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

Summary of Public Comments and Administration's Response on Parts XIII and XIV of the Securities and Futures Bill

Clause No.	Respondent	Respondent's comments	Administration's response
Part XIII – Market Misconduct Tribunal			
Generally	CC	The Council welcomes the establishment of the MMT and the creation of a civil route to deal with all market misconduct.	We welcome the Council's support.
Generally	LS	The broad drafting of the market misconduct provisions and the retention of some strict liability provisions may have a chilling effect on legitimate market activities.	The market misconduct provisions are not broad. The insider dealing provisions remain largely unchanged from the existing law. The market manipulation provisions are very specific and closely modelled on long established Australian provisions which were, in turn, modelled on US law. The Australian provisions have not inhibited legitimate market conduct and do not cause concern to listed companies, market intermediaries or investors in Australia. Nor should they in Hong Kong.
Anti-competitive behaviour	CC	The Council will continue to pursue that anti-competitive behaviour be included in the definition of market misconduct.	The Bill seeks to promote a fair, efficient, competitive, transparent and orderly market, as set out in the regulatory objectives and functions of SFC in Part II.
Burden of proof	LL	The burden of "going forward with the evidence" in respect of market misconduct should be free to move back and forth between the prosecution and the defendant. Under the Bill it "stagnates" with the prosecution. The common law does not require this. The Bill should adopt the US practice in bringing the burden of persuasion and the "burden of going forward with the evidence" into the law. This would strengthen the authorities ability to combat market misconduct and protect investors.	The Bill generally places the burden of proving a breach of the law on the prosecution. This is both a matter of common law and generally required by the bills of rights provisions of the Basic Law. The situation is the same in the US. The "burden of going forward with the evidence" (or the "persuasive burden" in UK-HK law) is a matter of tactics and not a strict matter of law. It refers to a matter of common sense that, if the prosecution has produced enough evidence to show that the defendant is guilty, the defendant should produce evidence to show their innocence. It is not a matter incorporated into statute in the US, the UK or Hong Kong. Nor should it be.
Burden of proof	LL	The burden of proof for market misconduct was reversed because of pressure from merchant banks and securities firms.	The burden of proof was only shifted to the prosecution from the defence in relation to the mental element for disseminating false or misleading information (cl 268 and 290). This was done following consideration of representations that it was contrary to international practice to impose the onus of proving the mental element on the defendant in such offences. The US, UK and Australia generally impose the onus of proving the mental element in such offences on the prosecution.

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Burden of proof	LL	The SFC cannot investigate and prosecute many cases of market misconduct because of the burden of proof and understaffing.	The SFC cannot comment on the cases referred to owing to secrecy laws. However, the SFC is not prevented from investigating or prosecuting cases because of the burden of proof and understaffing. The SFC has to prioritise taking action in different situations because, like any agency, it has limited resources. However, the greatest obstacles to the SFC successfully prosecuting market misconduct are the criminal laws of evidence and procedure which hamper prosecutions of complex white collar crime. With the creation of dual civil and criminal routes the SFC will have the option of criminal prosecution to severely punish the worst instances of misconduct but will have the flexibility to take civil action in those cases where the public interest does not favour a criminal prosecution and/or there is no reasonable prospect of a conviction. This will help the SFC more effectively combat market misconduct.
Burden of proof	Group of nine investment bankers	Press comments that the burden of proof in the Bill for market misconduct is out of line with that in the US are incorrect. Under US law, it is generally for the prosecution to prove intention in market manipulation prosecutions.	We agree.
240(2)(e) and (f), 273	HKAB, LS	Clause 240 has been extended to exchange participants, their officers and employees. When an exchange participant receives a large order from a client, information about that order may be inside information as the order may be sufficiently large to affect the price of the security concerned which would prevent the exchange participant from executing the order.	Existing law under the S(ID)O already covers exchange participants (as "members" of the Exchanges). Exchange participants obviously do not feel inhibited from processing large orders they receive now. The extension to officers and employees of exchange participants is only a logical extension to existing law. There is no need for a safe harbour.
245(1)(a)	HKISD	It is a protection of the integrity of our civil rights/ liberty that certain materials would not be admissible as evidence in civil or criminal proceedings. This sub-clause is a step backward in our legal system and should be deleted.	This clause repeats section 17 of the existing S(ID)O which has never been the subject of complaint by implicated persons in past tribunals of inquiry. Under that section, the emphasis shifted away from the question of whether a piece of evidence was admissible to being one of what weight if any should be attributed to it. Therefore, although all forms of evidence are admissible, the tribunal is still bound by principles of fairness and would give evidence, otherwise inadmissible in the courts of law, little or no weight at all, depending on the particular circumstances.
246	HKISD	This clause removes an individual's right to remain silent. A person will have to provide self-incriminating statements or evidence or else that person will be committing an offence under this clause.	The right to remain silent is guaranteed under the Bill of Rights only in respect of the determination of a criminal charge. The information required to be provided under cl 246 is for the purposes of proceedings before the MMT (which as a civil tribunal may use self-incriminating evidence), and pursuant to cl 247 is not admissible in non-Part XIII criminal proceedings if self-incriminating.

