

**Bills Committee on  
Securities and Futures Bill and Banking (Amendment) Bill 2000  
Part IV and Schedule 5**

Response to Comments of the Legal Service Division set out in CB(1) 515/00-01(01)

<b>Clause References</b>	<b>Response</b>
101(2)(b)	<p>On the remarks of the Legal Services Division (the “LSD”) that “Both the principal and agent are regarded as issuer. When read with the definition of “issue”, it may have the effect of making every person who has taking any part in the process of issuing any advertisements etc. potentially liable under this Part.” : -</p> <p>Clause 101(2) is to supplement the interpretation of the meaning of “an advertisement, invitation or document issued by a person” when referred to in subsequent provisions. Its implications can be drawn only by reference to the relevant provisions, i.e. clauses 102 and 109. For the offence created under clause 102, clause 102(6) to (8) has the effect of excluding those passive communication providers and “mere conduits” in the process. Clause 102(9) provides a defence to those “participants” who have taken reasonable steps and exercised due diligence to avoid the commission of the offence with which he is charged. As for the offence created under clause 109, similar exclusions and defence can be found in clause 109(4) to (7).</p>
102	<p>Clause 102(7) to (9) is covered in the response made in respect of clause 101(2)(b) above.</p> <p>On the remarks of the LSD that “Please note that authorized financial institutions, brokers of leveraged foreign contracts and their representatives are excepted from clause 102(1)” : -</p> <p>First, authorized financial institutions (“AI”), leveraged foreign exchange traders, and their</p>

	<p>representatives are only excepted in respect of leveraged foreign exchange contracts.</p> <p>Second, the exceptions referred to by the LSD are indeed only part of the whole proposal introduced here for avoiding double regulation and reducing regulatory cost. Clause 102(2)(a) to (c) has the effect of excluding an intermediary licensed or exempted by the Securities and Futures Commission (the “SFC”) from the need for authorization to issue advertisements, invitations or documents on a specified product, if he is already subject to the regulation by the SFC under Parts V to VII in respect of that product. Further, the activity of an AI in respect of leveraged foreign exchange contracts has been excluded from the regulated activity of “leveraged foreign exchange trading” by reason that such activity when conducted by an AI is already subject to the regulation by the Hong Kong Monetary Authority under the Banking Ordinance. Thus, clause 102(2)(c)(i) is similarly introduced to exclude an AI from the need for authorization to issue advertisements, invitations or documents in respect of a leveraged foreign exchange contract.</p>
103	<p>The mechanism for authorization of collective investment schemes has been covered in paragraphs 7 and 8(c) of Paper No. 4/01 on Part IV of the SF Bill.</p>
106	<p>On the remarks of the LSD that “Please note the possible effect of making all journalists and columnists liable. Also the criteria for liability may be less than certain than they may appear to be” : -</p> <p>A person commits an offence if he makes a fraudulent or reckless misrepresentation for the purpose of inducing another person to invest money, whether or not the former is a party to the agreement concerned. It would seem an investment columnist or journalist should not in the normal course of their profession, induce another person to invest money, unless the investment columnist or journalist is actually licensed or exempted to carry out the relevant regulated activities.</p> <p>By way of information, section 3 of the Protection of Investors Ordinance (Cap.335) (the “PIO”) is in this regard the same. Moreover, section 397 of the UK Financial Services and Market Act provides, among other things that a person who recklessly makes a statement, promise or forecast which is misleading, false or deceptive in a material particular for the purpose of inducing, or is reckless as to whether it may induce, another person to enter into a relevant agreement, commits an offence. No carve-out has been made in respect of an investment columnist or journalist.</p>

107	<p>On the remarks of the LSD that “It is not clear what meaning “reliance” has in the context” : -</p> <p>The concept of reliance exists also in the common law action of misrepresentation and is to our view clear. It is a question of fact whether the representee has relied on the misrepresentation in any particular case. By way of illustration, if the representee never knew of the existence of the representation; or did not allow the representation to affect his judgment; or was aware of the untruth of the representation; he had not relied on the representation and would have no action against the person making the representation under clause 107.</p> <p>On the remarks of the LSD that “The deeming provision in the existing legislation is abolished.”</p> <p>The deeming provision referred to is section 8(3)(b) of the PIO that reads “a person is deemed to be a director of a company or other body corporate if he occupies the position of director by whatever name he may be called, or is a person in accordance with whose directions or instructions the directors of the company or other body or any of them act; but a person shall not, by reason only that the directors of a company or other body corporate act on advice given by him in a professional capacity, be taken to be a person in accordance with whose directions or instructions those directors act.” This provision is made unnecessary under the SF Bill as Schedule 1 already defines directors to include a shadow director and any person occupying the position of director by whatever name called.</p>
108	The addition of clause 108(5)(a) as regards the exemption for offers made in accordance with the Listing Rules and the Takeovers Codes is covered in paragraph 12 of Paper No. 4/01 on Part IV of the SF Bill.
109	Clause 109(5) to (7) is covered in the response made in respect of clause 101(2)(b) above.