

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

**Parts XIII and XIV of and Schedule 8 to the Securities and Futures Bill  
Committee Stage Amendments**

Members examined on a clause-by-clause basis Parts XIII and XIV of and Schedule 8 to the Securities and Futures Bill on 19, 21 and 28 September 2001 and 3, 5 and 24 October 2001.

**Committee Stage Amendments**

2. We have since the above meetings made some amendments to Parts XIII and XIV of and Schedule 8 in the light of Members' comments and to further refine the drafting. All the amendments are marked up in **Annex 1**, **Annex 2** and **Annex 3** respectively with explanations therefor in the footnotes.

**About the marked-up versions of the Bill in the Annexes**

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

Financial Services Bureau  
Securities and Futures Commission  
3 December 2001

PART XIII

MARKET MISCONDUCT TRIBUNAL

Division 1 - Interpretation

237. Interpretation of Part XIII

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

"associate" (有聯繫者), in relation to a person, means -

- (a) the person's spouse or reputed spouse, any person cohabiting with the person as a spouse, the person's brother, sister, parent, step-parent, child (natural or adopted) or step-child;
- (b) any corporation of which the person is a director;
- (c) any employee or partner of the person;
- (d) where the person is a corporation, each of its directors and its related corporations and each director or employee of any of its related corporations;
- (e) without limiting the circumstances in which paragraphs (a) to (d) apply, in circumstances concerning the securities of or other interest in a corporation, or rights arising out of the holding of such securities or such interest,

any other person with whom the person has an agreement or arrangement -

- (i) with respect to the acquisition, holding or disposal of such securities or such interest; or
- (ii) under which they undertake to act together in exercising their voting power at general meetings of the corporation;

"controller" (控制人), in relation to a corporation, means any person -

- (a) in accordance with whose directions or instructions the directors of the corporation or of another corporation of which it is a subsidiary are accustomed or obliged to act; or
- (b) who, either alone or with any of his associates, is entitled to exercise or control the exercise of more than 33% of the voting power at general meetings of the corporation or of another corporation of which it is a subsidiary;

"insider dealing" (内幕交易) means insider dealing within the meaning of section 261;

"judge" (法官) means -

- (a) a judge or a deputy judge of the Court of First Instance;
- (b) a former Justice of Appeal of the Court of Appeal;
- (c) a former judge or a former deputy judge of the Court of First Instance;

"market misconduct" (市場失當行為) means -

- (a) insider dealing;
- (b) false trading within the meaning of section 265;
- (c) price rigging within the meaning of section 266;
- (d) disclosure of information about prohibited transactions within the meaning of section 267;
- (e) disclosure of false or misleading information inducing transactions within the meaning of section 268; or
- (f) stock market manipulation within the meaning of section 269,

and includes attempting to engage in, or assisting, counselling or procuring another person to engage in, any of the conduct referred to in paragraphs (a) to (f);

"Presenting Officer" (提控官), in relation to any proceedings instituted under section 244, means the person appointed under section 243(4) to conduct the proceedings;

"relevant overseas market" (有關境外市場) -

(a) in relation to securities, means a stock market outside Hong Kong; or

(b) in relation to futures contracts, means a futures market outside Hong Kong;

"relevant recognized market" (有關認可市場) -

(a) in relation to securities, means a recognized stock market; or

(b) in relation to futures contracts, means a recognized futures market;

"Tribunal" (審裁處) means the Market Misconduct Tribunal established by section 243.

(2) In this subsection and sections 238 to 241 and Division 4, unless the context otherwise requires -

"derivatives" (衍生工具), in relation to listed securities,

means -

(a) rights, options or interests (whether described as units or otherwise) in, or in respect of, the listed securities;

(b) contracts, the purpose or pretended purpose of which is to secure or increase a profit or avoid or reduce a loss, wholly or partly by

reference to the price or value, or a change in the price or value, of -

(i) the listed securities; or

(ii) any rights, options or interests referred to in paragraph (a);

(c) rights, options or interests (whether described as units or otherwise) in, or in respect of -

(i) any rights, options or interests referred to in paragraph (a); or

(ii) any contracts referred to in paragraph (b);

(d) instruments or other documents creating, acknowledging or evidencing any rights, options or interests or any contracts referred to in paragraph (a), (b) or (c), including certificates of interest or participation in, temporary or interim certificates for, receipts (including depositary receipts) in respect of, or warrants to subscribe for or purchase -

(i) the listed securities; or

(ii) the rights, options or interests or the contracts,

whether or not the derivatives are listed and regardless of who issued or made them;

<sup>1</sup>"listed" (上市) means listed on a recognized stock market, and for the purposes of this definition, securities shall continue to be regarded as listed during a period of suspension of dealings in those securities on the recognized stock market;

"listed corporation" (上市法團) means a corporation which has issued securities that are, at the time of any insider dealing in relation to the corporation, listed;

"listed securities" (上市證券) means -

- (a) securities which, at the time of any insider dealing in relation to a corporation, have been issued by the corporation and are listed;
- (b) securities which, at the time of any insider dealing in relation to a corporation, have been issued by the corporation and are not listed, but which, at that time, it is reasonably foreseeable will be and which, in fact, are subsequently listed;
- (c) securities which, at the time of any insider dealing in relation to a corporation, have not been issued by the corporation and are not listed, but which, at that time, it is

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<sup>1</sup> Technical amendment to add a definition of "listed" in line with section 2(4) of the Securities (Insider Dealing) Ordinance (SIDO).

reasonably foreseeable will be and which, in fact, are subsequently so issued and listed; "relevant information" (有關消息), in relation to a corporation,

means specific information about -

- (a) the corporation;
- (b) a shareholder or officer of the corporation; or
- (c) the listed securities of the corporation or their derivatives,

which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but which would if it were generally known to them be likely to materially affect the price of the listed securities;

"securities" (證券) means -

- (a) shares, stocks, debentures, loan stocks, funds, bonds or notes of, or issued by, or which it is reasonably foreseeable will be issued by, a body, whether incorporated or unincorporated, or a government or municipal government authority;
- (b) rights, options or interests (whether described as units or otherwise) in, or in respect of, such shares, stocks, debentures, loan stocks, funds, bonds or notes;



- (c) certificates of interest or participation in, temporary or interim certificates for, receipts for, or warrants to subscribe for or purchase, such shares, stocks, debentures, loan stocks, funds, bonds or notes;
- (d) interests, rights or property, whether in the form of an instrument or otherwise, commonly known as securities;
- (e) interests, rights or property, whether in the form of an instrument or otherwise, prescribed by notice under section 379 as being regarded as securities in accordance with the terms of the notice.

(3) For the purposes of the definition of "controller" in subsection (1), where a person is entitled to exercise or control the exercise of more than 33% of the voting power at general meetings of a corporation and the corporation is entitled to exercise or control the exercise of any of the voting power at general meetings of another corporation ("the effective voting power"), then the effective voting power at general meetings of the other corporation shall be regarded as exercisable by the person.

(4) For the purposes of this Part, a person shall not be regarded as a person in accordance with whose directions or instructions the directors of a corporation are accustomed or obliged to act by reason only that the directors of the

corporation act on advice given by him in a professional capacity.

**238. Interest in securities (insider dealing)**

For the purposes of sections 237(2) and 239 to 241 and Division 4, a reference to an interest in securities shall be construed as including an interest of any kind whatsoever<sup>2</sup> in the securities, and for that purpose any restraint or restriction to which the exercise of a right attached to the interest may be subject shall be disregarded.

**239. Connected with a corporation  
(insider dealing)**

(1) For the purposes of Division 4, a person shall be regarded as connected with a corporation if, being an individual -

- (a) he is a director or employee of the corporation or a related corporation of the corporation;
- (b) he is a substantial shareholder of the corporation or a related corporation of the corporation;
- (c) he occupies a position which may reasonably be expected to give him access to relevant

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<sup>2</sup> Technical amendment for consistency with clause 313. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 19 September 2001.

information in relation to the corporation by reason of -

- (i) a professional or business relationship existing between -
  - (A) himself, or his employer, or a corporation of which he is a director, or a firm of which he is a partner; and
  - (B) the corporation, a related corporation of the corporation, or an officer or substantial shareholder of either corporation; or

- (ii) his being a director, employee or partner of a substantial shareholder of the corporation or a related corporation of the corporation;

(d) he has access to relevant information in relation to the corporation and -

- (i) he has such access by reason of his being in such a position that he would be regarded as connected with another corporation by virtue of paragraph (a), (b) or (c); and
- (ii) the relevant information relates to a transaction (actual or contemplated)

involving both those corporations or involving one of them and the listed securities of the other or their derivatives, or to the fact that the transaction is no longer contemplated; or

- (e) he was, at any time within the 6 months preceding any insider dealing in relation to the corporation, a person who would be regarded as connected with the corporation by virtue of paragraph (a), (b), (c) or (d).

(2) For the purposes of Division 4, a corporation shall be regarded as a person connected with another corporation so long as any of its directors or employees is a person who would be regarded as connected with that other corporation by virtue of subsection (1).

(3) In subsection (1), notwithstanding any other provisions of this Ordinance, "substantial shareholder" (大股東), in relation to a corporation, means a person who has an interest of any kind<sup>3</sup> in the relevant share capital of the corporation, the nominal value of which is equal to or more than 5% of the nominal value of the relevant share capital of the corporation.

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<sup>3</sup> Technical amendment in the light of clause 238. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 19 September 2001.

**240. Connected with a corporation - possession of relevant information obtained in privileged capacity (insider dealing)**

(1) For the purposes of Division 4, where a public officer or a specified person in that capacity receives relevant information in relation to a corporation, he shall be regarded as a person connected with the corporation.

(2) In subsection (1), a reference to a specified person means a person who is -

- (a) a member of the Executive Council;
- (b) a member of the Legislative Council;
- (c) a member of a board, commission, committee or other body appointed by or on behalf of the Chief Executive or the Chief Executive in Council under an Ordinance;
- (d) an officer or employee of a recognized exchange company, a recognized clearing house or a recognized exchange controller;
- (e) an exchange participant;
- (f) an officer or employee of an exchange participant;
- (g) an officer or employee of a body corporate incorporated by an Ordinance; or

(h) an officer or employee of a body corporate specified by the Financial Secretary under subsection (3),

whether, in the case of paragraph (a), (b), (c), (d), (f), (g) or (h), the person is such a member, officer or employee (as the case may be) on a temporary or permanent basis, and whether he is paid or unpaid.

(3) The Financial Secretary may, by notice published in the Gazette, specify any body corporate for the purposes of subsection (2)(h).

**241. Dealing in listed securities or their derivatives (insider dealing)**

For the purposes of section 237(2) and Division 4, a person shall be regarded as dealing in listed securities or their derivatives if, whether as principal or agent, he sells, purchases, exchanges or subscribes for, or agrees to sell, purchase, exchange or subscribe for, any listed securities or their derivatives or acquires or disposes of, or agrees to acquire or dispose of, the right to sell, purchase, exchange or subscribe for, any listed securities or their derivatives.

**242. Interest in securities and beneficial ownership, etc. (market misconduct other than insider dealing)**

(1) For the purposes of Division 5, a person shall be regarded as having an interest in securities if he has

authority, whether formal or informal and whether express or implied, to dispose of or to exercise control over the disposal of the securities or, in the case of options in respect of the securities, to exercise the options.

(2) It is immaterial that the authority of a person referred to in subsection (1) -

(a) is, or is capable of being made, subject to restraint or restriction; or

(b) is exercisable jointly with another person.

(3) A person shall be regarded as having the authority referred to in subsection (1) where a corporation has the authority referred to in that subsection and -

(a) the corporation is, or its directors are, accustomed or under an obligation, whether formal or informal, to act in accordance with the directions or instructions of the person in relation to the securities in question; or

(b) the person, or an associate of the person, is a controller of the corporation.

(4) Where a person -

(a) has entered into a contract to purchase securities;

(b) has a right to have securities transferred to him or to his order whether the right is exercisable presently or in the future and

whether on the fulfilment of a condition or not; or

- (c) has the right to acquire securities, or an interest in securities, under an option, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not,

the person shall, to the extent to which he could do so on completing the contract, enforcing the right or exercising the option, be regarded as having the authority referred to in subsection (1).

(5) Where securities are subject to a trust, and a person who is not a trustee in those securities has an interest in those securities by virtue of subsection (4)(b), the interest of a trustee in those securities shall be disregarded for the purpose of determining whether the person has an interest in securities for the purposes of Division 5.

(6) The Commission may make rules to prescribe that an interest, being an interest of a person or of the persons included in a class of persons, shall be disregarded for the purpose of determining whether the person or the persons has or have an interest in securities for the purposes of Division 5.

(7) For the purposes of Division 5, a sale or purchase of securities does not involve a change in their beneficial ownership if a person who had an interest in the securities



before the sale or purchase, or an associate of the person, has an interest in the securities after the sale or purchase.

## **Division 2 - Market Misconduct Tribunal**

### **243. Market Misconduct Tribunal**

(1) There is established a Tribunal to be known as the Market Misconduct Tribunal which shall have jurisdiction to hear and determine in accordance with this Part and Schedule 8 any question or issue arising out of or in connection with the proceedings instituted under section 244.

(2) Subject as otherwise provided in this Part or in Schedule 8, the Tribunal -

(a) shall consist of a chairman and 2 other members; and

(b) shall be presided over by the chairman who shall sit with the 2 other members.

(3) The chairman of the Tribunal shall be a judge and the 2 other<sup>2</sup> members of the Tribunal shall not be public officers.

(4) The Secretary for Justice shall, in respect of any proceedings instituted under section 244, appoint a person as

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<sup>4</sup> Technical amendment for greater clarity. This is consistent with the amendment made to clause 210 (See Annex A to Paper No. CE10/01 issued to Members on 31 July 2001). **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.**

the Presenting Officer to conduct the proceedings, and may appoint one or more persons to assist the Presenting Officer.

(5) A Presenting Officer shall be a legal officer,<sup>5</sup> counsel ora<sup>5</sup> solicitor.

(6) Schedule 8 shall have effect in relation to the appointment of members and ~~temporary~~replacement<sup>6</sup> members of the Tribunal, the appointment and the role of Presenting Officers and of persons appointed to assist Presenting Officers, and to the proceedings and sittings of, and procedural and other matters concerning, the Tribunal.

(7) The Tribunal may, where the Chief Executive considers appropriate, be divided into 2 or more divisions, whereupon the provisions of this or any other Ordinance shall apply, subject to necessary modifications, to each division of the Tribunal (including appointment of the chairman and other members of such division and all matters concerning such division)<sup>7</sup> as they apply to the Tribunal.

(8) There may be paid to -

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<sup>5</sup> Technical amendment. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.

<sup>6</sup> Technical amendment consequential upon the renaming of “temporary members” to “replacement members” in Schedule 8 in response to comments made by Members at the Bills Committee meeting on 19 September 2001.

<sup>7</sup> Technical amendment to clarify that all the provisions governing the MMT in Part XIII and Schedule 8 apply to a division of the MMT mutatis mutandis. In response to comments from Bills Committee Members on clause 210(5) in Part XI, we have also made similar technical amendment in this clause to clarify that the creation of a new tribunal division also entails the appointment of a chairman and two members to the division.

