

For discussion on
14 September 2001

Paper No. CE09/01

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

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

At the Appendix is the mark-up version of Part X of the Securities and Futures Bill on powers of intervention and proceedings, with the proposed amendments thereto. The reasons for the amendments, as well as clarifications to address Members' concerns about certain provisions raised at the Bills Committee meetings on 24 and 27 April 2001, are set out in the footnotes and the relevant annexes.

Securities and Futures Commission
Financial Services Bureau
4 September 2001

PART X

POWERS OF INTERVENTION AND PROCEEDINGS

Division 1 - Powers of intervention**196. Restriction of business**

(1) Subject to section 200, the Commission may by notice in writing -

- (a) prohibit a licensed corporation from -
 - (i) entering into transactions of a specified description or other than of a specified description, or entering into transactions in specified circumstances or other than in specified circumstances, or entering into transactions to a specified extent or other than to a specified extent;
 - (ii) soliciting business from persons of a specified description or from persons other than of a specified description;
 - (iii) carrying on business in a specified manner or other than in a specified manner;
- (b) require a licensed corporation to carry on business in, and only in, a specified manner.

(2) A prohibition or requirement imposed on a licensed corporation under this section may relate to either or both of the following -

- (a) transactions entered into in connection with the business which constitutes a regulated activity for which the licensed corporation is licensed;
- (b) transactions entered into in connection with any other business which is carried on by the licensed corporation in connection with the business which constitutes a regulated activity for which it is licensed.

¹197. Restriction on dealing with property

(1) Subject to section 200, the Commission may by notice in writing, ~~as regards any property (whether of a licensed corporation~~

~~—~~

- (a) prohibit ~~a~~ the licensed corporation from -
 - (i) disposing of ~~the~~ any relevant property²;
 - (ii) dealing with ~~the~~ any relevant property in a specified manner or other than in a specified manner;

¹ See Annex 1.

² See Annex 2.

- (b) require ~~the~~ a licensed corporation to deal with ~~the~~ any relevant property in, and only in, a specified manner.

(2) In this section, "relevant property" (有關財產), in relation to a licensed corporation, means -

- (a) any property held by the licensed corporation, acting within the capacity for which the licensed corporation is licensed, on behalf of any of the clients of the licensed corporation, or held by any other person on behalf or to the order of the licensed corporation acting within such capacity;
- (b) any other property which the Commission reasonably believes to be owned or controlled by the licensed corporation or connected with the business which constitutes a regulated activity for which the licensed corporation is licensed.

198. Maintenance of property

(1) Subject to section 200, the Commission may by notice in writing require a licensed corporation to maintain property in Hong Kong and in any specified place outside Hong Kong such that -

- (a) the property maintained is of the value and of the description that appear to the Commission to be desirable with a view to ensuring that the licensed corporation will be able to meet its liabilities

in relation to the business which constitutes a regulated activity for which it is licensed; and

- (b) the property is maintained in a manner that will enable the licensed corporation at any time freely to transfer or otherwise dispose of the property.

(2) The Commission may in any requirement imposed under this section direct that, for the purposes of the requirement, property of a specified description shall or shall not be taken into account.

³**[199. Requirement to transfer custody of property**

(1) Subject to section 200, the Commission may by notice in writing require a licensed corporation or any other person to transfer the custody of relevant property of a specified description (whether of the licensed corporation or the other person (as the case may be) or not) to the Commission or to any person appointed in that behalf by the Commission.

(2) A requirement imposed under subsection (1) shall be regarded as also requiring the licensed corporation or the other person on whom the requirement is imposed to assist the Commission or the person appointed by the Commission pursuant to that subsection (as the case may be) to discharge its or his functions relating to the requirement.

(3) Where the custody of any relevant property has been transferred to the Commission, or to any person appointed by the

³ Propose to delete clause 199. See considerations at Annex 3.

Commission, pursuant to a requirement imposed under subsection (1), the Commission or the person (as the case may be) shall, subject to any order of a court (whether made under subsection (5) or otherwise) affecting all or any of the relevant property, take all reasonable steps to preserve the relevant property.

(4) Where the custody of any relevant property has been transferred to the Commission, or to any person appointed by the Commission, pursuant to a requirement imposed under subsection (1) -

- (a) the Commission shall, as soon as reasonably practicable thereafter, apply to the Court of First Instance for an order under subsection (5) in respect of the relevant property; and
- (b) the following persons may apply to the Court of First Instance for an order under subsection (5) in respect of the relevant property, or any part thereof -
 - (i) the licensed corporation or the other person (as the case may be) from whom the custody of the relevant property has been transferred; and
 - (ii) any other person having a claim to or any interest in, or in relation to, all or any of the relevant property.

(5) The Court of First Instance may, on an application of the Commission, the licensed corporation or any other person made

under subsection (4), make such order as it considers appropriate in relation to any of the relevant property in respect of which the application is made.

(6) Neither this section nor a transfer of the custody of any relevant property pursuant to a requirement imposed under subsection (1) shall affect any legal or equitable title to any of the relevant property.

(7) In this section, "relevant property" (有關財產) means -

- (a) any property held by a licensed corporation, acting within the capacity for which the licensed corporation is licensed, on behalf of any of the clients of the licensed corporation, or held by any other person on behalf or to the order of the licensed corporation acting within such capacity;
- (b) any other property which the Commission reasonably believes to be connected with the business which constitutes a regulated activity for which the licensed corporation is licensed,

but does not include securities deposited by a clearing participant with a recognized clearing house in accordance with the rules of the clearing house.¹

**200. Imposition of prohibition or requirement
under section 196, 197, 198 or [199]⁴**

The Commission may impose a prohibition or requirement under section 196, 197, 198 or [199]⁴ in respect of or with reference to any licensed corporation if it appears to the Commission that -

- (a) any property of the licensed corporation or its clients, or any property connected with the business which constitutes a regulated activity for which it is licensed, might be dissipated, transferred or otherwise dealt with in a manner prejudicial to the interest of any of its clients or creditors;
- (b) the licensed corporation is not a fit and proper person to remain licensed or is not a fit and proper person to carry on any regulated activity for which it is licensed (having regard, among other matters, to the matters specified in section 128);
- (c) the licensed corporation has failed to comply with the requirement specified in section 173(2) or, in purported compliance with such requirement, has furnished the Commission with information which ~~is~~

⁴ For easy reference, we put in square brackets cross references to clause 199 in various places in clauses 200 to 204 which would be deleted subject to Members' views on the proposed deletion of clause 199. See also Footnote 3 and Annex 3.

was at the time when it was furnished⁵ false or misleading in a material particular;

- (d) the licence of the licensed corporation may be revoked or suspended on any of the grounds specified in section 187(1) or 188(1) or (2); or
- (e) the imposition of the prohibition or requirement is desirable in the interest of the investing public or in the public interest.

