

PART II

SECURITIES AND FUTURES COMMISSION

5. Functions and powers of Commission¹

(1) The functions of the Commission are ~~to~~, so far as reasonably practicable -

- (a) to take such steps as it considers appropriate to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry;
- (b) to supervise, monitor and regulate -
 - (i) the activities carried on by recognized exchange companies, recognized clearing houses, recognized exchange controllers or recognized investor compensation companies, or by persons carrying on activities regulated by the Commission under any of the relevant provisions, other than registered institutions; and
 - (ii) such of the activities carried on by registered institutions as are required

¹ We propose further drafting amendment to Paper CSA01/01 in the light of the comment of a Member expressed at the Bills Committee meeting on 4 December 2001.

to be regulated by the Commission under
any of the relevant provisions;

- (c) to promote and develop an appropriate degree of self-regulation in the securities and futures industry;
- (d) to promote, encourage and enforce the proper conduct, competence and integrity of persons carrying on activities regulated by the Commission under any of the relevant provisions in the conduct of such activities;
- (e) to encourage the provision of sound, balanced and informed advice regarding transactions or activities related to financial products;
- (f) to take such steps as it considers appropriate to ensure that the relevant provisions are complied with;
- (g) to maintain and promote confidence in the securities and futures industry in such manner as it considers appropriate, including by the exercise of its discretion to disclose to the public any matter relating or incidental to the performance of any of its functions;
- (h) to co-operate with and provide assistance to regulatory authorities or organizations, whether formed or established in Hong Kong or elsewhere;

- (i) to promote understanding by the public of the securities and futures industry and of the benefits, risks and liabilities associated with investing in financial products;
- (j) to encourage the public to appreciate the relative benefits of investing in financial products through persons carrying on activities regulated by the Commission under any of the relevant provisions;
- (k) to promote understanding by the public of the importance of making informed decisions regarding transactions or activities related to financial products and of taking responsibility therefor;
- (l) to secure an appropriate degree of protection for members of the public investing in or holding financial products, having regard to their degree of understanding and expertise in respect of investing in or holding financial products;

- (m) to promote, encourage and enforce -
 - (i) the adoption of appropriate internal controls and risk management systems by persons carrying on activities regulated by the Commission under any of the relevant provisions, other than registered institutions; and
 - (ii) the adoption of appropriate internal controls and risk management systems by registered institutions in the conduct of activities regulated by the Commission under any of the relevant provisions;
- (n) to suppress illegal, dishonourable and improper practices in the securities and futures industry;
- (o) to take appropriate steps in relation to the securities and futures industry further to any requirement of the Financial Secretary for the purpose of providing assistance in maintaining the financial stability of Hong Kong;
- (p) to recommend reforms of the law relating to the securities and futures industry;

- (q) to advise the Financial Secretary on matters relating to the securities and futures industry and provide him with such information in relation thereto as it considers appropriate; and
- (r) to perform functions conferred or imposed on it by or under this or any other Ordinance.

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Financial Services Bureau
Securities and Futures Commission
4 January 2002

PART III

EXCHANGE COMPANIES, CLEARING HOUSES, EXCHANGE CONTROLLERS,
INVESTOR COMPENSATION COMPANIES AND AUTOMATED TRADING SERVICES

87. Subrogation of recognized investor
compensation company to rights, etc.
of claimant on payment from
compensation fund

(1) Where a recognized investor compensation company makes
any payment out of the compensation fund in respect of any claim
made under rules made under Part XII -

- (a) the company shall be subrogated, to the extent
which that payment bears to the loss sustained
(without taking into account any compensation paid
or payable out of the compensation fund for the
loss¹) by the claimant by reason of the default on
which the claim was based, to all the rights and
remedies of the claimant in relation to the loss;
and

¹ Members considered Paper No. CSA02/01 dated 17 November 2001, and did not propose further amendment to this clause at the Bills Committee meeting on 4 December 2001. The Legal Service Division of the Legislative Council made a technical comment outside the meeting that the meaning of "compensation" referred to in clause 87(1)(a) should be made clearer. We accept the comment and further propose the amendment to qualify "compensation" as that "paid or payable out of the compensation fund for the loss". (Same amendment will be made to clause 235).

(b) the respective rights of the claimant and the company in bankruptcy or winding up or by legal proceedings or otherwise to receive in respect of the loss -

(i) any sum out of the assets of the person concerned who is in default; or

(ii) any property held on trust by that person for the claimant,

shall rank equally.

