

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

**Part IX of the Securities and Futures Bill  
Committee Stage Amendments**

Members examined on a clause-by-clause basis Part IX of the Securities and Futures Bill on 14 September 2001.

**Committee Stage Amendments**

2. We have since the above meeting made some amendments to Part IX in the light of Members' comments and to further refine the drafting. All the amendments are marked up in the **Annex** with explanations therefor in the footnotes.

**About the marked-up version of the Bill in the Annex**

3. All the proposed amendments shown in the annex to this paper are marked up against the Blue Bill, notwithstanding that they might have appeared in earlier marked-up versions issued to Members. Where the amendments are made since Members last considered the relevant Part of the Bill, such **new amendments are explained in the footnotes in bold type**, to distinguish them from the footnotes for amendments which Members have considered and proposed no further changes at previous meetings.

Financial Services Bureau  
Securities and Futures Commission  
23 November 2001

PART IX

DISCIPLINE, ETC.

Division 1 - Interpretation

186. Interpretation of Part IX

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

- (a) a contravention of any of the relevant provisions;
- (b) a contravention of any of the terms and conditions of any licence or an exemption registration<sup>1</sup> under this Ordinance;
- (c) <sup>2</sup>a contravention of any other condition imposed under or pursuant to any provision of this Ordinance, or of any condition attached or amended under section 71C(2)(b) or (5) or 71E(3) of the Banking Ordinance (Cap. 155); or
- (d) an act or omission relating to the carrying on of any regulated activity for which a person is licensed or ~~exempt~~ registered<sup>1</sup> which, in the opinion

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<sup>1</sup> 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", "exempt" with "registered" and "exemption" with "registration" throughout the Bill to duly reflect the policy intention.

<sup>2</sup> This amendment is consequential to granting the SFC disciplinary powers pursuant to the new clause 189A in relation to registered institutions' executive officers in recognition of the fact that conditions may be imposed on them under the Banking Ordinance. See footnote (27).

of the Commission, is or is likely to be prejudicial to the interest of the investing public or to the public interest,

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

"register of companies" (公司登記冊) means the register within the meaning of section 291 of the Companies Ordinance (Cap. 32) or a register of oversea companies kept under section 333 of that Ordinance.

<sup>3</sup>(2) In this Part, where any ~~person intermediary~~ is, or was at any time, guilty of misconduct within the meaning of paragraph (a), (b), (c) or (d) of the definition of "misconduct" in subsection (1) as a result of the commission of any conduct ~~which occurred~~occurring with the consent or connivance of, or ~~was~~ attributable to any neglect on the part of -

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

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

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

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<sup>3</sup> Technical amendment for greater clarity. The addition of clause 186(2)(b) is to reflect the latest proposals of disciplinary sanctions applicable to registered institutions as detailed in Paper No. 8D/01 issued on 28 May 2001. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

(b) in the case of a registered<sup>1</sup> institution, another person as -

\_\_\_\_\_ (i) an executive officer of the registered<sup>1</sup> institution; or

\_\_\_\_\_ (ii) a person involved in the management of the business constituting any regulated activity for which the registered institution<sup>1</sup> is or was (as the case may be) registered<sup>1</sup>,

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

\_\_\_\_\_ <sup>4</sup>(3) For the purposes of paragraph (d) of the definition of "misconduct" in subsection (1), the Commission 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 or any code or guideline published under section 385 as are in force at the time of occurrence of, and applicable in relation to, the act or omission.

## Division 2 - Discipline, etc.

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<sup>4</sup> We accept the comment of some Members expressed at the Bills Committee on 14 September 2001 that the disciplinary ground under clause 186(1)(d) should be made clearer and that the SFC should be obliged to consider the relevant codes and guidelines in forming an opinion thereunder. The amendment accordingly imposes such a requirement.

