

Ref : CB1/BC/4/00

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

**Update on areas of concern raised by members  
during discussions on the Securities and Futures Bill and  
follow-up actions required from the Administration**

This paper summarizes the major concerns, views and suggestions raised by the Bills Committee on **Parts VIII to XII of and relevant Schedules** to the Securities and Futures Bill since December 2000. It has updated the list on areas of concern raised by members during discussions on the two Bills (LC Paper No. CB(1) 1379/00-01(01) issued on 29 May 2001 and summarized new issues and concerns raised by members during meetings held from June to October 2001 when the Bills Committee examined the two Bills clause-by-clause.

2. This paper should be read in conjunction with the relevant marked-up versions of the Blue Bill showing the Committee Stage Amendments to be proposed by the Administration which were issued to members in November and December 2001.

Legislative Council Secretariat

7 December 2001

## Part VIII of the Securities and Futures Bill

Date of meetings: 16 March and 17 & 18 July 2001

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
<b>Part VIII - Supervision and investigations</b>		
General	<p><u>Clauses 172 to 174 - Powers to require information, etc</u>  <u>Clauses 175 to 177 - Powers of investigations</u></p> <p>There are concerns about:</p> <p>(a) SFC has been given a wide range of power under clauses 172 to 177;</p> <p>(b) whether there are sufficient checks and balances for SFC's power; and</p> <p>(c) the request of audit working papers for "fishing expedition".</p>	<p>There are safeguards built-in in SFB to prevent abuse of power by SFC.</p> <p>The powers of SFC are also subject to judicial review and complaint to the Ombudsman.</p>
General	<p><u>PRP</u></p> <p>There is concern that PRP is only an administrative arrangement and has no statutory power to check the operation of SFC.</p> <p>The degree of transparency of operations of PRP is also a concern.</p>	<p>SFC's internal operation and procedures are subject to review by PRP, which set-up is unique to Hong Kong.</p> <p>A paper on PRP was provided under LC Paper No. CB(1) 909/00-01 of 26 March 2001.</p>

<b>Clause No.</b>	<b>Concerns/Views/Suggestions</b>	<b>Administration's response or Follow-up required by the Administration/Securities and Futures Commission</b>
175(1)	<p><u>Investigations</u></p> <p>The policy intention is to provide SFC with power to investigate both licensed persons/corporations and exempt persons/AIs.</p>	<p>The Administration will consider amendments.</p>
179	<p><u>Assistance to regulators outside Hong Kong</u></p> <p>There are concerns about assistance given by SFC for overseas regulators in conducting investigation in Hong Kong and how to ensure that an overseas regulator is subject to adequate secrecy provisions.</p>	<p>This is in line with international practice and subject to statutory safeguards. For instance, the SFC must be satisfied that the assistance should be provided in the interest of the public or investing public or that the assistance would enable or assist the recipient to perform its functions similar to those of the SFC or other financial regulators.</p> <p>A paper providing a list of authorities or regulatory organizations with which SFC has concluded MOUs or other co-operative arrangements was issued under LC Paper No. CB(1) 1174/00-01(03) of 8 May 2001.</p>

<b>Clause No.</b>	<b>Concerns/Views/Suggestions</b>	<b>Administration's response or Follow-up required by the Administration/Securities and Futures Commission</b>
180 (in connection with 172 and 177)	<p><u>Use of incriminating answers in proceedings</u></p> <p>There are concerns about self-incrimination for providing information or explanations required under Part VIII and that such evidence will be admissible to MMT proceedings under Part XIII.</p>	<p>For the concern about self-incriminating evidence, the policy intention is to oblige a person to provide information even though the information might tend to incriminate him in a preliminary inquiry into misconduct of listed corporations (clause 172(15A)) and an investigation (clause 177(3A)) by SFC. The protection for self-incrimination has been preserved in the revised clause 180.</p> <p>MMT proceedings are not criminal. Therefore, the use of information will not contravene the HKBOR.</p> <p>The use of information for "criminal" proceedings for MMT under clause 180(2)(ii) only refers to criminal provisions relating to the operation of MMT e.g. compliance with orders of MMT to compel evidence, giving of false evidence before MMT.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
	<p>There are concerns about why “the person” needs to make a claim for privilege against self-incrimination under clause 180(2)(i) and whether the person will be informed or reminded of such a need at crucial moment.</p> <p>There is a comment that the drafting of this clause should make reference to section 174 on prohibition of the use of evidence obtained by compulsion in criminal proceedings under FSMA of UK.</p> <p>There is a suggestion to delete “... limitations imposed by ...” in clause 180(1).</p>	<p>The need for making a claim is to replicate the common law requirement for privilege against self-incrimination.</p> <p>The Administration will consider a CSA to “remind” the person of the privilege.</p> <p>There is a statutory requirement under clause 180(1) to inform the person of the available privilege against self-incrimination.</p> <p>SFC has developed relevant procedures to inform and explain the details to the person concerned before the inquiry or investigation process begins.</p> <p>To consider the drafting comment.</p>

