Summary of Public Comments and Administration's Response on Securities and Futures Bill
Schedule 6 – Regulated Activities

Clause no.	Respondent	Respondent's comments	Administration's response
Schedule 6 – Regulated activities			
general	HKAB	The scope of the "regulated activities" is extremely wide. Some AIs which are not currently "exempt dealers" will in the future have to become exempt AIs to allow them to continue with their existing activities. This is a point of considerable significance, because so-called "exempt person" status will carry with it significant compliance burdens and costs. This is particularly the case for licensed banks offering investment advice.	The policy decision is that under the new regime, licensed banks are required to demonstrate their fitness and properness and obtain a declaration of exemption from the SFC if they wish to continue providing investment advice. Such is considered appropriate for investor protection as the provision of advisory services involves specialized knowledge in the securities field that is outside the coverage of the Banking Ordinance. This will also help promote a level playing field.
	HKAB	The definitions of advising on securities, advising on futures contracts, advising on corporate finance and asset management are extremely wide and not limiting to persons who gives such advice for remuneration. Furthermore, it appears inappropriate that AIs which provide advice to their customers wholly incidental to their trustee services within the company (instead of through a separate registered trust subsidiary) cannot be excluded from the definitions, as is the case for registered trust companies, solicitors, counsel and professional accountants.	It is not extremely wide, as the "business" test is present in clause 114. Having regard to the fact that AIs that provide trustee services may apply, under s. 106 of the Trustee Ordinance (Cap. 29), to be registered as a trustee company (and thereby take advantage of the existing exclusions), the need for extension of the existing exemptions has not been established.
"advising.." definitions	Law Society	The definitions of "advising on securities" and "advising on corporate finance" are broad and overlap with each other. A securities dealer who occasionally gives incidental corporate finance advice will need to be licensed for both type 1 and type 6 activities. This contrasts with "advising on securities" whereby the advice of a securities dealer given wholly incidental to carrying on of securities dealing business is excluded.	We do not agree that the definitions overlap, as the hanging paragraph of the definition of "advising on securities" specifies that such activity does not include the giving of advice that falls within the meaning of "advising on corporate finance". As regards the suggested relaxation for securities dealers, we agree and have proposed a CSA to the definition of "advising on corporate finance" accordingly.

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"advising on futures contracts" & "advising on securities"	Group of nine investment bankers	Under the SF Bill, a person who advises on futures contracts or securities that constitutes a business (without the exclusion in respect of those not conducted for remuneration and not on a regular basis) is required to be licensed or exempted for the regulated activity. This may be of concern to financial portals and website providers, which post research reports and other financial information on their sites. This contrasts with Parts XIII and XIV of the SF Bill (market misconduct) where the "mere conduit" has been excluded.	Yes, a person who carries on a business advising on futures contracts or securities is required to be licensed or exempt, unless they fall within any of the exclusions in the definitions. If a website or portal is advising on futures contracts or securities the licensing requirement may be triggered. However, as the SFC's recently issued Circular on Provision of Financial Information on the Internet – Licensing Requirements sought to make clear, the licensing requirement would not be triggered merely by posting on a website generic factual market information or research reports, unless specific recommendations or investment advice is proffered. The "mere conduit" exemption in Parts XIII and XIV is not a relevant comparison.
"advising on corporate finance"	HKAB & Group of nine investment bankers	The definition should be confined to advice on corporate restructuring involving (instead of "including") the issue, cancellation or variation any of rights attaching to any securities. Otherwise, the scope may be interpreted as extending to general strategic advice or advice on restructuring loans, and not just advice involving securities. Furthermore, an AI involved (as lender or as agent bank under a syndication) in a work-out where the borrower is in financial difficulties, even if the work-out involves the issue of new securities by the borrower, should not need to exempt for advising on corporate finance, as the involvement in the work-out would not amount to "advice".	We agree with the thrust of the comment and shall propose a CSA accordingly to include the words "involving securities". We agree that the involvement in the said work-out would not amount to "advice". Therefore, it should not be construed as falling within the definition of "advising on corporate finance". The SFC will issue guidance if necessary.
"advising on corporate finance"	Group of nine investment bankers	Confirmation is sought that the advice concerning offers of securities to the public means offers to the public in Hong Kong? A securities dealer, for example, may occasionally give corporate finance advice incidental to his activities as a securities dealer. If he needs to be licensed for both Type 1 and Type 6 activities, this may cause practical concern subject to the requirements imposed by the SFC in respect of a corporate finance adviser. Currently, the SFC tends to require Chinese Wall arrangements, and separate personnel registered as investment adviser/investment adviser's representatives in respect of corporate finance activities.	The focus is on offers made in Hong Kong, disregarding whether they are for investors in Hong Kong or overseas. The key issue here is whether such person carries on a business of advising on corporate finance in Hong Kong. Please see the response to the Law Society submission on "advising definitions", above.

