

PART VII

BUSINESS CONDUCT, ETC. OF INTERMEDIARIES

Division 1 - Interpretation

162. Interpretation of Part VII

In this Part, unless the context otherwise requires -

¹"client contract" (客戶合約) means any contract or arrangement between an intermediary and another person, which contains terms on which the intermediary is to provide services the provision of which constitutes a regulated activity;

"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

¹ A consequential amendment. In the Blue Bill, the term "client contract" is defined in clause 163(5) for use only in clause 163. We propose to use it in clause 169 as well in the light of a market comment (see Footnote 23). The definition of the term is consequentially relocated to clause 162 for use in both clauses 163 and 169.

(b) in relation to an ~~exempt person registered~~
institution², 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~~
engaged³ by the registered
institution² in respect of a regulated
activity; and

² **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 “exempt” with “registered” throughout the Bill to duly reflect our policy intention.**

³ **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. Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.**

- (ii) who carries on that regulated activity for the ~~exempt person~~ registered institution².

Division 2 - Business conduct

163. Business conduct of intermediaries and their representatives

(1) The Commission may make rules requiring intermediaries and their representatives to comply with such practices and standards, relating to their ~~conduct~~ conduct of the intermediaries or the representatives (as the case may be)⁴ in carrying on the regulated activities for which the intermediaries are licensed or ~~exempt~~ registered², as are specified in the rules.

(2) Without limiting the generality of subsection (1) and without prejudice to section ~~384(9)~~ 384A(7) and ~~(108)~~⁴, the Commission may in the rules referred to in subsection (1) -

- (a) prohibit the use of misleading or deceptive advertisements by or on behalf of intermediaries, and impose conditions for the use of advertisements by or on behalf of intermediaries;

⁴ Technical amendment to clause 163(1) for greater clarity. Amendment to clause 163(2) is consequential to the relocation of provisions in Part XVI. Members considered the amendment to clause 163(1) and did not propose further changes at the meeting on 17 July 2001.

- (b) require specified terms and conditions to be included in client contracts and provide that the terms and conditions are, unless the Commission in relation to any particular term or condition otherwise directs, to be deemed to be of the essence of the client contracts in which they are included, whether or not a different intention appears from the provisions of such client contracts;
- (c) require an intermediary to provide to its client, upon entering into a client contract with the client, and thereafter from time to time upon request by the client, specified information concerning the business of the intermediary, and the identity and status of any person acting on behalf of the intermediary and with whom the client may have contact;
- (d) require an intermediary, and any representative of an intermediary, to take specified steps to ascertain, in relation to each of the clients of the intermediary, specified matters relating to his identity and his financial situation, investment experience and investment objectives relevant to the services to be provided by the intermediary;

(e) require an intermediary, and any representative of an intermediary, ~~when providing information or advice concerning financial products to any client of the intermediary,~~ to take specified steps before providing to ensure the suitability of such information or advice concerning financial products being provided to any the client of the intermediary⁵;

⁶(ea) require an intermediary, and any representative of an intermediary, when making any recommendation concerning any financial product to any client of the intermediary, to disclose to the client in the specified manner any interest the intermediary or the representative (as the case may be) may have in the financial product;

(f) require an intermediary, and any representative of an intermediary, to take specified steps to

⁵ The amendment is to allay the concern of some market participants that suitability of information and advice depends on a myriad of circumstances and their obligations should be considered discharged if they have followed the steps prescribed by the SFC. Please see Paper 6B/01(Revised). **Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.**

⁶ The requirement in respect of the disclosure of interest is in existing legislation (section 79 of the Securities Ordinance). It was inadvertently omitted in the Blue Bill. The amendment is to re-instate the vires of the SFC to prescribe requirements in this regard. **Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.**

ensure that disclosure is made to any client of the intermediary of financial risks in relation to any financial product the intermediary or the representative (as the case may be) recommends to the client;