(2) ²~~All amounts~~ assets (whether in cash or otherwise) recovered by the recognized investor compensation company under subsection (1) shall be ~~paid~~ dealt with in such manner as the Commission may direct and shall become part of the compensation fund.

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² This further amendment to Paper No. CSA02/01 to replace “amounts” with “assets (whether in cash or otherwise)” is to cater for the circumstances where assets other than cash are recovered in the exercise of the subrogation rights. The same amendment has been made to clause 230(1)(c), which was considered and accepted by Members at the Bills Committee meeting on 10 December 2001.

PART IV

OFFERS OF INVESTMENTS

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

¹(1) A person commits an offence if ~~(a)~~ he makes any fraudulent misrepresentation or reckless misrepresentation for the purpose of inducing by which another person ~~is induced~~ -

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

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

~~(iiB)~~ a regulated investment agreement;

or

~~(iib)~~ to acquire an interest in or participate in, or offer to acquire an interest in

¹ This further amendment to Paper CSA03/01 dated 17 November 2001 has the effect of preserving largely the Blue Bill version. It reflects the view of some Members expressed at the Bills Committee meeting on 4 December 2001 that the reference to “by which another person is induced” is not necessary. We accept the comment and propose to delete that reference accordingly.

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

(3) For the purposes of this section -

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

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

- (iv) ²any 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; or
- ~~(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) "reckless misrepresentation" (罔顧實情的失實陳述)

means -

² At the Bills Committee meeting on 4 December 2001, a Member expressed the view that omission of information should not have the effect of causing a promise or forecast not capable of being fulfilled or justified. We accept the comment and accordingly propose further amendments to Paper CSA03/01 dated 17 November 2001 to remove related references.

Moreover, on reflection, we take the view that clauses 106(3)(a)(iv)(B) and (3)(b)(iv)(B) add nothing to clauses 106(3)(a)(ii) and (3)(b)(ii) respectively. We therefore propose to delete the two provisions altogether. This is similar to the position under section 3(2)(d) of the Protection of Investors Ordinance, which is the origin of clause 106(3).

- (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) ²any 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; or
 - ~~(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

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

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

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

~~(iiB)~~ a regulated investment agreement; or

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

³ At the Bills Committee meeting on 4 December 2001, a Member expressed the view that a person having made a fraudulent or reckless misrepresentation should be liable to pay compensation for damages incurred by another person who has been successfully induced by such misrepresentation to invest, regardless of whether he made the misrepresentation for the purpose of inducing that other person; as is the case for a person having made a negligent misrepresentation. We accept the comment and accordingly propose further amendments to Paper CSA03/01 dated 17 November 2001.

the first-mentioned person shall, whether or not he also incurs any other liability (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.

⁴(2) For the purposes of this section, where a company or other body corporate has made any fraudulent misrepresentation, reckless misrepresentation or negligent misrepresentation by which another person is induced to do any act referred to in subsection (1)(a)(~~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 ~~-(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.~~

⁴ **Technical amendment consequential to the amendments proposed to clause 107(1).**

(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 entertain an application for an injunction, 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.

(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.

(7) For the purposes of this section -

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

means -

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

- (ii) 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
- (iv) ⁵any 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; or
 - ~~-(B) in the case of the promise, the promise is not capable of being fulfilled or is rendered misleading or deceptive; or~~

⁵ At the Bills Committee meeting on 4 December 2001, a Member expressed the view that omission of information should not have the effect of causing a promise or forecast not capable of being fulfilled or justified. We accept the comment and accordingly propose further amendments to Paper CSA03/01 dated 17 November 2001 to remove related references.

Moreover, on reflection, we take the view that clauses 107(7)(a)(iv)(B), (7)(b)(iv)(B) and (7)(c)(iv)(B) add nothing to clauses 107(7)(a)(ii), (7)(b)(ii) and 7(c)(ii) respectively. We therefore propose to delete the three provisions altogether. This is similar to the position under section 8(2)(d) of the Protection of Investors Ordinance, which is the origin of clause 107(7).

