

Securities and Futures Bill

Part III

Response to the comments prepared by the Legal Services Division

Clause references in the Bill	Responses
18 “controller”	“Company” has been defined in Schedule 1 to the Securities and Futures Bill (the “Bill”) to follow the definition of the same term in the Companies Ordinance, which is of a narrower scope than that in the Exchanges and Clearing Houses (Merger) Ordinance (the “ECHMO”). An alternative term “corporation” that closely resembles the meaning of “company” in the ECHMO is defined in Schedule 1 for use as appropriate.
18 “market charge”	Given the changing market, and that the rules of a recognized clearing house which cover the types of property that may be charged are subject to the approval of the SFC, we consider the proposed arrangement appropriate.
18(6)	The sub-clause is derived from section 2(3) of the ECHMO.
19	<p>The clause is modeled on section 3 of the ECHMO and consolidates section 20 of the Securities Ordinance (the “SO”), sections 3 and 27 of the Stock Exchanges Unification Ordinance (the “SEUO”), and section 13 of the Commodities Trading Ordinance (the “CTO”).</p> <p>The penalty level has been adjusted in the light of market development and the price index movement. A separate paper will be submitted to Members on the adjustments in the penalty levels throughout Part III.</p> <p>The discretion of the Commission in the recognition of an exchange company under this clause is similar to that under the ECHMO; and is wider than that under the SEUO and the CTO with the balancing additional requirements to consult the public and the Financial Secretary. The Commission must also be satisfied that recognition is in the interest of the investing public or the public interest or for the proper regulation of markets. It is considered that this provision will provide greater flexibility to the Commission in determining the requirements which must be satisfied before recognition whilst at the same time adding the above checks and balances.</p> <p>The provision of ATS and dealing in futures contracts might constitute operation of a futures market, hence the carve out in clause 19(8).</p>

	<p>"Securities" are defined in Schedule 1 to the Bill to include "collective investment schemes". The exclusion of "collective investment schemes" from the definition of "securities" for the purpose of the definition of "stock market" in accordance with clause 19(9) is to avoid expanding the monopoly currently enjoyed by the SEHK.</p>
20	<p>Reference to "commodity" is outmoded in relation to our modern futures market. This change was effected in response to comments made during the consultation exercise.</p>
22	<p>According to the advice of the Department of Justice, a blanket immunity from criminal liability is too wide to be acceptable from a legal policy point of view.</p> <p>As stated in Halsbury's Laws of Hong Kong, Volume 1, (Butterworths, 1995) at paragraph 10.190, public officers are subject to prosecution for criminal offences in the same way as other persons. An example can be found in the Prevention of Bribery Ordinance, Cap.201 which is applicable to government servants and any employee of a public body, which includes the SFC.</p> <p>Furthermore, in the UK, paragraph 19(1) of Schedule 1 to the Financial Services and Markets Act 2000 provides that neither the Financial Services Authority (the "FSA") nor any person acting on his behalf shall be "liable for any damages for anything done or omitted in the discharge, or purported discharge of the [FSA's] functions". As explained in paragraph 135 of the First Report by the Joint Committee on Financial Services and Markets, the FSA is immune from suit for damages for acts in good faith in discharge of its functions but is not immune from criminal prosecution.</p> <p>If public officials performing a public function are not immune from criminal liability, we cannot see any reason why, in performing a public function (a fortiori a private one), a recognized exchange company, a recognized clearing house, a recognized exchange controller, or a recognized investor compensation company or persons acting on their behalf should be given immunity from criminal liability. Thus, clause 368 as well as clauses 22, 39, 64 and 81 are confined to immunity from civil liability only. There is no change in policy but we would like to put it beyond doubt in the Bill.</p>
23	<p>Clause 23(1) is added as an elaboration of the scope of the rule making power of a recognized exchange company.</p> <p>Clause 23(5) is added to address a specific difficulty arising from the case of <u>R v. Robert Eli Low Magistracy Appeal No 1180 of 1996</u> in which Mr. Low was charged with the offence of making a false statement in a statutory declaration contrary to s.36(a) of the Crimes Ordinance. In that case it was queried by the judge whether, if there was no statutory requirement to provide this information in the form of a declaration, the Stock Exchange was entitled to insist that a statutory declaration must be executed. The</p>

