Bills Committee on the SF Bill and BAB 2000

Response to comments raised at the meetings in December 2001

A. Securities and Futures Bill

Part III

1. To consider whether it would be appropriate to put the titles under clause 34(1) to a separate schedule to the SF Bill to facilitate amendment in the future

As explained to and accepted by Members at the Bills Committee meeting on 4 December 2001, we do not envisage frequent updating of the titles specified in clause 34(1). Moreover, clause 34(1) already covers any title that closely resembles the specified titles. We therefore do not pursue the suggestion for a separate schedule.

Part IV

2. To review the use of the noun "issue" in the phrase "for the purposes of issue" and to consider whether it would be appropriate to replace it by "issuing" in various provisions in Part IV

The Law Draftsman has considered the proposal and advised that –

(a) the expression "issue" is consistent with ordinary usage in other legislation[1]; and

(b) the meaning of "issue" should be sufficiently clear as a defined term under the SF Bill, covering also its grammatical variations and cognate expression by virtue of section 5 of Cap 1[2].

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[1] Please refer to the following –
- "have in his possession for the purposes of issue" in ss 4/5 of Cap 335 and s92 of Cap 155;
- "[possess] for the purp oses of sale" in ss 8/8A/10A/15A of Cap 371, s24 of Cap 138 and s7 of Cap 132AQ
- "have in his possession for the purpose of distribution" in s14(1)(b) of the Prevention of Fraud (Investments) Act 1958, on which s4 of Cap 335 is based; and
- "possesses for the purpose of publication" in s21(3A) of Cap 392 and s27A of Cap 390.

[2] Please note the following –
- "issue" is defined to mean, among others, "the act of delivery; emission; sending" in the Butterworths Australian Legal Dictionary;
- "issue" is defined as "a putting into circulation, giving out for use ..." in the Chambers Concise Dictionary (1990); and
- "issued" is defined to include the meaning of "the action of issuing" in the Oxford Concise English Dictionary.

3. *To consider where appropriate to replace the word "purposes" by "purpose" in various provisions in Part IV*

The Law Draftsman has considered the proposal. The use of both "purpose" and "purposes" is acceptable from the drafting point of view.

4. *To review the phrase "with the result that" in clauses 106 and 107*

The Law Draftsman has considered the proposal. The phrase "with the result that" is indicative of an objective fact and is appropriate in the context.

Part V

5. *To consult licensed corporations on draft rules on insurance coverage for licensees and to inform them of the new arrangements as early as practicable*

The SFC has undertaken to consult the market on the draft rules and the new arrangements in respect of insurance coverage as soon as they are ready.

6. *To consult the market on other particulars, such as disciplinary sanctions imposed, to be contained in the register on licensed persons and registered institutions under clause 133*

The SFC is currently consulting the market on the subject.

Part VI

7. *To review the drafting of clause 161A in relation to the word "notification"*

We have considered this drafting comment and come the view that the use of "notification", which covers both the act of notifying and the notice given[3], is appropriate in the context.

[3] Please note "notification" has the meaning of "the act of notifying; the notice given; the paper containing the notice" in Chambers English Dictionary.

Part VIII

8. To consider whether it would be appropriate to add "the Commission certifies in writing that the authorized person has reasonable cause to believe" to clause 172(5)

There is no value added by requiring the SFC to certify in writing that the authorized person has satisfied the statutory threshold. Such requirement would restrict SFC's power in conducting preliminary inquiry into suspected misconduct of a listed corporation (or its related corporation) which is the target of the inquiry and the resulting delay would be to the detriment of the investing public where expedient action is warranted (e.g. in the case of fraud).

The certification requirement under clauses 172(6), (7) and (8) is added in response to market concerns, when the power is exercised upon third parties who are not the target of the inquiry but merely persons assisting the SFC in the inquiry (e.g. auditors, bankers and transaction counterparties). We see the need to differentiate the arrangements for targets and non-targets of an inquiry, without undermining the effectiveness of the inquiry.

We also received no market comment that the certification requirement should be applied to the target of the inquiry under clause 172(5).

