

**Areas of concern raised by members during discussions
on Securities and Futures Bill and Banking (Amendment) Bill 2000**

Parts of the Bill/ Meeting dates	Areas of concern	Administration's response
<p>Overall and Part I and Schedule 1</p> <p>8 December 2000 15 December 2000</p>	<p><u>Clauses 1 to 2 - Preliminary</u></p> <p><u>Level playing field between exempt persons and licensed persons</u></p> <p>The definition of "exempt persons" needs clarification, and the need for retaining the exempt status of authorized institutions (AIs) is questionable.</p> <p>Issues relating to the proposal of a single regulatory regime under the Securities and Futures Commission (SFC) for all intermediaries <u>versus</u> the reliance on the Hong Kong Monetary Authority (HKMA) as the frontline regulator to supervise exempt AIs.</p> <p>Intermediaries will be subject to two regulatory regimes. There is a risk that the regulatory standards and requirements will not be consistently applied to licensed persons and exempt persons.</p>	<p><i>Information papers provided by the Administration issued under LC Paper No. CB(1) 569/00-01(01) on 12 February 2001 and LC Paper Nos. CB(1) 648/00-01(02) and (03) on 22 February 2001.</i></p>
<p>Part II and Schedule 2</p> <p>5 January 2001</p>	<p><u>Clauses 3 to 17 – Securities and Futures Commission</u></p> <p><u>Clause 4 - Regulatory objectives of SFC</u></p> <p>The justification for including clause 4(f) (i.e. SFC to assist the Financial Secretary in maintaining the financial stability of Hong Kong by taking appropriate steps in relation to the securities and futures industry) as one of the objectives in the SF Bill is not clear.</p>	

	<p><u>Clause 11 - Directions to SFC</u></p> <p>There is concern about the rationale and circumstances under which the Chief Executive may give directions to SFC regarding the performance of its functions. The independence of SFC would be compromised. There is a need for safeguards against abuse of this power.</p> <p>The expressions "in the public interest" (clause 11(1)) and "existence of particular circumstances" (clause 11(3)(b)) are not clearly defined.</p> <p><u>Clause 12 - SFC to furnish information</u></p> <p>The extent to which SFC is obliged to furnish information to the Financial Secretary and the nature of such information to be furnished are not clear. There is concern that this provision would enable the Government to access information on individual cases.</p> <p><u>Part 1 of Schedule 2 - Chairman and members of Committee</u></p> <p>Half of the members, including the Chairman, to be appointed will be executive directors (clause 2). There is a view that the number of non-executive directors should not be less than half of the members of the Commission.</p>	<p><i>Paper provided by the Administration was issued under LC Paper No. CB(1) 1174/00-01(01) on 8 May 2001.</i></p> <p><i>Discussed in the context of SFC's statutory obligation to preserve secrecy of information under Part XVI of the SF Bill.</i></p>
<p>Part III and Schedule 3</p> <p>12 January 2001</p> <p>19 January 2001</p>	<p><u>Clauses 19 to 36 - Exchange companies</u></p> <p>It is not clear whether penalty will be imposed on a recognized exchange company if it fails to perform its statutory duties under clause 21.</p> <p>Clause 22 provides statutory immunity to recognized companies if they acted "in good faith" in discharging its duties. It is not clear as to whether persons who have acted with "gross negligence" could also claim statutory immunity on the ground of acting "in good faith".</p>	<p><i>Paper provided by the Administration was issued under LC Paper No. CB(1) 1174/00-01(02) on 8 May 2001.</i></p> <p><i>Administration to consider amending the threshold for statutory immunity by including "with due diligence" in clauses 22, 39 and 64 of the SF Bill.</i></p>

	<p>It is not clear as to whether the penalties for offences under Part III of the SF Bill are set at levels that would ensure that all interested parties are treated with fairness.</p> <p>There is concern about the extent of SFC's power to serve notice to direct a recognized exchange company to cease to provide or operate the specified facilities or services in emergencies (clause 29).</p> <p>Since SFC is empowered under clause 29(2) to deal with various emergency situations, it appears that there is no need to give extensive power to the Chief Executive under clause 11 to give directions to SFC.</p> <p>The Chief Executive's power is not a reserve power, but more of a supplemental power because it can override SFC's opinion in times of financial instability.