

For Discussion on  
18 July 2001

Paper No. CE08/01

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

Part IX of the Securities and Futures Bill  
Clause-by-clause examination

At the Annex is the mark-up version of Part IX of the Securities and Futures Bill, with the proposed amendments thereto. The reasons for the amendments are set out in the footnotes.

**Securities and Futures Commission  
Financial Services Bureau  
17 July 2001**

PART IX  
DISCIPLINE, ETC.

**Division 1 - Interpretation**

**186. Interpretation of Part IX**

(1) In this Part, unless the context otherwise requires -  
"misconduct" (失當行為) means -

- (a) a contravention of any of the relevant provisions;
- (b) a contravention of any of the terms and conditions of a licence or an exemption under this Ordinance;
- (c) a contravention of any other condition imposed under or pursuant to any provision of this Ordinance; or
- (d) an act or omission relating to the carrying on of any regulated activity for which a person is licensed or exempt which, in the opinion of the Commission, is or is likely to be prejudicial to the interest of the investing public or to the public interest,

and "guilty of misconduct" (犯失當行為) shall be construed accordingly;

"register of companies" (公司登記冊) means the register within the meaning of section 291 of the Companies Ordinance (Cap. 32)

or a register of oversea companies kept under section 333 of that Ordinance.

<sup>1</sup>(2) In this Part, where any ~~person~~ intermediary is, or was at any time, guilty of misconduct within the meaning of paragraph (a), (b), (c) or (d) of the definition of "misconduct" in subsection (1) as a result of the commission of any conduct ~~which occurred~~occurring with the consent or connivance of, or ~~was~~ attributable to any neglect on the part of -

~~of~~ (a) \_\_\_\_\_ in the case of a licensed corporation, another person as -

\_\_\_\_\_ (i) a responsible officer of the licensed corporation; or

~~officer, or~~ \_\_\_\_\_ (ii) a person involved in the management of the business, ~~of a~~ of the licensed corporation; or

(b) in the case of an exempt person, another person as -

\_\_\_\_\_ (i) an executive officer of the exempt person; or

\_\_\_\_\_ (ii) a person involved in the management of the business constituting any regulated activity for which the exempt person is or was (as the case may be) exempt,

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<sup>1</sup> Technical amendment for greater clarity. The addition of clause 186(2)(b) is to reflect the latest proposals of disciplinary sanctions applicable to exempt AI as detailed in Paper No. 8D/01 issued on 28 May 2001.

the conduct shall also be regarded as misconduct on the part of that other person, and "guilty of misconduct" shall also be construed accordingly.

**Division 2 - Discipline, etc.**

**187. Disciplinary action in respect of licensed persons, etc.**

(1) Subject to section ~~189~~191<sup>2</sup>, where -

- (a) a regulated person is, or was at any time, guilty of misconduct; or
- (b) the Commission is of the opinion that a regulated person is not a fit and proper person to be or to remain licensed, ~~or to be or to remain a responsible officer, or a person involved in the management of the business, of a licensed the same type of~~ regulated person<sup>3</sup>,

the Commission may exercise such of the following powers as it considers appropriate in the circumstances of the case -

- (i) where the regulated person is a licensed person -

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<sup>2</sup> The amendment is consequential to the proposal to combine the respective provisions on procedural safeguards applicable in relation to a licensed corporation (clause 189 of the Blue Bill) and an exempt AI (clause 191 of the Blue Bill) to become the new clause 191.

<sup>3</sup> This amendment, together with the amendment to the definition of "regulated person" under clause 187(9) are of technical nature for greater clarity.

- (A) revoke his licence, whether in relation to all or any, or any part of all or any, of the regulated activities for which he is licensed; or
  - (B) suspend his licence, whether in relation to all or any, or any part of all or any, of the regulated activities for which he is licensed for such period or until the occurrence of such event as the Commission may specify;
- (ii) where the regulated person is a responsible officer of a licensed ~~person~~corporation<sup>4</sup> -
- (A) revoke the approval granted under section 125(1) in respect of him as such a responsible officer; or
  - (B) suspend such approval for such period or until the occurrence of such event as the Commission may specify;
- (iii) publicly or privately reprimand the regulated person;
- <sup>5</sup>(iv) prohibit the regulated person from doing all or any of the following in relation to such regulated

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<sup>4</sup> Technical amendment for greater clarity.

