

The following check list is compiled to assist Honourable Members of the Bills Committee at the stage of “clause by clause” discussion regarding the issues raised by the Hong Kong Stockbrokers Association in their previous submissions or discussions with the SFC. The full text of the submissions can be located as referred to in the last column. Members can ring Miss Sabrina Yu of the Association (Tel: 2541 8832) to obtain a full set of the said submissions.

**Check List of issues raised by the Hong Kong Stockbrokers Association  
on  
The Securities and Futures Bill**

<b>Clause</b>	<b>Issues raised</b>	<b>Date</b>
<b>5 (1)(c)</b>	One of the functions of the Commission is to promote self-regulation in the industry. We do not see any shadow of a self-regulation regime in the Bill.	p.4, 15.02.01
<b>23 (3)</b>	The exchange company may make rules with penalties or sanctions without provision for market consultation. The	p.3, 15.02.01
<b>(4)</b>	Commission may direct the ex. co. to make or amend such rules. We suggest market consultation and avenue of appeal.	
<b>29</b>	The Commission may order a 5-day cessation of the ex. co. We suggest this power should rest with the top of the Government	p.4, 15.02.01
<b>35 (1)</b>	The Commission may make rules to prescribe limit on futures contracts. This adds to market unpredictability as to when the rules may change. A referee should not be seen to change the rules.	p.4, 15.02.01
<b>101</b>	Representative of a licensed corporation has to be licensed, subject to fit and proper test etc. His transfer of employment requires approval. Whereas representative of an exempt person has no such requirements. This difference touches upon issues of qualification, competence and level playing field.	p.5, 15.02.01
<b>107 (2)</b>	Civil liability is created vicariously for a director in respect of misrepresentation made by his company. The presumption of fault and liability is unfair.	p.2, 15.02.01
<b>115(2) (c)</b>	Association objected to premises required to be approved by Commission prior to licensing.	p.5, 15.02.01
<b>(4,5,6)</b>	The Commission has power to make rules on security to be lodged with the Commission, modify or impose new conditions for the licence. We propose the Commission to produce a policy statement on how this power is going to be exercised and share the view of the Law society on this	p.6, 15.02.01

	section.	
118	The status of “Exempt persons” was commented on in our “overview” submission. In the interest of the investing public and to demonstrate fairness to all who participate in the industry we ask that the same law and rules should apply to all, to be supervised by the same regulatory body. Where “exempt persons” shall have a different law as compared with a licensed corporation can be seen in the following clauses (which are by no means exhaustive): 101,115(2)©, 118(4), (9),124(1)(a),(2), 125, 128(1)(d)(ii), 141(1),(2), 142, 143, 145, 150, 153, 155, 156, 158, 169(2)(b), (4), 187(2), 190(1),(4), 196, 197, 198, 199, 200, 205(1)(a), 210, 225 etc.	p.2, 29.01.01
124 (1)	Every executive director of a licensed corporation is required to be approved by the Commission.	p.8, 15.02.01
(2)	An exempt person is not required	
125	Representative of a licensed corporation has to be licensed and pass the “fit and proper” test. Representative of an exempt person is not so required.	p.8 15.02.01
127 (2)	The Commission may use any information in its possession. We suggest the information must be lawfully obtained and there should be more transparency in the process in getting such information and their authenticity must be verified.	p.8 15.02.01
128	In considering whether a person is “fit and proper”, the Commission may consider his reputation and character. We consider these are abstract concepts which is not capable of being directly proved or measured.	p.9 15.02.01
(1)(d)ii	The fitness of a corporation is affected by the reputation and character of any of its officers. We find this unreasonable.	
129	The premises of a licensed corporation has to obtain prior approval of the Commission and this requires the payment of a fee. No such requirement for an exempt person.	p.9 15.02.01
141	The financial resources rules (FRR) only apply to licensed corporations. There are specified amount requirements pertaining to assets, liabilities and other matters in Hong Kong or elsewhere. It will contain complex stock concentration rule, client concentration rule etc.	p.2 26.2.01
142	Failure to comply with the FRR shall be a criminal offence. Failure to report a breach within one day is another criminal offence (subsection (12)).	p.2 26.02.01
142(2) (6)	On receiving a report or on its own motion, the Commission may impose oral conditions on the FRR and the conditions in a written notice may be amended orally. In view of the severe	p.2 26.02.01