</p> <p><u>Clauses 37 to 58 - Clearing houses</u></p> <p>Clauses 45 and 46 enable the clearing houses to have priority over others in the event of liquidation/insolvency, which is contrary to the spirit of the law i.e. enhancing investor protection.</p> <p><u>Clauses 79 to 90 - Investor compensation companies (ICC)</u></p> <p>The SF Bill allows for the recognition of more than one ICC. If it is not the intention of the Government to recognize more ICCs, then the Bill should not allow so much flexibility and should stipulate clearly that there would only be one ICC.</p> <p>There is concern about the independence of the new ICC and any potential conflict of interest between the company and the exchanges.</p> <p>The funding arrangement for the new ICC is to be worked out after the consultation exercise.</p>	<p><i>Paper provided by the Administration was issued under LC Paper No. CB(1) 1246/00-01(01) on 16 May 2001.</i></p> <p><i>Paper provided by the Administration was issued under LC Paper No. CB(1)1174 /00-01(02) on 8 May 2001.</i></p> <p><i>Paper provided by the Administration was issued under LC Paper No. CB(1) 1174/00-01(01) on 8 May 2001.</i></p> <p><i>The consultation has since been completed. The Administration should be in a position to put in more concrete provisions.</i></p>
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	<p><u>Clauses 95 to 100 - Automated trading services (ATS)</u></p> <p>There is concern about the regulation of overseas exchanges trading in Hong Kong stocks by ATS:</p> <ul style="list-style-type: none"> - whether there will be any conflict between overseas exchanges and the Hong Kong Exchanges and Clearing Limited (HKEx) if the former choose to trade Hong Kong stocks by ATS in the overseas markets after the Hong Kong market has closed; and - whether the SF Bill has extra-territorial effect – regulation of services provided by overseas exchanges. <p>There is concern as to:</p> <ul style="list-style-type: none"> - whether ATS providers will be regulated by SFC to ensure investor protection; and - whether the new ICC will cover ATS investors. <p>There is concern as to whether a level playing field will be provided for the overseas exchanges operating their services in Hong Kong, in view of SFC’s powers under clause 98 to withdraw the authorization for overseas stock exchanges or future exchanges to provide ATS in Hong Kong.</p> <p>Under clause 99, SFC may make rules in respect of services provided by ATS. There is concern as to whether consultation will be conducted before the relevant guidelines and standards are issued.</p>	<p><i>Administration to provide information comparing the provisions for exchange companies, clearing houses, exchange controllers, investor compensation companies and ATS providers, and account for the differences.</i></p>
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<p>Part IV and Schedules 4 and 5</p> <p>19 January 2001 9 February 2001</p>	<p><u>Clauses 101 to 112 – Collective investment schemes</u></p> <p>The definition of “collective investment scheme” is too broad. The types of products that fall within the definition are not clearly set out.</p> <p>SFC has been given a wide range of discretionary powers in terms of authorization of the schemes, there is concern as to:</p> <ul style="list-style-type: none"> – whether there are any guidelines and checks and balances for the exercise of these powers; – whether a mechanism is available for appealing against SFC’s decisions to withdraw authorization (clause 105); and – about investor protection in cases of withdrawal of authorization. <p>There is concern about the regulation of offers of investments from overseas which have not been authorized.</p> <p>There is concern that the burden of proof falls on the defendant (clause 107(2)).</p> <p>The justifications for granting exemptions to bodies under Part 4 of Schedule 4 are not clear.</p> <p>There is concern about the regulation of analysts and intermediaries who give inaccurate or misleading advice or information through the media (clause 106).</p>	<p><i>Administration to provide information on justifications for including the Airport Authority as an exempted body and for excluding LegCo from the same.</i></p> <p><i>Administration to provide information on the US regulatory requirements on disclosure of interests in investments by analysts.</i></p>
<p>Part V and Schedule 6</p>	<p><u>Clauses 113 to 139 - Licensing and exemption</u></p> <p>The definition of “regulated function” in clause 113 is not clear. It is not clear why lawyers are not categorically excluded from the definition.</p>	<p><i>Paper provided by the Administration was issued under LC Paper No. CB(1)</i></p>

