

Ref : CB1/BC/4/00

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

**Update on areas of concern raised by members during discussions on the
Securities and Futures Bill and Banking (Amendment) Bill 2000 and
follow-up actions required from the Administration**

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

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

Legislative Council Secretariat

13 December 2001

Parts XIII and XIV of and Schedule 8 to the Securities and Futures Bill

Date of meetings: 19, 21 & 28 September and 3, 5 & 24 October 2001

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
Parts XIII - Market Misconduct Tribunal		
243	<u>Appointment of members to MMT</u> There should be a panel of members for appointment as ordinary members of MMT. The arrangement will enhance credibility of the Tribunal and transparency of its operation.	To consider.
244	<u>FS to initiate MMT proceedings</u> There are different views on the appropriate authority to initiate MMT proceedings and on the checks and balances among SFC, S for J and FS.	FS's power to institute MMT proceedings is adapted from the SIDO whereby an IDT inquiry is instigated by FS. The arrangement has worked well and there are no apparent merits for a change.
244(2)	To review "giving to" and "a written statement".	To consider.
244(4)(b)	To review "of him".	To consider.
244(9)	To consider replacing "report" by "inform".	To consider.

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
246(2)	<p><u>Power of MMT to ask for provision of records/information/explanation from persons</u></p> <p>MMT's powers in this respect is very wide.</p> <p>There is concern that the power to inspect any record or document on "reasonable grounds to suspect" is too wide. There are different views as to whether "reasonable grounds to believe" is a more appropriate threshold than "reasonable grounds to believe or suspect".</p>	<p>The clause will enable MMT to obtain new evidence when new matters come to light. The parties to proceedings will be given the opportunity to comment on the new evidence.</p> <p>The clause is based on existing provisions of the SIDO.</p>
247	<p><u>Use of evidence received for purposes of market misconduct proceedings</u></p> <p>There is concern over the meaning of clause 247(3). The clause should be consistent with relevant human rights protection against self-incrimination.</p> <p>To consider deleting "other" in the phrase "... any other proceedings (civil or criminal) in a court of law brought by or against him" in clause 247(1).</p>	<p>Confirmed consistency with relevant human rights principles. The Administration has proposed to delete clause 247(3). The effect will be that evidence admitted before MMT will not be admissible in other proceedings other than those identified in clause 247.</p> <p>To consider.</p>
249(1)	To consider substituting "make one, or more than one" by "make one or more".	To consider.