~~(CB)~~ in the case of the forecast, the forecast ~~is not capable of being justified or~~ 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) ⁵any 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; or
 - ~~-(B) in the case of the promise, the promise is not capable of being~~

~~fulfilled or is rendered~~

~~misleading or deceptive; or~~

(~~CB~~) in the case of the forecast, the

~~forecast is not capable of being~~

~~justified or is rendered~~

misleading or deceptive;

(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) ⁵any 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; or

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

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

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PART V

LICENSING AND REGISTRATION

114A. Application of section 114 in relation to
conduct or activities outside Hong Kong¹

(1) If -

- (a) a person actively markets, whether by himself or another person on his behalf and whether in Hong Kong or from a place outside Hong Kong, to the public any services that he provides; and
- (b) such services, if provided in Hong Kong, would constitute a regulated activity,

then -

- (i) the provision of such services so marketed shall be regarded for the purposes of section 114(1)(a) as carrying on a business in that regulated activity; ~~and~~

¹ At the Bills Committee meeting on 4 December 2001 when Annex 1 to Paper CSA04/01 was considered, some Members and the Legal Service Division expressed doubt as to whether the drafting of the provision could achieve our policy intention to cover also those regulated activities conducted overseas but targeting at investors in Hong Kong. We have considered the comments after the meeting and worked out with the Legal Service Division this revised version to reflect more clearly the policy intention.

- (ii) the person's marketing of such services as referred to in paragraph (a) shall be regarded for the purposes of section 114(1)(b) as holding himself out as carrying on a business in that regulated activity; and
- (iii) to the extent that the provision of such services involves the performance by a person of a function that, if performed in Hong Kong in relation to a regulated activity, would constitute a regulated function, the performance of such function by that person shall be regarded for the purposes of section 114(3)(a) as performance of that regulated function in relation to that regulated activity.

(2) If -

- (a) a person actively markets, whether by himself or another person on his behalf and whether in Hong Kong or from a place outside Hong Kong, to the public any function that he performs; and
- (b) such function, if performed in Hong Kong in relation to a regulated activity carried on as a business, would constitute a regulated function,

then -

(i) the performance of such function so marketed shall be regarded for the purposes of section 114(3)(a) as performance of that regulated function in relation to that regulated activity; and

(ii) the person's marketing of such function as referred to in paragraph (a) shall be regarded for the purposes of section 114(3)(b) as holding himself out as performing that regulated function in relation to that regulated activity.

115. Corporations to be licensed for carrying on regulated activities

* * * * *

(2) The Commission shall refuse to grant a licence to carry on a regulated activity under subsection (1) unless -

(a) the applicant is -

(i) a company;

(ii) an overseas company which has complied with the provisions of Part XI of the Companies Ordinance (Cap. 32) for the registration of documents; or

(iii) a corporation (other than a company or an overseas company) -

(A) which carries on a business principally outside Hong Kong in an activity which, if carried on in Hong Kong, would constitute the regulated activity;

(B) to which section 114(1) would not apply but for the provisions of section 114A(1)(i) and (ii)²; and

² We propose this amendment consequential to the further amendment proposed to clause 114A.

(C) to which Part XI of the Companies Ordinance (Cap. 32) would apply if it established a place of business in Hong Kong;

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116. Grant of temporary licences to corporations for carrying on regulated activities

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(2) The Commission shall refuse to grant a licence to carry on a regulated activity under subsection (1) unless the applicant satisfies the Commission that -

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(d) the granting of the licence would not result in its ~~being having been~~³ granted licences under subsection (1) for respective licence periods that in total exceed 6 months in any period of 24 months;

* * * * *

³ Minor drafting amendment in the light of the comment of a Member expressed at the Bills Committee meeting on 4 December 2001.

120. Temporary licence for representative

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(2) The Commission shall refuse to grant a licence for a regulated activity under subsection (1) unless the applicant satisfies the Commission -

* * * * *

(d) that the granting of the licence would not result in ~~him having been~~his being³ granted licences under subsection (1) for respective licence periods that in total exceed 6 months in any period of 24 months; and

* * * * *

128. Determination of "fit and proper"

(1) In considering whether a person is a fit and proper person for the purposes of any provision of this Part, the Commission or the Monetary Authority (as the case may be) shall, in addition to any other matter that the Commission or the Monetary Authority (as the case may be) may consider relevant, but subject to section 131, have regard to -

- (a) the financial status or solvency;
- (b) the educational or other qualifications or experience having regard to the nature of the functions which, if the application is allowed, the person will perform;
- (c) the ability to carry on the regulated activity competently, honestly and fairly; and
- (d) the reputation, character, reliability and financial integrity,

of -

- (i) where the person is an individual, the person himself;
- (ii) where the person is a corporation (other than an authorized financial institution), the corporation and any officer of the corporation; and

(iii) where the person is an authorized financial institution, the institution and any director, chief executive⁴, manager (as defined in section 2(1) of the Banking Ordinance (Cap. 155)) and executive officer of the institution.