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

(1) Subject to section ~~189~~191<sup>5</sup>, where -

- (a) a regulated person is, or was at any time, guilty of misconduct; or
- (b) the Commission is of the opinion that a regulated person is not a fit and proper person to be or to remain licensed, ~~or to be or to remain a responsible officer, or a person involved in the management of the business, of a licensed~~ the same type of regulated person<sup>6</sup>,

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

- (i) where the regulated person is a licensed person -
  - (A) revoke his licence, whether in relation to all or any, or any part of all or any, of the regulated activities for which he is licensed; or

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<sup>5</sup> The amendment is consequential to the proposal to combine the respective provisions on procedural safeguards applicable in relation to a licensed corporation (clause 189 of the Blue Bill) and a registered institution (clause 191 of the Blue Bill) to become the new clause 191. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001**

<sup>6</sup> This amendment, together with the amendment to the definition of "regulated person" under clause 187(9) are of technical nature for greater clarity. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.**

- (B) suspend his licence, whether in relation to all or any, or any part of all or any, of the regulated activities for which he is licensed for such period or until the occurrence of such event as the Commission may specify;
- (ii) where the regulated person is a responsible officer of a licensed ~~person~~corporation<sup>7</sup> -
  - (A) revoke the approval granted under section 125(1) in respect of him as such a responsible officer; or
  - (B) suspend such approval for such period or until the occurrence of such event as the Commission may specify;
- (iii) publicly or privately reprimand the regulated person;
- <sup>8</sup>(iv) prohibit the regulated person from ~~applying to be licensed, or~~doing all or any of the following in relation to such regulated activity or regulated activities, and for such period or until the

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<sup>7</sup> Technical amendment for greater clarity. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

<sup>8</sup> The amendments are to empower the SFC to impose a prohibition order with industry-wide effect. For example, a licensed representative whose licence has been revoked by the SFC cannot apply again for licensed representative status or seek admission to the register maintained by the HKMA under section 20 of the Banking Ordinance for a specified period. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

occurrence of such event, as the Commission may specify -

(A) applying to be licensed or registered<sup>1</sup>;

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

~~person, for such period as the Commission may specify.~~

(C) applying to be given consent to act or continue to act as an executive officer of a registered institution<sup>1</sup> under section 71C of the Banking Ordinance (Cap. 155);

(D) seeking through a registered institution<sup>1</sup> to have his name entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance (Cap. 155) as that of a person engaged<sup>9</sup> by the registered institution<sup>1</sup> in respect of a regulated activity.

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<sup>9</sup> 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 14 September 2001.**

(2) Subject to ~~subsection (7) and section 189~~sections 191 and 191A<sup>10</sup>, where -

- (a) a regulated person is, or was at any time, guilty of misconduct; or
- (b) the Commission is of the opinion that a regulated person is not a fit and proper person to be or to remain ~~licensed, or to be or to remain a responsible officer, or a person involved in the management of the business, of a licensed~~the same type of regulated person<sup>11</sup>,

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

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

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<sup>10</sup> Technical amendment due to the proposal to combine the provisions on procedural safeguards applicable in relation to a licensed corporation and a registered institution (note 5 above), and to create a separate section on the "fining guidelines" (originally in clause 187(7) of the Blue Bill) under the new clause 191A. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.**

<sup>11</sup> This amendment, together with the amendment to the definition of "regulated person" under clause 187(9) are of technical nature for greater clarity. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001**



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

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

(4) A regulated person ordered to pay a pecuniary penalty under subsection (2) shall pay the penalty to the Commission within 30 days ~~after being informed of the order by a notice under section 189(2)~~, or such further period as the Commission may specify by notice ~~in writing to him.~~  
under section 191(2), after the order has taken effect as a specified decision under section 224<sup>12</sup>.

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

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<sup>12</sup> We accept the market comment that the payment of a pecuniary penalty should not take effect prior to the determination of the relevant appeal. The amendment has the effect that payment is only required no sooner than 30 days after the determination of the relevant appeal. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.**

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

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

~~<sup>13</sup> (7) The Commission shall not perform any of its functions under subsection (2) unless it has published, in the Gazette and in any other manner it considers appropriate, guidelines to indicate the manner in which it proposes to perform such functions.~~

~~(8) Guidelines published under subsection (7) are not subsidiary legislation.~~

(9) In this section -

<sup>14</sup>"regulated person" (受規管人士) means a person who is or at the relevant time was any of the following types of person -

(a) a licensed person; ~~or~~

(b) a responsible officer of a licensed corporation;  
or

~~officer, or~~

(c) a person involved in the management of the  
business, of a licensed ~~person~~ corporation;

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<sup>13</sup> As mentioned in Note 10 above, this clause is deleted as we have proposed a separate section (clause 191A) to set out in greater detail the "fining guidelines". Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001

<sup>14</sup> As mentioned in Notes 6 and 11 above, the amendments to the definition of "regulated person" are of technical nature for greater clarity. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001