- (a) a member of the Tribunal (other than the chairman of the Tribunal who is a judge within the meaning of paragraph (a) of the definition of "judge" in section 237(1));
- (b) a Presenting Officer (other than a Presenting Officer who is a legal officer);
- (c) any person appointed to assist a Presenting Officer (other than any such person who is a legal officer or a public officer),

such amount, as a fee for his services, as the Financial Secretary considers appropriate, and that amount shall be a charge on the general revenue.

(9) Where a person who is a judge within the meaning of paragraph (a) of the definition of "judge" in section 237(1) is appointed as the chairman of the Tribunal, neither the appointment nor the service or removal of the person as the chairman affects -

- (a) the tenure of office of, and the exercise of powers by, the person as a judge within the meaning of that paragraph;
- (b) the person's rank, title, status, precedence, salary or other rights or privileges as a holder of that office;
- (c) the terms and conditions to which the person is subject as a holder of that office.

#### **244. Market misconduct proceedings**

(1) If it appears to the Financial Secretary, whether or not following any report by the Commission under subsection (8) or any notification<sup>8</sup> by the Secretary for Justice under subsection (9), that market misconduct has or may have taken place, he may institute proceedings before the Tribunal concerning the matter.

(2) The Financial Secretary shall institute proceedings before the Tribunal by giving ~~to the chairman of~~<sup>9</sup> the Tribunal a notice in writing which shall contain a ~~written~~<sup>10</sup> statement specifying such matters as are prescribed in Schedule 8.

(3) Without limiting the generality of section 243(1), the object of the proceedings instituted under subsection (1) is for the Tribunal to determine -

- (a) whether any market misconduct has taken place;
- (b) the identity of any person who has engaged in the market misconduct; and

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<sup>8</sup> **Technical amendment in response to comment from a Bills Committee Member.**

<sup>9</sup> **Technical amendment for consistency. See clause 211(1) of the Blue Bill. We have made minor technical amendments since the Bills Committee meeting on 21 September 2001 in response to a Member's drafting comment.**

<sup>10</sup> **Technical amendment in response to comment from a Bills Committee Member.**

- (c) the amount of any profit ~~secured or~~  
~~increased~~gained<sup>11</sup> or loss avoided~~er reduced~~<sup>11</sup> as  
a result of the market misconduct.

\_\_\_\_(4) Subject to subsections (5) and (6), the Tribunal may  
identify a person as having engaged in market misconduct  
pursuant to subsection (3)(b) if -

- (a) he has perpetrated any conduct which  
constitutes the market misconduct;
- (b) notwithstanding that he has not perpetrated any  
conduct which constitutes the market misconduct  
-

- (i) the Tribunal identifies another  
person which is a corporation as  
having engaged in market misconduct  
pursuant to subsection (3)(b); and
- (ii) the market misconduct~~was directly or~~  
~~indirectly attributable to, or~~<sup>12</sup>  
occurred with the consent or

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<sup>11</sup> **On the advice of our legal advisers, we have proposed a technical amendment to revert to the exact wording in the SIDO for defining the amount of “profit gained” (and “loss avoided”) to be identified by the MMT for subsequent disgorgement orders to be made under clause 249(1)(d). This is to preserve the method for calculating profit gained (and loss avoided) for disgorgement by the MMT, which has been considered in detail in an Insider Dealing Tribunal (IDT) case before the Court of Final Appeal. For consistency’s sake, we shall propose similar amendments to clauses 187(2)(ii) and 189A(2)(ii) in Part IX for the calculation of the ceiling of disciplinary fines as appropriate.**

<sup>12</sup> **Deletion in response to market comment (Hong Kong Society of Accountants) that the words “directly or indirectly attributable” were uncertain. Deleting the words will not lead to any person who should be able to be identified as guilty of market misconduct no longer being able to be identified. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.**

connivance of~~7~~ him as an officer of  
the corporation; or

(c) notwithstanding that he has not perpetrated any  
conduct which constitutes the market  
misconduct -

(i) the Tribunal identifies any other  
person as having engaged in market  
misconduct pursuant to subsection  
(3)(b); and

(ii) he assisted or connived with that  
other person in the perpetration of  
any conduct which constitutes the  
market misconduct, with the knowledge  
that such conduct constitutes or  
might constitute market misconduct.

(5) The Tribunal shall not identify a person as having  
engaged in market misconduct pursuant to subsection (3)(b) if  
it is provided under any provision of this Part that the  
person shall not by reason of that market misconduct be  
regarded as having engaged in market misconduct.

(6) The Tribunal shall not identify a person as having  
engaged in market misconduct pursuant to subsection (3)(b)  
without first giving the person a reasonable opportunity of  
being heard.

(7) Subject to section 253(3), the standard of proof  
required to determine any question or issue before the

Tribunal shall be that applicable to civil proceedings in a court of law.

(8) The Commission may report to the Financial Secretary the occurrence of any event which the Commission reasonably believes or suspects constitutes market misconduct.

(9) The Secretary for Justice may ~~report to~~notify<sup>13</sup> the Financial Secretary of<sup>13</sup> the occurrence of any event which the Secretary for Justice reasonably believes or suspects constitutes market misconduct.

(10) Nothing in subsection (1) prevents the Financial Secretary from referring any matter to the Secretary for Justice, if it appears to the Financial Secretary, whether or not following any report by the Commission under subsection (8) or any notification<sup>14</sup> by the Secretary for Justice under subsection (9), that an offence under Part XIV has or may have been committed.

#### **245. Powers of Tribunal**

(1) Subject to the provisions of Schedule 8 and any rules made by the Chief Justice under section 260, the Tribunal, for the purposes of any proceedings instituted under section 244, may, on its own motion or on the application of any party before it -

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<sup>13</sup> **Technical amendment in response to comment from a Bills Committee Member.**

<sup>14</sup> **Technical amendment in response to comment from a Bills Committee Member.**

- (a) receive and consider any material by way of oral evidence, written statements, documents or otherwise, even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law;
- (b) by notice in writing signed by the chairman of the Tribunal require a person to attend before it at any sitting relating to the proceedings and to give evidence and produce any article, record or document in his possession relating to the subject matter of the proceedings;
- (c) administer oaths ~~and affirmations~~<sup>15</sup>;
- (d) examine or cause to be examined on oath ~~or affirmation~~<sup>15</sup> or otherwise a person attending before it and require the person to answer truthfully any question which the Tribunal considers appropriate for the purposes of the proceedings;
- (e) order a witness to provide evidence in a truthful manner for the purposes of the proceedings by affidavit or affirmation;

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<sup>15</sup> Technical amendment as the Interpretations and General Clauses Ordinance (Cap.1) defines "oath" to include "affirmations". This is consistent with the amendment made to clause 213(1). (See Annex A to Paper No. CE10/01 issued to Members on 31 July 2001). **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.**



- (f) order a person not to publish or otherwise disclose any material the Tribunal receives;
- (g) prohibit the publication or disclosure of any material the Tribunal receives at any<sup>16</sup> sitting, or any<sup>16</sup> part of a sitting, which is held in private;
- (h) determine the manner in which any material referred to in paragraph (a) is received;
- (i) stay any of the proceedings on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice;
- (j) determine the procedure to be followed in connection with the proceedings;
- (k) exercise such other powers or make such other orders as may be necessary for or ancillary to the conduct of the proceedings or the carrying out of its functions.

(2) A person commits an offence if he, without reasonable excuse -

- (a) ~~refuses or~~<sup>17</sup> fails to comply with an order, notice, prohibition or requirement of the

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<sup>16</sup> Technical amendments for greater clarity. **Members considered the amendments and did not propose further changes at the Bills Committee meeting on 21 September 2001.**

<sup>17</sup> Technical amendment for consistency with other similar provisions and because failing to do something covers refusing to do it. This is consistent with the amendment made to clause 213(2). (See Annex A to

Tribunal made or given under or pursuant to subsection (1);

- (b) disrupts or otherwise misbehaves during any sitting of the Tribunal;
- (c) having been required by the Tribunal under subsection (1) to attend before the Tribunal, leaves the place where his attendance is so required without the permission of the Tribunal;
- (d) hinders or deters any person from attending before the Tribunal, giving evidence or producing any article, record or document, for the purposes of any proceedings instituted under section 244;
- (e) threatens, insults or causes any loss to be suffered by any person who has attended before the Tribunal, on account of such attendance; or
- (f) threatens, insults or causes any loss to be suffered by any member of the Tribunal, any Presenting Officer or any person assisting a Presenting Officer at any time on account of the performance of his functions in that capacity.

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Paper No. CE10/01 issued to Members on 31 July 2001.) **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.**

(3) A person who commits an offence under subsection (2) 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.

<sup>18</sup>(4) A person is not excused from complying with an order, notice, prohibition or requirement of the Tribunal made or given under or pursuant to subsection (1) only on the ground that to do so might tend to incriminate the person.

#### **246. Further powers of Tribunal concerning evidence**

(1) For the purposes of any proceedings instituted under section 244, the Tribunal may, on its own motion or on the application of the Presenting Officer appointed for the proceedings, authorize the Commission in writing to exercise any of the powers specified in subsection (2) and to provide the Tribunal with any of the records, documents and information obtained as a result of the exercise of the powers.

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<sup>18</sup> The amendment seeks to clarify that the powers under clause 245 override common law privilege against self-incrimination, i.e. a person is required to comply with an order of the MMT notwithstanding that doing so might incriminate him. However, by virtue of clause 247, the person is protected from self-incrimination as all information given before the MMT shall not be admissible in evidence for subsequent criminal or civil proceedings against the person except in specified circumstances under clause 247(2) (e.g. perjury) as permitted under relevant human rights principles. The proposed amendment is modelled upon clauses 172 and 176 in Part VIII, which Members considered and proposed no further changes at the Bills Committee meeting on 17 July 2001.

- (2) The powers specified for the purposes of subsection (1) are the powers -
- (a) to inspect any record or document of any person where ~~there are~~ Tribunal has<sup>19</sup> reasonable grounds to believe or suspect that the record or document may contain information relevant to the proceedings;
  - (b) to make copies or otherwise record details of any record or document referred to in paragraph (a) and, subject to subsection (3), to take possession of the record or document for the period (not exceeding 2 days) necessary to do so;
  - (c) to require any person to give, within a specified time, any explanation or particulars in respect of any record or document referred to in paragraph (a) (including, in so far as applicable, a description of the circumstances under which it was prepared or created, details of all instructions given or received in connection with it, and an explanation of the reasons for the making of entries contained in it or the omission of entries from it);

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<sup>19</sup> **Technical amendment to clearly refer to the “Tribunal” having the reasonable grounds to believe or suspect, for consistency with section 18(2)(a) of the SIDO.**

- (d) to require any person to give, within a specified time, information as to whether or not there is ~~at on~~<sup>20</sup> any premises any record or document which may contain information relevant to the proceedings, and particulars as to the premises or the record or document;
- (e) to require that any information, explanation or particulars given pursuant to this section be verified by statutory declaration and to take the declaration;
- (f) to take a statement from a person whom the Tribunal has reasonable grounds to believe or suspect is able to provide information which is relevant for the purposes of the proceedings.

(3) The Commission shall, subject to any reasonable conditions it imposes as to security or otherwise, permit a person who would be entitled to inspect any record or document had the Commission not taken possession of it under subsection (2)(b), to inspect it and to make copies or otherwise record details of it at all reasonable times.

(4) A person shall produce a record or document in his possession to the Commission if the Commission seeks to

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<sup>20</sup> Technical amendment. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.

inspect it, or exercise any other powers in respect of it, under this section.

(5) A person who is required under this section to give or provide any information, explanation or particulars shall comply with the requirement so far as it lies within his power to do so and shall, if requested, verify the information, explanation or particulars (as the case may be) by statutory declaration.

(6) A person commits an offence if -

(a) he, without reasonable excuse, contravenes subsection (4) or (5);

(b) he -

(i) in purported compliance with subsection (4) or (5), makes any statement which is false or misleading in a material particular; and

(ii) knows that, or is reckless as to whether, the statement is false or misleading in a material particular;

(c) he obstructs the Commission in the exercise of any of its powers under this section; or

(d) he, with intent to conceal, from the Tribunal, facts or matters capable of being disclosed by any record or document which is relevant to any proceedings instituted under section 244,

destroys, falsifies, conceals or otherwise disposes of, or causes or permits the destruction, falsification, concealment or disposal of, such record or document.

(7) A person who commits an offence under subsection (6) 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.

<sup>21</sup>(8) A person is not excused from complying with subsection (4) or (5) only on the ground that to do so might tend to incriminate him.

**247. Use of evidence received for purposes of market misconduct proceedings**

(1) Notwithstanding any other provisions of this Ordinance, evidence given by any person at or for the purposes of any proceedings instituted under section 244 (including any material, record or document received by the Tribunal from the person or produced to the Tribunal by the person under section 245, and any record or document or information given, provided, produced or disclosed to the Tribunal by the person

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<sup>21</sup> The amendment is similar to that made to clause 245(4) and provides expressly that the relevant powers override the common law privilege against self-incrimination. See Note 18 above.

under section 246) ~~is shall be~~<sup>22</sup> admissible in evidence for all the purposes of this Part (including any proceedings (civil or criminal) instituted under or pursuant to this Part) but, subject to subsections (2) ~~and (3), is not~~ shall not be<sup>22</sup> admissible in evidence against that person ~~in for~~ any other purposes in any<sup>22</sup> proceedings (civil or criminal) in a court of law brought by or against him.

(2) The evidence given by any person at or for the purposes of any proceedings instituted under section 244 as referred to in subsection (1) ~~is shall be~~<sup>23</sup> admissible in evidence against that person ~~in~~—

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<sup>24</sup>(aa) in civil proceedings instituted under or pursuant to Part XI;

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<sup>22</sup> Technical amendment. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.

<sup>23</sup> Technical amendment. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.

<sup>24</sup> This amendment seeks to allow information admitted before the MMT to be admitted before civil proceedings under Part XI (i.e. for purposes relating to SFAT proceedings). Express reference to civil proceedings is necessary because clause 247(1) prohibits information admitted before the MMT to be admitted in all proceedings whether civil or criminal. As MMT proceedings and SFAT proceedings might concern the same facts (e.g. appeals against SFC disciplinary decisions could be made by intermediaries or persons connected with them who might have been involved in market misconduct), evidence admitted before the MMT that is relevant to an SFC decision will be relevant to an SFAT appeal against that SFC decision.



<sup>25</sup>(ab)in proceedings instituted under section 296;

(a) in civil proceedings in a court of law arising out of the giving of evidence at or for the purposes of the proceedings instituted under section 244;

(b) in criminal proceedings where the person is charged with an offence under section 213(2)(a)<sup>26</sup>, or under Part V of the Crimes Ordinance (Cap. 200), or for perjury, in respect of answers given by that person to questions put to him at or for the purposes of the proceedings instituted under section 244.