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
249(1)(e), (f)	<p><u>Orders of Tribunal</u></p> <p>Sought details on the “costs and expenses” incurred by SFC in an investigation.</p> <p>The Administration should specify costs and expenses of the Tribunal to enhance transparency.</p> <p>To consider adding “reasonably” after “costs and expenses” in the sub-clauses.</p>	<p>Clause 249(1)(e) is adapted from the SIDO. Clause 249(1)(f) is new which will enable SFC to recover investigation cost incurred. The subject will be given an opportunity of being heard before the Tribunal makes an order (clause 249(3)) and can appeal to the Court of Appeal.</p> <p>The SFC has provided details on the “costs and expenses” it recovered from investigations in past three years in LC Paper No. CB(1) 423/01-02(03) of 27 November 2001.</p> <p>To consider.</p>
251	<p><u>Interest on moneys payable under section 249 or 252</u></p> <p>There is concern that compound interest is charged on payment of costs and expenses incurred by the Government and the SFC. This might be considered punitive.</p>	<p>To review.</p>
253	<p><u>Contempt dealt with by Tribunal</u></p> <p>The purpose of the clause is unclear and should be clarified.</p>	<p>To consider.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
	There is doubt about whether it is suitable to regard non-compliance with Tribunal orders as "contempt" to court.	
254(2)(b)(ii)	To consider adopting "making available a copy of the report" instead of "giving a copy of the report so far as reasonably practicable".	To consider.
254(4)	To consider deleting "to civil or criminal proceeding".	To consider.
255(1)	The words "... when the order is made" are too restrictive.	To consider.
259	<p><u>No stay of execution on appeal</u></p> <p>There is a view that MMT should be given power to consider stay of execution of its orders in place of the Court of Appeal. Since the Tribunal is familiar with the case, it can consider the application for stay of execution expeditiously.</p>	<p>The Court of Appeal can deal with application of stay of execution efficiently.</p> <p>To consider.</p>
new 262(7A), (9)	<p><u>Defence to insider dealing provisions</u></p> <p>The provision to be further refined in light of market comments.</p>	<p>The provisions are based on paragraphs 3 and 4 of Schedule 1 to the UK Criminal Justice Act 1993. The Administration will refine the provisions in consultation with the market.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
265-269	<p><u>Other market misconducts</u></p> <p>The structures of the clauses are difficult to understand. The provisions do not directly specify that a person will “commit a market misconduct” if he does certain things. Instead, they stipulate that a market misconduct “has taken place” if a person does certain things. The drafting should be reviewed.</p>	<p>The clauses are largely based on provisions in the ACL. The clauses spell out clearly what constitute market misconduct and the relevant mental elements to facilitate MMT proceedings and imposition of sanctions.</p> <p>The structure of the clauses follow that of the SIDO.</p>
265	<p><u>False trading</u></p> <p>There are market comments that clauses 265(1), (2) and (5) are widely drafted.</p> <p>It is asked if “Nasdaq” was an over the counter market and whether “market makers” would be caught by in the provision.</p>	<p>Market makers would not be caught. The Administration has provided information in LC Paper No. CB(1) 529/01-02(02) of 7 December 2001.</p> <p>The Administration has proposed CSAs to improve drafting of these provisions.</p>
268	<p><u>Disclosure of false or misleading information inducing transactions</u></p> <p>A person who is “concerned in” the disclosure, circulation or dissemination of false or misleading information may be caught. The phrase “is concerned in” is widely</p>	<p>To review.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
	drafted.	
268, 290	<p><u>Disclosure of false or misleading information inducing transactions</u></p> <p>There is concern about imposing <u>criminal liability</u> for “negligently” disseminating false or misleading information. Clause 290 should only apply to “knowingly” or “recklessly” disseminating false or misleading information.</p> <p>The provision will affect the operation of the news media industry and may have a chilling effect on legitimate dissemination of information.</p> <p>“Negligence standard” in clause 268 is appropriate for the civil regime under Part XIII.</p> <p>While the Hong Kong Journalist Association welcomes the deletion of negligence provision in clause 290, it opines that the same should be done for clause 268.</p>	<p>The two clauses will impose a duty on people to take reasonable care with respect to disclosure of false or misleading information affecting the price of securities or futures in order to protect investors and maintain an orderly market. The Administration will propose CSA to delete “negligent” from clause 290. The “negligence standard” is appropriate for clause 268.</p>
272, 296	<p><u>Civil liability for market misconduct (Part XIII).</u> <u>Civil liability for contravention of this Part (Part XIV)</u></p> <p>There is concern over the scope of two clauses and whether these civil liability provisions might overlap with clause 208 (civil liability for false or misleading public communications concerning securities and futures contracts).</p> <p>It is noted that the similar provisions on civil liability in the ACL have spelt out the scope of civil liability.</p>	<p>Clause 208 will be moved to Part XVI. The Administration will review the provision.</p> <p>Clause 272 creates rights of civil sanction for any person suffers pecuniary loss as a result of market misconduct. The damages will only be payable if the court</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
		<p>considers the claim is fair, just and reasonable.</p> <p>To provide information in overseas jurisdictions in relation to market misconduct showing how the courts overseas apply the principles of "fair, just and reasonable" in determining compensation. See LC Paper No. CB(1) 483/01-02 of 4 December 2001.</p>
273, 297	<p><u>Conducts not to constitute market misconduct or offences</u></p> <p>The clauses empower SFC to make "safe harbour" rules which will create exceptions to the market misconduct civil and criminal provisions.</p> <p>There is doubt that "safe harbour" rules may override the principle legislation.</p>	<p>The purpose of the rules is to provide defences so as not to outlaw legitimate market activities. The rules will not broaden the scope of market misconduct offences.</p>
276	<p><u>No retrospectivity</u></p> <p>The clause seems to imply that other provisions in SFB will have retrospective effect on conduct took place before the commencement of the Bill.</p>	<p>To review.</p>
General	<p><u>The name of "Market Misconduct Tribunal"</u></p> <p>There is a view that the name carries a negative connotation on persons subject to MMT proceedings. A more neutral term such as "Market Conduct Tribunal" may</p>	<p>The name of MMT is appropriate. It clearly conveys the purposes of</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
268(1)	<p>be appropriate. In UK, the tribunal responsible for market misconduct is named as the "Financial Services Market Tribunal".</p> <p><u>The term "negligent"</u></p> <p>“疏忽” is more appropriate than “忽視” for the term “negligent”.</p>	<p>the tribunal. The industry understands the function of the tribunal. The Financial Services Market Tribunal in UK does not just looks at market abuse, but also covers other breaches of market rules committed by intermediaries.</p> <p>To consider.</p>
Schedule 8 - Market Misconduct Tribunal		
7	The power of CE to remove the MMT chairman is too wide.	To consider.
8	<p>The purpose of clause 8 is unclear.</p> <p>There is a concern that if a member resigns or is vacated from office, it would be impractical for CE to authorize him to continue to act as a member under clause 8.</p>	To consider.
9-13	<p><u>Appointment of temporary members</u></p> <p>It may be inappropriate to appoint temporary members after a MMT hearing has commenced.</p>	The proposal allows flexibility and may save cost. The Tribunal will decide whether it should continue the hearing with temporary members or to restart hearing afresh. The Administration will reflect on the need for temporary