9. To provide examples of existing provisions similar to clause 172(13) where severe penalties would be imposed on non-compliance with requirements of regulatory authority

Examples of similar provisions in our statute and the penalties are set out below –

- Section 118 of the Banking Ordinance (Cap. 155) (Powers of the inspector and offences in connection with the investigation) – fine at tier 4 and 6 months' imprisonment
- Section 124 of the Copyright Ordinance (Cap. 528) (Obstruction of investigating officers) – fine at level 4 and 3 months' imprisonment
- Section 33A of the Prevention of Copyright Piracy Ordinance (Cap. 544) (Obstruction of authorized officers) – fine at level 4 and 1 year's imprisonment
- Section 32 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (Investigation) – fine at level 6 and 1 year's imprisonment
- Section 23 and 28 of Consumer Goods Safety Ordinance (Cap. 456) (Obstruction) – fine at level 3 and 1 year's imprisonment

10. To review the phrase "cease to remain listed" under the reference to "relevant time" in clause 172(16)

We consider that the expression "cease to remain listed" is sufficient for identifying the exact point of time at which the cessation takes place, and the expression is for that reason preferable to other alternatives like "was no longer listed". The expression also tallies with the definition of "listed" in Schedule 1 to the Bill.

Part IX

11. To review the drafting of clauses 187(1)(iv) and 189A(1)(iii)

We have considered the drafting comment of the Legal Service Division of the Legislative Council about presenting the substance of clauses 187(1)(iv) and 189A(1)(iii) in terms of each type of regulated person individually. We consider that the original presentation is both clear and concise.

Part X

12. To consider whether "will" or "may" should be used at the beginning of clause 204(2)

The Law Draftsman advises that "will" is appropriate in the context as it matches with the references to "reasonable likelihood" to indicate that the necessary degree of possibility that something might happen.

13. To consider deleting the words "in question" in clause 207(3)(b)

The Law Draftsman has considered the comment and prefers the retention of the expression for greater clarity.

Part XI

14. To reflect to the Judiciary Administrator Members' suggestion of appointing a standing "Chairman" for the Securities and Futures Appeals Tribunal (SFAT) to be responsible for reviewing its procedures and rules for improvement of the operation of SFAT in the long run

We shall discuss further with the Judiciary Administrator the subject matter together with any rules to be made by the Chief Justice under clause 226.

Part XII

15. To consider providing explicitly in Part XII the right for aggrieved persons to appeal to SFAT on compensation decisions made by the SFC or the investor compensation company

The overall drafting approach is to itemize in Schedule 7 all appealable decisions. To ensure that the relevant parties are fully aware of their right to appeal, the SFC or the investor compensation company will draw their attention to such a right through administrative means like stipulating the appeal right in the relevant notice of decision. We shall also flag up this right to appeal when consulting the public on the rules to be made under Part XII.

Parts XIII and XIV

16. To consider drafting comment to delete the word "a" before the word "notice" in clause 244(2)

The Law Draftsman considers that the retention of the article is preferred in the context as "which shall contain ..." qualifies "a notice in writing" which will have be understood in the non-generic sense.

17. To consider drafting comment to simplify clause 244(5)

The Law Draftsman has considered the comment and prefers the existing wording which tallies with that in other relevant provisions.

18. To consider drafting comment to replace the word "issue" by "issuing" in clause 268(2)(a)

Please refer to our response to a similar comment in relation to Part IV in Item 2 above.

19. To review the drafting of clauses 273(1A) & (1), and 297 (1A) & (1) to clarify that the safe-harbour rules prescribed by SFC would provide defences for market misconduct on a general ground

The Law Draftsman advises that the present form of clause 273(1) (and clause 297(1)) refers to "circumstances" and "any conduct" generally, instead of any particular person, and should be sufficient for the general nature of the rules.

20. To review clauses 272(7)(a) & (b), and 296(6)(a) & (b) in relation to admissibility of MMT evidence for proving civil and criminal liability for market misconduct

Clause 272 is based on section 62 of the Evidence Ordinance (Cap. 8) and does not exclude the admissibility of other evidence. Specifically, clause 272(8)(b) expressly provides that, without affecting the reception of other admissible evidence, contents of the MMT report shall also be admissible in evidence for the purpose of identifying facts on which the determination under subclause (7) was based.