## Part IX of the Securities and Futures Bill

**Date of meetings: 30 March, 20 & 24 April, 18 July, 14 September and 5 October 2001**

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
<b>Part IX - Discipline, etc.</b>		
186(1)	<p><u>Interpretation of "misconduct"</u></p> <p>There are concerns that in clause 186(1)(d):</p> <p>(a) the phrase "in the opinion of the Commission" involves SFC forming a subjective judgement; and</p> <p>(b) the phrase "prejudicial to the interest of the investing public or to the public interest" is widely drafted.</p> <p>There are suggestions :</p> <p>(a) to remove "in the opinion of the Commission" from clause 186(1)(d); and</p> <p>(b) to narrow the scope of the sub-clause e.g. to provide that SFC or court must make reference to published conduct codes or guidelines in forming their opinion about misconduct, and intermediaries may use the codes or guidelines as self-defence.</p> <p>There should be proper checks and balances on the wide power of SFC as it is acting as the investigator, prosecutor, judge and jury for "misconduct" of intermediaries.</p>	<p>The Administration's response to concerns about "misconduct" in LC Paper No. CB(1) 1836/00-01(02) of 26 July 2001. It explains why the phrase "in the opinion of the Commission" be retained.</p> <p>SFC has issued codes or guidelines on the standards of ongoing conduct expected of licensed persons and will base on them to form its opinion as to whether "misconduct" has occurred. The Administration will consider amendments to require SFC to have regard to such codes or guidelines in forming its opinion.</p> <p>Examples of "misconduct", which are modelled on existing law are provided in LC Paper No. CB(1) 1174/00-01(05) of 8 May 2001.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
		<p>SFC as the regulator of licensed intermediaries is the appropriate authority to impose disciplinary sanctions when intermediaries fall short of expected standards. Only breaches of the legislation will result in <u>criminal</u> sanctions. There are adequate procedural safeguards on SFC's disciplinary power (Administration's response in LC Paper No. CB(1) 1836/00-01(01) of 26 July 2001).</p>
186(2)	<p><u>The management of an intermediary is guilty of misconduct if such a misconduct occurred with the consent or connivance of, or due to negligence of the management</u></p> <p>There are concerns that:</p> <p>(a) the clause which deems the management of the intermediary to be guilty is too harsh; and</p> <p>(b) the "neglect" standard for attributing disciplinary liability is unfair.</p>	<p>Many significant intermediary failures were due to management incompetence. Managers have a duty to supervise the corporation properly. Neglect is an appropriate standard (Administration's response in LC Paper No. CB(1) 1836/00-01(01) of 26 July 2001).</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
		SFB has already tightened the current law which provides for automatic attribution to an officer of the misconduct of a licensed corporation. SFC must prove that the licensed person's misconduct was attributable to the neglect, consent or connivance of a responsible officer or other person involved in the management.
187(1)	There seems to be inconsistency as "regulated person" (in the English version) is sometimes referred to "該人" or "該人士" in the Chinese version.	To review the drafting.
187(2)	<p><u>SFC's power to impose civil fines</u></p> <p>There are concerns about SFC's power to impose civil fines which is the greater of \$10 million or three times the amount of the profit gained or loss avoided, and that the principles for determining the levels of fines are not clearly stipulated.</p>	<p>The Administration has proposed a new clause 191A to set out the considerations which SFC shall have regard to when imposing fines. SFC will be obliged to issue fining guidelines before this provision comes into effect.</p> <p>The policy intent is that where in cases the profits/losses could not be ascertained, the \$10 million cap will apply and SFC will determine the level with reference to the fining</p>



Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
	<p>There is concern about the compatibility of the fining power with the HKBOR.</p>	<p>guidelines.</p> <p>The Administration has provided a list of court cases which have been taken into account in ensuring compliance with Articles 10 and 11 of the HKBOR in LC Paper No. CB(1) 1246/00-01(05) of 16 May 2001.</p>
188(1)(b)(iv)	<p><u>SFC may suspend or revoke a corporation's licence if "any of its directors" is affected by mental illness</u></p> <p>There is comment that the provision is too harsh.</p> <p>There is concern that such a ground for suspension/revocation of licence is not applicable to exempt AI.</p>	<p>The Administration has proposed CSA to provide that "mental incapacity" can be a disciplinary ground only if it affects the fitness and properness of the licensed corporation.</p> <p>Mental incapacity will call into question the fitness and properness of a director of an authorized institution. This result in either withdrawal of consent given to the director or cast doubt on whether the AI should remain authorized.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
<p>187, 188, new 189A, 190</p>	<p><u>Disciplinary actions in respect of licensed persons and exempt persons</u></p> <p>There is concern that certain disciplinary sanctions have no application to an exempt AI. The clauses seek to extend sanctions including suspension of exemption, reprimand, prohibition orders and pecuniary fines applicable to licensed persons to exempt persons to better achieve a level play field.</p> <p>The LegCo Legal Service Division is required to ascertain whether there is any differences between the disciplinary provisions governing the licensed persons and the exempt person.</p>	<p>See the Administration's responses in LC Paper No. CB(1) 1374/00-01 of 28 May 2001.</p> <p>Paper provided by Legal Service Division - LC Paper No. CB(1) 2090/00-01 of 24 September 2001. See Administration's responses in LC Paper No. CB(1) 531/01-02 of 7 December 2001.</p>
<p>new 191</p>	<p><u>Procedural requirements in respect of exercise of powers under Part IX</u></p> <p>There is concern that clause 191(1) only provides an opportunity to be heard to an intermediary subject to disciplinary sanction. This is contrary to the existing law which provides that SFC must conduct a disciplinary "inquiry" before imposing a sanction.</p> <p>There is comment that the steps:</p> <p>(a) to issue to the concerned intermediary a letter of mindedness on SFC's concerns;</p> <p>(b) to provide the intermediary with an opportunity of being heard; and</p> <p>(c) to give the intermediary written notice of SFC's final decision on disciplinary</p>	<p>The existing "inquiry" requirement is somewhat artificial as disciplinary proceedings usually follow an investigation. Also, existing law does not specify how such an inquiry should be conducted.</p> <p>The new clause 191 will rationalize the existing process. The SFC will set out in a letter of mindedness its</p>

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	<p>actions with reasons</p> <p>to be taken by SFC to ensure procedural fairness in exercising its disciplinary power are unclear.</p>	<p>concerns and preliminary conclusions. The intermediary will be given a month to respond to the letter (extension will be allowed if justified). In order to ensure fairness and natural justice, meetings with the intermediary will be held where the case warrants. A written notice of decision will be issued after SFC has considered the representations.</p>
191(1)	<p>There is concern whether “合理的陳詞機會” in Chinese is appropriate for the phrase “opportunity of being heard”. There is a view that the definition of “opportunity of being heard” in Schedule 1 which means “an opportunity of being heard through the medium of written representations” is too restrictive. The subject should be provided with option to request for a meeting with SFC.</p>	<p>In practice, SFC apart from accepting written representations, may meet with the person as appropriate.</p> <p>To consider the comments.</p>
193	<p><u>General provisions relating to exercise of powers under Part IX</u></p> <p>Clause 193(1) provides that SFC may have regard to any information or material in its possession which is relevant regardless of how the information has come into its possession. There are concerns that:</p> <p>(a) evidence obtained by unlawful means will be admissible in courts; and</p> <p>(b) whether SFC should be given such a wide power.</p>	<p>SFC is obliged to disclose the information it relies upon in disciplinary proceedings and the subject will be given an opportunity to be heard. SFC will judge whether the information obtained is trustworthy and whether it is fair to use the information</p>

