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

Summary of Public Comments and Administration's Response on Part V of and Schedule 9 to the Securities and Futures Bill[1]

Clause no.	Respondent	Respondent's comments	Administration's Response
Part V – Licensing and Exemption			
113(1) "regulated function"	Group of nine investment bankers	The scope of "regulated function", the involvement in which (unless with a representative licence) attracts a maximum sanction of 2-year imprisonment, a fine of HK$1m and a daily default fine of HK$20k, is less than certain. More guidance from the Securities and Futures Commission (the "SFC") is necessary.	The definition of "regulated function" follows closely the formulation under the existing law, and the SFC will continue the current practice to issue guidance notes as to whether or not the conduct of certain activities requires a representative licence.
114(6)	Group of nine investment bankers	The licensing requirement in respect of "securities margin financing" should be triggered only if the provider of the financial accommodation was aware that the funding was to be used for facilitating the acquisition, etc. of securities (instead of when the accommodation was provided in order to facilitate the acquisition). This is because the licensing requirement is in respect of the provider of the financial accommodation and not the recipient. On this basis, the defence under clause 114(6) should not be that "if the provider reasonably believes that the funding was not to be used to facilitate the acquisition, etc of securities". Rather, the defence should be available to the provider unless he had reasonable grounds to believe that the funding would be used to acquire listed securities.	The construction and the definition of "securities margin financing" are carried down from the recently enacted Securities (Margin Financing) (Amendment) Ordinance. We take the view the lender can easily take certain steps to ascertain from the borrower the use of the loan. If a client of a lender unbeknownst to the lender uses a loan to buy or hold securities even though the purpose of the loan (as related to the lender) was purportedly for another purpose completely, the defence would be available to the lender. We do not agree with the proposal that would place the onus on the SFC to prove a state of mind before the licensing requirement is triggered. This will render the regulation of unlicensed activities ineffective.
115(1) & (2) & 116(1)	Group of nine investment bankers	The group seeks clarification as regards whether foreign limited partnerships that have separate legal personality will be regarded as corporation for the purpose of clause 115 and 116.	The SFC decided on the limitation applicable to entities eligible to be licensed under the SF Bill that they must be either companies or corporations registered under Part XI of the Companies Ordinance, because that was considered to provide the greatest degree of protection to investors. No such foreign limited partnership is currently registered in Hong Kong, hence the demand for extending

[1] Market comments on Schedule 6 to the SF Bill will be dealt with separately.

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			the licensing regime to such entities is unproven. If there are compelling commercial reasons as to why such partnerships need to be used, and it can be shown that investors' protection will not be compromised, the SFC will take such views into consideration.
115(2)(c) & 129(3)	HKISD HKSbA	There should be guidelines on the exercise of the power to approve premises for keeping records or documents. Subsection 2(c) requires the approval of the SFC in respect of the premises to keep records before the granting of a licence for a regulated activity. This poses a real-life problem in having to secure a premises for a certain period before the granting of a licence. It should be sufficient for the present purposes that the premises be proposed subject to confirmation upon the granting of a licence. The Association also wishes to seek clarification about the regulatory purpose that the requirement seeks to achieve.	This is an existing requirement under the Securities and Futures Commission Ordinance (the "SFCO"). No difficulties encountered since its coming into effect in 1989. The SFC will provide clarification if required. Such requirement has been established in the Securities Ordinance (the "SO") (s.53) and the Commodities Trading Ordinance (the "CTO") (s.32). In practice, the Commission adopts the practice suggested. We shall consider proposing CSAs to clarify the matter. The requirement seeks to ensure that records are kept in a reasonably safe place, and that they can be made available upon request for inspection purpose.
115(2)(c) 129(3)	Hon Henry Wu	A licensed corporation has to obtain prior approval of the SFC of premises to be used for keeping records or documents. An exempt Authorized Institution ("AI") requires no such approval.	An AI, including its local and overseas branches and subsidiaries, shall have to keep its records and documents in a manner in which the records and documents can be produced to the HKMA for inspection under section 56 of the Banking Ordinance.
115(4)(a) & 117(1)(a)(i)(A)	HKISD	The requirement in respect of the lodging of and the maintenance of security with the SFC should apply uniformly to all registered entities, rather than on a case by case basis.	Under the new regime, there are nine types of regulated activity. The requirements in respect of the lodging and the maintenance of security will not be uniformly applied to the nine types due to their differing nature. In any case, the requirements are to be prescribed by rules and will not be dealt with on a case by case basis.
115(5), etc licensing conditions	Law Society HKSbA	The amendments, revocations or imposition of new conditions should not take effect until the SFC has given reasons, and the period for application to the Securities and Futures Appeals Tribunal has elapsed or the relevant appeal has been heard (instead of at a time being the later of the time the relevant notice is served or the time specified in the notice). Such is in consideration of the fact that the validity of the relevant licence is open to question in the interim, and an application for a stay of a specified decision involves, for example, costs and further payment of money. This comment is applicable to the conditions imposed on the various	As in the SO and the CTO, the SF Bill provides that the decision of the SFC will not take effect until the expiry of the appeal period, or the determination of the appeal if one has been lodged. There are however exceptional circumstances in which, for investor protection and maintenance of the integrity of the market, the SFC has to impose reasonable conditions with immediate effect. This is subject to necessary safeguards. First, the SFC will be required to comply with the procedural requirements prescribed in clause 137, including informing the concerned parties the grounds of the preliminary views and affording the parties an opportunity of being heard, before exercising the power. Second, as a fair and adequate balancing measure, the relevant parties may apply to the Securities and