- (g) require an intermediary, and any representative of an intermediary, to take specified steps to ensure that disclosure is made to any client of the intermediary of any commission or advantage the intermediary or the representative (as the case may be) receives or is to receive from any third party in connection with any financial product the intermediary or the representative (as the case may be) recommends to the client;
- (h) require an intermediary, and any representative of an intermediary, not to effect a transaction on behalf of any client of the intermediary in specified circumstances;
- (i) prohibit the use by an intermediary, or any representative of an intermediary, of information relating to the affairs of a client of the intermediary, except in specified circumstances and under specified conditions;
- (j) require an intermediary, and any representative of an intermediary, to take specified steps to

~~avoid~~⁷ cases of conflict arising between any of their interests and those of a client of the intermediary;

- (k) prohibit the receipt by an intermediary of any property or services from another intermediary in consideration of directing business to that other intermediary, except in specified circumstances and under specified conditions;
- (l) prohibit the dealing by any representative of an intermediary for his own account in securities or futures contracts, except in specified circumstances and under specified conditions;

⁷ There are cases where complete avoidance of conflict of interests could not be reasonably expected. In those cases, the intention is to ensure that the concerned intermediary would treat its clients fairly. We propose the amendment such that SFC's power to prescribe requirements also covers this scenario. **Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.**

- (m) require an intermediary, and any representative of an intermediary, to take specified steps to introduce and implement procedures to discourage and identify any money laundering activities;
- (n) provide for any other matter relating to the practices and standards relating to conduct in carrying on the regulated activities for which intermediaries are licensed or ~~exempt~~registered².

(3) Notwithstanding anything in this section, the Commission shall not exercise any of its powers under this section to make rules to specify any terms and conditions for the purposes of any requirement referred to in subsection (2)(b) unless it is satisfied that the specification of the terms and conditions is for the better furtherance of any of its regulatory objectives or the better performance of any of its functions.

(4) Rules made under this section may provide that an intermediary, or a representative of an intermediary, that, without reasonable excuse, contravenes any specified provision of the rules that applies to it or him (as the case may be) commits an offence and is liable to a specified penalty not exceeding -

- (a) on conviction on indictment a fine of \$200,000 and a term of imprisonment of 2 years;

(b) on summary conviction a fine at level 6 and a term of imprisonment of 6 months.

~~(5) In this section, "client contract" (客戶合約) means any contract or arrangement between an intermediary and another person, which contains terms on which the intermediary is to provide services the provision of which constitutes a regulated activity.¹~~

164. Codes for business conduct of intermediaries and their representatives

(1) Without prejudice to the power of the Commission to make rules under section 163, the Commission may publish, in the Gazette and in any other manner it considers appropriate, codes of conduct for the purpose of ~~setting out~~ guidelines giving guidance⁸ relating to the practices and standards with which intermediaries and their representatives are ordinarily expected to comply in carrying on the regulated activities for which the intermediaries are licensed or ~~exempt~~ registered².

(2) Without limiting the generality of subsection (1), any code of conduct referred to in that subsection may, in

⁸ In view of the general power of the SFC under clause 385 to issue codes and guidelines, we propose this technical amendment to replace "codes of conduct setting out guidelines" with "codes of conduct giving guidance" to avoid confusion. Codes made under this subclause and clause 385 are not subsidiary legislation. **Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.**

~~setting out guidelines giving guidance~~⁸ referred to in that subsection, refer to obligations to observe -

- (a) any other codes or requirements issued or imposed otherwise than by the Commission;
- (b) continuing obligations, including any such obligations -
 - (i) in the case of an intermediary, to provide for the continuous training of its representatives; or
 - (ii) in the case of a representative of an intermediary, to undergo continuous training;
- (c) practices and standards concerning any of the matters described in section 163(2).

(3) The Commission may from time to time amend the whole or any part of any code of conduct published under this section in a manner consistent with the power to publish the code of conduct under this section, and -

- (a) the other provisions of this section apply, with the necessary modifications, to such amendments to the code as they apply to the code; and
- (b) any reference in this or any other Ordinance to the code (however expressed) shall, unless the context otherwise requires, be construed as a reference to the code as so amended.