On the weight attached to the evidence that can be admitted, clause 272(8)(a) provides that the MMT determinations referred to in clause 272(7)(a) and (b) (i.e. market misconduct has taken place, and the identity of a person identified by the MMT as having engaged in market misconduct) shall be prima facie evidence of the same facts in an action initiated under clause 272. That is, the evidence, if not balanced or outweighed by other evidence, will suffice to establish a particular contention. Such evidence is not conclusive (i.e. not irrebuttable). We believe that clauses 272(7) and (8) will assist investors in an action initiated under clause 272, by saving the plaintiff from having to prove the same facts from scratch. Investors would find it more difficult to substantiate their actions without clauses 272(7) and (8).

The concept of "issue estoppel", as a Member has raised at the Bills Committee meeting on 14 December 2001, does not apply here because the proceedings in question (i.e. MMT proceedings instituted under clause 244 and the civil proceedings under clause 272) do not involve the same parties.

Clause 296 under the criminal regime in Part XIV mirrors clause 272 under the civil regime in Part XIII.

Part XV

21. To review if the reference to "regulations" in clause 337(1)(e) should be further clarified

The reference to "regulations" is used in the existing Securities (Disclosure of Interests) Ordinance and the market is familiar with the term. The term is defined in Part XV and there should be no confusion.

Part XVI

22. To review clause 390(2) to consider whether it is necessary to give SFC the rule-making power to prescribe transactions or activities to be dealt with under the Gambling Ordinance

As explained in Paper No. CSA14/01 dated 28 November 2001, we consider it necessary to retain the flexibility for SFC to make rules to specify that the Gambling Ordinance (Cap. 148) (GO) should apply to certain transactions or activities under the SF Bill, despite the exemption under clause 390(1). This is to cater for situations where clarifications are needed in respect of new products which should be more appropriately dealt with under the GO. It also seeks to avoid circumvention of the GO by structuring certain gambling products such that it appears that the SF Bill would apply to them (e.g. offering the gambling products through a licensed intermediary), hence benefiting from the exemption under clause 390(1).

SFC's power under clause 390(2) will substitute an existing power of the Secretary for Financial Services (SFS) under section 29(2) of the GO. We have proposed to remove SFS' power under section 29(2) of the GO accordingly by way of consequential amendment in Part 2 of Schedule 9 to the SF Bill (see Annex 2 to Paper No. CSA15/01 dated 6 December 2001).

We consider it more appropriate to vest the rule-making power under clause 390(2) in the SFC as the independent regulator of the securities and futures industry. This is also in line with the approach taken in section 137A(2) of the Banking Ordinance (Cap. 148) (BO), which provides a similar power to the Monetary Authority to specify that the GO shall apply to certain transactions entered into by an authorized financial institution, despite the general exemption under section 137A(1) of the BO.

Schedule 1

23. To provide information on use of alternative terms of "professional investor" in overseas jurisdictions (defined in Schedule 1) adopted by the US and UK jurisdictions

Different jurisdictions have introduced different terms for investors of similar nature. In the UK, the terms "certified high net worth individual" and "investment professional" are used. In the US, the terms "accredited investor" and "institutional investor" are used. In Australia, a collective term of "sophisticated investor" is used. The local market is accustomed to the term "professional investor".

Schedule 8

24. To consider drafting comment to add "the" before "statement as amended" in clause 18 of Schedule 8

There is already an "a" before "statement as amended" in the mark-up version of Schedule 8 at Annex 3 to Paper No. CSA12/01 dated 3 December 2001, which is appropriate in the context.

25. To consider drafting comment to delete the words "given to" in clause 34 of Schedule 8

The Law Draftsman has considered the comment and prefers to retain the verb in the light of clause 386, which provides for the general requirements for service of notices under the Bill.

B. Banking (Amendment) Bill 2000

26. To consider deleting the reference to "given" in new section 132A(6) of the BO under clause 12 of BAB 2000

Please refer to our response to a similar comment in relation to Schedule 8 to the SF Bill in item 25 above.

27. To consider comments made by the LegCo Assistant Legal Adviser in respect of the mere conduits carve-outs under clause 102 of the SF Bill and consider introducing amendments to the BO as necessary

The Banking (Amendment) Ordinance 2001 contains provisions governing issue of advertisements, etc. relating to deposits, which are similar to clause 102 of the SF Bill. That Amendment Ordinance was passed by the Legislative Council on 19 December 2001 after scrutiny by a Bills Committee. We believe that there should be no problem in the operation of the provisions concerned as they stand. We will keep them under review and may consider amendments as necessary in the light of operational experience.

Financial Services Bureau
Securities and Futures Commission
Hong Kong Monetary Authority
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