<sup>5</sup> The amendments are to empower the SFC to impose a prohibition order with industry-wide effect. For example, a licensed representative whose licence has been revoked by the SFC cannot apply again for licensed representative status

activity or regulated activities, and for such period or until the occurrence of such event, as the Commission may specify -

(A) applying to be licensed or exempt;

~~applying to be licensed, or~~ (B) applying to be approved under section 125(1) as a responsible officer of a licensed corporation;

~~person,~~ (C) applying to be given consent to act or continue to act as an executive officer of an exempt person under section 71C of the Banking Ordinance (Cap. 155);

(D) seeking through an exempt person to have his name entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance (Cap. 155) as that of a person engaged by the exempt person in respect of a regulated activity for such period as the Commission may specify.

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or seek admission to the register maintained by the HKMA under section 20 of the Banking Ordinance for a specified period.

(2) Subject to ~~subsection (7) and section 189~~sections 191 and 191A<sup>6</sup>, where -

- (a) a regulated person is, or was at any time, guilty of misconduct; or
- (b) the Commission is of the opinion that a regulated person is not a fit and proper person to be or to remain ~~licensed, or to be or to remain a responsible officer, or a person involved in the management of the business, of a licensed~~the same type of regulated person<sup>7</sup>,

the Commission may, separately or in addition to any power exercisable under subsection (1), order the regulated person to pay a pecuniary penalty not exceeding the amount which is the greater of -

- (i) \$10,000,000; or
- (ii) 3 times the amount of the profit secured or increased or loss avoided or reduced by the regulated person as a result of his misconduct, or

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<sup>6</sup> Technical amendment due to the proposal to combine the provisions on procedural safeguards applicable in relation to a licensed corporation and an exempt AI (note 2 above), and to create a separate section on the "fining guidelines" (originally in clause 187(7) of the Blue Bill) under the new clause 191A.

<sup>7</sup> This amendment, together with the amendment to the definition of "regulated person" under clause 187(9) are of technical nature for greater clarity.

of his other conduct which leads the Commission to form the opinion (as the case may be).

(3) The Commission, in determining whether a regulated person is a fit and proper person within the meaning of subsection (1)(b) or (2)(b), may, among other matters (including those specified in section 128), take into account such present or past conduct of the regulated person as it considers appropriate in the circumstances of the case.

(4) A regulated person ordered to pay a pecuniary penalty under subsection (2) shall pay the penalty to the Commission within 30 days ~~after being informed of the order by a notice under section 189(2)~~, or such further period as the Commission may specify by notice ~~in writing to him.~~  
under section 191(2), after the order has taken effect as a specified decision under section 224<sup>8</sup>.

(5) The Court of First Instance may, on an application of the Commission made in the manner prescribed by rules made under section 384 for the purposes of this subsection, register an order made under subsection (2) in the Court of First Instance and the order shall, on registration, be regarded for all purposes as an order of the Court of First Instance made within the civil

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<sup>8</sup> We accept the market comment that the payment of a pecuniary penalty should not take effect prior to the determination of the relevant appeal. The amendment has the effect that payment is only required no sooner than 30 days after the determination of the relevant appeal.

jurisdiction of the Court of First Instance for the payment of money.

(6) Any pecuniary penalty paid to or recovered by the Commission pursuant to an order made under subsection (2) shall be paid by the Commission into the general revenue.

~~<sup>9</sup> (7) The Commission shall not perform any of its functions under subsection (2) unless it has published, in the Gazette and in any other manner it considers appropriate, guidelines to indicate the manner in which it proposes to perform such functions.~~

~~<sup>9</sup> (8) Guidelines published under subsection (7) are not subsidiary legislation.~~

(9) In this section -

<sup>10</sup>"regulated person" (受規管人士) means a person who is or at the relevant time was any of the following types of person -

- (a) a licensed person; ~~or~~
- (b) a responsible officer of a licensed corporation;  
or  
~~officer, or~~ (c) a person involved in the management of the business, of a licensed ~~pers~~corporation;

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<sup>9</sup> As mentioned in Note 6 above, this clause is deleted as we have proposed a separate section (clause 191A) to set out in greater detail the "fining guidelines".

<sup>10</sup> As mentioned in Notes 3 and 7 above, the amendments to the definition of "regulated person" are of technical nature for greater clarity.

<sup>11</sup>"relevant time" (有關時間), in relation to a person, means -

- (a) where subsection (1)(a) or (2)(a) applies, the time when the person is, or was, guilty of misconduct;  
or
- (b) where subsection (1)(b) or (2)(b) applies, the time ~~when the person is, in the opinion of the Commission,~~ of occurrence of any matter which, whether with any other matter or not, leads the Commission to form the opinion that the person is not a fit and proper person within the meaning of such subsection.