(4) A failure on the part of an intermediary, or a representative of an intermediary, to comply with the provisions set out in any code of conduct published under this section that apply to it or him (as the case may be) shall not by itself render it or him (as the case may be) liable to any judicial or other proceedings, but may be taken into account in considering, for the purposes of any provision of this Ordinance -

- (a) in the case of an intermediary, whether it is a fit and proper person to be or to remain licensed or ~~exempt~~registered²;
- (b) in the case of a representative of an intermediary that is a licensed person, whether he is a fit and proper person to be or to remain licensed as a representative; or
- (c) in the case of a representative of an intermediary that is an ~~exempt person, whether his name should remain registered institution~~², whether he is a fit and proper person to be or to remain a person whose name is⁹ entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance (Cap.

⁹ The amendment makes it explicit that whether an individual engaged by an exempt AI is fit and proper would depend, among other things, on his acting in compliance with the applicable requirements prescribed in the Business Conduct Codes. **Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.**

155) as that of a person ~~employed by the exempt~~
~~person~~¹⁰ engaged by a registered institution² in
respect of a regulated activity,

and in any proceedings under this Ordinance before any court
the code shall be admissible in evidence, and if any provision
set out in the code appears to the court to be relevant to any
question arising in the proceedings it shall be taken into
account in determining that question.

(5) Any code of conduct published under this section -

(a) may be of general or special application and,
without limiting the generality of the
foregoing, may be made so as to apply, or so as
not to apply -

(i) to a specified extent in relation to
any specified person or to members of
a specified class of persons;

(ii) in specified circumstances;

(b) may make different provisions for different
circumstances and provide for different cases
or classes of cases.

(6) Any code of conduct published under this section is
not subsidiary legislation.

¹⁰ Amendment consequential to the Committee Stage Amendments proposed to
the Banking (Amendment) Bill 2000. Please See Note 3. **Members considered
this amendment and did not propose further changes at the meeting on 17 July 2001.**

Division 3 - Restriction on short selling, etc.

165. Short selling restricted

(1) Subject to subsections (2) and (3), a person shall not sell securities at or through a recognized stock market unless at the time he sells them -

(a) he has or, where he is selling as an agent, his principal has; or

(b) he ~~reasonably and honestly believes~~believes and has reasonable grounds to believe¹¹ that he has or, where he is selling as an agent, that his principal has,

a presently exercisable and unconditional right to vest the securities in the purchaser of them.

(2) For the purposes of subsection (1) -

(a) a person shall be regarded as selling securities if he -

(i) purports to sell the securities;

(ii) offers to sell the securities;

(iii) holds himself out as being entitled to sell the securities; or

¹¹ Technical amendment for consistency. Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.

- (iv) instructs any representative of an intermediary that carries on Type 1 regulated activity for the intermediary, to sell the securities;
 - (b) a person who, at a particular time, has a presently exercisable and unconditional right to have securities vested in him or in accordance with his directions shall be regarded as having at that time a presently exercisable and unconditional right to vest the securities in a purchaser of them;
 - (c) a right of a person to vest securities in a purchaser of them shall not be regarded as not unconditional by reason only of the fact that the securities are charged or pledged in favour of some other person to secure the repayment of money.
- (3) Subsection (1) does not apply to -
- (a) a person who acts in good faith ~~in the reasonable and honest belief, believing and having reasonable grounds to believe¹¹~~ that he has a right, title, or interest to or in the securities which he sells within the meaning of subsection (1);
 - (b) a person who, as a representative of an intermediary that carries on Type 1 regulated

activity for the intermediary, acts in good faith on behalf of some other person ~~in the reasonable and honest belief, believing and having reasonable grounds to believe¹¹~~ that such other person has a right, title, or interest to or in the securities which he sells within the meaning of subsection (1) on behalf of such other person;

- (c) a sale of securities by an exchange participant acting as a principal, when he acts in the course of his business of dealing in odd lots of securities, in accordance with the rules of the recognized exchange company which operates a stock market, being a sale effected solely for the purpose of -
 - (i) accepting an offer to purchase an odd lot of securities; or
 - (ii) disposing of an odd lot of securities, by means of the sale of one board lot of those securities;
- (d) a sale of securities effected pursuant to a transaction in an options contract traded on a recognized stock market;
- (e) a sale of securities falling within a class of transactions prescribed by rules made under section 384 for the purposes of this paragraph.