<sup>15</sup>"relevant time" (有關時間), in relation to a person, means -

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

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

(1) Subject to section ~~189~~191<sup>16</sup>, the Commission may revoke a licensed person's licence, whether in relation to all or any, or any part of all or any, of the regulated activities for which he is licensed, or suspend a licensed person's licence, whether in relation to all or any, or any part of all or any, of the regulated activities for which he is licensed for such period or until the occurrence of such event as the Commission may specify, if -

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<sup>15</sup> Technical amendment for greater clarity. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

<sup>16</sup> The amendment is consequential to the proposal to combine the respective provisions on procedural safeguards applicable in relation to a licensed corporation (clause 189 of the Blue Bill) and a registered institution (clause 191 of the Blue Bill) to become the new clause 191. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001

- (a) where the licensed person is an individual -
- (i) the licensed person enters into a voluntary arrangement with creditors, or has a bankruptcy order made against him, under the Bankruptcy Ordinance (Cap. 6);
  - (ii) the licensed person fails to satisfy a levy of execution;
  - (iii) the licensed person has been found by a court to be mentally incapacitated, or is detained in a mental hospital, under the Mental Health Ordinance (Cap. 136), which in the opinion of the Commission impugns the fitness and properness of the licensed person to remain licensed<sup>17</sup>;  
or
  - (iv) the licensed person is convicted of an offence (other than an offence under any of the relevant provisions) in Hong Kong or elsewhere, which in the opinion of the

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<sup>17</sup> As we mentioned at the meeting on 20 April, in the light of the concern of some Members and market participants that the mental incapacity of one of the directors would be a straight ground for disciplinary sanction against the concerned licensed corporation, we propose to amend clause 188(1)(b)(vi) such that the provision explicitly says that the "mental incapacity" can be a disciplinary ground only if it affects the fitness and properness of the licensed corporation concerned. We also propose similar changes in clause 188(1)(a)(iii) in respect of the mental incapacity of a licensed representative. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.**

Commission impugns the fitness and properness of the licensed person to remain licensed;

- (b) where the licensed person is a corporation -
- (i) a receiver or manager of the property or business of the licensed person is appointed;
  - (ii) the licensed person fails to satisfy a levy of execution;
  - (iii) the licensed person enters into a compromise or scheme of arrangement with its creditors;
  - (iv) the licensed person goes into liquidation or is ordered to be wound up;
  - (v) the licensed person is convicted of an offence ( other than an offence under any of the relevant provisions) in Hong Kong or elsewhere, which in the opinion of the Commission impugns the fitness and properness of the licensed person to remain licensed;
  - (vi) any of the directors of the licensed person has been found by a court to be mentally incapacitated, or is detained in a mental hospital, under the Mental Health Ordinance (Cap. 136), which in

the opinion of the Commission impugns the fitness and properness of the licensed person to remain licensed<sup>17</sup>; or

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

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

~~-(d) circumstances exist which would require or entitle the Commission to refuse to issue a licence of the same type as the licensed person's licence to the licensed person under this Ordinance if the licensed person had not already been the holder of the licence;<sup>18</sup> or~~

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<sup>18</sup> Some market participants have expressed concerns that their licence would be revoked due to changing requirements introduced by the SFC over time without any grace or transitional period for compliance. We accept this comment and propose to delete clause 188(1)(d) of the Blue Bill accordingly. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.**

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

<sup>19</sup>(2) Subject to section ~~189~~191<sup>20</sup>, but without limiting the generality of subsection (1), the Commission may revoke a licensed person's licence in relation to Type 7 regulated activity or any part thereof if -

- (a) the Commission has ~~imposed a condition~~required under section 117(1)(c) that the licensed persons~~should, if he is to continue to carry on the regulated activity, be authorized to provide the automated trading services in question under section 95~~should apply for an authorization under section 95(2) for that regulated activity; and
- (b) (i) the licensed person has failed to make an application for the authorization under section 95(2), ~~within a period that is reasonable in the circumstances of the case in accordance with the~~requirement, or has otherwise informed

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<sup>19</sup> **The disciplinary power in respect of a person licensed to provide automated trading services overlaps with the revocation power under clause 117. We have proposed a Committee Stage Amendment to remove the revocation power there. This amendment is consequential to the amendment proposed to clause 117.**

<sup>20</sup> **The amendment is consequential to the proposal to combine the respective provisions on procedural safeguards applicable in relation to a licensed corporation (clause 189 of the Blue Bill) and a registered institution (clause 191 of the Blue Bill) to become the new clause 191. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001**

the Commission that he proposes not to make an application for the

authorization under section 95(2); or

- (ii) the licensed person has made an application for the authorization under section 95(2), but the application is not granted.