**188. Other circumstances for disciplinary actions in respect of licensed persons, etc.**

(1) Subject to section ~~189~~91<sup>12</sup>, the Commission may revoke a licensed person's licence, whether in relation to all or any, or any part of all or any, of the regulated activities for which he is licensed, or suspend a licensed person's licence, whether in relation to all or any, or any part of all or any, of the regulated activities for which he is licensed for such period or until the occurrence of such event as the Commission may specify, if -

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<sup>11</sup> Technical amendment for greater clarity.

<sup>12</sup> The amendment is consequential to the proposal to combine the respective provisions on procedural safeguards applicable in relation to a licensed corporation (clause 189 of the Blue Bill) and an exempt AI (clause 191 of the Blue Bill) to become the new clause 191.

- (a) where the licensed person is an individual -
- (i) the licensed person enters into a voluntary arrangement with creditors, or has a bankruptcy order made against him, under the Bankruptcy Ordinance (Cap. 6);
  - (ii) the licensed person fails to satisfy a levy of execution;
  - (iii) the licensed person has been found by a court to be mentally incapacitated, or is detained in a mental hospital, under the Mental Health Ordinance (Cap. 136), which in the opinion of the Commission impugns the fitness and properness of the licensed person to remain licensed<sup>13</sup>;  
or
  - (iv) the licensed person is convicted of an offence (other than an offence under any

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<sup>13</sup> As we mentioned at the meeting on 20 April, in the light of the concern of some Members and market participants that the mental incapacity of one of the directors would be a straight ground for disciplinary sanction against the concerned licensed corporation, we propose to amend clause 188(1)(b)(vi) such that the provision explicitly says that the "mental incapacity" can be a disciplinary ground only if it affects the fitness and properness of the licensed corporation concerned. We also propose similar changes in clause 188(1)(a)(iii) in respect of the mental incapacity of a licensed representative.

of the relevant provisions) in Hong Kong or elsewhere, which in the opinion of the Commission impugns the fitness and properness of the licensed person to remain licensed;

- (b) where the licensed person is a corporation -
  - (i) a receiver or manager of the property or business of the licensed person is appointed;
  - (ii) the licensed person fails to satisfy a levy of execution;
  - (iii) the licensed person enters into a compromise or scheme of arrangement with its creditors;
  - (iv) the licensed person goes into liquidation or is ordered to be wound up;
  - (v) the licensed person is convicted of an offence ( other than an offence under any of the relevant provisions) in Hong Kong or elsewhere, which in the opinion of the Commission impugns the fitness and properness of the licensed person to remain licensed;
  - (vi) any of the directors of the licensed person has been found by a court to be mentally incapacitated, or is detained

in a mental hospital, under the Mental Health Ordinance (Cap. 136), which in the opinion 136)of the Commission impugns the fitness and properness of the licensed person to remain licensed<sup>13</sup>;

or

(vii) any of the directors of the licensed person is convicted of an offence (other than an offence under any of the relevant provisions) in Hong Kong or elsewhere, which in the opinion of the Commission impugns the fitness and properness of the licensed person to remain licensed;

(c) the licensed person does not carry on the regulated activity or regulated activities, or the part of regulated activity or regulated activities, to which the revocation or suspension (as the case may be) relates;

~~\_(d) circumstances exist which would require or entitle the Commission to refuse to issue a licence of the same type as the licensed person's licence to the licensed person under this Ordinance if the~~

~~licensed person had not already been the holder of the licence;~~<sup>14</sup> or

(~~e~~) the licensed person requests the Commission to so revoke or suspend the licence.

(2) Subject to section ~~189~~191<sup>15</sup>, but without limiting the generality of subsection (1), the Commission may revoke a licensed person's licence in relation to Type 7 regulated activity or any part thereof if -

- (a) the Commission has imposed a condition under section 117(1)(c) that the licensed person should, if he is to continue to carry on the regulated activity, be authorized to provide the automated trading services in question under section 95; and
- (b) (i) the licensed person has failed to make an application for the authorization under section 95, within a period that is reasonable in the circumstances of

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<sup>14</sup> Some market participants have expressed concerns that their licence would be revoked due to changing requirements introduced by the SFC over time without any grace or transitional period for compliance. We accept this comment and propose to delete clause 188(1)(d) of the Blue Bill accordingly. Please see Paper 9A/01.

<sup>15</sup> The amendment is consequential to the proposal to combine the respective provisions on procedural safeguards applicable in relation to a licensed corporation (clause 189 of the Blue Bill) and an exempt AI (clause 191 of the Blue Bill) to become the new clause 191.

the case, or has otherwise informed the Commission that he proposes not to make an application for the authorization under section 95; or

(ii) the licensed person has made an application for the authorization under section 95, but the application is not granted.

