

Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000

**Summary of Public Comments and Administration's Response on
Banking (Amendment) Bill 2000**

Clause No.	Respondent	Respondent's Comments	Administration's Response
In relation to Part V of the Securities and Futures Bill ("SF Bill") – Licensing and Exemption			
3	Law Society	HKMA power – the amendment to S.7(2) of the Banking Ordinance (BO) should refer to "investing public" or "public interest" instead of "depositors and potential depositors".	<p>The amendment to S.7(2) also refers to the requirement that AIs should ensure that their businesses are carried on with integrity, prudence and the appropriate degree of professional competence. This will provide sufficient protection to investors.</p> <p>It is also relevant to note that Clause 5 of the BAB, which seeks to add a new section 58A for the HKMA to issue public or private reprimand to exempt AIs, defines "misconduct" to include acts or omissions prejudicial to the interest of the "investing public" or to the public interest.</p> <p>The new sections 71E(2) and 71E(5) concerning refusal to grant provisional consent to executive officers and withdrawal of such consent also refer to the interest of "investing public".</p>
4 BO S.20(10)	HKAB	Staff entered in the HKMA register – whether the staff must have employment contract with the exempt AI.	Will consider CSA so as not to restrict coverage to those under direct employment of an exempt AI : in line with the approach adopted in the SF Bill.
4	HKAB	The type of staff to be included in register – clarification needed.	The meaning of "regulated function" follows closely that under the SF Bill, which itself is based on the existing law. The SFC will continue with the current practice of issuing guidance notes on whether or not the conduct of certain activities requires a representative licence. The overall principle is that the HKMA will adopt the interpretation of the SFC in this regard in deciding whether the activities conducted by staff of exempt AIs should be regarded as regulated activities, and thus for the staff concerned to be included in the register.
4 BO S.20(10)	HKAB	Regulated function – the definition in the BAB is somewhat different from that in the SF Bill.	To consider CSA to make the BAB definition in line with that in the SF Bill as far as possible. The use of different wording in the SF Bill and BAB is unintentional.
4 BO S.20(1)(ea)	HKAB	The register to be maintained not later than 12 months after the commencement of the provision – no 2-year transitional period as in the SF	The 12-month period for establishing the HKMA register and the transitional period of 2 years for the SF Bill are separate issues that should not be confused.

		Bill.	The register is needed to accommodate also the relevant employees of those AIs which are not currently exempt dealers but wish to pursue the conduct of the regulated activity after the commencement of the SF Bill, and those employees of current exempt dealers employed after the commencement of the SF Bill for performing a regulated function. Moreover, different banks may apply for exemption at different times during the transitional period and some will be granted exempt status within the 2-year period. The register should therefore be in place so that the public can have access to the relevant information. The intended approach is to establish the register at a reasonable time after enactment that can allow banks to compile the details required. We do not agree that this arrangement will in any respect go against the spirit of the transitional arrangement for the SF Bill. It should be noted that AIs are already expected to ensure that their staff are fit and proper to conduct securities business and the placing of the names of such staff on the register is an acknowledgement of that fact. This need not wait until the end of the transitional period. The BAB together with the SF Bill on enactment will give the necessary statutory backing for the application of the relevant regulatory requirements and hence enhance the effectiveness.
4 BO S.20(3)	HKAB	The reference to “including an AI seeking to be an exempt AI” is unnecessary.	A minor drafting point to be considered further with the Law Draftsman although there is nothing objectionable in the current wording which seeks to put beyond doubt the meaning of an AI in the context.
4 BO S.20(4A)	Law Society	The requirement in S.20(4A) for the register to be made available for public inspection is redundant since s.20(5) already provides for public access to the register maintained by the HKMA.	Pursuant to a Government circular in relation to the Personal Data (Privacy) Ordinance, the purpose of a public register containing personal data should be set out in the legislation that establishes it. S.20(4A) seeks to achieve this specific objective.
4 BO S.20(9)(a)	HKAB	The reference to Sch 9 to the SF Bill should be section 25(a) and 32 instead of section 26(a) and 33.	Minor drafting point to be considered further with the Law Draftsman. The current formulation still works and it brings out more clearly the register as the subject matter.
4 BO S.20(1)(ea) SF Bill Cl.164(4)(c))	HKAB	Nexus between failure of staff of exempt AI to comply with code of conduct as fit and proper consideration and the maintenance of register of exempt AI staff by HKMA is unclear.	Will consider requiring a standard condition of exemption that the exempt AI should ensure that such relevant individuals are fit and proper before their names are entered into the HKMA register.
9 BO S.71C, 71D	Wocom	Executive officers of exempt AIs must be senior enough to commensurate with his/her responsibilities and a director rank should be required.	It is required that applicants for executive officer appointment should have sufficient authority to supervise the conduct of the regulated activities concerned. Whether a “director” ranking is necessary will have to be examined on a case by case