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⁴ We briefed Members on this additional amendment to Annex 1 to Paper CSA04/01 at the Bills Committee meeting on 10 December 2001. This amendment is consequential to the amendment to the Banking Ordinance effected through the Banking (Amendment) Ordinance 2001, whereby “chief executive” is taken out from the definition of “manager”.

130B. Commission's power to give directions

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(3) If a person fails to comply with any direction under subsection (1) or (2), the Commission may, by originating summons or originating motion, make an application to the Court of First Instance in respect of the failure, and the Court may inquire into the case and -

- (a) if the Court is satisfied that there is no reasonable ground for the person not to comply with the direction, order the person to comply with the direction within the period specified by the Court; and
- (b) if the Court is satisfied that the failure was without reasonable excuse, punish the person, and any other person ~~who appears to have been~~ knowingly⁵ involved in the failure, in the same manner as if

⁵ The expression “any other person who appears to have been involved in the failure” is intended to empower the court to punish an accessory or accomplice who has been involved in the non-compliance. At the Bills Committee meeting on 10 December 2001 when clause 178 was considered, some Members commented that such an expression (which is similar to this clause) should be made clearer. We therefore propose to further amend the provision to “any other person knowingly involved in the failure” to better reflect the policy intention. A similar amendment is also proposed to clauses 178(1)(b), 204(1)(b) and 352(3)(b).

he and, where applicable, that other person had been
guilty of contempt of court.

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PART VIII

SUPERVISION AND INVESTIGATIONS

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173. Supervision of intermediaries and their
associated entities

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(10) Before an authorized person exercises any power under this section (other than subsection (1)(c)(iii) or (3)(c))¹ in respect of a corporation -

- (a) where the corporation is an authorized financial institution or a corporation which, to the knowledge of the authorized person, is the controller of an authorized financial institution, or has as its controller an authorized financial institution, or has the same controller as an authorized financial

¹ **We propose a technical amendment to disapply the consultation requirement from the exercise of power under clause 173(1)(c)(iii) or (3)(c), both of which refer to inquiries for information made by the authorized person with persons other than the intermediary, its associated entity or related corporation in a routine supervisory exercise. Such inquiries will not require prior consultation among regulators. The consultation requirement should only apply when the authorized financial institution or the insurer (as the case may be) is the target of the supervisory action.**

institution, the authorized person shall consult the Monetary Authority; or

(b) where the corporation is an insurer authorized under the Insurance Companies Ordinance (Cap. 41), the authorized person shall consult the Insurance Authority.

* * * * *

**178. Application to Court of First Instance
relating to non-compliance with
requirements under section 172,
173, 174 or 176**

(1) If a person fails to do anything upon being required to do so by an authorized person under section 172, 173 or 174, or to do anything upon being required to do so by an investigator under section 176(1), (2) or (3), the authorized person or the investigator (as the case may be) may, by originating summons or originating motion, make an application to the Court of First Instance in respect of the failure, and the Court may inquire into the case and -

- (a) if the Court is satisfied that there is no reasonable ground for the person not to comply with the requirement, order the person to comply with the requirement within the period specified by the Court;
and

(b) if the Court is satisfied that the failure was without reasonable excuse, punish the person, and any other person ~~who appears to have been~~ knowingly² involved in the failure, in the same manner as if he and, where applicable, that other person had been guilty of contempt of court.

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² At the Bills Committee meeting on 10 December 2001, Members considered that further clarifications should be made to the expression “any other person who appears to have been involved in the failure”. The policy intention is that the Court should be empowered to punish an accessory or accomplice who has been involved in the non-compliance of the authorized person’s requirement. In the light of Members’ comments, we propose to amend the provision to “any other person knowingly involved in the failure” to better reflect the policy intention. A similar amendment is also proposed to clauses 130B(3)(b) of Part V, 204(1)(b) of Part X and 352(3)(b) of Part XV. Some Members also made other comments on clause 178(1)(b) at the Bills Committee meeting on 10 December 2001. Please see the Annex for our response.