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<sup>25</sup> Proceedings under clause 296 are identical to proceedings under clause 272 ie third party civil proceedings brought for compensation in relation to a pecuniary loss resulting from a contravention of the market misconduct provisions. The only difference is the location of the provision in Part XIV rather than Part XIII. The provisions in Parts XIII and XIV essentially cover the same conduct. As such, it is consistent policy-wise to allow information admitted before the MMT to be admissible in civil proceedings under clause 296. As the proceedings are civil, this is not contrary to relevant human rights protections. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.**

<sup>26</sup> As a general rule, information admitted before the MMT cannot be used in criminal or civil proceedings. There are a few exceptions. This amendment seeks to allow information admitted before MMT to be admitted before the SFAT to facilitate proof of crimes incidental to SFAT proceedings (e.g. giving false testimony before the SFAT). This is similar to the other exceptions in clause 247(2)(b). Information from MMT proceedings may be relevant because SFAT and MMT proceedings may often arise from the same facts (e.g. appeals against disciplinary decisions taken by the SFC to sanction an intermediary's involvement in market misconduct). The use of information in these proceedings will not contravene human rights principles because the information will only be used to prove that certain information was or was not produced in response to a request, rather than the truth of that information.

~~<sup>27</sup>(3) The evidence given by any person at or for the purposes of any proceedings instituted under section 244 as referred to in subsection (1) is admissible in evidence against that person in any other proceedings (civil or criminal) in a court of law where, had there been no such proceedings instituted under section 244, the same evidence would have been admissible in evidence in such other proceedings under the law or procedures applicable to such other proceedings in that court.~~

#### **248. Privileged information**

Nothing in this Part and Schedule 8 requires an authorized financial institution, acting as the banker or financial adviser of a person whose conduct is the subject, whether wholly or in part, of any proceedings instituted under section 244, to disclose information as to the affairs of any of its customers other than that person.

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<sup>27</sup> Clause 247(3) was deleted following the discussion in the Bills Committee. The deletion of the clause means that evidence admitted before the MMT (IDT) is not admissible in other proceedings other than those identified in clauses 247(1) and (2). This is generally consistent with the policy behind s 19 of the Securities (Insider Dealing) Ordinance (Cap.395) (S(ID)O). **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.**

## 249. Orders, etc. of Tribunal

(1) ~~Subject to subsection (3)~~<sup>28</sup>, the Tribunal may at the conclusion of any proceedings instituted under section 244 make one~~7~~, or more~~than one~~,<sup>29</sup> of the following orders in respect of a person identified as having engaged in market misconduct pursuant to section 244(3)(b) -

- (a) an order that the person shall not, without the leave of the Court of First Instance, be or continue to be a director, liquidator, or receiver or manager of the property or business, of a listed corporation or any other specified corporation or in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation or any other specified corporation for the period (not exceeding 5 years) specified in the order;
- (b) an order that the person shall not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly, in any way acquire, dispose of or otherwise deal in any

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<sup>28</sup> Technical amendment to emphasise that the MMT may only make a punitive order after a person who is the subject of the intended order has been afforded procedural fairness. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.**

<sup>29</sup> Technical amendment in response to a comment of a Bills Committee Member.

securities, futures contract or leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme for the period (not exceeding 5 years) specified in the order;

- (c) an order that the person shall not again perpetrate any conduct which constitutes such market misconduct as is specified in the order (whether the same as the market misconduct in question or not);
- (d) an order that the person pay to the Government an amount not exceeding the amount of any profit ~~secured or increased~~gained<sup>11</sup> or loss avoided<sup>11</sup>~~or reduced~~ by the person as a result of the market misconduct in question;
- (e) without prejudice to any power of the Tribunal under section 252, an order that the person pay to the Government the sum the Tribunal considers appropriate for the costs<sup>30</sup> and expenses reasonably<sup>31</sup> incurred by the Government, whether

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<sup>30</sup> Technical amendment to ensure that all costs properly recoverable are recoverable. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.

<sup>31</sup> Amendment in response to comment of a Bills Committee Member to ensure that a person found guilty of market misconduct can only be ordered to pay the reasonable costs of the Government relating to the proceedings or of the SFC's investigation.

in relation or incidental to the proceedings or  
in relation or incidental to any investigation  
of his conduct or affairs carried out for the  
purposes of the proceedings;

- (f) without prejudice to any power of the Tribunal  
under section 252, an order that the person pay  
to the Commission the sum the Tribunal considers  
appropriate for the costs<sup>30</sup> and expenses  
reasonably<sup>31</sup> incurred by the Commission, whether  
in relation or incidental to any investigation  
of his conduct or affairs carried out before the  
matter was referred to the Tribunal by the  
Financial Secretary or in relation or incidental  
to the proceedings;
- (g) an order that any body which may take  
disciplinary action against the person as one of  
its members be recommended to take disciplinary  
action against him.

(2) When making any order in respect of a person under  
subsection (1), the Tribunal may take into account any conduct  
by the person which -

- (a) previously resulted in the person being  
convicted of an offence in Hong Kong;
- (b) previously resulted in the person being  
identified by the Tribunal as having engaged in

any market misconduct pursuant to section 244(3)(b); or

- (c) at any time before the commencement of this Part resulted in the person being identified as an insider dealer in a determination under section 16(3), or in a written report prepared and issued under section 22(1), of the repealed Securities (Insider Dealing) Ordinance.

(3) The Tribunal shall not make an order in respect of a person under subsection (1) without first giving the person a reasonable opportunity of being heard.

(4) Where the Tribunal makes an order under subsection (1)(a), the Tribunal may specify a corporation by name or by reference to a relationship with any other corporation.

(5) The Tribunal may, in relation to any person, specify any market misconduct in an order under subsection (1)(c), whether or not there is, at the time when the order is made, likelihood that the person would perpetrate any conduct which constitutes the market misconduct.

(5A) Where the Tribunal makes an order under subsection (1)(e) or (f) requiring the payment of costs as costs reasonably incurred in relation or incidental to any proceedings instituted under section 244 -

- (a) subject to any rules made by the Chief Justice under section 260, Order 62 of the Rules of

High Court (Cap. 4 sub. leg.) applies to the taxation of the costs<sup>32</sup>; and

(b) the Tribunal may order that the costs shall be taxed on the basis of one of the scales of costs in the Schedules to Order 62 of the Rules of the High Court (Cap. 4 sub. leg.)<sup>33</sup>.

(6) The Tribunal shall by notice in writing notify a person of an order made in respect of him under subsection (1).

(7) An order made in respect of a person under subsection (1) takes effect at the time when it is notified to the person or at the time specified in the notice, whichever is the later.

(8) Where the Tribunal makes an order under subsection (1)(b), the Commission may notify any licensed ~~order exempt~~<sup>34</sup> person or registered institution<sup>34</sup> of the order in such manner as it considers appropriate.

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<sup>32</sup> Amendment to enable that orders in relation to costs of proceedings under clauses 249(1)(e) and (f) are taxable in accordance with the normal procedures for legal costs in civil proceedings. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.**

<sup>33</sup> Technical amendment for consistency with clause 252(4) and to make it is clear that orders to pay Government and SFC costs incurred in relation to or incidental to MMT proceedings under clauses 249 and 250 are taxable in accordance with the scales of costs in the High Court Rules.

<sup>34</sup> We accept the comment of some Members that the term “exempt person” is a misnomer and does not reflect the proposed regulatory framework whereby authorized institutions engaging in regulated activities are subject to a wide range of regulatory requirements and disciplinary sanctions. We informed Members at the meeting on 14 September 2001 that we would replace “exempt person” with “registered institution” and “exempt” with “registered” throughout the Bill to duly reflect the policy intention.

(9) A person commits an offence if he ~~refuses or~~<sup>17</sup> fails to comply with an order made under subsection (1)(a), (b) or (c) 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.

**250. Further orders in respect of officers of corporation**

(1) ~~W~~<sup>28</sup>Subject to subsection (3), where a corporation has been identified as having engaged in market misconduct pursuant to section 244(3)(b) and the market misconduct is directly or indirectly attributable to a breach by any person as an officer of the corporation of the duty imposed on him by section 270, the Tribunal may make ~~one, or more than one,~~<sup>29</sup> of the orders referred to in section 249(1)(a) to (g) in respect of the person even if the person has not been identified as having engaged in market misconduct pursuant to section 244(3)(b).

(2) When making any order in respect of a person under subsection (1), the Tribunal may take into account any conduct by the person which -

- (a) previously resulted in the person being convicted of an offence in Hong Kong;



- (b) previously resulted in the person being identified by the Tribunal as having engaged in any market misconduct pursuant to section 244(3)(b); or
- (c) at any time before the commencement of this Part resulted in the person being identified as an insider dealer in a determination under section 16(3), or in a written report prepared and issued under section 22(1), of the repealed Securities (Insider Dealing) Ordinance.

(3) The Tribunal shall not make an order in respect of a person under subsection (1) without first giving the person a reasonable opportunity of being heard.

(4) Where the Tribunal makes under subsection (1) an order referred to in section 249(1)(a), the Tribunal may specify a corporation by name or by reference to a relationship with any other corporation.

(5) Where the Tribunal, in relation to any person, makes under subsection (1) an order referred to in section 249(1)(c), the Tribunal may specify any market misconduct in the order, whether or not there is, at the time when the order is made, likelihood that the person would perpetrate any conduct which constitutes the market misconduct.

(5A) Where the Tribunal makes under subsection (1) an order referred to in section 249(1)(e) or (f) requiring the

payment of costs as costs reasonably incurred in relation or incidental to any proceedings instituted under section 244 -

(a) subject to any rules made by the Chief Justice under section 260, Order 62 of the Rules of High Court (Cap. 4 sub. leg.) applies to the taxation of the costs<sup>32</sup>; and

(b) the Tribunal may order that the costs shall be taxed on the basis of one of the scales of costs in the Schedules to Order 62 of the Rules of the High Court (Cap. 4 sub. leg.)<sup>33</sup>.

(6) The Tribunal shall by notice in writing notify a person of an order made in respect of him under subsection (1).

(7) An order made in respect of a person under subsection (1) takes effect at the time when it is notified to the person or at the time specified in the notice, whichever is the later.

(8) Where the Tribunal makes under subsection (1) an order referred to in section 249(1)(b), the Commission may notify any licensed ~~or exempt~~<sup>34</sup> person or registered institution<sup>34</sup> of the order in such manner as it considers appropriate.

(9) Where an order referred to in section 249(1)(a), (b) or (c) is made in respect of a person under subsection (1), the person commits an offence if he ~~refuses or~~<sup>17</sup> fails to comply with the order 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.

**251. Interest on moneys payable under order ~~section 249 or 250~~ referred to in section 249(1)(d)**<sup>35</sup>

Where the Tribunal makes an order ~~under section 249 or 250 referred to in section 249(1)(d), whether under section 249(1) or 250(1)~~<sup>35</sup>, requiring the payment of money by a person, the Tribunal may<sup>36</sup> also order that the payment shall carry compound interest calculated from—

~~<sup>35</sup>(a) where the payment is required under an order referred to in section 249(1)(e) or (f), whether made under section 249(1) or 250(1), the date of the order; or~~

~~(b) in any other case,~~

(a) from the date of occurrence of the market misconduct in question; and

(b) at the rate from time to time applicable to judgment debts under section 49 of the High Court Ordinance (Cap. 4) and with such rests

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<sup>35</sup> **We accept the comment of some Members and propose to remove the power of the MMT to impose compound interest on costs of the Government and investigatory costs orders.**

<sup>36</sup> **Amendment in response to market comment (Hong Kong Society of Accountants) that payment of compound interest should be made discretionary. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.**

and in such manner as the Tribunal considers appropriate.

## **252. Costs**

(1) Subject to subsection (5), at the conclusion of any proceedings instituted under section 244 or as soon as reasonably practicable after the conclusion of the proceedings, the Tribunal may by order award to -

(a) any person whose attendance, whether as a witness or otherwise, has been necessary or required for the purposes of the proceedings;

(b) any person whose conduct is the subject, whether wholly or in part, of the proceedings, such sum as it considers appropriate in respect of the costs reasonably incurred by the person in relation to the proceedings.

(2) Any costs awarded under this section are a charge on the general revenue.

(3) Subject to any rules made by the Chief Justice under section 260, Order 62 of the Rules of the High Court (Cap. 4 sub. leg.) applies to the award of costs, and to the taxation of any costs awarded, by the Tribunal under this section.

(4) The Tribunal may order that any costs awarded under this section shall be taxed on the basis of one of the scales of costs in the Schedules to Order 62 of the Rules of the High Court (Cap. 4 sub. leg.).

- (5) Subsection (1)(a) and (b) does not apply to -
- (a) a person who has by virtue of section 244(4)(a), (b) or (c) been identified as having engaged in market misconduct pursuant to section 244(3)(b);
  - (b) a person whose conduct the Tribunal considers has caused, whether wholly or in part, the Tribunal to investigate or consider his conduct during the course of the proceedings in question;
  - (c) a person whom the Tribunal considers has by his conduct caused, whether wholly or in part, the institution of the proceedings.

### **253. Contempt dealt with by Tribunal**

(1) The Tribunal shall have the same powers as the Court of First Instance to punish for contempt.

(2) Without limiting the generality of the powers of the Tribunal under subsection (1), the Tribunal shall have the same powers as the Court of First Instance to punish for contempt, as if it were contempt of court, a person who -

- (a) without reasonable excuse, commits any conduct falling within the description of section 245(2)(a), (b), (c), (d), (e) or (f);

- (b) commits any conduct falling within the description of section 246(6)(a), (b), (c) or (d); or
- (c) ~~refuses or~~<sup>17</sup> fails to comply with an order of the Tribunal referred to in section 249(9) or 250(9).

(3) The Tribunal shall, in the exercise of its powers to punish for contempt under this section, adopt the same standard of proof as the Court of First Instance in the exercise of the same powers to punish for contempt.

(4) Notwithstanding anything in this section and any other provisions of this Ordinance -

- (a) ~~no proceedings may be instituted~~power to punish for contempt may be exercised<sup>37</sup> against any person under this section in respect of any conduct if -
  - (i) criminal proceedings have previously been instituted against the person under section 245(2), 246(6), 249(9) or 250(9) in respect of the same conduct; and
  - (ii) (A) those criminal proceedings remain pending; or

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<sup>37</sup> Technical amendment in response to a comment made by the Legal Service Division of the Legislative Council that in the case of contempt, there may not be any proceedings instituted for that purpose. Similar amendments are also made to clause 214 in Part XI.

(B) by reason of the previous institution of those criminal proceedings, no criminal proceedings may again be lawfully instituted against that person under such section in respect of the same conduct;

(b) no criminal proceedings may be instituted against any person under section 245(2), 246(6), 249(9) or 250(9) in respect of any conduct if -

(i) ~~proceedings have any power to punish for contempt has~~<sup>37</sup> previously been ~~instituted exercised~~<sup>37</sup> against the person under this section in respect of the same conduct; and

(ii) (A) ~~those proceedings~~proceedings arising from the exercise of such power<sup>37</sup> remain pending; or

(B) by reason of the previous ~~institution of those proceedings, no proceedings exercise of such power, no power to punish for contempt~~<sup>37</sup> may again be lawfully ~~instituted exercised~~<sup>37</sup> against

that person under this section  
in respect of the same conduct.