	criminal penalties, we strongly suggest that oral instructions must be substantiated by written instructions at the same time even in the form of facsimile or electronic mail so there shall be no misunderstanding.	
143 (3) (4)	In monitoring compliance, the Commission may impose oral conditions and conditions, though in a written notice, may be subsequently amended orally. There is an important question of delegation and possibility of misinterpretation in these serious matters.	p.3 26.02.01
144 (2)(i)	Similar to clause 142 on FRR, it shall be a criminal offence to breach the provisions of the client securities rules which include a person's obligation to notify the Commission if he becomes aware of the breach. This is amounting to codifying a duty to self-incriminate. We suggest without reservation that this provision and similar ones in the Bill be removed.	p.4 26.02.01
145	In the interest of natural justice and for reasons as in given under clause 144, we suggest self-incriminating provisions under subsection-clause (2)(k) be removed. Under section 84 of the Securities Ordinance, an accused can plead "reason excuse". Under this Bill, there is no such safety-net. Even a technical breach is criminal under subsection (4). Compare subsection (5) which deals with "with intent to defraud".	p.4 26.02.01
(6)	Note that this clause only applies to licensed corporations. Again it poses a question of fair treatment and level playing field in contrast with exempt persons.	
147 (2) (d)	We are against the provision for self-incriminating notice to the Commission for reasons as above.	p.5 26.02.01
148 (2) (f)	We are against the provision for self-incriminating notice to the Commission for reasons as above.	p.5 26.02.01
155 (4)	The power that the Commission can order the payment to be paid in respect of audit costs and expenses even before the appointment is amounting to prejudging the situation and causing undue hardship on the licensed corporation. This provision is not applicable to "exempt persons". Similar comments as under 145(6).	p.5 26.02.01
156	We have no objection to (1)(a) which represents the present law. Our objection lies in (1)(b) which is new. So far clients' instructions are concerned, it is a matter for investigation which we agree. No amount of auditing can conclusively determine the dispute. Subsection (8) will cause injustice and hardship on a licensed corporation, forcing it to settle clients' disputes however unreasonable.	p.6 26.02.01

	This most objectionable new provision does not apply to “exempt persons”. Similar comments as under clause 145(6)	
158 (3)	It shall be a criminal offence not to comply with any requirement imposed on a licensed corporation by an auditor	p.7 26.02.01
(4)	including “the requirement to answer any question put to him”. Our basic common law right to remain silent is totally eroded. We suggest this is in contravention of Article 8 of the Basic Law which provides for the common law to be maintained.	
159 (3)	There is a presumption of intent to delay or obstruct the work of auditing written into the subsection. The presumption of intent is an important element in the presumption of guilt in an innocent act. This clause is borrowed from section 67of the Australian corporation legislation. However, there are two big differences. One is that there is no presumption of guilt in the Australian version; second is that there is a time frame for the offence, namely it deals with an act during or just before an investigation is about to begin. We therefore maintain that this subsection be removed.	p.8 26.02.01
163	Rules on practices and standards are best left to the industry. It is entirely unnecessary and unworkable to make contravention of such rules a criminal offence. The recent UK legislation has the opposite approach. Section 151 of the FS&M Act states: “A person is not guilty of an offence by reason of a contravention of a rule made by the Authority.” As the clause now stands, we have identified problems of practicability in sub-paragraphs (2)(e),(f),(j) and others.	p.1 23.03.01
164	A code of conduct is exactly on practices and standards. They must be workable and practical to the industry.	p.2 23.03.01
165, 166	We do not believe short selling and its requirements should be dealt with as a criminal offence. We suggest this is a departure of Article 7 of the Hong Kong Bill of Rights which states: “No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.”	p.3 23.03.01
169	We agree that unsolicited calls should be discouraged. However, we do not agree that banks should be exempt from it as exhibited in (2)(b)(i) and (4) and operate in a different standard.	p.4 23.03.01
173	An authorized person has the most extensive powers under this clause and yet his status is unknown apart that he is authorized by the Commission in writing. Any person whether connected with the intermediary or not must give the authorized person access to any record and	p.5 23.03.01

