

PART IV

OFFERS OF INVESTMENTS

Division 1 - Interpretation

101. Interpretation of Part IV

(1) In this Part, unless the context otherwise requires

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"advertisement" (廣告) includes every form of advertising,

whether made orally or produced mechanically,

electronically, magnetically, optically, manually or by

any other means;

"approved person" (核准人士) -

(a) in relation to a collective investment scheme,
means an individual approved by the Commission
under section 103(3); or

(b) in relation to the issue of an advertisement,
invitation or document, means an individual
approved by the Commission under section
104(3);

"document" (文件) means any publication (including a newspaper,
magazine or journal, a poster or notice, a circular,
brochure, pamphlet or handbill, or a prospectus) -

- (a) directed at, or the contents of which are likely to be accessed or read (whether concurrently or otherwise) by, the_public¹; and
- (b) whether produced mechanically, electronically, magnetically, optically, manually or by any other means;

"exempted body" (獲豁免團體) means a body specified in Part 4 of Schedule 4;

"invitation" (邀請) includes an offer and an invitation, whether made orally or produced mechanically, electronically, magnetically, optically, manually or by any other means;

²"issue" (發出), in relation to any material (including any advertisement, invitation or document), includes publishing, circulating, distributing or otherwise disseminating the ~~advertisement, invitation or document~~ material or the contents thereof, whether -

- (a) by any visit in person;

¹ We mentioned in Paper 4/01 that the interpretation of "public" in clause 102 is to follow the definition of the term in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) to include "any class of the public", and proposed to expressly state the coverage of "any section of the public" for greater clarity. On further consideration, we propose to add in Schedule 1 the definition of "public" which covers "any class of the public" for general application throughout the Bill. Same for clauses 102(1) and 102(10).

² We accept the comment of some Members expressed at the Bills Committee meeting on 27 June 2001 that the definition of "issue" under clauses 102(12) and 109(8) should be merged with the definition of the same term in clause 101 for use throughout this Part of the Bill.

- (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~~ any information system³ 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 ~~advertisement, invitation or document material~~ material to be issued;

³ The replacement of “computer” with “information system” is proposed in the light of technological development. As a general exercise, the Administration shall propose similar changes to other legislation as opportunities arise.

~~"multilateral agency" (多邊機構) means a body specified in Part 3 of Schedule 4;~~⁴

"relevant authority" (監管當局), in relation to a place outside Hong Kong, means an authority which the Monetary Authority is satisfied is a recognized banking supervisory authority of that place;

"representative" (代表) -

(a) in relation to a licensed corporation, means an individual -

(i) who is licensed as a licensed representative for a regulated activity; and

(ii) who carries on that regulated activity for the licensed corporation as a licensed corporation to which he is accredited; or

⁴ We mentioned in Paper 4B/01 that we would propose a Committee Stage Amendment to relocate clause 108 on "Offers by intermediaries or representatives for Type 1 or Type 4 regulated activity" to Part VII on "Business Conduct, etc of Intermediaries", as the subject matter dealt with in clause 108 concerns the business conduct of intermediaries.

Amendments to Part IV consequent to the relocation are that -

(a) the definition of "multilateral agency" currently set out in clause 101 of the Blue Bill would be relocated to Schedule 1 for shared use in respect of Parts IV and VII; and

(b) the empowering provision to amend Schedule 5 that relates to Clause 108 would be relocated to Part VII. See footnote 53.

Members considered this amendment and did not propose further changes at the meeting on 22 June 2001.

(b) in relation to ~~an exempt person~~ registered institution⁵, means an individual -

(i) whose name is entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance (Cap. 155) as that of a person ~~employed by the exempt person~~ engaged⁶ by the registered institution⁵ in respect of a regulated activity; and

(ii) who carries on that regulated activity for the ~~exempt person~~ registered institution⁵.

(2) For the purposes of this Part -

(a) an advertisement, invitation or document issued by a person shall be regarded as being issued by him on every day on which he causes or authorizes it to be so issued;

⁵ We accept the comment of some Members that the term “exempt person” is a misnomer and does not reflect the proposed regulatory framework whereby authorized institutions engaging in regulated activities are subject to a whole range of regulatory requirements and disciplinary sanctions. We informed Members at the meeting on 14 September 2001 that we would replace “exempt person” with “registered institution” and “exempted” with “registered” throughout the Bill to duly reflect our policy intention.

⁶ Amendment consequential to the Committee Stage Amendments proposed to the Banking (Amendment) Bill 2000, as explained to Members on 10 July 2001. The word “engaged” gives a wider catch than “employed”, as a bank may engage a person other than its employees to conduct a regulated activity.

- (b) an advertisement, invitation or document issued by one person on behalf of another shall be regarded as an advertisement, invitation or document (as the case may be) issued by both persons.

Division 2 - Regulation of offers of investments, etc.

102. Offence to issue advertisements, invitations or documents relating to investments in certain cases

(1) Subject to subsections (2), (3) and (~~54A~~⁷) to (9), a person commits an offence if he issues, or has in his possession for the purposes of issue, whether in Hong Kong or elsewhere⁸, an advertisement, invitation or document which to his knowledge is or contains an invitation to the public⁹-

- (a) to enter into or offer to enter into -
- (i) an agreement to acquire, dispose of, subscribe for or underwrite securities; or

⁷ **Technical amendment consequential to the introduction of new clause 102(4A).**

⁸ **In Annex A to Paper CE03/01, we explained to Members the policy intention to cover in this Part also those activities conducted overseas but targeting at investors in Hong Kong. This is in line with the arrangements in overseas jurisdictions. The amendment seeks to reflect the policy intention.**

⁹ **We mentioned in Paper 4/01 that the interpretation of "public" in clause 102 is to follow the definition of the term in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) to include "any class of the public", and proposed to expressly state the coverage of "any section of the public" for greater clarity. On further consideration, we propose to add in Schedule 1 the definition of "public" which covers "any class of the public" for general application throughout the Bill.**

(ii) a regulated investment agreement; or

(b) to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme,

unless the issue is authorized by the Commission under section 104(1).

(2) Subsection (1) does not apply to the issue, or the possession for the purposes of issue, of¹⁰ any advertisement, invitation or document ~~which is or is to be~~ -

(a) made by or on behalf of¹¹ an intermediary licensed or ~~exempt-registered~~⁵ for Type 1, Type 4 or Type 6 regulated activity, ~~or a representative of such intermediary that carries on such regulated activity for such intermediary, whether~~ (whether acting¹² as principal or agent₇) in respect of securities;

¹⁰ The offence provision in clause 102(1) covers both "issue" and "possession for the purpose of issue" of an advertisement, invitation or document. The carve-out provision in clause 102(2) is amended to follow the formulation in the offence provision for the avoidance of doubt. Same amendment to the other carve-out provision in clause 102(3). **Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.**

¹¹ The proposed amendment has the effect of extending and making available the carve-out to advertisement, etc issued or possessed for the purposes of issue by any person working on behalf of an intermediary. The coverage of the carve-out as revised would be the same as that under existing legislation and is also consistent with the carve-out under for example, paragraphs (d) to (h). **Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.**

¹² Technical drafting change for greater clarity. **Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.**

- (b) made by or on behalf of¹¹ an intermediary licensed or ~~exempt~~ registered⁵ for Type 2 or Type 5 regulated activity activity, ~~or a representative of such intermediary that carries on such regulated activity for such intermediary, whether~~ (whether acting¹² as principal or agent~~,~~) in respect of futures contracts;
- (c) made by or on behalf of¹¹ -
- (i) an authorized financial institution (whether acting as principal or agent)¹²; or
 - ~~(ii)~~ ~~(ii)~~ an intermediary licensed for Type 3 regulated activity activity, ~~or a representative of such intermediary that carries on such regulated activity for such intermediary,~~ ~~—~~ whether (whether acting¹² as principal or agent), ~~agent,~~ _____ in respect of leveraged foreign exchange contracts;
- (d) made by or on behalf of a recognized exchange company or recognized clearing house in respect of the provision of services by such recognized exchange company or recognized clearing house (as the case may be);

- (e) made by or on behalf of a corporation to holders of securities or creditors of, or employees employed by or agents acting in a professional capacity on behalf of, that corporation, or a ~~corporation which is a~~¹³ related corporation of that corporation, in respect of securities of that corporation or that related corporation;
- (f) made by or on behalf of the Government in respect of securities issued by it;
- (g) made by or on behalf of a credit union in respect of shares in the credit union;
- (h) made by or on behalf of a person acting as a trustee of a trust, not being a collective investment scheme, to beneficiaries under the trust; or
- (i) made by or on behalf of¹¹ a person who is engaged in the business of selling and purchasing property other than securities, ~~whether~~ (whether acting¹² as principal or agent,) in the ordinary course of that business.