	<p>specific point being addressed is that an element in the offence of making a false statutory declaration is the requirement for the declaration to have statutory backing.</p> <p>Section 34(1)(b) of the SEUO has not been incorporated as the responsibility for supervising exchange participants in relation to compliance with the Financial Resources Rules has been passed to the SFC, following the merger of the exchanges and the establishment of the HKEx.</p>
28 & 29	The power to direct a recognized exchange company to cease to provide specified facilities or services could amount to a closure in certain circumstances. It improves on the single nuclear option of closure in current law by enabling measures less than closure to be taken where necessary for better calibration of response.
30	A separate paper will be submitted to Members on the adjustments in the penalty levels throughout Part III.
33	The procedure for appeals to the Chief Executive in Council is provided for in section 64 of Cap.1, which states in its subsection 5 that a decision may be confirmed, varied or reversed.
34	<p>A Committee Stage Amendment will be proposed to reinstate “Unified Exchange” and “United Exchange”.</p> <p>A separate paper will be submitted to Members on the adjustments in the penalty levels throughout Part III.</p>
36	<p>Section 14(e) of the SO empowers the SFC to prescribe the type of business that may be carried on at the Unified Exchange. A similar power is not necessary because clause 20 has already provided for the transactions that may be conducted on a recognized stock market or a recognized futures market.</p> <p>The rules made under clause 36 are subsidiary legislation and the gazettal requirement under section 28(2) of Cap.1 applies.</p> <p>Should the SFC propose to impose a penalty for breaches of certain requirements of the rules, this could be done by regulations made by the Chief Executive in Council under clause 384(8).</p>
37	We have rationalized the existing discrepancy among the different recognition arrangements under the various ordinances. Under the SEUO, neither consultation with nor consent by the Financial Secretary is required. The requirement to consult the Financial Secretary applies throughout the recognition of exchange companies, clearing houses and investor compensation companies; and in the recognition of the Exchange Controller, the consent in writing by the Financial Secretary is required.
39(1)&(2)	Please see the above response made in respect of clause 22.

39(3)&(5)	A Committee Stage Amendment will be proposed to replace “duty” with “functions” in clauses 22, 39, 64 and 81.
46	A Committee Stage Amendment will be proposed to replace section 20 of the Bankruptcy Ordinance with sections 20A to 20K of the ordinance.
51	A Committee Stage Amendment will be proposed to reinstate the present position, and replace “a bankruptcy order made” with “grounds exist for a creditor to present a bankruptcy petition”.
56	The addition of “or its (the clearing house’s) nominees” is consistent with the policy of conferring “protection” over securities deposited in accordance with the rules of a recognized clearing house.
59	<p>Clause 59(4) is added to clarify clause 59(3) and make sure timely remedial actions can be taken for better investor protection.</p> <p>Clause 59(9)(a)&(b) is added having regard to the special position of an exchange controller which must balance its commercial interests and its public duties. For this reason, clause 59 requires that no person shall become an exchange controller without the approval of the SFC. If a person unlawfully becomes an exchange controller and uses his voting control to pass resolutions which would not have been passed had he observed the law, the SFC must be entitled to step in to nullify the original votes and require that the matter be considered anew by the shareholders. If this were not the case, an exchange controller who was not recognized would be permitted to benefit from his own wrongdoing.</p>
61	Please see the above response made in respect of clause 59.
64(1)	Please see the above response made in respect of clause 22.
65	No time limit as in the ECHMO is in clause 65 as the Risk Management Committee is already in existence and would be rolled over upon commencement. A new controller should have such a committee from inception.
71	A separate paper will be submitted to Members on the adjustments in the penalty levels throughout Part III.
73	Please see the response made in respect of clause 33.
74 & 75	Please see the response made in respect of clause 18 on “corporation”.
78	This is to achieve consistency among different Parts of the Bill. Amendments to the Schedules to be made by the Chief Executive in Council are also by way of order published in the Gazette. (see also clauses 112(3), 227, etc.)
79-90	The policy consideration in the establishment of an investor compensation

	company has been set out in FSB's paper no. 3/01 and discussed at the Bills Committee meeting on 12 January. The legislative framework for the new investor compensation scheme will also be discussed under Part XII.
91	Clause 91(4) is added to preserve the secrecy of information disclosed under clause 91.
92	The addition of "supplement" is for better clarity regarding the meaning of "amend".
93	<p>The coverage of a "suspension order" and its effect are clearly set out in clause 93 and we do not believe a definition is necessary. "Suspension order" is not defined under existing law either and its meaning is well understood.</p> <p>We do not agree the scope of the "suspension order" is narrower as compared with the existing law. Clause 93 is almost identical to section 51 of the Securities and Futures Commission Ordinance, save the updating of terms.</p>
Part 5 of Schedule 3	This is to elaborate on the clearing procedures provided for in the rules of the recognized clearing house.
Schedule 3 Part 6	The scope of "shares" in the ECHMO is not certain because under section 2(1) of the ECHMO, "shares" includes "securities" but "securities", which carries the meaning of section 2(1) of the SO, includes "shares" as well. Having regard to the meaning of "securities" in Schedule 1 to the Bill, we think the term "securities" should be used. Retaining the term "share" would give rise to the same uncertainties.

Securities and Futures Commission
Financial Services Bureau
18 January 2001