<p>16 February 2001 23 February 2001 9 March 2001</p>	<p>Clause 114(6) – There is a need to clarify the policy to oblige a person carrying on money lending business to establish that the purpose of the loan was not for the acquisition and continued holding of listed securities.</p> <p>Clause 131 – There is a need for increasing the public disclosure of SFC decisions on modifications and waivers to regulatory requirements in order to enhance transparency. There is concern about the provision for checks and balances for such powers.</p> <p>Banks with subsidiaries operating securities business are already subject to regulation by SFC. There is insufficient justification for granting exempt status to AIs.</p> <p>Banks have certain advantages in conducting securities business e.g. their branches can provide a wider network of service; and banks are not subject to the Financial Resources Rules.</p> <p>There is concern about the consistency in the standards and practices to be adopted by SFC and HKMA in the regulation of licensed and exempt persons.</p> <p>There is query as to whether banks have been granted exempt status for conducting other types of businesses such as insurance and MPF.</p> <p>There is concern about the rule-making powers of a recognized stock exchange and the checks and balances for such powers.</p>	<p><i>1246/00-01(03) on 16 May 2001.</i></p> <p><i>Paper provided by the Administration was issued under LC Paper No. CB(1) 1246/00-01(03) on 16 May 2001.</i></p> <p><i>Paper provided by the Administration was issued under LC Paper No. CB(1) 1246/00-01(03) on 16 May 2001.</i></p> <p><i>Paper providing information on regulatory framework in other jurisdictions for banks conducting securities business was issued under LC Paper No. CB(1) 569/00-01(01) on 12 February 2001.</i></p> <p><i>Information papers provided by the Administration were issued under LC Paper No. CB(1) 569/00-01(01) on 12 February 2001 and LC Paper No. CB(1) 648/00-01(02) and (03) on 22 February 2001.</i></p> <p><i>Paper providing information on AIs' involvement in securities, insurance and MPF businesses was issued under LC Paper Nos. CB(1) 648/00-01(02) and (03) on 22 February 2001.</i></p> <p><i>Paper provided by the Administration was issued under LC Paper No. CB(1)</i></p>
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<p>Parts VI and VII</p> <p>2 March 2001</p> <p>9 March 2001</p>	<p><u>Clauses 140 to 170 – Capital requirements, client assets, records and audit; and Business conduct, etc.</u></p> <p>There is a need for more information on subsidiary legislation, non-statutory codes and guidelines to be made by SFC for commencement of the SF Bill.</p> <p>There is concern about the large number of rules not being incorporated in the primary legislation, and as to whether market participants are aware of requirements and offences made under these rules.</p>	<p><i>Paper provided by the Administration was issued under LC Paper No. CB(1) 1246/00-01(04) on 16 May 2001.</i></p>

	<p><u>Clause 143(4) – Monitoring compliance with financial resources rules</u></p> <p>There is concern as to whether advice of conditions in cases of breaches against the Financial Resources Rules should be given orally.</p> <p><u>Clauses 155 and 156 – Power of Commission to appoint auditors for licensed corporations and their associated entities</u></p> <p>There is a view that the SF Bill should follow the alternative approach under the Banking Ordinance where HKMA is empowered to request an AI to appoint an auditor and to approve such an appointment.</p> <p>The scope of clause 156(1) is too wide.</p> <p><u>Clause 169 – Certain agreements not to be made during unsolicited calls</u></p> <p>It is not clear as to whether it is practical to provide that a person may rescind an agreement by giving notice to the other party within 28 days after the date on which he becomes aware of the contravention (clause 169(6)).</p> <p><u>General</u></p> <p>There is concern that SFC has extensive power to make rules a breach of which, without reasonable excuse, is a criminal offence punishable by imprisonment and substantial fines. There should be a requirement for those rules to be issued in draft for public consultation. There should also be guidance on when SFC will exercise its rule-making power or instead choose to issue a code of conduct.</p>	<p><i>Administration to consult the industry and to propose CSAs if necessary.</i></p> <p><i>Paper provided by the Administration was issued under LC Paper No. CB(1) 1246/00-01(03) on 16 May 2001.</i></p> <p><i>Administration to propose CSAs for clause 169(6).</i></p> <p><i>Administration to consider providing for a statutory consultation requirement before SFC makes rules or issues codes and guidelines.</i></p>