(4) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 6 and to imprisonment for 2 years.

166. Requirements to confirm short selling order

(1) A person, where he is selling as a principal, shall not convey a short selling order at or through a recognized stock market unless he provides to his agent an assurance, in the form of a document, that -

- (a) he has a presently exercisable and unconditional right to vest the securities to which the order relates in the purchaser of them; and
- (b) where the short selling order is such order by virtue of paragraph (a)(i) or (v) of the definition of "short selling order" in section 1 of Part 1 of Schedule 1, the counterparty or the other person (as the case may be) referred to in such paragraph has the securities to which the order relates available to lend or deliver to him.

(2) A person to which subsection (1) applies shall provide to his agent such information (if any), in the form of a document and within such time, as is prescribed by rules made under section 384 for the purposes of this subsection.

(3) An exchange participant, where he is selling as a principal, shall not convey a short selling order which is such order by virtue of paragraph (a)(i) or (v) of the definition of "short selling order" in section 1 of Part 1 of Schedule 1 at or through a recognized stock market unless he has received an assurance, in the form of a document, from the counterparty or the other person (as the case may be) referred to in such paragraph that the counterparty or the other person (as the case may be) has the securities to which the order relates available to lend or deliver to him.

(4) An exchange participant to which subsection (3) applies shall collect from the counterparty or the other person referred to in that subsection such information (if any), in the form of a document and within such time, as is prescribed by rules made under section 384 for the purposes of this subsection.

(5) A person, where he is selling as an agent, shall not convey or accept an order to sell securities which is a short selling order at or through a recognized stock market unless he has received from his principal, or the other person for whose benefit or on whose behalf the order is made, an assurance, in the form of a document, that -

(a) his principal or that other person (as the case may be) has a presently exercisable and unconditional right to vest the securities to

which the order relates in the purchaser of them; and

- (b) where the short selling order is such order by virtue of paragraph (a)(i) or (v) of the definition of "short selling order" in section 1 of Part 1 of Schedule 1, the counterparty or the other person (as the case may be) referred to in such paragraph has the securities to which the order relates available to lend or deliver to him.

(6) A person to which subsection (5) applies shall collect from his principal, or the other person referred to in that subsection, such information (if any), in the form of a document and within such time, as is prescribed by rules made under section 384 for the purposes of this subsection.

(7) For the purposes of subsections (1), (3) and (5), a person who conveys or accepts an order on behalf of his clients or beneficiaries shall be regarded as selling as a principal if -

- (a) he has full discretion to sell the securities to which the order relates; and
- (b) his conveyance or acceptance is not in accordance with any instruction from his clients or beneficiaries.

(8) An agent or exchange participant who receives or collects an assurance or information by virtue of or under subsection (1), (2), (3), (4), (5) or (6) shall -

(a) subject to paragraph (b), retain the document in which it is contained for not less than one year from the date on which it is received; and

~~(b) provide the document to the Commission~~

¹²(b) upon request made at any time within that year by the Commission, give the Commission access to the document, and produce to the Commission, within the time and at the place specified by the Commission, the document.

(9) An assurance or information referred to in subsection (1), (2), (3), (4), (5) or (6) shall in any proceedings under this Ordinance before any court be admissible as prima facie evidence of -

(a) in the case of an assurance, the matters specified in subsection (1), (3) or (5) (as the case may be) as that to which the assurance relates; or

(b) in the case of information, the matters (if any) specified in the rules referred to in

¹² We propose the amendment to cater for the scenario where the document (defined in Schedule 1 to include any form of computer input or output) may not be submitted to the SFC in its original form. For instance, the authentication of certain materials could only be ascertained through trail in the computer network in the premises of the agent or exchange participant concerned. The revised formulation is consistent with the one adopted in clause 173(3)(c)(i).

subsection (2), (4) or (6) (as the case may be) as that to which the information relates.

