

Securities & Futures Bill Parts VI & VII

Supplement to the Derivation Tables for Parts VI & VII (Annex A to LC Paper No. CB(1) 626/00-01(01))

References to clauses (cl.), sub-clauses (*sc.*) or paragraphs in the comments column are to those of the Bill unless otherwise expressly stated.

Commission = the Securities and Futures Commission

FRR = Financial Resources Rules

MA = the Monetary Authority

SFCO = Securities and Futures Commission Ordinance(Cap. 24)

SO = Securities Ordinance (Cap. 333).

CTO = Commodities Trading Ordinance (Cap. 250)

LFETO= Leveraged Foreign Exchange Trading Ordinance (Cap. 451)

Blue Bill Clause Ref.	SO section	CTO section	LFETO section	Comments (Only new provisions & differences with existing legislation would be mentioned.)
142	65C & 121AC	-	19	The clause now distinguishes between non-compliance in respect of the specified amount requirements and non-compliance of other rules of FRR. For the former, the time limit for notification is the same day (<i>sc.</i> (1)) and the licensee has to cease carrying on the regulated activity except as permitted by the Commission subject to conditions (<i>sc.</i> (2)). For the latter, the time limit is one business day (<i>sc.</i> (3)). <i>Sc.</i> (4) adds the duty to keep adequate records & to make them available to the Commission upon notice. <i>Sc.</i> (5) empowers the Commission to suspend the licence of a licensed corporation or to permit the carrying on of business subject to conditions upon reasonable belief of its inability to maintain or ascertain compliance with specific amount requirements. <i>Sc.</i> (6) & (7) provides for the amendments of conditions imposed. <i>Sc.</i> (8) prescribes the time at which a notice takes effect. <i>Sc.</i> (9) stipulates the other provisions applicable on a suspension. The offences of non-compliance are both indictable & summary. The penalties have been increased very considerably (<i>sc.</i> (11) to (13)). <i>Sc.</i> (14) enables penalty provisions to be included in FRR.

143(1)	-	-	-	New. The Commission is expressly empowered to require a licensed corporation to satisfy it that the corporation complies with all the requirements of the applicable FFR.
143(2)	65D(1)	-	20	The effect is the same.
143(3) to (9)	-	-	-	New.
144	75A, 81, 121AA & 121AB	47	-	New. The existing legislation contains substantive provisions restricting the handling of securities belonging to client. The clause empowers the Commission to make rules covering various aspects of holding client securities & collateral. The rules made are binding on the authorized institutions holding client assets in the course of their business in any regulated activities. The intermediaries & their associated entities are personally responsible for ensuring that persons holding or receiving client securities or collateral on their behalf would deal with such securities & collateral in accordance with the rules made by the Commission.
145	84, 85, 121AJ, 121AK, 121AL, 121AM, 121AN & 121AP	46 & 47	23 & 24	Similar to <i>cl.</i> 144, this is also an empowering section, leaving the details to be filled out in the rules to be made by the Commission. The basic structure of segregated accounts for clients' money designated as trust accounts or clients' accounts remain the same. Please note the exception stipulated in <i>sc.</i> (7) in respect of client money of a licensed corporation held by an associated entity that is an authorized financial institution. It is not clear whether the exception is warranted by the general principle that rules governing client money do not apply to authorized financial institutions.
146	81B, 86 & 121AO	48	25	The clause adds that such claim & lien does not relieve an intermediary or an associated entity of the duty to comply with the rules. The maximum fine and imprisonment term for summary offence are respectively increased fivefold and doubled.