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247 and 249	LCK	Clause 247(1) allows those who collaborate in market misconduct to avoid liability. By declaring that evidence provided by third parties is not admissible, the unintended consequence could be that investors lose their private civil rights of action against collaborators. Clause 249 should be amended so that the MMT may order collaborators to account for their aiding and abetting in the same manner as principals who engage in market misconduct are.	Clause 247(1) does not have the effect suggested. Clauses 247(1) and (3) have the effect that information adduced during MMT proceedings is only admissible in other civil proceedings if it would be admissible under the applicable evidence laws relating to those civil proceedings, regardless of that information being adduced before the MMT. In particular, the findings of the MMT and an MMT report are admissible and persuasive evidence in private civil actions brought under cl 272 (covered by cl. 247(1) by virtue of "admissible in evidence for all the purposes of this Part …"). But, information that the SFC gathers under its investigatory powers for the purposes of MMT proceedings will not normally be disclosed by the SFC to a private litigant. Under cl 244(4)(b) and (c), the MMT may identify a person who aids and abets another's market misconduct as a person who has engaged in market misconduct. That person is then subject to punishment by the MMT under cl 249.
247	KGI	Cases brought before MMT have usually been investigated by the SFC exercising its powers under Part VIII which includes the power to compel incriminating information to be used as evidence in MMT (cl 180). Under cl 247, MMT may receive and consider materials or evidence that would be inadmissible in civil or criminal proceedings. If such powers are to be indirectly generalised into civil or criminal actions, it may mean a serious canvass of the established legal rights of litigants.	Cl 180 provides that incriminating answers are not admissible in evidence against the person in criminal proceedings. The information required to be provided under cl 246 for the purposes of proceedings before the MMT, pursuant to cl 247, is generally not admissible in criminal proceedings if self-incriminating.
249	BA	The power to impose treble fines has been dropped on legal advice about developing European Court of Human Rights jurisprudence but we have yet to see concrete arguments why treble fines are in breach of human rights. High fines should be kept to ensure effectiveness of the market misconduct regime.	In the course of developing this proposal, the Government has been advised that the jurisprudence developing before the European Court of Human Rights involving human rights protections similar to those under the Basis Law and the Hong Kong Bill of Rights Ordinance cautions that pecuniary fine orders could, in certain cases, be "criminal" for human rights purposes. In light of such advice, the Government has decided that, while the original imperatives behind the creation of the MMT remain, a more prudent way forward would be not to pursue the original proposal to give the MMT the power to impose pecuniary fine orders, but to build in a series of effective civil measures to protect investors. However, the issue has been raised in an inquiry currently before the IDT under the existing ordinance and may therefore be determined by the courts in due course. It would not therefore be appropriate to speculate further on the issue since to do so might risk prejudicing those proceedings.