<b>Clause No.</b>	<b>Concerns/Views/Suggestions</b>	<b>Administration's response or Follow-up required by the Administration/Securities and Futures Commission</b>
		<p>(Administration's response in LC Paper No. CB(1) 1836/00-01(01) of 26 July 2001).</p> <p>The Administration has explained the common law position with respect to admissibility of evidence in disciplinary proceedings, and provided examples of illegally obtained evidence which might be admissible in criminal proceedings in LC Paper No. CB(1) 1420/00-01(03) of 4 June 2001.</p>

## Part X of the Securities and Futures Bill

Date of meetings: 24 April and 14 & 17 September 2001

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
<b>Part X - Powers of intervention and proceedings</b>		
197	<p><u>Restriction on dealing with property</u></p> <p>The clause is widely drafted. The scope of "property" on which SFC may impose restrictions is not clearly defined.</p> <p>The Administration is requested to compare the definition of "property" and the use of "asset" in equivalent provisions of FSMA in UK.</p> <p>There is concern about imposing restriction on "any other property ... connected with the business ... the licensed corporation is licensed" in revised clause 197(2)(b). The clause is widely drafted.</p>	<p>The power for SFC to impose prohibitions or requirements on corporations in dealing with property is important to preserve the property for protecting investors' interests.</p> <p>The Administration's response in Annexes 1 and 2 of LC Paper No. CB(1) 1964/00-01(01) of 5 September 2001.</p> <p>SFC's decision under clause 197 is appealable to SFAT. The Administration has proposed CSA in clause 197(2) to restrict the definition of "relevant property".</p> <p>The Administration will review the revised clause 197(2)(b).</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
199	<p><u>Requirement to transfer custody of property</u></p> <p>There are comments that the scope of “property to be transferred” and the ways by which SFC deals with different types of property are not clear.</p>	<p>Clauses 199 and 206 (SFC to apply for court orders and injunctions with respect to client property) together are intended to enable SFC to protect client property. Due to members' concern about the wide scope of clause 199, the Administration has proposed to delete the clause and rely on clauses 197 and 206 to protect clients' property. (Annex 3 to LC Paper No. CB(1) 1964/00-01(01) of 5 September 2001).</p> <p>Members accepted this proposal at the meeting on 14 September 2001.</p>
202(7)	<p><u>SFC to publish actions about prohibition or requirement on licensed corporations</u></p> <p>The clause requires that SFC “may” publish the actions in the Gazette. There is a comment that “shall” is a more appropriate word as this will enhance transparency of decisions made.</p>	<p>To consider the drafting comment.</p>
204	<p><u>Certification to Court of First Instance relating to non-compliance with prohibitions or requirements</u></p> <p>There is a view that as guilty of contempt of court will lead to criminal sanctions,</p>	<p>The procedures regarding service of</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
	sufficient safeguards must be put in place for SFC to serve notice of prohibition or requirement to protect the subject.	notices in relation to prohibitions are stipulated in clause 386 in Part XVI.
205	<p><u>Winding up orders and bankruptcy orders</u></p> <p>There is concern that SFC's power in this respect is very wide and has extended to "related corporations" which are not listed.</p>	<p>The Administration has stressed that an application to the court for the order must be made in public interest and is only granted by the court on the ground that it is "just and equitable".</p> <p>The Administration has provided information on how the power will be exercised (Annexes 4 and 5 to LC Paper No. CB(1) 1964/00-01(01) of 5 September 2001).</p>
206	<p><u>Injunctions and other orders</u></p> <p>There are concerns that:</p> <p>(a) the scope of orders made under clause 206(2)(d) is unclear;</p> <p>(b) SFC is not required to give an undertaking for damages in an application for injunctions in clause 206(7);</p>	<p>The Administration has explained the need for clause 206 and clarified the concerns in Annex 6 to LC Paper No. CB(1) 1964/00-01(01) of 5 September 2001.</p> <p>The Administration has proposed CSA to delete clause 206(7).</p>