			basis, depending on the way the securities business of an AI is structured.
9 BO S.71C, 71D	Law Society	Only officers with overall responsibility for the supervision of regulated activities as a whole should require HKMA approval as executive officers or only two such approved executive officers are required.	Under s.71D of BO, consistent with the requirement on a licensed corporation, an exempt AI is required to have not less than 2 executive officers for directly supervising its conduct of the regulated activity. The consent of the HKMA is required for becoming an executive officer. The HKMA shall have regard to, among other things, whether the officers have sufficient authority to assume the supervisory role. In other words, S.71D of BO only requires the appointment of not less than 2 executive officers. It does not require the appointment of each and every person having any responsibilities for any part of the regulated activity of an AI.
9 BO S.71D	HKAB	Executive officers – no need to be a director to be appointed, no need to appoint every person who has some supervisory responsibility, no limit on the number of officers who can be appointed.	The understanding is correct, provided each executive officer appointed has sufficient authority to directly supervise the regulated activity. [See also the response above to the comments of Wocom and the Law Society on clause 9.]
9 BO S.71D	HKAB	In a licensed corporation, the role of the “executive director” is either actively participating in or directly supervising the regulated activity. There is no guidance on the role of the other responsible officer (i.e. who is not an “ED”). The BAB requirement therefore goes beyond the SF Bill since under BAB both executive officers are “directly supervising”.	The requirements in the BAB regarding the appointment of executive officers do not go beyond the corresponding requirements in the SF Bill for licensed corporations. The latter requirements mean that licensed corporations must appoint at least two responsible officers. At least one of these need to be an “executive director”, but both must have sufficient authority within the licensed corporation. Also, by construction of the relevant provisions, both must be capable of supervising since there has to be at all times at least one available to supervise.
9 BO S.71D	Hon Henry Wu	Every executive director of a licensed corporation has to be approved by the Commission as a responsible officer of the corporation under section 124(1)(a) subject to the "fit and proper" test under section 125. However, a bank can <u>nominate</u> (by itself) any two executive officers as responsible officer <u>without approval</u> from the Commission.	Given that securities dealing is not the core business of AIs, it is not practical to require the executive directors of AIs to be appointed as executive officer. The purpose of requiring the appointment of executive officers (subject to HKMA’s consent in the case of exempt AIs) is to ensure that the senior management of AIs assigns officers of sufficient authority to supervise the conduct of regulated activities, and this is enshrined in the new section 71C(2)(a)(iii). The SFC fit and proper test for responsible officers will also apply to the appointment of executive officers in the case of exempt AIs.
9 BO S.71C	HKAB	Executive officers subject to such conditions that HKMA <u>thinks proper</u> – responsible officers subject to <u>reasonable</u> conditions that SFC may impose.	Drafting is in line with S.71 of BO. There does not appear to be any practical inconsistency with the SF Bill.

9 BO S.71C, 71D	HKAB	Strict liability offence under new S.71C and 71D of BO but offence in Cl.124 of SF Bill only committed if the act is “without reasonable excuse”. Penalties in BO also higher.	The level of penalties is in line with S.71 and 74 of BO. S.126 of the BO also provides a defence if the person charged proved that he took all reasonable precautions and exercised all due diligence.
9 BO S.71C(7)(b)	Law Society	S.71C(7)(b) should be revised to read “.... in relation to <u>substantially</u> the same regulated activity”.	Drafting point to be discussed with the Law Draftsman. The current wording is not expected to give rise to any major problem.
In relation to Part VI of the SF Bill – Capital Requirements, Client Assets, Records, Audit etc			
6 BO S.59B(4)	Law Society	The penalty for breaching S.59B concerning notification of financial year-end is disproportionately severe. Same concern arises in respect of other penalty provisions of the BO.	Need to maintain internal consistency in the BO. But prepared to examine this particular case further subject to views of the Bills Committee.
In relation of Part IX of the SF Bill – Discipline			
5 BO S.58A	Law Society	Disciplinary actions against exempt AIs – whether the HKMA has the final say upon consultation by the SFC and whether the HKMA will also consult the SFC before taking any disciplinary actions.	The power of revoking exemption ultimately rests with the SFC, which will obviously consider seriously the views expressed by the HKMA in the required consultation. Before exercising its power of issuing reprimand, the HKMA will take into account the approach of the SFC in similar cases. The regulatory co-operation between the SFC and the HKMA will be underpinned by a revised MoU.
5 BO S.58A(2)	HKAB	Exempt AIs should have “reasonable” opportunity of being heard before HKMA exercises power of reprimand.	Will consider whether CSA is needed.
5 BO S.58A(4)	Law Society	Definition of misconduct adds too much potential subjectivity. S.58A(4)(d) of BO and s.186(1)(d) of SF Bill should therefore refer to the “reasonable opinion” of the HKMA or SFC. Alternatively, the HKMA should be required by law to consult the SFC before forming any opinion of misconduct having been committed by an exempt AI.	In practice, the HKMA will follow the approach adopted by the SFC in forming the opinion and make reference to the SFC decisions in previous cases. The intention is to issue a Guidance Note to AIs in due course. The forming of “opinion” inevitably involves subjective judgement. For this, the SFC is required to observe the procedural requirements as specified in clauses 189 and 191 for making an informed and transparent opinion. The HKMA is also required to observe the procedural requirements in section 58A. Any party aggrieved by the decision made in respect of him can lodge an appeal with the Securities and Futures Appeals Tribunal or, in the case of exempt AI, to the Chief Executive in Council. Furthermore, the common law grounds of judicial review already require a decision-maker to make a properly informed and balanced decision. Otherwise, the decision will be struck down.

5 BO S.58A(5)	Law Society	S.58A(5) should be revised to read “.... to reprimand an <u>exempt</u> authorised institution”	Drafting point to be considered with the Law Draftsman. Proposed wording does not appear to be absolutely necessary as specific reference has been made to MA's power to reprimand under this clause.
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**Hong Kong Monetary Authority
Financial Services Bureau
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