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
	<p>There is concern that a temporary chairman may be appointed.</p> <p>The circumstances in clause 9 where temporary members may be appointed are too board.</p> <p>The CE should appoint temporary members on the advice or recommendation of the Tribunal Chairman or CJ.</p>	<p>members and consider appropriate safeguards to ensure the process and fair hearing.</p> <p>To consider.</p>
14	<p>There is no need to qualify the statement as the “written” statement as it is contained in a notice in writing given to the MMT.</p>	<p>To consider.</p>
15	<p>To consider substituting “perpetrated” by “engaged”.</p>	<p>To consider.</p>
16	<p>To review the drafting “... in respect of a financial product ... which is the subject of the market misconduct ...”.</p> <p>It is not desirable to add other “implicated persons” to the proceedings after a hearing has commenced. It is essential to ensure that the “additional persons” fully comprehend the details of the previous proceedings and there may be a need to start the proceedings all over again.</p> <p>Where other “implicated persons” are identified, the matter should be referred to FS for instituting separate MMT proceedings to deal with these persons.</p>	<p>To consider.</p> <p>} To consider.</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
17	To delete "shall" in clauses 17(a) and (b).	To consider.
18	To consider the suitability of "... jurisdiction exercisable by reference to ...".	To consider.
27, 28	To review the clauses in connection with clause 16.	To consider.
31	<p>The purposes and scope of the preliminary conferences should be clarified.</p> <p>The conferences should be presided over by the Chairman, and held with agreement of parties concerned.</p> <p>Results of the conferences should be reported to the Tribunal.</p>	To consider.
Part XIV - Offences relating to dealing in securities and futures contracts, etc.		
280	<p><u>Connected with a corporation - possession of relevant information obtained in privileged capacity (insider dealing offence)</u></p> <p>There is a comment that members of boards, commissions, committee or other bodies appointed by CS or FS may also be regarded as "specified person" under clause 280(2).</p> <p>It is unclear as to the class/category of persons to be included under clause 280(2)(h).</p>	<p>Clause 280(2)(h) is derived from the SIDO and provides flexibility in updating the regulatory catch. The Administration will consult internally to see if a more specific list of relevant bodies could be drawn up in the primary legislation.</p> <p>.</p>
284(9)	<p><u>Insider dealing offence - general defence</u></p> <p>To consider substituting "facts" with "matters".</p>	To consider.

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
	To review the word "any" in sub-clause (a).	
286	<p><u>Insider dealing offences - defences for certain persons exercising right to subscribe for or acquire securities or derivatives</u></p> <p>The purpose of the defences is unclear.</p>	To review the insider dealing defences with reference to overseas practices as appropriate.
287(5) 288(1), (2)	<p><u>Offence of false trading</u> <u>Offence of price rigging</u></p> <p>There is concern that the clauses are strict liability offences and no element of "criminal intention" is attached .</p>	The prosecution has to prove that a person has engaged in "wash sales" or "match orders". The person will have a defence under clause 287(7) and 288(5). The defendant is best placed to explain if he engaged in that behaviour for only legitimate reasons.
293(1)	<p><u>Offence of disclosure of false or misleading information inducing others to enter into leveraged foreign exchange contracts</u></p> <p>The phrase of "be concerned in" is too board.</p> <p>The phrase "is likely to induce" is too vague. It is suggested that a person be liable if he has "financial gain" from the disclosure.</p>	To consider.