201. Withdrawal, substitution or variation of prohibitions or requirements under section 196, 197, 198 or [199]⁴

(1) [Subject to subsection (2),]⁴ where a prohibition or requirement imposed under section 196, 197, 198 or [199]⁴ is in force, the Commission may, where it considers appropriate to do so (whether of its own volition or upon the request of the person on whom the prohibition or requirement is imposed or any other person affected by the prohibition or requirement), by notice in writing given to the person on whom the prohibition or requirement is imposed -

- (a) withdraw the prohibition or requirement; or
- (b) substitute another prohibition or requirement for, or vary, the prohibition or requirement.

⁵ Technical amendment for greater clarity and to align with the CSA to clause 105(1)(a)/(c), as set out in Paper No.CE03/01 considered by Members on 27 June 2001.

⁴[(2) No withdrawal, substitution or variation may be made under subsection (1) in respect of a requirement imposed under section 199 after the Court of First Instance has made any order under section 199(5) in respect of the relevant property, or any of the relevant property, the custody of which has been transferred pursuant to the requirement.—]

(3) [Subject as otherwise provided in any order made by the Court of First Instance under section 199(5),]⁴ a prohibition or requirement imposed under section 196, 197, 198 or [199]⁴, or a prohibition or requirement substituting for another prohibition or requirement under subsection (1)(b), or a prohibition or requirement as varied under subsection (1)(b), shall, unless it provides otherwise, remain in force in accordance with the terms thereof until it is -

(a) withdrawn; or

(b) substituted by another prohibition or requirement, or varied,

by the Commission under this section.

(4) The provisions of this section apply, with necessary modifications, to a prohibition or requirement substituting for another prohibition or requirement under subsection (1)(b), or a prohibition or requirement as varied under subsection (1)(b), as they apply to a prohibition or requirement imposed under section 196, 197, 198 or [199]⁴, and the provisions of this Division shall be construed accordingly.

⁴[(5) Without prejudice to subsection (4), section 199(2) to (6) applies, with necessary modifications, to a requirement substituting for another requirement under subsection (1)(b), or a requirement as varied under subsection (1)(b), as it applies to a requirement imposed under section 199, and the provisions of this Division shall be construed accordingly.]

202. General provisions relating to sections 196, 197, 198, [199]⁴ and 201

(1) Where the Commission imposes under section 196, 197, 198 or [199]⁴, or withdraws, substitutes or varies under section 201, a prohibition or requirement, the imposition, withdrawal, substitution or variation (as the case may be) of the prohibition or requirement takes 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.

(2) Where the Commission imposes under section 196, 197, 198 or [199]⁴, or withdraws, substitutes or varies under section 201, a prohibition or requirement, the notice given in respect thereof shall be accompanied by a statement specifying the reasons for the imposition, withdrawal, substitution or variation (as the case may be) of the prohibition or requirement.

(3) Where any request is made by any person to the Commission pursuant to section 201(1) for the withdrawal, substitution or variation of a prohibition or requirement, the Commission shall serve on the person -

- (a) where it withdraws, substitutes or varies the prohibition or requirement in accordance with the request, a copy of the notice given in respect thereof and of the statement accompanying it in accordance with subsection (2); or
 - (b) where it refuses to withdraw, substitute or vary the prohibition or requirement notwithstanding the request, a notice of its refusal, together with a statement specifying the reasons for the refusal.
- (4) Where -
- (a) the Commission imposes under section 196, 197, 198 or [199]⁴, or withdraws, substitutes or varies under section 201, a prohibition or requirement; and
 - (b) the reasons for the imposition, withdrawal, substitution or variation (as the case may be) as specified in the statement accompanying the notice given in respect thereof in accordance with subsection (2) relate specifically to matters which -
 - (i) refer to any person who is identified in the statement but who is not the person on whom the prohibition or requirement was imposed; and

- (ii) are, in the opinion of the Commission, prejudicial to the person in any respect,

the Commission shall, as soon as reasonably practicable after the imposition, withdrawal, substitution or variation (as the case may be), take all reasonable steps to serve on the person a copy of the notice given in respect of the imposition, withdrawal, substitution or variation (as the case may be) and of the statement accompanying it in accordance with subsection (2).

⁴[(5) Where the Commission imposes a requirement under section 199, or withdraws, substitutes or varies such a requirement under section 201, the Commission shall, as soon as reasonably practicable after the imposition, withdrawal, substitution or variation (as the case may be), take all reasonable steps to -

- (a) identify any person who, not being a person on whom the requirement was imposed, has a claim to or any interest in, or in relation to, all or any of the relevant property to which the requirement relates; and
- (b) serve on the person so identified a copy of the notice given in respect of the imposition, withdrawal, substitution or variation (as the case may be) and of the statement accompanying it in accordance with subsection (2).]

(6) Nothing in subsections (3) to [(5)]⁴ requires a copy of any notice given in respect of the imposition, withdrawal,

substitution or variation of a prohibition or requirement, or of a statement accompanying it in accordance with subsection (2), to be served on any person if the notice or statement or a copy of the notice or statement (as the case may be) has been served on the person under any other provision of this Part.

(7) The Commission may publish in the Gazette, and by such additional means as it may consider appropriate, a notice regarding the imposition under section 196, 197, 198 or [199]⁴, or the withdrawal, substitution or variation under section 201, of a prohibition or requirement.

(8) Where the imposition of a prohibition or requirement is published under subsection (7), the Commission shall also publish in the Gazette, and by such additional means as it may consider appropriate, a notice regarding any subsequent withdrawal, substitution or variation of the prohibition or requirement under section 201.