(10) Subject to subsection (11), a person who contravenes subsection (1), (3) or (5) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 1 year.

(11) It is a defence to a charge for an offence under subsection (10) for the person charged to prove that when he conveyed or, in the case of a contravention of subsection (5), conveyed or accepted the order concerned, he -

- (a) believed and had reasonable grounds to believe ~~and did~~¹³ believe that the order was not a short selling order; or
- (b) did not know that the order was a short selling order.

(12) A person who, without reasonable excuse, contravenes subsection (2), (4), (6) or (8) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 1 year.

167. Requirements to disclose short sales

¹³ Technical amendment for consistency. Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.

(1) An exchange participant or exchange participant's representative who knows or is informed that an order to sell securities is a short selling order shall -

- (a) when passing the order to any other person with a view that the other person shall input the order into the trading system of a recognized stock market, inform that other person that the order is a short selling order; and
- (b) when inputting the order into the trading system of a recognized stock market, indicate such matters as may be required, under the rules of the recognized exchange company by which the recognized stock market is operated, to show that the order is a short selling order.

(2) A person who, without lawful excuse, contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 1 year.

(3) For the purposes of subsection (2), ~~lawful excuse shall be regarded as having been established if the person by whom subsection (1) is contravened establishes that the contravention is by reason only of~~ "lawful excuse" (合法辯解)

includes inadvertence, carelessness or negligence ~~on his~~
part.¹⁴

(4) In this section, "exchange participant's representative" (交易所參與者代表) means a licensed representative accredited to a licensed corporation that is an exchange participant of a recognized exchange company which operates a recognized stock market.

Division 4 - Other requirements

168. Requirements for options trading

- (1) The Commission may make rules -
- (a) prohibiting Type 1 intermediaries from -
 - (i) transacting in Hong Kong;
 - (ii) holding themselves out in Hong Kong as being prepared to transact, except as provided in the rules, any dealing whereby directly or indirectly they confer on any person an option to sell to or purchase from them, or any other person on their behalf, any listed securities;
 - (b) prohibiting Type 2 intermediaries from -

¹⁴ We accept the comment of some Members expressed at the Bills Committee meeting on 17 July 2001 that the formulation in the Blue Bill can be improved for better clarity. We also accept Members' suggestion to revert to the original formulation in section 80C of the Securities Ordinance enacted in May 2000.

(i) transacting in Hong Kong;

(ii) holding themselves out in Hong Kong as being prepared to transact, except as provided in the rules, any dealing whereby directly or indirectly they confer on any person an option to sell to or purchase from them, or any other person on their behalf, any futures contracts traded on a recognized futures market.

(2) Rules made under this section may provide that a Type 1 intermediary, or a Type 2 intermediary, which, without reasonable excuse,¹⁵ contravenes any specified provision of the rules that applies to it commits an offence and is liable to a specified penalty not exceeding -

- (a) on conviction on indictment a fine of \$200,000 and a term of imprisonment of 2 years;
- (b) on summary conviction a fine at level 6 and a term of imprisonment of 6 months.

(3) In this section -

"Type 1 intermediary" (第1類中介人) means an intermediary licensed or ~~exempt~~ registered² for Type 1 regulated activity;

¹⁵ On reflection, we consider that contravention of specified requirements on "options trading" should not constitute a strict liability offence. Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.

"Type 2 intermediary" (第2類中介人) means an intermediary licensed or ~~exempt~~registered² for Type 2 regulated activity.

