

For discussion on
29 June 2001

Paper No. CE04/01

**Bills Committee on
Securities and Futures Bill and Banking (Amendment) Bill 2000**

**Part V and Schedule 6 to the Securities and Futures Bill
Clause-by-clause examination**

Members are invited to consider two major Committee Stage Amendments proposed to Part V of the Securities and Futures Bill arising from -

- (a) our recent refinements to the proposed regulatory framework for authorized institutions conducting securities business (Clause 118); and
- (b) our agreement with Members at the last round of policy discussions at the Bills Committee on ways to enhance transparency in implementing the licensing regime (Clause 131).

2. At the Annex is the updated mark-up version of Clause 118 and 131 of the Securities and Futures Bill. The reasons for the amendments are set out in the footnotes.

3. Members are invited to refer to the Blue Bill for the rest of Part V and Schedule 6 in respect of which we are working on some minor technical amendments.

Securities and Futures Commission
Financial Services Bureau
28 June 2001

118. Exempt persons

(1) The Commission may, upon application by an authorized financial institution in the prescribed manner and payment of the prescribed fee, grant a declaration of exemption to the applicant for carrying on one or more than one regulated activity (other than Type 3 and Type 8 regulated activities) as the Commission may specify in the declaration of exemption.

(2) The Commission shall refer to the Monetary Authority any application made to it under subsection (1).

(3) Upon receiving an application for an exemption for a regulated activity referred to him under subsection (2), the Monetary Authority shall -

- (a) consider the application;
- (b) consult the Commission upon the merits of the application; and
- (c) advise the Commission whether he is satisfied by the applicant that the applicant is a fit and proper person to be granted the exemption for that regulated activity.

(4) The Commission shall -

- (a) refuse to grant an exemption to the applicant if the Monetary Authority advises the Commission pursuant to subsection (3) that he is not satisfied; or
- (b) grant an exemption to the applicant if the Monetary Authority advises the Commission pursuant to subsection (3) that he is satisfied,

that the applicant is a fit and proper person to be granted the exemption.

(5) An exemption granted under subsection (1) shall be subject to such reasonable conditions as the Commission may impose, and the Commission may at any time, by notice in writing served on the exempt person concerned, amend or revoke any such condition or impose new conditions as may be reasonable in the circumstances.

(6) Where the Commission by notice in writing amends or revokes any condition or imposes any new condition under subsection (5), the amendment, revocation or imposition takes effect at the time of the service of the notice or at the time specified in the notice, whichever is the later.

(7) Without prejudice to subsection (8)(b) and the Commission's powers in Part IX, an exemption granted to an authorized financial institution to carry on a business in Type 7 regulated activity shall be deemed to be revoked in respect of that regulated activity upon the institution's being granted an authorization under section 95 to provide automated trading services.

(8) Without limiting the generality of subsection (5), it shall be a condition of an exemption granted under this section for carrying on the business of -

(a) a regulated activity, that—

(i) in relation to the regulated activity,

there is at least one executive officer

of the exempt person who is available at

all times to supervise the business of the regulated activity for which the person is exempt; and

(ii) any individual whose name is entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance (Cap.155) as that of a person engaged by the exempt person in respect of the regulated activity is fit and proper¹.

(b) Type 7 regulated activity, that if the Commission in its absolute discretion requires by notice in writing, the exempt person shall apply, within such reasonable period as may be specified in the notice, for an authorization under section 95 for that regulated activity, and -

(i) the exemption shall be deemed to be revoked -

(A) where the requirement is not complied with, upon the expiration of the period;

(B) where the requirement is complied with, upon the determination of the

¹ We propose a Committee Stage Amendment to impose a statutory obligation on an exempt AI to ensure that individuals engaged by it in respect of a regulated activity are fit and proper.

application for such authorization; and

- (ii) the regulated activity shall be operated in such manner as may be specified in the notice pending the revocation of the exemption under subparagraph (i).

(9) The Commission shall not exercise its power under subsection (5) or (8) (b) unless the Commission has first consulted the Monetary Authority.

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131. Modification or waiver of requirements

(1) The Commission may, upon application in the prescribed manner and payment of the prescribed fee by -

- (a) a licensed corporation;
- (b) an applicant for a licence under section 115 or 116;
- (c) an exempt person;
- (d) an applicant for an exemption;
- (e) a licensed representative;
- (f) an applicant for a licence under section 119 or 120;
- (g) a responsible officer approved under section 125;
- (h) a substantial shareholder approved under section 130;

- (i) an applicant for approval under section 130 to become a substantial shareholder; or
- (j) an associated entity,

grant a modification or waiver, in relation to the applicant, in respect of any condition specified in section 117 or imposed under section 115, 116, 118, 119, 120, 125 or 130 or any of the requirements of the following -

- (i) sections 115(2)(b) and 124(1) and (2);
- (ii) sections 115(2)(c) and 129;
- (iii) rules made under section 117(2);
- (iv) section 128;
- (v) rules made under section 141;
- (vi) rules made under section 144;
- (vii) rules made under section 145;
- (viii) rules made under section 147;
- (ix) rules made under section 148;
- (x) rules made under section 163;
- (xi) rules made under section 168; or
- (xii) any provision of rules made by the Commission under this Ordinance.