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
295(2), (2)(b), (3), (7)	<p><u>Penalties</u></p> <p>There is doubt as whether it is appropriate:</p> <ul style="list-style-type: none">(a) to extend orders available to MMT to the criminal regime;(b) for the court to take into account MMT's decision in deciding the penalty for an offence;(c) that non-compliance with orders made under clause 295(2) is a criminal offence; and(d) to prohibit the convicted person from dealing in a wide range of financial products for a period of five years. <p>There is a view that "collective investment scheme" should be excluded from prohibition.</p>	To consider.
296(7)(b)	<p><u>Civil liability for contravention of this Part</u></p> <p>To simplify the present drafting to make it clear that findings of MMT and its reports are admissible as evidence for the purpose of clause 296.</p>	To review.
297(4)	<p><u>Transactions not to constitute offences</u></p> <p>There is a view that clause 297(4) seems conflict with clause 297(1).</p>	To consider.

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
General	<u>Definition of "securities"</u> There is an observation that a different definition on "securities" from that in Schedule 1 has been adopted for Parts XIII and XIV.	The definitions of "securities" in Parts XIII and XIV are appropriate for the market misconduct regimes.

Part XVII of and Schedule 9 to the Securities and Futures Bill

Date of meetings: 30 May and 26 October 2001

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
Part XVII - Repeals and related provisions		
General	<p><u>Transition for existing intermediaries</u></p> <p>There is a view that the two-year period for existing intermediaries to transit into the new licensing regime is fairly long and the arrangements are rather complicated.</p>	<p>It is necessary to provide ample time for the intermediaries to prepare themselves for migration to the new regime.</p> <p>There will be simplified process to admit existing intermediaries to the new regime. SFC will encourage existing intermediaries to hand in their applications at an earlier time before the expiry of the transitional period.</p>
General	<p><u>Disciplinary sanctions during the transitional period</u></p> <p>There is question on whether lighter penalties, e.g. civil fines, partial revocation or suspension of a licence which are available under the new regulatory regime, can be applied to breaches occurred prior to the commencement of SFB.</p>	<p>Misconduct before commencement of the Securities and Futures Ordinance will be dealt with under the existing disciplinary regime. New disciplinary sanctions, like partial revocation or suspension of licence, might apply through</p>

Clause No.	Concerns/Views/Suggestions	Administration's response or Follow-up required by the Administration/Securities and Futures Commission
		settlement between SFC and the licensees.
General	<p><u>Drafting of the transitional provisions and consequential amendments</u></p> <p>The LegCo Legal Service Division has raised a number of issues/concerns on the drafting of the provisions in Schedule 9 including inter alia:</p> <p>(a) clauses 10, 22, 24-27, 29-32, 39, 40, 42, 43, 46, 47 in Part 1 of Schedule 9; and</p> <p>(b) consequential amendments to sections 49BA(8) and (9) of CO (Cap. 32); section 26A(2) of IRO (Cap. 112).</p>	The Administration will respond in writing.

Abbreviations :

ACL	- Australian Corporations Law
AI	- Authorized institution
ATS	- Automated Trading Services
BAB	- Banking (Amendment) Bill 2000
BO	- Banking Ordinance
CE	- The Chief Executive
CJ	- The Chief Justice
CO	- Companies Ordinance
CS	- The Chief Secretary for Administration
CSA	- Committee Stage Amendments
ED	- Executive Director
ETO	- Electronic Transactions Ordinance
FRR	- Financial Resources Rules

FS	- The Financial Secretary
FSMA	- Financial Services and Markets Act 2000
HKBOR	- Hong Kong Bill of Rights
HKE _x	- The Hong Kong Exchanges and Clearing Limited
HKMA	- The Hong Kong Monetary Authority
ICC	- Investor Compensation Companies
IRO	- Inland Revenue Ordinance
LegCo	- The Legislative Council
MMT	- Market Misconduct Tribunal
MOU	- Memorandum of Understanding
MPF	- Mandatory Provident Fund
PRP	- Process Review Panel
S for J	- The Secretary for Justice
SEHK	- The Stock Exchange of Hong Kong
SFAT	- The Securities and Futures Appeals Tribunal
SFB	- Securities and Futures Bill
SFC	- The Securities and Futures Commission
SIDO	- Securities (Insider Dealing) Ordinance
SO	- Securities Ordinance

Legislative Council Secretariat

13 December 2001