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

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

<sup>21</sup>(4) Subject to subsection (5), a licence shall be deemed to be suspended if -

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

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<sup>21</sup> **Technical amendment for greater clarity and for drafting consistency with clause 135, which is the source provision for the requirement to pay annual fee and submit annual return.**



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

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

<sup>22</sup>(5) A licence shall not be regarded as suspended under subsection (4) unless and until -

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

(b) in the case of a suspension under subsection (4)(b) by reference to any failure to submit an annual

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<sup>22</sup> **Technical amendment for greater clarity and for drafting consistency with clause 135, which is the source provision for the requirement to pay annual fee and submit annual return.**

return, the Commission has, by notice in writing given not less than 10 business days before the suspension is to take effect, informed the licensed person of the requirement to submit the annual return, and of the consequence of the failure to comply with the requirement under this section.

(6) Where a licence is suspended under subsection (4) and the event described in subsection (4)(a) or (b) (as the case may be) has not been remedied within 30 days after the date<sup>23</sup> on which the suspension becomes effective under subsection (4), or such further period as the Commission may specify by notice in writing to the licensed person, the licence shall be deemed to be revoked.

(7) Subject to section ~~189~~<sup>191</sup><sup>24</sup>, where a person who is a responsible officer of a licensed ~~person~~<sup>corporation</sup><sup>25</sup> is convicted of an offence (other than an offence under any of the relevant provisions) in Hong Kong or elsewhere, which in the opinion of the Commission impugns the fitness and properness of the person to remain such a responsible officer, the Commission may -

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<sup>23</sup> Technical amendment. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

<sup>24</sup> The amendments are consequential to the proposal to combine the respective provisions on procedural safeguards applicable in relation to a licensed corporation (clause 189 of the Blue Bill) and a registered institution (clause 191 of the Blue Bill) to become the new clause 191. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

<sup>25</sup> Technical amendment for greater clarity. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

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

<sup>26</sup>(8) For the avoidance of doubt, nothing in this section limits the generality of section 187(1)(a) or (b) or (2)(a) or (b).

**~~189. Procedural requirements in respect of exercise of powers under section 187 or 188~~**

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

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

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

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<sup>26</sup> We accept the comment of the Legal Service Division of the Legislative Council that “fitness and properness” referred to in clause 188 by reference to specific grounds may unnecessarily restrict the interpretation of “fitness and properness” under clause 187. The amendment seeks to put it beyond doubt the generality of “fitness and properness” and “misconduct” as grounds of disciplinary actions under clause 187.

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

<sup>27</sup>189A. Disciplinary action in respect of registered institutions<sup>1</sup>, etc.

(1) Subject to section 191, where -

- (a) a regulated person is, or was at any time, guilty of misconduct; or
- (b) the Commission is of the opinion that a regulated person is not a fit and proper person to be or to remain the same type of regulated person.

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<sup>27</sup> The new clause 189A is to reflect the latest proposals to apply the same range of disciplinary sanctions to registered institutions and licensed corporations as detailed in Paper No. 8D/01. The effect is that a registered institution, its executive officers, relevant employees and management would be subject to "reprimand", "civil fines", "prohibition orders" (where applicable), "suspension/revocation" (where applicable) in the same manner as that applicable in relation to a licensed corporation. The equivalent of "suspension" and "revocation" of the relevant employees and executive officers **have been** included as Committee Stage Amendments to the Banking (Amendment) Bill 2000 as their admission to the conduct of a regulated activity is provided for in that Bill. Otherwise, clause 189A is basically the same as clause 187 in respect of disciplinary action against licensed persons. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.**

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

(i) where the regulated person is a registered institution<sup>1</sup> -

(A) revoke its registration<sup>1</sup>, whether in relation to all or any, or any part of all or any, of the regulated activities for which it is registered<sup>1</sup>; or

(B) suspend its registration<sup>1</sup>, whether in relation to all or any, or any part of all or any, of the regulated activities for which it is registered<sup>1</sup> for such period or until the occurrence of such event as the Commission may specify;

(ii) publicly or privately reprimand the regulated person;

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

(A) applying to be licensed or registered<sup>1</sup>;

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

(C) applying to be given consent to act or  
continue to act as an executive officer of a  
registered institution<sup>1</sup> under section 71C of  
the Banking Ordinance (Cap. 155);

(D) seeking through a registered institution<sup>1</sup> to  
have his name entered in the register  
maintained by the Monetary Authority under  
section 20 of the Banking Ordinance (Cap. 155)  
as that of a person engaged by the registered  
institution<sup>1</sup> in respect of a regulated  
activity.