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		types of licences and exemption granted under Part V.	Futures Appeals Tribunal urgently for a stay of execution of such conditions (clause 220 of the SF Bill). Third, the validity of the licence in respect of which conditions have been imposed will not be open to question in the interim, as is the case under the existing law.
115(5), etc licensing conditions	HKISD HKSbA	There is no clear indication at this stage as to what conditions are considered to be "reasonable". The discretion of the SFC on this seems overly wide. The HKSbA suggests the SFC to produce a policy statement in advance with full market consultation on what conditions are considered reasonable and under what circumstances they would be invoked, modified or revoked.	The term "reasonable" is well established (as a requirement of administrative law). A general policy statement clarifying "reasonableness" would not add much value. Each case would have to be considered on its own merits and having regard to the individual facts and circumstances. It would be impossible to say in advance what is reasonable other than a high level. The SFC is required to comply with the procedural requirements prescribed in clause 137, including informing the concerned parties the grounds of the preliminary views and affording the parties an opportunity of being heard, before exercising the power. The decision of the SFC to impose conditions, etc is subject to review by the Securities and Futures Appeals Tribunal.
116(2)(d)	HKISD	The purpose of granting a temporary licence only on the condition among others that, in the 24 months immediately before the date on which the applicant lodges an application, it has not carried on a business in the regulated activity in Hong Kong for more than 6 months, should be clarified.	This is to prevent a corporation from relying continuously on a temporary licence to carry on regulated activities, and hence evading the full-fledged regulatory requirements that have to be met for applying a full licence from the SFC.
117(1)(a)(ii)	HKISD	The requirement to have at least one responsible officer to supervise the business of regulated activity at all times is unclear and is capable of being construed as "24 hours and 365 days 1 year". This should be substituted by "at least one responsible officer during working days available to supervise and at least reachable by communication means".	The phrase "at all times" bears its ordinary meaning. It is important that responsible officers are always available in case of need. Experience shows that such occasions do not respect office hours.
117(2)	HKISD	This panel should be a ready panel made up with securities professionals, which deals with also other matters relating to the discretion exercised by the SFC.	The panel is to be set up for dealing solely with disputes between a licensed leveraged foreign exchange trader and its customer should the latter so request. Its composition will include members of the profession having regard to the expertise required in a particular case. It has nothing to do with the decisions of the SFC. The provisions are inherited from the existing Leveraged Foreign Exchange Trading Ordinance ("LFETO"). The Securities and Futures Appeals Tribunal is established to deal with appeals against the decisions made by the SFC.

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Regulation of exempt AIs	Consumer Council	The direction to provide for similar investor safeguards with respect to the involvement of AIs in the securities and futures sector is supported.	Noted.
Two regulators	HKISD Hon Henry Wu	There should not be 2 regulators, namely the SFC with respect to licensed corporations and the Hong Kong Monetary Authority (the "HKMA") as the frontline regulator with respect to the exempt AIs, as this would result in double standards and possibly duplication of taxpayers' resources.	Under the proposed regime, as is currently the case, the HKMA will adopt standards equivalent to those of the SFC. This arrangement is intended to prevent regulatory overlap and to promote better utilization of resources since the HKMA already supervises AIs on a day-to-day basis, including their securities business. The arrangement therefore saves the duplication of efforts on the part of the regulators. The exempt AIs also need to deal with only one regulator normally. The proposed regime further enhances the arrangement by applying the relevant SFC rules and codes to AIs on a statutory basis. As far as the regulatory requirements are concerned, the basic principle is that exempt AIs will be subject to regulatory standards (in respect of their conduct of the regulated activity) which are the same or equivalent to those applicable to licensed corporations. Except for clearly defined areas where the SFC considers the regulatory results can be achieved by the requirements under the Banking Ordinance, the regulatory requirements prescribed in the SF Bill or the rules/codes, etc. by the SFC are equally applicable to both exempt AIs and licensed corporations. With respect to the interpretation and administration of the requirements, as the requirements will be clearly set out in the legislation and the codes/ guidelines, we do not envisage any major interpretation problems by the regulators or for that matter, the market practitioners. Moreover, the following measures will be in place to ensure the two regulators interpret and apply the requirements on the same basis: - The two regulators already have regular monthly meetings to exchange information in respect of the regulation of exempt AIs. With the amendments to the Banking Ordinance to relax the secrecy restrictions, there will not be any barrier in the exchange process. This is in addition to other liaison between the two regulators to deal with any issues whenever needed. - The frequency of examination of exempt AIs is agreed with the SFC. The examination checklists adopted by the HKMA are formulated based on those of the SFC.