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259	HKISD	An 'innocent appellant' who was wrongly accused will not have the right of stay of execution. It is grossly unfair where a business is terminated as a result of a wrong decision by the MMT, which is later overturned by the Court of Appeal. The Court should have the power to grant a stay of execution if it deems appropriate.	The Court of Appeal does have the power to grant a stay of execution under clause 259. However, the lodging of an appeal against a determination of the MMT will not of itself, operate as a stay of that determination unless the Court of Appeal orders otherwise. The objective is to discourage applications for review or appeals which are designed to cause delay, whilst at the same time permitting stays to be granted in appropriate cases. The provision follows existing law in section 33 of S(ID)O.
250 and 270	HKAB, Group of nine investment bankers	It is unjust to treat a corporate officer who has not taken all reasonable measures to stop the corporation of which they are an officer from engaging in market misconduct as if they themselves have engaged in market misconduct when they have had no personal involvement.	Clauses 250 and 270 of the Bill are based on existing provisions in the S(ID)O and merely extend the principle that an officer of a corporation should take reasonable measures to ensure that the corporation of which they are an officer does not engage in insider dealing, to all other forms of market misconduct. Indeed, in line with the market misconduct provisions in Part XIII generally, the provisions are less harsh than those in the S(ID)O as treble damages will no longer be able to be imposed for breach of that duty. The provision is not harsh as it only requires an officer to take reasonable measures and the punishments that can imposed are only civil. What measures are reasonable will depend on what position an officer holds. The provision is a useful supplement to the more specific insider dealing and market manipulation provisions. Most reputable large intermediaries should already have controls in place that would typically meet the test set out in cl 270 in order to comply with their duties under the licensing or authorisation regime to which they are subject and also to meet their compliance obligations generally.
251	HKSA	The imposition of compound interest should be discretionary. Rates of judgement interest are already high.	The imposition of orders by the MMT is discretionary. Whether compound interest should be imposed is a matter of discretion for the court.
257-8	HKSA	The MMT's contempt of tribunal findings and other findings should also be appealable to the Court of Appeal.	Contempt decisions are already appealable to the Court of Appeal under s 50 of the High Court Ordinance. Under cl 257(1), the Court of Appeal may hear any finding or determination made by the MMT for the purposes of its proceedings. However, the Court of Appeal should exercise caution in reviewing the MMTs orders under cl 245 and 246, as they closely relate to the MMT's power to regulate its own proceedings and not to orders with a final determinative effect on a person's rights or interests. For this reason, the Court of Appeal should not have the power to vary such MMT orders or substitute its own order but should be required to remit them to the MMT for reconsideration subject to whatever directions it thinks fit, if necessary. Such orders are subject to judicial review in any event.

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268 and 290	CSHK	*Disclosure of false or misleading information* Cls 268 and 290 may discourage the robust dissemination of information to investors and the marketplace.	*Disclosure of false or misleading information* The negligence standard for false or misleading information is already a feature of Hong Kong criminal law in the SO and CTO. The provisions (on which cl 268 and 290 are modelled) have not caused any difficulties in Australia. We believe that imposing a duty to take reasonable care is not unreasonable or unduly onerous with respect to disclosure of false or misleading information and serves to close a regulatory gap which does not exist in other regimes like the US or the UK. We do not anticipate that these provisions will have a 'chilling' effect on the dissemination of reliable information. Hong Kong, Australia, Singapore and Malaysia have not seen harmful effects on business conduct from criminalising the negligent dissemination of false or misleading information. False or misleading information has a very serious effect on the price of securities or futures which may cause immediate harm to a large number of investors and disruption in the market. It is easier for a person disseminating information to take reasonable steps to ensure that it is true and not misleading than it is for an investor to verify that information and hence determine the correct value for a security or future.
		Importance of electronic information The definition of the 'disclosure of false and misleading information including transactions in securities' will chill the production of electronic investor information. Information providers would be discouraged from creating customer assess to the wealth of information, news and research. Securities firms should help investors make informed decisions, and the offence as it is constructed may hamper what we see as a securities firm's role in the SFC-designated mandate for the Commission at cl 5.	*Importance of electronic information* The provisions are technology neutral. We agree that it is important for investors to have access to reliable sources of information.

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		Knowledge that information is false or misleading The knowledge elements should not be a matter that must be established in the conduit exemptions in cls 268(3),(4) &(5). In respect of cl 268(1), the creation of a negligence standard sets too high a threshold for the sort of market misconduct violations intended to be addressed by Parts XIII and XIV of the Bill. The new exemptions created in the new sub-clauses 268(3) and 290(4) are important for persons like online financial service providers to redistribute information provided to them. This however does not address the authors or vendors of the information. Unless the negligence threshold is not addressed for them, the source of information for HK investors will be impeded. *Scienter with regard to securities sales or market manipulation* An anti-fraud provision like cl 268 or a provision that carries criminal liability like cl 290 should include a strong mental-state requirement, not only with regard to the false or misleading character of the information distributed, but also with regard to its impact. The mental state required should be intent, and at the very least recklessness. *Clause 106* The offence in cl 106 based on 'any fraudulent or reckless misrepresentation' should be eliminated or revised so that it does not overlap with the liabilities created under cls 268 and 290.	*Knowledge that information is false or misleading* We disagree. Because of the potentially large audience that can be reached by 'conduits' of information, we do not think it is unreasonable to require such third parties to establish that they did not know that the information was false or misleading. Clause 268(1) –see above comments. *Scienter with regard to securities sales or market manipulation* In the context of dissemination of information to the market as a whole, it would be difficult to prove that a person disseminating information had a specific mental element of intention, knowledge or recklessness as to whether it would induce investment decisions. We believe that proving that there was a "likely" inducement is the appropriate test. Invariably, this will be obvious one way or the other from the nature of the disclosure. Requiring proof that someone was induced to subscribe or sell would distract from the intention behind the provision which is to focus on the nature of the disclosure and to determine whether it is offensive. *Clause 106* Clauses 106 and 268 have different rationales – 106 relates to conduct that is intended to induce others and is usually operative on a one-on-one basis (e.g. participation in investment arrangements by invitation) while cl 268 relates to the widespread dissemination etc of information to the market in general. The introductory words of the different provisions should reflect this