(9) A notice published under subsection (7) or (8) may, if the Commission considers appropriate, include a statement specifying the reasons for the imposition, withdrawal, substitution or variation (as the case may be) to which the notice relates.

(10) The Commission shall -

- (a) before imposing under section 196, 197, 198 or [199]⁴, or withdrawing, substituting or varying under section 201, a prohibition or requirement in respect of or with reference to a corporation that

is an exchange participant or a clearing participant, use its best endeavours to inform the recognized exchange company or the recognized clearing house (as the case may be) of the proposed imposition, withdrawal, substitution or variation (as the case may be) by notice in writing; and

(b) where before the imposition, withdrawal, substitution or variation of a prohibition or requirement it has not informed the recognized exchange company or the recognized clearing house (as the case may be) of the proposed imposition, withdrawal, substitution or variation (as the case may be) by notice in writing, forthwith after the imposition, withdrawal, substitution or variation (as the case may be) inform the recognized exchange company or the recognized clearing house (as the case may be) thereof by notice in writing.

(11) Sections 196, 197, 198, [199]⁴ and 201, and the imposition, withdrawal, substitution or variation of a prohibition or requirement under section 196, 197, 198, [199]⁴ or 201, do not operate so as to render an agreement unenforceable by a party to the agreement if he proves that in entering into the agreement he acted in good faith and was unaware of any notice given, served or published, whether under section 196, 197, 198, [199]⁴ or 201 or under this section, in respect of or regarding the imposition, withdrawal, substitution or variation (as the case may be).

(12) Where by ~~virtue~~ reason⁶ of the application of section 196, 197, 198, [199]⁴ or 201 or of the giving, service or publication of any notice, whether under section 196, 197, 198, [199]⁴ or 201 or under this section, a person rescinds an agreement, he shall restore to any other party to the agreement any money or other benefit received or obtained by him under the agreement from that party.

(13) A notice published under subsection (7) or (8) is not subsidiary legislation.

203. Cases of revocation or suspension of licensed corporations' licences

(1) Notwithstanding any other provisions of this Ordinance, but without limiting the generality of section 192(1) (whether having application with or without reference to section 142(9) or 143(7)), the revocation or suspension of the licence of a licensed corporation under any provision of this Ordinance does not affect -

⁶ Technical amendment for greater clarity, in response to a comment made by the Bills Committee at the meeting on 27 April 2001. At the meeting, Members also asked about further explanation on the use of this power. The provision is to ensure that parties to an agreement concerning property which is the subject of a restriction notice etc. are not prejudiced as a result of the other party rescinding that agreement (or that one of the parties does not get a windfall benefit). This would cover a situation where a contract was partly executed (e.g. a deposit was paid by a purchaser pursuant to an unconditional contract) and the contract could not be completed as a result of the restriction notice being imposed.

(a) the validity of -

(i) a prohibition or requirement imposed under section 196, 197, 198 or [199]⁴ in respect of or with reference to the corporation;

(ii) a prohibition or requirement substituting for another prohibition or requirement under section 201(1)(b); or

(iii) a prohibition or requirement as varied under section 201(1)(b),

where the imposition, substitution or variation (as the case may be) takes effect at any time before the revocation or suspension (as the case may be) takes effect;

(b) without limiting the generality of paragraph (a), any power exercisable by the Commission under section 201 in respect of any prohibition or requirement provided for in that paragraph, at the time when, or at any time after, the revocation or suspension (as the case may be) takes effect,

and references in this Division to a licensed corporation shall be construed accordingly.

(2) Notwithstanding section 192(1)(whether having application with or without reference to section 142(9) or 143(7)), where -

- (a) the licence of a corporation is revoked or suspended under any provision of this Ordinance; and
- (b) the Commission has imposed under section 196, 197, 198 or [199]⁴ a prohibition or requirement in respect of or with reference to, or substituted or varied under section 201 a prohibition or requirement imposed in respect of or with reference to, the corporation, whether before or after the revocation or suspension,

the corporation shall not, by reason of its compliance with the prohibition or requirement in force in respect of it under the circumstances described in paragraph (b), be regarded as having contravened section 114.

(3) For the avoidance of doubt, where the Commission has decided to revoke or suspend the licence of a licensed corporation under any provision of this Ordinance, the Commission may, at any time before the revocation or suspension (as the case may be) takes effect -

- (a) impose under section 196, 197, 198 or [199]⁴ a prohibition or requirement in respect of or with reference to; or
- (b) withdraw, substitute or vary under section 201 a prohibition or requirement imposed in respect of or with reference to,

the licensed corporation.

⁷(4) For the avoidance of doubt, nothing in this section affects the power of the Commission to -

(a) impose under section 196, 197, 198 or [199] a prohibition or requirement in respect of or with reference to; or

(b) withdraw, substitute or vary under section 201 a prohibition or requirement imposed in respect of or with reference to,

a licensed corporation the licence of which has been suspended under any provision of this Ordinance.

⁸204. ~~Certification~~ Application to Court of First Instance relating to non-compliance with prohibitions or requirements under section 196, 197, 198, [199]⁴ or 201

(1) If a person, ~~without reasonable excuse,~~⁹ fails to comply with a prohibition or requirement in force in respect of him as a result of the exercise of any of the powers under sections 196,

⁷ Technical amendment for greater clarity that the SFC may exercise the various powers under clauses 196, 197, 198, [199] or 201 against a corporation which licence has been suspended.

⁸ Technical amendment for greater clarity.

⁹ We consider that whether the failure in complying with an SFC prohibition or requirement was without reasonable excuse or not should be a matter for the Court and not the SFC to decide. We also consider that before making any order to enforce compliance with an SFC prohibition or requirement under clause 204(1)(a), the Court should be satisfied that the failure to comply with such prohibition or requirement is without reasonable excuse.

197, 198, [199]⁴ and 201, the Commission may, by originating summons or originating motion, ~~certify the failure~~ make an application to the Court of First Instance in respect of the failure⁸, and the Court may inquire into the case and-

- (a) if the Court is satisfied that there is no reasonable ground for the person not to comply with the prohibition or requirement (as the case may be),⁹ order the person to comply with the prohibition or requirement (as the case may be) within the period specified by the Court; and
- (b) if the Court is satisfied that the failure was without reasonable excuse, punish the person, and any other person who appears to have been involved in the failure, in the same manner as if he and, where applicable, that other person had been guilty of contempt of court.