#### 254. Report of Tribunal

(1) The Tribunal shall, after the conduct of any proceedings instituted under section 244, prepare a written report in respect of the proceedings, which shall contain -

- (a) any of its determinations made pursuant to section 244(3) and any order made under sections ~~249 and 249~~ or<sup>38</sup> 250, and the reasons for making such determinations and order; and
- (b) any order made under section ~~251~~ or<sup>39</sup> 252, and the reasons for making such order.

(2) The Tribunal shall issue the report prepared under subsection (1) -

- (a) first, by giving a copy of the report to the Financial Secretary; and
- (b) then, except where the Tribunal sat in private for the whole or any part of its proceedings, by -

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<sup>38</sup> Technical amendment for greater clarity. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.**

<sup>39</sup> Amendment consequential to amendment to clause 251 to make payment of compound interest discretionary. See Note 36. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.**



- (i) publishing the report so that copies of the report are available to the public;
- (ii) giving a copy of the report, so far as reasonably practicable, to any person whose conduct was directly in question in the proceedings;
- (iii) giving a copy of the report to the Secretary for Justice;
- (iv) giving a copy of the report to the Commission; and
- (v) where the Tribunal considers appropriate, giving a copy of the report to any body which may take disciplinary action against the person identified as having engaged in market misconduct pursuant to section 244(3)(b), as one of its members.

(3) Where the Tribunal sat in private for the whole or any part of its proceedings, the Financial Secretary may, where he is of the opinion that it is in the public interest to do so, cause the whole or any part of the report to be made available to the public or to a particular person or body in the manner he directs.

(4) A person is not liable to civil or criminal proceedings for publishing a true and accurate account or a fair and accurate summary of a report of the Tribunal issued or made available under subsection (2)(b) or (3).

#### **255. Form and proof of orders of Tribunal**

(1) An order made by the Tribunal shall be recorded in writing and signed by the chairman of the Tribunal ~~when the order is made~~<sup>40</sup>.

(2) A document purporting to be an order of the Tribunal and to be signed by the chairman of the Tribunal shall, in the absence of proof to the contrary, be regarded as an order of the Tribunal duly made, without proof of its making, or proof of signature, or proof that the person signing the order was in fact the chairman.

#### **256. Orders of Tribunal may be registered in Court of First Instance**

(1) The Court of First Instance may, on notice in writing given by the Tribunal in the manner prescribed by rules made by the Chief Justice under section 260, register an order of the Tribunal in the Court of First Instance and the order shall, on registration, become for all purposes an order

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<sup>40</sup> We accept the comment of the Legal Service Division of the Legislative Council and propose to delete “when the order is made” to eliminate unjustified disputes over the validity of an MMT order.

of the Court of First Instance made within the jurisdiction of the Court of First Instance.

(2) Where an order is made under section 249(1)(a), or an order referred to in section 249(1)(a) is made under section 250(1), the order shall be filed by the Tribunal with the Registrar of Companies, as soon as reasonably practicable after it is made.

### **Division 3 - Appeals, etc.**

#### **257. Appeal to Court of Appeal**

(1) <sup>41</sup>Where, ~~after~~ the Tribunal has made any finding or determination for the purposes of any proceedings instituted under section 244, and the Secretary for Justice, or a person identified as having engaged in market misconduct pursuant to section 244(3)(b), is dissatisfied with the finding or determination, the Secretary for Justice or the person (as the case may be) may, after the Tribunal has made orders (if any) under section 249, 250, 251 or 252 for the purposes of the proceedings<sup>41</sup>, appeal to the Court of Appeal against the finding or determination -

(a) on a point of law; or

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<sup>41</sup> **Technical amendment to clarify that the Secretary for Justice or the parties identified as having engaged in market misconduct may appeal against the decisions of the MMT on conclusion of all the proceedings, i.e. after the making of any finding or determination of market misconduct and orders (if any) under clauses 249, 250, 251 or 252. This amendment also reflects the practice in criminal and civil law generally and eliminates the possibility of unjustified delays caused by strategic appeals.**

(b) with the leave of the Court of Appeal, on a question of fact.

(2) A person in respect of whom an order has been made under section 249, 250, 251<sup>42</sup> or 252 may appeal to the Court of Appeal against the order.

### **258. Powers of Court of Appeal on appeal**

(1) In an appeal under section 257(1), the Court of Appeal may -

(a) allow the appeal;

(b) dismiss the appeal;

<sup>43</sup>(ba) vary or set aside the finding or determination, and, where the finding or determination is set aside, substitute for the finding or determination any other finding or determination it considers appropriate;

(c) remit the matter in question to the Tribunal with the directions it considers appropriate, which may include a direction to the Tribunal

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<sup>42</sup> Amendment consequential to amendment to clause 251 to make payment of compound interest discretionary. See Note 36. If the payment of compound interest is discretionary, an order to pay discretionary interest forms part of the "sentencing" by the MMT and should be appealable as of right to the Court of Appeal. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.

<sup>43</sup> We accept the comments made by some Members at the Bills Committee meeting on 17 September 2001 that the Court of Appeal should be empowered to substitute a decision of the SFAT, and have amended clause 221(2) in Part XI accordingly. We therefore propose a similar amendment to enable the Court of Appeal to substitute findings or determinations of the MMT.

to conduct the proceedings in question afresh for the purpose of determining any question specified by the Court of Appeal.

(2) In an appeal under section 257(2), the Court of Appeal may -

- (a) confirm, vary or set aside the order appealed against;
- (b) substitute another order it considers appropriate, ~~whether more or less onerous, being an~~ (whether more or less onerous), being any order that the Tribunal had power to make in respect of the appellant, ~~whether or not under the same provision as that under which the order has been made~~<sup>44</sup>.

<sup>43</sup>(2A) Where the Court of Appeal varies, or substitutes any finding or determination for, the finding or determination in question under subsection (1)(ba), the finding or determination in question as varied or the finding or determination substituting for the finding or determination in question (as the case may be) may be any finding or determination (whether more or less onerous) that the Tribunal had power to make for the purposes of the proceedings in question, whether or not under the same provision as that

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<sup>44</sup> Technical amendment for greater clarity for the Court of Appeal's power to substitute an MMT order. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001.

under which the finding or determination in question has been made.

<sup>45</sup>(2B)Where the Court of Appeal remits any matter to the Tribunal under section 258(1)(c), without limiting the generality of that section, the Court of Appeal may direct that the matter in question, upon being remitted to the Tribunal, shall be disposed of by -

(a) the same Tribunal from which the appeal in question lies; or

(b) the Tribunal constituted in such manner as the Court of Appeal considers appropriate.

<sup>45</sup>(2C) Where, upon a matter being remitted to it under section 258(1)(c), the Tribunal is constituted in accordance with the terms of any direction given by the Court of Appeal under subsection (2B), the validity of the proceedings before the Tribunal shall not be called into question by reason only that members of the Tribunal are not the same as those of the Tribunal from which the appeal in question lies.

(3) In an appeal under section 257, the Court of Appeal may make such order as to costs as it considers appropriate.

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<sup>45</sup> **Technical amendment to clarify that where the Court of Appeal on an appeal remits a matter to the MMT, it can direct that the remitted matter be heard by the same division of the MMT or alternatively a division to be constituted in accordance with its directions. Usually, the Court of Appeal would direct the same division of the MMT which had heard the proceedings before to hear the remitted case, but where that is inappropriate (e.g. the Court of Appeal considers one or more members are biased) or impracticable (e.g. some members are no longer available), the Court of Appeal may direct another division of the MMT made up in whole or in part of new members to hear the case.**

## 259. No stay of execution on appeal

Neither the lodging of an appeal nor the filing of an application for leave to appeal under section 257 operates as a stay of execution of a finding or determination or an order (as the case may be) of the Tribunal unless the Court of Appeal otherwise orders, and any stay of execution may be subject to such conditions as to costs, payment of money into the Tribunal or otherwise as the Court of Appeal considers appropriate.

## 260. Rules by Chief Justice

The Chief Justice may make rules -

- (a) providing for the taxation of costs required to be paid under an order referred to in section 249(1)(e) or (f), whether made under section 249(1) or 250(1), and for the<sup>46</sup> award of costs under section 252 and the taxation of those costs;
- (b) prescribing the manner in which the Tribunal is to give notice to the Court of First Instance in respect of orders of the Tribunal pursuant to section 256;

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<sup>46</sup> Amendment consequential to the amendment to introduce clauses 249(5A) and 250(5A) allowing for the taxation of costs orders under clauses 249(1)(e) and (f) and clause 250(1). See Notes 32 and 33. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 21 September 2001. We have since made some technical amendments for greater clarity.**

- (c) regulating the procedure for -
  - (i) applying for leave to appeal, and the hearing of applications for leave to appeal, under section 257;
  - (ii) the hearing of appeals under that section;
- (d) requiring the payment of the fees specified in the rules for any matter relating to the proceedings instituted under section 244;
- (e) providing for matters of procedure or other matters relating to the proceedings instituted under section 244, which are not provided for in this Part or in Schedule 8;
- <sup>47</sup>(ea)providing for the issue or service of any document (however described) for the purposes of this Part or Schedule 8;
- (f) prescribing any matter which this Part provides is, or may be, prescribed by rules made by the Chief Justice.

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<sup>47</sup> **Amendment to allow the Chief Justice to make rules providing for the service of documents for MMT proceedings, independent of the general rules for service of documents provided for in clause 386. This will give the Chief Justice flexibility in making service rules most suitable to the MMT in the light of practical experience.**



## Division 4 - Insider dealing

### 261. Insider dealing

(1) Insider dealing in relation to a listed corporation takes place -

- (a) when a person connected with the corporation and having information which he knows is relevant information in relation to the corporation -
  - (i) deals in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives; or
  - (ii) counsels or procures another person to deal in such listed securities or derivatives, knowing or having reasonable cause to believe that the other person will deal in them;
- (b) when a person who is contemplating or has contemplated making, whether with or without another person, a take-over offer for the corporation and who knows that the information that the offer is contemplated or is no longer

contemplated is relevant information in relation to the corporation -

- (i) deals in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives, otherwise than for the purpose of the take-over; or
  - (ii) counsels or procures another person to deal in such listed securities or derivatives, otherwise than for the purpose of the take-over;
- (c) when a person connected with the corporation and knowing that any information is relevant information in relation to the corporation, discloses the information, directly or indirectly, to another person, knowing or having reasonable cause to believe that the other person will make use of the information for the purpose of dealing, or of counselling or procuring another person to deal, in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives;

(d) when a person who is contemplating or has contemplated making, whether with or without another person, a take-over offer for the corporation and who knows that the information that the offer is contemplated or is no longer contemplated is relevant information in relation to the corporation, discloses the information, directly or indirectly, to another person, knowing or having reasonable cause to believe that the other person will make use of the information for the purpose of dealing, or of counselling or procuring another person to deal, in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives;

(e) when a person who has information which he knows is relevant information in relation to the corporation and which he received, directly or indirectly, from a person whom he knows is connected with the corporation and whom he knows or has reasonable cause to believe held the information as a result of being connected with the corporation -

(i) deals in the listed securities of the corporation or their derivatives, or

in the listed securities of a related corporation of the corporation or their derivatives; or

(ii) counsels or procures another person to deal in such listed securities or derivatives; or

(f) when a person having received, directly or indirectly, from a person whom he knows or has reasonable cause to believe is contemplating or is no longer contemplating making a take-over offer for the corporation, information to that effect which he knows is relevant information in relation to the corporation -

(i) deals in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives; or

(ii) counsels or procures another person to deal in such listed securities or derivatives.

(2) Insider dealing in relation to a listed corporation also takes place when a person who knowingly has relevant information in relation to the corporation in any of the circumstances described in subsection (1) -

- (a) counsels or procures another person to deal in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives, knowing or having reasonable cause to believe that the other person will deal in such listed securities or derivatives outside Hong Kong on a stock market other than a recognized stock market; or
- (b) discloses the relevant information to another person knowing or having reasonable cause to believe that the other person or some other person will make use of the relevant information for the purpose of dealing, or of counselling or procuring any other person to deal, in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives, outside Hong Kong on a stock market other than a recognized stock market.

**<sup>48</sup>262. Insider dealing - certain persons not to be regarded as having engaged in market misconduct**

<sup>48</sup>(1) ~~A person who enters into a transaction which is an insider dealing shall not by reason of the insider dealing be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing in or counselling or procuring another person to deal in listed securities or derivatives if he establishes that he entered into the transaction dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question (as the case may be) -~~

- (a) for the sole purpose of acquiring shares required for his being qualified as a director or intending director of a corporation;
- (b) in the performance in good faith of an underwriting agreement for the securities to

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<sup>48</sup> We previously informed Members at the Bills Committee meeting on 28 September 2001 (see Note 57 below) that we were then refining the insider dealing clauses in consultation with the market. In particular, the market is concerned that the meaning of the opening words of some of the insider dealing defences (which are carried over from the existing defences in the SIDO), i.e. “a person who enters into a transaction which is an insider dealing”, may not be entirely clear. This issue was highlighted by the proposed amendment to the opening wording of clause 262(7) in the last marked up version of Part XIII issued to Members in September 2001. The proposed amendments to clauses 262 to 264 (see Notes 49 to 62 below) seek to clarify the scope of these defences to address market concerns. In particular, the amendment to clause 262(1) would clarify that the defence should apply to any of the identified persons who deals or counsels or procures another to deal for the identified purposes.

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All proposed amendments to clauses 262(1) to (9) are marked up against the Blue Bill. Those which have been made since Members last considered Paper No. CE12/01 are now explained in bold type. We have consulted concerned market participants on such latest amendments and they are in agreement with them.

~~which the transaction relates~~listed securities  
or derivatives in question; or

- (c) in the performance in good faith of his functions as a liquidator, receiver or trustee in bankruptcy.

<sup>49</sup>(2) A corporation~~which enters into a transaction which is an insider dealing~~ shall not~~by reason of the insider dealing~~ be regarded as having engaged in market misconduct by reason of an insider dealing taking place through its dealing in or counselling or procuring another person to deal in listed securities or derivatives if it establishes that -

- (a) although one or more of its directors or employees had the relevant information in relation to the corporation the listed securities of which were, or the derivatives of the listed securities of which were, the ~~subject of the insider dealing~~listed securities or derivatives in question, each person who took the decision for it to deal in or counsel or procure the other person to deal in such listed securities or derivatives (as the case may be)~~to enter into the transaction for it did not have the relevant information up to (and~~

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<sup>49</sup> The amendments would clarify that the defence should apply to a corporation which deals or counsels or procures another to deal (e.g. a broker on its behalf), if it has working “Chinese walls” to prevent the improper communication of inside information.

including) the time when it dealt in or counselled or procured the other person to deal in such listed securities or derivatives (as the case may be)~~entered into the transaction;~~

(b) arrangements then existed to secure that -

(i) the relevant information was, up to (and including) the time when it ~~entered into the transaction~~dealt in or counselled or procured the other person to deal in such listed securities or derivatives (as the case may be), not communicated to any person who took the decision; and

(ii) none of its directors or employees who had the relevant information gave advice concerning the ~~transaction~~decision to any person who took the decision at any time before it dealt in or counselled or~~entered into the transaction~~procured the other person to deal in such listed securities or derivatives (as the case may be); and

(c) the relevant information was in fact not so communicated to any person who took the decision and none of its directors or employees who had



the relevant information in fact so gave the advice to any person who took the decision.