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272	KGI	(1) The current wording of the clause seems to include investor losses whether or not they are 'caused' by the market misconduct. This would create floodgate of claims and cast unfairness to the wrongdoers. It is the established practice that a claimant would substantiate the claim and the court would make a decision differentiating between damages caused by and associated with the market misconduct. It is unclear whether cl 272(1) has operated to change this established practice by automatically conferring a statutory right of compensation on the claimants and shifting the onus on the wrongdoer to prove that it is not just, fair or reasonable to require the wrongdoer to pay compensation. This would be unduly prejudicial to the wrongdoer. (2) Besides persons committing market misconduct, persons conducting a relevant act of market misconduct are also liable to pay damages under cl 272(1) irrespective of their state of mind and motive. This includes the situations set out in cl 272(3). Cl 272(1) also applies to persons who are not identified as engaging in the market misconduct (cl 272(5)(b)). This approach may entrap innocent parties, e.g. brokers are implicated in every market misconduct involving improper trading because they are the ones to execute the trade orders. Under the proposed section, a person will be deemed to be liable under cl 272 with the onus on him to rebut the claim against him is just, fair and reasonable. This clause would burden the court with complex issues of causation, circumstances, and apportionment of liability.	The clause confers a right of action on a person who has suffered loss as a result of the market misconduct. Investors should have a potential remedy if they have suffered loss as a result of another's market misconduct and can establish the other elements of the cause of action. We do not anticipate a floodgate of unmeritorious claims. The courts have well-established procedures for dealing with unmeritorious claims. Hong Kong does not have the litigation culture or the procedural law that would enable the degree of what might be considered frivolous or vexatious claims in the US. The claimant will still have to substantiate his claim and prove that he has suffered loss as a result of the defendant's market misconduct. The onus of proving that it is not just, fair or reasonable to pay compensation is not on the defendant. (2) By committing a relevant act of market misconduct, a person has according to cl 272(3), perpetrated or assisted in or been responsible for market misconduct which is defined in clause 237. The market misconduct offences require a mental element of intention or recklessness or at the least, in the case of disclosure of false or misleading information, negligence. According to common law principles, it is not necessary to establish motive on the part of the defendant in order to found a cause of action for damages. Cl 272(5) permits a claimant to prove market misconduct independently of the MMT. The claimant must still prove that there has been market misconduct on the part of the defendant and indeed this could be more difficult than if the MMT had identified the defendant as engaging in market misconduct which could be used as evidence in support of the claim. Innocent parties will not be subject to liability. The market misconduct must be perpetrated by, or attributable to or perpetrated with the consent, assistance or connivance of the defendant. The Hong Kong judiciary can be trusted to sensibly elaborate on the "fair, just and reasonable" formula for civil actions with reference to existing tort law and comparable overseas case law on civil rights of action.