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			- The HKMA has established specialized teams for the purpose. The SFC will continue to arrange briefings for the relevant staff of the HKMA on the interpretation and the administration of the requirements. There will also be exchange of personnel between the two regulators. In addition, notwithstanding the HKMA is to be the frontline regulator for the day to day supervision of exempt AIs, the SFC remains the ultimate authority for regulating the regulated activities. It can mount its own investigation and if necessary, after consultation with the HKMA, remove the exempt status of an AI which is no longer considered fit and proper to remain exempt. For more detailed information on this subject, please refer to Bills Committee Paper No.5/01 already circulated to Members.
Two regulators	HKISD Hon Henry Wu	The Memorandum of Understanding ("MOU") between the SFC and the HKMA is not transparent and is unlikely to result in a level playing field. Hon Henry Wu is also concerned that the MoU is not legally binding and can be amended without vetting by the Legislative Council or market consultation. By having two different regulators would only provide an excuse for them to shift their responsibility on to the other and ultimately neither takes blame.	We have already provided the existing MOU to the Bills Committee. An outline of the new MoU will be provided when ready. The SF Bill and the Banking Amendment Bill ("BAB") have clearly defined the respective roles of the SFC and the HKMA in respect of the regulation of exempt AIs. This will be supplemented by the Memorandum of Understanding between the two regulators. Through very frequent formal and informal contacts under the MOU framework, the two regulators have been able to ensure that equivalent regulatory standards are applied to brokers and AIs' securities operations. The cooperation over the past few years also help accumulate useful and relevant experience in regulating the securities business of AIs. To say that the arrangement will provide an excuse for the two regulators to shift responsibility is unfounded. We do not see reasons for concerns. Both regulators sacredly guard their local and international reputation, and they will be under the watchful eyes of market participants in administering the new requirements in future.
Two regulators	Professor Stephen Cheung	There is room for the HKMA to enhance its supervisory policy in respect of the securities operation of AIs due to its experience. However, the supervision of the HKMA is more stringent, thus it is less likely that the securities operation of AIs will run into problems.	Noted.
Two regulators	Wocom	The idea that the HKMA acts as the frontline regulator to supervise AIs in the conduct of the regulated activities is supported. The supervision must parallel and be consistent with the standards applied by the SFC.	Noted.

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Two regulators	HKAB	The HKMA should remain the frontline regulator for AIs to minimize regulatory overlap and duplication of costs. The HKMA is already responsible for consolidated supervision of the whole of an AI's business and needs to have detailed knowledge of the business conducted as an exempt AI. Further, as the rules and guidelines applying to exempt AIs will largely be the same as those applying to licensed corporations, there should not be any investor protection concerns nor undue competitive advantage to AIs.	Noted.
AIs to operate through subsidiaries	HKSbA	The setting up of a subsidiary by an AI to operate its securities operation is not difficult, having regard to the financial strength of an AI. By this, the competition may be fairer. Moreover, the HKMA would no longer have to burden itself on something which is entirely alien to its proper monetary responsibilities and business and the SFC would have no difficulties in accommodating the same. Such shall also have the advantage of eliminating any chance of overlapping or gap in regulating the industry and by all measures, most cost-effective and fair to all participants.	Some AIs have indeed set up subsidiaries to become exchange participants so that they can execute and clear their clients' transactions through their group companies. Other AIs have chosen to establish strategic alliance with independent exchange participants. The business model is a commercial decision for the AIs concerned. Even in such cases, the AIs will generally still provide their customers with the ability to deal in securities through the AIs. The important point is that AIs are serving a useful "agent" role in the process and help improve the convenience and service quality to investors. Investors should also be given a choice on the way they conduct securities trading, so long as comparable and reasonable protection is afforded to them. There is no business, policy or supervisory case for compelling AIs to divest all their securities business to a subsidiary. The suggestion indeed runs contrary to the practices in other leading jurisdictions. The HKMA is responsible for supervising the overall business of AIs (including securities business) and has built up over time the requisite expertise for the purpose. It is incorrect to suggest that the supervision of AIs" securities business is "alien to the proper monetary responsibilities" of the HKMA. As the HKMA would in any case be responsible for consolidated supervision of the whole of AIs' business, the suggestion would result in increased regulatory cost on the parts of both the regulators and AIs. Please also see the above as to how the HKMA intends to discharge its frontline regulator role, and the reasons why we take the view the arrangements set out in the SF Bill and the BAB are the most cost-effective. Bills Committee paper no.5/01 discussed this subject in greater detail.