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"asset manage-ment"	Group of nine investment bankers	Confirmation is sought that a person who manages a portfolio for another person without remuneration is not regarded as providing asset management.	The relevant factor is not whether remuneration is involved but whether the person provides asset management by way of business. If so, such a person would be regarded as providing asset management unless it fell within the exclusions from the definition of "asset management".
"dealing in securities"	Law Society, HKAB & Group of nine investment bankers	The definitions of "dealing in securities" and "providing automated trading services ("ATS")" appear to overlap substantially, and both could be interpreted so as to apply to technology providers (who provide systems that assist licensed corporations to deal with their customers or for dealings by professional investors in swap contracts). At the very least, the SFC should provide clear guidance as to how the categories will be applied, and we believe that confirmation from the SFC that no licence is required should have binding effect under the Bill.	We agree there is some overlap between the definitions of "providing ATS" and "dealing in securities". We shall propose a CSA to remove paragraph (b) of the definition of "dealing in securities". As regards the regulatory catch of "providing ATS", please refer to the response below on that definition.
"dealing in securities" para. (b)	HKAB & G10	Paragraph (b) of the definition is very broad and appear to catch various types of internet-based and proprietary electronic trading systems, vendors of dealing systems that provide facilities to licensed intermediaries and arguably, even the installation of a telephone system in a dealing room of an investment bank. This additional limb of the definition of "dealing in securities" should be deleted for seemingly lack of justification.	See above. We shall propose a CSA to remove paragraph (b) of the definition of "dealing in securities".
"dealing in securities" para. (iv)(I) & (II)	Group of nine investment bankers	The part of the definition of "dealing in securities" which deems a person to be "dealing in securities" if he for remuneration receives or communicates orders, or effects introductions may require further consideration, notwithstanding it is the same as under the SO. It appears wide enough to apply to passive providers of electronic communication services. To the extent that providers of electronic trading facilities should be regulated, this is more appropriately addressed under the regulated activity of "providing ATS". At least, the SFC should have power to give binding written confirmations that particular persons or facilities do not fall within the definition of "dealing in securities" (and/or "providing automated trading services").	The SFC appreciates that a significant number of electronic trading or advisory platforms utilized by licensed intermediaries are provided, either by way of a rental, leasing or similar contractual arrangement, by other firms primarily engaged in the technology service sector. These firms are primarily "technology vendors" or "technology providers". Queries have been raised by a number of these firms as to whether a licensing requirement would be triggered by such an arrangement on their part. The SFC's general view is that, these firms are not in the business of dealing in securities or giving investment advice. Their clients are licensed intermediaries, and are not members of the investing public. Hence no licence will be required. See the response below on "providing ATS"..

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"dealing in securities" para. (xiii)	Group of nine investment bankers	The exemption in paragraph (b)(xiii) of the definition of "dealing in securities" in respect of investment advisers or corporate finance advisers who issue documents in accordance with Clause 108 of the Ordinance, is difficult to follow. Clause 108 as drafted does not refer to Type 6 intermediaries (i.e. corporate finance advisers) at all.	We agree that the intention here could be reflected more clearly by adding reference to Type 6 regulated activity in clause 108 and shall propose a CSA accordingly.
"dealing in securities" para. (v)(B)	Group of nine investment bankers	The definition of "dealing in securities" includes two exclusions, namely for dealing as principal with a "person whose business involves the acquisition, disposal or holding of securities, either as principal or agent" and for dealing as principal with a "professional investor". As a general comment on the SF Bill, it would seem more logical and less confused if the first category be included in the definition of "professional investor".	The expression in current law that denotes a professional investor is "a person whose business involves the acquisition, disposal or holding of securities". In compiling the new definition of "professional investor" this formula has been omitted and it is not intended to include it in the description of qualifying attributes of a professional investor to be prescribed in rules made by the SFC for the purposes of paragraph (i) of that definition. The formula is too wide as it does not even require that the "acquisition" etc. is the person's principal business. Accordingly, such a definition would catch any business which incidentally buys, sells or holds securities. On reflection, and having further considered market comments, we have come to a view that such a description is far from defining the attributes of a person who should have professional status or who would have the expertise and knowledge that their interests as investors would not be jeopardized by the relaxation of various investor protection measures that will follow professional status. Hence, that formula is too broad and cannot be defended from an investor protection perspective. We will propose a CSA to remove the words "or whose business involves the acquisition, holding or disposal of securities" from paragraph (v)(B) and from the like exclusion in paragraph (vii) of the definition of "dealing in futures contracts".
"LFET" para. (ii)(C)	Law Society & Group of nine investment bankers	The exemption for contracts entered into for hedging purposes applies only to any "corporation" if the transaction is effected with a Hong Kong incorporated-company. Similar exemption should extend to transactions effected with any other corporation.	We agree and will propose a CSA to change the exclusion in paragraph (ii)(C) of the definition to refer to "corporation".

