

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

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

Members examined on a clause-by-clause basis Part XVI of the Securities and Futures Bill on 8 October 2001.

Committee Stage Amendments

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

About the marked-up version of the Bill in the Appendix

3. All the proposed amendments shown in the appendix of 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 the previous meeting.

Financial Services Bureau
Securities and Futures Commission
28 November 2001

PART XVI

MISCELLANEOUS

**Division 1 - Secrecy, conflict of interests,
and immunity**

366. Preservation of secrecy, etc.

(1) Except in the performance of a function under, or for the purpose of carrying into effect or doing anything required or authorized under, any of the relevant provisions, a specified person -

- (a) shall preserve and aid in preserving secrecy with regard to any matter coming to his knowledge by virtue of his appointment under any of the relevant provisions, or in the performance of any function under or in carrying into effect any of the relevant provisions, or in the course of assisting any other person in the performance of any function under or in carrying into effect any of the relevant provisions;
- (b) shall not communicate any such matter to any other person; and
- (c) shall not suffer or permit any other person to have access to any record or document which is

in his possession by virtue of the appointment, or the performance of any such function under or the carrying into effect of any such provisions, or the assistance to the other person in the performance of any such function under or in carrying into effect any such provisions.

(2) Nothing in subsection (1) applies to -

(a) the disclosure of information which has already been made available to the public ~~by virtue of being disclosed in any circumstances in which, or for any purpose for which, disclosure is not precluded by this section~~¹;

(b) the disclosure of information with a view to the institution of, or otherwise for the purposes of, any criminal proceedings, or any investigation carried out under the laws of Hong Kong, in Hong Kong;

¹ The original wording would imply that a defendant being charged for a breach of the secrecy provision would have to prove that the information was made public in certain circumstances. We consider this unreasonable and unnecessary, hence the proposed deletion. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

²(ba) the disclosure of information for the purpose of seeking advice from, or giving advice by, counsel or a solicitor or other professional adviser acting or proposing to act in a professional capacity in connection with any matter arising under any of the relevant provisions;

³(bb) the disclosure of information by a person in connection with any judicial or other proceedings to which the person is a party;

⁴(bc) the disclosure of information in accordance with an order of a court, or in accordance with a law or a requirement made under a law;

² This amendment reflects our proposals set out in paragraph 4(c) of Paper No. 14/01 issued to Members on 18 May 2001, that a person should not be prohibited from disclosing information for the purpose of exercising legitimate rights. Paragraph (ba) makes explicit that the secrecy provisions would not prevent any person from seeking professional advice, whether from lawyers or others. See also Footnotes 3 and 4. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

³ This amendment makes it explicit that information may be disclosed in connection with any proceedings to which the person (including the SFC) is a party. In consequence, clause 366(3)(b) is deleted as being otiose. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

⁴ This amendment makes it explicit that information may be disclosed by a person in accordance with an order of the court, or in accordance with any legal requirement. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

(c) the communication of any information or opinion to which section 369(1) applies (whether with or without reference to section 369(2)) -

(i) to the Commission in the manner described in section 369(1);

(ii) where section 369(4) applies, to the Insurance Authority or the Monetary Authority (as the case may be) in the manner described in section 369(4).

(3) Notwithstanding subsection (1), the Commission may disclose information -

(a) in the form of a summary compiled from any information in the possession of the Commission, including information provided by persons under any of the relevant provisions, if the summary is so compiled as to prevent particulars relating to the business or identity, or the trading particulars, of any person from being ascertained from it;

~~⁵(b) in connection with any judicial or other proceedings (other than criminal proceedings) to which the Commission is a party;~~

⁵ This paragraph is deleted because it is covered by the new clause 366(2)(bb). See Footnote 3. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

- (c) to a person who is a liquidator appointed under the Companies Ordinance (Cap. 32);
- (d) to the Market Misconduct Tribunal;
- (e) to the Securities and Futures Appeals Tribunal;
- (f) to the Monetary Authority, if -
 - (i) the information relates to -
 - (A) any business of an ~~exempt person~~ registered institution⁶ which constitutes a regulated activity for which the ~~exempt person is exempt~~ registered institution is registered⁶; or
 - (B) any business of an associated entity that is an authorized financial institution, which is that of receiving or holding client assets of the intermediary of which the associated entity is an associated entity; or

⁶ 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 wider 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.

- (ii) in the opinion of the Commission the condition specified in subsection (5) is satisfied;
- (g) if in the opinion of the Commission the condition specified in subsection (5) is satisfied, to -
 - (i) the Chief Executive;
 - (ii) the Financial Secretary;
 - (iii) the Secretary for Justice;
 - (iv) the Secretary for Financial Services;
 - (v) the Insurance Authority;
 - (vi) the Registrar of Companies;
 - ⁷(via) the Official Receiver;
 - (vii) the Mandatory Provident Fund Schemes Authority;
 - (viii) the Privacy Commissioner for Personal Data;
 - (ix) the Ombudsman;
 - (x) a public officer authorized by the Financial Secretary under subsection (12);

⁷ The amendment seeks to close a gap in existing law. It would allow the SFC to disclose information to the Official Receiver to facilitate him in carrying out his functions under the law, for example, for pursuing disqualification of directors proceedings under the Companies Ordinance (Cap. 32). Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

- (xi) an inspector appointed by the Financial Secretary to investigate the affairs of a corporation;
 - (xii) a recognized exchange company;
 - (xiii) a recognized clearing house;
 - (xiv) a recognized exchange controller;
 - (xv) a recognized investor compensation company;
 - (xvi) a person authorized to provide authorized automated trading services under section 95(2);
- (h) if in the opinion of the Commission the condition specified in subsection (5) is satisfied -
- (i) to an authority or regulatory organization outside Hong Kong which, or to a companies inspector outside Hong Kong who, in the opinion of the Commission satisfies the requirements referred to in subsection (6)(a) and (b);
 - ⁸(ii) to -

⁸ This amendment is made to combine the current paragraphs (h)(ii) and (h)(iii) as the purposes of disclosure made under the two paragraphs are essentially the same, i.e. for referral to the relevant bodies to take disciplinary action against their members concerned. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

(A) the Hong Kong Society of Accountants;

~~(ii) to such professional or semi-professional bodies as are~~

(B) any other body prescribed by rules made under section 384 for the purposes of this subparagraph;

~~(iii) without prejudice to subparagraph~~

~~(ii), to the Hong Kong Society of Accountants with a view to the institution~~

with a view to its taking of, or otherwise for the purposes of, any disciplinary action against any of its members; proceedings relating to the performance or non performance of the professional duties of an auditor or a former auditor appointed under any of the relevant provisions;

(i) to a person who is or was an auditor appointed under any provision of this Ordinance, for the purpose of enabling or assisting the Commission

to ~~discharge~~perform⁹ its functions under any of the relevant provisions;

- (j) where the information is obtained by an investigator under section 176, to -
- (i) the Financial Secretary;
 - (ii) the Secretary for Justice;
 - (iii) the ~~police~~Commissioner of Police¹⁰;
 - (iv) the Commissioner of the¹¹ Independent Commission Against Corruption;
 - (v) the Market Misconduct Tribunal;
 - (vi) the Securities and Futures Appeals Tribunal;
- (k) for the purpose of, or otherwise in connection with, an audit required by section 16;
- (l) with the consent of the person from whom the information was obtained or received¹² and, if the information relates to a different person, also with the consent of the person to whom the information relates.

⁹ **Technical amendment for consistency throughout the Bill.**

¹⁰ **We have accepted the suggestion made by some Members at the Bills Committee meeting on 8 October 2001 that specific reference to “the Commissioner of Police” be adopted in the place of “the police”.**

¹¹ **Amendment consistent with that described in Footnote 10 above. As a result of the amendment, the definition of “Commissioner of the Independent Commission Against Corruption” will replace the existing definition of “Independent Commission Against Corruption” in Part 1 of Schedule 1**

¹² **Technical amendment for greater clarity. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

(4) Notwithstanding subsection (1), a person who is or was an auditor appointed in relation to a licensed corporation or an associated entity of a licensed corporation under section 155 or 156, and a person who is or was an employee or agent of such auditor, may disclose information ~~that comes to his knowledge~~obtained or received by him¹³ in the course of performing his duties as such auditor or as an employee or agent of such auditor (as the case may be) -

- (a) for the purposes of any judicial or other proceedings arising out of the performance of his duties as such auditor or as an employee or agent of such auditor (as the case may be);
- (b) in the case of a person who is or was an employee or agent of an auditor, to the auditor.

(5) The condition referred to in subsection (3)(f), (g) and (h) is that -

- (a) it is desirable or expedient that the information should be disclosed pursuant to subsection (3)(f), (g) or (h)(as the case may be) in the interest of the investing public or in the public interest; or

¹³ Technical amendment for greater clarity. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

(b) the disclosure will enable or assist the recipient of the information to perform its or his functions and it is not contrary to the interest of the investing public or to the public interest that the information should be so disclosed.

(6) Where the Commission is satisfied, for the purposes of subsection (3)(h)(i), that an authority, regulatory organization or companies inspector outside Hong Kong -

(a) performs any function similar to a function of the Commission or the Registrar of Companies, or regulates, supervises or investigates banking, insurance or other financial services or the affairs of corporations; and

(b) is subject to adequate secrecy provisions, the Commission shall as soon as reasonably practicable thereafter cause the name of the authority, regulatory organization or companies inspector (as the case may be) to be published in the Gazette.

(7) Where information is disclosed pursuant to subsection (1), or in any of the circumstances described in

subsection (2), (3) or (4) (other than subsections (2)(a), (3)(a), ~~(3)(h)(i)~~¹⁴ and (1) and (4)(b)) -

- (a) the person to whom that information is so disclosed; or
- (b) any other person obtaining or receiving the information, whether directly or indirectly, from the person referred to in paragraph (a),

shall not disclose the information, or any part thereof, to any other person, unless -

- (i) the Commission consents to the disclosure; ~~or~~
- (ii) the information or the part thereof (as the case may be) has already been made available to the public ~~by virtue of being disclosed in any circumstances in which, or for any purpose for which, disclosure is not precluded by this~~
section¹;

¹⁴ Subclause (3)(b) has been deleted. Hence no need for cross reference here. In respect of the reference to subclause 3(h)(i), it is added in response to comments of the Legal Service Division of the Legislative Council that any statutory prohibition imposed on overseas authorities, regulators or companies inspectors against onward disclosure of information provided to them by the SFC may not be enforceable through the offence provision in clause 366(10). We agree that it may not be appropriate to deal with such enforcement issues under the statute. In practice, the use of confidential information would be subject to the Memorandum of Understanding entered into between the SFC and the overseas authority, and any conditions therein which may be attached to onward disclosure. There are also sufficient safeguards under clause 366, in that the SFC can only share confidential information with an overseas authority if it is satisfied that the overseas authority performs a financial market regulatory function and is subject to adequate secrecy provisions (subclauses (6)(a) and (b)). Therefore, we are satisfied that it is not necessary to impose the restriction of subclause (7) to disclosure made under subclause (3)(h)(i). **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

¹⁵(iii) the disclosure is for the purpose of seeking advice from, or giving advice by, counsel or a solicitor or other professional adviser acting or proposing to act in a professional capacity in connection with any matter arising under any of the relevant provisions;

¹⁵(iv) the disclosure is in connection with any judicial or other proceedings to which the person or the other person referred to in paragraph (a) or (b) (as the case may be) is a party; or

¹⁵(v) the disclosure is in accordance with an order of a court, or in accordance with a law or a requirement made under a law.

