

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 XV and XVI** of 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 200

Part XV of the Securities and Futures Bill

Date of meetings: 18 & 21 May and 12 & 24 October 2001

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up by the Administration/Securities and Futures Commission
Part XV - Disclosure of interests		
299	<p><u>Interpretation of Part XV</u></p> <p>Members have made comments or suggestions on the drafting of:</p> <p>(a) "relevant share capital" and</p> <p>(b) "underlying shares".</p>	To consider.
300	<p><u>Exemptions</u></p> <p>There is suggestion that SFC should publish particulars of exemptions granted.</p>	To consider.
304	<p><u>Circumstances in which duty of disclosure arises</u></p> <p>There is a question on why a new exemption is provided for intra-group transactions under clause 304(9).</p>	<p>The Administration has explained the policy for providing the exemption in Annex 1 to LC Paper No. CB(1) 2121/00-01 of 29 September 2001.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up by the Administration/Securities and Futures Commission
319	<p><u>Offence for non-compliance with notification requirements</u></p> <p>There are concerns that:</p> <p>(a) Part XV is complex and inadvertent breaches may lead to prosecution and conviction; and</p> <p>(b) it is a strict liability offence under clause 319 and defences available are insufficient.</p> <p>There are suggestions:</p> <p>(a) to add a “reasonable excuse defence” provision; and</p> <p>(b) to consider adjusting the penalty levels to better match the severity of the breach; and</p> <p>(c) to move clauses 319(4) to (6) relating to restrictions on shares to Division 12 of Part XV.</p>	To consider the amendments.
320, 325	<p><u>Power of listed corporation to investigate ownership of interests in its shares, etc;</u> <u>Offences for failure to provide information required by listed corporation</u></p> <p>A member has expressed concern that it is very time consuming and costly for an intermediary to provide such information. It is unfair to require the defendant to prove that the requirement to give the information is frivolous or vexatious. The listed corporation should be required to set out the reasons for seeking the information and to reimburse the intermediary for the expenses incurred.</p>	<p>The Administration has responded to the concern in LC Paper No. CB(1) 1407/00-01 of 31 May 2001.</p> <p>On the question on reimbursement of cost, the Bills Committee noted</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up by the Administration/Securities and Futures Commission
	<p>Imposing criminal liability for failure to comply with the requirement is too harsh. A "reasonable excuse defence" should be provided.</p>	<p>that no provision on reimbursement of cost is provided in comparable legislation in UK and Singapore. Members agreed not to propose change to the provision.</p> <p>To consider.</p>
322	<p><u>Listed corporation to investigate ownership of interests in its shares, etc on requisition by members</u></p> <p>There is concern that non-compliance with the request will be a strict liability offence.</p>	<p>To consider.</p>
323	<p><u>Listed corporation to report to members</u></p> <p>There is concern that non-compliance on the requirement will be a strict liability offence.</p> <p>It is suggested that the listed corporation should publish a report prepared under clause 323(3).</p>	<p>Members noted that the publication of a report arising from a clause 322 investigation is quite a rare event. The company would be put on alert at an early stage and should have ample time to meet this requirement.</p> <p>To consider.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up by the Administration/Securities and Futures Commission
347	<p><u>Power to investigate ownership of listed corporation</u></p> <p>The reasons for FS to commence an investigation is unclear.</p> <p>There is a comment that members of the listed corporation should not be required to pay for the cost of the investigation.</p> <p>If an applicant is required to contribute to the cost, he must be informed of the estimated amount before the investigation commences.</p>	To consider.
352	<p><u>Obstruction of inspectors</u></p> <p>Clause 370 (in Part XVI) also relates to obstruction. The two clauses should be reviewed.</p>	To review clause 352 with clause 370.
354(1)	<p><u>Expenses of investigation of affairs of corporation</u></p> <p>There is a question on whether the Court may require the convicted person to pay for expenses of investigation. There is a concern about the liability for the convicted person to indemnify other persons mentioned in clause 354(1)(b) to (e).</p>	To consider.
356	<p><u>Power to obtain information as to those interested in shares, etc.</u></p> <p>The grounds for FS to initiate an investigation or to require a person to provide information under clause 356(1) are unclear.</p> <p>A "reasonable excuse defence" should be provided in clause 356(4).</p>	To consider.

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up by the Administration/Securities and Futures Commission
General	<p><u>Disclosure regime as compared to those of overseas jurisdictions</u></p> <p>The proposed disclosure regime goes considerably further than other international financial markets. It will be complex and costly to comply with the requirements. Thus may affect Hong Kong's competitiveness as an international financial centre.</p> <p>There is suggestion that if the proposed disclosure regime is passed into law, the Panel on Financial Affairs of LegCo should review the regime at appropriate time in light of actual implementation.</p> <p>There is concern that the disclosure regime is not binding on the Government</p>	<p>The Administration has responded to similar market comments in LC Paper No. CB(1) 2120/00-01 of 28 September 2001.</p> <p>The Administration has provided comparison on the Hong Kong/US disclosure regimes in LC Paper No. CB(1) 2120/00-01 of 28 September 2001.</p> <p>The Administration has provided a paper on overseas jurisdictions (LC Paper No. CB(1) 2020/00-01 of 17 September 2001).</p>
Part XV - Disclosure of interests (Chinese version)		
335	<p><u>Notification of family and corporate interest and short positions by director and chief executive</u></p> <p>It is suggested that the drafting of clause 335 should be reviewed.</p>	To review.