¹³ Technical drafting change for brevity. Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.

(3) Subsection (1) does not apply to the issue, or the possession for the purposes of issue¹⁴ -

(a) ~~the issue~~ of -

(i) a prospectus which complies with or is exempt from compliance with Part II of the Companies Ordinance (Cap. 32);

(ii) in the case of a corporation incorporated outside Hong Kong, a prospectus which complies with or is exempt from compliance with Part XII of that Ordinance;

(iii) an extract from or abridged version of a prospectus referred to in subparagraph (i) or (ii), the publication of which would not contravene section 38B(1) of that Ordinance by virtue of the operation of section 38B(2) of that Ordinance;

(b) ~~the issue~~ of a document relating to the securities of a body corporate incorporated in Hong Kong that is not a registered company, being a document which -

¹⁴ Same reason for amendment as in footnote 10. **Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.**

- (i) would, if the body corporate were a registered company, be a prospectus to which section 38 of the Companies Ordinance (Cap. 32) applies, or would apply if not excluded by section 38(5)(b) or 38A of that Ordinance; and
- (ii) contains all the matters which, by virtue of Part XII of that Ordinance, it would be required to contain if the body corporate were a ~~company~~ corporation¹⁵ incorporated outside Hong Kong and the document were a prospectus issued by that ~~company~~ corporation¹⁵;
- (c) ~~the issue~~ of a form of application for the shares or debentures of a ~~company~~ corporation¹⁵, where it is issued, or the possession is for the purposes of issue¹⁶, together with -
- (i) a prospectus with respect to those shares or debentures¹⁶ which complies with or is exempt from compliance

¹⁵ The word “company” is defined to mean a company formed and registered under the Companies Ordinance (Cap. 32), thus we propose the technical amendment to replace the term with “corporation” which includes both companies incorporated locally or overseas, to rectify the mismatch.

with Part II of the Companies Ordinance (Cap. 32) or, in the case of a corporation incorporated outside Hong Kong, complies with or is exempt from compliance with Part XII of that Ordinance; or

- (ii) in the case of a body corporate incorporated in Hong Kong that is not a registered company, a document containing ~~the matters specified in paragraph (b)(ii);~~

all the matters which, by virtue of Part XII of that Ordinance, it would be required to contain if the body corporate were a corporation¹⁵ incorporated outside Hong Kong and the document were a prospectus issued by that corporation¹⁵ with respect to those shares or debentures¹⁷;

- (d) ~~the issue of a form of application for the securities of a corporation, where it is issued, or the possession is for the purposes~~

¹⁶ **Technical drafting amendment for greater clarity.**

¹⁷ **Technical drafting change for greater clarity. Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.**

of issue,¹⁶ in connection with an invitation made in good faith to a person to enter into an underwriting agreement with respect to those securities;

- (e) ~~the issue~~ of any advertisement, invitation or document made in respect of the issue, whether in Hong Kong or elsewhere, of a certificate of deposit by an authorized financial institution;
- (f) ~~the issue~~ of any advertisement, invitation or document made in respect of the issue, whether in Hong Kong or elsewhere, of a certificate of deposit -

- (i) the amount or denomination of which is not less than the sum specified in Part 1 of Schedule 4; and

- (ii) by -

- (A) a multilateral agency; or

- (B) a bank incorporated outside Hong Kong and having no place of business in Hong Kong, where the Monetary Authority has declared in writing that he is satisfied that the bank is likely to be adequately supervised by the relevant authority of any place in which it is incorporated or

has its principal place of
business;

(g) ~~the issue~~ of any advertisement, invitation or document made in respect of the issue, whether in Hong Kong or elsewhere, of any instrument specified in Part 2 of Schedule 4 (other than a certificate of deposit), where the amount or denomination of the instrument is not less than the sum specified in Part 1 of Schedule 4 and the instrument -

(i) is issued by an authorized financial institution or a multilateral agency, or by an exempted body which, if it is a corporation or a wholly owned subsidiary specified in item 115¹⁸ of Part 4 of Schedule 4, complies with the relevant condition;

(ii) is issued by a corporation which complies with the relevant condition, and is guaranteed by an authorized financial institution or a multilateral agency, or by an exempted body (other than a corporation specified in item 115¹⁸ of

¹⁸ **Reference to Part 4 of Schedule 4 updated as a consequential change. See the footnote to Schedule 4.**

Part 4 of Schedule 4 which does not comply with the relevant condition, or a wholly owned subsidiary of the corporation); or

(iii) is issued by a wholly owned subsidiary specified in item 11~~5~~¹⁸ of Part 4 of Schedule 4 and is guaranteed by the corporation of which it is such a subsidiary and ~~that corporation~~which¹⁹ complies with the relevant condition;

(h) ~~the issue~~ of any advertisement, invitation or document made in respect of the issue of securities the listing of which on a recognized stock market has been approved by the recognized exchange company by which the recognized stock market is operated, where the advertisement, invitation or document complies with the rules made under section 23 or 36 governing the listing of securities, except to the extent that compliance is, in accordance with those rules, waived, modified or not required;

¹⁹ Technical drafting change for brevity. Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.

²⁰(ha)of any advertisement, invitation or document made in respect of securities regulated in a jurisdiction outside Hong Kong which have been admitted to trading on a recognized stock market under or pursuant to rules made under section 23 or 36;

- (i) ~~the issue of any advertisement, invitation or document made in respect of securities, or interests in any collective investment scheme or regulated investment agreement, which are or are intended to be disposed of only to persons outside Hong Kong;~~
- (j) ~~the issue of any advertisement, invitation or document made in respect of securities, or interests in any collective investment scheme or regulated investment agreement, which are or are intended to be disposed of only to professional investors, whether as principal or agent~~²¹.

²⁰ **The amendment is proposed to avoid unnecessary duplication of regulatory efforts. As part of the efforts to promote market development, certain securities regulated and listed in overseas jurisdictions are approved for trading in local stock market. We accept the market comment that any advertisement, invitation or document issued in respect of these securities should also be exempted as they are already subject to overseas regulation comparable to that by the SFC.**

²¹ **The amendment allows flexibility for the SFC to make rules to prescribe different extent of exclusion in respect of material issued to different types of professional investors. It is intended that the exclusion under clause 102(3)(j) will be extended to material issued to some classes of professional investors acting as principals or agents, and to other classes of professional investors acting solely as principals.**

(4) A person who commits an offence under subsection (1) is liable -

- (a) on conviction on indictment to a fine of \$500,000 and to imprisonment for 3 years and, in the case of a continuing offence, to a further fine of \$20,000 for every day during which the offence continues; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months and, in the case of a continuing offence, to a further fine of \$10,000 for every day during which the offence continues.

²²(4A) a person shall not be regarded as committing an offence under subsection (1) by reason only that he issues, or has in his possession for the purposes of issue -

- (a) as or on behalf of an intermediary licensed or registered for Type 1, Type 4 or Type 6 regulated activity (whether acting as principal or agent), any advertisement, invitation or document made in respect of securities;
- (b) as or on behalf of an intermediary licensed or registered for Type 2 or Type 5 regulated activity (whether acting as principal or

²² **As the conduct of an intermediary is regulated under Part VII, issue of advertisement, invitation or document by it should be exempted here to avoid double regulation, rationale similar to the exemption granted under clause 102(3). This also reflects the existing practice.**

agent), any advertisement, invitation or document made in respect of futures contracts;

(c) as or on behalf of -

(i) an authorized financial institution (whether acting as principal or agent); or

(ii) an intermediary licensed for Type 3 regulated activity (whether acting as principal or agent),

any advertisement, invitation or document made in respect of leveraged foreign exchange contracts.