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

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

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

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

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

(ii) 3 times the amount of the profit secured or  
increased or loss avoided or reduced by the  
regulated person as a result of his misconduct, or

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

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

(4) A regulated person ordered to pay a pecuniary penalty under subsection (2) shall pay the penalty to the Commission within 30 days, or such further period as the Commission may specify by notice under section 191(2), after the order has taken effect as a specified decision under section 224.

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

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

(7) Without prejudice to the exercise by the Monetary Authority of any powers under the Banking Ordinance (Cap. 155),

the Commission may make such recommendations to the Monetary Authority in respect of the exercise by the Monetary Authority of any of its powers under sections 58A(1)<sup>28</sup> and 71C(4) of that Ordinance as the Commission considers appropriate.

(8) In this section -

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

- (a) a registered institution<sup>1</sup>;
- (b) an executive officer of a registered institution<sup>1</sup>;
- (c) a person involved in the management of the business constituting any regulated activity for which a registered institution<sup>1</sup> is or was (as the case may be) registered<sup>1</sup>; or
- (d) an individual whose name is or was (as the case may be) entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance (Cap. 155) as that of a person engaged by a registered institution<sup>1</sup> in respect of a regulated activity;

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

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

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<sup>28</sup> **Technical amendment to include specific cross-reference to section 58A(1) of the Banking Ordinance.**



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

**190. Other circumstances for disciplinary ~~disciplinary~~ action in respect of ~~exempt persons registered institutions~~<sup>1</sup>, etc.**

(1) Subject to ~~subsection (4) and~~<sup>29</sup> section 191, the Commission may revoke an ~~exempt person's exemption, a registered institution's registration~~<sup>1</sup>, whether in relation to all or any, or any part of all or any, of the regulated activities for which he ~~is exempt~~ it is registered<sup>1</sup>, or suspend<sup>30</sup> a registered institution's ~~registration~~<sup>1</sup>, whether in relation to all or any, or any part of all or any, of the regulated activities for which it is registered<sup>1</sup> for such period or until the occurrence of such event as the Commission may specify -

~~(a) if the exempt person carries on any of the regulated activities, or any part of the regulated activities, for which he is exempt, otherwise than~~

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<sup>29</sup> Technical amendment to subsume clause 190(4) of the Blue Bill under the new clause 191. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.**

<sup>30</sup> The amendment is to empower the SFC to suspend the registration granted to a registered institution based on similar grounds as that applicable to a licensed corporation under clause 188. Clause 190(1)(a) to (c) of the Blue Bill have been relocated as the new clause 190A. Please see Note 27 above. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.**

~~in accordance with the conditions imposed under section 118(5);~~

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

~~(c) if the Commission is of the opinion that the exempt person is not a fit and proper person to be or to remain exempt;~~

(d) if -

(i) a receiver or manager of the property or business of the ~~exempt person~~registered institution<sup>1</sup> is appointed;

(ii) the ~~exempt person~~registered institution<sup>1</sup> fails to satisfy a levy of execution;

(iii) the ~~exempt person~~registered institution<sup>1</sup> enters into a compromise or scheme of arrangement with its creditors;

(iv) the ~~exempt person~~registered institution<sup>1</sup> goes into liquidation or is ordered to be wound up;

(v) the ~~exempt person~~registered institution<sup>1</sup> is convicted of an offence (other than an offence under any of the relevant provisions) in Hong Kong or elsewhere, which in the opinion of the

Commission impugns the fitness and  
properness of the ~~exempt person~~  
registered institution<sup>1</sup> to remain  
~~exempt~~registered<sup>1</sup>;

- (e) if the ~~exempt person~~registered institution<sup>1</sup> does not carry on the regulated activity or regulated activities, or the part of regulated activity or regulated activities, to which the revocation or suspension (as the case may be)<sup>30</sup> relates; or
- (f) if the ~~exempt person~~registered institution<sup>1</sup> requests the Commission to so revoke or suspend<sup>30</sup> the ~~exemption~~registration<sup>1</sup>.