(2) If there is a reasonable likelihood that a person will fail to comply with a prohibition or requirement in force in respect of him as a result of the exercise of any of the powers under sections 196, 197, 198, [199]⁴ and 201, the Commission may, by originating summons or originating motion, apply to the Court of First Instance for an order that the person, and any other person who the Court is satisfied is able to procure the person to comply with the prohibition or requirement (as the case may be), to take such action or refrain from taking such action as the Court directs.

(3) An originating summons under this section shall be in Form No. 10 in Appendix A to the Rules of the High Court (Cap. 4 sub. leg.).

Division 2 - Other powers and proceedings

205. Winding-up orders and bankruptcy orders

¹⁰(1) If -

- (a) a corporation, other than an authorized financial institution, is of a class of corporations which the Court of First Instance has jurisdiction to wind up under the Companies Ordinance (Cap. 32); and
- (b) it appears to the Commission that it is desirable in the public interest that the corporation should be wound up,

the Commission may present a petition for the corporation to be wound up under that Ordinance on the ground that it is just and equitable that the corporation should be so wound up, and that Ordinance shall apply to such petition as it applies in relation to a petition presented under section 177 of that Ordinance.

¹¹(2) If -

¹⁰ See Annex 4.

¹¹ See Annex 5.

(a) grounds exist for the presentation of a petition for a bankruptcy order against a licensed ~~person~~ representative¹² by his creditor in accordance with the Bankruptcy Ordinance (Cap. 6); and

(b) it appears to the Commission that it is desirable in the public interest to present a petition for a bankruptcy order against the licensed ~~person~~ representative¹² in accordance with that Ordinance, the Commission may present a petition for a bankruptcy order against the licensed ~~person~~ representative¹² in accordance with that Ordinance, and that Ordinance shall apply to such petition as it applies in relation to a petition presented by a creditor.

(3) The Commission shall -

(a) before presenting a petition under ~~this section~~ subsection (1) against a corporation ~~or licensed~~ ~~person~~¹³ that is an exchange participant or a clearing participant, use its best endeavours to inform the recognized exchange company or the recognized clearing house (as the case may be) of

¹² Technical amendment to clarify that a bankruptcy order only applies to a licensed representative as an individual, but not a licensed corporation. The original reference to "licensed person" could mean "licensed corporation" or "licensed representative" under Schedule 1 to the Bill.

¹³ Technical amendment as a licensed representative could not be an exchange or clearing participant.

the proposed presentation of the petition by notice in writing; and

- (b) where before the presentation of the petition it has not informed the recognized exchange company or the recognized clearing house (as the case may be) of the proposed presentation of the petition by notice in writing, forthwith after the presentation of the petition inform the recognized exchange company or the recognized clearing house (as the case may be) thereof by notice in writing.

206. Injunctions and other orders

(1) Where -

(a) a person has -

(i) contravened -

- (A) any of the relevant provisions;
- (B) any notice or requirement given or made under or pursuant to any of the relevant provisions;
- (C) any of the terms and conditions of a licence or an exemption under this Ordinance; or
- (D) any other condition imposed under or pursuant to any provision of this Ordinance;

- (ii) aided, abetted, or otherwise assisted, counselled or procured a person to commit any such contravention;
 - (iii) induced, whether by threats, promises or otherwise, a person to commit any such contravention;
 - (iv) directly or indirectly been in any way knowingly involved in, or a party to, any such contravention; or
 - (v) attempted, or conspired with others, to commit any such contravention; or
- (b) it appears, whether or not during the course or as a result of an investigation by an investigator under section 175 or not, to the investigator the exercise of any power under Part VIII, to the Commission¹⁴ that any of the matters referred to in

¹⁴ The policy intention is that the SFC may form the requisite opinion under clause 206(1)(a) whether or not as a result of an investigation under clause 175 of the Bill. For example, the SFC may obtain information indicating anticipated, past or continuing breach or other conduct falling under clause 206(1)(a) during a routine inspection under clause 173, or as a result of referral from another regulator, etc. Technically there can only be an "investigator" if an investigation under clause 175 is initiated. The amendment would therefore better reflect the intention that the opinion need not be formed by an "investigator", but by the SFC under the exercise of power under Part VIII in general, or in other situations.

paragraph (a)(i) to (v) has occurred, is occurring or may occur,

the Court of First Instance, on the application of the Commission, may, subject to subsection (4), make one or more of the orders specified in subsection (2).

(2) The orders specified for the purposes of subsection (1) are -

- (a) an order restraining or prohibiting the occurrence or the continued occurrence of any of the matters referred to in subsection (1)(a)(i) to (v);
- (b) where a person has been, or it appears that a person has been, is or may become, involved in any of the matters referred to in subsection (1)(a)(i) to (v), whether knowingly or otherwise, an order requiring the person to take such steps as the Court of First Instance may direct, including steps to restore the parties to any transaction to the position in which they were before the transaction was entered into;
- (c) an order restraining or prohibiting a person from acquiring, disposing of, or otherwise dealing in, any property specified in the order;
- (d) an order appointing a person to administer the property of another person¹⁵;

¹⁵ See Annex 6.

- (e) an order declaring a contract relating to any securities, futures contract, leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme to be void or voidable to the extent specified in the order;
 - (f) for the purpose of securing compliance with any other order made under this section, an order directing a person to do or refrain from doing any act specified in the order;
 - (g) any ancillary order which the Court of First Instance considers necessary in consequence of the making of any of the orders referred to in paragraphs (a) to (f).
- (3) The Commission shall -
- (a) before making an application pursuant to subsection (1) for an order affecting any person that is an exchange participant or a clearing participant, use its best endeavours to inform the recognized exchange company or the recognized clearing house (as the case may be) of the proposed application by notice in writing; and
 - (b) where before the making of the application it has not informed the recognized exchange company or the recognized clearing house (as the case may be) of

the proposed application by notice in writing, forthwith after the making of the application inform the recognized exchange company or the recognized clearing house (as the case may be) thereof by notice in writing.