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"LFET"	Group of nine investment bankers	There should be a wider exemption for inter-professionals business, whether or not for hedging purposes and whether or not one of the parties to the transaction is itself a licensed LFE trader or bank.	The Leveraged Foreign Exchange Trading (Exemption) Rules, which will be remade under paragraph (xiii) of the definition of "leveraged foreign exchange trading", provide exemptions for persons whose activities are not regarded as constituting "leveraged foreign exchange trading" or "foreign exchange trading". These relate to corporations, certain collective investment schemes and managers of such collective investment schemes, which either have a qualifying credit rating (as defined in section 3 of the rules) or whose average principal amount of transactions in leveraged foreign exchange spot trading in each financial year is not less than $7.8 million. Any person with the attributes of a "professional" in the field of leveraged foreign exchange trading should already benefit from this exemption. We see no justification at present for extending such exemptions which, taken together with the exclusions in the definition of "leveraged foreign exchange trading", are already comprehensive in their scope.
"LFET" para. (xiii)	Group of nine investment bankers	The existing exemptions in the Leveraged Foreign Exchange Trading (Exemption) Rules (the "Rules") should be retained such that those entities that are currently entitled to rely on exemptions under the Rules may continue to do so.	The intention is to preserve the existing exemption through rules to be made under the SF Bill.
"LFET" and "SMF"	Law Society	The exemption in section 3 of the Securities Ordinance for dealings conducted by or through a registered or exempt person or as principal with a "professional investor" should be extended also to, for example, LFET and SMF.	For the reason given in the last response but one, above, any person who is qualified to be regarded as a "professional" in the context of leveraged foreign exchange trading should be enjoying the exemption provided in the Leveraged Foreign Exchange Trading (Exemption) Rules and we see no justification at present to extend such exemption. In relation to "securities margin financing" we see no justification for the proposed exemption in addition to that provided under the recently enacted Securities (Margin Financing) (Amendment) Ordinance. In practical terms, there is no evidence of any demand in the market to exclude from the licensing requirement persons, other than those already exempted under the definition, who might wish to provide margin financing solely to professional investors.
"providing ATS"	HKAB	The definition of "providing ATS" is very wide and may be interpreted as extending to vendors of technology services, where those services enable dealers and banks to effect transactions in securities and futures with their customers. Either the definition should be drafted more narrowly (for example, to exclude services provided to intermediaries), or guidance should be issued.	We have taken into account the market comments on the definition of "providing ATS" received during the White Bill consultation, and produced the version in the SF Bill. We are minded not to cast a narrow definition which may create regulatory gaps and fail to embrace technology and trading methods. The intention is not to catch vendors of technology services and we take the view that the definition, which requires the existence of two elements, namely, the provision of