<sup>31</sup> ~~(2) The Commission, in determining whether an exempt person is a fit and proper person within the meaning of subsection (1)(c), may, among other matters (including those specified in section 128), take into account such present or past conduct of the exempt person as it considers appropriate in the circumstances of the case.~~

<sup>32</sup>(2) Subject to section 191, but without limiting the generality of subsection (1), the Commission may revoke a

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<sup>31</sup> Technical amendment to subsume clause 190(2) of the Blue Bill under the new clause 189A. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

<sup>32</sup> Clause 118 of the Blue Bill provides the SFC with the power to revoke the registration granted to an authorized institution in respect of the provision of automated trading services. As in the case for licensed corporations (See clause 188(2) as amended and Note 19), we propose to “centralize” the revocation power under Part IX. Accordingly, we have proposed a Committee Stage Amendment to remove the revocation power from clause 118. This amendment seeks to include the revocation power under Part IX.

registered institution's registration in relation to Type 7 regulated activity or any part thereof if -

(a) the Commission has required under section 118(8)(b) that the registered institution should apply for an authorization under section 95(2) for that regulated activity; and

(b) (i) the registered institution has failed to make an application for the authorization under section 95(2) in accordance with the requirement, or has otherwise informed the Commission that it proposes not to make an application for the authorization under section 95(2); or

(ii) the registered institution has made an application for the authorization under section 95(2), but the application is not granted.

<sup>1</sup>(3) ~~An exemption by which a person has become an exempt person~~ The registration of a registered institution shall be deemed to be revoked if -

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

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

<sup>33</sup> ~~(4) No exemption by which a person has become an exempt person shall be revoked under subsection (1) unless the Commission has first consulted the Monetary Authority.~~

<sup>34</sup>(5) <sup>1</sup>~~Subject to subsection (6), an exemption by which a person has become an exempt person~~ the registration of a registered institution shall be deemed to be suspended if the exempt person registered institution fails to pay make full payment of any annual fee payable by him-it under section 135, or any additional sum payable by him-it under that section as a result of any default in paying-making full payment of any annual fee payable by him-it under that section, within 3 months after the due date for payment of the annual fee under that section ~~first became so payable, and, subject to subsection (7), the suspension shall remain in force until such time as the Commission considers it appropriate that the exemption-registration should no longer be suspended and informs the exempt person-registered institution to that effect by notice in writing.~~

<sup>35</sup>(6) <sup>1</sup>~~An exemption~~ Any registration shall not be regarded as suspended under subsection (5) by reference to any failure to pay make full payment of any annual fee or additional sum, unless and

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<sup>33</sup> Technical amendment to subsume clause 190(4) of the Blue Bill under the new clause 191. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

<sup>34</sup> Technical amendment for greater clarity and for drafting consistency with clause 135, which is the source provision for the requirement to pay annual fee.

<sup>35</sup> Technical amendment for greater clarity and for drafting consistency with clause 135, which is the source provision for the requirement to pay annual fee.

until the Commission has, by notice in writing given not less than 10 business days before the suspension is to take effect, informed the ~~exempt person registered institution~~<sup>1</sup> of the requirement to ~~pay~~ make full payment of the annual fee or additional sum (as the case may be), and of the consequence of the failure to comply with the requirement under this section.

<sup>35</sup>(7) ~~Where an exemption any registration is~~ suspended under subsection (5) and the failure to ~~pay~~ make full payment of the annual fee or additional sum described in that subsection has not been remedied within 30 days after the ~~date~~ day on which the suspension becomes effective under that subsection, or such further period as the Commission may specify by notice in writing to the ~~exempt person registered institution~~, the ~~exemption registration~~ shall be deemed to be revoked.

<sup>36</sup>(8) For the avoidance of doubt, nothing in this section limits the generality of section 189A(1)(a) or (b) or (2)(a) or (b).

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<sup>36</sup> We accept the comment of the Legal Service Division of the Legislative Council that “fitness and properness” referred to in clause 190 by reference to specific grounds may unnecessarily restrict the interpretation of “fitness and properness” under clause 189A. The amendment seeks to put it beyond doubt the generality of “fitness and properness” and “misconduct” as grounds of disciplinary actions under clause 189A.