(3) A licence shall be deemed to be revoked if -

(a) where the licensed person is an individual, the licensed person dies; or

(b) where the licensed person is a corporation, the licensed person is wound up, struck off the register of companies or is otherwise dissolved.

(4) Subject to subsection (5), a licence shall be deemed to be suspended if -

(a) the licensed person fails to pay any annual fee payable by him under section 135, or any additional sum payable by him under that section as a result of any default in paying any annual fee payable by him under that section, within 3 months after the annual fee first became so payable; or

(b) the licensed person fails to submit an annual return required to be submitted by him under section 135 within 3 months after the annual return was first required to be so submitted,

and, subject to subsection (6), the suspension shall remain in force until such time as the Commission considers it appropriate that the licence should no longer be suspended and informs the licensed person to that effect by notice in writing.

(5) A licence shall not be regarded as suspended under subsection (4) unless and until -

(a) in the case of a suspension under subsection (4)(a) by reference to any failure to pay any annual fee or additional sum, the Commission has, by notice in writing given not less than 10 business days before the suspension is to take effect, informed the licensed person of the requirement to pay the annual fee or additional sum (as the case may be), and of the consequence of the failure to comply with the requirement under this section; or

(b) in the case of a suspension under subsection (4)(b) by reference to any failure to submit an annual return, the Commission has, by notice in writing given not less than 10 business days before the suspension is to take effect, informed the licensed person of the requirement to submit the annual return, and of the consequence of the failure to comply with the requirement under this section.

(6) Where a licence is suspended under subsection (4) and the event described in subsection (4)(a) or (b) (as the case may

be) has not been remedied within 30 days after the date<sup>16</sup> on which the suspension becomes effective under subsection (4), or such further period as the Commission may specify by notice in writing to the licensed person, the licence shall be deemed to be revoked.

(7) Subject to section ~~189~~91<sup>17</sup>, where a person who is a responsible officer of a licensed ~~person~~corporation<sup>18</sup> is convicted of an offence (other than an offence under any of the relevant provisions) in Hong Kong or elsewhere, which in the opinion of the Commission impugns the fitness and properness of the person to remain such a responsible officer, the Commission may -

- (a) revoke the approval granted under section 125(1) in respect of the person as such a responsible officer; or
- (b) suspend such approval for such period or until the occurrence of such event as the Commission may specify.

~~**189. Procedural requirements in respect of exercise of powers under section 187 or 188**~~<sup>17</sup>

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<sup>16</sup> Technical amendment.

<sup>17</sup> The amendments are consequential to the proposal to combine the respective provisions on procedural safeguards applicable in relation to a licensed corporation (clause 189 of the Blue Bill) and an exempt AI (clause 191 of the Blue Bill) to become the new clause 191.

<sup>18</sup> Technical amendment for greater clarity.

~~(1) The Commission shall not exercise any power under section 187(1) or (2) or 188(1)(a), (b), (c) or (d), (2) or (7) without first giving the person in respect of whom the power is exercised a reasonable opportunity of being heard.~~

~~(2) Where the Commission decides to exercise any power under section 187(1) or (2) or 188(1), (2) or (7), the Commission shall inform the person in respect of whom the power is exercised of its decision to do so by notice in writing, and the notice shall include—~~

- ~~(a) a statement of the reasons for which the decision is made;~~
- ~~(b) the time at which the decision is to take effect;~~
- ~~(c) in so far as applicable, the duration and terms of any revocation, suspension or prohibition to be imposed under the decision;~~
- ~~(d) in so far as applicable, the terms in which the person is to be reprimanded under the decision; and~~
- ~~(e) in so far as applicable, the amount of any pecuniary penalty to be imposed under the decision and the date by which it is required to be paid~~

<sup>19</sup>189A. Disciplinary action in respect of exempt persons, etc.

(1) Subject to section 191, where -

(a) a regulated person is, or was at any time, guilty of misconduct; or

(b) the Commission is of the opinion that a regulated person is not a fit and proper person to be or to remain the same type of regulated person.

the Commission may exercise such of the following powers as it considers appropriate in the circumstances of the case -

(i) where the regulated person is an exempt person -

(A) revoke his exemption, whether in relation to all or any, or any part of all or any, of the regulated activities for which he is exempt; or

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<sup>19</sup> The new clause 189A is to reflect the latest proposals to apply the same range of disciplinary sanctions to exempt AIs and licensed corporations as detailed in Paper No. 8D/01. The effect is that an exempt AI, its executive officers, relevant employees and management would be subject to "reprimand", "civil fines", "prohibition orders" (where applicable), "suspension/revocation" (where applicable) in the same manner as that applicable in relation to a licensed corporation. The equivalent of "suspension" and "revocation" of the relevant employees and executive officers will be included as Committee Stage Amendments to the Banking (Amendment) Bill 2000 as their admission to the conduct of a regulated activity is provided for in that Bill. Otherwise, clause 189A is basically the same as clause 187 in respect of disciplinary action against licensed persons.