~~(3) A person who enters into a transaction which is an insider dealing shall not by reason of the insider dealing be regarded as having engaged in market misconduct if he establishes that the purpose for which he entered into the transaction was not, or, where there was more than one purpose, the purposes for which he entered into the transaction did not include, the purpose of securing or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using relevant information.~~

~~(4) A person who enters into a transaction which is an insider dealing shall not by reason of the insider dealing be regarded as having engaged in market misconduct if he establishes that—~~

- ~~(a) he entered into the transaction as agent for another person;~~
- ~~(b) he did not select or advise on the selection of the listed securities or their derivatives to which the transaction relates;~~
- ~~(c) he had no knowledge or reasonable cause to suspect that the other person had the relevant information in question; and~~
- ~~(d) he did not counsel or procure the other person in relation to the transaction.~~

~~(5) A person who enters into a transaction which is an insider dealing shall not by reason of the insider dealing be regarded as having engaged in market misconduct if he establishes that—~~

~~(a) he and the other party to the transaction entered into the transaction directly with each other; and~~

~~(b) at the time he entered into the transaction—~~

~~(i) the other party to the transaction knew, or ought reasonably to have known, of the relevant information in question; and~~

~~(ii) the transaction was not required to be recorded on a recognized stock market or to be notified to a recognized stock market under the rules of the recognized exchange company by which the recognized stock market is operated.~~

~~(6) A person who enters into a transaction which is an insider dealing shall not by reason of the insider dealing be regarded as having engaged in market misconduct if he establishes that—~~

~~(a) he entered into the transaction, otherwise than as a person who has counselled or procured the~~

~~other party to the transaction to deal in listed securities or their derivatives; and~~  
~~(b) at the time he entered into the transaction, the other party to the transaction knew, or ought reasonably to have known, that he was a person connected with the corporation the listed securities of which were, or the derivatives of the listed securities of which were, the subject of the insider dealing.~~

~~— (7) A person who enters into a transaction which is an insider dealing, as a person who has counselled or procured another person to deal in listed securities of a corporation or their derivatives, shall not by reason of the insider dealing be regarded as having engaged in market misconduct if he establishes that —~~

- ~~(a) the other person entered into the transaction, otherwise than as a person who has counselled or procured the other party to the transaction to deal in listed securities or their derivatives; and~~
- ~~(b) at the time the other person entered into the transaction, the other party to the transaction knew, or ought reasonably to have known, that the other person was a person connected with the corporation.~~

~~(8) A person who enters into a transaction which is an insider dealing shall not by reason of the insider dealing be regarded as having engaged in market misconduct if he establishes that the transaction is a market contract.~~

<sup>50</sup>(3) A person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing in or counselling or procuring another person to deal in listed securities or derivatives or his disclosure of information if he establishes that the purpose for which he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question or disclosed the information in question (as the case may be) was not, or, where there was more than one purpose, the purposes for which he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question or disclosed the information in question (as the case may be) did not include, the purpose of securing or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using relevant information.

<sup>51</sup>(4) A person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place

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<sup>50</sup> **The amendments would clarify that the defence should apply to a person who deals or counsels or procures another to deal or discloses information to another.**

<sup>51</sup> **The amendments would clarify that the defence should apply to an agent dealing on behalf of a principal whom it has not solicited, or through counselling or procuring another to deal (e.g. another broker to whom the order is “farmed out”), again on behalf of an unsolicited principal.**

through his dealing in or counselling or procuring another person to deal in listed securities or derivatives if he establishes that -

(a) he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question (as the case may be) as agent;

(b) he did not select or advise on the selection of such listed securities or derivatives; and

(c) he -

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<sup>52</sup>(i) did not know that the person for whom he acted as agent was a person connected with the corporation the listed securities of which were, or the derivatives of the listed securities of which were, such listed securities or derivatives; or

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<sup>52</sup> The amendment is for two purposes. First, to remove the obligation that a defendant prove that they did not have reasonable cause to suspect that their principal had relevant information. This requirement, which is not in s 10(4) of S(ID)O, imposes a duty on agents to inquire whether their principal is insider dealing. On reflection, this may be better dealt with as a business conduct requirement set by the SFC for licensed persons **and registered institutions** and enforced through the disciplinary regime, rather than as a civil wrong. Secondly, the other changes provide that a defendant agent has a defence if they can prove either that they did not know that their principal was a connected person or that they did not know that their principal had relevant information. To identify the principal as an insider dealer, the Presenting Officer must prove both that he was a connected person and he had relevant information, so it is only logical that an agent should have a defence if they do not know either matter.

<sup>52</sup>(ii) did not know that the person for whom he acted as agent had the relevant information in question.

~~(d) he did not counsel or procure the other person in relation to the transaction.<sup>53</sup>~~

<sup>54</sup>(5) A person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing in or counselling or procuring another person to deal in listed securities or derivatives if he establishes that -

(a) at the time when he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question, the dealing in question was not required to be recorded on a recognized stock market or to be notified to a recognized exchange company under its rules<sup>55</sup>; and

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<sup>53</sup> The requirement that a defendant agent also prove that they did not counsel or procure their principal has been deleted as it adds little or nothing to the requirement that they prove that they did not select or advise the principal on the selection of listed securities or their derivatives the subject of the transaction.

<sup>54</sup> **The amendment would clarify that the defence should apply to a person who deals directly with another person with the same inside information or counsels or procures another person with the same inside information to deal directly with him. The amendment also clarifies that if there is counselling or procuring, the defence is still available even if the deal counselled or procured did not materialise.**

<sup>55</sup> Technical amendment for consistency with new clause 265(6A). See Note 68.

(b) (i) where the insider dealing took place through his dealing in listed securities or derivatives -

(A) he and the other party to the dealing in question entered into the dealing directly with each other; and

(B) at the time when he entered into the dealing, the other party to the dealing knew, or ought reasonably to have known, of the relevant information in question; or

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(ii) where the insider dealing took place through his counselling or procuring another person to deal in listed securities or derivatives -

(A) he counselled or procured the other party to the dealing in question to enter into the dealing directly with him; and

(B) at the time when he counselled or procured the other party to enter into the dealing, the other party knew, or ought reasonably to have known, of the

relevant information in  
question.

<sup>56</sup> (6) A person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing in listed securities or derivatives if he establishes that -

- (a) he entered into the dealing in question,  
otherwise than as a person who has counselled  
or procured the other party to the dealing to  
deal in listed securities or their derivatives;  
and
- (b) at the time when he entered into the dealing,  
the other party to the dealing knew, or ought  
reasonably to have known, that he was a person  
connected with the corporation the listed  
securities of which were, or the derivatives of  
the listed securities of which were, the listed  
securities or derivatives in question.

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<sup>56</sup> **The amendment would clarify that the defence should only apply to a person who deals directly with another who knows, or should know, that the first person is an insider to a listed corporation and whom the first person has not solicited to deal with him.**



<sup>57</sup> (7) A person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his counselling or procuring another person to deal in listed securities or derivatives if he establishes that -

- (a) the other person did not counsel or procure the other party to the dealing in question to deal in listed securities or their derivatives; and
- (b) at the time when he counselled or procured the other person to deal in the listed securities or derivatives in question, the other party to the dealing in question knew, or ought reasonably to have known, that the other person was a person connected with the corporation the listed securities of which were, or the derivatives of such listed securities of which were, such listed securities or derivatives.

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<sup>57</sup> The amendment has been made in response to market comment (group of nine investment bankers and Law Society) that the effect of the opening words of the defence provision is not clear. **We advised Members at the Bills Committee meeting on 28 September 201 that we were seeking further market views as to how their concerns should be addressed. We have now consulted the concerned market participants and made further technical amendments to bring the wording of the clauses into conformity with the new opening wording of the other insider dealing defence clauses. In addition, the amendments clarify that the deal counselled or procured need not have materialised for the defence to arise as with clause 262(5).**

<sup>58</sup> (7A) A person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing in or counselling or procuring another person to deal in listed securities or derivatives if he establishes that -

(a) he acted -

(i) in connection with any dealing in listed securities or their derivatives (whether by himself or another person) which was under consideration or was the subject of negotiation, or in the course of a series of such dealings; and

(ii) with a view to facilitating the accomplishment of the dealing or the series of dealings; and

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<sup>58</sup> New defence proposed in response to market comment (group of nine investment bankers). The defence is based on paras 3 and 4 of Sch 1 to the UK Criminal Justice Act 1993 and gives a defence to a person who trades with knowledge of their own trading intentions or activities and a person who executes or facilitates that trade or trades on their behalf. The defence caters for the situation in which a person, whose trading intentions or activities might be price sensitive information (eg a substantial shareholder increasing his stake in a listed corporation), might otherwise be prohibited from performing those trades. Similarly an agent executing that trade or those trades or facilitating them in more sophisticated ways (eg through hedging) would also be prohibited from doing so, as they will often be a connected person owing to clause 239(1)(c) or (d), or clause 240(1)(e) or (f). **We have made further technical amendments to bring the wording of the clauses into conformity with the new opening wording of the other insider dealing defence clauses. The amendment would also clarify that the defence should apply to a person who deals or counsels or procures another to deal. After discussion with concerned market participants, we are satisfied that the substance of the relevant provisions of the UK Criminal Justice Act have been reflected in the defence as currently amended.**

(b) the relevant information in question was market information arising directly out of his involvement in the dealing or the series of dealings.

<sup>59</sup>(8) A person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing in or counselling or procuring another person to deal in listed securities or derivatives if he establishes that the dealing in question is a market contract.

<sup>60</sup>(9) For the purposes of subsection (7A), "market information" (市場消息) means information consisting of one or more of the following facts -

(a) that there has been or is to be any dealing in listed securities or derivatives of listed securities of a particular kind, or that any such dealing is under consideration or is the subject of negotiation;

(b) that there has not been or is not to be any dealing in listed securities or derivatives of listed securities of a particular kind;

(c) the quantity of listed securities or derivatives of listed securities in which there

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<sup>59</sup> **The amendment would clarify that the defence should apply to a person who deals or counsels or procures another to deal.**

<sup>60</sup> Amendment to insert a definition of "market information" upon which the new defence in clause 262(7A) depends. See Note 58.

is or is to be any dealing, or in which any dealing is under consideration or is the subject of negotiation;

(d) the price (or range of prices) at which listed securities or derivative of listed securities have been or are to be dealt in, or the price (or range of prices) at which listed securities or derivatives of listed securities in which any dealing is under consideration or is the subject of negotiation may be dealt in;

(e) the identity of the persons involved or likely to be involved in any capacity in any dealing in listed securities or derivatives of listed securities.

**263. Insider dealing - certain trustees and personal representatives not to be regarded as having engaged in market misconduct**

<sup>61</sup>A person who, ~~as is~~ a trustee or personal representative, ~~enters into a transaction which is an insider dealing~~ shall not ~~by reason of the insider dealing~~ be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing in or counselling or

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<sup>61</sup> The amendment would clarify that the defence should apply to a person who deals or counsels or procures another to deal.

procuring another person to deal in listed securities or derivatives<sup>61</sup> if he establishes that -

(aa) he acted on advice obtained in good faith from another person, and;

(a) that other person appeared to him to be an appropriate person from whom to seek the advice; and

(b) it did not appear to him that, had that other person entered into the transaction, that other person would be entering into a transaction which would be an insider dealing dealt in the listed securities or derivatives in question, an insider dealing would take place<sup>61</sup>.

**264. Insider dealing - certain persons exercising right to subscribe for or acquire securities or derivatives not to be regarded as having engaged in market misconduct**

~~A person who enters into a transaction which is an insider dealing through~~ shall not ~~this exercise of a right to subscribe for or otherwise acquire the listed securities of a corporation or their derivatives shall not by reason of the insider dealing~~ be regarded as having engaged in market misconduct by reason of an insider dealing taking place

through his dealing in listed securities or derivatives<sup>62</sup> if he establishes that ~~the~~

(a) he dealt in the listed securities or derivatives in question by way of his exercise of a right to subscribe for or otherwise acquire such listed securities or derivatives<sup>62</sup>; and

(b) the right was granted to him or was derived from securities or their derivatives that were held by him before he became aware of any relevant information in relation to the corporation, ~~the listed securities of which were, or the derivatives of the listed securities of which were, such listed securities or derivatives<sup>62</sup>.~~

#### **Division 5 - Other market misconduct**

##### **265. False trading**

(1) False trading takes place when, in Hong Kong or elsewhere, a person ~~intentionally or recklessly~~ does anything or causes anything to be done, with the intention that, or

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<sup>62</sup> The amendment would clarify that the defence should apply to a person who deals.

being reckless as to whether, it has, or is likely to have,  
the effect of

~~(a) creates;~~

~~(b) causes to be created; or~~

~~(c) does anything that is likely to create,~~

creating<sup>63</sup> a false or misleading appearance —

~~(i)(a)~~ of active trading in securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services; or

~~(ii)(b)~~ with respect to the market for, or the price for dealings in, securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services.

(2) False trading takes place when, in Hong Kong, a person ~~intentionally or recklessly~~ —

~~(a) creates;~~

~~(b) causes to be created; or~~

~~(c) does anything that is likely to create,~~

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<sup>63</sup> Amendment in response to market comment (group of nine investment bankers and Law Society) to clarify that the mental element relates to the creation of a false or misleading appearance. We are satisfied that there is no change to the scope of the provision. **We have considered the technical comments of some Members expressed at the meeting on 28 September 2001, and believe that the present draft would best reflect the policy intention of the provision and address market concerns.**

does anything or causes anything to be done, with the intention that, or being reckless as to whether, it has, or is likely to have, the effect of creating<sup>63</sup> a false or misleading appearance -

~~(i)(a)~~ of active trading in securities or futures contracts traded on a relevant overseas market;

or

~~(ii)(b)~~ with respect to the market for, or the price for dealings in, securities or futures contracts traded on a relevant overseas market.

(3) False trading takes place when, in Hong Kong or elsewhere, a person takes part in, is concerned in, or carries out, directly or indirectly, one or more transactions (whether or not any of them is a dealing in securities or futures contracts), with the intention that, or being reckless as to whether, it or they has or have, or is or are likely to have, the effect of creating an artificial price, or maintaining at a level that is artificial (whether or not it was previously artificial) a price, for dealings in securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services.

(4) False trading takes place when, in Hong Kong, a person takes part in, is concerned in, or carries out, directly or indirectly, one or more transactions (whether or not any of them is a dealing in securities or futures contracts), with the intention that, or being reckless as to



whether, it or they has or have, or is or are likely to have, the effect of creating an artificial price, or maintaining at a level that is artificial (whether or not it was previously artificial) a price, for dealings in securities or futures contracts traded on a relevant overseas market.

