

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000
Summary of Public Comments and Administration's Response on
Part XI of the Securities and Futures Bill

Clause no.	Respondent	Respondent's comments	Administration's response
<i>Part XI – Securities and Futures Appeals Tribunal (SFAT)</i>			
Cost of appeals to SFAT	Bar Association	By virtue of more formal proceedings, a review may prove more costly and time consuming, which may deter some parties from pursuing their rights.	<p>Proceedings before the SFAT will be conducted with a similar level of formality as at present. The improved resources of the SFAT and its full time operation would allow appeals to be dealt with more expeditiously and hence most cost effectively. For instance, the SFAT would be more able to dispose of in one day a matter that would have spanned two evenings before the Securities and Futures Appeals Panel (SFAP) set up under existing law. Preliminary conferences to facilitate the early identification of matters in dispute should be conducive to the more expeditious hearing of appeals by the SFAT. In addition, the SFAT will retain the current power of the SFAP to award costs to an applicant.</p> <p>As at present, any person who seeks to appeal to the SFAT without any form of representation (and the SFAT has the discretion to allow a person to be represented by a person other than a lawyer) will be accorded the greatest practicable degree of assistance by the Tribunal and the highest level of co-operation by the SFC. Therefore, we do not envisage that any person who wishes to appeal to the SFAT will be deterred from doing so.</p>
Effect of appointing judge as chairman.	Bar Association	The appointment of a judge as chairman to the SFAT will take resources away from the ordinary courts. The judiciary will need extra resources.	<p>The Government has already set aside in the Budget resources for the judiciary to meet with the requirement to appoint judges for the SFAT. This is considered fully justified in the interests of maintaining a first class regulatory system, which is essential for maintaining Hong Kong as an international financial centre.</p> <p>By way of information, former judges can also be appointed as chairman of the SFAT, by virtue of the definition in clause 209.</p>
209*	HKSA	It is not clear why certain decisions should be deemed to be “excluded decisions” and not be appealable to the SFAT, although under clause 225 an aggrieved person has a right of appeal against an excluded decision to the Chief Executive in Council.	We have proposed an amendment to have decisions made in relation to an exempt AI appealable to the SFAT, instead of to the Chief Executive in Council, as explained to members at the Bills Committee meeting held on 18 July. See Paper 8D/01 dated 28 May 2001 and Paper CE10/01 dated 31 July 2001.

* Response to comment not incorporated in Paper 10A/01 when last issued on 25 April 2001.

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210	HKISD	<p>The appointed lay members to the SFAT “should have a majority in number of stockbrokers” because stockbrokers know the work of stockbrokers, market practice and the professional standard to be maintained. Comparison was made to disciplinary hearings for other professionals such as doctors and lawyers, which are heard by people from the same profession. For a tribunal that is convened to hear an appeal from a stockbroker, the two lay members should be stockbrokers.</p>	<p>The SFAT will be an independent body presided over by persons with appropriate legal and market qualifications. It is not designed to represent sectoral interests of parties who may be an applicant of appeal. We agree that stockbrokers have the expertise that makes them potentially appropriate candidates to sit as lay members to hear certain types of appeals. (The Chief Executive’s recent appointment of three stockbrokers to the SFAP reflects this.) However, automatically requiring that the SFAT, when reviewing a case involving a stockbroker, should be presided over by a majority of stockbrokers would interfere in the selection of the right mix of members, a decision that should only be made after taking into consideration all circumstances of each case. In addition, although lay members are appointed by reference to their expertise, they should not be chosen to represent the sectoral interests of the industry or profession they are drawn from as this might compromise the independence of the SFAT. If expert knowledge is required, the parties are at liberty to call expert witness to appear before the SFAT or to support their evidence.</p>
210 & 225	HKSbA HKISD	<p>The SFAT should have power to hear and review all decisions of the SFC so that any stockbroker aggrieved by a decision of the SFC can appeal against the decision.</p>	<p>The policy intention and the reasons therefor are set out at great length in paragraphs 7-14 of Paper 10/01. The general policy is that any person who is the subject of a decision made by the SFC should enjoy a right of appeal against such decision unless there are compelling policy reasons to the contrary. The reasons cover broadly (a) intermediate decisions with no substantial conclusive effect on the rights or interests of the subject persons (but the granting of such right of appeal would hamper or frustrate the regulatory efforts of the SFC to the detriment of the interests of the investing public, for example, an appeal against an investigator’s direction requiring attendance at an interview might mean that important regulatory process cannot be performed or completed); (b) decisions followed by application to the court; (c) decisions involving broad policy such as the making of subsidiary legislation; and (d) decisions subject to other specialized merits review appeal mechanisms.</p> <p>In addition to the rights of appeal under the SF Bill, a person who is the subject of action taken by the SFC may, if there are grounds, consider applying for judicial review, reporting to the Ombudsman, the Privacy Commissioner or the ICAC (if corruption is alleged to be involved). The newly established Process Review Panel also serves as an additional check on the SFC’s exercise of its power.</p> <p>Bearing these principles in mind, we have an open mind to proposals for including any SFC decisions in the respective lists of appealable matters in Schedule 7. The lists will be subject to review as the regulatory regime develops.</p>

