Securities and Futures Legislation
(Provision of False Information) Bill 2000

Administration's response to the submissions to the Bills Committee

On 2 June 2000, the Administration received two submissions on the Securities and Futures Legislation (Provision of False Information) Bill 2000 ("the Bill") from the Hong Kong Exchanges and Clearing Limited ("HKEx") and the Hong Kong Securities Industry Group ("HKSIG") respectively. This paper provides our responses to the comments made in the two submissions.

It is noted that HKEx is in general agreement with the legislative intent of the Bill and believes that the introduction of the Bill will enable it to carry out its public duties more efficiently. HKEx wishes to seek clarification as to whether failure to provide information is covered under the Bill. The objective of the Bill is to criminalise the provision of false and misleading information to the Securities and Futures Commission ("SFC") and front-line market operators in relation to the performance of regulatory function. It does not create any new obligation to provide information and non-provision of information is not covered.

HKSIG considers the headings of the new sections do not fully describe the sections and suggests the headings be elaborated. While the Administration does not disagree with the comment, it is considered that the section heading is only indicative of the purpose of the section and does not have any legislative effect in accordance with section 18(3) of the Interpretation and General Clauses Ordinance (Cap. 1). We, therefore, do not consider it necessary to amend the section headings.

HKSIG is concerned that the Bill has a wide scope of applicability and suggests to limit the scope to persons registered in the SFC or those in a position to provide correct information. Furthermore, it is suggested that the scope should be limited to documents and not oral information given casually.

The Bill aims to send out a clear message that any person telling a lie to SFC or front-line market operators in relation to a regulatory function is wrong and will not be tolerated. As we previously submitted to the Bills Committee, in equivalent legislation overseas, the offences also apply to any person and do not identify specific categories of person to whom they apply. It is also our opinion that if the offences only applied to specific categories of person, it would be easily evaded making it ineffective. As regards the

provision of oral information, in response to the concerns expressed in the various submissions received, the scope of the Bill will be reduced to exclude provision of oral information in respect of the "general reporting" offences (i.e. subsection (3)). Please refer to our separate letter to the Legislative Council Secretariat dated 3 June 2000.

HKSIG is concerned that there are no defence provisions such as if the person had reasonable grounds to believe that the information was true. As provided for under the Bill to be further amended as proposed in the aforementioned letter, the prosecution is required to prove beyond reasonable doubt that the person providing information knows that the information is false or misleading in a material particular or is reckless as to whether it may be false or misleading in a material particular. The prosecution is also required to prove additional elements for offences under subsection (3). There are in our view adequate mens rea tests for the offences.

It is pointed out that section 32 of the Securities Exchange Act ("SEA") provides that it is an offence for "*wilful*" violation of the Act and section 1001 of Title 18 of the US Federal Code on Crimes and Criminal Procedures ("USC") provides that it is an offence if a person "knowingly and *wilfully* makes any false or fictitious or fraudulent statements in respect of matters within the jurisdiction of any department or agency of the US". As we submitted in the paper dated 26 May 2000, section 1001 of the USC is a closer equivalent to the Bill than section 32 of SEA, which is a narrower, more specific provision. The offence in section 1001 of USC 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."[1] The offence makes reference to "statements" but in fact as supported by case law, 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.

It is noted that the US provisions do not apply in respect of provision of information to the exchanges or clearing houses, but equivalent legislation in Australia does. HKSIG observed that there are certain disparities between section 64 of the Australian Securities and Investments Commission Act ("AISCA") and the Bill. However, as explained in our submission dated 26 May 2000, section 64 of the ASICA is an offence that

[1] *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

basically deals with giving false or misleading information in connection with an inquiry, investigation or hearing and sections 1308 and 1309 of the Corporations Laws ("CL") are closer in nature to the offence proposed in the Bill.

The offences in sections 1308 and 1309 of CL apply to information given to the Australian Securities and Investment Commission (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. However, it is noted that 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, but presumably it is due to the piecemeal development of the Australian provisions rather than a deliberate policy choice as there seems to be no sensible policy reason why this should be so.

For more detailed comparison of the Bill with equivalent legislation in overseas jurisdictions, please refer to our earlier submission dated 26 May 2000.

Financial Services Bureau
3 June 2000