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AIs to operate through subsidiaries	Professor Stephen Cheung	The participation of AIs in securities operation brings more advantages than disadvantages. This will bring greater competition to, and thus promote the development of the securities industry.	Noted.
AIs to operate through subsidiaries	HKAB	AIs should not be required to conduct the regulated activities through subsidiaries for the following reasons: - - Such would run contrary to international practice. - Such would increase the costs of conducting business in the financial market in Hong Kong, thus contrary to the interest of the public. - With the growth of private banking and the increased sophistication of financial products, it is becoming increasingly difficult to distinguish between banking and investment related services. Consumers will often want to receive a range of banking and other financial services and it may be very artificial and complex, thus more expensive, for the services to be provided through a number of different entities in the banking group. This is particularly the case as the securities business of a bank is typically incidental to its banking business. - Subsidarization would lead to duplication of regulatory capital, and increase systemic risks by reducing the banking group's ability to net banking and investment-related exposures to and from a customer in the event of the customer's default and/or insolvency.	Noted.
Regulation of AIs	HKSbA	The continuation of exempt status by AIs should be reconsidered. The arguments in support of the proposition are: - - Licensed stockbrokers have to comply with stringent Financial Resources Rules (FRR) which do not apply to exempted banks. During an active day's trading, a licensed stockbroker has to stop trading to check if he has gone over the mark if he senses that he might be near the border line, which obviously is not conducive to good broker-client relationship when trading prices are volatile. Failure to	The Banking Ordinance already imposes stringent statutory requirements on the financial resources of AIs covering aspects of initial paid-up capital, capital adequacy and liquidity. The SF Bill therefore continues the existing practice of not applying the FRRs to exempt AIs for avoiding regulatory overlap. The "mark" referred to in the market submission is not something imposed under the FRRs and is a requirement imposed by the clearing house instead. In any case, the relevant amount will be booked as "(very short term) receivable from CCASS"

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		comply with the FRRs or failure to report non-compliance may result in suspension of licence and upon conviction, 1-year imprisonment.	if the licensed corporations are able to meet the "mark" requirements. It should not on its own have any impact upon the compliance by the licensed corporations with the FRRs. For exempt AIs clearing clients' transactions through their subsidiaries which are exchange participants, the exempt AIs concerned, in conducting the dealing business also have to make sure their subsidiaries are able to meet the "mark" requirements. In other cases where AIs are not clearing the transactions through their subsidiaries, they still have to ensure that there are brokers prepared to take on the brokerage business from them. In fact, the exempt AIs' position in the circumstances is no different from those licensed corporations which are non-exchange participants.
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		- Licensed stockbrokers have to comply with strict rules in dealing with client money. Client money is required to be paid into segregated trust accounts. Failure to comply with the rules may result upon conviction, 2-year imprisonment. Exempt AIs, on the other hand is not bound at all by these rules for all practical purposes. Exempt AIs can freely use client's deposits as individuals' accounts. The competition cannot be more unfair. Exempt AIs' capital can come from clients whereas stockbrokers themselves only.	*An AI is specifically authorized to take deposits from the public. There are already prudential requirements imposed on an AI under the Banking Ordinance in respect of large exposures, liquidity, capital adequacy and provision adequacy, for example, to ensure that the depositors' interests are safeguarded. It would serve no useful regulatory purpose to require artificial distinction between client money received from banking operations and that received from securities/futures operation, and to subject the latter to the regulatory requirements under the client money rules.*
Regulation of AIs	HKISD	AIs should not be given exempt status to uphold the spirit of level playing field, and should comply with the standards prescribed by the SFC with respect to dealing in securities. In particular, the following differential treatments are identified: -	Exempt status does not mean that the investment-related activities of AIs will be unregulated nor less stringently regulated as compared with their conduct by licensed corporations. The basic principle is that exempt AIs will be subject to regulatory standards (in respect of their conduct of the regulated activity) which are the same or equivalent to those applicable to licensed corporations. Except for clearly defined areas where the SFC considers the regulatory result can be achieved by the requirements under the Banking Ordinance, the regulatory requirements prescribed in the SF Bill or the rules/codes, etc. by the SFC are equally applicable to both exempt AIs and licensed corporations.
		- Employees of AIs do not need to be registered, which runs contrary to investor protection. They should comply similarly with the fit and proper criteria prescribed by the SFC and the registration requirements.	Employees of exempt AIs have to be registered with the HKMA before they can perform any regulated functions with the combined effect of the SF Bill and the BAB. The intention is that only those employees who are able to meet the fitness and properness criteria promulgated by the SFC applicable to licensed