(B) suspend his exemption, whether in relation to all or any, or any part of all or any, of the regulated activities for which he is exempt for such period or until the occurrence of such event as the Commission may specify;

(ii) publicly or privately reprimand the regulated person;

(iii) prohibit the regulated person from doing all or any of the following in relation to such regulated activity or regulated activities, and for such period or until the occurrence of such event, as the Commission may specify -

(A) applying to be licensed or exempt;

(B) applying to be approved under section 125(1) as a responsible officer of a licensed corporation;

(C) applying to be given consent to act or continue to act as an executive officer of an exempt person under section 71C of the Banking Ordinance (Cap. 155);

(D) seeking through an exempt person to have his name entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance (Cap. 155) as that of a person engaged by the exempt person in respect of a regulated activity.

(2) Subject to sections 191 and 191A, where -

(a) a regulated person is, or was at any time, guilty of misconduct; or

(b) the Commission is of the opinion that a regulated person is not a fit and proper person to be or to remain the same type of regulated person,

the Commission may, separately or in addition to any power exercisable under subsection (1), order the regulated person to pay a pecuniary penalty not exceeding the amount which is the greater of -

(i) \$10,000,000; or

(ii) 3 times the amount of the profit secured or increased or loss avoided or reduced by the regulated person as a result of his misconduct, or of his other conduct which leads the Commission to form the opinion (as the case may be).

(3) The Commission, in determining whether a regulated person is a fit and proper person within the meaning of subsection (1)(b) or (2)(b), may, among other matters (including those specified in section 128), take into account such present or past conduct of the regulated person as it considers appropriate in the circumstances of the case.

(4) A regulated person ordered to pay a pecuniary penalty under subsection (2) shall pay the penalty to the Commission within 30 days, or such further period as the Commission may specify by

notice under section 191(2), after the order has taken effect as a specified decision under section 224.

(5) The Court of First Instance may, on an application of the Commission made in the manner prescribed by rules made under section 384 for the purposes of this subsection, register an order made under subsection (2) in the Court of First Instance and the order shall, on registration, be regarded for all purposes as an order of the Court of First Instance made within the civil jurisdiction of the Court of First Instance for the payment of money.

(6) Any pecuniary penalty paid to or recovered by the Commission pursuant to an order made under subsection (2) shall be paid by the Commission into the general revenue.

(7) Without prejudice to the exercise by the Monetary Authority of any powers under the Banking Ordinance (Cap. 155), the Commission may make such recommendations to the Monetary Authority in respect of the exercise by the Monetary Authority of any of its powers under sections 58A and 71C(4) of that Ordinance as the Commission considers appropriate.

(8) In this section -  
"regulated person" (受規管人士) means a person who is or at the

relevant time was any of the following types of person -

- (a) an exempt person;
- (b) an executive officer of an exempt person;
- (c) a person involved in the management of the business  
constituting any regulated activity for which an

exempt person is or was (as the case may be) exempt;

or

(d) an individual whose name is or was (as the case may be) entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance (Cap. 155) as that of a person engaged by an exempt person in respect of a regulated activity;

"relevant time" (有關時間), in relation to a person, means -

(a) where subsection (1)(a) or (2)(a) applies, the time when the person is, or was, guilty of misconduct;

or

(b) where subsection (1)(b) or (2)(b) applies, the time of occurrence of any matter which, whether with any other matter or not, leads the Commission to form the opinion that the person is not a fit and proper person within the meaning of such subsection.

**190. Other circumstances for disciplinary action in**  
**Disciplinary action in respect of exempt persons, etc.**

(1) Subject to ~~subsection (4) and~~<sup>20</sup> section 191, the Commission may revoke an exempt person's exemption, whether in

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<sup>20</sup> Technical amendment to subsume clause 190(4) of the Blue Bill under the new clause 191.

relation to all or any, or any part of all or any, of the regulated activities for which he is exempt, or suspend an exempt<sup>21</sup> -

~~(a) if the exempt person carries on any of the regulated activities, or any part of the regulated activities, for which he is exempt, otherwise than in accordance with the conditions imposed under section 118(5);~~

~~(b) if the exempt person is, or was at any time, guilty of misconduct;~~

~~(c) if the Commission is of the opinion that the exempt person is not a fit and proper person to be or to remain exempt; person's exemption, whether in relation to all or any, or any part of all or any, of the regulated activities for which he is exempt for such period or until the occurrence of such event as the commission may specify -~~

(d) if -

(i) a receiver or manager of the property or business of the exempt person is appointed;

(ii) the exempt person fails to satisfy a levy of execution;

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<sup>21</sup> The amendment is to empower the SFC to suspend the exemption granted to an exempt AI based on similar grounds as that applicable to a licensed corporation under clause 188. Clause 190(1)(a) to (c) of the Blue Bill have been relocated as the new clause 190A. Please see Note 19 above.