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272(3)(b)(ii)	HKSA	The words "directly or indirectly attributable" are too vague.	The words have a clear meaning and exist to deal with indirect agency and supervisory responsibility in corporations in which delegation is common.
265, 266 and 269	HKAB	There is significant overlap between these categories of market misconduct.	Overlap between different provisions is not a problem in itself. We have made careful efforts to ensure that any overlap is minimised. Similar provisions in the US, Australia and many other jurisdictions also overlap so as not to create gaps. The provisions are generally designed to identify specific types of manipulative conduct so that certain provisions may be more readily prosecuted in those instances and also so that the market is more familiar with specific types of activity which are unlawful. The alternative to overlapping provisions that are specific is fewer provisions that are broader in wording and less certain in their interpretation, which we do not believe is of benefit to either the market, the regulator and prosecuting authorities or the courts.
265(3) and (4)	HKAB, Group of nine investment bankers	The false trading provisions should be confined to conduct engaged in with the intention of, or being reckless as to whether it has the effect of, creating a false or misleading appearance of active trading or with respect to the price of, or market for, securities or futures contracts. The provisions should not also prohibit transactions which may create an artificial price for securities. This is a very uncertain concept and may outlaw arbitrage, hedging, and other legitimate activities.	Clauses 265(3) and (4) and 287(3) and (4) are modelled on Australian provisions and specifically outlaw cross-market manipulation (that is, manipulation of the futures market by conduct relating to the assets from which those futures are derived or manipulation of the securities market by conduct relating to the futures market). As such, the provisions specifically identify a type of manipulation that is unlawful for the benefit of the public and the courts and MMT. It is by no means certain that a court or MMT would specifically hold such conduct unlawful under the general false trading provisions (cl 265(1) or (2) and cl 287(1) or (2)). The word "artificial", to which HKAB objects, is used in the Australian provision, commonly used in US case law and is used in the UK FSA's draft Code of Market Conduct for market abuse (a concept analogous to market misconduct). It is not uncertain and clearly captures the notion of a price that is not the result of the forces of genuine supply and demand. The use of the word "artificial" in Australia has not led to the outlawing of hedging, arbitrage and other legitimate transactions there and nor will it here.
265(5) and (6)	HKAB, Group of nine investment bankers, LS	A significant number of legitimate transactions may fall within the wash sale and matched order deeming provisions. A defendant should not have to prove an innocent purpose for engaging in such transactions.	Wash sales and matched orders are common blatantly manipulative forms of conduct which have few legitimate excuses. As such, they are the subject of a reverse onus of proof defence that they were engaged in with an innocent purpose. The aim of this is to force a defendant to explain why they have engaged in such behaviour. There is rarely direct evidence of a defendant's intention in trading, and it is not onerous to require a defendant to establish their innocent purpose on a balance of probabilities when their conduct is so blatant. The reverse onus of proof in the equivalent provisions in Australia has not stifled legitimate conduct in Australia.

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265(5) and (6)	Group of nine investment bankers	Absent of imposing the onus of proving the requisite mental element under cl 265(5) and (6) on the prosecution, the SFC should issue guidance that it will only prosecute under these provisions when the purpose is to create a false or misleading appearance.	The clauses in question prohibit wash sales and matched orders, which are common manipulative devices with relatively few innocent explanations. As trading in financial products does not on its face disclose the intention with which it is engaged in, proving a manipulative intention to a high standard of proof is very difficult. If a defendant has a legitimate reason for a wash sale or matched orders, he will be in the best position to give evidence about it. The provisions only require that a person establish that their purposes were innocent on the lower standard of "balance of probabilities".
266	HKAB, Group of nine investment bankers, LS	Creating a separate market misconduct category of price rigging goes beyond the Australian provisions on which the market misconduct provisions are allegedly based.	The price-rigging provisions in cl 266 are based on ss 998(3) and 1260(2) of the Australian Corporations Law.
266(1)(a) and (2)(a)	Group of nine investment bankers, LS	The onus of proof of intention and recklessness should be on the prosecution. Failing that, the SFC should give guidance that prosecutions will only occur when the purpose is to create a false or misleading appearance.	The onus of proof for wash sales or matched orders should remain on the defendant (see response to HKAB and Group of nine investment bankers' comments on cl 265(5) and (6)).
266(1)(b) and (2)(b)	Group of nine investment bankers	The section prohibits entering into artificial transactions with the intention or being reckless as to whether the transaction may cause price fluctuations. If a regulator regards a transaction as artificial, the mental element does not protect a defendant as it is likely that they will have been reckless as to its price effect even though the intention was not to cause a price movement.	See the response to HKAB and Group of nine investment bankers' comments on cl 265(3) and (4) on "artificial". It is not the SFC which decides whether a transaction is artificial but the MMT or a court, which will do so on the basis of the intention of the provisions to prohibit manipulative activities and by reference to US and Australian case law. The required mental element is appropriate to capture manipulative behaviour. There is no danger of innocent activities like arbitrage being prohibited. This has not occurred in Australia and it will not occur in Hong Kong.
266(1)(b) and (2)(b)	Group of nine investment bankers	One solution may be to make the reverse onus innocent purpose defence in cl 266(4) apply to both cl 266(1)(b) and (2)(b) as well as to cl 266(1)(a) and (2)(a).	Applying a reverse onus defence of innocent purpose to an offence provision that already requires the prosecution to prove a positive mental element is circular, confusing and unnecessary.
272	CC	The Consumer Council supports the establishment of a right of private parties to seek compensation from a person for recovery of pecuniary losses as a result of the latter's misconduct. It also welcomes the provisions that allow for an MMT finding to be used admissible in evidence.	We welcome the Council's support.