(4) The Court of First Instance shall, before making an order under subsection (1), satisfy itself, so far as it can reasonably do so, that it is desirable that the order be made, and that the order will not unfairly prejudice any person.

(5) The Court of First Instance may, before making an order under subsection (1), direct that a notice of the application made in respect thereof be given to the persons it considers appropriate, or be published in the manner it considers appropriate, or both.

(6) Where the Court of First Instance considers it desirable to do so, it may grant such interim order as it considers appropriate pending the determination of an application made pursuant to subsection (1).

~~¹⁶(7) Where the Commission applies to the Court of First Instance for an order pursuant to subsection (1), it shall not be required, as a condition of the granting of an interim order under subsection (6), to give an undertaking as to damages.~~

¹⁷(8) An order may be made under subsection (1) whether or not it appears to the Court of First Instance that -

- (a) the person against whom the order is made intends to engage again, or to continue to engage, in any of the matters referred to in subsection (1)(a)(i) to (v);
- (b) the person against whom the order is made has previously engaged in any of such matters;
- (c) there is an imminent danger of damage to any person in the event of the order not being made.

(9) Where the Court of First Instance has power to make an order against a person under subsection (1), it may, in addition

¹⁶ The original intention of the clause is not to inhibit the SFC from enforcing the law in the public interest by applications that it should give undertakings as to damages. The common law position is that the Court has a discretion whether to require a public authority to give an undertaking if it seeks to enforce the law in application for interlocutory injunctions. Our intention is not to go beyond the common law position. In light of public comments and as mentioned in Paper No. 9A/01 issued on 23 April 2001, we consider that the matter should best be left to the court's discretion in the circumstances of each case, and that clause 206(7) be deleted.

¹⁷ See Annex 6.

to or in substitution for such order, make an order requiring the person to pay damages to any other person.

(10) The Court of First Instance may reverse, vary or discharge an order made or granted by it under subsection (1) or (6) or suspend the operation of the order.

(11) A notice published under subsection (5) is not subsidiary legislation.

**207. Remedies in cases of unfair prejudice, etc.
to interests of members**

(1) If it appears to the Commission that the business or affairs of a listed corporation ~~(other than a listed corporation which is an authorized financial institution)~~¹⁸ are being, or at or after the time of the formation of the corporation have been, conducted in a manner -

- (a) oppressive to its members or any part of its members;
- (b) involving defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members;
- (c) resulting in its members or any part of its members not having been given all the information with

¹⁸ We have reviewed the scope of application of this provision and considered that it should also apply to listed authorized financial institutions subject to certain exceptions and procedural arrangements. See also Footnotes (21) and (24).

respect to its business or affairs that they might reasonably expect; or

- (d) unfairly prejudicial to its members or any part of its members,

the Commission, ~~after consultation with the Financial Secretary,~~ may, subject to subsection (3)¹⁹, by petition apply to the Court of First Instance for an order under this section, whether or not at the time of such application the corporation remains a listed corporation.

(2) If, on a ~~petition~~ an application²⁰ under this section, the Court of First Instance is of opinion that the business or affairs of a listed corporation are being or have been conducted in a manner described in subsection (1)(a), (b), (c) or (d), whether through conduct consisting of an isolated act or a series of acts or any failure to act, the Court may -

- (a) make an order restraining the carrying out, or requiring the carrying out, of any act or acts;
- (b) order that the corporation shall bring in its name such proceedings as the Court considers appropriate against such persons, and on such terms, as may be specified in the order;

¹⁹ A consequential amendment to proposed changes to clause 207(3). See Footnote (24).

²⁰ Technical amendment for greater clarity.

- (c) unless the corporation is an authorized financial institution²¹, appoint a receiver or manager of the whole or any part of the property or business of the corporation and may specify the powers and duties of the receiver or manager and fix his remuneration;
- (d) ~~subject to subsection (3),~~²² order that a person wholly or partly responsible for the business or affairs of the corporation being or having been²³ so conducted shall not, without the leave of the Court -
- (i) be, or continue to be, a director, liquidator, or receiver or manager of the property or business, of the corporation or any other corporation; or
 - (ii) in any way, whether directly or indirectly, be concerned, or take part,

²¹ A court order on appointment of receiver or manager is not applied to a listed authorized financial institution as there are already similar provisions under the Banking Ordinance. This seeks to avoid duplication and possible confusion.

²² Original clause 207(3) is deleted as both the SFC and the HKMA agreed that clause 207(2)(d) should apply to listed authorized financial institutions as well.

²³ Technical amendment for greater clarity.

in the management of the corporation or
any other corporation,

for such period (not exceeding 15 years) as may be
specified in the order;

- (e) make any other order it considers appropriate,
whether for regulating the conduct of the business
or affairs of the corporation in future, or for the
purchase of the shares of any members of the
corporation by other members of the corporation or
by the corporation (and, in the case of a purchase
by the corporation, for the reduction accordingly
of the corporation's capital), or otherwise.

~~²² (3) No order made under subsection (2)(d) shall prohibit a
person from being, or continuing to be, a director, liquidator,
or receiver or manager of the property or business, of a corporation
which is an authorized financial institution.~~

²⁴ (3) The Commission shall not make an application under this
section unless it has first consulted -

(a) the Financial Secretary; and

(b) where the corporation in question is an authorized
financial institution or a corporation which, to

²⁴ To provide that before the SFC applies for a court order against a listed
corporation which is an authorized financial institution or its related
companies, it should consult the HKMA as the lead regulator of such institutions,
as is the case under clause 172(10).

the knowledge of the Commission, is the controller of an authorized financial institution, or has as its controller an authorized financial institution, or has the same controller as an authorized financial institution, the Monetary Authority.

(4) Where the Court of First Instance makes an order under subsection (2)(d), the order shall be filed by the Court with the Registrar of Companies, as soon as reasonably practicable after it is made.

(5) Where an order under this section makes an alteration in or addition to the constitution of a company, notwithstanding any other provisions of the Companies Ordinance (Cap. 32) but subject to the provisions of the order, the company shall not have the power, without the leave of the Court of First Instance, to make any further alteration in or addition to the constitution inconsistent with the order.

