

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

**Administration’s Response to “Supplement to the Comparison Table for Part VIII”
prepared by the Legal Service Division (LSD) of the Legislative Council
(Annex to LC Paper No. CB(1)770/00-01(01))**

Clause No.	LSD’s Remarks	Administration’s Response
172(1)	The power to direct production of records etc., which was previously exercisable by the Commission and on delegation by an authorized person, is now exercisable exclusively by an authorized person.	Under clause 172(1), an authorized person may subject to certain conditions give a direction to a corporation, as well as a related corporation, an authorized financial institution, an auditor or any transaction counterparty of the corporation requiring the production of any record and document specified in the direction. An “authorized person” is defined in clause 172(16) as a person authorized under sub-clause (11), which provides that the SFC may authorize in writing any person as an authorized person for the purposes of clause 172. The intention is that the SFC will usually authorize one of its staff as an authorized person under clause 172(11). However, the Bill allows the SFC the flexibility to authorize a person outside the SFC to be an authorized person. For example, in occasional situations, the SFC may wish to appoint an independent expert (e.g. an accountant) to carry out an inspection where specialist expertise is required.
172(4)	In the existing legislation, it is a defence if a person does not comply with a direction because he is not in possession or control of the record or document or it is not reasonably practicable for him to comply with the requirement. It is not clear whether such defences are included in “reasonable excuse”. It is not clear whether legal privilege is a reasonable excuse.	What is a reasonable excuse is ultimately up to the court to decide. However, from SFC’s past experience, we would anticipate that “not in possession or control of the record or document”, “no knowledge” and “legal privilege” would constitute reasonable excuses. In respect of legal professional privilege, this is already protected by clause 368(4). But what amounts to “not reasonably practicable” would depend on the circumstances of each case. We expect that a court would balance the importance and scope of the requirement against the difficulty and cost of compliance to the person subject to the requirement. In practice, the SFC would negotiate with the person being the subject of an inquiry if there were genuine compliance difficulties or ambiguity in the scope of documents requested.

Clause No.	LSD's Remarks	Administration's Response
173	The powers of the authorized person seem no longer exercisable in respect of any person who has since ceased to be an intermediary.	The supervisory powers of the SFC are not intended to apply in respect of a person who has ceased to be an intermediary or an associated entity of an intermediary. The clause is intended for the SFC to monitor and inspect, on a routine basis, the businesses of an intermediary or an associated entity for the purposes of ensuring compliance with the regulatory requirements.
174	The Commission no longer exercises any of the powers under this section. Only an authorized person may exercise those powers for the purpose of performing a function of the Commission.	Clause 174(1) allows only an authorized person to exercise the power to require any person identified in clause 174(1)(a)-(d) to furnish the authorized person with the information delineated in clause 174(2). An authorized person is defined in clause 174(10) as the person authorized under clause 174(5). Under clause 174(5), the SFC may authorize any person as an authorized person for the purposes of clause 174. The power to grant such authorization is in line with existing legislation (s 30 of the SFC Ordinance). The existing practice is for SFC employees to be authorized to carry out inspection, usually in a team under the supervision of an experienced SFC officer. The Bill allows the SFC the flexibility to authorize a person outside the SFC to be an authorized person. For example, in occasional situations, the SFC may wish to appoint an independent expert (such as an accountant) to carry out the inspection where specialist expertise is required.
178(3)	Instead of a straightforward statement of no double jeopardy as is the case in the existing legislation, Clause 178(3) now stipulates in a convoluted way to apparently the same effect.	Clause 178(3) seeks to set out more clearly the circumstances under which the “no double jeopardy” rule should operate, by providing not only for “previous conviction” as in existing legislation but also for “previous acquittal” and a temporal restriction by reference to “pending proceedings” to avoid unfair prejudice to defendants. The provision is consistent with Article 11(6) of the Hong Kong Bill of Rights, which states “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong” (our emphasis).

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180(2)	<p>The application of the rule against self-incrimination appears to have been restricted. Clause 180(2) now requires a person to provide self incriminating information notwithstanding such information may be used in criminal proceeding in respect of an offence under clause 172 or 177 and also in civil and criminal proceedings under Part XIII (market misconduct).</p>	<p>The Department of Justice advised that the criminal proceedings which may be instituted under clauses 172(13), (14), (15), 177, or clauses 245(2), 246(6), 249(9) or 250(9) of Part XIII of the Bill are mainly concerned with the prosecution for acts of non-compliance with a requirement to provide information, the giving of false or misleading information to an authorised person, non-compliance with orders of the Market Misconduct Tribunal (MMT) or for failure to comply with the procedural requirements imposed by the MMT.</p> <p>The compelled evidence obtained pursuant to the exercise of the power under clauses 172 and 176 might be relevant where it is used as evidence to prove that certain statements have indeed been made by the person concerned, for instance, in the prosecution of the offences of giving false or misleading information to an authorized person or of failing to answer truthfully the questions asked by the MMT in contravention of the relevant provisions mentioned in the above paragraph and as specified under clause 180(2)(i) and (ii) of the Bill. As the purpose of the admission of such statement in those proceedings is not to establish the truth of its contents but merely as evidence of the fact that such a statement had been made, the statement in itself does not incriminate the person concerned. Other evidence would have to be adduced, as in the case of perjury or other offences under Part V of the Crimes Ordinance, to establish that the statement is false or misleading.</p> <p>In this regard it has already been provided under the existing provision of section 19 of the Securities (Insider Dealing) Ordinance (Cap 395) that the evidence obtained under compulsion pursuant to the exercise of the powers under sections 16, 17 and 18 of the Ordinance shall be admissible as evidence in criminal proceedings where a person is charged with an offence under section 18 or 20 of the Ordinance which contains provisions similar in nature to those stipulated under clauses 172, 177, 245 (2) and 246(6) of the Bill.</p> <p>Furthermore, a provision has been enacted under section 174 of the UK Financial Services and Market Act 2000 that compelled answers made by a person to an investigator of the Financial Services Authority in compliance with an information requirement will not be admissible as evidence against the person generally in criminal proceedings brought against the person except where the offence being prosecuted relates to the provision of information which he knows to be or is reckless as to whether it is false or misleading.</p>

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		<p>As regards prosecution instituted under clauses 249(9) and 250(9) of Part XIII of the Bill for failure by a person, having been identified by the MMT to have engaged in market misconduct or whose breach of duties has been found by the MMT to have contributed to the market misconduct, to comply with an order of the MMT, it appears that the compelled evidence obtained under clause 172 or 176 is not likely to be relevant to those proceedings.</p> <p>In the circumstances, clause 180(2)(i) and (ii) do not appear to infringe the right to remain silent and the right against self-incrimination guaranteed under Articles 10, 11(1) and 11(2)(g) of the Hong Kong Bill of Rights or Article 14(1), (2) and (3)(g) of the International Covenant on Civil and Political Rights.</p>

Financial Services Bureau
Securities and Futures Commission
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