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	Hon Henry Wu	- An applicant must satisfy the SFC in respect of the "fit and proper" test under clause 119(3). However, no licence requirement is imposed on an exempt AI under clause 101 (Part IV). - Subsidiary branches of AIs can bypass similar SFC registration requirements. - The HKMA cannot impose fines on AIs.	representatives should be included in the register. The HKMA will issue guidelines on this. Senior management of exempt AIs have the primary responsibility to ensure the guidelines are being complied with, and their failure to properly do so would reflect on the fitness and properness of them and the relevant exempt AIs. Where necessary, the HKMA will also request an exempt AI to remove an employee from the conduct of any regulated activity. We take the view this register approach to be administered by the HKMA would achieve comparable level of investor protection as the licensing regime to be administered by the SFC. AIs have to satisfy stringent prudential requirements on capital, liquidity, internal controls etc, in conducting their daily operations, including those conducted through branches. Individual branches of AIs must be approved by the HKMA under the Banking Ordinance. Any supervisory concerns about an AI will be a factor for consideration by the HKMA in granting approval for branch establishment. The fining power by the SFC is designed as an intermediate disciplinary power, in addition to reprimand, suspension and revocation of licence/exemption. Such is not necessary for exempt AIs as the Banking Ordinance already empowers the HKMA to take supervisory actions to deal with misconduct or non-compliance issues in respect of exempt AIs. These include issuing direction to and restricting business of exempt AIs, as well as attaching conditions to the authorization of the AIs concerned. The subject of disciplinary actions will be discussed further in the context of Part IX of the SF Bill.
Regulation of AIs	HKAB	Exempt status does not mean that the investment-related activities of AIs will be unregulated nor less stringently regulated as compared with their conduct by licensed corporations. Exempt AIs have already been required by the HKMA to comply with the relevant Code of Conduct and internal control guidelines issued by the SFC, and subject to the supervision by the HKMA for ensuring that their relevant business conduct is of a comparable standard to the broking industry. The SF Bill further enhances the regulation of exempt AIs through:- - Employees of exempt AIs need to registered on a new register maintained by the HKMA.	Noted.

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		- Rules, codes and guidelines to be issued by the SFC, except in clearly defined areas such as the FRRs, apply directly to exempt AIs. - Exempt AIs are required to have at least two executive officers approved by the HKMA. - Exempt AIs are subject to disciplinary sanctions of withdrawal or suspension of exemption as well as public/private reprimands. Executive officers' status may also be withdrawn. The regulatory framework will provide for regulation equivalent to that applying to licensed corporations. As regards the comment that licensed corporations suffer a competitive disadvantage due to the costs involved in establishing a branch network, AIs require the approval of the HKMA to establish branches and have to pay significant annual fees for each of the branch maintained.	
118(4)	Hon Henry Wu	The SFC has no veto power over the exempt status granted by the HKMA.	The SFC remains the authority to grant a declaration of exemption to an AI under Clause 118(4) upon the advice by the HKMA. As set out in clause 118(3)(b), the HKMA has to consult the SFC in coming up with the advice, which guarantees the inputs of the detailed information about the AIs and the agreed interpretation of the fitness and properness criteria between the two regulators in the process. Further, the SFC can impose conditions on the exemption as appropriate.
118(9) & 119(5)	Hon Henry Wu	Under clause 118(9), the SFC shall consult the HKMA before amending or revoking or imposing conditions upon an exempt AI. Under clause 119(5), the situation as regards a licensed corporation is different as it shall be subject to any conditions the SFC may impose.	Clause 119(5) concerns licensed representatives, instead of licensed corporations. In any case, the arrangement to consult the HKMA does not affect the substance that an exemption granted to an AI is subject to conditions, nor that the SFC remains the ultimate authority to prescribe the conditions. The consultation requirement is indeed appropriate as the HKMA has detailed knowledge about the AI from its capacity as the regulator under the BO and the frontline regulator under the arrangement.
118(9)	HKAB	The imposition of any conditions on exemption should be determined by the HKMA instead of by the SFC in consultation with the HKMA, for consistency with that the application for exemption is referred to the HKMA (Clause 118(2)).	The HKMA advises and recommends the SFC as to whether an AI should be granted exemption status based on its knowledge about the AI and in accordance with the criteria set by the SFC. However, it remains that the SFC is the authority to set the regulatory requirements in respect of the conduct of the regulated activities. Therefore, the SFC should be the authority to prescribe the conditions