(6) Where any alteration in or addition to the constitution of a company is made by an order under this section, the alteration or addition (as the case may be) has the same effect as if duly made by a resolution of the company, and the Companies Ordinance (Cap. 32) applies to the constitution as altered or added to accordingly.

(7) An office copy of an order of the Court of First Instance altering or adding to, or of the leave of the Court to alter or add to, the constitution of a company shall, within 14 days after

the order is made or the leave is given, be delivered by the company to the Registrar of Companies for registration.

(8) A company which contravenes subsection (7) commits an offence and is liable on conviction to a fine at level ~~2~~ 3²⁵ and, in the case of a continuing offence, to a further fine of ~~\$200~~ \$300²⁵ for every day during which the offence continues.

²⁶(9) In this section, "controller" (控制人) means a person who is an indirect controller or a majority shareholder controller as defined in section 2(1) of the Banking Ordinance (Cap.155)

²⁷**[208. Civil liability for false or misleading public communications concerning securities and futures contracts**

(1) Subject to subsections (3) to (7), where -

(a) a person is responsible for a relevant communication being made or issued to the public,

²⁵ To align the penalty maxima for a similar offence under section 168A(4) of the Companies Ordinance concerning alternative remedy to winding up in cases of unfair prejudice.

²⁶ To define "controller" in the new clause 207(3), based on the same definition in clause 172(16).

²⁷ Clause 208 will be relocated to Part XVI for a better and more logical flow of the Bill. In light of members' earlier comments, we are exploring options with our legal advisers to articulate when a duty under this clause will arise, and that a breach of such duty will give rise to the right for an aggrieved investor to pursue a civil private cause of action for compensation. We shall re-visit the matter in Part XVI.

or to a group of persons comprising members of the public (including the shareholders of a listed corporation or the holders of listed securities);

- (b) the relevant communication concerns securities or futures contracts, or may affect the price of securities or futures contracts;
- (c) the relevant communication is false or misleading in a material particular; and
- (d) the person knows that, or is reckless or negligent as to whether, the relevant communication is false or misleading in a material particular,

that person shall, apart from any other liability he may incur, be liable to pay compensation by way of damages to any other person for any pecuniary loss sustained by the other person as a result of his acting, or refraining from acting in a manner in which he would otherwise have acted, in reliance on the relevant communication.

(2) For the purposes of subsection (1), a person responsible for a relevant communication being made or issued includes -

- (a) any person making or issuing it; and
- (b) any person who in a material manner participated in, or approved, the making or issuing of it.

(3) No person shall be liable to pay compensation under subsection (1) for any pecuniary loss sustained by any other person as a result of the other person acting, or refraining from acting

in a manner in which he would otherwise have acted, in reliance on a relevant communication unless -

- (a) he has assumed responsibility with respect to the other person in connection with the relevant communication; or
- (b) it is fair, just and reasonable in the circumstances of the case that he should be so liable.

(4) No person shall be liable to pay compensation under subsection (1) for any pecuniary loss sustained by any other person as a result of the other person acting, or refraining from acting in a manner in which he would otherwise have acted, in reliance on a relevant communication if -

- (a) the first-mentioned person carried on a business the principal purpose of which was to provide the service of issuing or reproducing materials provided to him by others;
- (b) the relevant communication was issued or reproduced by him in the ordinary course of that business;
- (c) the contents of the relevant communication were wholly devised by a customer of his or by a person acting on behalf of a customer of his;
- (d) the nature of the service which he provided in relation to the relevant communication was such that he did not select, modify or otherwise

exercise control over the contents of the relevant communication prior to its issue or reproduction; and

- (e) at the time he issued or reproduced the relevant communication he did not know that it was false or misleading in a material particular.

(5) No person shall be liable to pay compensation under subsection (1) for any pecuniary loss sustained by any other person as a result of the other person acting, or refraining from acting in a manner in which he would otherwise have acted, in reliance on a relevant communication if -

- (a) he carried on a business the normal conduct of which involved the re-transmission of information to other persons within an information system or from one information system to another information system (wherever situated), whether directly or by facilitating the establishment of links between such other persons and third parties;
- (b) the relevant communication was re-transmitted by him to other persons in the ordinary course of such re-transmission of information;
- (c) the contents of the relevant communication were devised by another person and he did not modify or otherwise exercise control over its contents prior to its re-transmission;

(d) the re-transmission of the relevant communication by him -

(i) was accompanied by a message to the effect; or

(ii) was effected following acknowledgment by the persons to whom it was re-transmitted of their understanding,

that he did not devise the contents of the relevant communication and that he neither took responsibility for it nor endorsed its accuracy; and

(e) at the time he re-transmitted the relevant communication -

(i) he did not know that it was false or misleading in a material particular; or

(ii) he knew that it was false or misleading in a material particular, but in the circumstances of the case he could not reasonably be expected to prevent the re-transmission.

(6) No person shall be liable to pay compensation under subsection (1) for any pecuniary loss sustained by any other person as a result of the other person acting, or refraining from acting in a manner in which he would otherwise have acted, in reliance on a relevant communication if -

(a) the first-mentioned person was a broadcaster;

- (b) the relevant communication was broadcast live by him as a broadcaster;
- (c) he did not modify the contents of the relevant communication prior to its broadcast;
- (d) he has, in relation to the broadcast, acted in accordance with the terms and conditions of the licence (if any) by which he became entitled to broadcast and with any code of practice or guidelines (however described) issued under or pursuant to the Telecommunications Ordinance (Cap. 106) or the Broadcasting Ordinance (48 of 2000) and applicable to him as a broadcaster; and
- (e) at the time of the broadcast -
 - (i) he did not know that the relevant communication was false or misleading in a material particular; or
 - (ii) he knew that the relevant communication was false or misleading in a material particular, but in the circumstances of the case he could not reasonably be expected to prevent the broadcast.

(7) Where an action is brought against a person under subsection (1) by reference to subsection (2)(b) in respect of a relevant communication, it is a defence for the person to prove -

- (a) that he only participated in, or approved, the making or issuing of a part of the relevant

communication and that the part was not false or misleading in a material particular; or

- (b) where the action is brought on the basis that he participated in the making or issuing of the relevant communication, that at the time when it was made or issued, he opposed the making or issuing of it because it was false or misleading in a material particular.