	answer his question. We suggest this power is far too wide, going beyond the industry.	
174	The duty to supply information to an authorized person on transactions in securities with criminal liability for non-compliance goes as far as virtually any shareholder in any company in Hong Kong. We do not believe this is the purpose of this legislation.	p.5 23.03.01
176	We believe the powers of the investigator is too extensive. Any person whom he believes to have possession of any relevant record must give him all assistance in connection with the investigation (1)(d).	p.6 23.03.01
180	Despite the fact that they may be self-incriminating, answers must be given during an investigation (clause 177) and they may be further used in civil or criminal proceedings in certain instances. This is in contradiction with Article 11 of the Bill of Rights Ordinance, which provides that a person shall not be compelled to testify against himself or to confess guilt.	p.6 23.03.01
186	Misconduct is widely defined to include a contravention of any of the relevant provisions and an act or omission which is in the opinion of the Commission, prejudicial to the public interest. The expression “in the opinion of the Commission” is an addition to the existing law. We suggest this power is too wide. Clause 186 is not a subject matter of appeal and in passing disciplinary sanctions, the Commission plays all the roles of regulator, judge and jury.	p.7 23.03.01
187	We argue strongly against the Commission having a new power to order a fine on top of the sanctions currently in force. We do not believe that this theme will be conducive to fairness and impartiality when all the powers lie in one body. Our other views are summarized in our response submitted earlier to the “Fining guidelines” of the Commission. We are convinced that the power to order a pecuniary penalty should be left to the courts of law in Hong Kong.	p.8 23.03.01
188	Situations mentioned in subsection-paragraph (vi)and (vii) of subsection (1)(b) (on mental incapacity and criminal offence) should go to the disqualification of an individual director and not the revocation of a licence of the corporation. These provisions are not present under clause 190 in respect of exempt persons.	p.8 23.03.01
193	In taking disciplinary actions the Commission may use any information or material in its possession which is relevant, regardless of how it is obtained. We do not think this will promote justice and transparency of its operations.	p.9 23.03.01

194	A paragraph on an available defence which appeared in the White Bill should be reinstated.	p.9 23.03.01
197	The Commission may prohibit a licensed corporation from dealing with any property whether of a licensed corporation or not. The word “any” requires some reconsideration. Clauses from 196 to 200 inclusive only applies to licensed corporations.	p.1 10.05.01
199	The Commission may require a licensed corporation or any other person to transfer the custody of relevant property to the Commission. One wonders why such power of the Commission should extend to “any other person”.	p.1 10.05.01
200	We wonder why the power of the Commission to impose a prohibition mentioned therein should indiscriminately apply to situations under paragraphs (b) to (e). Paragraph ©, via clause 173(2) covers contravention on virtually any provision of the Ordinance.	p.1 10.05.01
202	Under subsection-clause (7), we suggest the word “may” appearing in the first line should be amended to read “shall” in order to increase the transparency of the Commission’s actions in the eyes of the public.	p.2 10.05.01
205	The power of the Commission to petition for the winding-up of a corporation extends to beyond licensed corporations or listed corporations. It is also wondered why the Commission should be concerned with public interest instead of interest of the investing public.	p.2
206 (7)	It is established practice that the party seeking an interim order of injunction is required to give an undertaking to the court as to damages.	p.2
210	The jurisdiction of the Appeals Tribunal is limited to review specified decisions only. We suggest an all-embracing right to review and appeal by an aggrieved party instead of the present definitive rights in the Bill. Our suggestion is in line with the UK model.	p.3
211	We suggest that the Tribunal should have discretion to hear any appeal out of time.	p.3
220	We suggest a stay of execution of a matter under appeal should be automatic and should not be subject to application to the Tribunal except in certain emergency situations.	p.3