Clause 178(1)(b)

Some Members questioned the need for empowering the Court under clause 178(1)(b) to punish a person who has failed to comply with the requirements of an investigator or authorized person in the same manner as if the person had been guilty of contempt of court, given a breach of the relevant requirements under clauses 172(13), 173(14), 174(7) and 177(1) would already constitute an offence. Some Members also expressed concern over the lack of a prescribed penalty maxima under clause 178(1)(b).

2. The following sets out our observations in light of SFC's past regulatory experience in enforcing the forerunners of these provisions in existing law; and our consultation with the public, in particular the professional bodies whose members may assist the SFC in conducting the investigation -

- (a) the offence provisions under clauses 172(13), 173(14), 174(7) and 177(1) are necessary as deterrent and to encourage compliance. We also understand from some market practitioners that in certain circumstances (e.g. an auditor required to produce audit working papers concerning its client under clause 172), the offence provisions would assist them in managing their relationships with clients;
- (b) the Court's power to punish for contempt under clause 178(1)(b) complements the Court's power to order compliance under clause 178(1)(a) and does away with the need for separate criminal proceedings under the offence provisions. The SFC's overriding objective is to ensure effective compliance with the relevant requirements so that the SFC may obtain the relevant information without resorting to prosecution for non-compliance;

- (c) under clause 178(1)(b), the Court must first inquire into the case and be satisfied that the failure to comply with the requirements of an investigator or authorized person was without reasonable excuse, and should be trusted to act fairly in exercising its power to punish for contempt. The Courts have demonstrated in the past (*Kwan Wing Kim v. Cheung Ka Kim*) that they would not act lightly in punishing a person under existing similar provisions of the SFC Ordinance;
- (d) the Court can be trusted to impose a reasonable level of penalty when exercising its power to punish for contempt under clause 178(1)(b), and has demonstrated in a past case (*Jessie Wong Wing Yee v. Real Grant Limited*) that it will have regard to the sanctions under the offence provisions for the same conduct when punishing as if for contempt; and
- (e) it should be stressed that clause 178(3) provides that a person cannot be punished under clause 178(1)(b) if criminal proceedings have been instituted in respect of the failure, and vice versa.

3. Having considered the above, we believe that it is necessary on regulatory grounds to retain the provision which is modelled on existing law to allow the SFC to perform its investigative functions for the protection of investors against the misconduct of listed corporations and market intermediaries.

PART X

POWERS OF INTERVENTION AND PROCEEDINGS

* * * * *

204. Application to Court of First Instance relating to non-compliance with prohibitions or requirements under section 196, 197, 198 or 201

(1) If a person fails to comply with a prohibition or requirement in force in respect of him as a result of the exercise of any of the powers under sections 196, 197, 198 and 201, the Commission may, by originating summons or originating motion, make an application to the Court of First Instance in respect of the failure, and the Court may inquire into the case and -

- (a) if the Court is satisfied that there is no reasonable ground for the person not to comply with the prohibition or requirement (as the case may be), order the person to comply with the prohibition or requirement (as the case may be) within the period specified by the Court; and

(b) if the Court is satisfied that the failure was without reasonable excuse, punish the person, and any other person ~~who appears to have been~~knowingly¹ involved in the failure, in the same manner as if he and, where applicable, that other person had been guilty of contempt of court.

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¹ As in the case of clause 178(1)(b) of Part VIII, we accept Members' comments that that the expression "any other person who appears to have been involved in the failure" should be clarified and propose to amend it to "any other person knowingly involved in the failure". The policy intention is that the Court should be empowered to punish an accessory or accomplice who has been involved in the non-compliance with a prohibition or requirement imposed by the SFC.

PART XII

INVESTOR COMPENSATION

229. Establishment of compensation fund

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(2) In this section -

"associated person" (相聯者), in relation to a specified
person, means -

- (a) ~~an employee of a person employed or otherwise~~
engaged by¹ the specified person;

* * * * *

¹ Members considered the amendment set out in Paper No. CSA11/01 dated 23 November 2001 at the Bills Committee meeting on 10 December 2001, and proposed a further change to sub-clause (2). We agree with Members that having regard to the range of persons permitted to act for or on behalf of a specified person, the provision should be extended to cover also persons engaged, but not necessarily employed, by the specified person.