(8) Where information is disclosed to an auditor in the circumstances described in subsection (4)(b) -

- (a) the auditor; or
- (b) any other person obtaining or receiving the information, whether directly or indirectly, from the auditor,

shall not disclose the information, or any part thereof, to any other person, unless -

¹⁵ These amendments have been made for consistency with new clauses 366(2)(ba), (bb) and (bc). See Footnotes 2 to 4. **Members considered the amendments and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

- (i) in the case of the auditor, the disclosure is for the purpose described in subsection (4)(a);
- (ii) the Commission~~otherwise~~¹⁶ consents to the disclosure; ~~or~~
- (iii) the information or the part thereof (as the case may be) has already been made available to the public ~~by virtue of being disclosed in any circumstances in which, or for any purpose for which, disclosure is not precluded by this section~~¹;

¹⁵(iv) the disclosure is for the purpose of seeking advice from, or giving advice by, counsel or a solicitor or other professional adviser acting or proposing to act in a professional capacity in connection with any matter arising under any of the relevant provisions;

¹⁵(v) the disclosure is in connection with any judicial or other proceedings to which the auditor or the other person referred to in paragraph (a) or (b) (as the case may be) is a party; or

¹⁶ Technical amendment for greater clarity. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

¹⁵(vi) the disclosure is in accordance with an order of a court, or in accordance with a law or a requirement made under a law.

¹⁷(8A)The Commission, in disclosing any information in any of the circumstances described in subsection (3) or in granting any consent pursuant to subsection (7)(i) or (8)(ii), may impose such conditions as it considers appropriate.

(9) A person who contravenes subsection (1) commits an offence and is liable -

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(10) Where a person discloses any information in contravention of subsection (7) or (8) and, at the time of the disclosure -

- (a) in the case of a contravention of subsection (7), he -
 - (i) knew or ought reasonably to have known that the information was previously disclosed to him or any

¹⁷ As we briefed Members at the Bills Committee meeting on 8 October 2001, we propose a new provision to explicitly empower the SFC to impose conditions on disclosure pursuant to clause 366(3) and on consents under clause 366(7)(i) and 366(8)(ii), such as conditions regarding the use of the material by the person or limiting disclosure to persons named or described. It has been SFC's current practice to impose conditions in the above circumstances.

other person (as the case may be)¹⁸

pursuant to subsection (1), or in any of the circumstances described in subsection (2), (3) or (4) (other than subsections (2)(a), (3)(a), ~~(b)(i)~~¹⁸ and (1) and (4)(b)); and

- (ii) had no reasonable grounds to believe that subsection (7)(i) ~~or (ii), (ii), (iii), (iv) or (v)~~¹⁸ applies to the disclosure of the information by him; or

- (b) in the case of a contravention of subsection (8), he -

- (i) knew or ought reasonably to have known that the information was previously disclosed to him or any ~~other~~ auditor (as the case may be)¹⁹ in the circumstances described in subsection (4)(b); and

- (ii) had no reasonable grounds to believe that subsection (8)(i), (ii) ~~or (ii),~~

¹⁸ These are technical amendments for greater clarity and consistency with clause 366(7). Members considered the amendments and did not propose further changes at the Bills Committee meeting on 8 October 2001.

¹⁹ These are technical amendments for greater clarity and consistency with clause 366(8). Members considered the amendments and did not propose further changes at the Bills Committee meeting on 8 October 2001.

(iii), (iv), (v) or (vi)¹⁹ applies to
the disclosure of the information by
him,

he commits an offence and is liable -

- (i) on conviction on indictment to a fine of
\$1,000,000 and to imprisonment for 2 years; or
- (ii) on summary conviction to a fine at level 6 and
to imprisonment for 6 months.

~~²⁰(11) For the purposes of this section, a person shall be
regarded as assisting any other person in the performance of
any function under or in carrying into effect any of the
relevant provisions if he so assists any other person or he
otherwise—~~

~~(a) is a person who is subject to any requirement
imposed by an authorized person under section
172, 173 or 174, or by an investigator under
section 176, or is a counsel or solicitor or
other professional adviser, acting for such
person in connection with the requirement; or~~

~~(b) is a counsel or solicitor or other professional
adviser acting for—~~

²⁰ Subclause (11) is not in existing law. On reflection, we consider that
this provision can be deleted because all the persons to whom this
provision is intended to apply are already covered by clause 366(7) as
revised. Members considered the amendment and did not propose further changes at the Bills
Committee meeting on 8 October 2001.

- ~~(i) any person who makes or proposes to make any application to the Commission under or pursuant to any of the relevant provisions;~~
- ~~(ii) an approved person as defined in section 101(1) in respect of any matter;~~
- ~~(iii) any person in respect of whom the Commission exercises or proposes to exercise any power under Part IX;~~
- ~~(iv) any person against whom any criminal proceedings have been or may be instituted under any of the relevant provisions;~~
- ~~(v) any person who is or may be involved in any proceedings instituted under section 244;~~
- ~~(vi) any person who has made or proposes to make an application for review under Part XI or otherwise seeks advice regarding such an application;~~
- ~~or~~
- ~~(vii) any person who is or may be involved in any other proceedings arising from any matter referred to in subparagraphs (i) to (vi).~~

(12) The Financial Secretary may authorize any public officer as a person to whom information may be disclosed under subsection (3)(g)(x).

(13) Any matter published under subsection (6) is not subsidiary legislation.

(14) For the avoidance of doubt, it is hereby declared that subsection (1) does not preclude the disclosure of information under a reprimand under section 187(1)(iii) or 189A(1)(ii)²¹.

(15) In this section -
"companies inspector" (公司審查員), in relation to a place outside Hong Kong, means a person whose functions under the laws of that place include the investigation of the affairs of a corporation carrying on business in that place;

"specified person" (指明人士) means -

- (a) the Commission;
- (b) any person who is or was a member, an employee, or a consultant, agent or adviser, of the Commission; or
- (c) any person who is or was -

²¹ Technical amendment to cover a reprimand against an exempt person (to be retitled as "a registered institution" as proposed at the Bills Committee meeting on 14 September 2001) and its relevant officers, consequential to the latest proposals to align the disciplinary sanctions against licensed persons and **registered institutions**. See Annex to Paper No. CE08/01 issued to Members on 17 July 2001. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

- (i) a person appointed under any of the relevant provisions;
- (ii) a person performing any function under or carrying into effect any of the relevant provisions; or
- (iii) a person assisting any other person in the performance of any function under or in carrying into effect any of the relevant provisions.

367. Avoidance of conflict of interests

(1) Subject to subsection (2), any member of the Commission or any person performing any function under any of the relevant provisions shall not directly or indirectly effect or cause to be effected, on his own account or for the benefit of any other person, a transaction regarding any securities, futures contract, leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme -

- (a) which transaction he knows is or is connected with a transaction or a person that is the subject of any investigation or proceedings by the Commission under any of the relevant provisions or the subject of other proceedings under any provision of this Ordinance; or

(b) which transaction he knows is otherwise being considered by the Commission.

(2) Subsection (1) does not apply to any transaction which a holder of securities effects or causes to be effected by reference to any of his rights as such holder -

- (a) to exchange the securities or convert them to another form of securities;
- (b) to participate in a scheme of arrangement sanctioned by the Court of First Instance under the Companies Ordinance (Cap. 32);
- (c) to subscribe for other securities or dispose of a right to subscribe for other securities;
- (d) to charge or pledge the securities to secure the repayment of money;
- (e) to realize the securities for the purpose of repaying money secured under paragraph (d); or
- (f) to realize the securities in the course of performing a duty imposed by law.

(3) Any member of the Commission or any person performing any function under any of the relevant provisions shall forthwith inform the Commission if, in the course of performing any function under any such provisions, he is required to consider any matter relating to -

- (a) any securities, futures contract, leveraged foreign exchange contract, regulated investment agreement, or an interest in any securities,

futures contract, leveraged foreign exchange contract, collective investment scheme or regulated investment agreement -

- (i) in which he has an interest;
- (ii) in which a corporation, in the shares of which he has an interest, has an interest; or
- (iii) which -
 - (A) in the case of securities, is of or issued by the same issuer, and of the same class, as those in which he has an interest; or
 - (B) in the case of a futures contract, is interests, rights or property based upon securities of or issued by the same issuer, and of the same class, as those in which he has an interest; or

(b) a person -

- (i) by whom he is or was employed;
- (ii) of whom he is or was a client;
- (iii) who is or was his associate; or
- (iv) whom he knows is or was a client of a person with whom he is or was

employed or who is or was his
associate.

(4) A person who, without reasonable excuse, contravenes
subsection (1) or (3) commits an offence and is liable -

(a) on conviction on indictment to a fine of
\$1,000,000 and to imprisonment for 2 years; or

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

368. Immunity

(1) A person shall not incur any civil liability,
whether arising in contract, tort, defamation, equity or
otherwise, in respect of any act done or any omission made by
reason only of -

(a) his performance or purported performance in
good faith of any function (including that
under each of the paragraphs of section 5(1))
under any of the relevant provisions; or

(b) his furtherance or purported furtherance in
good faith of any regulatory objective, or
performance or purported performance in good
faith of any function, pursuant to or
consequent upon any written direction given by
the Chief Executive under section 11.

(2) Nothing in subsection (1) applies to a person
appointed as an auditor under section 149.

(3) A person who complies with a requirement made under any provision of this Ordinance shall not incur any civil liability, whether arising in contract, tort, defamation, equity or otherwise, to any person by reason only of that compliance.

²²(4) Subject to subsection (5), nothing in this Ordinance affects any claims, rights or entitlements which would, apart from this Ordinance, arise on the ground of legal professional privilege.