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	(c) the policy intention of clause 206(8) is unclear.	The Administration has confirmed the policy intention of clause 206(8) that the court should be liberal in considering injunction and other applications given SFC's objectives and other guiding principles as set out in Part II of SFB (Annex 6 to LC Paper No. CB(1) 1964/00-01(01) of 5 September 2001).
207(3)	<p><u>SFC to consult FS before applying to the court for remedies in cases of unfair prejudice, etc by a listed corporation to interests of its members</u></p> <p>There is reservation on the need to consult FS before SFC will exercise the power.</p>	The clause follows the existing law. The requirement for prior consultation with FS and that the court has discretion to refuse an order are protection for possible abuse of power. This is in line with a similar power of FS under CO.
208	<p><u>Civil liability for false or misleading public communications concerning securities and futures contracts</u></p> <p>There are concerns that:</p> <p>(a) the clause is too board and overlaps with clause 107 (civil liability for inducing others to invest money in certain cases);</p>	Clause 208 will be relocated to Part XVI of SFB. The Administration has set out its latest position on the matter in the Annex to the CSA paper on Part XVI (LC Paper No.



<b>Clause No.</b>	<b>Concerns/Views/Suggestions</b>	<b>Administration's response or Follow-up required by the Administration/Securities and Futures Commission</b>
	<p>(b) it is not clear whether auditors' reports are covered under the clause (it will be unfair to the accounting profession as accountants do not have a direct responsibility to the public);</p> <p>(c) it is not clear how a person "has assumed responsibility" with respect to the victim in relation to the disclosure in clause 208(3); and</p> <p>(d) the basis for calculating damages is unclear.</p>	CB(1) 452/01-02(01) of 29 November 2001).
drafting in the Chinese version	There is an observation that the reference to "any" in the English text is referred to "任何" in some of the clauses in the Chinese text e.g. 206(2)(a), (b) and (c); but not in others e.g. 206(2)(f).	To review the English and Chinese texts to achieve consistency.

**Part XI of and Schedule 7 to the Securities and Futures Bill**

**Date of meetings: 27 April, 2 May and 17 September 2001**

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
<b>Part XI - Securities and Futures Appeals Tribunal</b>		
210	<p><u>SFAT</u></p> <p>There is a view that SFAT should have power to hear and review all decisions of SFC.</p>	<p>The present approach to state in the legislation the specific decisions that can be appealed to SFAT is modelled on existing laws and is considered clearer and more certain (Administration's response in LC Paper No. CB(1) 1855/00-01(02) of 1 August 2001).</p>
210(2) 210(5)	<p><u>Chairman of SFAT; SFAT to be divided into divisions</u></p> <p>There is a view that a "deputy chairman" should be appointed for each review if the Tribunal was to be divided into divisions.</p> <p>The operation of "divisions" of SFAT is unclear. It is unclear whether the Chairman of the Tribunal will preside over reviews conducted by other divisions.</p>	<p>To consider clarifications.</p>
211	<p><u>Applications for review of specific decisions</u></p> <p>To review the use of "served on" in the clause.</p>	<p>To consider the drafting comment.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
211(3)	<p><u>Extension of appeal period</u></p> <p>SFAT should be empowered to extend the appeal period of 21 days which is consistent with provisions in FSMA of UK.</p>	To consider amendments.
212(2)(a)	<p><u>Decisions SFAT may make</u></p> <p>To replace “and” with “or” in the clause.</p>	To consider the drafting comment.
212(3)	<p><u>An opportunity of being heard to the parties to a review</u></p> <p>This clause seems superfluous as there are already provisions on proceedings for SFAT.</p>	To review the need of the clause.
212(4)	<p><u>Standard of proof in Tribunal proceedings</u></p> <p>There is concern about adopting “balance of probabilities” as the standard of proof. This is different from “the standard of proof as the Court of First Instance in the exercise of the same powers to punish for contempt” in clause 214(3).</p>	To consider amendments.
213, 214	<p><u>Powers of Tribunal in conducting a review; Contempt dealt with by Tribunal</u></p> <p>Clause 213 provides that it is an offence to disobey a SFAT order. Clause 214 provides an alternative route where SFAT can punish non-compliance with its order as contempt of court.</p> <p>The Administration is requested to provide information on the bases for the penalty level prescribed in clause 213(3) and to provide examples in existing law where a criminal offence could be punished as contempt of court.</p>	To provide the information.