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		<p>By comparison, Part IV of the UK's Financial Services and Markets Act (FSMA), which deals with "Permission to carry on Regulated Activities", appears to have a wider scope of appeal by persons aggrieved by the determination of an application made under that Part or the exercise of the Financial Services Authority (FSA)'s own-initiative power.</p>	<p>Part IV of the FSMA deals, inter alia, with matters relating to the FSA's power to determine authorizations to carry on regulated activities, conditions on such authorizations, requests for variations to an authorization or conditions. Equivalent decisions of the SFC under the SF Bill are also appealable to the SFAT under the SF Bill.</p> <p>In particular, the "own-initiative power" referred to in the FSMA is about the power of the FSA under section 45 to vary the permission given for the conduct of a regulated activity including the requirement imposed on a permission. The corresponding decisions made under the SF Bill are similarly appealable to the SFAT.</p> <p>By way of information, under the FSMA there is no right of appeal to the Tribunal set up thereunder in relation to requirements to obtain information from authorized persons (section 165), or in relation to the exercise of the general power of investigation (sections 167-176). In this regard, the appeal regime under the SF Bill is indeed comparable to that under the FSMA.</p>
210*	HKSbA	<p>It is a more open and clearer arrangement to make all decisions appealable to the SFAT except for certain supervisory decisions of the SFC.</p> <p>This suggestion has a precedent in the UK model, see section 55 of the FSMA.</p>	<p>As mentioned in the response to the comment of the HKSbA and the HKISD immediately above, apart from certain supervisory decisions, there are decisions of other nature that are considered not appropriate or unnecessary to be made appealable to the SFAT.</p> <p>The present approach to state in the legislation the specific decisions that can be appealed to the SFAT has precedents in the Securities and Futures Commission Ordinance and other legislation in HK. We consider this approach clearer and more certain. On the other hand, the approach suggested in the market submission requires the introduction of a certain test of whether a specific decision is appealable or not, which may give rise to genuine disputes or be deployed as a tactic to delay the enforcement of SFC's decisions.</p> <p>Also as mentioned in the response immediately above, the right of appeals conferred under section 55 of the FSMA is about a confined range of decisions, namely decisions made under Part IV of the FSMA on "permission to carry on regulated activities" (there are a total of 30 parts in the FSMA). On the other hand, appealable decisions under the SF Bill run through a number of parts, namely Parts III, IV, V, VI, IX, X and XII).</p>

* Response to comment not incorporated in Paper 10A/01 when last issued on 25 April 2001.