²²(5) Nothing in subsection (4) affects any requirement under this Ordinance to disclose the name and address of a client of a legal practitioner (whether or not ~~he~~the legal practitioner is qualified in Hong Kong to practise as a counsel or to act as a solicitor). ~~4) . A person who is shall not be required under this Ordinance to disclose any information (other than the name and address of a client) or produce any record or document (whether an original or a copy) which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the Court of First Instance.~~

~~(5) A person who is not a legal practitioner shall not be required under this Ordinance to disclose any information~~

²² The amendments are made in response to suggestions of the Bills Committee that subclauses (4) and (5) can be refined to better reflect the legal professional privilege. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

~~or produce any record or document (whether an original or a copy) if the requirement to do so would not apply in the case of a legal practitioner by virtue of subsection (4).~~

369. Immunity in respect of communication with Commission by auditors of listed corporations, etc.

(1) Without prejudice to section 368, a person who is or was an auditor of a ~~listed corporation~~corporation which is listed²³, or of any associated corporation of ~~the a listed corporation~~corporation²³, shall not incur any civil liability, whether arising in contract, tort, defamation, equity or otherwise, by reason only of his communicating in good faith to the Commission any information or opinion on a matter of which he becomes or became aware in his capacity as such auditor, being a matter which in his opinion suggests -

(a) that at any time since the formation of the corporation²³ ~~the business of the listed~~²⁴ ~~corporation is being or~~²⁴ has been conducted -

- (i) with intent to defraud its creditors, or the creditors of any other person;
- (ii) for any fraudulent or unlawful purpose; or

²³ Consistent with the latest changes to clause 172 in Part VIII, the amendment seeks to clarify the coverage of the immunity provided to an auditor of a listed corporation (or its associated corporations). It expressly provides that the relevant matters communicated to the SFC may occur prior to the listing of the corporation, as long as the corporation is subsequently listed.

²⁴ The deleted words are no longer necessary with the amendment described in Footnote 23 above.

- (iii) in a manner oppressive to its members
or any part of its members;
- (b) that the ~~listed~~²⁴ corporation was formed for any fraudulent or unlawful purpose;
- (c) that persons concerned in the process by which the ~~listed~~²⁴ corporation became listed (including that for making the securities of the corporation available to the public in the course of such process) have engaged, in relation to such process, in defalcation, fraud, misfeasance or other misconduct;
- (d) that at any time since the formation of the corporation²³ persons involved in the management of the affairs of the ~~listed~~²⁴ corporation ~~are or~~²⁴ have engaged, in relation to such management, in defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members; or
- (e) that at any time since the formation of the corporation²³ members of the ~~listed~~²⁴ corporation or any part of its members have not been given all the information with respect to its affairs that they might reasonably expect.

(2) In addition to applying to a person who is or was an auditor of a ~~listed corporation~~corporation which is listed²⁵, or of any associated corporation of ~~the a listed corporation~~corporation²⁵, subsection (1) also applies to -

(a) a person who is or was an auditor of a corporation ~~that~~which²⁵ was formerly ~~a listed corporation~~listed²⁵, or of any associated corporation of that corporation, in which case a reference to matter in that subsection shall be construed on the basis that -

²⁵(i) it includes any matter occurring at any time whether before or after ~~the first mentioned corporation was a listed corporation; and~~first referred to in this paragraph ceased to remain listed;

²⁵(ii) the circumstances required to be suggested by the matter under ~~paragraphs (a), (b) and (c), (d) or (e)~~(a), (b), (c), (d) or (e) of that subsection relate, instead of to the ~~listed~~ corporation referred to in ~~those~~

²⁵ **In line with the amendment to clause 369(1), clause 369(2) is similarly amended to clarify the scope of the immunity provided to an auditor of a corporation (or its associated corporations or its formerly associated corporations). It expressly provides for the time at which the relevant matters communicated to the SFC should occur, despite that the corporation has ceased to remain listed.**

~~paragraphs~~such paragraph, to the corporation first referred to in this paragraph; and

²⁵(iii) the circumstances required to be suggested by the matter under paragraph (a), (d) or (e) of that subsection occurred at any time since the formation of the corporation but before the corporation first-mentioned corporation when it was a listed corporation ceased to remain listed; and

(b) a person who is or was an auditor of a corporation ~~that~~which²⁵ was formerly an associated corporation of a ~~listed corporation~~corporation which is listed²⁵, in which case a reference to matter in that subsection shall be construed on the basis that -

²⁵(i) it includes any matter occurring at any time whether before or after the ~~first-mentioned~~ corporation was first referred to in this paragraph ceased to remain an associated corporation of the

corporation which is listed

~~corporation;~~ and

- ²⁵(ii) the circumstances required to be suggested by the matter under ~~paragraphs (a), (b) and (c)~~ (a), (b), (c), (d) or (e) of that subsection relate, instead of to the ~~listed~~ corporation referred to in ~~those paragraphs~~ such paragraph, to the ~~listed~~ corporation of which the ~~first~~ mentioned corporation first referred to in this paragraph was formerly an associated corporation.

(3) The application of subsection (1) to any person (whether with or without reference to subsection (2)) is not affected by the fact that the person has, before communicating in the manner described in subsection (1) any information or opinion to which subsection (1) applies (whether with or without reference to subsection (2)), previously communicated such information or opinion to any other person.

(4) Without prejudice to subsection (1), where a person communicates in the manner described in that subsection any information or opinion to which that subsection applies (whether with or without reference to subsection (2)), he shall at the same time communicate the information or opinion to -

- (a) where the corporation of which he is or was an auditor is or was an insurer authorized under the Insurance Companies Ordinance (Cap. 41), the Insurance Authority; or
- (b) where the corporation of which he is or was an auditor is or was an authorized financial institution, the Monetary Authority.

(5) In this section -

"associated corporation" (相聯法團), in relation to a ~~listed~~²⁶ corporation, means -

- (a) a subsidiary of that ~~listed~~²⁶ corporation;
- (b) a corporation in which that ~~listed~~²⁶ corporation has an interest (whether held by that ~~listed~~²⁶ corporation directly or indirectly through any other corporation or corporations), which is properly accounted for by that ~~listed~~²⁶ corporation in its accounts using the method generally known as equity accounting; or
- (c) a corporation a substantial shareholder of which is also a substantial shareholder of that ~~listed~~²⁶ corporation;

"auditor" (核數師), in relation to a corporation, means -

²⁶ The deleted words are no longer necessary with the amendments to clauses 369(1) and (2).

- (a) a person appointed to be an auditor of the corporation for the purposes of any Ordinance, or otherwise for the purposes of auditing the accounts of the corporation (irrespective of whether such person is qualified for the appointment under the Professional Accountants Ordinance (Cap. 50) or is otherwise qualified for the appointment); or
- (b) a person appointed to be an auditor of the corporation for the purposes of any enactment of a place outside Hong Kong which imposes on such person responsibilities comparable to those imposed on an auditor by the Companies Ordinance (Cap. 32).

Division 2 - General provisions regarding proceedings and offences

370. Obstruction

(1) A person who, without reasonable excuse²⁷, obstructs any ~~other~~ specified²⁷ person in the performance of a function under or in carrying into effect any provision of this Ordinance commits an offence and is liable -

²⁷ Following the suggestion of the Bills Committee, we have restricted the scope of the provision to "specified person", and included a safeguard for the defendant by adding "reasonable excuse". Members considered the amendments and did not propose further changes at the Bills Committee meeting on 8 October 2001.

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

²⁷(2) In this section, "specified person" (指明人士) means -

- (a) the Commission;
- (b) any member, employee, or consultant, agent or adviser, of the Commission; or
- (c) any person appointed to investigate any matter under section 175(1).

371. False or misleading representations in applications to Commission

- (1) A person commits an offence if -
 - (a) he, in support of any application made to the Commission under or pursuant to any provision of this Ordinance, whether for himself or for another person, makes a representation, whether in writing, orally or otherwise, that is false or misleading in a material particular; and
 - (b) he knows that, or is reckless as to whether, the representation is false or misleading in a material particular.

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

(3) In this section, "representation" (陳述) means a representation or statement -

- (a) of a matter of fact, either present or past;
- (b) about a future event; or
- (c) about an existing intention, opinion, belief, knowledge or other state of mind.

372. Provision of false or misleading information

(1) Subject to subsection (2), a person commits an offence if -

- (a) he, in purported compliance with a requirement to provide information imposed by or under any of the relevant provisions, provides to a specified recipient any information which is false or misleading in a material particular; and
- (b) he knows that, or is reckless as to whether, the information is false or misleading in a material particular.

(2) Subsection (1) does not apply to the provision of information which is false or misleading in a material particular if the provision of such information is purported

compliance with a requirement imposed by or under any of the relevant provisions would, apart from subsection (1), also constitute an offence under any of the relevant provisions.

(3) Subject to subsection (4), a person commits an offence if -

- (a) ~~he, in circumstances other than those that would constitute an offence under subsection (1), provides to a specified recipient, otherwise than in purported compliance with a requirement to provide information imposed by or under any of the relevant provisions but~~ in connection with the performance by a specified recipient ~~the specified recipient~~ of a function under any of the relevant provisions, provides to the specified recipient any record or document which is false or misleading in a material particular; and
- (b) he -
- (i) knows that, or is reckless as to whether, the record or document is false or misleading in a material particular; and

²⁸ In the light of the comments made by some Members at the Bills Committee meeting on 8 October 2001, we have clarified the circumstances in which a person commits the offence.

(ii) has, in relation to the provision of the record or document, received prior written warning from the specified recipient to the effect that the provision of any record or document which is false or misleading in a material particular in the circumstances of the case would constitute an offence under this subsection.

(4) Subject to subsection (5), no person shall be convicted of an offence under subsection (3) unless the prosecution proves that -

- (a) the specified recipient to which the record or document in question has been provided has reasonably relied on the record or document; or
- (b) the person intended that the specified recipient would rely on the record or document.

(5) Nothing in subsection (4)(a) requires it to be proved that the specified recipient who has reasonably relied on any record or document ~~was~~²⁹ -

- (a) was²⁹ misled;
- (b) suffered any detriment; or

²⁹ Technical amendment to improve drafting. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

(c) incurred any loss,
as a result of such reliance.

(6) 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 2 years; or
- (b) on summary conviction to a fine at level 6 and
to imprisonment for 1 year.

(7) A person who commits an offence under subsection (3)
is liable -

- (a) on conviction on indictment to a fine of
\$500,000 and to imprisonment for 6 months; or
- (b) on summary conviction to a fine at level 5 and
to imprisonment for 6 months.

(8) In this section, "specified recipient" (指明收受者)
means -

- (a) the Commission;
- (b) a recognized exchange company;
- (c) a recognized clearing house; or
- (d) a recognized exchange controller.

373. Power of Commission to intervene in proceedings

(1) Where -

- (a) there are any judicial or other proceedings
(other than criminal proceedings) which concern
a matter provided for in any of the relevant

provisions, or in which the Commission has an interest by virtue of its functions under any of the relevant provisions; and

(b) the Commission is satisfied that it is in the public interest for the Commission to intervene and be heard in the proceedings,

the Commission, after consultation with the Financial Secretary, may, by an application made in accordance with subsection (2) to the court hearing or otherwise having competent authority to hear the proceedings, apply to intervene and be heard in the proceedings.

(2) An application made for the purposes of subsection (1) shall be -

(a) made in writing; and

(b) supported by an affidavit showing that the conditions set out in subsection (1)(a) and (b) are satisfied.

(3) A copy of the application made for the purposes of subsection (1) shall be served on each of the parties to the proceedings to which the application relates as soon as reasonably practicable after the application is made.

(4) Subject to subsection (5), the court to which an application is made for the purposes of subsection (1) may by order -

(a) allow the application, subject to such terms as it considers just; or

(b) refuse the application.