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up by the Administration/Securities and Futures Commission
356	It is suggested that the reference of “財政司司長” should be adopted.	To replace the reference to “司長” by “財政司司長” in the Chinese version.

Part XVI of the Securities and Futures Bill

Date of meetings: 25 May and 8 & 24 October 2001

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up by the Administration/Securities and Futures Commission
Part XVI - Miscellaneous		
366	<p><u>Presentation of secrecy, etc</u></p> <p>There are concerns about:</p> <ul style="list-style-type: none"> (a) scope of the exceptions to secrecy under clause 366(3)(g); (b) the condition (i.e. in the interests of the investing public or in the public interest) under which SFC may disclose information; (c) independence of SFC may be compromised; and (d) the Administration may be able to obtain information received by the SFC. <p>There is a view that the exceptions to secrecy provision should be restricted to those persons who have a clear reason to know.</p> <p>The term "professional or semi-professional bodies" in clause 366(3)(h)(ii) is not clearly defined.</p> <p>There is a comment that the drafting of clause 366(3)(f)(i)(B) is complicated and should be reviewed.</p> <p>To consider narrowing the term "the police" in clause 366(3)(j).</p>	To consider improvements.

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up by the Administration/Securities and Futures Commission
	<p>There is concern about how to ensure there are “adequate secrecy provisions” in overseas regulatory organizations (clause 366(6)).</p> <p>It is suggested that there should be transparency in the public officer authorized under clause 366(12).</p>	
368	<p><u>Immunity</u></p> <p>There is doubt about whether “in good faith” is the sufficient threshold for immunity against civil liability.</p>	<p>See LC Paper No. CB(1) 1420/00-01(01) of 4 June 2001. Clauses 154 and 369 concerning immunity granted to auditors are also relevant.</p>
370	<p><u>Obstruction</u></p> <p>The clause is widely drafted. There are concerns about:</p> <p>(a) the phrase “any other person” is not clearly defined; and</p> <p>(b) whether there are sufficient checks and balances to guard against the extensive power of SFC.</p> <p>There is a view that the level of penalty under clause 370(1) should be comparable to similar offences.</p>	<p>To consider.</p> <p>The Administration undertook to provide a paper. See LC Paper No. CB(1) 512/01-02(04) of 7 December 2001.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up by the Administration/Securities and Futures Commission
372(3)(a)	<p><u>Provision of false or misleading information</u></p> <p>The circumstances under which a person will commit the offence is unclear.</p>	To consider.
373	<p><u>Power of Commission to intervene in proceedings</u></p> <p>The rights, duties and liabilities of SFC in intervening in a proceeding are unclear.</p>	To consider.
375	<p><u>Standard of proof</u></p> <p>There is doubt as whether the standard of proof in the provision should apply to “a court”.</p>	To consider.
376	<p><u>Prosecution of certain offences by Commission</u></p> <p>There are concerns about:</p> <p>(a) the circumstances under which SFC can exercise this power are unclear;</p> <p>(b) whether any guidelines will be made available as safeguards against possible abuse of power;</p> <p>(c) a person “not qualified to practise as a barrister or to act as a solicitor” can appear and plead before a magistrate for prosecution cases;</p> <p>(d) relationship of clause 376(3) with the Basic Law.</p>	<p>To explain existing SFC practice in this respect. See LC Paper No. CB(1) 529/01-02(03) of 7 December 2001.</p> <p>Confirmed consistent with the Basic Law.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up by the Administration/Securities and Futures Commission
378	<p><u>Liability of officers of corporations for offence by corporations, and of partners for offences by other partners</u></p> <p>To review phrases including “or attributable to any recklessness on the part of” and “is guilty of the offence”.</p> <p>The term “recklessness” in the English and Chinese versions should be reviewed.</p>	To consider.
384, 384A	<p><u>Rules by Commission</u> <u>General provisions for rules by Commission</u></p> <p>Clause 384A(3) may give SFC too much leeway not to conduct prior consultation on draft rules. It is suggested that a statutory Consumer Panel should be set up for consultation with the investing public.</p> <p>Criminal liability for breaching of rules (which are subsidiary legislation) should be specified in the primary legislation.</p> <p>Clause 384A(6) will have the effect of turning breaches of rules, which are not criminal offences in the primary legislation, into criminal offences by way of regulations by CE in Council. The Administration should provide such examples in other legislation.</p>	<p>See LC Paper No. CB(1) 423/01-02(01) of 27 November 2001.</p> <p>To provide relevant examples in other legislation. See LC Paper No. CB(1) 529/01-02(04) of 7 December 2001.</p>
385(6)	<p><u>Codes or Guidelines by Commission</u></p> <p>There is comment that it will suffice to spell out that court may consider the code or guideline if it is “relevant” to the proceedings. The phrase “shall be taken into account” in determining that question should be reviewed.</p>	To consider.

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up by the Administration/Securities and Futures Commission
390	<u>Exclusions of provisions of Gambling Ordinance</u> The proposed CSA is complicated. The clause should be amended to restore the Blue Bill version.	To consider.

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
HKEx	- The Hong Kong Exchanges and Clearing Limited
HKMA	- The Hong Kong Monetary Authority
ICC	- Investor Compensation Companies
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

8 December 2001