²³(5) A person shall not be regarded as committing an offence under subsection (1) by reason only that he issues any advertisement, invitation or document, or has any advertisement, invitation or document in his possession for the purposes of issue -

(a) in the case of any advertisement, invitation or document, which is made in respect of securities, to an intermediary licensed or exempt-registered⁵ for Type 1, Type 4 or Type 6 regulated activity, or a representative of such intermediary that carries on such regulated activity for such intermediary;

²³ Minor technical drafting amendment.

- (b) in the case of any advertisement, invitation or document, ~~which is~~ made in respect of futures contracts, to an intermediary licensed or ~~exempt-registered~~⁵ for Type 2 or Type 5 regulated activity, or a representative of such intermediary that carries on such regulated activity for such intermediary;
- (c) in the case of any advertisement, invitation or document, ~~which is~~ made in respect of leveraged foreign exchange contracts, to -
- (i) an authorized financial institution;
 - or
 - (ii) an intermediary licensed for Type 3 regulated activity, or a representative of such intermediary that carries on such regulated activity for such intermediary.

~~_____ ²⁴(6) A person shall not be regarded as committing an offence under subsection (1) by reason only that he issues, or has in his possession for the purposes of issue, to purchasers copies of any newspaper, magazine,~~

²⁴ The carve-out of "hawker" and "vendor", etc is no longer necessary as they would be covered with the proposed amendment to clause 102(7)(b) below. **Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.**

~~journal or other periodical publication of general and regular circulation, which contain an invitation to do any act referred to in subsection (1)(a) or (b).~~

²⁵ ~~and~~ ²⁶ (7) A person shall not be regarded as committing an offence under subsection (1) ~~in respect of~~ by reason only that he issues, or has in his possession for the purposes of issue, any advertisement, invitation or document which is or contains an invitation to do any act referred to in subsection (1)(a) or (b) if -

- (a) ~~he carried on a business~~ the advertisement, invitation or document (as the case may be) was so issued, or possessed for the purposes of issue, in the ordinary course of a business (whether or not carried on by him), the principal purpose of which was to provide the

²⁵ We take the view that a person should be carved out from the general prohibition under clause 102(1), among other conditions, if the contents of the advertisement, etc were wholly devised by "another person" (instead of only if the contents of the advertisement, etc were wholly devised by "his customer or a person acting on behalf of that customer"), as the first person's position as a "mere conduit" remains irrespective of who (other than himself, his employees or agents) devised the contents of the advertisement. The proposed amendment to the original clause 102(7)(b) is to reflect this accordingly. Same amendment to clause 109(5)(b). **Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.**

²⁶ The proposed amendments are primarily to make it clear that the mere conduit carve-out would also be available to employees or agents of a person carrying out business of a mere conduit nature, provided that they themselves can satisfy the various prescribed conditions. Same amendments to clause 109(5). **Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.**

~~service of issuing or receiving and issuing materials provided to him by others;~~

~~(b) he issued, or had in his possession for the purposes of issue, the advertisement, invitation or document (as the case may be) by reason only of its being issued or received by him in the ordinary course of that business;~~

~~(e^b)²⁷ the contents of the advertisement, invitation or document (as the case may be) were wholly devised by a customer of his or by a person acting on behalf of a customer of his; and not, wholly or partly, devised by--~~

~~(i) where the business was carried on by him, by himself or any officer, employee or agent of his; or~~

~~(ii) where the business was not carried on by him, by himself; and~~

~~(c)²⁷ for the purposes of the issue -~~

~~(i) where the business was carried on by him, he or any officer, employee or agent of his; or~~

~~(ii) where the business was not carried on by him, he,~~

²⁷ Further technical drafting amendments introduced in the light of the comment of some Members on drafting.

~~(d) the nature of the service which he provided in relation to the advertisement, invitation or document (as the case may be) was such that he _____ did not select, add to, modify or otherwise exercise control over the contents of the advertisement, invitation or document (as the case may be) prior to its issue or receipt.~~

²⁸(8) ²⁹A person shall not be regarded as committing an offence under subsection (1) ~~in respect of~~ by reason only that he issues by way of live broadcast, or has in his possession for the purposes of issue, by way of live broadcast, any advertisement, invitation or document which is or contains an invitation to do any act referred to in subsection if -
~~(1)(a) or (b) if -~~

~~(a) he was a broadcaster;~~

~~(b) the advertisement, invitation or document (as the case may be) was broadcast live by him as a broadcaster;~~

²⁸ **Further technical drafting amendments introduced in the light of the comment of some Members on drafting.**

²⁹ The proposed amendments are primarily to make it clear that the mere conduit carve-out for a broadcaster would also be available to his employees or agents carrying out the broadcaster's business of a mere conduit nature, provided that they themselves can satisfy the various prescribed conditions and had reasonable grounds to believe that the broadcaster had acted in accordance with the terms and conditions of its licence, and with the relevant code of practice or guidelines. Same amendments to clause 109(6). **Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.**

so issued, or possessed for the purposes of
issue, in the ordinary course of the business
of a broadcaster (whether or not he was such
broadcaster);

~~(c) he did not modify the contents of the
advertisement, invitation or document (as the
case may be) the contents of the
advertisement, invitation or document (as the
case may be) prior to its broadcast; and were
not, wholly or partly, devised by -~~

(i) where he was the broadcaster, by
himself or any officer, employee or
agent of his; or

(ii) where he was not the broadcaster, by
himself;

(c) for the purposes of the issue -

(i) where he was the broadcaster, he or
any officer, employee or agent of
his; or

(ii) where he was not the broadcaster, he,
did not select, add to, modify or otherwise
exercise control over the contents of the
advertisement, invitation or document (as the
case may be); and

(d) he has, in relation to the broadcast -

~~(i) where he was the broadcaster, the~~
~~broadcaster~~ he; or

~~(ii) where he was not the broadcaster, he~~
~~believed and had reasonable grounds~~
~~to believe and did believe that the~~
~~broadcaster,~~

~~broadcast,~~ _____ acted in accordance with the terms
and conditions of the licence (if any) by which
he or the broadcaster (as the case may be)
became entitled to broadcast as a broadcaster
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 or the broadcaster (as the
case may be) as a broadcaster.

(9) It is a defence to a charge for an offence under
subsection (1) for the person charged to prove that he took
all reasonable steps and exercised all due diligence to avoid
the commission of the offence with which he is charged.

(10) For the purposes of any proceedings under this
section -

(a) an advertisement, invitation or document which
consists of or contains information likely to
lead, directly or indirectly, to the doing of
any act referred to in subsection (1)(a) or (b)

shall be regarded as an advertisement,
invitation or document (as the case may be)
which is or contains an invitation to do such
act;

- (b) an advertisement, invitation or document which is or contains an invitation directed at, or the contents of which are likely to be accessed or read (whether concurrently or otherwise) by, the public¹ shall be regarded as an advertisement, invitation or document (as the case may be) which is or contains an invitation to the public¹.

(11) Nothing in subsection (2)(a), (b), (c) or (i) or (4A)(a), (b) or (c)²² applies to anything done by any person in respect of any interest in a collective investment scheme that is not authorized by the Commission under section 103.

~~(12) In subsection (7), "issue" (發出), in relation to any material (including any advertisement, invitation or document), has the same meaning as it has in relation to any advertisement, invitation or document under section 101(1).²~~

(13) In this section -
"guaranteed" (作出擔保) means guaranteed fully, unconditionally, irrevocably and in writing;
"registered company" (註冊公司) means a company registered under the Companies Ordinance (Cap. 32);

"relevant condition" (有關條件), in relation to a corporation (including a wholly owned subsidiary of any other corporation), means a condition that the amount by which the aggregate of the corporation's assets exceeds the aggregate of its liabilities, as calculated in accordance with generally accepted accounting principles, is not less than the sum specified in Part 5 of Schedule 4.