(5) The court to which an application is made for the purposes of subsection (1) shall not make an order pursuant to subsection (4)(a) or (b) without first giving the Commission, and each of the parties to the proceedings to which the application relates, a reasonable opportunity of being heard.

(6) Where an application made for the purposes of subsection (1) is allowed under subsection (4)(a), the Commission, subject to the terms referred to in subsection (4)(a) -

(a) may intervene and be heard in the proceedings to which the application relates; and

(b) shall be regarded for all purposes as a party to the proceedings and shall have the rights, duties and liabilities of such a party.

(7) Nothing in this section prejudices Order 15, rule 6 of the Rules of the High Court (Cap. 4 sub. leg.).

(8) In this section, "court" (法院) includes a magistrate and a tribunal, other than the Market Misconduct Tribunal and the Securities and Futures Appeals Tribunal.

374. Proceedings not to be stayed

(1) The existence of any judicial or other proceedings, or circumstances that disclose the commission of an offence, shall not by itself constitute justification for any other

proceedings or action under this Ordinance being stayed or deferred.

(2) For the avoidance of doubt, nothing in subsection (1) =

³⁰(a) affects any other law requiring or providing for a stay of any proceedings or action under this Ordinance;

(b) prevents a court of competent jurisdiction from ordering that any proceedings or action under this Ordinance shall be stayed or deferred.

375. Standard of proof

Where it is necessary for ~~a court or~~³¹ the Commission to establish or to be satisfied, for the purposes of any of the relevant provisions (other than provisions relating to criminal proceedings or to an offence), that -

(a) a person has contravened -

(i) any provision of any Ordinance;

³⁰ This amendment is introduced to clarify the preservation of the common law position regarding the granting of a stay of proceedings. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

³¹ In the light of the comments made by the Assistant Legal Adviser of the Legislative Council at the Bills Committee meeting on 8 October 2001, we have clarified that the standard of proof in this provision applies only to the SFC. The application to "a court" is otiose. We have also made some technical amendments for clarity.

- (ii) any notice or requirement given or made under or pursuant to any provision of any Ordinance;
 - (iii) any of the terms and conditions of any³² licence or ~~an exemption~~ registration⁶ under this Ordinance; or
 - (iv) any other condition imposed under or pursuant to any provision of this Ordinance;
- (b) a person has been responsible for an unlawful act or omission;
 - (c) a person has assisted, counselled, procured or induced any other person to do anything which results in the occurrence of any of the matters referred to in paragraph (a) or (b);
 - (d) a person has been concerned in, or a party to, anything which results in the occurrence of any of the matters referred to in paragraph (a) or (b);
 - (e) a person has attempted, or conspired with any other person, to commit anything which results in the occurrence of any of the matters referred to in paragraph (a) or (b); or

³² Minor technical amendment for clarity.

(f) any of the matters referred to in paragraphs (a) to (e) might occur, it is, ~~except as otherwise provided in any of the relevant provisions,~~³¹ sufficient for the ~~court or the~~³¹ Commission ~~(as the case may be)~~³¹ to establish, or to be satisfied as to, the matter referred to in paragraph (a), (b), (c), (d), (e) or (f) (as the case may be) on the balance of probabilities standard of proof applicable to civil proceedings in a court of law³³.

376. Prosecution of certain offences by Commission

(1) An offence under any of the relevant provisions, and an offence of conspiracy to commit such an offence, may be prosecuted by the Commission in its own name but, where under this subsection the Commission prosecutes an offence, the offence shall be tried before a magistrate as an offence which is triable summarily.

(2) For, and only for, the purpose of the prosecution of an offence referred to in subsection (1), an employee of the Commission who apart from this subsection is not qualified to practise as a barrister or to act as a solicitor under the Legal Practitioners Ordinance (Cap. 159) may appear and plead before a magistrate any case of which he has charge and shall,

³³ In response to comments of the Bills Committee on clause 212(4) of Part XI of the Bill, the amendment is made to clarify that the applicable standard of proof is the same as that which would be adopted in civil proceedings. It is modelled on clause 244(7) of Part XIII. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

in relation to the prosecution, have all the other rights of a person qualified to practise as a barrister or to act as a solicitor under that Ordinance.

(3) Nothing in this section derogates from the powers of the Secretary for Justice in respect of the prosecution of criminal offences.

377. Limitation on commencement of proceedings

(1) Notwithstanding section 26 of the Magistrates Ordinance (Cap. 227), any information or complaint relating to an offence under this Ordinance, other than an indictable offence, may be tried if it is laid or made (as the case may be) at any time within 3 years after the commission of the offence.

(2) Nothing in section 376(1) affects or limits the meaning of indictable offence referred to in subsection (1).

378. Liability of officers of corporations for offences by corporations, and of partners for offences by other partners

(1) Where the commission of an offence under this Ordinance by a corporation is proved to have been aided, abetted, counselled, procured or induced by, or committed with the consent or connivance of, or attributable to any recklessness on the part of, any officer of the corporation, or any person who was purporting to act in any such capacity, that person, as well as the corporation, is guilty of the

offence and is liable to be proceeded against and punished accordingly.

(2) Where the commission of an offence under this Ordinance by a partner in a partnership is proved to have been aided, abetted, counselled, procured or induced by, or committed with the consent or connivance of, or attributable to any recklessness on the part of, any other partner of the partnership, that other partner, as well as the first-mentioned partner, is guilty of the offence and is liable to be proceeded against and punished accordingly.

³⁴ **378A. Civil liability for false or misleading public communications concerning securities and futures contracts**

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

(a) a person is responsible for a relevant communication being made or issued to the public, or to a group of persons comprising members of the public (including the shareholders of a listed corporation or the holders of listed securities);

(b) the relevant communication concerns securities or futures contracts, or may affect the price

³⁴ **As we mentioned at the Bills Committee meeting on 14 September 2001, clause 208 in the Blue Bill has been relocated to clause 378A of Part XVI. We have prepared a note in response to major comments made by Members at previous meetings. See the Annex.**

of securities or the price for dealings³⁵ in
futures contracts;

(c) the relevant communication is false or
misleading in a material particular; and

(d) the person knows that, or is reckless or
negligent as to whether, the relevant
communication is false or misleading in a
material particular.

that person shall, ~~apart from any other liability he may incur~~
whether or not he also incurs any other liability³⁶, be liable
to pay compensation by way of damages to any other person for
any pecuniary loss sustained by the other person as a result
of his acting, or refraining from acting in a manner in which
he would otherwise have acted, in reliance on the relevant
communication.

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

(a) any person making or issuing it; and

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

³⁵ The words “the price for dealings” are added for consistency with clause 266 in Part XIII where a similar reference is found.

³⁶ Technical amendment for consistency with other civil liability clauses in the Bill (e.g. clause 272 in Part XIII).

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

(a) he has assumed responsibility with respect to the other person in connection with the relevant communication; or

(b) it is fair, just and reasonable in the circumstances of the case that he should be so liable.

³⁷(4) No person shall be liable to pay compensation under subsection (1) to any other person by reason only of the issue or reproduction of a relevant communication if -

(a) the issue or reproduction of the relevant communication took place in the ordinary course of a business (whether or not carried on by him), the principal purpose of which was issuing or reproducing materials provided by others;

(b) the contents of the relevant communication were not, wholly or partly, devised -

³⁷ **The new subclauses (4) to (6) have replaced clauses 208(4) to (6) in the Blue Bill. They are adopted from similar conduit defences in Parts XIII and XIV and make clear that such defences apply both to a firm and people acting for that firm, with necessary modifications.**

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

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

(c) for the purposes of the issue or reproduction -

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

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

did not select, add to, modify or otherwise exercise control over the contents of the relevant communication; and

(d) at the time of the issue or reproduction, he did not know that the relevant communication was false or misleading in a material particular.

³⁷(5) No person shall be liable to pay compensation under subsection (1) to any other person by reason only of the re-transmission of a relevant communication if -

(a) the re-transmission of the relevant communication took place in the ordinary course of a business (whether or not carried on by him), the normal conduct of which involved the re-transmission of information to other persons

within an information system or from one information system to another information system (wherever situated), whether directly or by facilitating the establishment of links between such other persons and third parties;

(b) the contents of the relevant communication were not, wholly or partly, devised -

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

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

(c) for the purposes of the re-transmission -

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

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

did not select, add to, modify or otherwise exercise control over the contents of the relevant communication;

(d) the re-transmission of the relevant communication was accompanied by a message to the effect, or was effected following acknowledgment by the persons to whom it was re-transmitted of their understanding, that -

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

(ii) where the business was not carried on by him, the person who carried on the business or any officer, employee or agent of that person,

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

(e) at the time of the re-transmission -

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

(ii) he knew that the relevant communication was false or misleading in a material particular, but -

(A) where the business was carried on by him, in the circumstances of the case he could not reasonably be expected to prevent the re-transmission; or

(B) where the business was not carried on by him, in the circumstances of the case he has taken all reasonable steps to

bring the fact that the relevant communication was so false or misleading to the attention of a person in a position to take steps to cause the re-transmission to be prevented (even if the re-transmission in fact took place).

³⁷(6) No person shall be liable to pay compensation under subsection (1) to any other person by reason only of the live broadcast of a relevant communication if -

(a) the broadcast of the relevant communication took place in the ordinary course of the business of a broadcaster (whether or not he was such broadcaster);

(b) the contents of the relevant communication were not, wholly or partly, devised -

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

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

(c) for the purposes of the broadcast -

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

(ii) where he was not the broadcaster, he, did not select, add to, modify or otherwise exercise control over the contents of the relevant communication;

(d) in relation to the broadcast -

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

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

acted in accordance with the terms and conditions of the licence (if any) by which he or the broadcaster (as the case may be) became entitled to broadcast as a broadcaster and with any code of practice or guidelines (however described) issued under or pursuant to the Telecommunications Ordinance (Cap. 106) or the Broadcasting Ordinance (48 of 2000) and applicable to him or the broadcaster (as the case may be) as a broadcaster; and

(e) at the time of the broadcast -

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

(ii) he knew that the relevant communication was false or misleading in a material particular, but -

(A) where he was the broadcaster, in the circumstances of the case he could not reasonably be expected to prevent the broadcast; or

(B) where he was not the broadcaster, in the circumstances of the case he has taken all reasonable steps to bring the fact that the relevant communication was so false or misleading to the attention of a person in a position to take steps to cause the broadcast to be prevented (even if the broadcast in fact took place).