**235. Subrogation of the Commission to rights,
etc. of claimant on payment from
compensation fund**

(1) Where the Commission makes any payment out of the compensation fund in respect of any claim for compensation made under rules made under this Part -

(a) the Commission shall be subrogated, to the extent which that payment bears to the loss sustained (without taking into account any compensation paid or payable out of the compensation fund for the loss²) by the claimant by reason of the default on which the claim was based, to all the rights and remedies of the claimant in relation to the loss; and

(b) the respective rights of the claimant and the Commission in bankruptcy or winding up or by legal proceedings or otherwise to receive in respect of the loss -

(i) any sum out of the assets of the person concerned who is in default;

or

² **Members considered Paper No. CSA11/01 dated 23 November 2001, and did not propose further amendment to this clause at the Bills Committee meeting on 10 December 2001. The Legal Service Division of the Legislative Council made a technical comment outside the meeting that the meaning of “compensation” referred to in clause 235(1)(a) should be made clearer. We accept the comment and further propose the amendment to qualify “compensation” as that “paid or payable out of the compensation fund for the loss”. (Same amendment will be made to clause 87).**

(ii) any property held on trust by that person for the claimant, shall rank equally.

(2) All assets (whether in cash or otherwise) amounts³ recovered by the Commission under subsection (1) shall become part of the compensation fund.

³ This further amendment to Paper No. CSA11/01 to replace “amounts” with “assets (whether in cash or otherwise)” is to cater for the circumstances where assets other than cash are recovered in the exercise of the subrogation rights. The same amendment has been made to clause 230(1)(c), which was considered and accepted by Members at the Bills Committee meeting on 10 December 2001.

236. Rules by Chief Executive in Council and Commission

* * * * *

(4) In making any rules under subsection (1)(a), the Chief Executive in Council shall ensure that the funds of the compensation fund shall, so far as practicable, be ~~derived from the securities and futures industry borne by participants or any particular class of participants in the securities and futures market~~⁴.

* * * * *

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⁴ Members considered the proposed amendment last set out in Paper No. CSA11/01 dated 23 November 2001, and did not propose further changes at the Bills Committee meeting on 10 December 2001. The Legal Service Division of the Legislative Council made a technical comment outside the meeting that the reference to “derived from the securities and futures industry” may be construed as excluding transaction levy as a source of contribution. We accept the comment. For avoidance of doubt, we propose to replace the phrase with “borne by participants or any particular class of participants in the securities and futures market”.

BANKING (AMENDMENT) BILL 2000

2. Interpretation

Section 2(1) of the Banking Ordinance (Cap. 155) is
amended by adding -

* * * * *

~~"Securities and Futures Ordinance (— of 2000)" (《證券及期
貨條例》(2000 年第—號)) means the Ordinance with
that short title enacted after the introduction of
the Banking (Amendment) Bill 2000 into the
Legislative Council;¹".~~

* * * * *

¹ Members considered Paper CSAB at the Bills Committee meeting on 10 December 2001 and made no comment on clause 2. Subsequently, the Legal Service Division of the Legislative Council raised the point that it was not necessary to include a reference to the definition of the "Securities and Futures Ordinance". We accept the comment and accordingly propose this deletion.

4. Register of authorized institutions,
etc.

Section 20 is amended -

(a) in subsection (1) -

* * * * *

(ii) by adding -

"(ea) in the case of a registered
institution, and not later
than 12 months after the
commencement of this
paragraph -

(i) the name and
business address
of every relevant
individual;

(ii) the capacity in
which every
relevant
individual is
engaged in
relation to a
regulated function
in a regulated
activity;~~and~~

(iii) the date on which every relevant individual was first so engaged; and";

(iv) such other particulars as the Monetary Authority thinks fit having regard to rules made under section 384 of the Securities and Futures Ordinance (of 2002) for the purpose of section 133(2) of that Ordinance; and";²

* * * * *

² **We briefed Members on this additional amendment to Paper CSAB at the Bills Committee meeting on 10 December 2001. This amendment is proposed in order to enable the HKMA to include, where appropriate, other information in the securities staff register to be maintained under section 20(1)(ea) of the Banking Ordinance, such as the disciplinary history of persons included in the register. This is in line with the arrangement being contemplated by the SFC in respect of its register of licensed persons pursuant to clause 133(2)(e) of the SF Bill.**