103. Commission may authorize collective investment schemes

(1) On an application to the Commission, the Commission may, where it considers appropriate, authorize any collective investment scheme, subject to the condition specified in subsection (2) and to any other conditions it considers appropriate.

(2) It shall be a condition of authorization of a collective investment scheme under subsection (1) that at any time when the scheme is authorized -

(a) there is an individual approved by the Commission under subsection (3) as an approved person for the purpose of being served by the Commission with notices and decisions for the scheme; and

(b) the Commission is informed of particulars -
(i) subject to subparagraph (ii), of the current contact details of the

approved person referred to in paragraph (a), including, in so far as applicable, the address, telephone and facsimile numbers, and electronic mail address of the approved person;

(ii) where there is any change in the contact details referred to in subparagraph (i), of the change, within 14 days after the change takes place.

(3) For the purposes of subsection (2)(a), on an application by any person to the Commission, the Commission may, where it considers appropriate, approve any individual nominated in the application in respect of a collective investment scheme as an approved person for the purpose of being served by the Commission with notices and decisions for the scheme, and may, by notice in writing served on the person, withdraw the approval.

(4) The Commission may at any time, by notice in writing served on the approved person for a collective investment scheme, amend or revoke any of the conditions (other than the condition specified in subsection (2)) imposed, or impose new conditions, in respect of the authorization granted under subsection (1) in respect of the scheme.

(5) Without limiting any other ground on which the Commission may refuse to authorize any collective investment

scheme under subsection (1), the Commission may refuse to do so where it is not satisfied that the authorization is in the interest of the investing public.

(6) An application made pursuant to subsection (1) or (3) shall be accompanied by such information and documents as the Commission requires.

(7) Where the Commission refuses to authorize a collective investment scheme, or to approve an individual as an approved person, pursuant to subsection (1) or (3), it shall by notice in writing notify the person making the application in question of the decision and the reasons for which it is made.

(8) The Commission may publish in such manner as it considers appropriate particulars of any collective investment scheme authorized under subsection (1).

(9) Particulars published under subsection (8) are not subsidiary legislation.

104. Commission may authorize issue of advertisements, invitations or documents

(1) On an application to the Commission, the Commission may, where it considers appropriate, authorize the issue of any advertisement, invitation or document which is or contains an invitation to do any act referred to in section 102(1)(a) or (b), subject to the condition specified in subsection (2) and to any other conditions it considers appropriate,

including conditions on the matter to which the advertisement, invitation or document relates.

(2) It shall be a condition of authorization of the issue of any advertisement, invitation or document under subsection (1) that at any time when the issue is authorized -

(a) there is an individual approved by the Commission under subsection (3) as an approved person for the purpose of being served by the Commission with notices and decisions for the issue; and

(b) the Commission is informed of particulars -

(i) subject to subparagraph (ii), of the current contact details of the approved person referred to in paragraph (a), including, in so far as applicable, the address, telephone and facsimile numbers, and electronic mail address of the approved person;

(ii) where there is any change in the contact details referred to in subparagraph (i), of the change, within 14 days after the change takes place.

(3) For the purposes of subsection (2)(a), on an application by any person to the Commission, the Commission may, where it considers appropriate, approve any individual

nominated in the application in respect of the issue of any advertisement, invitation or document as an approved person for the purpose of being served by the Commission with notices and decisions for the issue, and may, by notice in writing served on the person, withdraw the approval.

(4) The Commission may at any time, by notice in writing served on the approved person for the issue of any advertisement, invitation or document, amend or revoke any of the conditions (other than the condition specified in subsection (2)) imposed, or impose new conditions, in respect of the authorization granted under subsection (1) in respect of the issue.

(5) Without limiting any other ground on which the Commission may refuse to authorize the issue of any advertisement, invitation or document under subsection (1), the Commission may refuse to do so where it is not satisfied that the matter to which the advertisement, invitation or document relates is in the interest of the investing public.

(6) An application made pursuant to subsection (1) or (3) shall be accompanied by such information and documents as the Commission requires.

(7) Where the Commission refuses to authorize the issue of any advertisement, invitation or document, or to approve an individual as an approved person, pursuant to subsection (1) or (3), it shall by notice in writing notify the person making

the application in question of the decision and the reasons for which it is made.

105. Withdrawal of authorization under section 103 or 104, etc.

(1) Subject to subsection (5), where, in relation to an authorization of a collective investment scheme under section 103, or an authorization of the issue of an advertisement, invitation or document under section 104, the Commission decides that -

- (a) any information provided to the Commission pursuant to section 103(6) or 104(6) (as the case may be) ~~is was at the time when it was~~ provided³⁰ false or misleading in a material particular;
- (b) any of the conditions imposed in respect of the authorization under section 103 or 104 (as the case may be) are not being complied with;
- (c) any information provided to the Commission in purported compliance with any of the conditions imposed in respect of the authorization under section 103 or 104 (as the case may be) ~~is was~~

³⁰ Technical amendment for greater clarity of the deterrent against provision of false or misleading information to the SFC. **Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.**

at the time when it was provided³⁰ false or misleading in a material particular; or

- (d) it is desirable to withdraw the authorization in order to protect the interest of the investing public,

the Commission may withdraw the authorization.

(2) Subject to subsection (3), the Commission shall, upon a request in writing made by an approved person for a collective investment scheme or the issue of an advertisement, invitation or document to withdraw the authorization of the scheme or of the issue (as the case may be), withdraw the authorization.

(3) Subject to subsection (5), the Commission may refuse to withdraw an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (2) where it considers that -

- (a) in the case of an authorization of a collective investment scheme, it is in the public interest that any matter concerning the scheme should be investigated before the authorization is withdrawn under subsection (2); or
- (b) the withdrawal of the authorization would not be in the interest of the investing public.

(4) Subject to subsection (5), where the Commission withdraws an authorization under subsection (1) or (2), it may

impose such conditions on the withdrawal of the authorization as it considers appropriate.

(5) The Commission shall not -

- (a) withdraw an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (1);
- (b) refuse to withdraw an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (3); or
- (c) impose any conditions on the withdrawal of an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (4),

without first giving the approved person for the scheme or the issue (as the case may be) a reasonable opportunity of being heard.

(6) Where the Commission -

- (a) withdraws an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (1);
- (b) withdraws an authorization of a collective investment scheme or of the issue of an

advertisement, invitation or document under subsection (2);

(c) refuses to withdraw an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (3); or

(d) imposes any conditions on the withdrawal of an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (4),

it shall by notice in writing notify the approved person for the scheme or the issue (as the case may be) of the decision and, in the case of paragraph (a), (c) or (d), the reasons for which it is made.

(7) Where the Commission withdraws an authorization under subsection (1) or (2), it may publish notice of the withdrawal and the reasons therefor in such manner as it considers appropriate.

(8) A notice or any other matter published under subsection (7) is not subsidiary legislation.

106. Offence to fraudulently or recklessly induce others to invest money

³¹(1) A person commits an offence if ~~he, by any fraudulent or reckless misrepresentation, induces another person--~~

(a) he makes any fraudulent misrepresentation or reckless misrepresentation by which another person is induced -

(a~~i~~) to enter into or offer to enter into -

(~~i~~A) an agreement to acquire, dispose of, subscribe for or underwrite securities; or

(~~ii~~B) a regulated investment agreement; or

(~~b~~ii) to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme.; and

(b) he makes the misrepresentation for the purpose of inducing the other person to do any act referred to in paragraph (a)(i) or (ii).

(2) A person who commits an offence under subsection (1) is liable -

(a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 7 years; or

³¹ In the light of the comments by some Members at the Bills Committee meeting on 27 June 2001, we propose the amendment to make clear the effect of the provision, being that a person commits an offence if another person is induced by him to invest by making fraudulent or reckless misrepresentation. Moreover, we propose to make clear the mental element with which such misrepresentation was made. The amendment also addresses the concern of the Legal Service Division of the Legislative Council.