**169. Certain agreements not to be made during
unsolicited calls**

(1) Subject to subsections (2) and (3), ~~a licensed or exempt person~~an intermediary or its representative¹⁶ shall not, as principal or agent, during or as a consequence of an unsolicited call made, whether in Hong Kong or elsewhere¹⁷, by him -

- (a) make or offer to make with another person -
 - (i) an agreement for that other person to sell or purchase, or with a view to having that other person sell or purchase, any securities, futures contract or leveraged foreign exchange contract;

¹⁶ A licensed person is defined in Schedule 1 to mean both the licensed corporation and a licensed representative whereas a registered institution (formerly "exempt person") covers only the institution. The amendment is to rectify the anomaly in the Blue Bill such that the staff of a bank whose name is entered in the register maintained by the HKMA under the Banking Ordinance is also covered. We considered replacing "a licensed person or exempt person" with "an intermediary" and covering a representative of an intermediary through the agency principle. We have come to the view that a representative should also have the primary obligation to comply with the requirement. It is also consistent with the regulatory catch in clauses 167 and 169A. Technical consequential amendments are made to clause 169(1)(a)(ii) and the definition of "existing client" in clause 169(7).

¹⁷ The amendment is to close the possible gap that a person regulated by the SFC may bypass the cold calling restriction through making cold calls from outside Hong Kong that target at local investors.

¹⁶(ii) an agreement ~~for him~~ to provide, or with a view to ~~having him provide~~providing, to that other person securities margin financing; or

(iii) an agreement the purpose or effect, or pretended purpose or effect, of which is to provide, whether conditionally or unconditionally, to that other person a profit, income or other returns -

(A) from any securities, futures contract or leveraged foreign exchange contract; or

(B) calculated by reference to changes in the value of any securities, futures contract or leveraged foreign exchange contract; or

(b) induce or attempt to induce another person to enter into an agreement referred to in paragraph (a),

whether or not in making the unsolicited call he does any other act or thing.

(2) A person shall not be regarded as contravening subsection (1) by reason only that he -

- (a) ~~(i)~~¹⁸ makes a call on another person who is a solicitor or professional accountant acting in his professional capacity, or a licensed person, ~~exempt person registered institution², money lender or professional investor, or his existing client or professional investor;~~ and
- ~~(ii)(b)~~ whether as principal or agent, makes or offers to make with that other person an agreement referred to in subsection (1)(a), or induces or attempts to induce that other person to enter into such an agreement; ~~or.~~
- (b) ~~(i)~~ being an authorized financial institution, makes a call on another person; and
- ~~(ii)~~ whether as principal or agent, makes or offers to make with that other person an agreement referred to in subsection (1)(a)(ii),

¹⁸ Technical amendment for greater clarity. Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.

~~or induces or attempts to induce that other person to enter into such an agreement.¹⁹~~

(3) This section does not apply to -

- (a) agreements relating to securities, futures contracts or leveraged foreign exchange contracts or to securities margin financing which are of a class prescribed by rules made under section 384 for the purposes of this paragraph;
- (b) calls made by a person who is of a class prescribed by rules made under section 384 for the purposes of this paragraph;
- (c) calls made on a person who is of a class prescribed by rules made under section 384 for the purposes of this paragraph;
- (d) calls which are of a class prescribed by rules made under section 384 for the purposes of this paragraph.

(4) Without limiting the generality of the powers of the Commission to make rules for the purposes of subsection (3)(d), the Commission may in the rules prescribe that calls

¹⁹ Technical amendment to delete the original subclause which is superfluous in the light of the definition of "securities margin financing". **Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.**

made by an authorized financial institution in compliance with such requirements under any guidelines published under section 7(3) of the Banking Ordinance (Cap. 155) that apply to it shall be within a class of calls to which this section does not apply.

(5) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5.

(6) ~~Where, a person on whom an unsolicited call is made enters into an agreement with another person in consequence of a contravention of subsection (1), a person enters into an agreement with another person, that other person on whom the unsolicited call is so made~~ may, subject to the rights of a subsequent purchaser in good faith for value, rescind the agreement, by giving notice in writing to that effect to ~~that~~ other person who contravenes that subsection²⁰, within 28 days after the ~~date~~ datey on which the agreement is entered into or 7 days after the day on which he becomes aware of the contravention, whichever is the earlier²¹.