(5) Without limiting the general nature of the conduct which constitutes false trading under subsection (1) or (2), where a person<sup>64</sup> -

- (a) enters into or carries out, directly or indirectly, any transaction of sale or purchase, or any transaction which purports to be a transaction of sale or purchase, of securities that does not involve a change in the beneficial ownership of them;
- (b) offers to sell securities at a price that is substantially the same as the price at which he has made or proposes to make, or knows that an associate of his has made or proposes to make, an offer to purchase the same or substantially the same, number of them; or
- (c) offers to purchase securities at a price that is substantially the same as the price at which he has made or proposes to make, or knows that

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<sup>64</sup> Technical amendment. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.

an associate of his has made or proposes to make, an offer to sell the same or substantially the same, number of them, then, unless the transaction in question is an off-market transaction, the person<sup>65</sup> shall, for the purposes of subsection (1) ors (1) and<sup>66</sup> (2), be regarded as doing something or causing something to be done, with the intention that, having intentionally or recklessly created, caused to be created, or done something that is likely to create, or being reckless as to whether, it has, or is likely to have, the effect of creating<sup>67</sup> a false or misleading appearance -

- (i) where the securities are traded on a relevant recognized market or by means of authorized automated trading services, of active trading in securities so traded or with respect to the

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<sup>65</sup> Amendment in response to market comment (group of nine investment bankers) that the wash sale and matched order deeming provisions should only relate to on-market transactions. We are satisfied that off-market wash sales and matched orders do not have an adverse effect on the interest of the investing public. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.**

<sup>66</sup> Technical amendment as one may be deemed to have contravened either clause 265(1) or (2) or both as (1) relates to conduct in or outside Hong Kong having an effect on Hong Kong market or ATS-traded securities and (2) relates to conduct in Hong Kong with an effect on securities traded on a market outside Hong Kong. One person's conduct in Hong Kong may affect securities traded both in Hong Kong and outside Hong Kong. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.**

<sup>67</sup> Amendment consequential to the amendment described in Note 63. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.**

market for, or the price for dealings in,  
securities so traded; or

- (ii) where the securities are traded on a relevant overseas market, of active trading in securities so traded or with respect to the market for, or the price for dealings in, securities so traded.

(6) A person shall not be regarded as having engaged in market misconduct by reason of false trading taking place through the commission of an act referred to in subsection (5)(a), (b) or (c) if he establishes that the purpose for which he committed the act was not, or, where there was more than one purpose, the purposes for which he committed the act did not include, the purpose of creating a false or misleading appearance of active trading in securities, or with respect to the market for, or the price for dealings in, securities, referred to in subsection (1) or (2) (as the case may be).

<sup>68</sup>(6A) In subsection (5), "off-market transaction" (場外交易) means a transaction which -

- (a) in the case of securities traded on a relevant recognized market, is not required to be recorded on the relevant recognized market, or to be notified, under the rules of the person

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<sup>68</sup> Amendment to add definition of "off-market transaction" consequential to amendment described in Note 65. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.**

by whom the relevant recognized market is operated, to such person;

(b) in the case of securities traded by means of authorized automated trading services, is not required to be recorded by means of authorized automated trading services, or to be notified, under the rules of the person by whom the authorized automated trading services are operated, to such person; or

(c) in the case of securities traded on a relevant overseas market, is not required to be recorded on the relevant overseas market, or to be notified, under the rules of the person by whom the relevant overseas market is operated, to such person.

(7) In this section -

(a) a reference to a transaction of sale or purchase, in relation to securities, includes an offer to sell or purchase securities and an invitation (however expressed) that expressly or impliedly invites a person to offer to sell or purchase securities; and

(b) a reference to entering into or carrying out a transaction of sale or purchase shall, in the case of an offer or an invitation referred to in paragraph (a), be construed as a reference

to making the offer or the invitation (as the case may be).

## **266. Price rigging**

(1) Price rigging takes place when, in Hong Kong or elsewhere, a person -

- (a) enters into or carries out, directly or indirectly, any transaction of sale or purchase of securities that does not involve a change in the beneficial ownership of those securities, which has the effect of maintaining, increasing, reducing, stabilizing, or causing fluctuations in, the price of securities traded on a relevant recognized market or by means of authorized automated trading services; or
- (b) enters into or carries out, directly or indirectly, any fictitious or artificial transaction or device, with the intention that, or being reckless as to whether, it has the effect of maintaining, increasing, reducing, stabilizing, or causing fluctuations in, the price of securities, or the price for dealings in futures contracts, that are traded on a relevant recognized market or by means of authorized automated trading services.

(2) Price rigging takes place when, in Hong Kong, a person -

- (a) enters into or carries out, directly or indirectly, any transaction of sale or purchase of securities that does not involve a change in the beneficial ownership of those securities, which has the effect of maintaining, increasing, reducing, stabilizing, or causing fluctuations in, the price of securities traded on a relevant overseas market; or
- (b) enters into or carries out, directly or indirectly, any fictitious or artificial transaction or device, with the intention that, or being reckless as to whether, it has the effect of maintaining, increasing, reducing, stabilizing, or causing fluctuations in, the price of securities, or the price for dealings in futures contracts, that are traded on a relevant overseas market.

(3) For the purposes of subsections (1)(b) and (2)(b), the fact that a transaction is, or at any time was, intended to have effect according to its terms is not conclusive in determining whether the transaction is, or was, not fictitious or artificial.

(4) A person shall not be regarded as having engaged in market misconduct by reason of price rigging taking place

through any transaction of sale or purchase of securities~~that~~  
~~does not involve a change in the beneficial ownership of those~~  
~~securities~~referred to in subsection (1)(a) or (2)(a)<sup>69</sup> if he  
establishes that the purpose for which the securities were  
sold or purchased was not, or, where there was more than one  
purpose, the purposes for which the securities were sold or  
purchased did not include, the purpose of creating a false or  
misleading appearance with respect to the price of securities.

(5) In this section -

- (a) a reference to a transaction of sale or purchase, in relation to securities, includes an offer to sell or purchase securities and an invitation (however expressed) that expressly or impliedly invites a person to offer to sell or purchase securities; and
- (b) a reference to entering into or carrying out a transaction of sale or purchase shall, in the case of an offer or an invitation referred to in paragraph (a), be construed as a reference to making the offer or the invitation (as the case may be).

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<sup>69</sup> Technical amendment to clarify application of the defence.

**267. Disclosure of information about prohibited transactions**

(1) Disclosure of information about prohibited transactions takes place when a person discloses, circulates or disseminates, or authorizes or is concerned in the disclosure, circulation or dissemination of, information to the effect that the price of securities of a corporation, or the price for dealings in futures contracts, that are traded on a relevant recognized market or by means of authorized automated trading services will be maintained, increased, reduced or stabilized, or is likely to be maintained, increased, reduced or stabilized, because of a prohibited transaction relating to securities of either the corporation or a related corporation of the corporation or to the futures contracts (as the case may be), if he, or an associate of his -

- (a) has entered into or carried out, directly or indirectly, the prohibited transaction; or
- (b) has received, or expects to receive, directly or indirectly, a benefit as a result of the disclosure, circulation or dissemination of the information.

(2) A person shall not be regarded as having engaged in market misconduct by reason of disclosure of information about prohibited transactions on the basis that he, or an associate of his, received, or expected to receive, directly or



indirectly, a benefit ~~as a result of disclosure, circulation or dissemination of the information~~referred to in subsection (1)(b)<sup>70</sup>, if he establishes that -

- (a) the benefit which he or the associate of his (as the case may be) received, or expected to receive, was not from a person who has entered into or carried out, directly or indirectly, the prohibited transaction in question, or an associate of such person; or
- (b) the benefit which he or the associate of his (as the case may be) received, or expected to receive, was from a person who has entered into or carried out, directly or indirectly, the prohibited transaction in question, or an associate of such person, but up to (and including) the time of the disclosure, circulation or dissemination of the information he has acted in good faith.

(3) In this section -

- (a) a reference to a prohibited transaction means any conduct or transaction which constitutes market misconduct or a contravention of any of the provisions of Divisions 2 to 4 of Part XIV; and

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<sup>70</sup> Technical amendment to clarify application of the defence.

- (b) a reference to any person having entered into or carried out the prohibited transaction shall be construed accordingly.

**268. Disclosure of false or misleading information inducing transactions**

(1) Disclosure of false or misleading information inducing transactions takes place when, in Hong Kong or elsewhere, a person discloses, circulates or disseminates, or authorizes or is concerned in the disclosure, circulation or dissemination of, information that is likely -

- (a) to induce another person to subscribe for securities, or deal in futures contracts, in Hong Kong;
- (b) to induce the sale or purchase in Hong Kong of securities by another person; or
- (c) to maintain, increase, reduce or stabilize the price of securities, or the price for dealings in futures contracts, in Hong Kong,

if -

- (i) the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact; and
- (ii) the person knows that, or is reckless or negligent as to whether, the information is false or misleading as to a material fact, or

is false or misleading through the omission of a material fact.

<sup>71</sup>(2) A person shall not be regarded as having engaged in market misconduct by reason of disclosure of false or misleading information inducing transactions if ~~he establishes that the disclosure has taken place by reason only of the~~

- ~~(a) he 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 information was issued or reproduced by him in the ordinary course of that business;~~
- ~~(c) the contents of the information 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 information was such that he did not select, modify or otherwise exercise control over the contents of the information prior to its issue or reproduction; and~~
- ~~(e) at the time he issued or reproduced the information, he did not know that it was false~~

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<sup>71</sup> Amendment consequential to amendment of the conduit defences in Part IV to clarify that the conduit defences apply both to a firm and people acting for that firm, with necessary adaptations. We have considered the comments of some Members expressed at the meeting on 28 September 2001, and believe that the present draft would best reflect the policy intention of the provision and address market concerns.

~~or misleading as to a material fact or was false or misleading through the omission of a material fact.~~

~~(3) A person shall not be regarded as having engaged in market misconduct by reason of disclosure of false or misleading information inducing transactions if he establishes that~~

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

~~(c) the contents of the information 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 information 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 information and that he neither took responsibility for it nor endorsed its accuracy; and~~

~~(c) at the time he re-transmitted the information~~

~~(i) he did not know that it was false or misleading as to a material fact or was false or misleading through the omission of a material fact; or~~

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

~~(4) A person shall not be regarded as having engaged in market misconduct by reason of disclosure of false or misleading information inducing transactions if he establishes that~~

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

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

~~(c) he did not modify the contents of the  
information 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) issue or reproduction of the  
information and he establishes that -~~

~~(a) the issue or reproduction of the information  
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 information 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 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 information; and

(d) at the time of the issue or reproduction, he did not know that the information was false or misleading as to a material fact or was false or misleading through the omission of a material fact.

<sup>72</sup>(3) A person shall not be regarded as having engaged in market misconduct by reason of disclosure of false or misleading information inducing transactions if the disclosure has taken place by reason only of the re-transmission of the information and he establishes that -

(a) the re-transmission of the information 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

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<sup>72</sup> Amendment consequential to amendment of the conduit defences in Part IV to clarify that the internet hyperlink defence applies both to a firm and people acting for that firm, with necessary adaptations. **We have considered the comments of some Members expressed at the meeting on 28 September 2001 and believe that the present draft would best reflect the policy intention of the provision and address market concerns.**

the establishment of links between such other persons and third parties;

(b) the contents of the information 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 information;

(d) the re-transmission of the information 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



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(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 information, and neither took responsibility for it nor endorsed its accuracy; and

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

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(i) he did not know that the information was false or misleading as to a material fact or was false or misleading through the omission of a material fact; or

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(ii) he knew that the information was false or misleading as to a material fact or was false or misleading through the omission of a material fact, 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  
information 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).

<sup>73</sup>(4) A person shall not be regarded as having engaged in  
market misconduct by reason of disclosure of false or  
misleading information inducing transactions if the disclosure  
has taken place by reason only of the live broadcast of the  
information and he establishes that -

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

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

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<sup>73</sup> Amendment consequential upon amendment to the live broadcast defences in  
Part IV to clarify that those defences apply to both to a firm and  
people acting for that firm, with necessary adaptations. **We have  
considered the comments of some Members expressed at the meeting on 28 September 2001, and  
believe that the present draft would best reflect the policy intention of the provision and address  
market concerns.**

(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 information;

(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) 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 information was false or misleading as to a material fact or was false or misleading through the omission of a material fact; or

(ii) he knew that the information was false or misleading as to a material fact or was false or misleading through the omission of a material fact, but -

(A) where he was the broadcaster,<sup>73</sup>

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

information 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)<sup>73</sup>.

(5) In this section, "issue" (發出), in relation to any material (including any information), includes publishing, circulating, distributing or otherwise disseminating the material or the contents thereof<sup>74</sup>, 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;
- (e) by an exhibition of photographs or cinematograph films;
- (f) by way of sound or television broadcasting;
- (g) by ~~computer~~ any information system<sup>75</sup> or other electronic device; or

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<sup>74</sup> Technical amendment for consistency with other similar definitions of "issue" (e.g. clause 101). Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.

<sup>75</sup> 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.

- (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.

#### **269. Stock market manipulation**

(1) Stock market manipulation takes place when, in Hong Kong or elsewhere -

- (a) a person enters into or carries out, directly or indirectly, 2 or more transactions in securities of a corporation that by themselves or in conjunction with any other transaction increase, or are likely to increase, the price of any securities traded on a relevant recognized market or by means of authorized automated trading services, with the intention of inducing another person to purchase or subscribe for, or to refrain from selling, securities ~~issued by~~<sup>of</sup><sup>76</sup> the corporation or ~~by~~<sup>of</sup><sup>76</sup> a related corporation of the corporation;

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<sup>76</sup> Technical amendment for tallying with clause 7 of Schedule 1. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.**

- (b) a person enters into or carries out, directly or indirectly, 2 or more transactions in securities of a corporation that by themselves or in conjunction with any other transaction reduce, or are likely to reduce, the price of any securities traded on a relevant recognized market or by means of authorized automated trading services, with the intention of inducing another person to sell, or to refrain from purchasing, securities ~~issued by~~<sup>76</sup> the corporation or ~~by~~<sup>76</sup> a related corporation of the corporation; or
- (c) a person enters into or carries out, directly or indirectly, 2 or more transactions in securities of a corporation that by themselves or in conjunction with any other transaction maintain or stabilize, or are likely to maintain or stabilize, the price of any securities traded on a relevant recognized market or by means of authorized automated trading services, with the intention of inducing another person to sell, purchase or subscribe for, or to refrain from selling, purchasing or subscribing for, securities ~~issued by~~<sup>76</sup> the corporation or ~~by~~<sup>76</sup> a related corporation of the corporation.