(b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

³²(3) For the purposes of this section -

~~(3) In this section, "fraudulent or reckless~~

(a) "fraudulent misrepresentation" (欺詐的或罔顧實情的失實陳述) means -

~~(a) any statement -~~

(i) which, any statement which, at the time when it is made, is to the knowledge of its maker, was false, misleading or deceptive; or

(ii) which is false, misleading or deceptive and was made recklessly; any promise which, at the time when it is made, its maker has no intention of fulfilling, or is to the knowledge of its maker not capable of being fulfilled;

~~(iii) any forecast which, at the time when it is made, is to the knowledge of its maker not justified on the facts then known to him; or~~

³² We accept the comment of some Members expressed at the Bills Committee meeting on 27 June 2001 that fraudulent misrepresentation and reckless misrepresentation are of different nature, and thus propose the amendment to define the two types of misrepresentation separately.

~~(iv) any statement, promise or forecast~~

~~from which, at the time when it is made, its maker intentionally omits a material fact, with the result that -~~

~~=~~

~~(A) in the case of the statement, the~~

~~statement is rendered false,~~

~~misleading or deceptive;~~

~~(B) in the case of the promise, the~~

~~promise is not capable of being~~

~~fulfilled or is rendered~~

~~misleading or deceptive; or~~

~~(b) any promise -~~

~~(i) which its maker had no intention of~~

~~fulfilling;~~

~~(ii) which, to the knowledge of its maker,~~

~~was not capable of being fulfilled;~~

~~or~~

~~(iii) which is not capable of being~~

~~fulfilled and was made recklessly;~~

~~(c) any forecast -~~

~~(i) which, to the knowledge of its maker,~~

~~was not justified on the facts known~~

~~to him at the time when he made it;~~

~~or~~

~~(ii) which was not justified on the facts known to its maker at the time when he made it and was made recklessly; or~~

~~(d) any statement, promise or forecast from which its maker intentionally or recklessly omitted a material fact, with the result that—~~

~~(i) in the case of the statement, the statement was rendered false, misleading or deceptive;~~

~~(ii) in the case of the promise, the promise was not capable of being fulfilled or was rendered misleading or deceptive; or~~

~~(iiiC) in the case of the forecast, the forecast was is not capable of being justified or was is rendered misleading or deceptive.~~

(b) "reckless misrepresentation" (罔顧實情的失實陳述)

means -

(i) any statement which, at the time when it is made, is false, misleading or deceptive and is made recklessly;

(ii) any promise which, at the time when it is made, is not capable of being fulfilled and is made recklessly;

(iii) any forecast which, at the time when it is made, is not justified on the facts then known to its maker and is made recklessly; or

(iv) any statement, promise or forecast from which, at the time when it is made, its maker recklessly omits a material fact, with the result that -

=

(A) in the case of the statement, the statement is rendered false, misleading or deceptive;

(B) in the case of the promise, the promise is not capable of being fulfilled or is rendered misleading or deceptive; or

(C) in the case of the forecast, the forecast is not capable of being justified or is rendered misleading or deceptive.

107. Civil liability for inducing others to invest money in certain cases

³³(1) ~~Where -A person who, by any fraudulent, reckless or negligent~~

~~(a) a person makes any fraudulent misrepresentation, induces reckless misrepresentation or negligent misrepresentation by which another person is induced -~~

~~(a*i*) to enter into or offer to enter into~~

~~-~~

~~(a*A*) an agreement to acquire, dispose of, subscribe for or underwrite securities; or~~

~~(a*i*B) a regulated investment agreement; or~~

~~(b*i*i) to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme; and~~

~~(b) in the case of the fraudulent misrepresentation or reckless misrepresentation, the first-~~

³³ **Clause 107 creates a private cause of action which finds its origin in section 8 of the Protection of Investors Ordinance (“PIO”). Retaining this private cause of action will remove any doubt as to whether such right is preserved under this new regulatory regime as the PIO is to be repealed. In light of Members’ comments made at the meeting of the Bills Committee on 27 June 2001, we propose some refinements. First, a maker of the misstatement should only be liable if a misrepresentee has been induced and consequently incurred loss. This is reflected in clause 107(1)(a). Second, under common law, no liability will arise in respect of fraudulent misrepresentation or reckless misrepresentation if the statement was not made with the intention that it should be acted upon by the plaintiff. However, in an action based on negligent misrepresentation, liability may arise in the absence of such an intention. Hence, clause 107(1)(b).**

mentioned person makes the misrepresentation for the purpose of inducing the other person to do any act referred to in paragraph(a)(i) or (ii),

the first-mentioned person shall, in addition to whether or not he also incurs any other liability he may incur³⁴ (whether under this Part or otherwise), be liable to pay compensation by way of damages to the other person for any pecuniary loss that the other person has sustained as a result of the reliance by the other person on the misrepresentation.

³⁵(2) For the purposes of this section, where a company or other body corporate has, ~~by any fraudulent, reckless or negligent~~made any fraudulent misrepresentation, reckless misrepresentation or negligent misrepresentation by which induced another person is induced to do any act referred to in subsection (1)(a) ~~or (b)(i) or (ii)~~, any person who was a director of the company or body corporate at the time when the misrepresentation was made shall, unless it is proved that he did not authorize the making of the misrepresentation, be presumed also ~~to have, by the misrepresentation, induced that other person to do such act.-~~

³⁴ Technical amendment for greater clarity. Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.

³⁵ Technical amendment consequential to the amendments proposed to clause 107(1).

(a) to have made the misrepresentation; and
(b) in the case of the fraudulent misrepresentation or reckless misrepresentation, where the company or body corporate has made the misrepresentation for the purpose of inducing the other person to do any act referred to in subsection (1)(a)(i) or (ii), to have made the misrepresentation for such purpose.

³⁶(3) 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~~ entertain an application for an injunction³⁷, grant an injunction in addition to, or in substitution for, damages, on such terms and conditions as it considers appropriate.

(4) 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) applies.

³⁶ At the Bills Committee meeting on 27 June 2001, a Member sought clarification about the purpose of clause 107(3). The clause is to put beyond doubt that the Court has the power to grant an application made by a party to the proceedings for an injunction order against the other party. By way of illustration, the Court may make an order restricting the manner in which the defendant is permitted to deal with any assets, including any of the plaintiff's assets over which he has control, pending disposal of the claim, thereby serving to prevent the dissipation of assets which may be relevant to the proceedings.

³⁷ Technical amendment for greater clarity. Members considered this amendment and did not propose further changes at the meeting on 27 June 2001.

(5) A person may bring an action under subsection (1) even though the person against whom the action is brought has not been charged with or convicted of an offence by reason of a contravention of this Part.

(6) 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.

³⁸(7) For the purposes of this section -

~~— (7) In this section, "fraudulent, reckless or negligent misrepresentation" (欺詐的、罔顧實情的或疏忽的失實陳述) means —~~

(a) "fraudulent misrepresentation" (欺詐的失實陳述)

means -

~~(a) any statement —~~

(i) which, any statement which, at the time when it is made, is to the knowledge of its maker, was false, misleading or deceptive;

(ii) ~~which is false, misleading or deceptive and was made recklessly;~~
or any promise which, at the time when it is made, its maker has no

³⁸ We accept the comment of some Members expressed at the Bills Committee meeting on 27 June 2001 that fraudulent misrepresentation, reckless misrepresentation and negligent misrepresentation are of different nature. We thus propose the amendment to define the three types of misrepresentation separately.

intention of fulfilling, or is to the knowledge of its maker not capable of being fulfilled;

(iii) ~~which is false, misleading or deceptive and was made without reasonable care having been taken to ensure its accuracy;~~any forecast which, at the time when it is made, is to the knowledge of its maker not justified on the facts then known to him; or

(iv) any statement, promise or forecast from which, at the time when it is made, its maker intentionally omits a material fact, with the result that -

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(A) in the case of the statement, the statement is rendered false, misleading or deceptive;

(B) in the case of the promise, the promise is not capable of being fulfilled or is rendered misleading or deceptive; or

(C) in the case of the forecast, the forecast is not capable of being

justified or is rendered
misleading or deceptive;

~~(b) any promise~~

~~(i) which its maker had no intention of
fulfilling;~~

~~(ii) which, to the knowledge of its maker,
was not capable of being fulfilled;~~