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

~~(a) the first mentioned person carried on a business the principal purpose of which was to provide the service of issuing or reproducing materials provided to him by others;~~

- ~~(b) the relevant communication was issued or reproduced by him in the ordinary course of that business;~~
- ~~(c) the contents of the relevant communication were wholly devised by a customer of his or by a person acting on behalf of a customer of his;~~
- ~~(d) the nature of the service which he provided in relation to the relevant communication was such that he did not select, modify or otherwise exercise control over the contents of the relevant communication prior to its issue or reproduction; and~~
- ~~(e) at the time he issued or reproduced the relevant communication he did not know that it was false or misleading in a material particular.~~

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

- ~~(a) he carried on a business the normal conduct of which involved the re transmission of information to other persons within an information system or from one information system to another information system (wherever~~

~~situated), whether directly or by facilitating the establishment of links between such other persons and third parties;~~

~~(b) the relevant communication was re-transmitted by him to other persons in the ordinary course of such re-transmission of information;~~

~~(c) the contents of the relevant communication were devised by another person and he did not modify or otherwise exercise control over its contents prior to its re-transmission;~~

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

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

~~_____ (ii) was effected following acknowledgment by the persons to whom it was re-transmitted of their understanding, that he did not devise the contents of the relevant communication and that he neither took responsibility for it nor endorsed its accuracy; and~~

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

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

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

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

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

~~(b) the relevant communication was broadcast live by him as a broadcaster;~~

~~(c) he did not modify the contents of the relevant communication prior to its broadcast;~~

~~(d) he has, in relation to the broadcast, acted in accordance with the terms and conditions of the licence (if any) by which he became entitled to broadcast and with any code of practice or guidelines (however described) issued under or pursuant to the Telecommunications Ordinance (Cap. 106) or the Broadcasting Ordinance (48 of 2000) and applicable to him as a broadcaster; and~~

~~(e) at the time of the broadcast—~~

~~(i) he did not know that the relevant communication was false or misleading in a material particular; or~~

~~(ii) he knew that the relevant communication was false or misleading in a material particular, but in the circumstances of the case he could not reasonably be expected to prevent the broadcast.~~

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

(a) that he only participated in, or approved, the making or issuing of a part of the relevant communication and that the part was not false or misleading in a material particular; or

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

(8) For the avoidance of doubt, where a court has jurisdiction to determine an action brought under subsection (1), it may, where it is, apart from this section, within its

jurisdiction to **entertain an application for an ~~de se~~**
injunction³⁸, grant an injunction in addition to, or in
substitution for, damages, on such terms and conditions as it
considers appropriate.

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

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

(11) In this section -
"issue" (發出), in relation to any material (including any
relevant communication), includes publishing,
circulating, distributing or otherwise disseminating the
material or the contents thereof³⁹, whether -

- (a) by any visit in person;
- (b) in a newspaper, magazine, journal or other
publication;
- (c) by the display of posters or notices;
- (d) by means of circulars, brochures, pamphlets or
handbills;

³⁸ Technical amendment for greater clarity.

³⁹ Technical amendment for consistency with similar definition of "issue" (e.g. clause 101).

- (e) by an exhibition of photographs or cinematograph films;
- (f) by way of sound or television broadcasting;
- (g) by ~~computer~~ **any information system**⁴⁰ or other electronic device; or
- (h) by any other means, whether mechanically, electronically, magnetically, optically, manually or by any other medium, or by way of production or transmission of light, image or sound or any other medium.

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

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

Division 3 - Power to make rules, and codes or guidelines, etc.

379. Financial Secretary to prescribe interests, etc. as securities and futures contracts

(1) For the purposes of this Ordinance, the Financial Secretary may by notice published in the Gazette prescribe, either generally or in a particular case, that -

⁴⁰ The replacement of "computer" with "information system" is proposed in the light of technological development. As a general exercise, the Administration will propose similar changes to other legislation as opportunities arise.

- (a) any interests, rights or property, whether in the form of an instrument or otherwise, or any class or description of any such interests, rights or property, is to be regarded as securities or futures contracts;
- (b) any interests, rights or property, whether in the form of an instrument or otherwise, or any class or description of any such interests, rights or property, is not to be regarded as securities or futures contracts.

(2) Without limiting the generality of subsection (1), a notice under that subsection may prescribe the circumstances under which or the purposes for which any interests, rights or property, or any class or description of interests, rights or property, referred to in the notice is to be regarded, or not to be regarded, as securities or futures contracts (as the case may be).

380. Financial Secretary to prescribe arrangements as collective investment schemes

(1) For the purposes of this Ordinance, the Financial Secretary may by notice published in the Gazette prescribe, either generally or in a particular case, that -

- (a) any arrangements, or any class or description of arrangements, is to be regarded as

collective investment schemes, where the arrangements -

(i) are made available in the course of business and have the purpose or effect, or pretended purpose or effect, of enabling the participating persons -

(A) to acquire any right, interest, title or benefit in any property for valuable consideration;

(B) to defer taking possession of the property; and

(C) to transfer or retransfer any right, interest, title or benefit in the property to a person who is a party to, or is referred to in, the arrangements; or

(ii) have the purpose or effect, or pretended purpose or effect, of enabling the participating persons, whether by acquiring any right, interest, title or benefit in any property or any part of the property or otherwise, to participate in or receive -

(A) profits, income or other returns represented to arise or to be likely to arise from the acquisition, holding, management or disposal of the property or any part of the property, or sums represented to be paid or to be likely to be paid out of any such profits, income or other returns; or

(B) a payment or other returns arising from the acquisition, holding or disposal of, the exercise of any right in, the redemption of, or the expiry of, any right, interest, title or benefit in the property or any part of the property;

(b) any arrangements, or any class or description of arrangements, is not to be regarded as collective investment schemes.

(2) Without limiting the generality of subsection (1), a notice under that subsection may prescribe the circumstances under which or the purposes for which any arrangements, or any class or description of arrangements, referred to in the

notice is to be regarded, or not to be regarded, as collective investment schemes.

381. Orders by Chief Executive in Council for levies

(1) A levy (if any) at the rate specified by the Chief Executive in Council by order published in the Gazette shall be payable to the Commission by the person or persons so specified by the Chief Executive in Council for -

- (a) every sale and purchase of any securities which is recorded on a recognized stock market or notified to a recognized exchange company under its rules;
- (b) every sale and purchase of any futures contract traded on a recognized futures market; and
- (c) every sale and purchase of any securities or futures contracts traded by means of authorized automated trading services.

(2) For the purposes of subsection (1), the Chief Executive in Council may -

- (a) specify the rate or amount of the levy payable under that subsection for any sale and purchase -
 - (i) as a percentage of the consideration for the sale and purchase;
 - (ii) as a fixed amount;

(iii) as a nil rate, nil percentage or nil amount; or

(iv) as to be calculated in any other manner specified in the order;

(b) specify different rates for different classes of securities or futures contracts.

(3) ~~Subject to subsection (4), e~~⁴¹Each recognized exchange company, and each person authorized to provide authorized automated trading services, shall collect, account for, and pay to the Commission, the levy (if any) payable under subsection (1).

~~⁴¹(4) A recognized exchange company shall retain such proportion of the levy (if any) collected under subsection (3) as is specified by the Chief Executive in Council by order published in the Gazette.~~

(5) The Commission may recover the amount of any levy payable under this section as a civil debt due to it.

(6) The Chief Executive in Council may make rules for -

(a) the payment of levies under this section;

⁴¹ The Revenue (Amendment)(No.3) Ordinance, which came into effect on 1 September 2001, provides that the Stock Exchange of Hong Kong (SEHK) would not be entitled to receive any statutory levy, as it is now a subsidiary of the Hong Kong Exchanges and Clearing Ltd, which is a commercial entity. The statutory levy originally received by the SEHK is now replaced by a new trading fee charged on market users. Consequential amendments of a technical nature are made in clauses 381(3) and 381(6)(c). **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

- (b) the imposition of charges or penalties for late payment of such levies;
- (c) the keeping, examination and audit of the accounts of recognized exchange companies, and of persons authorized to provide authorized automated trading services, relating to the collection, ~~retention,~~⁴² and payment to the Commission~~r~~ of such levies.

(7) Nothing in subsection (1) requires the Chief Executive in Council to specify a rate or amount of levy in any particular sale and purchase to which that subsection applies or in any particular class of sales and purchases to which that subsection applies.

**382. Rules by Chief Executive in Council
for payment of fees**

(1) The Chief Executive in Council may, after consultation with the Commission, make rules to -

- (a) require and provide for the payment to the Commission of, and prescribe, fees -

- (i) for an application to the Commission under or pursuant to any of the relevant provisions;

⁴² Technical amendment consequential to the amendment described in Footnote 41. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

- (ii) for anything done by the Commission or a committee established under section 8 in the performance of a function relating to takeovers and mergers or to share repurchases;
 - (iii) for anything done by the Commission or a committee established under section 8 or the Monetary Authority in the performance of a function under any of the relevant provisions (other than the function referred to in subparagraph (ii));
 - (iv) for any other matter with regard to which provision is made by or under any of the relevant provisions;
- (b) provide for the payment to the Commission of, and prescribe, fees (however described) which this Ordinance provides are, or may be, prescribed, specified or provided for by rules made under this section.

(2) Without prejudice to subsection (3), fees prescribed by rules made under this section may be fixed at levels sufficient to recover expenditure incurred, or likely to be incurred, by the Commission or a committee established under section 8 or the Monetary Authority in providing the services or performing the functions to which the fees relate, but in

fixing the level of the fees appropriations under section 14 shall not be taken into account.

(3) Fees prescribed by rules made under this section shall not be limited by reference to the amount of the administrative or other costs incurred, or likely to be incurred, by the Commission or a committee established under section 8 or the Monetary Authority in providing the services or performing the functions to which the fees relate.

(4) Rules made under this section may provide -

- (a) that the amount of any fee shall be fixed by reference to a scale set out in the rules;
- (b) for the payment of different fees by or in relation to persons or cases of different classes or descriptions;
- (c) that the payment of any fee shall be waived, either generally or in a particular case, whether or not it is otherwise specified as being payable under any provision of this Ordinance;
- (d) for the payment of fees annually or at other intervals.

(5) The Commission may pay to the Monetary Authority such of the fees paid to it in accordance with the rules made under this section that in the opinion of the Commission represent the expenditure or costs incurred, or likely to be

incurred, by the Monetary Authority in providing the services or performing the functions to which the fees relate.

(6) The Commission may recover the amount of any fees payable under the rules made under this section as a civil debt due to it.

(7) This section is in addition to and not in derogation of sections 29 and 29A of the Interpretation and General Clauses Ordinance (Cap. 1).

383. Reduction of levy

(1) If during a financial year of the Commission -

(a) the reserves of the Commission, after deducting depreciation and all provisions, are more than twice its estimated operating expenses for the financial year; and

(b) the Commission has no outstanding borrowings, the Commission shall consult the Financial Secretary with a view to recommending to the Chief Executive in Council that the rate or amount of a levy be reduced under section 381.

(2) The Commission may, after consultation with the Financial Secretary under subsection (1), recommend to the Chief Executive in Council that the rate or amount of a levy be reduced under section 381.

⁴³**384. Rules by Commission**

- (1) The Commission may make rules to -
- (a) provide for applications for licences ~~and exemptions and registration~~⁶, the issue of licences and ~~exemptions~~ certificates of registration⁴⁴, and incidental matters;
 - (b) require the display of licences and ~~exemptions~~ certificates of registration⁴⁴ in the specified manner and circumstances and at specified places, and require that licences and ~~exemptions~~ certificates of registration⁴⁴ are in specified circumstances, other than those specified in any provision of this Ordinance, to be returned to the Commission for any specified purpose;
 - (c) require intermediaries to carry on business in relation to a specified class of persons, and in the specified manner and circumstances;
 - (d) prescribe the qualifications, experience and training required of any persons employed or engaged by intermediaries, and provide for the obligations imposed on the persons and the

⁴³ Unless explained in footnotes in bold type, all proposed amendments to this clause were submitted to Members in October 2001 vide paper No. CE14/01.

