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Secretary for Financial Services  
Financial Services Bureau  
(Attn: Miss Vivian LAU  
PAS (Securities)(SD))  
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Tower 1, 18 Harcourt Road  
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By Fax (2294 0460) and By Post

12 February 2001

Dear Miss LAU

### **Securities and Futures Bill**

At the meeting of the Bills Committee held on 9 February 2001, Hon Audrey EU, SC, JP made the observation that contrary to the Administration's statement made to the Bills Committee that the Divisions in Part III of the Bill relating to respective recognized entities are mirror images of one another, there are differences in the substantive provisions, e.g. the existence of offence and penal provisions, the description of duties and the rule making powers. We are instructed to request an explanation from the Administration.

To facilitate your consideration of the matter, we attach hereto a comparison table of the provisions of the Divisions of Part III identifying some of the differences which, we believe, may have led to the Member's remark. We would be grateful if the Administration could address the matter at the coming meeting.

Yours sincerely

(KAU Kin-wah)  
Assistant Legal Adviser

Encl.

c.c. Hon Audrey EU, SC, JP

**Comparison Table of the Common Provisions in the Divisions of Part III  
of the Securities and Futures Bill**

The numbers appearing in the columns are unless otherwise stated clause numbers with reference to the Securities and Futures Bill.

Unless it is a direct quotation from the Bill, provisions of the Bill are referred to as clauses (cl.) or sub-clauses (sc.).

The Commission = the Securities & Futures Commission    s. = section    ss. = subsection

Provisions obviously peculiar to the specific functions of a recognized or authorized entity are not covered.

Nature/Summary of Provisions	Division 2 Exchange Companies	Division 3 Clearing Houses	Division 4 Exchange Controllers	Division 4 Minority Controllers	Division 5 Investor Compensation Companies	Division 7 Automated Trading Services
Prohibition of unrecognized companies etc.	Yes 19(1)	No	Yes 59(1)	Yes 61(1)	No	Yes 95(1)
Offence for contravening the prohibition	Yes 19(5)	No	Yes 59(5)	Yes 61(4)	No	Yes 100(a)
Exonerating circumstances in relation to the offence	Yes 19(8)	No	No	No	No	No
Statutory defence	No	No	Yes 59(6)	61(5)	No	No
Definition of expression	Yes 19(9)	No	No	No	No	No
The Commission shall prepare & publish guidelines	No	No	No	No	No	95(5)

Duty to ensure an orderly, informed and fair market ...	Yes 21(1)(a)	No	Yes 63(1)(a)	No	No	Yes in relation to all transactions which are carried out or by means of or through the services. 97(3)(b)
Duty to ensure that there are orderly, fair and expeditious clearing and settlement arrangements ...	No	Yes 38(1)(a)	Yes 63(1)(b)	No	No	No
Duty to ensure that risks associated with its business & operations are managed prudently	Yes 21(1)(b)	Yes 38(1)(b)	Yes 63(1)(c)	No	No	No
Duty to ensure compliance with lawful requirement under any enactment placed on the recognized exchange company or recognized clearing house	No	No	Yes 63(1)(d)	No	No	No

To act in the interest of the public, having particular regard to the interest of the investing public	Yes 21(2)(a)	Yes 38(2)(a)	Yes 63(2)(a)	No	No	No
To ensure that the interest of the public prevail where there is a conflict of interests	Yes 21(2)(b)	Yes 38(2)(b)	Yes 63(2)(b)	No	No	No
To operate facilities in accordance with rules approved by the Commission	Yes 21(3)	Yes 38(3)	No	No	No	No
To formulate & implement appropriate procedures for ensuring participants complying with the rules of the company	Yes 21(4)	Yes 38(4)	No	No	No	No
To notify the Commission upon becoming aware of any non-compliance of any rules or any financial irregularity or other matter concerning financial integrity or standing	Yes 21(5)	No	No	No	No	No

<p>at all times to provide and maintain (a) adequate &amp; properly equipped premises; (b) competent personnel; &amp; (c) automated systems with adequate capacity, facilities to meet contingencies or emergencies, security arrangements &amp; technical support.</p>	<p>Yes 21(6)</p>	<p>Yes 38(5)</p>	<p>No</p>	<p>No</p>	<p>No</p>	<p>"provide &amp; maintain automated systems with adequate capacity, facilities to meet contingencies or emergencies, security arrangements &amp; technical support for the provision of the services" (97(3)(g))</p>
<p>No civil liability</p>	<p>"in the discharge or purported discharge of the duties under s. 21 or under the rules of the Company" (22(1))</p>	<p>"in the discharge or purported discharge of the duties under (i) s. 38; (ii) s. 47; or (iii) the rules of the clearing house, including its default rules." (39(1))</p>	<p>"in the discharge or purported discharge of the duties under s. 63 or under the rules of the controller" (64(1))</p>	<p>No</p>	<p>"in the discharge or purported discharge of the duties to which this subsection applies" (81(1))</p>	<p>No</p>

