64(2) amended by No 104 of 1994, Sch 6 (effective 16 October 1995).

64(3) [Defence of belief on reasonable grounds] It is a defence to a prosecution for a contravention of subsection (1) or (2) if it is proved that the defendant, when giving the information or evidence or making the statement, believed on reasonable grounds that it was true and not misleading.

SECTION 65 OBSTRUCTING PERSON ACTING UNDER THIS PART

14; FIA 15; SIA 10

65(1) [Offences of obstruction] A person shall not, without reasonable excuse:
(a) obstruct or hinder a person in the exercise of a power under this Part; or
(b) obstruct or hinder a person who is executing a warrant issued under section 36. Penalty: 100 penalty units or imprisonment for 2 years, or both.

History
S 65(1) amended by No 104 of 1994, Sch 6 (effective 16 October 1995).

65(2) [Assistance of occupier] The occupier, or person in charge, of premises that a person enters under a warrant issued under section 36 shall provide to that person all reasonable facilities and assistance for the effective exercise of his or her powers under the warrant.
Penalty: 25 penalty units or imprisonment for 6 months, or both.

History
S 65(2) amended by No 104 of 1994, Sch 6 (effective 16 October 1995).

SECTION 66 CONTEMPT OF COMMISSION

SIA 10; NC 40

66(1) [Offences of obstruction; disruption] A person shall not:
(a) obstruct or hinder the Commission or a member in the performance or exercise of any of the Commission's functions and powers; or
(b) disrupt a hearing.
Penalty: 50 penalty units or imprisonment for 1 year, or both.

History
S 66(1) amended by No 104 of 1994, Sch 6 (effective 16 October 1995).

66(2) [Offence relating to section 55(1)] A person shall not, without reasonable excuse, contravene a direction given under subsection 55(1).
Penalty: 50 penalty units or imprisonment for 1 year, or both.