(7) In this section -

²⁰ **The amendment seeks to allow for a more logical and reasonable arrangement whereby the notice of rescission is to be served on the seller of the securities, instead of on the person (who may act only as an agent in the transaction) who contravenes the cold calling prohibition. This takes into account the fact that the effect of rescission is actually borne by the other party to the agreement. The arrangement is the same as that in section 73(4) of the Securities Ordinance.**

²¹ **We accept the market comment that the right to rescind an agreement by a person within 28 days from his awareness of the contravention would be overly long and leave scope for manipulation. Please see Paper 6B/01 (Revised). The amendment is to shorten the period. Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.**

"call" (造訪) means a visit in person, or a communication by any 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;

~~²²"client" (客戶), in relation to a licensed or exempt person, means a person for whom the licensed or exempt person provides a service in the course of his business;~~

~~"existing client" (原有客戶), in relation to a licensed or exempt person, means a client who has entered into an agreement with the licensed or exempt person as a client in accordance with requirements prescribed by rules made under section 384 for the purposes of this definition;²² an intermediary or its representative¹⁶, means a person -~~

²³(a) who has entered into a client contract with the intermediary at any time during the period of 3 years immediately preceding the day on which the call is made, and remains a party to the client contract when the call is made; or

²² The amendment is to define "existing client" in primary legislation. The definition is straightforward and "durable", and does not need to be dealt with by subsidiary legislation. **Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.**

²³ **The SFC has formed a working group with market representation for assisting its preparation of the subsidiary legislation to be made under this clause. We accept the comment of the working group that a person having a subsisting client contract with an intermediary, despite that the actual provision of the contract service has not yet been commenced, should also be regarded as an existing client of the intermediary. The proposed amendment accordingly expands the meaning of "existing client".**

(b) for whom the intermediary has provided a service, the provision of which constitutes a regulated activity, at any time during the period of 3 years immediately preceding the day on which the call is made;

"futures contract" (期貨合約) means -

- (a) a futures contract as defined in section 1 of Part 1 of Schedule 1;
- (b) a futures contract, or a contract represented as being a futures contract, in respect of an item, whether or not capable of being delivered, which is prescribed by rules made under section 384 for the purposes of this definition;

"money lender" (放債人) has the meaning assigned to it by

section 2(1) of the Money Lenders Ordinance (Cap. 163);

"unsolicited call" (未獲邀約的造訪) means any call made otherwise than at the express invitation of the person called upon, and for the purposes of this definition, the provision by a person of his contact details, including an address, telephone or facsimile number, or electronic mail address, does not by itself constitute an express invitation to call that person.

²⁴ 169A. Requirements for offers by intermediaries or representatives for Type 1, Type 4 or Type 6 regulated activity

(1) Subject to subsection (5), a Type 1 intermediary or representative, a Type 4 intermediary or representative or a Type 6 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 written document in an official language; or

(ii) if communicated otherwise than in the form of a written document satisfying the requirement of subparagraph (i).

²⁴ As we mentioned in Paper CE03/01, this clause (originally clause 108 in Part IV of the Blue Bill) deals with business conduct of intermediaries and should be relocated to this Part for the sake of tidiness and easy reference. Please note the following amendments -

(a) replace the previous references to "document" (which has been defined in Schedule 1 to include "tape recording") to "written document" defined in clause 169A(10). This is to make it clear that for better investor protection, "tape recording" could not be taken as acceptable means of confirmation to clients;

(b) as we mentioned in Paper 5J/01, insert reference to "Type 6 regulated activity" (i.e. advising on corporate finance) to rectify the inadvertent omission in the Blue Bill;

(The intention to apply this clause to "Type 6 regulated activity" has indeed been reflected in paragraph (b)(xiii) of the definition of "dealing in securities" in Schedule 6 that reads "is licensed or exempt for Type 4 and Type 6 regulated activity and, solely for the purposes of carrying on that regulated activity, he issues a document under section 108(1)(a)(i) or (ii) of this Ordinance, the content of which complies with the requirements of section 108(1)(b) and (c) of this Ordinance.)

(c) for similar reason set out in note 21, amend the period within which a person can rescind an acceptance under clause 169A(7).

Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.

is reduced to a written document in an official language and delivered to the person or persons to whom it was made not later than 24 hours after the 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 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, the Type 4 intermediary or representative or the Type 6 intermediary or representative (as the case may be) is regarded as such by virtue of being an intermediary, the Type 1 intermediary or representative, the Type 4 intermediary or representative or the Type 6 intermediary or

representative (as the case may be); or

(B) where the Type 1 intermediary or representative, the Type 4 intermediary or representative or the Type 6 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 written 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 6B;

(D) where the offer is for the disposal of securities, satisfies the requirements of Part 2 of Schedule 6B; 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 in the manner

described in paragraph (a)(ii), 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 written document referred to in paragraph (a)(i) or is

reduced to a written document referred to in paragraph (a)(ii) but the written document is in only one official language, the written 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 written 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 written document.

(3) Where an offer communicated in the manner described in subsection (1)(a)(ii) 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, Type 4 intermediary or representative or Type 6 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 communicated to persons who already hold securities of, or issued by, a body, for those persons to acquire securities of, or issued by, the body;

(c) an offer communicated by a Type 1 intermediary or representative, a Type 4 intermediary or representative or a Type 6 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, the Type 4
intermediary or representative or the
Type 6 intermediary or representative
(as the case may be) is regarded as
such by virtue of being an
intermediary, the Type 1 intermediary
or representative, the Type 4
intermediary or representative or the
Type 6 intermediary or representative
(as the case may be); or

(ii) where the Type 1 intermediary or
representative, the Type 4
intermediary or representative or the
Type 6 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 communicated by an exchange participant in the ordinary course of trading on a recognized stock market;
- (f) an offer communicated 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.

²⁵ ~~(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),~~

²⁵ At the Bills Committee meeting on 17 July 2001, we clarified that the power to modify the detailed requirements prescribed in this clause would be exercised only after the SFC has taken into account the circumstances pertaining to each case submitted by an intermediary applying for the modification and is satisfied that the application should be granted. We accept the comment of some Members that changes should be introduced to reflect this intention. For consistent drafting, we propose to make these changes under clause 131 which deals with individual applications for modification of regulatory requirements.

~~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 communicated 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 offeror~~Type 1 intermediary or representative, the Type 4 intermediary or representative or the Type 6 intermediary or representative who communicated the offer~~²⁶, within 28 days after the date of acceptance or 7 days after the day on which he becomes aware of the matter described in paragraph (b), whichever is the earlier.~~

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

~~(a) where a Type 1 intermediary or representative, a Type 4 intermediary or representative or a Type 6 intermediary or representative communicates an invitation to a person to~~

²⁶ We propose the amendment for the same reason as set out in Footnotes 20 and 21.

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 registered² 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 registered² for Type 4 regulated activity; or

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

"Type 6 intermediary or representative" (第6類中介人或代表)

means -

(a) an intermediary licensed or registered² for Type 6 regulated activity; or

(b) its representative that carries on Type 6 regulated activity for it;

"written document" (書面文件) means any document or similar material, or any other medium (whether effected as such mechanically, electronically, magnetically, optically, manually or by any other means), by which words are represented in a visible form.

170. Certain representations prohibited

(1) Subject to subsection (2), an intermediary, or a representative of an intermediary, shall not represent, or permit any other person to represent, in any manner and whether expressly or by implication, that its or his abilities or qualifications have been endorsed or warranted by the Government or the Commission.

(2) A statement to the effect that a person is licensed or ~~exempt~~registered² under this Ordinance does not by itself constitute a contravention of subsection (1).

(3) An intermediary, or a representative of an intermediary, that, without reasonable excuse, contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5.

Division 5 - Miscellaneous

²⁷ 170A. Amendment of Schedule 6B

The Chief Executive in Council may, by order published in the Gazette, amend Schedule 6B.

²⁷ Consequential to the relocation of clause 108 in the Blue Bill to become the new clause 169A (please see Note 25), Schedule 5 has to be relocated to become Schedule 6B for the sake of tidiness and easy reference. **Members considered this amendment and did not propose further changes at the meeting on 17 July 2001.**