147	83 & 121AG	45	21	The clause follows the new approach of providing rule making powers and leaving the detail provisions to be prescribed by the rules. The amounts of fines and imprisonment terms have been increased. A distinction is made between offences committed with intent to defraud and those committed without reasonable excuse. The rules made by the Commission are applicable to the authorized institutions in relation to their business in regulated activities.
148	75, 75A & 121Z	45A & 45B	22	The clause adopts the new approach of providing rule making powers and leaving the detail provisions to be prescribed by the rules. A distinction is made between offences committed with intent to defraud and those committed without reasonable excuse.
149	87 & 121AR	49	27	The clause appears to be based on section 27 of LFETO. The new <i>sc.</i> (2) is added to require an associated entity of an intermediary to appoint an auditor. <i>Sc.</i> (4)(b) is added to make clear that the auditor appointed may be the same auditor appointed by the licensed corporation or associated entity for the purposes of the Companies Ordinance (Cap. 32). By the offence creating provisions in <i>sc.</i> (5), a statutory duty is imposed to appoint auditor within one month of the corporation being registered or become an associated entity or the appointed auditor ceases to be such. Failure to notify an appointment is now an offence under <i>sc.</i> (6). <i>Sc.</i> (7) makes clear that this clause does not affect the operation of any other legislation. <i>Sc.</i> (8) excludes the application to authorized financial entity as an associated entity.
150	87B & 121AS	49A	28	The clause appears to be based on section 28 of LFETO. An associated entity is also covered. The strict criminal liability of directors upon contravening of the clause by the corporation is removed. The offence is no longer an indictable one. The imprisonment term upon conviction is also removed. <i>Sc.</i> (3) excludes the application to an associated entity that is authorized financial institution.

151	87A & 121AH	101	26	The clause appears to be based on section 26 of LFETO. An associated entity is also covered. <i>Sc.</i> (4) makes contravening <i>sc.</i> (1) an offence punishable with a fine of \$50,000. <i>Sc.</i> (6) excludes the application to an associated entity that is authorized financial institution.
152	88 & 121AI	50	29	The clause again adopts the approach of leaving detail requirements to be made in the rules. An associated entity is also covered. A distinction is made between contravening of the requirements and contravening with intention to defraud. The penalties for the latter offences are much more severe. <i>Sc.</i> (7) excludes the application to an associated entity that is authorized financial institution.
153	89 & 121AU	51	31	The expression of "reportable matter" defined in <i>sc.</i> (3) extends to cover non-compliance in respect of client securities & collateral & client money. An associated entity is also covered. If the auditor is appointed under the Banking Ordinance (Cap. 151), he should report to both the Commission & MA.
153(2)	89(2) & 121AT	51(2)	31(2)	The auditor's obligation to notify the Commission is extended to give reasons for so doing & particulars of any connected circumstances or to state that there is no such circumstance.
154	89A & 121AV	51A	32	The clause appears to be a revamp of section 121AV of SO. The application is extended to associated entities.
155	90 & 121AW	52	33	The clause incorporates the existing legislation. It now covers associated entities. An additional ground for the Commission to appoint auditor is that it has reasonable cause to believe that a licensed corporation or its associated entity has failed to comply with any prescribed requirement under <i>cl.</i> 144, 145, 147 & 148. <i>Sc.</i> (2) empowers an auditor to examine any client assets held or received by a licensed corporation or associated entity. <i>Sc.</i> (3) requires the Commission to consult MA before exercising its power under this section in respect of an authorized financial institution. The Commission in exercising its power to direct a licensed corporation or associated entity to pay the costs of an audit must have regard to the conduct of such corporation or entity (<i>sc.</i> (4)).

156	91 & 121AX	53	34	<p>The clause incorporates the existing legislation. The scope is extended to associated entity. The applicant is not restricted to a client. The failure to act in accordance with instructions, failure to account for profits or to compensate for loss are added grounds for application. <i>Sc. (2)</i> empowers an auditor to examine any client assets held or received by a licensed corporation or associated entity. <i>Sc. (5)</i> requires the Commission to consult MA before exercise its power under this section in respect of an authorized financial institution. <i>Sc. (6)</i> stipulates that a reasonable opportunity of being heard should be given to the corporation or associated entity concerned before an appointment is made. Every statement made in an application is for the purposes of the law of defamation privileged (<i>sc.(7)</i>) instead of qualified privilege but still requiring good faith & absence of improper motive. The Commission in exercising its power to direct a licensed corporation or associated entity to pay the costs of an audit must have regard to the conduct of such corporation or associated entity (<i>sc. (8)</i>).</p>
158	93 & 121AZ	55	36	<p>The clause appears to be based on the provision in CTO. The power to examine & audit is extended to cover associated entities. The Commission may now require the party to explain the contents of the accounts or records produced. The Commission may also require a recognized exchange company or a party holding clients assets on behalf of the licensed corporation or the associated entity to produce and explain accounts & records & information in its possession. <i>Sc. (2)</i> enables the auditor & a person authorised by him to exercise the powers contained in <i>sc. (1)</i> in relation to (a) any business carried on in conjunction with any of the regulated business & any business of any of the associated entities; & (b) any related corporation of the licensed corporation or any of its associated entities. <i>Sc. (3), (4) & (5)</i> are added to impose criminal liabilities & corresponding penalties in respect of (i) non-compliance without reasonable excuse; (ii) knowingly or recklessly produce false or misleading accounts or records or giving false or misleading answers; & (iii) doing acts described in (i) or (ii) with intent to defraud. The penalties for summary offence have been substantially increased.</p>