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			that exempt AIs are to comply in the conduct of the regulated activities, in consultation with the HKMA.
124	HKAB	Failure to have at least 2 approved executive officers and a person becoming an executive officer without the consent of the HKMA or acting as executive officer without complying with the conditions imposed by the HKMA constitute an offence under sections 71C and 71D of the BO consequent to the BAB. For the same breaches, however, the relevant exempt AI commits an offence under Clause 124 of the SF Bill. This appears to constitute "double jeopardy". Therefore, clause 124 of the SF Bill should apply only to licensed corporations.	We agree that there is double jeopardy, and will propose CSAs to rectify.
124	HKAB	The requirement to become executive officers should apply only if the personnel are supervising the regulated activities conducted in Hong Kong. While the board of directors of Hong Kong-incorporated AIs will be responsible generally for oversight of all its operations, including those outside Hong Kong, the requirements in respect of "executive officers" only make sense in relation to business within the territorial scope of the SF Bill, and not for activities of branches outside Hong Kong.	The meaning and territorial scope of the "regulated activity" follows the SF Bill. Moreover, as is the case also for licensed corporations, the board of directors will not be required to be approved as executive officers by the mere fact that they have an oversight of all operation of AIs.
124 & 125	Group of nine investment bankers	In order to become a responsible officer a person must also be licensed with the SFC as a licensed representative. It is not clear whether this will require significant duplication when making applications for approval as a responsible officer, and licensing as a representative, respectively.	This concept has been adopted in the LFETO which came into effect in 1994. As with the LFETO, both applications will be made in a single application form and processed accordingly. We shall model on this current practice and minimize duplication.
124,125 & s.23 of Sch. 9	HKSbA	With respect to a licensed corporation regarded as licensed by virtue of the transitional arrangements, any of its directors who are registered as a dealer before the commencement of the SF Bill shall be regarded as licensed as a licensed representative and approved as a responsible officer of the corporation for a period of 2 years. However, not all of them are directly concerned with the supervision of certain regulated activities. Some may specialize in human resources, research development or company executive work. Furthermore, by reason of their position, they may not be able to satisfy the SFC with respect to the fit and proper criteria to be so approved, and they may not have sufficient authority within the licensed corporation.	The intention is to grandfather only those directors registered under the various relevant existing ordinances **and** whose roles in the corporations would fall within the meaning of "executive director" under the SF Bill. A director engaged only in human resources and research development etc should not be registered as a dealing director. Therefore, the issue raised should not arise. Should it really be the case, it is open to the concerned dealing director to notify the SFC.

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124 & 125	Law Society	The requirement for non-Hong Kong based directors of a Hong Kong licensed corporation in a multinational group to be licensed as representatives (involving examinations, etc) and approved as responsible officers if they are to be involved in supervising the conduct of regulated activities, would lead to that the local licensed corporations losing the benefit of oversight by knowledgeable senior persons located in their overseas offices or head offices. Directors involved in areas such as Compliance and Legal may still require to become registered as responsible officers and licensed representatives. This may be impractical given that they may not have financial markets-related qualifications. Their role, although vital, would risk being subject to relegation to a position outside the Board to avoid the registration requirements. This would be unfortunate.	The requirements in respect of "executive director" apply in relation to the active participation in or direct supervision of the business of a "regulated activity". The non-Hong Kong based directors will not be required to be approved as executive officers by the mere fact that they have an oversight of the licensed corporations. Executive directors in charge of administrative functions would be required to be approved as responsible officers only if they actively participate or directly supervise the conduct of the business of a "regulated activity". The fitness and properness criteria to be applied is not a uniform set of criteria for all participants, but is relative to the role of the relevant persons in the corporations.
125(2)	HKSbA	The meaning of responsible officers having "sufficient authority" is not clear, and would cause uncertainty. Policy statement to categorize what is sufficient authority and what is not might help eliminate any mistaken interpretation of this term.	The intention is that the responsible officers approved should have authority that empowers him to discharge properly his supervisory role in the conduct of the business of the regulated activity. The SFC will issue guidelines if necessary.
127(2)	HKSbA	The SFC should disclose to the applicants information (which is not provided by the applicants) including its sources that it has taken into account in determining an application. The SFC should only take into account information obtained lawfully and verify their authenticity and truthfulness, lest the SFC would act on unsubstantiated information.	Clause 137 obliges the SFC to inform the applicants its preliminary view as regards the granting of the application including the grounds therefor, as well as giving the applicants a reasonable opportunity of being heard. As is the current practice, the SFC will almost invariably inform the applicants the nature of any concerns and the source of the information, and consider their side of story. It is possible but very unlikely that there may be a case in which the source of information should not be disclosed on public policy grounds. It is not a practical test that information be "lawfully" obtained. These are not judicial proceedings and there is no mechanism or ruling on whether information is lawfully obtained. The SFC would make its judgement as to whether the information is trustworthy. As is applicable to both concerns, any party aggrieved by the decision of the SFC made in respect of him can appeal to the Securities and Futures Appeals Tribunal.