224 (2)	Situations included in this subsection illustrate our point raised under 220. The amendment or revocation of conditions of a licence and the imposition of a pecuniary penalty affect materially licensees’ ability to continue their business and once effected may become irreparable to the business.	p.4
225	In the interest of fairness and justice must be seen to be done, we maintain our opinion that there should not be “excluded decisions” and the CE in Council should not be involved.	p.4
240	Exchange participants and their employees are not public officers and should not be included in the list in subsection (2).	p.5
245	The admissibility of evidence used by the Tribunal has a standard below those used by the courts and one wonders if this can be reconciled with the standard of proof mentioned under subsection (7) of clause 244.	p.5
246	The provisions of this clause suggest that the Tribunal is not an impartial court since it has statutory power to participate in collecting materials and evidence for its own hearing. It is inadvisable to expand the present practice of the Insider Dealing Tribunal to a full Securities and Futures Tribunal.	p.5
250	We do not believe an officer of a corporation should be sanctioned in respect of a market misconduct only for reason that the breach of section 270 is <b>indirectly</b> attributable to him.	p.5
265	The expressions “artificial price” and “level that is artificial” are not defined. All prices in the market are artificial, they are not natural phenomena. The test is whether the price represent genuine market demand and supply.	p.6
269	Market manipulation is so widely drafted that it will catch all market consumers. There is no time span specified for the interval between any 2 transactions and this might prove unworkable.	p.6
270	The imposition of a statutory duty on every officer of a corporation to ensure that proper safeguards to prevent the happening of market misconduct is unfair. It imposes a presumption of fault on an officer; and when a market misconduct occurs, the onus is on him to prove that the safeguards are proper. The prosecution can easily argue that if the safeguards are proper it would not have occurred. It is all the more worrying since under clause 250 an officer can be sanctioned if the misconduct may be indirectly attributable to him.	p.6

280	Exchange participants and their employees are not public officers and should not be included in the list in subsection (2).	p.1 26.05.01
290	The offence of disclosure of false or misleading information should rest on positive intent or recklessness but not on mere “negligence”. Section 138 of the Securities Ordinance contains no element of negligence.	p.1
291	Similar comments under 269	p.1
320	We do not think it necessary that a listed corporation should be empowered to investigate into any interest in its shares, including short position in shares and shares related to equity derivatives. A listed corporation is not a regulatory body and it should pay expenses arising from an exercise for its (or its shareholders) benefit. Since this provides for criminal offence for non-compliance, we advise extreme caution.	p.2
366	Sub-paragraph (15)©(iii) requires more consideration as to whom may be involved in such a category. We suggest that for clarity, it should be: “a person assisting <b>in an official capacity</b> any other person in the performance..”	p.2
371	We do not believe it is right that an oral “misrepresentation” of a future event or about an existing state of mind should be an offence. We suggest the deletion of sub-paragraphs (b) and © under subsection (3).	p.2
375	One wonders why this Ordinance should provide for standard of proof regarding contravention of <b>any</b> provision of <b>any</b> Ordinance under paragraph (a). We do not know whether the expression: “a person has been concerned in , or party to..” in sub-paragraph (d) is capable of a clear interpretation.	p.3
384	We have argued strongly against the Commission’s power to make rules that carry criminal offences with or without strict liabilities. We suggest the method of cost benefit analysis be adopted as in the UK model under section 65 of their Financial Services and Markets Act 2000.	p.3
Schedule 9	Section 23 provides all directors of a licensed corporation who are registered dealers shall be approved as a responsible officer for 2 years from the commencement of the Ordinance. We suggest this approval shall be automatically extended thereafter.	p.1 29.01.01