159	96, 121BC & 121BD	56	37	The clause appears to follow section 37 of LFETO. The scope of the offence is extended to aiding & abetting or conspiring with another to make unavailable any accounts, records or documents. The fine & prison term upon summary conviction has been respectively increased fivefold and doubled.
160	-	-	-	The clause seems not to cover client assets being held outside Hong Kong.
163	-	-	-	New. The clause follows the new approach of providing the Commission with rule making powers and leaving the detail provisions to be prescribed by the rules. <i>Sc.</i> (2)(b) allows rules to be made requiring certain terms or conditions to be included in client contracts and be deemed to be essence of the contract.
164	-	-	76	New. The power of the Commission to make code of conduct is enhanced by the provisions contained in <i>sc.</i> (2), (3) & (5). <i>Sc.</i> (6) expressly stipulates that such codes are not subsidiary legislation.
164(4)	-	-	77	New. A breach of any codes of conduct would not by itself actionable but such codes may be adduced in any proceedings under the SFB & be taken into account in considering any relevant question.
165	80	-	-	The clause follows substantially the provisions of section 80 of SO. A new paragraph (d) is added to <i>sc.</i> (3) excluding the application of the clause to a sale of securities effected pursuant to a transaction in an options contract traded on a recognized stock market.
166	80B	-	-	The clause reproduces substantially the existing section 80B of SO. In <i>sc.</i> (9), the admissibility of the assurance as prima facie evidence is restricted to proceedings under the SFB only. There is no such restriction in the existing legislation.
167	80C	-	-	The clause contains substantially the same provisions as the existing legislation. The lawful excuse defence set out in <i>sc.</i> (3) is now limited to the personal inadvertence, carelessness or negligence of the offender.

168	76(1)(a) & (2)	61	-	<p>New. The clause follows the new approach of providing the Commission with rule making powers and leaving the detail provisions to be prescribed in the rules to be made. The offences & penalties that the Commission may create or impose in the rules are upgraded. An offence may now be indictable or summary. The fine & prison terms for conviction upon indictment are respectively \$200,000 & 2 years. The fine for summary conviction is now \$100,000.</p>
169	74	60A	39	<p>The clause subsumes the existing legislation. In <i>sc.</i> (1)(a), an item (ii) is added to cover an agreement to provide securities margin financing. Of the exclusion from prohibition in respect of persons subject to unsolicited calls under <i>sc.</i> (2), there is added the class of professional investors but the exclusion in respect of bankers, solicitors & professional accountants are more restricted. As to persons making unsolicited calls, authorized financial institutions are excluded from the prohibition (<i>sc.</i> (2)(b)). What is provided in Leveraged Foreign Exchange Trading (Calls) Rules (Cap. 451 sub. leg.) is now covered by the combined effect of <i>sc.</i> (2)(b) & (4). <i>Sc.</i> (3) is added to allow exclusion of class of documents, class of person making calls, class of person on whom calls are made, & class of calls from the prohibition to be effected by rules made by the Commission. The offence is no longer punishable by imprisonment (<i>sc.</i> (5)). <i>Sc.</i> (6) enables a person to rescind a contract entered into with the person guilty of "hawking of securities". <i>Sc.</i> (7) contains new definitions in addition to "call". The definition of "call" is now expanded to take account of the advance in communication and information technologies.</p>

170	78	-	-	The existing provision refers to "approved by the Hong Kong Government, the Commission". The provision of the Bill refers to "endorsed or warranted". The penalty for contravention is increased 25 times.
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Prepared by

Legal Service Division
Legislative Council Secretariat
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