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

The Group is grateful for the opportunities that it has been afforded to discuss the Bill with the Bills Committee and the Administration. The Group has been particularly impressed by the willingness of the Administration to listen to its concerns and to address those concerns in the drafting of the Bill.

Many of the Group's concerns have been allayed. However, an important concern remains outstanding: the fact that "recklessness" will satisfy the mental element of the criminal offence. The Group notes that the Bills Committee did not move to make any further amendments to the Bill but would ask that the following thoughts be given further consideration.

Uncertainty

"Generally, where the word reckless appears in a statute creating a criminal offence, a person is reckless if he does an act which involves an obvious and serious risk of causing the harm prohibited in the statute and either the accused fails to give any thought to the possibility of there being such a risk or, having recognised that there is some risk, he nevertheless goes on to take it."

from Halsbury's Laws of Hong Kong

Various Hong Kong Ordinances make use of the concept of "recklessness" (e.g. Securities and Futures Commission Ordinance, Leveraged Foreign Exchange Trading Ordinance, Insurance Companies Ordinance). However, the concept is not defined in any of these Ordinances nor in the Interpretation and General Clauses Ordinance. As noted above, the Hong Kong courts have adopted the construction of "recklessness" used in the English House of Lord's decisions in R v Caldwell (criminal damage) and R v Lawrence (reckless driving). However, we have been unable to identify any Ordinance or case that might indicate how "reckless" should be construed in the circumstances contemplated by the Bill. This uncertainty is a source of concern for the Group.

Comparative Jurisdictions

We note that UK and Australia incorporate the "reckless" standard in their equivalent legislation although, the scope of this legislation is restricted in other ways. In Singapore, equivalent legislation requires there to have been an "intent to deceive". This is a much higher standard. The equivalent US legislation applies only to those who "knowingly and wilfully" make false statements. We recognise that this legislation has been extended by some lower courts 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 …" (emphasis added). The Group is of the view that this "gloss" does not reduce the mental element of the US legislation to mere "recklessness".

Statutory and Non-Statutory Contexts

The Group draws some comfort from the various checks and balances afforded by the proposed legislation in respect of information that is provided to the regulators but not in response to a requirement imposed by or under any relevant Ordinance. However, the Group notes, for example, those provisions in the Stock Exchange Unification Ordinance and the Securities and Futures Bill that empower the Exchange and the SFC respectively to make rules to assist in their regulation of the market. Such rules would include the Listing Rules and might even extend to the various Codes (including those that are currently being debated). Consequently, if such Rules or Codes require information to be provided, is such a requirement imposed "under" a relevant Ordinance? If

so, the provider of such information would not benefit from the checks and balances referred to above.

Lack of Awareness

The Group's principal concern in relation to the use of "reckless" stems from that part of the above definition that reads, "the accused fails to give any thought to the possibility of there being such a risk". This is quite different from a situation where the accused is aware of the risk or suspects that the risk might be present and deliberately closes her mind to that risk. Nevertheless, our discussions with the Administration have suggested that it is precisely this latter circumstance that the "reckless" standard is intended to address. The Group is concerned that "reckless" extends the scope of the Bill further than the Administration actually requires.

The concerns of the Group are perhaps best illustrated by an example. Rule 3A.64 of the new Listing Rules (as currently drafted) provides:

"(i) On submission of the advance booking form, declarations, in the prescribed Form G as set out in Appendix 16, requiring each of the sponsors to a listing application to confirm, among other things, that all the relevant requirements of the Listing Rules and qualifications for listing have been met or fulfilled in respect of the application.

(ii) Prior to the issue of the listing document, a declaration in the prescribed Form H as set out in Appendix 16, requiring each of the sponsors to a listing application to confirm, among other things, that the new applicant is suitable for listing on the Exchange and is in full compliance with the Listing Rules and that there are no other matters the omission of which would make the statements in the listing document misleading and affect the judgement of investors."

(see also 3A.60 and 3A.61)

What if the sponsor fails to ask a particular question of the applicant in circumstances where a truthful response to that particular question might have revealed or suggested the applicant's unsuitability for listing? Would the sponsor have provided its declaration "recklessly"?

In discussions with the Administration, different formulations of the second mental element were discussed. In light of these discussions, the Group believes that "deliberate/wilful disregard" would encapsulate the mental element that the Administration have in mind and would ask, even at this late stage, that such formulation be considered.