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272	LCK	The civil liability provision should be expanded so that an investor who is a victim of market misconduct can piggy back on any finding of liability by the MMT. An investor would be able to sue a person found guilty of market misconduct as of right. The plaintiff would just have to prove on a balance of probabilities that he or she traded in the securities or futures market affected by the market misconduct found to have occurred in the period in which it had occurred to establish civil liability on the part of the person found guilty of market misconduct by the MMT. The person found guilty of market misconduct would then have a defence if they proved on the balance of probabilities that they didn't engage in that particular trade directly or through his or her agents.	We generally agree that investors should be empowered to protect themselves through private civil suits. The Bill does seek to allow those affected by market misconduct to make use of an MMT finding in that it is admissible in a civil suit under the Bill as evidence of market misconduct. As such, it should be very persuasive evidence.
272	KGI	Welcomes the recognition of MMT findings in civil proceedings to facilitate private actions against market misconduct. We believe a more effective way to do so is to empower the SFC to conduct class actions on behalf of aggrieved investors.	The issue of class actions is outside the scope of the Bill.
273	HKSA	Public consultation on safe harbours will be important.	We agree.
273	HKAB, Group of nine investment bankers	With the extension of insider dealing laws to dealings or counselling or procuring dealings in shares as yet unissued and unlisted, there should be wider defences for pre-IPO marketing and underwriting.	There are significant concerns among regulators world-wide about the unequal dissemination of information and the consequent prejudice suffered by different groups of investors of which pre-IPO road shows and marketing is just one example. The SFC is exploring with other regulators, in particular the UK FSA and US SEC, a pragmatic approach to the issue in conjunction with an overall approach to the equality of information distribution in light of Regulation FD (regulation on fair disclosure) in the US. It would be premature to address these matters before this review was complete.
273	HKAB, Group of nine investment bankers	A safe harbour is needed for price stabilisation.	The SFC is in the process of drafting safe harbour rules for price stabilisation based on the UK price stabilisation rules

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273	HKAB, Group of nine investment bankers	A safe harbour is needed for market making.	No safe harbour is necessary as the provision does not prohibit market making.
273	Group of nine investment bankers, LS	Safe harbours for market making, price stabilisation, "dealing on market information" and acting with a view to facilitate market transactions are needed for market certainty.	See the responses to HKAB, Group of nine investment bankers and LS's comments on cl 240(2)(e) and (f) and 273 together and cl 273 alone
273	HKAB, LS	There should be a safe harbour for a bank which exercises security rights it holds over shares in a listed company to sell those shares before knowledge of a default by that listed company which allows the bank to exercise those security rights is available to the public.	A bank which sell shares in a listed corporation over which it has security rights before information about a default, which would give the bank the ability to exercise its security rights, is generally known to the market, is dealing while in possession of relevant information and so insider dealing. A bank should not be made an exception.
273	HKAB	Given the breadth of cl 265, 266 and 269 it is essential that there are safe harbours for arbitrage and hedging activities.	Arbitrage and hedging still continue in Australia without any problem despite provisions very similar to those proposed in the Bill. There is no need for safe harbours.
Part XIV – Offences Relating to Dealings in Securities and Futures Contracts, etc.			
Burden of proof	LL	See comments in Part XIII.	See responses to those comments.
Burden of proof	Group of nine investment bankers	See comments in Part XIII.	See responses to those comments.
280(2)(e) and (f), 297	HKAB	See comments on cl 240(2)(e) and (f) and 273.	See response to those comments.
287, 288 and 291	HKAB	See comments on cl 265, 266 and 269.	See response to those comments.
287(1) and (2)	Group of nine investment bankers	See comments on cl 265(1) and (2).	See response to those comments.
287(3) and (4)	HKAB, Group of nine investment bankers	See comments on cl 265(3) and (4)	See response to those comments.
287(5) and (7)	HKAB, Group	See comments on cl 265(5) and (6)	See response to those comments.