<p>Part VIII</p> <p>16 March 2001</p>	<p><u>Clauses 171 to 185 – Supervision and investigations</u></p> <p><u>Clause 172 – Power to require production of records and documents concerning listed corporations</u></p>	

	<p>There is concern about the following:</p> <ul style="list-style-type: none"> – SFC has been given a wide range of intrusive power, e.g. clause 172(1)(e) and 172(2)(a) and (b); – the expression “may be given” in clause 172(7)(a) will allow SFC to go on fishing expeditions; – whether there are any checks and balances for such powers e.g. internal guidelines and codes of practice on how the powers should be exercised; – suitability of using audit working papers; – severe damage to auditor/client relationship; – auditors are there to assist in the investigation and should not be targeted as a subject of investigation; and – the level of penalty stipulated in clause 172(13) is too high. <p><u>Process Review Panel (PRP)</u></p> <p>There is concern about the establishment of the PRP, the degree of transparency of its operation and the checks and balances for its powers.</p> <p>There is concern that the PRP is only an administrative arrangement and is not provided in the SF Bill.</p> <p><u>Clause 179 – Assistance to regulators outside Hong Kong</u></p> <p>There is concern about the measures to be taken to ensure:</p> <ul style="list-style-type: none"> - that an overseas regulator is subject to adequate secrecy provisions under clause 179(5)(b); and - assistance given by SFC for overseas regulators in conducting investigation in Hong Kong. 	<p><i>Paper provided by the Administration was issued under LC Paper No. CB(1) 909/00-01 on 26 March 2001.</i></p> <p><i>Paper providing a list of authorities or regulatory organizations with which SFC has concluded a Memorandum of Understanding (MOUs) or other co-operative arrangement was issued under LC Paper No. CB(1) 1174/00-01(03) on 8 May 2001.</i></p> <p><i>Administration to consider whether to set out under clause 179(5) the list of</i></p>
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		<i>MOUs in a schedule to the SF Bill subject to negative vetting by LegCo.</i>
Part IX	<u>Clauses 186 to 195 – Discipline, etc.</u>	
30 March 2001 20 April 2001 24 April 2001	<p><u>Clause 186(1)(d) - "Misconduct"</u></p> <p>The phrase "in the opinion of the Commission" in clause 186(1)(d) - involves SFC making a subjective judgement and there are no codes or guidelines for exercising judgement under this sub-clause; the need for retaining this phrase in the sub-clause is unclear.</p> <p>The phrase of "prejudicial to the interest of the investing public or to the public interest" is widely drafted. SFC has too much power in determining whether a person is guilty of misconduct on public interest grounds.</p> <p><u>Clause 187 - Disciplinary action in respect of licensed persons, etc.</u></p> <p>Three new types of intermediate disciplinary sanctions i.e. partial suspension or revocation of licence, disciplinary fines and prohibition order (with the exception of partial revocation) have no application to an exempt AI. It is unfair that HKMA cannot impose fines on AIs but SFC can impose fines on regulated persons. This leads to questions about the consistency in the standards and practices to be adopted by SFC and HKMA in the regulation of licensed and exempt persons respectively.</p> <p>Pecuniary penalty to be imposed under clause 187(2) is not commensurate with the types of misconduct specified under clause 186(1). The appropriateness of imposing disciplinary fines not exceeding the amount which is the greater of \$10 million or three times the amount of the profit increased or loss avoided is questionable. The US tiered system is not to be pursued. The principles for determining the levels of fines to be imposed are not clearly stipulated.</p>	<p><i>Administration to consider whether to retain the reference of "in the opinion of the Commission".</i></p> <p><i>Paper providing examples of misconduct falling within clause 186(1)(a) to (d) was issued under LC Paper No. CB(1) 1174/00-01(05) on 8 May 2001.</i></p> <p><i>Administration to consider whether disciplinary fines should be extended also to an exempt AI and its staff.)</i></p> <p><i>Administration to consider setting out in the SF Bill the principles of guidelines on imposition of civil fines and to propose CSAs in this regard.</i></p> <p><i>Administration to consider whether the \$10 million cap on civil fines should</i></p>