~~or~~

~~(iii) which is not capable of being
fulfilled and was made recklessly or
without reasonable care having been
taken to ensure that it could be
fulfilled;~~

(b) "reckless misrepresentation" (罔顧實情的失實陳述)

means -

(i) any statement which, at the time when
it is made, is false, misleading or
deceptive and is made recklessly;

(ii) any promise which, at the time when
it is made, is not capable of being
fulfilled and is made recklessly;

(iii) any forecast which, at the time when
it is made, is not justified on the
facts then known to its maker and is
made recklessly; or

(iv) any statement, promise or forecast
from which, at the time when it is
made, its maker recklessly omits a
material fact, with the result that -
(A) in the case of the statement, the
statement is rendered false,
misleading or deceptive;
(B) in the case of the promise, the
promise is not capable of being
fulfilled or is rendered
misleading or deceptive; or
(C) in the case of the forecast, the
forecast is not capable of being
justified or is rendered
misleading or deceptive;

~~(c) any forecast -~~

~~_____ (i) which, to the knowledge of its maker,~~
~~was not justified on the facts known~~
~~to him at the time when he made it;~~
~~or~~

~~_____ (ii) which was not justified on the facts~~
~~known to its maker at the time when~~
~~he made it and was made recklessly or~~
~~without reasonable care having been~~
~~taken to ensure the accuracy of those~~
~~facts; or~~

(c) "negligent misrepresentation" (疏忽的失實陳述) means -

(i) any statement which, at the time when it is made, is false, misleading or deceptive and is made without reasonable care having been taken to ensure its accuracy;

(ii) any promise which, at the time when it is made, is not capable of being fulfilled and is made without reasonable care having been taken to ensure that it can be fulfilled;

(iii) any forecast which, at the time when it is made, is not justified on the facts then known to its maker and is made without reasonable care having been taken to ensure the accuracy of those facts; or

(iv) any statement, promise or forecast from which, at the time when it is made, its maker negligently omits a material fact, with the result that -

=

(A) in the case of the statement, the statement is rendered false, misleading or deceptive;

(B) in the case of the promise, the
promise is not capable of being
fulfilled or is rendered
misleading or deceptive; or

(C) in the case of the forecast, the
forecast is not capable of being
justified or is rendered
misleading or deceptive.

~~(d) any statement, promise or forecast from which
its maker intentionally, recklessly or
negligently omitted a material fact of which he
had knowledge or ought to have had knowledge,
with the result that —~~

~~————— (i) in the case of the statement, the
statement was rendered false,
misleading or deceptive;~~

~~————— (ii) in the case of the promise, the
promise was not capable of being
fulfilled or was rendered misleading
or deceptive; or~~

~~————— (iii) in the case of the forecast, the
forecast was not capable of being
justified or was rendered misleading
or deceptive.~~

~~108. Offers by intermediaries or representatives
for Type 1 or Type 4 regulated activity³⁹~~

~~(1) Subject to subsection (5), a Type 1 intermediary or representative or a Type 4 intermediary or representative shall not communicate an offer to acquire or dispose of any securities of, or issued by, a body unless —~~

~~(a) the offer —~~

~~(i) is contained in a document in an official language; or~~

~~(ii) if communicated verbally, is reduced to writing in a document in an official language and delivered to the person or persons to whom it was made not later than 24 hours after the verbal communication;~~

~~(b) the offer —~~

~~(i) contains a description of the securities sufficient to enable them to be identified;~~

~~(ii) specifies the terms of the offer, including where appropriate the amount of consideration proposed to~~

³⁹ Clause 108 deals with business conduct of intermediaries and has been relocated to Part VII of the Bill for the sake of tidiness and easy reference. See footnote 4. **Members considered this amendment and did not propose further changes at the meeting on 29 June 2001.**

~~be paid for the securities to be
acquired pursuant to the offer;~~

~~(iii) where a dividend has been declared or
recommended in respect of the
securities, or it is anticipated that
a dividend may be so declared or
recommended before the transfer of
the securities, states whether the
securities are to be transferred with
or without the dividend;~~

~~(iv) specifies —~~

~~(A) whether, in the event of a
person accepting the offer, the
offeror will pay any stamp duty
which the person so accepting
the offer will become liable to
pay in respect of the
transaction under the Stamp Duty
Ordinance (Cap. 117); and~~

~~(B) if the offeror will not so pay
the stamp duty, the rate of the
stamp duty that the person so
accepting the offer will become
liable to pay in respect of the
transaction under that
Ordinance;~~

~~(v) specifies whether, in the event of a person accepting the offer, any fees will be payable by that person to —~~

~~(A) where the Type 1 intermediary or representative or the Type 4 intermediary or representative (as the case may be) is regarded as such by virtue of being an intermediary, the Type 1 intermediary or representative or the Type 4 intermediary or representative (as the case may be); or~~

~~(B) where the Type 1 intermediary or representative or the Type 4 intermediary or representative (as the case may be) is regarded as such by virtue of being a representative of an intermediary, the intermediary;~~

~~(vi) if contained in a document referred to in paragraph (a)(i) —~~

~~(A) specifies the name and address of the offeror and, where any person is making the offer on~~

~~behalf of the offeror, the name
and address of that person;~~

~~(B) bears a date which is not more
than 3 days before the date on
which the offer is communicated;~~

~~(C) where the offer is for the
acquisition of securities,
satisfies the requirements of
Part 1 of Schedule 5;~~

~~(D) where the offer is for the
disposal of securities,
satisfies the requirements of
Part 2 of Schedule 5; and~~

~~(E) where a report of an expert in
connection with the offer is
included in or annexed to the
offer, contains a statement to
the effect that the expert has
consented to the inclusion or
annexure, and has not, before
the communication of the offer,
withdrawn that consent; and~~

~~(vii) if communicated verbally, where there
is a report of an expert in
connection with the offer, specifies
the place at which the report is~~

~~available for inspection, and
contains a statement to the effect
that the expert has consented to the
contents of the report, and has not,
before the communication of the
offer, withdrawn that consent; and~~

~~(c) where the offer is contained in a document
referred to in paragraph (a)(i) or is reduced
to writing in a document referred to in
paragraph (a)(ii) but the document is in only
one official language, the document includes a
translation, in the other official language, of
all the particulars required in respect of the
offer under paragraph (b), except where the
Commission has previously agreed that the
requirements of this paragraph may be dispensed
with in any particular case.~~

~~(2) Where an offer contained in a document referred to
in subsection (1)(a)(i) is to contain a statement referred to
in subsection (1)(b)(vi)(E) regarding the consent of an
expert, the offer shall not be communicated unless the expert
has given, and has not before the communication of the offer
withdrawn, his consent to the offer being communicated with
the inclusion of the statement in the form and context in
which it is included in the document.~~

~~(3) Where an offer communicated verbally is to contain a statement referred to in subsection (1)(b)(vii) regarding the consent of an expert, the offer shall not be communicated unless the expert has given, and has not before the communication of the offer withdrawn, his consent to the offer being communicated with a reference to the statement in the form and context in which it is referred to.~~

~~(4) Any Type 1 intermediary or representative or Type 4 intermediary or representative who communicates an offer to acquire or dispose of any securities without having complied with subsections (1), (2) and (3) commits an offence and is liable on conviction to a fine at level 6 and, in the case of a continuing offence, to a further fine of \$20,000 for every day during which the offence continues.~~

~~(5) This section does not apply to —~~

~~(a) an offer regulated by, and made in accordance with, the requirements of —~~

~~(i) the rules made under section 23 or 36 governing the listing of securities;~~

~~(ii) the code published under section 385(2)(a); or~~

~~(iii) Part II of the Companies Ordinance (Cap. 32) or, in the case of a corporation incorporated outside Hong Kong, Part XII of that Ordinance;~~

~~(b) an offer to dispose of securities of, or issued by, a body in favour of persons who already hold securities of, or issued by, the body;~~

~~(c) an offer by a Type 1 intermediary or representative or a Type 4 intermediary or representative if the offer is made to a person with whom, or on whose behalf —~~