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	of nine investment bankers		
287(6) and (7)	Group of nine investment bankers	See comments on cl 265(5) and (6).	See response to those comments.
288	HKAB	See comments on cl 266.	See response to those comments.
288(1)(a) and (2)(a)	Group of nine investment bankers	See comments on cl 266(1)(a) and (2)(a).	See response to those comments.
288(1)(b) and (2)(b)	Group of nine investment bankers	See comments on cl 266(1)(b) and (2)(b).	See response to those comments.
288(1)(b) and (2)(b)	Group of nine investment bankers	See comments on cl 266(1)(b) and (2)(b).	See response to those comments.
290	MH	TV and newspaper commentators on securities and futures can have a large audience and be very influential. The manner in which they comment on securities and futures is similar to horse racing tipsters and they encourage a gambling ambience. It is important that the market misconduct provisions apply to these people.	We agree, but the market misconduct provisions do apply to such people. The defences for conduits and live broadcasters do not apply to them. If they knowingly, recklessly or negligently spread false or misleading information about securities or futures they face criminal conviction, punishment by the MMT or civil liability.
290	HKAB	There is no need for cl 290 which overlaps significantly with cl 106.	Clauses 106 and 290 serve different purposes. Clause 106 makes it a crime to fraudulently or recklessly induce people to make an investment. It is prosecuted in relation to one on one acts of fraud. Clause 290, however, is intended to apply to and will be prosecuted in situations involving widely disseminated false or misleading information. To highlight the difference, there is no need to prove inducement with cl 290, while it is a necessary element in a prosecution under cl 106.

Clause No.	Respondent	Respondent's comments	Administration's response
290	HKAB, Group of nine investment bankers, LS	Imposing criminal liability with the threat of 10 years imprisonment and fines up $10 million for negligently disseminating false or misleading information is too harsh. Clause 290 [and by extension cl 293] should only apply to intentionally or recklessly disseminating false or misleading information.	Existing Hong Kong law imposes criminal liability for negligently disseminating false or misleading information about securities or futures (s 138 Securities Ordinance and s 64 Commodities Trading Ordinance). Australian, Singaporean and Malaysian law does too. Whether it is appropriate to criminalise negligence is a question of balancing the interests at stake. From SFC's past regulatory experience and given Hong Kong's conditions, we believe that it is appropriate to impose criminal liability on those who negligently disseminate false or misleading information about securities or futures. Information about securities and futures is very difficult for an individual investor to verify but may be disseminated very widely very quickly, particularly in Hong Kong's rumour driven, media saturated markets. Those who disseminate information are the most able to take steps to ensure whether it is not false or misleading. If in doubt, it is easy to qualify the content of the information (e.g. by saying it is a rumour or by qualifying the statement made). The US need not impose criminal liability for negligently disseminating false or misleading information because it has procedural laws which make it very easy for investors to bring civil suits based on a negligence standard for substantial civil damages. Even with the procedural reforms in the Bill, Hong Kong law does not make it easy for investors to bring such civil suits. The UK need not impose criminal liability for negligently disseminating false or misleading information either because it has a very strict civil regime which enables the FSA to impose unlimited fines for such conduct. In the absence of these features, we believe it appropriate for the Bill to criminalise negligence in these circumstances. Hong Kong, Australia, Singapore and Malaysia have not seen harmful effects on business conduct from criminalising the negligent dissemination of false or misleading information.
290, 293 and 106	Group of nine investment bankers	Civil or disciplinary liability is a more appropriate sanction that criminal liability on a negligence standard.	See the response to comments by the HKAB and Group of nine investment bankers on cl 290. However, the acceptance that a negligence standard is appropriate for civil and disciplinary liability is welcome.