- (iii) the exempt person enters into a compromise or scheme of arrangement with its creditors;
  - (iv) the exempt person goes into liquidation or is ordered to be wound up;
  - (v) the exempt person is convicted of an offence (other than an offence under any of the relevant provisions) in Hong Kong or elsewhere, which in the opinion of the Commission impugns the fitness and properness of the exempt person to remain exempt;
- (e) if the exempt person does not carry on the regulated activity or regulated activities, or the part of regulated activity or regulated activities, to which the revocation or suspension (as the case may be) relates; or
- (f) if the exempt person requests the Commission to so revoke or suspend the exemption.

~~<sup>22</sup> (2) The Commission, in determining whether an exempt person is a fit and proper person within the meaning of subsection (1)(c), may, among other matters (including those specified in section 128), take into account such present or past conduct of the exempt~~

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<sup>22</sup> Technical amendment to subsume clause 190(2) of the Blue Bill under the new clause 189A.

~~person as it considers appropriate in the circumstances of the case.~~

(3) An exemption by which a person has become an exempt person shall be deemed to be revoked if -

(a) the exempt person ceases to be an authorized financial institution; or

(b) the exempt person is wound up, struck off the register of companies or is otherwise dissolved.

~~<sup>23</sup> (4) No exemption by which a person has become an exempt person shall be revoked under subsection (1) unless the Commission has first consulted the Monetary Authority.~~

(5) Subject to subsection (6), an exemption by which a person has become an exempt person shall be deemed to be suspended if the exempt person fails to pay any annual fee payable by him under section 135, or any additional sum payable by him under that section as a result of any default in paying any annual fee payable by him under that section, within 3 months after the annual fee first became so payable, and, subject to subsection (7), the suspension shall remain in force until such time as the Commission considers it appropriate that the exemption should no longer be suspended and informs the exempt person to that effect by notice in writing.

(6) An exemption shall not be regarded as suspended under subsection (5) by reference to any failure to pay any annual fee

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<sup>23</sup> Technical amendment to subsume clause 190(4) of the Blue Bill under the new clause 191.

or additional sum, unless and until the Commission has, by notice in writing given not less than 10 business days before the suspension is to take effect, informed the exempt person of the requirement to pay the annual fee or additional sum (as the case may be), and of the consequence of the failure to comply with the requirement under this section.

(7) Where an exemption is suspended under subsection (5) and the failure to pay the annual fee or additional sum described in that subsection has not been remedied within 30 days after the date on which the suspension becomes effective under that subsection, or such further period as the Commission may specify by notice in writing to the exempt person, the exemption shall be deemed to be revoked.

**~~191. Procedural requirements in respect of  
exercise of powers under section 190~~<sup>24</sup>**

~~(1) The Commission shall not revoke an exemption under section 190(1)(a), (b), (c), (d) or (e) without first giving the exempt person concerned a reasonable opportunity of being heard.~~

~~(2) Where the Commission decides to revoke an exemption under section 190(1), the Commission shall inform the exempt person~~

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<sup>24</sup> The amendment is consequential to the proposal to combine the respective provisions on procedural safeguards applicable in relation to a licensed corporation (clause 189 of the Blue Bill) and an exempt AI (clause 191 of the Blue Bill) to become the new clause 191.

~~concerned of its decision to do so by notice in writing, and the notice shall include —~~

~~(a) a statement of the reasons for which the decision is made; and~~

~~(b) the time at which the decision is to take effect.~~

### Division 3 - Miscellaneous

#### **191. Procedural requirements in respect of exercise of powers under Part IX<sup>25</sup>**

(1) The Commission shall not exercise any power under section 187(1) or (2), 188(1)(a), (b) or (c), (2) or (7), 189A(1) or (2) or 190(1) (d) or (e) without first giving the person in respect of whom the power is exercised a reasonable opportunity of being heard.

(1A) The Commission shall not exercise any power under section 189A(1) or (2) or 190(1) unless it has first consulted the Monetary Authority.