~~(i) where the Type 1 intermediary or representative or the Type 4 intermediary or representative (as the case may be) is regarded as such by virtue of being an intermediary, the Type 1 intermediary or representative or the Type 4 intermediary or representative (as the case may be); or~~

~~(ii) where the Type 1 intermediary or representative or the Type 4 intermediary or representative (as the case may be) is regarded as such by virtue of being a representative of an intermediary, the intermediary,~~

~~has transacted the sale or purchase of securities on at least 3 occasions during the period of 3 years immediately preceding the date of the offer;~~

~~(d) an offer made to~~

~~(i) a professional investor;~~

~~(ii) a solicitor or professional
accountant acting in his professional
capacity; or~~

~~(iii) any other person who is of a class
prescribed by rules made under
section 384 for the purposes of this
paragraph;~~

~~(e) an offer made by an exchange participant in the
ordinary course of trading on a recognized
stock market;~~

~~(f) an offer made by a person who is of a class
prescribed by rules made under section 384 for
the purposes of this paragraph;~~

~~(g) an offer which is of a class prescribed by
rules made under section 384 for the purposes
of this paragraph.~~

~~(6) Without prejudice to section 384(9) and (10), the
Commission may make rules to add to, waive or modify any of
the requirements specified in subsections (1), (2) and (3),
whereupon the provisions of subsections (1), (2) and (3) shall
apply subject to the rules accordingly.~~

~~(7) Where~~

~~(a) a person has accepted an offer to acquire or
dispose of any securities of, or issued by, a~~

~~body which is an offer to which this section applies; and~~

~~(b) the offer has been made without subsections (1), (2) and (3) having been complied with in a material particular,~~

~~that person may, subject to the rights of a subsequent purchaser of the securities in good faith for value, rescind the acceptance, by giving notice in writing to that effect to the Type 1 intermediary or representative or the Type 4 intermediary or representative who communicated the offer, within 14 days after the date on which he becomes aware of the matter described in paragraph (b).~~

~~— (8) For the purposes of this section —~~

~~(a) where a Type 1 intermediary or representative or a Type 4 intermediary or representative invites a person to acquire or dispose of any securities of, or issued by, a body, the invitation shall be deemed to be an offer, and a reference in this section to acceptance shall be construed accordingly;~~

~~(b) an offer to acquire or dispose of a right to acquire or dispose of securities or an interest in securities shall be deemed to be an offer to acquire or dispose of securities, and a reference in this section to a person who holds securities includes a person who holds a right~~

~~to acquire securities or an interest in securities;~~

~~(c) an offer to acquire or dispose of securities in consideration or part consideration for other securities shall be deemed to be both an offer to acquire and an offer to dispose of securities.~~

~~(9) In this section, a reference to securities of a body shall, unless the context otherwise requires, be construed as a reference to securities (having the meaning under section 1 of Part 1 of Schedule 1) which are —~~

~~(a) issued, made available or granted by the body;~~

~~or~~

~~(b) proposed to be issued, made available or granted by the body.~~

~~(10) In this section —~~

~~"body" (團體) means a corporation, a multilateral agency, or a government or municipal government authority;~~

~~"expert" (專家) includes an engineer, valuer, professional accountant, solicitor, and any other person whose profession gives authority to a statement made by him;~~

~~"Type 1 intermediary or representative" (第1類中介人或代表) means —~~

~~(a) an intermediary licensed or exempt for Type 1 regulated activity; or~~

~~(b) its representative that carries on Type 1 regulated activity for it;~~

~~"Type 4 intermediary or representative" (第4類中介人或代表)~~

~~means—~~

~~(a) an intermediary licensed or exempt for Type 4 regulated activity; or~~

~~(b) its representative that carries on Type 4 regulated activity for it.~~

109. Offence to issue advertisements relating to carrying on of regulated activities, etc.

(1) Subject to subsections (2) ~~and (43A)~~⁴⁰ to (7), a person commits an offence if he issues, or has in his possession for the purposes of issue -

(a) an advertisement in which to his knowledge⁴¹ a person, ~~not being an intermediary licensed or exempt for -~~

~~Type 4, Type 5, Type 6 or Type 9 regulated activity, holds himself out as being prepared to carry on~~

⁴⁰ The amendment is consequential to the new clause 109(3A). Members considered this amendment and did not propose further changes at the meeting on 29 June 2001.

⁴¹ To make it clear that the applicability of the mental element ("to his knowledge") for committing the offence covers both the matters set out in clause 109(1)(a)(i) and (ii). Members considered this amendment and did not propose further changes at the meeting on 29 June 2001.

~~such regulated activity for which he is not licensed or
exempt; or~~

~~(i) a person holds himself out as being
prepared to carry on Type 4, Type 5,
Type 6 or Type 9 regulated activity;
and~~

~~(ii) the person is not licensed or
registered for such regulated
activity as required under this
Ordinance⁴²; or~~

(b) any document which to his knowledge contains
such advertisement.

~~⁴³(2) Subsection (1) does not apply to the issue of any
advertisement or document referred to in subsection (1)(a) or
(b) to an intermediary licensed or exempt for Type 4, Type 5,
Type 6 or Type 9 regulated activity, or a representative of
such intermediary that carries on such regulated activity for
such intermediary.~~

⁴² The proposed amendment is to make it clear that the provision only catches an advertisement by a person who is required to be but has not been properly licensed or registered under the SF [Ordinance], and not by a person who is not at all required to be licensed or registered. **Members considered this amendment and did not propose further changes at the meeting on 29 June 2001.**

⁴³ Technical drafting amendment to relocate and reflect the original clause 109(2) under the new clause 109(3A). **Members considered this amendment and did not propose further changes at the meeting on 29 June 2001.**

(3) A person who commits an offence under subsection (1) is liable on conviction to a fine at level 5 and to imprisonment for 6 months.

⁴⁴(43A) A person shall not be regarded as committing an offence under subsection (1) by reason only that he issues any advertisement or document, or has any advertisement or document in his possession for the purposes of issue, ~~to purchasers copies of any newspaper, magazine, journal or other periodical publication of general and regular circulation, which contain any advertisement or document referred to in subsection (1)(a) or (b).~~⁴⁵

(a) in the case of an advertisement in which a person holds himself out as being prepared to carry on Type 4 regulated activity, to an intermediary licensed or registered for Type 4 regulated activity, or a representative of such intermediary that carries on such regulated activity for such intermediary;

(b) in the case of an advertisement in which a person holds himself out as being prepared to carry on Type 5 regulated activity, to an

⁴⁴ **Technical drafting amendment to enhance clarity on the intended application of the exemption for persons licensed or registered for different types of regulated activity.**

⁴⁵ **The carve-out of "hawker" and "vendor" is no longer necessary as they would be covered with the proposed amendment to clause 109(5)(b) below. See footnote (24). Members considered this amendment and did not propose further changes at the meeting on 29 June 2001.**

intermediary licensed or registered for Type 5 regulated activity, or a representative of such intermediary that carries on such regulated activity for such intermediary;

(c) in the case of an advertisement in which a person holds himself out as being prepared to carry on Type 6 regulated activity, to an intermediary licensed or registered for Type 6 regulated activity, or a representative of such intermediary that carries on such regulated activity for such intermediary; or

(d) in the case of an advertisement in which a person holds himself out as being prepared to carry on Type 9 regulated activity, to an intermediary licensed or registered for Type 9 regulated activity, or a representative of such intermediary that carries on such regulated activity for such intermediary.