(8) For the avoidance of doubt, where a court has jurisdiction to determine an action brought under subsection (1), it may, where it is, apart from this section, within its jurisdiction to do so, grant an injunction in addition to, or in substitution for, damages, on such terms and conditions as it considers appropriate.

(9) This section does not confer a right of action in any case to which section 40 of the Companies Ordinance (Cap. 32)(whether with or without reference to section 342E of that Ordinance) or section 107 applies.

(10) Nothing in this section affects, limits or diminishes any rights conferred on a person, or any liabilities a person may incur, under the common law or any other enactment.

(11) In this section -
 "issue" (發出), in relation to any material (including any relevant communication), includes publishing, circulating, distributing or otherwise disseminating the material, whether -

- (a) by any visit in person;
- (b) in a newspaper, magazine, journal or other publication;
- (c) by the display of posters or notices;
- (d) by means of circulars, brochures, pamphlets or handbills;
- (e) by an exhibition of photographs or cinematograph films;
- (f) by way of sound or television broadcasting;
- (g) by computer or other electronic device; or
- (h) by any other means, whether mechanically, electronically, magnetically, optically, manually or by any other medium, or by way of production or transmission of light, image or sound or any other medium,

and also includes causing or authorizing the material to be issued;

"relevant communication" (有關通訊) means any communication, including any announcement, disclosure and statement, and any combination thereof.]

Clause 197

Restriction on dealing with property

Clause 197 enables the SFC to preserve property so as to protect investors' interests. Members have expressed concern about the scope of the property that could be covered by clause 197 which includes "any property (whether of a licensed corporation or not)". We have explored ways to further refine the scope, without creating gaps in the power exercised by the Securities and Futures Commission (SFC).

2. The clause is based on existing law namely, section 40 of Securities and Futures Commission Ordinance (SFCO) (Cap. 24) and section 51 of Leveraged Foreign Exchange Trading Ordinance (LFETO) (Cap. 451), which also apply to "any assets".

3. From past practical experience in protecting investors, it is important for the SFC to be able to impose restrictions on dealings with property which –

- (a) may be connected with the business of the licensed corporation but which may not be under the control of the licensed corporation, e.g. under the control of another corporation which may be related to the licensed corporation or a nominee or custodian. There may be a number of persons interposed between the licensed corporation and the third party holding the property and the property may be "removed" from the ownership or control of the licensed corporation by way of a sham transaction among these interposed persons; or
- (b) belongs to clients of the licensed corporation but may be at risk of being fraudulently disposed of by the licensed corporation.

4. Furthermore, in urgent situations, where the SFC needs to be able to act quickly in order to protect property in the interests of investors, there may not be sufficient time when imposing a restriction, for the SFC to verify ownership of the property at risk.

5. To address Members' concerns, we propose to restrict the definition of "relevant property" to the following –

- (a) held by a licensed corporation on behalf of clients, or held by a third party on the licensed corporation's behalf in its capacity as such; or

- (b) where the SFC reasonably believes the property is either owned or controlled by the licensed corporation, or connected with the corporation's regulated business.

This is based on the definition of "relevant property" in clause 199(7).

6. There are adequate safeguards on the exercise of the powers under clause 197 by the SFC, including –

- (a) only the full board of directors of the SFC may authorize the exercise of the power;
- (b) written notice must be given to the subject of the notice, together with a statement of the reasons for the imposition of the restriction notice;
- (c) the SFC, as a matter of policy, publicizes imposition of the restriction notice to inform the public;
- (d) the SFC may, as a matter of its own volition or on the representation of a person affected by the restriction notice, vary the restriction notice after imposing it;
- (e) there is a right of appeal to the Securities and Futures Appeals Tribunal (SFAT) under the Bill within 21 days of imposition of the restriction notice. The subject of a restriction notice may also apply to the SFAT to stay its immediate commencement pending hearing of their appeal; and
- (f) subject to judicial review or complaint to the Ombudsman.

Definition of “Property” in the Securities and Futures Bill and “Assets” in the Financial Services and Markets Act

Members’ have asked us to compare the definition of “property” under this Part of the Bill and “assets” in equivalent provisions under the UK Financial Services and Markets Act (FSMA). We have researched into this subject and are of the view that there is essentially not much difference between the terms.

2. “[P]roperty” is defined in Part 1 of Schedule 1 of the Securities and Futures Bill as including –

- (a) money, goods, choses in action and land, whether in Hong Kong or elsewhere; and
- (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a).

3. This definition is taken from the Interpretation and General Clauses Ordinance (Cap. 1) with necessary adaptation.

4. The FSMA does not define “assets”. We have, however, reviewed some major pieces of UK business legislation. The Insolvency Act 1985 defines “property” as including money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property. This is very similar to the definition adopted in the Bill.

5. Black’s Law Dictionary (1999 7th edition) defines “asset” as “an item that is owned and has value; the entries on a balance sheet showing items of property owned, including cash, inventory, equipment, real estate, accounts receivable and goodwill; and all the property of a person (especially a bankrupt or deceased person) available for paying debts”.

6. Given the lack of a conclusive legal definition of “assets” applicable to the circumstances, it is just as likely that the courts would turn to the ordinary meaning of “assets” as reasoning by analogy with related legal definitions from other contexts.

7. On this basis, we consider that there is not much difference between “property” and “assets”, since “assets” is synonymous in plain language with “property” and the related UK legal definitions and plain language definition also tend to suggest the same. The definition of “property” in the Bill is just a comprehensive statement of what “property” includes for the sake of clarity.

Clauses 199 and 206

Requirement to transfer custody of property

Members have expressed concern about clause 199, both as to its practical application and the extent of the powers conferred on the SFC.

2. Clauses 199 and 206 together are intended to enable the SFC to protect client property from being dissipated by persons holding such property. Clause 206 enables the SFC to apply for court orders and injunctions with respect to client property, whereas clause 199 empowers the SFC to transfer custody of such property to itself before applying to the court. Clause 199 attempts to reduce the risk of property dissipation during the time required for the SFC applying to the court. The clause has not attracted any major market comments during the public consultation exercise.