(2) Where the Commission decides to exercise any power under section 187(1) or (2), 188(1), (2) or (7), 189A(1) or (2) or 190(1), the Commission shall inform the person in respect of whom the power

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<sup>25</sup> The amendment is consequential to the proposal to combine the respective provisions on procedural safeguards applicable in relation to a licensed corporation (clause 189 of the Blue Bill) and an exempt AI (clause 191 of the Blue Bill) to become the new clause 191.

is exercised of its decision to do so by notice in writing, and the notice shall include -

- (a) a statement of the reasons for which the decision is made;
- (b) the time at which the decision is to take effect;
- (c) in so far as applicable, the duration and terms of any revocation, suspension or prohibition to be imposed under the decision;
- (d) in so far as applicable, the terms in which the person is to be reprimanded under the decision; and
- (e) in so far as applicable, the amount of any pecuniary penalty to be imposed under the decision and the period (being specified as a period after the decision has taken effect as a specified decision under section 224) within which it is required to be paid.

**191A. Guidelines for exercise of functions under section 187(2) or 189A(2)<sup>26</sup>**

(1) The Commission shall not perform any of its functions under section 187(2) or 189A(2) unless -

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<sup>26</sup> As mentioned in Note 6 above, we propose to create a separate section on the "fining guidelines" under clause 191A for application both in relation to a licensed corporation and an exempt AI. Moreover, having regard to Members' views expressed at the meeting on 20 April, we propose under clause 191A(1)(b) that

(a) it has published, in the Gazette and in any other manner it considers appropriate, guidelines to indicate the manner in which it proposes to perform such functions; and

(b) in performing such functions, it has had regard to the guidelines so published.

(2) Without prejudice to the inclusion of any other factors that the Commission may consider relevant, guidelines published under subsection (1) shall include the following as factors that the Commission shall take into account in performing any of its functions under section 187(2) or 189A(2) -

(a) whether the conduct of the regulated person in question was intentional, reckless or negligent;

(b) whether the conduct damaged the integrity of the securities and futures market;

(c) whether the conduct caused loss to, or imposed costs on, any other person; and

(d) whether the conduct resulted in a benefit to the regulated person or any other person.

(3) Guidelines published under subsection (1) are not subsidiary legislation.

## **192. Effect of suspension under Part IX**

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the SFC shall have regard to the guidelines and under clause 191A(2) the general factors that the SFC must have regard to.

(1) If a licence of a person is suspended under section 187 or 188 in relation to all or any, or any part of all or any, of the regulated activities for which the person is licensed, then, without prejudice to any provision of this Ordinance which has application in relation to the suspension, the person shall, during the period of the suspension -

- (a) continue to be regarded for the purposes of the provisions of this Ordinance, but not section 114, to be licensed for the regulated activity or regulated activities, or the part of regulated activity or regulated activities, to which the suspension relates; and
- (b) without limiting the generality of paragraph (a), continue to be required to comply with such provisions of this Ordinance relating to a licensed person as would apply to him were the licence not so suspended.

(2) If an approval of a person as a responsible officer of a licensed ~~person~~corporation<sup>27</sup> is suspended under section 187 or 188, then, without prejudice to any provision of this Ordinance which has application in relation to the suspension, the person shall, during the period of the suspension -

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<sup>27</sup> Technical amendment for greater clarity.

- (a) continue to be regarded for the purposes of the provisions of this Ordinance, but not sections 117 and 124, to be such a responsible officer; and
- (b) without limiting the generality of paragraph (a), continue to be required to comply with such provisions of this Ordinance relating to a responsible officer as would apply to him were the approval not so suspended.

(3) If an exemption by which a person has become an exempt person is suspended under section 189A or 190<sup>28</sup> in relation to all or any, or any part of all or any, of the regulated activities for which the person is exempt, then, without prejudice to any provision of this Ordinance which has application in relation to the suspension, the person shall, during the period of the suspension -

- (a) continue to be regarded for the purposes of the provisions of this Ordinance, but not section 114, to be exempt for the regulated activity or regulated activities, or the part of regulated activity or regulated activities, to which the suspension relates; and
- (b) without limiting the generality of paragraph (a), continue to be required to comply with such

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<sup>28</sup> The amendment is consequential to extending the application of "suspension" to an exempt AI.

provisions of this Ordinance relating to an exempt person as would apply to him were the exemption not so suspended.

(4) A licence of a person may be revoked under section 187 or 188 notwithstanding that, at the time of revocation, the licence is suspended, whether in relation to all or any, or any part of all or any, of the regulated activities for which the person is licensed, under any provision of this Ordinance.

(5) An approval of a person as a responsible officer of a licensed ~~person~~corporation<sup>29</sup> may be revoked under section 187 or 188 notwithstanding that, at the time of revocation, the approval is suspended under any provision of this Ordinance.