<b>Clause No.</b>	<b>Concerns/Views/Suggestions</b>	<b>Administration's response or Follow-up required by the Administration/Securities and Futures Commission</b>
221	<p><u>Appeal to Court of Appeal</u></p> <p>There is a view that the Court of Appeal should have the power to confirm, vary or substitute a decision of SFAT, in addition to the power to remit a matter back to the Tribunal.</p>	To consider the view.
225	<p><u>Appeals to CE in Council in respect of excluded decisions</u></p> <p>There is concern about the difference in appeal mechanism where decisions made by HKMA in relation to an exempt AI are appealable to CE in Council while those by SFC for a licensed person are appealable to SFAT.</p>	<p>To ensure consistency in approach and a level playing field for SFC licensees and registered institutions (previously exempt AIs), all decisions concerning securities and futures related activities will be appealable to SFAT. Clause 225 will be deleted. Other major CSAs will be made to clauses 209, 212, and Part 2 of Schedule 7 (Divisions 1, 2) of SFB; and clause 12 of BAB (i.e. section 132A of BO).</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
<b>Schedule 7 - Appointment of members and proceedings of Tribunal, etc Part 1</b>		
2, 5	There is a view that as the Chairman of the Tribunal is appointed by CE with recommendation of CJ, he/she may be removed from office by CE after consultation with CJ.	To consider the views.
11	There is reservation that SFS shall appoint members to a review. In order to uphold justice, SFAT members should be assigned to reviews on roster basis subject to there being no conflict of interest to the parties under review. This arrangement is adopted by the Board of Review (Inland Revenue Ordinance).	
13, 16	<p>There is query about the need to appoint temporary members to replace the Chairman and ordinary members after a review has been commenced.</p> <p>It will be unfair to the parties if members are allowed to be absent from sittings or resign, and replaced by temporary members. Under such circumstances, members to a review should be re-appointed and hearings be started afresh.</p>	
21	The Chairman for a review shall convene sittings <u>as soon as practicable</u> to avoid unnecessary delay in determining a review.	
31	<p>The purposes of a preliminary conference should be clearly spelt out in the provision.</p> <p>There is concern that "ordinary member or other person" may preside over such conferences.</p>	

<b>Clause No.</b>	<b>Concerns/Views/Suggestions</b>	<b>Administration's response or Follow-up required by the Administration/Securities and Futures Commission</b>
General	<p><u>"specific decisions" made by the Commission or ICC</u></p> <p>There is a view that "compensation decisions" made by SFC or ICC should be appealable to SFAT.</p>	<p>A new Division 3 in Part 2 of Schedule 7 to SFB will be created for this purpose.</p>

**Part XII of and Schedule 9 to the Securities and Futures Bill**

**Date of meetings: 4 May and 17 September 2001**

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
<b>Part XII - Investor Compensation</b>		
228	<u>Definition on "default"</u>  The words "to be" should be deleted.	To consider the drafting comment.
229(1)	<u>Establishment of compensation fund</u>  The phrase "trading in" should be deleted.	To consider amendment.
230(1)(c)	<u>The compensation fund to receive all amounts recovered by SFC or ICC</u>  There is doubt as to whether the compensation fund can receive non-money assets (e.g. securities) recovered by SFC or ICC.	To review the clause.
232	<u>Accounts of compensation fund</u>  There is a view that the audited financial statement of the compensation fund should be laid before the LegCo.	The Administration will propose CSA to this effect.
234(4)	<u>Payments out of the compensation fund</u>  To delete the clause which is not relevant consequential to the transitional arrangements under clauses 72 and 73 of Schedule 9.	The Administration will propose CSA to this effect.