	<p>The guidelines to be published under sub-clause (7) in relation to the exercise of SFC's fining power are not subsidiary legislation.</p> <p>There is concern about the compatibility of the proposed SFC fining powers with the Hong Kong Bill of Rights.</p> <p>SFC plays the role of investigator, prosecutor, judge and jury. There must be more checks and balances.</p> <p><u>Clause 188 - Other circumstances for disciplinary actions in respect of licensed persons, etc.</u></p> <p>Under clause 188(1)(b)(vi), SFC may suspend or revoke the licence of a licensed corporation if any of its directors is affected by mental illness. This is unfair to licensed corporations because their licence may be suspended or revoked even if "any of its directors" is affected by mental illness, and because this ground is not extended to an exempt AI and is not provided in the Banking Ordinance.</p> <p><u>Clause 193 - General provisions relating to the exercise of powers under Part IX</u></p> <p>Clause 193(1) allows SFC to use evidence that is obtained by unlawful means ("regardless of how the information or material has come into its possession"). The admissibility of such evidence in a court of law is questionable. SFC should not be given such wide and drastic power.</p>	<p><i>remain applicable in cases where the profits made or losses avoided could not be ascertained.</i></p> <p><i>Administration to consider providing for a statutory consultation requirement before SFC makes rules or issues codes and guidelines.</i></p> <p><i>List of court cases taken into account in ensuring compliance with Articles 10 and 11 of the Hong Kong Bill of Rights was issued under LC Paper No. CB(1) 1246/00-01(05) on 16 May 2001.</i></p> <p><i>Administration to review the effect of SFC's power to revoke a licensed corporation's licence on ground of mental health of directors and to consider proposing CSAs if necessary.</i></p> <p><i>Administration to provide examples of information obtained unlawfully but which may be admitted and accepted as evidence by a criminal court.</i></p>
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Part X	<u>Clauses 196 to 208 – Powers of intervention and proceedings</u>	
24 April 2001	<u>Clause 197 – restriction on dealing with property</u>	
	This clause is widely drafted. The scope of "property" on which SFC may impose restrictions is not clearly defined.	<i>Administration to provide information.</i>
	<u>Clause 199 - Requirement to transfer custody of property</u>	
	The scope of property to be transferred under this clause is not clear. More information is required to illustrate how the provision can be applied in the context of immovable property such as land. Sufficient safeguards have not been given to "third party rights".	<i>Administration to provide information.</i>
	<u>Clause 205 - Winding up orders and bankruptcy orders</u>	
	The power of SFC is very wide because it may use the power against licensees or "related corporations" which are not listed.	<i>Administration to provide information on the scope of application of clause 205.</i>
	<u>Clause 206 - Injunctions and other orders</u>	
	The drafting of clauses 206(2)(d), 206(7) and 206(8) should be tightened up.	<i>Administration to provide information on the scope of persons the property of whom could be administered by the person appointed by the Court under clause 206(2)(d); to propose CSAs to delete clause 206(7); and to confirm the policy objective of clause 206(8).</i>

	<p><u>Clause 208 - Civil liability for false or misleading public communications concerning securities and futures contracts</u></p> <p>The clause is too broad. It may overlap with clause 107.</p> <p>It is not clear whether auditors' reports are covered under clause 208(1)(a). This is unfair to the accounting profession because accountants do not have a direct responsibility to the public, but a contravention of this provision will attract civil liability.</p> <p>Clause 208(3) is not clearly drafted. It is not clear how a person "has assumed responsibility" with respect to the victim in relation to the disclosure. The basis for calculating damages is also not clear.</p>	<p><i>Administration to provide information to illustrate the scope of clause 208 in terms of auditors' report.</i></p> <p><i>Administration to provide information on the position in the US concerning possible causes of private action which could be initiated in situations similar to clause 208.</i></p> <p><i>Administration to provide a list of court cases which have been taken into account in ensuring appropriateness of clauses 208(3)(a) and (b).</i></p> <p><i>Administration to provide examples to illustrate the use of the power under clauses 199, 202(12), 205(2)(a) and 208(3)(a).</i></p>