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211	Charles Schwab	The mandate of the SFAT may have been weakened by not giving it and the investing public clearer guidance as to its role. It is suggested that wording outlining a non-exclusive list of the grievances the SFAT may address should be included.	<p>Clause 210(1) gives the SFAT mandate to review decisions made by the SFC as itemized in Schedule 7. The present arrangement indeed gives the clearest guidance on the role of the SFAT, and is user-friendly and conducive to certainty. There is also power under clause 227 for the Chief Executive in Council to amend the list to cater for inclusion of any properly appealable matters in future.</p> <p>Please refer to the response to the market comment immediately above.</p>
211*	HKISD HKSbA	The SFAT should be empowered to extend the appeal period of 21 days. This is also consistent with the UK model.	<p>In the light of comments received in the consultation in 1999, we have extended the appeal period from 14 days to 21 days. We consider that this is adequate as in most cases SFC decisions would not take effect during the appeal period, and too long an appeal period would work against the interest of the investing public.</p> <p>Moreover, the decisions which are reviewable by the SFAT will be made only after the SFC has provided the affected party with prior notice with reasons and the party has the opportunity to make representations. The issues will therefore be well known to a potential applicant for review by the time that the 21-day period begins to run. Accordingly, an application for review could have been made within that time.</p> <p>Also, as a result of market comments in earlier consultation, we have introduced an arrangement in clause 220 whereby a person who is the subject of an SFC decision may apply to the SFAT for a stay of execution of that decision pending determination of an appeal (see also response below to comments on clause 220(1)). The Securities and Futures Appeals Panel does not have the power to extend the period. The Bill goes a step further to allow for greater flexibility to the appellants.</p>

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220(1) 224	HKSbA	<p>The SF Bill should provide for an automatic stay of execution during review so that an appellant does not need to apply to the SFAT for it.</p> <p>Before the application for stay of execution is heard, one is bound by the decision under application for review. In some instances damage may have occurred and no later review can alleviate the situation.</p>	<p>Clauses 224 and 225 of the SF Bill stipulate that a majority of SFC decisions do not ordinarily take effect until the time for an SFAT appeal has expired or, if an appeal is made, the appeal is withdrawn or determined. However, there are cases where the decisions have to be enforced as a matter of urgency <u>in the interests of investors</u>. By way of illustration, the conditions imposed under clause 142(2) whereby a licensed corporation is permitted to continue the conduct of a regulated activity, albeit not in compliance with the specified amounts requirements under the Financial Resources Rules, need to take effect almost immediately. For the same investor protection concern, under existing law, decisions relating to licensing conditions, etc., can also take effect immediately. This is preserved in the SF Bill.</p> <p>To enable the SFAT to alleviate the effects of those decisions, the SFAT has been vested with the power to grant a stay, as a newly introduced safeguard in response to concerns expressed by members of the Legislative Council in 1999. Under clause 220, the SFAT must convene as soon as reasonably practicable to consider an application for a stay. In practice, a person concerned will be aware of the possibility of the SFC decision against him before the final decision is notified and may, as soon as he is notified of the SFC's final decision, immediately lodge an appeal and apply at once for a stay.</p> <p>Please see paragraphs 21 and 22 of Paper 10/01 for more details.</p>
221	HKSA	<p>The Court of Appeal should have the power to vary a decision of the SFAT, in addition to the power to remit a matter back to the SFC.</p>	<p>We do not agree. The SFAT is to be chaired by a High Court judge and assisted by members with industry experience and expertise. It is most appropriately tasked with considering matters which come before it. Appeals from SFAT decisions to the Court of Appeal may only be made on matters of law. In our view, the powers proposed to be vested in the Court of Appeal, to allow or dismiss an appeal and, if it wishes to take an intermediate approach, to remit the matter to the SFAT with directions as to how that matter must be considered, are most appropriate.</p>
225*	HKSA	<p>There should not be any "excluded decisions". The judicial process of appeal should be the same for exempt and licensed persons.</p>	<p>We have proposed an amendment to have decisions made in relation to an exempt AI appealable to the SFAT, instead of to the Chief Executive in Council, as explained to members at the Bills Committee meeting held on 18 July. See Paper 8D/01 dated 28 May 2001 and Paper CE10/01 dated 31 July 2001.</p>

Details of Submissions referred to in the Comment/Response Table

Date Received	Organization/Party
18 January 2001, 31 January 2001	Hong Kong Society of Accountants (“HKSA”)
29 January 2001, 15 February 2001, 2 March 2001, 10 May 2001	Hong Kong Stockbrokers Association (“HKSbA”)
29 January 2001	Charles Schwab Hong Kong (“Charles Schwab”)
30 January 2001	Hong Kong Institute of Securities Dealers (“HKISD”)
14 February 2001	Hong Kong Bar Association (“Bar Association”)

**Securities and Futures Commission
Financial Services Bureau
31 July 2001**