⁴⁴ Technical amendments consequential to amendments from "exempt person" to "registered institution", and amendments to clause 118 to refer to the grant of a "certificate of registration" (instead of a "declaration of exemption").

intermediaries in relation to such requirements, the examinations that applicants for ~~licences or exemptions~~ or registration⁶ are required to take, and the circumstances in which they may be exempted from such requirements;

- (e) provide for the correction of errors in the register maintained by the Commission under section 133;
- (f) provide for the admissibility in evidence in judicial or other proceedings of specified records, and extracts from specified records, kept by the Commission;
- (g) require documents and information required to be lodged, filed, submitted or retained for the purposes of any provision of this Ordinance to be so lodged, filed, submitted or retained in the specified manner, whether by electronic or other means;
- (h) require documents and information lodged, filed, submitted or retained for the purposes of any provision of this Ordinance in any specified manner to be completed, signed, executed and authenticated in the specified form and manner;

- (i) specify whether, when and the circumstances in which records compiled in any specified form or manner, or documents or information completed, signed, executed or authenticated in any specified form or manner, are acceptable or required for the purposes of any provision of this Ordinance;
- (j) require the payment of remuneration to any auditor appointed, and the costs of an audit carried out, under any provision of this Ordinance, and provide for matters relating to such remuneration and costs;
- (k) require a person of a specified description, when selling securities at or through a recognized stock market where his right to vest the securities in the purchaser (or, where he is acting as agent, his principal's right to do so) is derived from an arrangement of a specified kind, to notify the exchange participant through whom the sale is being effected of the fact that the right to vest the securities in the purchaser is derived from such an arrangement, and require the person who, having sold such securities pursuant to such an arrangement, purchases securities at or through a recognized stock market in

satisfaction, in whole or in part, of his obligations under the arrangement to notify the exchange participant through whom the purchase or purchases is or are being effected of that fact;

- (l) require a lender under a securities borrowing and lending agreement to -
 - (i) keep specified records or documents in the specified form and manner; and
 - (ii) give copies of such records or documents to the Commission at its request in the specified form and manner and within the specified time;
- (m) require intermediaries to make returns at specified times (whether at regular intervals or otherwise) to the Commission, and provide for the particulars, or the nature of particulars, to be contained therein, the person by whom, and the manner and circumstances in which they are to be made, and other matters related to such returns;
- (n) require a form or return required to be submitted under any provision of this Ordinance to be received by the Commission by or within the specified time;

- (o) prescribe, specify or provide for any matter which this Ordinance provides is, or may be, prescribed, specified or provided for by rules made under this section;
- (p) provide for any other matters for the better carrying out of the objects and purposes of this Ordinance.

(2) ~~Subject to subsections (3) and (4),~~⁴⁵In addition to the power to make rules under subsection (1), the Commission may, after consultation with the Financial Secretary, make such other rules as are necessary for the furtherance of any of its regulatory objectives and the performance of any of its functions.

~~⁴⁵(3) Where the Commission proposes to make rules under subsection (2), it shall, before consulting the Financial Secretary for the purpose, prepare and publish a draft of the rules, in such manner as it considers appropriate, for the purpose of inviting representations on the rules by the public.~~

~~⁴⁵(4) After a draft of the rules which the Commission proposes to make under subsection (2) is published under subsection (3), the Commission may modify the rules, taking into consideration any representation on the rules received as a~~

⁴⁵ Subject to Members' view on the proposed public consultation requirements under new clause 384A, we propose to delete clauses 384(3) and (4). See Footnote 49 below.

~~result of the publication, in such manner as it considers appropriate, for the purpose of having the rules made under subsection (2).~~

(5) Notwithstanding anything in this section -

(a) the power of the Commission to make rules under this section in respect of any persons as intermediaries shall, where the intermediaries are ~~exempt persons~~ registered institutions⁶, be regarded as the power to make rules in respect of the intermediaries only in relation to the businesses which constitute ~~them~~⁴⁶ regulated activities for which they are ~~exempt as exempt persons~~ registered⁶;

(b) the power of the Commission to make rules under this section in respect of any persons as associated entities shall, where the associated entities are authorized financial institutions, be regarded as the power to make rules in respect of the associated entities only in relation to their businesses of receiving or holding client assets of intermediaries of which they are associated entities.

(6) For the avoidance of doubt, the powers of the Commission to make rules under this section are in addition to

⁴⁶ Technical amendment for greater clarity.

and not in derogation of any other power of the Commission to make rules under any provision of this or any other Ordinance.

~~⁴⁷(7) Notwithstanding any other provisions of this Ordinance, the Commission shall consult the Monetary Authority regarding rules it proposes to make under this section or any other provision of this Ordinance in so far as such rules apply to authorized financial institutions by reason of their being exempt persons, or associated entities of intermediaries.~~

~~(8) Where rules are made by the Commission under this section or any other provision of this Ordinance and it has not been provided in this Ordinance that the rules may provide that a contravention of any specified provision of the rules constitutes an offence, the Chief Executive in Council may make regulations to provide that a person who contravenes any specified provision of the rules that applies to him commits an offence and is liable to a specified penalty not exceeding—~~

~~(a) on conviction on indictment a fine of \$500,000 and a term of imprisonment of 2 years;~~

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

⁴⁷ Clauses 384(7) to (10) in the Blue Bill are relocated to the new clauses 384A(4) and (6) - (8) for greater consistency.

~~(9) Except as otherwise provided in this Ordinance, rules made by the Commission under this section or any other provision of this Ordinance may provide that, subject to the terms and conditions specified in the rules, the provisions of this Ordinance specified in the rules—~~

~~(a) shall not have effect, or shall only have effect to a specified extent, in relation to any specified person or to members of a specified class of persons—~~

~~(i) who is or are or may be required to be licensed by reason only of his or their doing anything that is incidental to another business;~~

~~(ii) who does not or do not, on behalf of any other person, deal in securities or futures contracts or trade in interests in collective investment schemes or leveraged foreign exchange contracts; or~~

~~(iii) who is or are or may be required to be licensed by reason only of his or their entering into a specified class of transactions;~~

~~(b) shall not have effect in relation to any specified transaction or class of transactions~~

~~entered into by any specified person or class of persons;~~

~~(c) shall, where they require any application, statement, notice or other document (however described) to be lodged or filed with or submitted to the Commission, be regarded as having been complied with if the application, statement, notice or other document (as the case may be) is lodged or filed with or submitted to any other specified person.~~

~~(10) Except as otherwise provided in this Ordinance, rules made by the Commission under this section or any other provision of this Ordinance~~

~~(a) may be of general or special application and may be made so as to apply only in specified circumstances;~~

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

~~(c) may authorize any matter or thing to be determined, applied or regulated by any specified person;~~

~~(d) may provide for the exercise of discretion in specified cases;~~

~~(e) may, for the better and more effectual carrying into effect of any provision of this Ordinance~~

~~or the rules, include any savings,
transitional, incidental, supplemental,
evidential and consequential provisions
(whether involving the provisions of any
principal legislation or the provisions of any
subsidiary legislation).~~

⁴⁸ and ⁴⁹ **384A. General provisions for rules by Commission**

(1) Notwithstanding any other provisions of this Ordinance but subject to subsection (3), where the Commission proposes to make rules under any provision of this Ordinance, it shall publish a draft of the proposed rules, in such manner as it considers appropriate, for the purpose of inviting representations on the proposed rules by the public.

(2) Where the Commission makes any rules under any provision of this Ordinance after a draft is published under subsection (1) in relation to the rules, it shall -

(a) publish, in such manner as it considers appropriate, an account setting out in general terms -

⁴⁸ **Unless explained in footnotes in bold type, all proposed amendments to this clause were submitted to Members in October 2001 vide paper No. CE14/01.**

⁴⁹ In response to comments from the market and the Bills Committee, we propose to add a new clause 384A, which applies to all rules made by the SFC under this Bill, to impose an express requirement for the SFC to consult the public before making any rules, apart from and in addition to other requirements as may be specified by other provisions relating to the making of rules. Consequential amendments will be made to other relevant provisions to align with this proposal as appropriate.

(i) the representations made on the draft; and

(ii) the response of the Commission to the representations; and

(b) where the rules are made with modifications which in the opinion of the Commission result in the rules being significantly different from the draft, publish, in such manner as it considers appropriate, details of the difference.

(3) Subsections (1) and (2) do not apply if the Commission considers, in the circumstances of the case, that -

(a) it is inappropriate or unnecessary that such subsections should apply; or

(b) any delay involved in complying with such subsections would not be -

(i) in the interest of the investing public; or

(ii) in the public interest.

⁵⁰(4) Notwithstanding any other provisions of this Ordinance, the Commission shall consult the Monetary Authority regarding rules it proposes to make under any provision of this Ordinance in so far as such rules apply to authorized

⁵⁰ Adapted from clause 384(10) of the Blue Bill.

financial institutions by reason of their being registered institutions, or associated entities of intermediaries.

⁵¹(5) For the avoidance of doubt, nothing in subsections (1) to (4) affects any other requirements which, apart from such subsections, apply to the making of any rules under any provision of this Ordinance.

⁵²(6) Where rules are made by the Commission under any provision of this Ordinance and it has not been provided in this Ordinance that the rules may provide that a contravention of any specified provision of the rules constitutes an offence, the Chief Executive in Council may make regulations to provide that a person who contravenes any specified provision of the rules that applies to him commits an offence and is liable to a specified penalty not exceeding -

(a) on conviction on indictment a fine of \$500,000 and a term of imprisonment of 2 years;

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

⁵³(7) Except as otherwise provided in this Ordinance, rules made by the Commission under any provision of this Ordinance may provide that, subject to the terms and

⁵¹ To clarify that this clause shall not affect any other requirements relating to the making of rules by SFC under other provisions.

⁵² Adapted from clause 384(8) of the Blue Bill.

⁵³ Adapted from clause 384(9) of the Blue Bill.

conditions specified in the rules, the provisions of this Ordinance specified in the rules -

(a) shall not have effect, or shall only have effect to a specified extent, in relation to any specified person or to members of a specified class of persons -

(i) who is or are or may be required to be licensed by reason only of his or their doing anything that is incidental to another business;

(ii) who does not or do not, on behalf of any other person, deal in securities or futures contracts or trade in interests in collective investment schemes or leveraged foreign exchange contracts; or

(iii) who is or are or may be required to be licensed by reason only of his or their entering into a specified class of transactions;

(b) shall not have effect in relation to any specified transaction or class of transactions entered into by any specified person or class of persons;

(c) shall, where they require any application, statement, notice or other document (however

described) to be lodged or filed with or submitted to the Commission, be regarded as having been complied with if the application, statement, notice or other document (as the case may be) is lodged or filed with or submitted to any other specified person.