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
235	<p><u>Subrogation of the Commission to rights, etc of claimant on payment from compensation fund</u></p> <p>It is not clear as to how the loss recovered from the defaulted intermediaries will be distributed between SFC and the claimants under the clause.</p> <p>There is still doubt as to whether the revised clause 235 has achieved the purpose that the rights of SFC and the claimant to recovered assets will be "proportional".</p>	<p>The Administration has provided examples to illustrate the operation of clause 235 in LC Paper No. CB(1) 2008/00-01(01) of 14 September 2001.</p> <p>CSAs have been proposed in clause 235 (and clause 87 in Part III) to remove SFC's priority in the distribution of recovered assets to reflect the High Court decision in the Forluxe case in 2000. The rights of SFC and the claimant to recovered assets will be ranked equally.</p>
236	<p><u>Rules by CE in Council and Commission</u></p> <p>It is not clear as to when rules will be made by CE in Council or by SFC.</p> <p>The principles and matters to be covered by rules should be set out in SFB as far as practicable.</p>	<p>The Administration has provided the main conclusions reached during the public consultation on the Proposed New Investor Compensation Arrangements conducted in April 2001, and summarized the matters to be covered by rules made under Part XII in LC Paper No. CB(1)</p>



Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
		<p>1855/00-01(04) of 1 August 2001.</p> <p>The overall purpose of the investor compensation arrangements is stipulated in the revised clause 229. Any rules (which are subsidiary legislation) to be made under clause 236 has to be subject to this overall purpose.</p>
236(2)(a)	The reference "is to be or" should be deleted.	To consider the drafting comment.
General	There is no specific provision on the person or authority to be responsible for the management of the compensation fund and determination of claims.	The Administration will add a new clause 230A to spell out the arrangement.
General	<p><u>Decisions by ICC to be appealable</u></p> <p>There is a suggestion that compensation decisions made by SFC or ICC should be appealable to SFAT.</p>	The Administration has proposed to create a new Division 3 in Part 2 of Schedule 7 for this purpose.
General (in connection with 80 in Part III)	<p><u>Structure and functions of ICC</u></p> <p>There is concern that Part III does not provide for the structure and functions of ICC.</p>	The Administration will review the relevant clauses to ensure that the important functions would <u>not be transferred</u> from SFC to ICC under clause 80. These may include some of the functions under clause

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
	<p>There is a view that provision should be made to govern the board of ICC.</p>	<p>232.</p> <p>Currently, there are only provisions on the board of the recognized exchange controller (i.e. HKEx). No such requirements are imposed on the structures of exchanges and clearing houses.</p> <p>ICC's governing body will include representatives from SFC, exchanges, the industry and the public. ICC's constitution and rules will be approved by SFC.</p>
<p><b>Schedule 9 - Savings, Transitional and Supplemental Arrangements</b></p> <p><b>Part 1</b></p>		
<p>72, 73, 74</p>	<p><u>Transitional arrangements regarding the existing compensation funds and the new fund</u></p> <p>There should be provisions to cater for late claims made to the existing compensation funds.</p>	<p>To consider the comments.</p>

Abbreviations :

AI	- Authorized institution
ATS	- Automated Trading Services
BAB	- Banking (Amendment) Bill 2000
BO	- Banking Ordinance
CE	- The Chief Executive
CJ	- The Chief Justice
CO	- Companies Ordinance
CSA	- Committee Stage Amendments
ED	- Executive Director
ETO	- Electronic Transactions Ordinance
FRR	- Financial Resources Rules
FS	- The Financial Secretary
FSMA	- Financial Services and Markets Act 2000
HKBOR	- Hong Kong Bill of Rights
HKE <sub>x</sub>	- The Hong Kong Exchanges and Clearing Limited
HKMA	- The Hong Kong Monetary Authority
ICC	- Investor Compensation Company
LegCo	- The Legislative Council
MMT	- Market Misconduct Tribunal
MOU	- Memorandum of Understanding
MPF	- Mandatory Provident Fund
PRP	- Process Review Panel
SEHK	- The Stock Exchange of Hong Kong
SFAT	- The Securities and Futures Appeals Tribunal
SFB	- Securities and Futures Bill
SFC	- The Securities and Futures Commission
SO	- Securities Ordinance

Legislative Council Secretariat

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