<p>Part XI and Schedule 7</p> <p>27 April 2001</p> <p>2 May 2001</p>	<p><u>Clauses 209 to 227 – Securities and Futures Appeals Tribunal</u></p> <p><u>Clause 225 - Appeals to Chief Executive in Council in respect of excluded decisions</u></p> <p>Although an aggrieved person has a right of appeal against an excluded decision to the Chief Executive in Council, it is not clear why certain decisions should be deemed to be "excluded decisions" and not be appealable to the Securities and Futures Appeals Tribunal (SFAT). To ensure consistency in approach and a level</p>	<p><i>Administration to consult the banking industry and to reflect on the arrangements to deal with appeals in relation to the regulation of exempt AIs.</i></p>

	<p>playing field for SFC licensees and exempt AIs, all decisions concerning securities and futures related activities should be appealable to SFAT.</p> <p>The improvements made for the operation of the SFAT are not found in the mechanism for appeals to the CE in Council. For example, hearings before the SFAT will be held in public. However, the same degree of transparency is not provided for appeals to the CE in Council by an AI which is aggrieved by an excluded decision made by SFC in respect of it.</p> <p>As the "excluded decisions" are appealable to the CE in Council which is a part of the executive authorities, there is concern that the independence of SFC will be undermined.</p> <p>It is not sufficient that only 64 decisions are appealable to the SFAT. The SFAT should have power to hear and review all decisions of SFC, so that any stockbroker aggrieved by a decision of SFC can appeal against the decision.</p> <p>It should be set out clearly in the SF Bill those decisions which cannot be appealed to the SFAT so as to enhance the clarity of the scope of appealable decisions.</p> <p><u>Process Review Panel</u></p> <p>The PRP has no statutory power and the scope of its functions is limited. If it is a part of the checks and balances mechanism, it should be included in the SF Bill as one of the statutory bodies with clearly defined roles and functions. This will also enhance its transparency.</p>	<p><i>Paper provided by the Administration was issued under LC Paper No. CB(1) 909/00-01 on 26 March 2001.</i></p>
<p>Part XII</p> <p>4 May 2001</p>	<p><u>Clauses 228 to 236 – Investor compensation</u></p> <p><u>Clause 235 - Subrogation of the Commission to rights, etc. of claimant on payment from compensation fund</u></p> <p>It is not clear as to how the loss recovered from the defaulted intermediaries would be distributed between SFC and the claimants under clause 235.</p>	<p><i>Administration to provide information.</i></p>

	<p><u>Clause 236 - Rules by Chief Executive in Council and Commission</u></p> <p>It is not clear as to when rules will be made by the Chief Executive in Council and by SFC.</p> <p>There should be sufficient safeguards against possible interference by the Chief Executive with the independence of SFC in performing its functions.</p> <p>The principles under which the rules are to be made should be clearly set out in the SF Bill.</p> <p>The rules to be made under clause 236(1)(a) to (d) should be clearly stipulated in the SF Bill.</p>	<p><i>Administration to propose CSAs to stipulate in greater detail the matters to be covered in rules made by the Chief Executive in Council under clause 236(1).</i></p> <p><i>Paper providing information on the subsidiary legislation, and non-statutory codes and guidelines to be made by SFC under the SF Bill was issued under LC Paper No. CB(1) 1246/00-01(04) on 16 May 2001.</i></p> <p><i>Administration to propose CSAs to enhance the powers of the SFAT to enable it to deal with appeals against compensation decisions, and to clarify that the investor compensation funds covers default and liquidation of an intermediary.</i></p>
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<p>Parts XIII and XIV and Schedule 8</p> <p>8 May 2001 11 May 2001 16 May 2001</p>	<p><u>Clauses 237 to 298 – Market Misconduct Tribunal; and Offences relating to dealings in securities and futures contracts, etc.</u></p> <p><u>Clause 247 – Use of evidence received for purposes of market misconduct proceedings</u></p> <p>There is concern that the evidence given by any person for the purposes of market misconduct proceedings is admissible in evidence against that person in any other proceedings in a court of law (clause 247(3)).</p> <p>The types of evidence that clauses 247(1) and 247(3) are directed at are not clearly set out, which may make them open to interpretation.</p> <p><u>Clause 265 – False trading</u></p> <p>Clauses 265(1), (2) and (5) are widely drafted.</p> <p><u>Clause 266 – Price rigging</u></p> <p>There are doubts as to whether a separate market misconduct category of price rigging is necessary, as there is considerable duplication between clauses 265 and 266.