(2) The grant of a modification or waiver under subsection (1) shall be effected by a notice in writing served on the person applying for it specifying the period (if any) for which the modification or waiver is valid.

(3) The Commission shall refuse to grant a modification or waiver under subsection (1) unless it is satisfied by the applicant that to do so will not prejudice -

- (a) in the case of a modification or waiver granted in respect of a condition imposed under section 115, 116 or 118, the interests of any client of the applicant; or
- (b) in the case of a modification or waiver granted in respect of a condition imposed under section 119, 120, 125 or 130 or specified in section 117, or in respect of any requirement of a provision specified in subsection (1) (i) to (xii), the interest of the investing public.

(4) A modification or waiver granted under subsection (1) to a person shall be subject to such reasonable conditions as the Commission may impose, and the Commission may at any time by notice in writing served on -

- (a) the person;
- (b) where the person is an intermediary or an associated entity, an executive officer of the intermediary or the entity; and
- (c) where the modification or waiver is granted pursuant to an application made under subsection (1) (e), (f) or (g), the principal to which the person is accredited,

amend such modification or waiver, or amend or revoke any such condition or impose new conditions as may be reasonable in the circumstances.

(5) Subject to subsection (4), a modification or waiver granted under subsection (1) remains in force -

- (a) if a period is specified in the notice served under subsection (2) in respect of the modification or waiver, until the end of the period; or
- (b) if no such period is specified, until revoked by the Commission by notice in writing served on -
 - (i) the person;
 - (ii) where the person is an intermediary or an associated entity, an executive officer of the intermediary or the entity; and
 - (iii) where the modification or waiver is granted pursuant to an application made under subsection (1) (e), (f) or (g), the principal to which the person is accredited.

(6) In relation to a modification or waiver under subsection (1) to a person, the Commission shall -

- (a) on the grant of the modification or waiver;
- (b) on its amendment or an amendment or revocation of its conditions or the imposition of any new condition on it under subsection (4); or
- (c) on its revocation under subsection (5) (b),

publish a notice in the Gazette specifying, subject to subsection (6A)² -

- (i) the name of the person;
- (ii) the incident event referred to in paragraph (a),
(b) or (c) (as the case may be) and the reasons for allowing the incident; and
- (iii) any condition imposed on the modification or waiver on its grant, or the condition amended or revoked or newly imposed subsequently under subsection (4), as the case may be;
- (iv) (if applicable) the period for which the grant or amendment of the modification or waiver or the new condition so imposed on it or its condition as amended is valid.

² As mentioned in Paper No. 5H/01 dated 28 May 2001, we agree with the Bills Committee that the SFC should disclose the reasons for granting a modification or waiver for greater transparency. We propose that the SFC should also disclose the conditions imposed on a modification or waiver. However, the SFC should be provided with the discretion in disclosing the details about the conditions for preservation of trade secrets in justified cases, where such disclosure would reveal, for instance, prospective transactions, trading strategies, or the identity of clients or counterparties, which would prejudice the commercial interests of the applicant for the modification or waiver. The latter arrangement is similar to that in the UK where pursuant to the Financial Services and Markets Act, the Financial Services Authority (FSA) will make public waivers or modifications granted unless the FSA believes it is inappropriate or unnecessary to do so. There would be publication unless the commercial interests of the regulatees are to be unfairly prejudiced.

²(6A) If the applicant satisfies the Commission that compliance with subsection (6) (iii) would prejudice, to an unreasonable degree, the commercial interests of the applicant, then instead of specifying the conditions in compliance with [that subsection], the Commission may include in the notice -

(a) a brief account of its reasons for the non-compliance; and

(b) information on the conditions of the waiver and modification only to such extent as the Commission considers appropriate so as not to prejudice, to an unreasonable degree, the commercial interests of the applicant.

(7) The Commission may by rules grant a modification or waiver, in relation to a class of licensed persons or exempt persons or associated entities, in respect of any of the requirements of the rules referred to in subsection (1) (v), (vi), (vii), (viii), (ix) or (x).

(8) The Commission shall not make any rules under subsection (7) to grant a modification or waiver referred to in that subsection unless the Commission is satisfied that to do so will not prejudice the interest of the investing public.

(9) The Commission may specify in the rules referred to in subsection (7) the conditions subject to which the modification or waiver is granted and the rules may provide that a person who fails to comply with such a condition commits an offence and is liable on conviction to a fine not exceeding level 6.

(10) The Commission may at any time by rules -

- (a) revoke a modification or waiver granted under subsection (7); or
- (b) amend, revoke or add to, any condition subject to which such modification or waiver is granted.

(11) The Commission shall not exercise its power under subsection (1), (4), (7), (9) or (10) in relation to any exempt person or any associated entity that is an authorized financial institution unless the Commission has first consulted the Monetary Authority.

(12) Any person who fails to comply with a condition imposed under subsection (4) commits an offence and is liable on conviction to a fine at level 6.