(2) Stock market manipulation takes place when, in Hong Kong -

(a) a person enters into or carries out, directly or indirectly, 2 or more transactions in securities of a corporation that by themselves or in conjunction with any other transaction increase, or are likely to increase, the price of any securities traded on a relevant overseas market, with the intention of inducing another person to purchase or subscribe for, or to refrain from selling, securities ~~issued by~~<sup>of</sup>of<sup>76</sup> the corporation or ~~by~~<sup>of</sup>of<sup>76</sup> a related corporation of the corporation;

(b) a person enters into or carries out, directly or indirectly, 2 or more transactions in securities of a corporation that by themselves or in conjunction with any other transaction reduce, or are likely to reduce, the price of any securities traded on a relevant overseas market, with the intention of inducing another person to sell, or to refrain from purchasing, securities ~~issued by~~<sup>of</sup>of<sup>76</sup> the corporation or ~~by~~<sup>of</sup>of<sup>76</sup> a related corporation of the corporation;  
or

(c) a person enters into or carries out, directly or indirectly, 2 or more transactions in



securities of a corporation that by themselves or in conjunction with any other transaction maintain or stabilize, or are likely to maintain or stabilize, the price of any securities traded on a relevant overseas market, with the intention of inducing another person to sell, purchase or subscribe for, or to refrain from selling, purchasing or subscribing for, securities ~~issued by~~<sup>of</sup>76 the corporation or ~~by~~<sup>of</sup>76 a related corporation of the corporation.

(3) In this section -

- (a) a reference to a transaction includes an offer and an invitation (however expressed); and
- (b) a reference to entering into or carrying out a transaction shall, in the case of an offer or an invitation referred to in paragraph (a), be construed as a reference to making the offer or the invitation (as the case may be).

#### **Division 6 - Miscellaneous**

##### **270. Duty of officers of corporations**

Every officer of a corporation shall take all reasonable measures from time to time to ensure that proper safeguards exist to prevent the corporation from acting in a way which

would result in the corporation perpetrating any conduct which constitutes market misconduct.

**271. Transactions ~~constituting~~ relating to market misconduct not void or voidable**

A transaction is not void or voidable by reason only ~~of its constituting market misconduct~~ that any market misconduct has taken place in relation to or as a result of it<sup>77</sup>.

**272. Civil liability for market misconduct**

(1) Subject to subsection (2), a person who has committed a relevant act in relation to market misconduct shall, ~~apart from whether or not he also incurs~~<sup>78</sup> any other liability ~~he may incur~~<sup>78</sup> (whether under this Part or otherwise), be liable to pay compensation by way of damages to any other person for any pecuniary loss sustained by the other person as

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<sup>77</sup> **Technical amendment to clarify that not only transactions that constitute market misconduct, but also transactions affected by market misconduct (e.g. those at a price affected by various forms of market manipulation) are not void or voidable. The clause exists to preserve the certainty of trades executed on a stock or futures market or authorized ATS so that their settlement would not be affected.**

<sup>78</sup> **Technical amendment to further clarify that liability under clause 272 is not dependent on and does not affect liability arising in any other manner. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.**

a result of the market misconduct, whether or not<sup>79</sup> the loss arises from the other person having entered into a transaction or dealing at a price affected by the market misconduct, ~~or~~ otherwise<sup>79</sup>.

(2) No person shall be liable to pay compensation under subsection (1) unless it is fair, just and reasonable in the circumstances of the case that he should be so liable.

(3) For the purposes of this section, a person shall, subject to subsection (4), be regarded as having committed a relevant act in relation to market misconduct if -

(a) he has perpetrated any conduct which constitutes market misconduct;

(b) (i) another person which is a corporation has ~~perpetrated any conduct which constitutes market misconduct~~ committed a relevant act in

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<sup>79</sup> Technical amendment for greater clarity. The meaning of the words "or otherwise" is presently uncertain. (It may be taken as "as a result of (1) the market misconduct or (2) otherwise", or "arises from the other person (1) having entered into a transaction or dealing at a price affected by the market misconduct or (2) otherwise", or "arises from (1) the other person having entered .... or (2) otherwise".) The amendment will have the effect that the clause means whether the loss "arises from (1) the other person having entered into a transaction or dealing at a price affected by the market misconduct or (2) otherwise". **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.**

relation to market misconduct under paragraph (a)<sup>80</sup>; and

(ii) ~~the market misconduct was directly or indirectly attributable to, or~~ occurred with the consent or connivance of, him as an officer of the corporation; or

(c) (i) any other person has ~~perpetrated any conduct which constitutes market misconduct~~committed a relevant act in relation to market misconduct under paragraph (a)<sup>80</sup>; and

(ii) he assisted or connived with that other person in the perpetration of ~~the conduct~~any conduct which constitutes the market misconduct<sup>80</sup>, with the knowledge that such conduct constitutes or might constitute market misconduct.

(4) For the purposes of this section, where it is provided under any provision of this Part that a person shall not by reason of any market misconduct be regarded as having engaged in market misconduct, the person shall not, in

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<sup>80</sup> Technical amendments to mirror the effect of clauses 244(4)(b) and (c) where if the primary person found guilty of market misconduct under clauses 272(3)(b)(ii) and (c)(ii) has a defence, secondary persons participated in that person's market misconduct in cannot be found guilty of market misconduct.

relation to that market misconduct, be regarded as having committed a relevant act in relation to market misconduct.

(5) A person may bring an action under subsection (1) even though the person against whom the action is brought -

- (a) is not a person whose conduct has been the subject, whether wholly or in part, of any proceedings instituted under section 244 in respect of the market misconduct from which the pecuniary loss of the person bringing the action is alleged to result; or
- (b) has not been identified by the Tribunal pursuant to section 244(3)(b) as having engaged in the market misconduct.

(6) 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 ~~de se~~ for an injunction<sup>81</sup>, grant an injunction in addition to, or in substitution for, damages, on such terms and conditions as it considers appropriate.

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<sup>81</sup> Technical amendment for greater clarity that a court originally having power to grant injunction will also have the power to grant an injunction under clause 272. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.**

(7) Without prejudice to section 62 of the Evidence Ordinance (Cap. 8), in an action brought under subsection (1) -

- (a) the fact that there is<sup>82</sup> a determination by the Tribunal pursuant to section 244(3)(a) that market misconduct has taken place;
- (b) the fact that there is<sup>83</sup> a determination by the Tribunal pursuant to section 244(3)(b) identifying a person (whether or not a party to the action) as having engaged in market misconduct,

shall, in so far the determination is still subsisting, be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in the action -

- (i) in the case of a determination referred to in paragraph (a), that the market misconduct has taken place; or
- (ii) in the case of a determination referred to in paragraph (b), that the person has engaged in market misconduct.

(8) In an action brought under subsection (1) -

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<sup>82</sup> For greater consistency with section 62 of Cap. 8 (also referred to in this sub-section), so that any relevant case law can also apply if necessary. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.

<sup>83</sup> As for Note 82, but in relation to an MMT determination that a person had engaged in market misconduct. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.

~~(a) where, where the fact that~~ there is a  
determination referred to in subsection (7)(a)  
or (b) is admissible in evidence under  
subsection (7)<sup>84</sup> -

(a) then -

(i) in the case of a determination  
referred to in subsection (7)(a), the  
market misconduct that is the subject  
of the determination shall, unless  
the contrary is proved, be taken to  
have taken place; or

(ii) in the case of a determination  
referred to in subsection (7)(b), the  
person that is the subject of the  
determination shall, unless the  
contrary is proved, be taken to have  
engaged in market misconduct; and

(b) without prejudice to the reception of any other  
admissible evidence as evidence of the  
determination or<sup>85</sup> for the purpose of  
identifying the facts on which the  
determination was based, the contents of a

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<sup>84</sup> Amendment consequential upon amendments described in Notes 82 and 83.  
Members considered the amendment and did not propose further changes at the Bills Committee  
meeting on 28 September 2001.

report of the Tribunal containing the determination and published under section 254(2)(b)(i), or the contents of a copy of a report of the Tribunal containing the determination and made available under subsection (9), shall also be admissible in evidence for ~~that~~such<sup>86</sup> purpose.

(9) Where in an action brought under subsection (1) -

(a) the fact that there is<sup>82</sup> a determination referred to in subsection (7)(a) or (b) is admissible in evidence under subsection (7); and

(b) a report of the Tribunal containing the determination has not been published under section 254(2)(b)(i),

the court having jurisdiction to determine the action may, where it considers appropriate, require that a copy of the report be made available to the court to enable it to be used for the purposes of subsection (8)(b), whereupon -

(i) the Tribunal shall cause a copy of the report to be made available to the court to enable it

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<sup>85</sup> Technical amendment for greater clarity. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.

<sup>86</sup> Technical amendment. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.



to be used for the purposes of subsection  
(8)(b); and

(ii) the contents of the report shall be admissible  
for the purpose specified in subsection (8)(b).

<sup>87</sup>(9A) In this section, a reference to a transaction  
includes an offer and an invitation (however expressed).

(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.

**273. ~~Transactions~~Conduct<sup>88</sup> not to constitute market misconduct**

~~<sup>89</sup>(1) Subject to subsections (2) and (3), the Commission  
may, where it considers it is in the public interest to do so,  
make rules to prescribe the circumstances in which any conduct  
that would otherwise constitute market misconduct under this  
Part shall not be regarded as constituting market misconduct.~~

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<sup>87</sup> Technical amendment for consistency with clause 296(9) in Part XIV.

<sup>88</sup> Technical amendment to tie in with wordings in clause 273. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.**

<sup>89</sup> Technical amendment to relocate subclause (4) as (1A) and to clarify the effect of the safe harbour rules as a defence.

~~<sup>90</sup>(2) Where the Commission proposes to make rules under subsection (1), it shall 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.~~

~~<sup>90</sup>(3) After a draft of the rules which the Commission proposes to make under subsection (1) is published under subsection (2), the Commission may, modify the rules, taking into consideration any representation on the rules received as a result of the publication, in such manner as it considers appropriate, for the purpose of having the rules made under subsection (1).~~

<sup>89</sup>(1A4) Notwithstanding anything in this Part, a person shall not be regarded as having engaged in market misconduct by reason of any market misconduct under this Part if he establishes that the conduct in question is, according to the rules made under subsection (1), not to be regarded as constituting market misconduct.

<sup>89</sup>(1) For the purposes of subsection (1A), the Commission, after consultation with the Financial Secretary, may, where it considers it is in the public interest to do so, make rules to prescribe the circumstances in which any conduct that would

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<sup>90</sup> **We propose to delete subclauses (2) and (3) and subsume the consultation requirement under the general market consultation provision in clause 384A of Part XVI. The obligation to consult with the Financial Secretary on amendments to the draft rules after consultation with the public is preserved in subclause (1).**

otherwise constitute market misconduct under this Part shall not be regarded as constituting market misconduct.

- (5) Notwithstanding anything in this Part, where -
- (a) it is alleged that a person has engaged in market misconduct under section 265, 266 or 269 by reason of any conduct; and
  - (b) it is so alleged on the basis that the conduct was carried out not in respect of securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services, but in respect of securities or futures contracts traded on a relevant overseas market,

the person shall not be regarded as having engaged in the market misconduct unless it is proved that in any place in which such relevant overseas market is situated the conduct would have ~~constituted a criminal offence~~ been unlawful<sup>91</sup> had it been carried out there.

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<sup>91</sup> Clauses 265(2), 265(4), 266(2) and 269(2) provide that conduct in Hong Kong that affects securities or futures contracts traded on a market outside Hong Kong may amount to market misconduct. Clause 273(5) requires the Presenting Officer to prove that such conduct must be a crime in that place where the market is located for the conduct to amount to market misconduct in Hong Kong. As market misconduct under Part XIII is a civil wrong and conduct that, in Hong Kong would amount to market misconduct, may also be a civil wrong rather than a crime outside Hong Kong, the word "unlawful" is more appropriate. The amendment does not apply to the corresponding Part XIV provision which concerns criminal offences only. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.**

**274. No further proceedings after Part XIV  
criminal proceedings**

Notwithstanding anything in this Part, no proceedings may be instituted against any person under section 244 in respect of any conduct if -

- (a) criminal proceedings have previously been instituted against the person under Part XIV in respect of the same conduct; and
- (b)
  - (i) those criminal proceedings remain pending; or
  - (ii) by reason of the previous institution of those criminal proceedings, no criminal proceedings may again be lawfully instituted against that person under Part XIV in respect of the same conduct.

**275. Market misconduct regarded as contravention  
of provisions of this Part**

Where a person is by reference to any conduct identified in a determination made pursuant to section 244(3)(b) as having engaged in market misconduct, the person shall be regarded as having, by reason of the conduct, contravened the provisions of this Part, and any reference in this Ordinance to contravention of a provision of this Ordinance (however expressed) shall have application accordingly.

<sup>92</sup>~~276.No retrospectivity~~

~~— This Part shall not have effect with respect to any conduct that would otherwise constitute market misconduct under this Part if the conduct took place before the commencement of this Part.~~

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<sup>92</sup> The provision is deleted as Part XIII provisions do not have retrospective effect. The transitional arrangements are covered by clauses 75 to 76 of Part 1 of Schedule 9.

PART XIV

OFFENCES RELATING TO DEALINGS IN SECURITIES AND  
FUTURES CONTRACTS, ETC.

**Division 1 - Interpretation**

**277. Interpretation of Part XIV**

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

"associate" (有聯繫者), in relation to a person, means -

- (a) the person's spouse or reputed spouse, any person cohabiting with the person as a spouse, the person's brother, sister, parent, step-parent, child (natural or adopted) or step-child;
- (b) any corporation of which the person is a director;
- (c) any employee or partner of the person;
- (d) where the person is a corporation, each of its directors and its related corporations and each director or employee of any of its related corporations;
- (e) without limiting the circumstances in which paragraphs (a) to (d) apply, in circumstances concerning the securities of or other interest in a corporation, or rights arising out of the

holding of such securities or such interest,  
any other person with whom the person has an  
agreement or arrangement -

- (i) with respect to the acquisition,  
holding or disposal of such  
securities or such interest; or
- (ii) under which they undertake to act  
together in exercising their voting  
power at general meetings of the  
corporation;

"controller" (控制人), in relation to a corporation, means any  
person -

- (a) in accordance with whose directions or  
instructions the directors of the corporation  
or of another corporation of which it is a  
subsidiary are accustomed or obliged to act; or
- (b) who, either alone or with any of his  
associates, is entitled to exercise or control  
the exercise of more than 33% of the voting  
power at general meetings of the corporation or  
of another corporation of which it is a  
subsidiary;

"relevant overseas market" (有關境外市場) -

- (a) in relation to securities, means a stock market  
outside Hong Kong; or

- (b) in relation to futures contracts, means a futures market outside Hong Kong;

"relevant recognized market" (有關認可市場) -

- (a) in relation to securities, means a recognized stock market; or
- (b) in relation to futures contracts, means a recognized futures market.

(2) In this subsection and sections 278 to 281 and Division 2, unless the context otherwise requires -

"derivatives" (衍生工具), in relation to listed securities, means -

- (a) rights, options or interests (whether described as units or otherwise) in, or in respect of, the listed securities;
- (b) contracts, the purpose or pretended purpose of which is to secure or increase a profit or avoid or reduce a loss, wholly or partly by reference to the price or value, or a change in the price or value, of -
  - (i) the listed securities; or
  - (ii) any rights, options or interests referred to in paragraph (a);
- (c) rights, options or interests (whether described as units or otherwise) in, or in respect of -



- (i) any rights, options or interests referred to in paragraph (a); or
- (ii) any contracts referred to in paragraph (b);

(d) instruments or other documents creating, acknowledging or evidencing any rights, options or interests or any contracts referred to in paragraph (a), (b) or (c), including certificates of interest or participation in, temporary or interim certificates for, receipts (including depositary receipts) in respect of, or warrants to subscribe for or purchase -

- (i) the listed securities; or
- (ii) the rights, options or interests or the contracts,

whether or not the derivatives are listed and regardless of who issued or made them;

<sup>1</sup>"listed" (上市) means listed on a recognized stock market, and for the purposes of this definition, securities shall continue to be regarded as listed during a period of suspension of dealings in those securities on the recognized stock market;

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<sup>1</sup> Amendment consistent with the new definition of "listed" in clause 237(1) in Part XIII.