**~~191. Procedural requirements in respect of  
exercise of powers under section 190<sup>37</sup>~~**

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

~~\_\_\_\_\_ (2) Where the Commission decides to revoke an exemption  
under section 190(1), the Commission shall inform the exempt person  
concerned of its decision to do so by notice in writing, and the  
notice shall include—~~

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

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

**Division 3 - Miscellaneous**

**191. Procedural requirements in respect of exercise  
of powers under Part IX<sup>37</sup>**

\_\_\_\_\_ (1) The Commission shall not exercise any power under  
section 187(1) or (2), 188(1)(a), (b) or (c), (2) or (7), 189A(1)  
or (2) or 190(1) (d) or (e) or (2)<sup>38</sup> without first giving the person

<sup>37</sup> The amendment is consequential to the proposal to combine the respective  
provisions on procedural safeguards applicable in relation to a licensed  
corporation (clause 189 of the Blue Bill) and a registered institution  
(clause 191 of the Blue Bill) to become the new clause 191. **Members considered  
this amendment and did not propose further changes at the Bills Committee meeting on 14 September  
2001.**

<sup>38</sup> Amendment consequential to the addition of clause 190(2). See note 32.

in respect of whom the power is exercised a reasonable opportunity of being heard.

(1A) The Commission shall not exercise any power under section 189A(1) or (2) or 190(1) or (2)<sup>38</sup> unless it has first consulted the Monetary Authority.

(2) Where the Commission decides to exercise any power under section 187(1) or (2), 188(1), (2) or (7), 189A(1) or (2) or 190(1) or (2)<sup>38</sup>, the Commission shall inform the person in respect of whom the power is exercised of its decision to do so by notice in writing, and the notice shall include -

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



191A.Guidelines for exercise of functions  
under section 187(2) or 189A(2)<sup>39</sup>

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

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

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

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

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

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

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

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<sup>39</sup> As mentioned in Note 13 above, we propose to create a separate section on  
the "fining guidelines" under clause 191A for application both in relation  
to a licensed corporation and a registered institution. Moreover, having  
regard to Members' views expressed at the meeting on 20 April, we propose  
under clause 191A(1)(b) that the SFC shall have regard to the guidelines and  
under clause 191A(2) the general factors that the SFC must have regard to.  
**Members considered this amendment and did not propose further changes at the Bills Committee  
meeting on 14 September 2001.**

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

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

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

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

- (a) continue to be regarded for the purposes of the provisions of this Ordinance, but not section 114, to be licensed for the regulated activity or regulated activities, or the part of regulated activity or regulated activities, to which the suspension relates; and
- (b) without limiting the generality of paragraph (a), continue to be required to comply with such provisions of this Ordinance relating to a licensed person as would apply to ~~him~~the person<sup>40</sup> were the licence not so suspended.

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<sup>40</sup> Minor technical amendment.

(2) If an approval of a person as a responsible officer of a licensed ~~person~~corporation<sup>41</sup> is suspended under section 187 or 188, then, without prejudice to any provision of this Ordinance which has application in relation to the suspension, the person shall, during the period of the suspension -

- (a) continue to be regarded for the purposes of the provisions of this Ordinance, but not sections 117 and 124, to be such a responsible officer; and
- (b) without limiting the generality of paragraph (a), continue to be required to comply with such provisions of this Ordinance relating to a responsible officer as would apply to ~~him~~the person<sup>40</sup> were the approval not so suspended.

(3) If ~~an exemption by which a person has become an exempt~~any registration<sup>1</sup> of a person is suspended under section ~~189A or 190~~<sup>42</sup> in relation to all or any, or any part of all or any, of the regulated activities for which the person is ~~exempt~~registered<sup>1</sup>, then, without prejudice to any provision of this Ordinance which has application in relation to the suspension, the person shall, during the period of the suspension -

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<sup>41</sup> Technical amendment for greater clarity. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

<sup>42</sup> The amendment is consequential to extending the application of "suspension" to a registered institution under clause 189A. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

- (a) continue to be regarded for the purposes of the provisions of this Ordinance, but not section 114, to be ~~exempt~~registered<sup>1</sup> for the regulated activity or regulated activities, or the part of regulated activity or regulated activities, to which the suspension relates; and
- (b) without limiting the generality of paragraph (a), continue to be required to comply with such provisions of this Ordinance relating to a ~~an exempt person~~registered institution<sup>1</sup> as would apply to ~~him were the exemption~~the person were the registration<sup>1</sup> not so suspended.