^{46, 47 and 48}(5)A person shall not be regarded as committing an offence under subsection (1) ~~in respect of~~ by reason only that he issues, or has in his possession for the purposes of issue, any advertisement or document referred to in subsection (1)(a) or (b) if -

- (a) ~~he carried on a business~~ the advertisement or document (as the case may be) was so issued, or possessed for the purposes of issue, in the ordinary course of a business (whether or not carried on by him), the principal purpose of which was to provide the service of issuing or receiving and issuing materials provided to him by others;

⁴⁶ We take the view that a person should be carved out from the general prohibition under clause 109(1), among other conditions, if the contents of the advertisement, etc were wholly devised by "another person" (instead of only if the contents of the advertisement, etc were wholly devised by "his customer or a person acting on behalf of that customer"), as the first person's position as a "mere conduit" remains irrespective of who (other than himself, his employees or agents) devised the contents of the advertisement. The proposed amendment to clause 109(5)(b) is to reflect this accordingly. See footnote (25). **Members considered this amendment and did not propose further changes at the meeting on 29 June 2001.**

⁴⁷ The proposed amendments are primarily to make it clear that the mere conduit carve-out would also be available to employees or agents of a person carrying out business of a mere conduit nature, provided that they can themselves satisfy the various prescribed conditions. See footnote (26). **Members considered this amendment and did not propose further changes at the meeting on 29 June 2001.**

⁴⁸ **Further technical drafting amendments are proposed in the light of the drafting comments made by some Members at the Bills Committee meeting on 29 June 2001.**

~~(b) he issued, or had in his possession for the purposes of issue, the advertisement or document (as the case may be) by reason only of its being issued or received by him in the ordinary course of that business;~~

~~(eb) the contents of the advertisement or document (as the case may be) were wholly devised by a customer of his or by a person acting on behalf of a customer of his; and not, wholly or partly, devised -~~

~~(i) where the business was carried on by him, by himself or any officer, employee or agent of his; or~~

~~(ii) where the business was not carried on by him, by himself; and~~

~~(c) for the purposes of the issue -~~

~~(i) where the business was carried on by him, he or any officer, employee or agent of his; or~~

~~(ii) where the business was not carried on by him, he,~~

~~(d) the nature of the service which he provided in relation to the advertisement or document (as the case may be) was such that he did not select, add to, modify or otherwise exercise control over the contents of the advertisement~~

or document (as the case may be) ~~prior to its issue or receipt.~~

^{49 and 50}(6) A person shall not be regarded as committing an offence under subsection (1) ~~in respect of~~ by reason only that he issues by way of live broadcast, or has in his possession for the purposes of issue by way of live broadcast, any advertisement or document ~~referred to in subsection (1)(a) or (b) if~~ —

~~(a) he was a broadcaster; if —~~

~~(b)~~ (a) the advertisement or document (as the case may be) was broadcast live by him as a broadcaster so issued, or possessed for the purposes of issue, in the ordinary course of the business of a broadcaster (whether or not he was such broadcaster);

~~(c) he did not modify the contents of the advertisement or document (as the case may (b) _____ the contents of the advertisement or document (as the case may be) prior to its~~

⁴⁹ The proposed amendments are primarily to make it clear that the mere conduit carve-out for a broadcaster would also be available to his employees or agents carrying out the broadcaster's business of a mere conduit nature, provided that they themselves can satisfy the various prescribed conditions and had reasonable grounds to believe that the broadcaster had acted in accordance with the terms and conditions of its licence, and with the relevant code of practice or guidelines. See footnote (29). **Members considered this amendment and did not propose further changes at the meeting on 29 June 2001.**

⁵⁰ Further technical drafting amendments are proposed in the light of the drafting comments made by some Members at the Bills Committee meeting on 29 June 2001.

~~broadcast; and were not, wholly or partly,~~
devised -

(i) where he was the broadcaster, by
himself or any officer, employee or
agent of his; or

(ii) where he was not the broadcaster, by
himself;

(c) for the purposes of the issue -

(i) where he was the broadcaster, he or
any officer, employee or agent of
his; or

(ii) where he was not the broadcaster, he,
did not select, add to, modify or otherwise
exercise control over the contents of the
advertisement or document (as the case may be);
and

(d) he has, in relation to the broadcast -

(i) where he was the broadcaster, ~~the~~
~~broadcaster~~he; or

(ii) where he was not the broadcaster, he
believed and had reasonable grounds
to believe ~~and did believe~~ that the
broadcaster,

~~broadcast,~~ acted in accordance with the terms
and conditions of the licence (if any) by which
he ~~he~~ or the broadcaster (as the case may be)

became entitled to broadcast as a broadcaster 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 or the broadcaster (as the case may be) as a broadcaster.

(7) It is a defence to a charge for an offence under subsection (1) for the person charged to prove that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence with which he is charged.

~~²(8) In subsection (5), "issue" (發出), in relation to any material (including any advertisement or document), has the same meaning as it has in relation to any advertisement, invitation or document under section 101(1).~~

Division 3 - Miscellaneous

110. Submission of information to Commission

- (1) A person that is -
- (a) an authorized financial institution;
 - (b) an exempted body or, in the case of a wholly owned subsidiary specified in item 115⁵¹ of Part 4 of Schedule 4 but incorporated outside Hong

⁵¹ Reference in Part 4 of Schedule 4 updated as a consequential change. See the footnote to Schedule 4.

Kong, an authorized representative of that subsidiary;

(c) a multilateral agency or an authorized representative of that agency; or

(d) a bank incorporated outside Hong Kong or an authorized representative of that bank,

commits an offence if he fails, within 10 business days, or such longer period as is prescribed by rules made under section 384 for the purposes of this subsection, after the issue of any advertisement, invitation or document referred to in section 102(3)(e), (f) or (g) by the authorized financial institution, the exempted body or the wholly owned subsidiary, the multilateral agency or the bank (as the case may be), to submit to the Commission such information in respect of the advertisement, invitation or document as is prescribed by the rules.

(2) A person who commits an offence under subsection (1) is liable on conviction to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$5,000 for every day during which the offence continues.

(3) In subsection (1), "authorized representative" (獲授權代表), in relation to the issue of any advertisement, invitation or document, means -

(a) in the case of a wholly owned subsidiary specified in item 11~~5~~⁵¹ of Part 4 of Schedule 4

- but incorporated outside Hong Kong, the listed corporation of which it is the subsidiary; or
- (b) in the case of a multilateral agency or a bank incorporated outside Hong Kong, a person resident in Hong Kong who is authorized by the agency or the bank (as the case may be) to act on behalf of the agency or the bank (as the case may be) in respect of that issue.

111. Service of notices, etc. on approved persons⁵²

~~_(1) Notwithstanding section 386, any notice, decision, written notice, decision or direction or other document (however described) required under this Ordinance to be issued to or served (however described) to or on an approved person by the Commission shall for all purposes be regarded as duly issued or served only if -~~

- (a) it is delivered to him by hand; or
- (b) it is -
- (i) left at, or sent by post to, the last address;
 - (ii) sent by facsimile transmission to the last facsimile number; or
 - (iii) sent by electronic mail transmission to the last electronic mail address,

⁵² **Minor technical drafting amendment.**

shown by the particulars of which the Commission is informed in respect of the approved person for the purposes of section 103(2)(b) or 104(2)(b) (as the case may be).

(2) Where a notice, decision, direction or other document (however described) is regarded as duly issued ~~to~~ or served to or on an approved person under subsection (1)(b), it shall for all purposes be regarded as issued ~~to~~ or served to or on the approved person, and as coming to his notice, at the time when -

- (a) where it is left at an address, it is so left at that address;
- (b) where it is sent by post to an address, it would in the ordinary course of post be delivered to that address;
- (c) where it is sent by facsimile transmission to a facsimile number, it would in the ordinary course of transmission by facsimile be received at that number; or
- (d) where it is sent by electronic mail transmission to an electronic mail address, it would in the ordinary course of transmission by electronic mail be received at that address.

112. Amendment of Schedules ~~4 and 5~~ 4⁵³

(1) The Financial Secretary may, by notice published in the Gazette, amend Part 1 of Schedule 4.

(2) The Commission may, after consultation with the Financial Secretary, by notice published in the Gazette, amend Parts 2, ~~3~~, 4 and 5 of Schedule 4.

~~— (3) The Chief Executive in Council may, by order published in the Gazette, amend Schedule 5.~~⁵³

⁵³ Schedule 5 deals with offers by intermediaries for dealing in or advising on securities under clause 108. With the relocation of clause 108 to Part VII on business conduct of intermediaries, the empowering provision to amend Schedule 5 has also been relocated to Part VII. See footnote 4. **Members considered this amendment and did not propose further changes at the meeting on 29 June 2001.**