⁵⁴(8) Except as otherwise provided in this Ordinance, rules made by the Commission under any provision of this Ordinance -

- (a) may be of general or special application and may be made so as to apply only in specified circumstances;
- (b) may make different provisions for different circumstances and provide for different cases or classes of cases;
- (c) may authorize any matter or thing to be determined, applied or regulated by any specified person;
- (d) may provide for the exercise of discretion in specified cases;
- (e) may, for the better and more effectual carrying into effect of any provision of this Ordinance or the rules, include any savings, transitional, incidental, supplemental,

⁵⁴ Adapted from clause 384(10) of the Blue Bill.

evidential and consequential provisions
(whether involving the provisions of any
principal legislation or the provisions of any
subsidiary legislation).

385. Codes or guidelines by Commission

(1) The Commission may publish, in the Gazette and in any other manner it considers appropriate, such codes and guidelines as it considers appropriate for providing guidance -

- (a) for the furtherance of any of its regulatory objectives;
- (b) in relation to any matter relating to any of the functions of the Commission under any of the relevant provisions;
- (c) in relation to the operation of any provision of this Ordinance.

(2) Without limiting the generality of subsection (1), the Commission may publish under that subsection -

- (a) a code ~~to be known as the "Code on Takeovers and Mergers"~~ ⁵⁵ to provide for matters concerning

⁵⁵ The deletion of the names of the Codes is made for two reasons: first, it is sufficient to describe the contents of the Codes, and second, to provide for flexibility. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

takeovers and mergers and matters incidental thereto;

- (b) a code ~~to be known as the "Code on Share Repurchases"~~⁵⁵ to provide for matters concerning share repurchases and matters incidental thereto.

(3) Notwithstanding anything in this section -

- (a) the power of the Commission to publish codes or guidelines under this section in respect of any persons as intermediaries shall, where the intermediaries are ~~exempt persons~~ registered institutions⁶, be regarded as the power to publish codes or guidelines in respect of the intermediaries only in relation to the businesses which constitute ~~the any~~⁵⁶ regulated activities for which they are ~~exempt as exempt persons~~ registered⁶;
- (b) the power of the Commission to publish codes or guidelines under this section in respect of any persons as associated entities shall, where the associated entities are authorized financial institutions, be regarded as the power to publish codes or guidelines in respect of the

⁵⁶ Technical amendment for greater clarity. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

associated entities only in relation to their businesses of receiving or holding client assets of intermediaries of which they are associated entities.

(4) For the avoidance of doubt, the power of the Commission to publish codes or guidelines under this section is in addition to and not in derogation of any other power of the Commission to publish codes or guidelines under any provision of this or any other Ordinance.

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

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

(6) A failure on the part of any person to comply with the provisions set out in any code or guideline published under this section that apply to him shall not by itself render him liable to any judicial or other proceedings, but in

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

(7) Any code or guideline published under this section -

(a) may be of general or special application and may be made so as to apply only in specified circumstances;

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

(8) Any code or guideline published under this section is not subsidiary legislation.

(9) Notwithstanding any other provisions of this Ordinance, the Commission shall consult the Monetary Authority regarding codes or guidelines it proposes to publish under this section or any other provision of this Ordinance, or amendments it proposes to make to codes or guidelines published under this section or any other provision of this Ordinance, in so far as such codes or guidelines or such amendments (as the case may be) apply to authorized financial institutions by reason of their being ~~exempt persons~~ registered institutions⁶, or associated entities of intermediaries.

Division 4 - Miscellaneous

386. Service of notices, etc.

Subject to sections 111, 138 and 363, ~~any notice, and any~~
rules made under section 226 or 260, any written notice or⁵⁷
direction or other document (however described) required
under ~~any provision of~~ this Ordinance to be issued or served
(however described)⁵⁸ to or on any person, other than the
Commission, shall for all purposes be regarded as duly issued
or served if -

- (a) in the case of an individual, it is -
 - (i) delivered to him by hand;
 - (ii) left at, or sent by post to, his last known business or residential address;
 - (iii) sent by facsimile transmission to his last known facsimile number; or

⁵⁷ The amendment is made to subject the methods of service provided for in this clause to rules made by the Chief Justice relating to the Securities and Futures Appeals Tribunal (clause 226) and those relating to the Market Misconduct Tribunal (clause 260), in case such rules should prescribe different methods for service. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

⁵⁸ Technical amendment for greater clarity. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

(iv) sent by electronic mail transmission to his last known electronic mail address;

(b) in the case of a company, it is -

⁵⁹(ia) delivered to any officer of the company by hand;

(i) left at, or sent by post to, the registered office of the company within the meaning of the Companies Ordinance (Cap. 32);

(ii) sent by facsimile transmission to its last known facsimile number; or

(iii) sent by electronic mail transmission to its last known electronic mail address;

(c) in the case of an overseas company, it is -

(i) delivered by hand to, or sent by post to, the person resident in Hong Kong who is authorized to accept service of process and notices on its behalf for the purposes of Part XI of the Companies Ordinance (Cap. 32) at his

⁵⁹ This amendment is made for consistency with Order 65 Rule 3 of the Rules of the High Court which provides for personal service upon an officer of a company. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

address delivered to the Registrar of Companies under that Ordinance;

(ii) sent by facsimile transmission to the last known facsimile number of the person; or

(iii) sent by electronic mail transmission to the last known electronic mail address of the person;

(d) in the case of a partnership, it is -

(i) delivered to any partner of the partnership by hand;

(ii) left at, or sent by post to, the last known principal place of business of the partnership;

(iii) sent by facsimile transmission to the last known facsimile number of the partnership; or

(iv) sent by electronic mail transmission to the last known electronic mail address of the partnership; or

(e) in the case of a body corporate (other than a company or an overseas company or the Commission) or an unincorporated body (other than a partnership), or a tribunal, it is -

- (i) delivered to an officer of the body or the tribunal (as the case may be) by hand;
- (ii) left at, or sent by post to, the last known principal place of business of the body or the tribunal (as the case may be);
- (iii) in the case of the body, sent by facsimile transmission to the last known facsimile number of the body; or
- (iv) in the case of the body, sent by electronic mail transmission to the last known electronic mail address of the body.

387. Evidence regarding Commission's records or documents

A record or document purporting to be a record or document, or a copy of a record or document, signed, executed or issued by or on behalf of the Commission and purporting to be signed or initialled by any member of the Commission or any person performing any function under any of the relevant provisions shall in any proceedings be admissible as evidence of the facts stated in it, without proof of the signature or

initials of the person purporting to sign or initial the record or document.

388. General requirements for documents lodged with Commission

(1) ~~¶~~Except as otherwise provided in section 315,⁶⁰the Commission may, by notice published in the Gazette, specify any form in respect of any application, statement, notice, return or other document (however described) required to be lodged, filed or submitted with or to the Commission for the purposes of any provision of this Ordinance, either generally or in any particular case, and, without limiting the generality of the foregoing, may in the form -

~~(a) include directions and instructions relating to the inclusion of statutory declarations made in respect of the particulars in~~

⁶¹(aa) include directions and instructions relating to the compilation of the application, statement, notice, return or other document (as the case may be);

⁶⁰ The amendment makes it clear that this clause will not be applicable to Part XV as clause 315 therein already provides for specific requirements for forms to be prescribed under that Part. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

⁶¹ The amendments clarify that the notice published by the SFC would contain directions and instructions relating to the compilation of the information, as well as directions and instructions relating to the making of statutory declarations. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

- ⁶¹(a) include directions and instructions relating to the inclusion of statutory declarations made in respect of the particulars in it; and
- (b) specify documents by which it is to be accompanied.

⁶²(1A) For the purposes of subsection (1), the Commission may specify any form by referring in a notice published in the Gazette to the form as separately published by such electronic means as the Commission considers appropriate, instead of setting out the form in a notice published in the Gazette, whereupon the Commission shall for all purposes be regarded as having duly specified the form under subsection (1).

(2) For the purposes of subsection (1), the Commission may specify that different forms are to be used in different circumstances.

(3) Subject to subsections (4) and (5), where -

- (a) there is any requirement for any application, statement, notice, return or other document (however described) to be lodged, filed or

⁶² This amendment is designed to facilitate the promulgation of electronic forms that may be used for various purposes, for example, annual returns filed by intermediaries to the SFC. Such forms would be, for example, accessed over the internet on the SFC's website. These electronic forms could be interactive and might not be reproduced in hard copy, hence the alternative of enabling notice to be given in the Gazette specifying that an electronic form is available on the SFC's website. The SFC would continue to make available physical forms. The format of physical forms may be different from that of electronic forms but the information required would be substantially the same. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.**

submitted with or to the Commission for the purposes of any provision of this Ordinance; and

(b) the Commission has specified any form in respect of it under subsection (1),

the requirement shall not be regarded as having been complied with unless it -

(i) is in the form specified;

⁶³(ia) is compiled in accordance with such directions and instructions as are included in the form;

(ii) contains statutory declarations~~made in respect of the particulars in it,~~⁶⁴ in accordance with such directions and instructions as are included in the form; and

(iii) is accompanied by such documents as are specified in the form.

(4) An application, statement, notice, return or other document shall not by reason of any deviation from a form specified in respect of it ~~by notice published pursuant to~~⁶⁵ subsection (1) cease to be regarded as being in that

⁶³ Amendment to tally with that described in Footnote 61. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

⁶⁴ Technical amendment for greater clarity. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

⁶⁵ Technical amendment to improve drafting. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

form, if the deviation does not affect the substance of the form.

(5) Where the Commission is satisfied that a person has substantial practical difficulties in complying with any of the requirements referred to in subsection (3)(i), (ia),⁶⁶ (ii) or (iii), it may in its discretion dispense with the requirements in the case of the person to such extent as it considers necessary.

(6) A notice published pursuant to subsection (1)⁶⁷ is not subsidiary legislation.

389. General provisions for approvals by Commission

Where under any provision of this Ordinance, an act cannot be done, or an omission cannot be made, except with the approval, whether in writing or otherwise, of the Commission -

- (a) without prejudice to any express provisions in this Ordinance relating to imposition of conditions, the approval may be given subject to such conditions (if any) as the Commission may specify in giving the approval (including conditions which provide that failure to comply

⁶⁶ Amendment consequential to that described in Footnote 63. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 8 October 2001.

⁶⁷ On reflection, the reference to the new subsection (1A) in the previous marked up draft is considered not necessary as a notice referred to thereunder is still one published under subsection (1).

with the conditions causes the approval to lapse); and

- (b) for the purposes of any pecuniary, custodial or other sanction which may be imposed under any provision of this Ordinance in relation to any such act done or omission made without such approval, the approval shall have no effect to the extent that the act is done or the omission made (as the case may be) otherwise than in accordance with any such conditions.