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			services prescribed in paragraphs (a) to (c) of the definition and the use of electronic facilities, adequately reflects the intention. In addition, the proposed CSA mentioned in the following response will further clarify the matter. Furthermore, the SFC will issue guidance on this area which should be sufficient for the purpose of interpreting the ambit of this regulated activity. As far as practicable, the SFC will set out in the guidance the circumstances under which "no licence" is required. The SFC will continue to engage the market participants in developing guidelines on ATS in order to address their practical concerns. This is in line with practice in overseas jurisdictions.
"providing ATS"	Group of nine investment bankers	The definition of "providing ATS" is very wide and may be capable of including, for example, a "bulletin board" on which persons accessing a website which display securities prices, even though the transactions would then be included on a bilateral basis off-line and the bulletin board provider has no involvement. The SFC should have power to give binding confirmations that particular persons or facilities do not fall within the definition.	The intention is not to catch mere bulletin boards and we shall propose a CSA to the definition of "automated trading services" to reflect this accordingly. See above.
"providing ATS"	Group of nine investment bankers	The territorial application in respect of "providing ATS" is unclear as to whether it covers services provided by persons outside Hong Kong but are accessible online by persons in Hong Kong. Clause 95 of the Bill seems to assume that, for example, stock exchanges or futures exchanges outside Hong Kong may require authorization thereunder. In principle, the coverage should only be in respect of those conducted in Hong Kong. At the very least, the SFC should issue guidance on this topic. We suggest that (consistent with the SFC Guidance Note on Internet Regulation) offshore ATS providers need not be licensed unless it is targeting the public in Hong Kong to use its services. The operation outside Hong Kong of an ATS used only by intermediaries and professional investors in Hong Kong should not trigger a licensing requirement for the ATS provider.	The territorial application in respect of "providing ATS" refers to those activities that target investors in Hong Kong. The same interpretation applies to clause 95. It is proposed to clarify the matter through a CSA. No. Such ATS operations which are targeted at Hong Kong investors would, however, require to be licensed or authorized under the SF Bill. The conditions and the requirements imposed on those ATSs would take into account their clientele.

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"securities margin financing"	Group of nine investment bankers	In the White Bill certain activities were excluded from the definition of "securities margin financing". In the Blue Bill, four of these excluded activities have been removed from the exemption to the definition of securities margin financing. Instead, under Clause 114(5), a person whose only securities margin financing activities are one or more of those four excluded activities would not be regarded as contravening the requirement to be licensed to carry on securities margin financing. The effect of treating these activities as excluded activities, rather than as falling outside the definition of securities margin financing, appears to be that if those activities are engaged in by a licensed securities margin financier, the rules on securities margin financing made under Part VI of the Bill will still apply (see Clause 117(1)(d)(ii)). However, it seems likely that such rules will be inappropriate in respect of these excluded activities and we see no reason for the treatment of these activities in the Blue Bill. We would prefer to see the excluded activities being treated as exclusions from the definition of securities margin financing, as in the White Bill. If the drafting is not amended, the FSB/SFC should clarify, for the avoidance of doubt, that rules made under Part VI relating to securities margin financing will not apply to any excluded activities conducted by exempt persons.	The difficulty that has given rise to this comment is that Schedule 4 of the Securities (Margin Financing)(Amendment) Ordinance lumps together the provision of financial accommodation by persons other than margin financiers with that which could be undertaken by margin financiers. This approach was reflected in the drafting of the definition in the White Bill. To correct the situation, the activities itemized in that Schedule were divided between those that could not be undertaken by margin financiers (and made exemptions in the definition, as originally intended) and those that could be undertaken by margin financiers (and listed in Part 3 of Schedule 6). In accordance with the current law, where a margin financier chooses to provide financial accommodation in the circumstances specified in Part 3 of Schedule 6, he is required, for the sake of investor protection and the proper conduct of such business, to comply with applicable rules in relation thereto (as provided under clause 117(1)(d)(ii)). That is the policy intention under the current law and also under the Bill. In our view, such an approach is appropriate in all respects. Similarly, where a person who does not carry on business in margin financing carries on any of the activities specified in Part 3 of Schedule 6, he is not required to be licensed or to comply with any of the rules under Part VI (as provided by clause 114(5)).

Details of Submissions referred to in the Comment / Response Table

Date received	Organization /party
23 January 2001	Hong Kong Association of Banks ("HKAB")
23 January 2001, 15 February 2001	Linklaters & Alliance representing – Bear Stearns Asia Limited – Credit Suisse First Boston (Hong Kong) Limited – Dresdner Kleinwort Wasserstein – Goldman Sachs (Asia) L.L.C. – Merrill Lynch (Asia Pacific) Limited – JP Morgan – Morgan Stanley Dean Witter Asia Limited – Salomon Smith Barney Hong Kong Limited – UBS Warburg ("Group of nine investment bankers")
23 January 2001	Law Society of Hong Kong ("Law Society")

Financial Services Bureau
Securities and Futures Commission
4 July 2001