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127(2)	HKSbA	It is considered that reputation, character etc. are abstracts based on conceptual and morality values without any recognized standards and any information on those abstract qualities can only be hearsay evidence at the best, unless the applicant is personally known to the Commission. Provisions similar to subsection (d) are not to be found in the present SO. In UK's recent legislation, the Authority only takes into account a candidate's qualification, training or level of competence, which can be proved or measured. It is not clearly understood under sub-paragraph (d)(ii) why the fitness of a corporation should be affected by the reputation of "any officer of the corporation". This sub-paragraph also illustrates the different treatment of an exempt person inconsistent to the concept of a level playing field.	The same assessment criteria can be found in the SFCO, and the SFC shall continue the current practice to publish the "Fit and Proper Criteria" to elaborate the concepts. Schedule 6, clause 5 of the Financial Services and Market Act makes it clear that before a person is permitted to carry on a regulated activity, they must satisfy the FSA that they are fit and proper having regard to "all the circumstances". Again, that the SFC shall have regard to the "fitness and properness" of the officer of the corporation can be found in the SFCO. "Officer" is defined in Schedule 1 as those involved in the management of the corporation. Apparently, their fitness and properness has a bearing upon that of the corporation they act for. The conduct of the regulated activities is the core business, if not the sole business, of a licensed corporation. Such is not the case for exempt AIs apparently. Therefore, the assessment of their fitness and properness is accordingly confined to the top management and the executive officers involved in the conduct of the regulated activities.
126 & 131	HKAB	The application for variation of exemption of regulated activities should be referred to the HKMA, as is the case under clause 118 in respect of first application. Similarly, the application for modifications and waivers should be referred to the HKMA, instead of that the SFC needs only to consult the HKMA.	Clause 126(2) of the SF Bill provides that an application for addition of regulated activities will be regarded as an application for exemption in respect of that regulated activity. This would be governed by clause 118 and referred to the HKMA. It remains that the SFC is the authority to set the regulatory requirements in respect of the conduct of the regulated activities. Therefore, the SFC should be the authority to determine any application for modifications and waivers of requirements, in consultation with the HKMA.
128(2)(b)(iii)	HKISD	The fact that the SFC is empowered to consider the fitness and properness in relation to licensed persons having regard also to their other group companies, officers and substantial shareholders of the same group, may mean judging them by some loose unknown relationship for undefined purpose.	In the interest of investors' protection, the SFC should be empowered to consider the fitness and properness of the relevant persons in the light of the information about the types of specified persons they associate with. This scope is indeed carried down from the SFCO. The SFC will administer the provision sensibly. The relevant decisions made by the SFC are subject to the procedural requirements prescribed in clause 137, including giving the relevant persons an opportunity of being heard. Moreover, the decisions are subject to appeals lodged with the

Clause no.	Respondent	Respondent's comments	Administration's Response
			Securities and Futures Appeals Tribunal.
130	HKISD	There should be a definition for "substantial shareholder".	The term "substantial shareholder" is explained in clause 6 of Part 1 of Schedule 1.
130	HKISD	Whereas a licensed person is part of the activities of a conglomerate, particularly as part of a listed entity, it is unsure how an acquiring substantial shareholder is able to balance the approval application and the commercial aspects of negotiations and completion.	The requirement does not impose any restraint on negotiations. A party wishing to acquire a substantial shareholding is at liberty to lodge an application for approval in anticipation of securing a sufficient shareholding.
130(3)(c)	Group of nine investment bankers	The notification period for persons becoming aware of being substantial shareholders should increase from 3 to 5 business days. The corresponding notification period under the Securities and Futures Commission Ordinance is 14 days and the White Bill 2 business days.	3 business days should be sufficient. This will be consistent with the new regime for disclosure of interests in Part XV of the SF Bill.
131	Charles Schwab	The power of the SFC to grant modifications and waivers of licensing requirements under clause 131 of the SF Bill is supported. This notwithstanding, the SFC should further have the statutory exemptive and no-action power for promoting innovation and adding to the flexibility in allowing for new technologies, structures and products that serve the investing public and strengthen the position of Hong Kong as an international financial centre while maintaining appropriate protections. The changes consequent to the White Bill consultation to publish decisions of modifications and waivers, and to enable the granting of class modifications and waivers are supported as they enhance transparency to the regulatory exercise of the power. There should be a further requirement that the SFC should explain the purpose or reasoning for each waiver and modification, such that the market may understand the principles engaged.	Under clause 131 of the SF Bill, the SFC is empowered to grant modifications and waivers with respect to a wide range of requirements for the regulation of intermediaries. To go so far as to provide the SFC with no-action power would raises concern over prosecution discretion, which should be the prerogative of the Secretary for Justice under the Basic Law. We take the view the present arrangement strikes a right balance. There may be concern among market participants over disclosure of information in relation to individuals or entities. The SFC may publish summary information where appropriate.
132	HKAB	Clause 132 of the Bill requires exempt AIs to give notice both to the SFC and the HKMA of the various matters required under that Clause to be reported. This is unduly onerous and it should be sufficient to provide the information to the HKMA.	The relevant matters concern the intended cessation of business, intended change of addresses at which the regulated activities are carried out and such further matters as prescribed by rules made by the SFC. As regards the last category, the SFC would only make the prescription if the matters are considered important and the reporting cannot be covered or await the submission of annual returns. We therefore do not consider the proposed reporting arrangement unduly onerous.