(6) An exemption by which a person has become an exempt person may be revoked under section 189A or 190<sup>30</sup> notwithstanding that, at the time of revocation, the exemption is suspended, whether in relation to all or any, or any part of all or any, of the regulated activities for which the person is exempt, under any provision of this Ordinance.

**193. General provisions relating to exercise  
of powers under Part IX**

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<sup>29</sup> Technical amendment for greater clarity.

<sup>30</sup> The amendment is consequential to extending the application of "suspension" to an exempt AI.

(1) In reaching a decision under section 187(1) or (2), 188(1), (2) or (7), 189A(1) or (2)<sup>31</sup> or 190(1), the Commission may have regard to any information or material in its possession which is relevant to the decision, regardless of how the information or material has come into its possession.

(2) The revocation or suspension of a licence or an exemption under this Part does not operate so as to -

- (a) avoid or affect an agreement, transaction or arrangement entered into by the licensed person or exempt person (as the case may be) whether the agreement, transaction or arrangement was entered into before or after the revocation or suspension;
- (b) affect a right, obligation or liability arising under the agreement, transaction or arrangement.

(3) Where at any time the Commission is contemplating exercising any power in respect of a person under section 187(1) or (2) ~~or 188(1)(a), (b), (c) or (d), (2) or (7), 188(1)(a), (b) or (c), (2) or (7), 189A(1) or (2) or 190(1)(d) or (e)~~<sup>32</sup>, it may, where it considers it appropriate to do so in the interest of the investing public or in the public interest, by agreement with the person -

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<sup>31</sup> The amendment is consequential to the extended disciplinary sanctions applicable in relation to an exempt AI.

<sup>32</sup> The amendment is consequential to the extended disciplinary sanctions applicable in relation to an exempt AI.

- (a) exercise any power the Commission may exercise in respect of the person under such section this Part (whether or not the same as the power the exercise of which has been contemplated); and
- (b) take such additional action as it considers appropriate in the circumstances of the case.

(4) Where the Commission exercises any power or takes any additional action under subsection (3) <sup>-33</sup>

~~(3), a~~ it shall comply with section 191(1A) and (2), subject however that section 191(1A) and (2) shall, in addition to applying to the exercise of power under the sections specified therein, also apply with necessary modifications to the taking of any additional action under subsection (3); and  
~~189(2), but, b~~ subject to the agreement of the person in respect of whom it decides to exercise the power or take the additional action (as the case may be) under subsection (3), it is not obliged to comply with section ~~189~~91(1).

(5) Nothing in this Part affects the power of the Court of First Instance to make any order or exercise any other power under or pursuant to section 204, 205, 206 or 207.

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<sup>33</sup> Technical amendments consequential to the relocation of provisions and also for greater clarity.

**194. Requirement to transfer records upon revocation  
or suspension of licence or exemption**

(1) Where a licence or exemption is revoked or suspended under this Part, the Commission may by notice in writing require the person to whom the licence was granted or the person who became an exempt person by the exemption (as the case may be) to transfer to, or to the order of, his client such records relating to client assets or to the affairs of the client held at any time for the client, in such manner, as the Commission reasonably specifies in the notice.

(2) A person who, without reasonable excuse, fails to comply with a requirement imposed on him under subsection (1) commits an offence and is liable on conviction to a fine of \$200,000 and to imprisonment for 2 years.

(3) In this section, "client" (客戶), in relation to a person referred to in subsection (1), means any person who, at any time when the first-mentioned person was an intermediary, was a client of the first-mentioned person under the definition of "client" in section 1 of Part 1 of Schedule 1.

**195. Permission to carry on business operations  
upon revocation or suspension of  
licence or exemption**

(1) Where a licence or exemption is revoked or suspended under this Part, the Commission may by notice in writing permit the person to whom the licence was granted or the person who became an exempt person by the exemption (as the case may be) to -

- (a) in the case of a revocation, carry on business operations for the purpose of closing down the business connected with the revocation; or
- (b) in the case of a suspension, carry on only essential business operations for the protection of interests of clients of the person or, in the case of a licensed representative, of the licensed corporation to which the person is accredited, during the period of suspension,

subject to such conditions as the Commission may specify in the notice.

(2) Notwithstanding section 192(1), where the Commission has granted a permission to a person under subsection (1), the person shall not, by reason of its carrying on business operations in accordance with the permission, be regarded as having contravened section 114.

(3) Any permission granted under subsection (1), and the imposition of conditions pursuant to that subsection, take effect at the time of the service of the notice given in respect thereof or at the time specified in the notice, whichever is the later.