3. To address Members' concerns, we have explored the possibility of classifying different types of property (e.g. land and intangible property) and stipulating the manner in which the SFC should handle their custody in the Bill, and come to the conclusion that this approach is overly complex, impractical and would probably have limited effect.

4. After further discussion with the SFC, we consider that clause 206 (combined with the powers under clause 197) already achieves the objectives behind clause 199, i.e. to take urgent action to prevent the dissipation of relevant property.

5. Clause 206, together with clause 197, will enable the SFC to ensure that property of a licensed corporation or its clients or connected with its business can be protected, where necessary, in the interests of investors. Past experience suggests that the SFC may obtain a court order or injunction quickly. The SFC therefore considers that the risks of property dissipation arising as a result of the time required to make an application to the Court under clause 206 would be minimal. As an administrative measure, the SFC will endeavour to expedite internal process as far as possible, to minimise any possible risks.

6. Subject to Members' further comments on clauses 199 and 206, we are prepared to delete clause 199 and invite the SFC to rely on clause 206 to protect clients' property under such circumstances.

Clause 205(1) – Winding-up orders

Some Members suggested that the power to apply for a winding-up order should only be in respect of listed corporations and licensed corporations under the purview of the SFC. We believe that the power should not be restricted to such corporations and that the test should continue to be whether or not the winding-up is in the public interest. Flexibility is needed to deal with circumstances like –

- (a) unlicensed corporations carrying out activities for which they should be licensed;
- (b) third parties that hold or have control over relevant property;
- (c) third parties holding the property on behalf of listed corporations; or
- (d) companies with ownership in common with listed corporations or corporations licensed by the SFC.

2. The provision merely gives the SFC the standing to apply to the court for a winding-up order, which the court will only award on the ground that it is just and equitable and after considering the circumstances of the case. It is derived from section 45 of the SFCO (Cap.24) and section 59 of the LFETO (Cap.451).

Clause 205(2) – Bankruptcy orders

Clause 205(2) is adapted from section 46(1) of the SFCO (Cap. 24) and section 60 of the LFETO (Cap. 451). It empowers the SFC to present a petition for a bankruptcy order against a licensed person under certain circumstances. Some Members have asked us to provide examples to illustrate how the power will be exercised and also to clarify whether the SFC is required to issue a statutory demand under the Bankruptcy Ordinance.

2. Under the existing registration regime, the SFC may apply for a bankruptcy order against a registered individual if it appears to SFC that it is expedient in the public interest to do so and if grounds exist for a creditor to present a bankruptcy petition. This power would enable SFC to safeguard the interest of clients of the registered persons by taking steps to freeze their assets for repayment of debts due to the clients.

3. To illustrate, the SFC had in the past petitioned the bankruptcy of a registered person who ran a dealing business. The dealer confessed theft of some of his clients' assets to the police. The SFC exercised the power in consideration of that. If the dealer was not bankrupted, the remaining of his clients' assets might not be returned to his clients.

4. Before it can apply for a bankruptcy order under clause 205(2), the SFC must not only satisfy itself that it is desirable in the public interest to present a bankruptcy petition, but there must be grounds for the presentation of a petition by a creditor. Service of a statutory demand is not a pre-requisite for all creditors' petition. If a creditor intends to claim that a debtor appears unable to pay a debt, it is sufficient for the creditor to prove that there is an unsatisfied execution of a judgement or court order against the debtor. It is also unnecessary for a creditor to serve a statutory demand if there are reasonable grounds for believing that a debtor intends to depart, or has departed from Hong Kong to frustrate his creditors. Service of a statutory demand is required if a creditor intends to rely on the ground that the debtor appears to have no reasonable prospect of being unable to pay a debt. The Department of Justice has advised that it would therefore be inconsistent with the prevailing requirements of the Bankruptcy Ordinance to oblige the SFC to serve a statutory demand.

Clause 206 – Injunctions and other orders***Clause 206(2)(d)***

Existing law is inadequate in enabling the SFC to seek orders from a court in the interest of the investing public. Clause 206 is intended to remedy this. In respect of clause 206(2)(d), some Members sought clarification as to the scope of persons whose property could be subject to administration by the person appointed by the Court.

2. In an application for an order under the clause, the Court has a discretion to grant or refuse such an order and may always impose restrictions on the order. The SFC must also convince the Court that the order is desirable and that it will not unfairly prejudice anyone (clause 206(4)). It is important that the scope of this clause extends to the property of persons other than licensed persons or listed corporations, as it may be necessary, in order to protect investor interests, to obtain an administration order in relation to a range of people who may hold investor property, or be in a position to affect investors' interests, or who may be liable to pay compensation to others.

3. Clause 206(2)(d) is derived from section 144(1)(b) and (e) of the Securities Ordinance (SO) and section 13(1)(b) of the LFETO. Section 144(1)(b) of the SO has been used by the SFC on past occasions. Section 144(1)(e) (which allows for ancillary orders in the consequence of making an order under (a) and (d)) has been used in the past to appoint administrators over unregistered securities businesses. The orders were made as an ancillary order restraining the company from dealing in securities, and dealing with its assets (section 144(1)(a)). The Court granted the administrator necessary powers, including the power to take possession and preserve all the property of the corporations and client property, to sell the assets, to manage the business and to exercise voting and other rights in any securities included in the assets.

Clause 206(8)

4. Members have also asked us to clarify the policy intention of clause 206(8), which provides that the Court may make specified orders whether or not it appears to the Court that the person against whom the order is made intends to engage again or has previously engaged in any specified matters, or that there is an imminent danger of damage to any person in the event of the order not being made.

5. The considerations mentioned above are discretionary, not binding, and the Court is not prevented from considering them. This provision does override the discretionary equitable considerations, but ensures that the Court has the power to make an order without being bound by these considerations (which would normally apply in actions between private litigants) so as to be in the position to prevent contraventions of the law. The intention is that the Court should be relatively liberal in considering injunction and other order applications, given SFC's objectives and other guiding principles as set out in clauses 4 to 6 of the Bill. It should be noted that the SFC brings an action under this provision in a protective capacity and in the public interest.

6. Clause 206(8) is modelled on section 1324(6) of the Australian Corporations Law, which contains a similar injunction and court order power.