Clause No.	Respondent	Respondent's comments	Administration's response
290, 293 and 106	Group of nine investment bankers	Although the existing s 138 SO and s 64 CTO impose criminal liability for negligent false or misleading information, s 3 PIO requires intention or recklessness. But s 138 SO and s 64 CTO are narrower than cl 290 and 293 in that they only apply to statements for the purpose of inducing a sale of securities or the purchase or sale of futures. The Bill should rationalise the existing laws to create an appropriate framework that protects investors without being unduly draconian. Cl 106, 290 and 293 should be combined into one offence (in Pt 4) covering fraudulent or reckless misrepresentations likely to induce investment transactions and made with the intention of inducing, or knowing that they would or being reckless as to whether they would be likely to induce, investment transactions. Alternatively, cl 290 and 293 should be amended to require a mental element of knowledge or recklessness and to only apply to statements likely to increase, reduce or stabilise the market price of securities, futures or leveraged foreign exchange contracts, as the case may be.	See the response to comments by the HKAB and G10 on cl 290. In the context of a one on one fraud provision such as cl 106, it may be appropriate to have to prove that false or misleading information was disseminated for the purpose of inducing a person to make an investment decision. However, in the context of market misconduct provisions which are intended to apply to the dissemination of information to the market as a whole, it would be difficult to prove that a specific mental element that a person disseminating information intended, knew or was reckless as to whether it would induce investment decisions. False or misleading information about securities and futures can spread far, quickly, especially in Hong Kong's markets. Such information can have a very distorting effect on the market for a security, futures or leverage foreign exchange contract and so harm those who invest or might invest but refrain from doing so because of information whether or not they are actually induced by the information or that was the intention of the person disseminating the information. The present requirement in cl 290 that the information be likely to induce investment decisions or likely to have a price effect are appropriate.
291(2)	HKISD	We should only be concerned with offences involving stock market manipulation in Hong Kong and not overseas because this is neither practical nor cost effective to monitor and enforce. The policing of foreign markets should be left with those concerned in those markets. Also, transactions considered as an offence in HK may not be so considered in other markets.	Globalization and the trend towards convergence of markets has highlighted the need for cross-market cooperation and surveillance. With increasingly globalised markets, it is essential that HK is not used as a haven for abuse of other markets. Manipulation in one market can have a substantial impact on another market and it is important that activities carried out in Hong Kong which involve manipulation of overseas markets should be deterred. We anticipate that with the cooperation of overseas markets, the monitoring of such activities will be achievable and cost effective.

Clause No.	Respondent	Respondent's comments	Administration's response
292(2)(b)	Group of nine investment bankers	The clause should not apply to conduct which is "deceptive" which implies an objective standard.	No objective standard is created. "[D]eceptive" is derived from "deceive" and "deception" both of which in criminal law require proof of a blameworthy mental element and so imputes the need to prove a blameworthy mental element.
294	Group of nine investment bankers	A defence should be added for when a defendant has made a genuine mistake and thinks that a client order had been executed when it had not.	There is no need for such a defence. The offence is targeted at a "bucket shop" which represents that it is executing orders for futures contracts on an organised futures market or in accordance with its rules when in fact the firm does not and instead takes the risk as counterparty to the futures contract on itself. It is a simple matter for a broker to check that an order is so executed.
295	LCK	In the South East Asia Wood case, even though there was a conviction for false trading in breach of s 135 SO, the culprit was only fined $80,000 and ordered to pay the SFC's costs of $50,000. This sum is benign and casts doubt on the willingness of the judiciary to impose strict sanctions despite the availability of custodial sentences under the Ordinance.	The Bill raises the maximum penalties to 10 years imprisonment and/or $10m fine. We note the calls that judges should be encouraged to sentence serious white collar crime appropriately as occurs in the US where heavy custodial sentences are regularly imposed.
297	HKSA	See comments on cl 273.	See responses to those comments.
297	HKAB, Group of nine investment bankers	See comments on cl 273 (other than re safe harbour for banks exercising security rights over listed securities).	See responses to those comments.
297	Group of nine investment bankers	See comment on cl 273.	See responses to those comments.

Details of Submissions Referred to in the Comment / Response Table

Respondent
Charles Schwab, Hong Kong Limited and Charles Schwab Hong Kong Securities, Limited ("CSHK")
The Institute of Securities Dealers Limited ("HKISD")
Hong Kong Society of Accountants ("HKSA")
Hong Kong Association of Banks ("HKAB")
Linklaters & Alliance representing - Bear Stearns Asia Limited - Credit Suisse First Boston (Hong Kong) Limited - Dresdner Kleinwort Wasserstein - Goldman Sachs (Asia) L.L.C. - Merrill Lynch (Asia Pacific) Limited - JP Morgan - Morgan Stanley Dean Witter Asia Limited - Salomon Smith Barney Hong Kong Limited - UBS Warburg ("Group of nine investment bankers")
Hong Kong Bar Association ("BA")
KGI Asia Limited ("KGI")
Low Chee Keong, Associate Professor in Corporate Law, School of Accountancy, The Chinese University of Hong Kong ("LCK")
Professor Larry H P Lang, Chair Professor of Finance, The Chinese University of Hong Kong ("LL")
Law Society of Hong Kong ("LS")
Marcus Hung, Executive Director, Wocom Holdings Limited ("MH")
Consumer Council ("CC")

Securities and Futures Commission
Financial Services Bureau
7 May 2001