Clause no.	Respondent	Respondent's comments	Administration's Response
136	HKISD	It would be better to ascertain the official title "Registered" (broker, advisor, dealer) etc, than to be so specific towards what the title should be. One example is, say at 136 (4), a person cannot be called "securities adviser", etc. This may not be able to catch those misleading titles such as "stocks consultant".	Leaving aside the appropriateness to monopolize the use of "Register" only for the purposes of the SF Bill, the concern raised can indeed be addressed by clause 136(9) which prohibits the use of any title that suggests a person carrying on a business in the relevant regulated activities or performing any regulated functions, unless he has been authorized in respect of the activities under the SF Bill.
Schedule 9 – Savings, transitional, consequential and related provisions, etc.			
23 & 24	HKSbA	Section 23 provides that any director of a licensed corporation shall be approved as a responsible officer for 2 years upon the commencement of this new ordinance. It does not provide for the situation after this 2-year period. It is suggested that the law should produce a more comprehensive "grandfathering clause" to take care of these directors in the longer term. Section 24 similarly deals with the situation of a registered dealer's representative upon the commencement of this new ordinance. It does not provide for further registration after the initial period of 2 years. It is suggested that a proper grandfathering clause be inserted. Existing licensed individuals (and those currently working for an exempt dealer) should not be required to take additional examinations in order to be licensed under the new regime. There should be a "grandfathering" procedure for such persons. There should also be "grandfathering" for directors of licensed persons or exempt dealers who are not currently registered, but may need to become registered as "responsible officers" under the new regime.	In the interest of investor protection, existing participants will have to satisfy the SFC of their fitness and properness under the new regime. The purpose of the 2-year transitional arrangement is to allow them to adjust to the new regime. The SFC shall have regard to the experience of the applicants under the existing regime. In view of their current status and experience, they will only be subject to a simplified process for admission to the new regime. The current thinking is that entrance examination will not be required for existing registrants. However, they are required to meet the Continuous Professional Training requirements prescribed in the fit and proper criteria. retraining requirements, instead of examination requirements, will be prescribed for admission to the new regime. The training requirement is in fact prescribed in the existing "Fitness and Properness" criteria.)

Clause no.	Respondent	Respondent's comments	Administration's Response
25, 26 & 52(2)	HKAB	AIs that are already acting as exempt dealers/investment advisers should effectively be "grandfathered" when applying for exempt status, without the HKMA and the SFC conducting an ab initio review of their "fitness and properness". Individuals currently carrying out regulated functions for exempt AIs should be "grandfathered" and automatically eligible for inclusion on the HKMA register, without, for example, any need to obtain recognized industry qualifications.	The transitional arrangement as applied to exempt AIs would mirror that for licensed corporation in the interest of investor protection and fairness.
Various	Group of nine investment bankers HKAB	Transitional relief should be given in respect of compliance with the requirements under the SF Bill and the rules and codes made thereunder (such as those relating to capital adequacy, prudential requirements and conduct of business), at least to the extent that the requirements create new obligations to which licensed persons and/or exempt dealers (including exempt AIs) are not currently subject to. This is especially important in respect of currently non-AI exempt dealers as the compliance involves major changes in systems and in some cases injection of additional capital or capital restructuring. The HKAB suggests there should be a significant lead-time (of at least six months after commencement of the rest of the Ordinance) before any significant new legislative requirements, rules and guidelines applying to intermediaries	We will strike a reasonable balance between enhancing investor protection and minimizing regulatory burden on market participants. Where considered appropriate, the SFC will defer the commencement of certain requirements under the SF Bill or grant modifications or waivers in respect of those requirements for a suitable period. The thinking is that the SFC will relax the requirement in respect of the FRR in the interim.
34 – 37	Group of nine investment bankers	As the definition of providing automated trading services is unclear, all registered or exempt dealers should automatically be regarded as being licensed to provide automated trading services, instead of confining only to those registered dealers, commodities dealers or exempt dealers which are immediately before the commencement of Part V, carrying on a business in providing automated trading services.	We do not agree that the definition of "providing automated trading services" is unclear. As a general principle, the transitional arrangement is to enable existing market participants to continue what they have been doing before the commencement of the new legislation. We therefore consider the present arrangement to transit those registered or exempt dealers which immediately before the commencement of Part V, carrying on a business in providing automated trading services both reasonable and appropriate.
52	Group of nine investment bankers	Depending on the procedures and information, etc involved, the SFC may not have sufficient resources to process all the applications received prior to the expiration of the 2-year transitional period on a timely basis, in addition to that such will be a major exercise for the industry if fresh applications are required.	As far as possible, the SFC will redeploy its internal resources for handling the applications received around the expiry of the transitional period. We also encourage existing practitioners to hand in their applications at an earlier time. In any case, existing practitioners who have submitted applications prior to the expiry of the transitional period will be able to continue their conduct of regulated activities until the determination of their applications.

Details of Submissions referred to in the Comment / Response Table

Date received	**Organization / party**	
19 January 2001	Professor Stephen Cheung	
23 January 2001	Hong Kong Association of Banks ("HKAB")	
23 January 2001, 15 February 2001	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")	
23 January 2001	Law Society of Hong Kong ("Law Society")	
23 January 2001	Wocom Holdings Limited ("Wocom")	
29 January 2001	Charles Schwab	
29 January 2001, 15 February 2001	Hong Kong Stockbrokers Association ("HKSbA")	
30 January 2001	Hong Kong Institute of Securities Dealers ("HKISD")	

3 February 2001	Consumer Council	
15 February 2001	The Hon Henry K.C. Wu ("Hon Henry Wu")	

Financial Services Bureau
22 February 2001