</p> <p><u>Clause 272 – Civil liability for market misconduct</u> <u>Clause 296 – Civil liability for contravention of this Part</u></p> <p>There is concern as to whether the civil liability provisions under these two clauses will overlap with clause 107 (Civil liability for inducing others to invest money in certain cases) and clause 208 (Civil liability for false or misleading public communications concerning securities and futures contracts).</p> <p>The requirement for proof of a mental element in the civil regime for market misconduct is too high. The relevant provisions in the UK Financial Services and</p>	<p><i>Administration to consider clarifying the relevant provisions.</i></p> <p><i>Administration to consider improving the drafting of these provisions.</i></p> <p><i>Administration to provide information comparing the civil liability provisions under clauses 107, 208, 272 and 296.</i></p>
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	<p>Markets Act 2000 provide objective tests for market abuse and do not require proof of intention. Draconian penalty for market misconduct in the civil regime should be avoided.</p> <p>There is concern as to whether imposing heavy financial penalties as a sanction would impinge on human rights protection.</p> <p><u>Clause 290 – Offence of disclosure of false or misleading information inducing transactions</u></p> <p>The appropriateness of imposing criminal liability with the threat of 10 years’ imprisonment and fines of up to \$10 million for negligently disseminating false or misleading information is questionable. Clause 290 should only apply to intentionally or recklessly disseminating false or misleading information.</p> <p>The question was raised as to whether clause 268 (Disclosure of false or misleading information inducing transactions) on its own would be adequate in achieving the same deterrent effect which clause 290 is intended to achieve.</p> <p>This provision will expose professional advisers who have no direct responsibility for a mis-statement to the risk of criminal and civil liability. It appears that the duty of care requirement is higher in clause 290. For example, the provision under clause 296(2) regarding “fair, just and reasonable in the circumstances of the case” is not available in clause 290.</p> <p>The effect of this provision on the news media industry is not known. There is concern that the strict liability provisions may have a chilling effect on legitimate dissemination of information.</p>	<p><i>Representations from the news media industry in relation to clauses 268 and 290 are being invited.</i></p> <p><i>Administration to provide examples of cases to illustrate the nature of offences under clause 290(1)(c)(i) and (ii).</i></p>
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Part XVI	<u>Clauses 366 to 391 - Miscellaneous</u>	
25 May 2001	<p data-bbox="389 233 931 269"><u>Clause 366 – Preservation of secrecy, etc.</u></p> <p data-bbox="389 309 1491 488">There is concern about the exceptions provided under clause 366(3)(g). The safeguard provided under clause 366(5) (i.e. in the interest of the investing public or in the public interest) is extremely wide. There is concern that the independence of SFC would be compromised and that the executive authorities would take advantage of this provision to obtain information.</p> <p data-bbox="389 528 1491 671">Bearing in mind the fact that the disclosure of interests is an essential element in the proposed regulatory regime, the preservation of secrecy should be carefully guarded. The exceptions should be restricted to those persons who have a clear reason to know.</p> <p data-bbox="389 711 1491 783">The term “professional or semi-professional bodies” in clause 366(3)(h)(ii) is not clearly defined.</p> <p data-bbox="389 823 723 860"><u>Clause 370 – Obstruction</u></p> <p data-bbox="389 900 1491 1007">This clause is widely drafted. For example, the phrase “any other person” is not clearly defined. There is concern as to whether sufficient checks and balances have been provided to guard against the extensive power given to SFC under this clause.</p> <p data-bbox="389 1046 1178 1083"><u>Clause 376 – Prosecution of certain offences by Commission</u></p> <p data-bbox="389 1123 1491 1230">The circumstances under which SFC can exercise this power are not clear. There is concern as to whether any guidelines will be made available as safeguards against any abuse of this power.</p>	<p data-bbox="1491 900 2004 971"><i>Administration to provide additional information.</i></p> <p data-bbox="1491 1123 2004 1230"><i>Administration to provide a list of the types of offences that may be prosecuted by SFC.</i></p>