390. Exclusions of provisions of Gambling Ordinance

⁶⁸(1) Subject to subsection (2), tThe Gambling Ordinance (Cap. 148) shall not apply to any transaction or activity⁶⁸ which is regulated by or under, or which is carried out in compliance with, this Ordinance.

⁶⁹(2) The Commission may make rules to prescribe any class of transactions or activities (being transactions or activities⁶⁸ to which the Gambling Ordinance (Cap. 148) would

⁶⁸ **We accept the comment made by some Members at the Bills Committee meeting on 8 October 2001 that this subclause should be amended to restore the Blue Bill version, save that "or activity" be added for greater clarity. Consequential amendments are made to clause 390(2).**

⁶⁹ **The amendment provides the SFC with the flexibility to prescribe rules to specify that the Gambling Ordinance should apply to certain transactions under the SF Bill despite subclause (1). This is to cater for the situation where clarifications are needed in respect of any specific transactions under the SF Bill which should more appropriately be dealt with under the Gambling Ordinance. The rule-making power has been retained to preserve the flexibility for making clarification as needed in respect of any new products.**

apart from this section apply), whether by reference to the nature of the transactions or activities⁶⁸ or all or any of the parties to or persons involved in the transactions or activities⁶⁸ or otherwise, as a class of transactions or activities⁶⁸ to which that Ordinance shall apply, whereupon that Ordinance shall have application accordingly.

391. Inland Revenue Ordinance not affected

Nothing in this Ordinance affects section 4 of the Inland Revenue Ordinance (Cap. 112).

Clause 378A - civil liability for false or misleading public communications

Purpose

Some Members have requested at the Bills Committee meeting on 27 April 2001 that the Administration should reflect on clauses 378A(2)(a) and (b) (originally clauses 208(2)(a) and (b) in Part X) to see if improvements can be made to clarify their application.

Background

2. Clause 378A will make a person civilly liable for disclosing to the public materially false or misleading information concerning securities or futures contracts, or that might affect the price of securities or futures contracts. Any person who has suffered loss as a result of relying on such disclosure may claim damages from the person who is responsible for the disclosure.

3. There is one considerable advantage to stating a civil private cause of action in the legislation. Clause 378A states that private rights are intended; the waters are clarified and everyone who reads the law will know that this is intended without resort to litigation. The question “is this intended to give me, the investor, a private cause of action notwithstanding (e.g.) the public law sanctions in Parts XIII and XIV?”, is answered.

4. We have proposed this provision arising from the market consensus that the quality of disclosure under the various regulatory requirements, especially those relating to listings, takeovers and mergers, needs to be strengthened. Present sanctions against non-compliance, essentially public censures and “cold shoulder” orders, have become inadequate.

5. The public has earlier called for the Stock Exchange Listing Rules to be given “teeth” to ensure accurate and adequate disclosure. At the same time, there are market calls for maintaining the non-statutory, market-oriented nature of these Rules, as they are essentially commercial rules written in business language and designed to be administered with commercial pragmatism and flexibility. In response we have considered creating statutory sanctions in the Bill for breach of the Stock Exchange Listing Rules and the SFC Code on Takeovers and Mergers. However, according to administrative law experts, this would mean that these Rules and Codes would become statutory. On balance we considered that these rules should remain non-statutory. It is important that they may be amended in a timely manner in response to rapid market changes. We have therefore decided not to pursue the option of creating statutory sanctions, but to focus on stating the liability to pay compensation in private law through clause 378A.

Clause 378A(2)(a)

6. Some Members commented that the concept of “assumption of responsibility” was not clear and others felt that the paragraph was superfluous. We noted this paragraph was added at the suggestion of the Hong Kong Bar Association during the consultation on the White Bill in 2000 to clarify that a person shall not be liable to pay compensation under clause 378A(1) unless “he has assumed responsibility” with respect to the claimant. On reflection, we accept that Members’ concerns are valid concerns and propose to delete the provision.

Clause 378A(2)(b)

7. This paragraph provides that a person shall not be liable unless it is “fair, just and reasonable” in the circumstances of the case that he should be so liable. Some Members commented that the meaning of “fair, just and reasonable” was not clear and questioned whether clause 378A(2)(b) should be retained. As in the case of clauses 272 and 296 in Parts XIII and XIV respectively, which provide for private causes of action for losses resulting from market misconduct, we had considered removing the test of “fair, just and reasonable” from this clause in finalising the Blue Bill. On balance, we decided to accept the views expressed during the consultation on the White Bill that it would be better if we could put in a provision to negate any suggestion that strict liability is intended or that the common law principles are not applicable. This would allay market concerns that the private cause of action might result in a floodgate of claims in an indeterminate amount to an indeterminate class.

8. On the advice of our legal advisers, we have chosen to include “fair, just and reasonable” as the test for determining liability and the extent thereof. According to them, this appears to be the most appropriate formula as it encapsulates the fundamental common law principles in the relevant area. There are also a number of court cases which adopt the same test as the moral criterion or benchmark for civil liability (see **Enclosure A**). This moral criterion has been adopted in cases involving damage to property, psychiatric injury as well as pure economic loss which arises from the acts or omissions of auditors, accountants, building and ship surveyors, building contractors, solicitors, psychologists, ambulance services and schools. We cannot see any reason why the same principle cannot be applied to clause 378A. The formula was also well received by the market and the legal profession when the Blue Bill was exposed.

9. As revealed in our latest international legal research into relevant private legal actions in the context of clauses 272 and 296, the court is prepared to adopt such common law principles as appropriate in determining liability and the extent thereof. Whilst inclusion of clause 378A(2)(b) may help address market concerns, it is inconceivable that the court would come to a decision that is unfair, unjust and

unreasonable or that it would ignore the relevant common law principles when determining liability or the extent thereof.

10. In light of the above, if Members do not think that clause 378A(2)(b) is necessary, we have no objection to removing it. This, we believe, would not undermine the protection that clause 378A is intended to provide to investors.

Possible overlap

11. We accept Members' comments made at earlier Bills Committee meetings that clause 378A (originally clause 208 in Part X) might overlap slightly with clauses 272 and 296 (which provides for private causes of action for investors to seek compensation for losses suffered as a result of market misconduct). We consider this overlap acceptable in light of the strong urge from the Legislative Council, market and media for more deterrents against false disclosure, as explained in paragraphs 4 and 5 above. Our legal advisers also advise that as clause 378A and clauses 272/296 are intended to achieve different policy intent, it would be better for the various private rights of action to be spelt out in individual provisions so that investors would clearly see their rights under different circumstances. On Members' request, we have prepared a brief comparison, based on the Blue Bill version, of clauses 272/296 and clause 208, at **Enclosure B**. It can be seen that clause 208 (now 378A) will serve to empower investors further in advancing their rights for compensation through private actions.

Enclosure A

**Judicial Application of "Fair, Just and Reasonable"
as the test for establishing liability**

Whether auditors owed a duty of care to another company intending to take over/acquire the shares in the subject company – Caparo v Dickman ([1990] 2 A.C. 605); James McNaughton Paper Group Ltd v Hicks Anderson & Co ([1991] 2 Q.B. 113); Yue Xiu Finance Co Ltd & Anor v Agnew & Ors (formerly via Deloitte Haskins & Sells & Anor) (1996) 2HKC 122

Whether auditors owed the Law Society a duty of care – Law Society v KPMG Peat Marwick and others ([2000] 1 All ER 515)

Whether auditors owed a duty of care to the liquidators of companies whose accounts the auditors had audited – Bank of Credit and Commerce International (Overseas) Ltd (In Liquidation) v Price Waterhouse (No.2) ([1998] P.N.L.R. 564)

Whether solicitors owed a duty of care to a non-client – White v Jones ([1993] 3 W.L.R. 730; Dean Allin & Watts (23 May 2001)

Whether a surveyor valuing a house for a building society owes a duty of care to the potential purchaser – Smith v Bush ([1990] 2 A.C. 831)

Whether a ship surveyor who recommended that a damaged ship should continue its voyage was liable to the owner of the cargo which was lost when the ship sank – Marc Rich & Co AG v Bishop Rock Marine Co, Ltd ([1993] 3 All ER 307)

Whether an educational psychologist owed a duty of care to a child whom she diagnosed – Phelps v Hillingdon London Borough Council ([1999] 1 All ER 421)

Whether a sub-contractor owed a duty of care to the employer – British Telecommunications plc v James Thomson & Sons (Engineers) Ltd ([1999] 2 All ER 241)

Whether an ambulance service owed a duty of care to a member of the public on whose behalf a 999 call had been made – Kent v Griffiths and Others (No. 2) ([2000] 2 All ER 474)

Whether a victim of self-inflicted injuries owed a duty of care towards a secondary

party who suffered only psychiatric illness as a result of having witnessed the event causing the injuries - Greaves v Greaves and Others (The Times, June 5, 2000)

Whether a school owed a duty of care to a pupil who was being bullied while at school and who suffered only psychiatric injury - Bradford-Smart v West Sussex County Council (The Times, December 5, 2000)

**Blue Bill version of the Securities and Futures Bill
Private Causes of Action**

	Clause 208	Clause 272/296
Policy objective	<ul style="list-style-type: none"> To send a signal to the market that any person responsible for issuing public communications concerning securities or futures contracts or which are price sensitive, has the duty to ensure that the communications are not false or misleading. Otherwise, he might be liable to a person who suffers financial loss as a result of reliance on the public communication. We believe that investors should be made explicitly aware of their rights in this regard for the better protection of their interests. 	<ul style="list-style-type: none"> The clause provides for a right of action on a person who has suffered loss as a result of another person’s market misconduct. To assist the plaintiff in claiming damages, the clause also provides that determination of the Market Misconduct Tribunal shall be admissible in evidence in such a private action.
Details of the provisions	<ul style="list-style-type: none"> Confers a right to a person who suffers loss as a result of reliance on communication to the public (or a group comprising members of the public) that - <ul style="list-style-type: none"> ➢ is false or misleading in a material particular; and ➢ concerns securities or futures or is price sensitive and the person <u>responsible for</u> the making or issuing of the communication <u>knows, or is reckless or negligent</u> as to whether the communication is false or misleading. 	<ul style="list-style-type: none"> Confers a cause of action against a person who has committed an act of market misconduct under Part XIII or committed one of the offences in clauses 283-294 in Part XIV, whether the loss arises from the plaintiff having entered into a transaction or dealing at a price affected by the market misconduct. The plaintiff may initiate an action even though such person has not been the subject of MMT proceedings under Part XIII or criminal proceedings under Part XIV (as the case may be), or has not been identified as or convicted of having engaged in market misconduct.
Circumstances under which a person would be liable	<ul style="list-style-type: none"> Clause 208 potentially catches a wider category of persons compared to clause 272/296. To contain the category of persons who would be liable under clause 208 within reasonable bounds, the clause provides that a person shall not be liable unless – <ul style="list-style-type: none"> (a) the defendant has assumed responsibility with respect to the plaintiff; or (b) it is fair, just and reasonable in the circumstances of the case that he should be so liable. 	<ul style="list-style-type: none"> Not liable unless it is fair, just and reasonable in the circumstances of the case that the defendant should be liable.