(bb) by adding -

"(5A) The fee mentioned in subsection (5) shall not be payable in the case of an inspection, or the obtaining of a copy or an extract, mentioned in that subsection where the register or document concerned is available to the public in the form of an on-line record.-

~~—(a) the inspection is made by the use of an on-line medium;~~

~~—(b) the copy or extract is obtained by the use of an on-line medium."~~³

* * * * *

³ **Section 20(5) of the Banking Ordinance currently provides that the public may, on payment of the fee specified in the Second Schedule, inspect the register maintained by the Monetary Authority or obtain a copy of an entry/extract from the register, or inspect or obtain a copy of or an extract from any document lodged under section 15(2)(a) of that Ordinance. The original intention was that this fee payment requirement should not apply to cases where the act of inspection or obtaining a copy is conducted through an "on-line medium", so that the public will not be required to pay a fee to inspect the on-line securities staff register. At the meeting on 10 December 2001, Members commented that the term "on-line medium" was not defined. Having reviewed the matter, we propose to redraft section 20(5A) such that the fee payment requirement will not apply where the information requested is available "in the form of an on-line record". The revised wording is in line with clause 133(7) of the SF Bill.**

5. Section added

The following is added in Part X -

"58A. Disciplinary action in respect of relevant individuals

* * * * *

_____ (7) For the purposes of paragraph (b) of the definition of "misconduct" in subsection (6), the Monetary Authority shall not form any opinion that any act or omission is or is likely to be prejudicial to the interest of the investing public or to the public interest, unless it has had regard to such of the provisions set out in any code of conduct published under section 164 of the Securities and Futures Ordinance (_____ of 2002) or any code or guideline published under section 385 of that Ordinance as are in force at the time of occurrence of, and applicable in relation to, the act or omission."⁴

⁴ **We briefed Members on this additional amendment to Paper CSAB at the Bills Committee meeting on 10 December 2001. The amendment mirrors the new clause 186(3) of the SF Bill in relation to the definition of "misconduct". It requires the Monetary Authority to have regard to codes and guidelines issued by the SFC before forming an opinion that an act or omission by frontline staff of a registered institution is likely to be prejudicial to the interest of the investing public or to the public interest.**

9. Sections added

The following are added -

"71C. Executive officers of registered institutions require Monetary Authority's consent

* * * * *

(10) For the purposes of paragraph (c) of the definition of "misconduct" in subsection (8), the Monetary Authority shall not form any opinion that any act or omission is or is likely to be prejudicial to the interest of the investing public or to the public interest, unless it has had regard to such of the provisions set out in any code of conduct published under section 164 of the Securities and Futures Ordinance (of 2002) or any code or guideline published under section 385 of that Ordinance as are in force at the time of occurrence of, and applicable in relation to, the act or omission.⁵".

⁵ **We briefed Members on this additional amendment to Paper CSAB at the Bills Committee meeting on 10 December 2001. The amendment mirrors the new clause 186(3) of the SF Bill in relation to the definition of "misconduct". It requires the Monetary Authority to have regard to codes and guidelines issued by the SFC before forming an opinion that an act or omission by an executive officer of a registered institution is likely to be prejudicial to the interest of the investing public or to the public interest.**

12. Appeals

Section 132A is amended -

* * * * *

(b) by adding -

* * * * *

(10) In this section -

“specified decision” (指明決定) means a

decision of the Monetary Authority -

(a) in a notice under section

58A(4) served on the person
concerned;

(b) to refuse to grant consent

under section ~~71C(2)(a)(1)~~⁶,

to attach pursuant to

section 71C(2)(b) conditions

to such consent, to withdraw

or suspend under section

71C(4) such consent, to

attach pursuant to section

⁶ **We propose this further amendment to Paper CSAB (considered by Members at the Bills Committee meeting on 10 December 2001) to replace the original reference to “section 71C(2)(a)” with “section 71C(1)” for consistency with the relevant “Specified Decision” in Schedule 7 to the SF Bill.**

71C(5) conditions to such consent or to amend pursuant to section 71C(5) any such conditions; or

- (c) to attach pursuant to section 71E(3) conditions to provisional consent given under section 71E(1) or to amend pursuant to section 71E(3) any such conditions."

Financial Services Bureau
Hong Kong Monetary Authority
4 January 2002