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

(5) An approval of a person as a responsible officer of a licensed ~~person~~corporation<sup>43</sup> may be revoked under section 187 or 188 notwithstanding that, at the time of revocation, the approval is suspended under any provision of this Ordinance.

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<sup>43</sup> Technical amendment for greater clarity. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

(6) ~~An exemption by which a person has become an exempt~~Any registration<sup>1</sup> of a person may be revoked under section 189A or<sup>44</sup> 190 notwithstanding that, at the time of revocation, the ~~exemption~~ registration<sup>1</sup> is suspended, whether in relation to all or any, or any part of all or any, of the regulated activities for which the person is ~~exempt~~registered<sup>1</sup>, under any provision of this Ordinance.

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

(1) In reaching a decision under section 187(1) or (2), 188(1), (2) or (7), 189A(1) or (2)<sup>45</sup> or 190(1) or (2)<sup>46</sup>, the Commission may have regard to any information or material in its possession which is relevant to the decision, regardless of how the information or material has come into its possession.

(2) The revocation or suspension of any licence or ~~an exemption~~registration<sup>1</sup> under this Part does not operate so as to -

- (a) avoid or affect an agreement, transaction or arrangement entered into by the licensed person or ~~exempt person~~registered institution<sup>1</sup> (as the case may be) whether the agreement, transaction or

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<sup>44</sup> The amendment is consequential to extending the application of "suspension" to a registered institution under clause 189A. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.**

<sup>45</sup> The amendment is consequential to the extended disciplinary sanctions applicable in relation to a registered institution under clause 189A. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.**

<sup>46</sup> Amendment consequential to the addition of clause 190(2).

arrangement was entered into before or after the revocation or suspension;

- (b) affect a right, obligation or liability arising under the agreement, transaction or arrangement.

(3) Where at any time the Commission is contemplating exercising any power in respect of a person under section 187(1) or ~~(2) or 188(1)(a), (b), (c) or (d), (2) or (7), 188(1)(a), (b) or (c), (2) or (7), 189A(1) or (2) or 190(1)(d) or (e)~~<sup>47</sup> or ~~(2)~~<sup>48</sup>, it may, where it considers it appropriate to do so in the interest of the investing public or in the public interest, by agreement with the person -

- (a) exercise any power ~~under such section~~ the Commission may exercise in respect of the person under this Part (whether or not the same as the power the exercise of which has been contemplated)<sup>49</sup>; and
- (b) take such additional action as it considers appropriate in the circumstances of the case.

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<sup>47</sup> The amendment is consequential to the extended disciplinary sanctions applicable in relation to a registered institution. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

<sup>48</sup> Amendment consequential to the addition of clause 190(2).

<sup>49</sup> Technical amendment for greater clarity. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001.

<sup>50</sup>(4) Where the Commission exercises any power or takes any additional action in respect of a person under subsection (3) under subsection ~~\_\_~~

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

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

**194. Requirement to transfer records upon revocation or suspension of licence or exemptionregistration<sup>1</sup>**

(1) ~~Where a licence or exemp~~any licence or registration<sup>1</sup> is revoked or suspended under this Part, the Commission may by notice in writing require the person to whom the licence ~~was granted or the person who became an exempt person by the exemption~~or

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<sup>50</sup> Technical amendments consequential to the relocation of provisions and also for greater clarity. Members considered this amendment and did not propose further changes at the Bills Committee meeting on 14 September 2001. The Law Draftsman has since made some drafting improvements.

registration<sup>1</sup> (as the case may be) was granted to transfer to, or to the order of, his client such records relating to client assets or to the affairs of the client held at any time for the client, in such manner, as the Commission reasonably specifies in the notice.

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

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

**195. Permission to carry on business operations upon revocation or suspension of licence or ~~exemption~~registration<sup>1</sup>**

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

- (a) in the case of a revocation, carry on business operations for the purpose of closing down the business connected with the revocation; or



(b) in the case of a suspension, carry on only essential business operations for the protection of interests of clients of the person or, in the case of a licensed representative, of the licensed corporation to which the person is accredited, during the period of suspension, subject to such conditions as the Commission may specify in the notice.

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

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