Duties referring to in ss. (1) not applicable in respect of anything done or omitted to be done in good faith by the company in consequence of the discharge or purported discharge by the recognized exchange controller of its duties under s. 63.	Yes 22(2)	Yes 39(2)	No	No	No	No
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To make rules	"for such matters as are necessary or desirable (a) for the proper regulation & efficient operation of the market which it operates; (b) for the proper regulation of its exchange participants & holders of trading rights; (c) for the establishment & maintenance of compensation arrangements for the investing public." (23(1))	"for such matters as are necessary or desirable (a) for the proper regulation & efficient operation of the clearing facilities which it operates; (b) for the proper regulation of its clearing participants; (c) for the establishment & maintenance of compensation arrangements for the investing public." (40(1))	"for such matters as are necessary or desirable (a) for the performance of its duties under s. 63; (b) for the establishment & maintenance of compensation arrangements for the investing public."(66(1))	No	"for such matters as are necessary or desirable (a) for the proper & <b>efficient management</b> & operation of the company; (b) for the obtaining of such insurance, surety, guarantee or other security or the making of such financial arrangement by company as may be necessary or appropriate for the purposes of its operation; (c) for the proper & efficient performance of a function transferred to the Company under s.80." (82)	No
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rule making	"a recognized exchange company which may operate a stock market <b>may</b> make rules for (a).... " (23(2))	"a recognized clearing house <b>shall</b> make rules which (a) provide for the taking of proceedings or other action if a clearing participant appears to be unable, or likely to become unable, to meet his obligations in respect of all unsettled or open market contracts to which he is a party; and (b) comply with Part 5 of Schedule 3." (40(2))	No	No	No	No
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The Commission may by notice in Gazette declare a person or body of persons to be a person or body of persons to which para. (c)(ii(C) of the def. of "rules" in s. 1 of Part I of schedule 1 shall apply	No	No	Yes 66(2)	No	No	No
No rules or any amendment thereto shall have effect without the approval of the Commission	Yes 24(1) to (7)	Yes 41(1) to (7)	Yes 67(1) to (7)	No	Yes 83(1) to (7)	No
To make its rules available to the public in a manner approved by the Commission	No	No	No	No	Yes 83(8)	No
Not subsidiary legislation	"Neither the rules under s. 23 nor a notice under ss. (7) is subsidiary legislation." (24(8))	"Neither the rules under s.40 nor a notice under ss. (7) is subsidiary legislation." (41(8))	"Neither the rules under s. 66(1) nor a notice under ss. (7) is subsidiary legislation." (67(8))	No	"Neither the rules under s. 82 nor a notice under ss. (7) is subsidiary legislation." (83(9))	"Guidelines published under ss.(5) are not subsidiary legislation." (95(6))

Transfer & resumption	Yes 25	No	Yes 68	No	Yes 80	No
of functions of Commission	"This section applies to a function of the Commission under (a) Part V; (b) s. 141; & (c) Parts II & XII of the Companies Ordinance (Cap. 32)." (25(2))	No	Same as cl. 25(2) (68(2))	No	"This section applies to a function of the Commission under Part XII (other than s. 236(2)) or the rules made under that Part." (80(2))	No

	<p>"The Commission shall not request that a transfer order be made in respect in the making of financial resources rules unless the proposed designated exchange company has first supplied the Commission with a draft of the financial resources rules which it proposes to make, and the Commission is satisfied that the rules, if made, will afford the investing public an adequate level of protection." (25(5))</p>	<p>No</p>	<p>Same as cl. 25(5) (68(5))</p>	<p>No</p>	<p>No</p>	<p>No</p>
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	No	No	No	No	"For the purpose of ss. (2), the function of the Commission under Part XII to maintain the compensation fund includes a function to maintain all or any part of the compensation fund, and the other provisions of this Ordinance shall apply accordingly." (80(3))	No
Chairman of the recognized exchange controller approved by CE	No	No	Yes 69	No	No	No

Appointment of top officers requires approval of the Commission	"No appointment of a person as chief executive of a recognized exchange company shall have effect unless the appointment has the approval in writing of the Commission." (26)	No	"No appointment of a person as chief executive <b>or chief operating officer of a company which is a</b> recognized exchange controller shall have effect unless the appointment has the approval in writing of the Commission" (70(1)).	No	No	No
Production of records, etc. by recognized company	Yes 27 "or in respect of any trading in securities or futures contracts ..."	Yes 42	Yes but cl. 71(1)(a) contains the following extra provisions: "(ii) ...traded on the stock market or futures market operated by the recognized exchange company of which it is a controller or through the facilities of that company; or (iii) in respect of any clearing or settlement arrangements for any transactions ...".	No	Yes 84 "or in respect of the management & administration of the compensation fund under Part XII ...".	No

Withdrawal of recognition	Yes 28	Yes 43 The provisions are the same as cl.28..	Yes 72 The provisions are different as they are reproduced from s. 4 of the Exchanges and Clearing Houses (Merger) Ordinance (Cap. 55) with new ss. (5) & (6) added.	No	Yes 85 The provisions are the same as cl. 28 except that any appeal would not delay the taking effect of the notice.	Yes 98 The provisions are similar to cl. 72 except that the consent of the Financial Secretary is not required.
Contravening of notice constitutes offence	Yes 30	No	Yes 72(7) A defence of reasonable diligence is allowed. (72(8))	No	No	Yes 100(b)
Direction to cease to provide facilities or services in emergencies	Yes 29	No	No	No	No	No
Publication of directions	Yes 32	No	No	No	No	No
Appeals	Yes 33	Yes 44	Yes 73	No	Yes 86	Yes Under Part XI to the Securities & Futures Appeal Tribunal

Rules by Commission	Yes 36	No	No	No	No	Yes 99 The subject matters in respect of which the Commission may make rules are different from those provided in cl. 36.
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Prepared by

Legal Service Division  
 Legislative Council Secretariat  
 12 February 2001