"listed corporation" (上市法團) means a corporation which has issued securities that are, at the time of the relevant contravention in relation to the corporation, listed;

"listed securities" (上市證券) means -

- (a) securities which, at the time of the relevant contravention in relation to a corporation, have been issued by the corporation and are listed;
- (b) securities which, at the time of the relevant contravention in relation to a corporation, have been issued by the corporation and are not listed, but which, at that time, it is reasonably foreseeable will be and which, in fact, are subsequently listed;
- (c) securities which, at the time of the relevant contravention in relation to a corporation, have not been issued by the corporation and are not listed, but which, at that time, it is reasonably foreseeable will be and which, in fact, are subsequently so issued and listed;

"relevant contravention" (違例事件) means a contravention of any of the provisions of Division 2;

"relevant information" (有關消息), in relation to a corporation, means specific information about -

- (a) the corporation;

- (b) a shareholder or officer of the corporation; or
- (c) the listed securities of the corporation or their derivatives,

which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but which would if it were generally known to them be likely to materially affect the price of the listed securities;

"securities" (證券) means -

- (a) shares, stocks, debentures, loan stocks, funds, bonds or notes of, or issued by, or which it is reasonably foreseeable will be issued by, a body, whether incorporated or unincorporated, or a government or municipal government authority;
- (b) rights, options or interests (whether described as units or otherwise) in, or in respect of, such shares, stocks, debentures, loan stocks, funds, bonds or notes;
- (c) certificates of interest or participation in, temporary or interim certificates for, receipts for, or warrants to subscribe for or purchase, such shares, stocks, debentures, loan stocks, funds, bonds or notes;

- (d) interests, rights or property, whether in the form of an instrument or otherwise, commonly known as securities;
- (e) interests, rights or property, whether in the form of an instrument or otherwise, prescribed by notice under section 379 as being regarded as securities in accordance with the terms of the notice.

(3) For the purposes of the definition of "controller" in subsection (1), where a person is entitled to exercise or control the exercise of more than 33% of the voting power at general meetings of a corporation and the corporation is entitled to exercise or control the exercise of any of the voting power at general meetings of another corporation ("the effective voting power"), then the effective voting power at general meetings of the other corporation shall be regarded as exercisable by the person.

(4) For the purposes of this Part, a person shall not be regarded as a person in accordance with whose directions or instructions the directors of a corporation are accustomed or obliged to act by reason only that the directors of the corporation act on advice given by him in a professional capacity.

**278. Interest in securities (insider dealing offence)**

For the purposes of sections 277(2) and 279 to 281 and Division 2, a reference to an interest in securities shall be construed as including an interest of any kind whatsoever<sup>2</sup> in the securities, and for that purpose any restraint or restriction to which the exercise of a right attached to the interest may be subject shall be disregarded.

**279. Connected with a corporation  
(insider dealing offence)**

(1) For the purposes of Division 2, a person shall be regarded as connected with a corporation if, being an individual -

- (a) he is a director or employee of the corporation or a related corporation of the corporation;
- (b) he is a substantial shareholder of the corporation or a related corporation of the corporation;
- (c) he occupies a position which may reasonably be expected to give him access to relevant information in relation to the corporation by reason of -

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<sup>2</sup> Technical amendment for consistency with clause 313. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.

- (i) a professional or business relationship existing between -
    - (A) himself, or his employer, or a corporation of which he is a director, or a firm of which he is a partner; and
    - (B) the corporation, a related corporation of the corporation, or an officer or substantial shareholder of either corporation; or
  - (ii) his being a director, employee or partner of a substantial shareholder of the corporation or a related corporation of the corporation;
- (d) he has access to relevant information in relation to the corporation and -
- (i) he has such access by reason of his being in such a position that he would be regarded as connected with another corporation by virtue of paragraph (a), (b) or (c); and
  - (ii) the relevant information relates to a transaction (actual or contemplated) involving both those corporations or

involving one of them and the listed securities of the other or their derivatives, or to the fact that the transaction is no longer contemplated; or

- (e) he was, at any time within the 6 months preceding the relevant contravention in relation to the corporation, a person who would be regarded as connected with the corporation by virtue of paragraph (a), (b), (c) or (d).

(2) For the purposes of Division 2, a corporation shall be regarded as a person connected with another corporation so long as any of its directors or employees is a person who would be regarded as connected with that other corporation by virtue of subsection (1).

(3) In subsection (1), notwithstanding any other provisions of this Ordinance, "substantial shareholder" (大股東), in relation to a corporation, means a person who has an interest of any kind<sup>3</sup> in the relevant share capital of the corporation, the nominal value of which is equal to or more than 5% of the nominal value of the relevant share capital of the corporation.

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<sup>3</sup> Technical amendment similar to that made to clause 239(3) in Part XIII. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 28 September 2001.

**280. Connected with a corporation - possession of relevant information obtained in privileged capacity (insider dealing offence)**

(1) For the purposes of Division 2, where a public officer or a specified person in that capacity receives relevant information in relation to a corporation, he shall be regarded as a person connected with the corporation.

(2) In subsection (1), a reference to a specified person means a person who is -

- (a) a member of the Executive Council;
- (b) a member of the Legislative Council;
- (c) a member of a board, commission, committee or other body appointed by or on behalf of the Chief Executive or the Chief Executive in Council under an Ordinance;
- (d) an officer or employee of a recognized exchange company, a recognized clearing house or a recognized exchange controller;
- (e) an exchange participant;
- (f) an officer or employee of an exchange participant;
- (g) an officer or employee of a body corporate incorporated by an Ordinance; or



(h) an officer or employee of a body corporate specified by the Financial Secretary under subsection (3),

whether, in the case of paragraph (a), (b), (c), (d), (f), (g) or (h), the person is such a member, officer or employee (as the case may be) on a temporary or permanent basis, and whether he is paid or unpaid.

(3) The Financial Secretary may, by notice published in the Gazette, specify any body corporate for the purposes of subsection (2)(h).

**281. Dealing in listed securities or their derivatives (insider dealing offence)**

For the purposes of section 277(2) and Division 2, a person shall be regarded as dealing in listed securities or their derivatives if, whether as principal or agent, he sells, purchases, exchanges or subscribes for, or agrees to sell, purchase, exchange or subscribe for, any listed securities or their derivatives or acquires or disposes of, or agrees to acquire or dispose of, the right to sell, purchase, exchange or subscribe for, any listed securities or their derivatives.

**282. Interest in securities and beneficial ownership, etc. (market misconduct offences other than insider dealing offence)**

(1) For the purposes of Division 3, a person shall be regarded as having an interest in securities if he has

authority, whether formal or informal and whether express or implied, to dispose of or to exercise control over the disposal of the securities or, in the case of options in respect of the securities, to exercise the options.

(2) It is immaterial that the authority of a person referred to in subsection (1) -

(a) is, or is capable of being made, subject to restraint or restriction; or

(b) is exercisable jointly with another person.

(3) A person shall be regarded as having the authority referred to in subsection (1) where a corporation has the authority referred to in that subsection and -

(a) the corporation is, or its directors are, accustomed or under an obligation, whether formal or informal, to act in accordance with the directions or instructions of the person in relation to the securities in question; or

(b) the person, or an associate of the person, is a controller of the corporation.

(4) Where a person -

(a) has entered into a contract to purchase securities;

(b) has a right to have securities transferred to him or to his order whether the right is exercisable presently or in the future and

whether on the fulfilment of a condition or not; or

- (c) has the right to acquire securities, or an interest in securities, under an option, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not,

the person shall, to the extent to which he could do so on completing the contract, enforcing the right or exercising the option, be regarded as having the authority referred to in subsection (1).

(5) Where securities are subject to a trust, and a person who is not a trustee in those securities has an interest in those securities by virtue of subsection (4)(b), the interest of a trustee in those securities shall be disregarded for the purpose of determining whether the person has an interest in securities for the purposes of Division 3.

(6) The Commission may make rules to prescribe that an interest, being an interest of a person or of the persons included in a class of persons, shall be disregarded for the purpose of determining whether the person or the persons has or have an interest in securities for the purposes of Division 3.

(7) For the purposes of Division 3, a sale or purchase of securities does not involve a change in their beneficial ownership if a person who had an interest in the securities

before the sale or purchase, or an associate of the person, has an interest in the securities after the sale or purchase.

## **Division 2 - Insider dealing offence**

### **283. Offence of insider dealing**

(1) A person connected with a listed corporation and having information which he knows is relevant information in relation to the corporation shall not -

- (a) deal in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives; or
- (b) counsel or procure another person to deal in such listed securities or derivatives, knowing or having reasonable cause to believe that the other person will deal in them.

(2) A person who is contemplating or has contemplated making, whether with or without another person, a take-over offer for a listed corporation and who knows that the information that the offer is contemplated or is no longer contemplated is relevant information in relation to the corporation shall not -

- (a) deal in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of

the corporation or their derivatives, otherwise than for the purpose of the take-over; or

- (b) counsel or procure another person to deal in such listed securities or derivatives, otherwise than for the purpose of the take-over.

(3) A person connected with a listed corporation and knowing that any information is relevant information in relation to the corporation shall not disclose the information, directly or indirectly, to another person, knowing or having reasonable cause to believe that the other person will make use of the information for the purpose of dealing, or of counselling or procuring another person to deal, in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives.

(4) A person who is contemplating or has contemplated making, whether with or without another person, a take-over offer for a listed corporation and who knows that the information that the offer is contemplated or is no longer contemplated is relevant information in relation to the corporation shall not disclose the information, directly or indirectly, to another person, knowing or having reasonable cause to believe that the other person will make use of the information for the purpose of dealing, or of counselling or procuring another person to deal, in the listed securities of

the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives.

(5) A person who has information which he knows is relevant information in relation to a listed corporation and which he received, directly or indirectly, from a person whom he knows is connected with the corporation and whom he knows or has reasonable cause to believe held the information as a result of being connected with the corporation shall not -

- (a) deal in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives; or
- (b) counsel or procure another person to deal in such listed securities or derivatives.

(6) A person who has received, directly or indirectly, from a person whom he knows or has reasonable cause to believe is contemplating or is no longer contemplating making a take-over offer for a listed corporation, information to that effect which he knows is relevant information in relation to the corporation shall not -

- (a) deal in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives; or

(b) counsel or procure another person to deal in such listed securities or derivatives.

(7) A person who knowingly has relevant information in relation to a listed corporation in any of the circumstances described in subsection (1), (2), (3), (4), (5) or (6) shall not -

(a) counsel or procure another person to deal in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives, knowing or having reasonable cause to believe that the other person will deal in such listed securities or derivatives outside Hong Kong on a stock market other than a recognized stock market; or

(b) disclose the relevant information to another person knowing or having reasonable cause to believe that the other person or some other person will make use of the relevant information for the purpose of dealing, or of counselling or procuring any other person to deal, in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives, outside

Hong Kong on a stock market other than a recognized stock market.

(8) Subject to sections 284, 285 and 286, a person who contravenes subsection (1), (2), (3), (4), (5), (6) or (7) commits an offence.

#### **284. Insider dealing offence - general defences**

<sup>4</sup>(1) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283\_ taking place through his dealing in or counselling or procuring another person to deal in listed securities or derivatives, it is a defence to the charge for the person to prove that ~~the conduct which constituted the contravention~~he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question (as the case may be) was carried out -

- (a) for the sole purpose of acquiring shares required for his being qualified as a director or intending director of a corporation;
- (b) in the performance in good faith of an underwriting agreement for the ~~securities to which the transaction relates~~listed securities or derivatives in question; or

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<sup>4</sup> The amendments to this clause mirror that made to clause 262(1) in Part XIII. Please see the relevant Notes in Part XIII for details of the latest amendments.



(c) in the performance in good faith of his functions as a liquidator, receiver or trustee in bankruptcy.

<sup>5</sup>(2) Where a corporation is charged with an offence under section 283(8) in respect of a contravention of section 283 ~~by reason of having entered into a transaction intaking place through his dealing in or counselling or procuring another person to deal in listed the listed securities of a listed corporation or their securities or derivatives~~, it is a defence to the charge for the corporation to prove that -

(a) although one or more of its directors or employees had the relevant information in relation to the ~~listed corporation, corporation~~ the listed securities of which were, or the derivatives of the listed securities of which were, the listed securities or derivatives in question, each person who took the decision for it to deal in or counsel or procure the other person to deal in such listed securities or derivatives (as the case may be) ~~to enter into the transaction for it~~ did not have the relevant information up to (and including) the time when it dealt in or counselled or procured

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<sup>5</sup> The amendments to this clause mirror that made to clause 262(2) in Part XIII. Please see the relevant Notes in Part XIII for details of the latest amendments.

the other person to deal in such listed securities or derivatives (as the case may be) entered into the transaction;

- (b) arrangements then existed to secure that -
- (i) the relevant information was, up to (and including) the time when it entered into the transaction dealt in or counselled or procured the other person to deal in such listed securities or derivatives (as the case may be), not communicated to any person who took the decision; and
  - (ii) none of its directors or employees who had the relevant information gave advice concerning the transaction decision to any person who took the decision at any time before it dealt in or counselled or entered into the transaction procured the other person to deal in such listed securities or derivatives (as the case may be); and
- (c) the relevant information was in fact not so communicated to any person who took the decision and none of its directors or employees who had the relevant information in fact so gave the advice to any person who took the decision.

~~(3) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 by reason of having entered into a transaction in listed securities or their derivatives, it is a defence to the charge for the person to prove that the purpose for which he entered into the transaction was not, or, where there was more than one purpose, the purposes for which he entered into the transaction did not include, the purpose of securing or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using relevant information.~~

~~(4) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 by reason of having entered into a transaction in listed securities or their derivatives, it is a defence to the charge for the person to prove that —~~

- ~~(a) he entered into the transaction as agent for another person;~~
- ~~(b) he did not select or advise on the selection of the listed securities or the derivatives (as the case may be);~~
- ~~(c) he had no knowledge or reasonable cause to suspect that the other person had the relevant information in question; and~~
- ~~(d) he did not counsel or procure the other person in relation to the transaction.~~

~~(5) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 by reason of having entered into a transaction in listed securities or their derivatives, it is a defence to the charge for the person to prove that—~~

~~(a) he and the other party to the transaction entered into the transaction directly with each other; and~~

~~(b) at the time he entered into the transaction—~~

~~(i) the other party to the transaction knew, or ought reasonably to have known, of the relevant information in question; and~~

~~(ii) the transaction was not required to be recorded on a recognized stock market or to be notified to a recognized stock market under the rules of the recognized exchange company by which the recognized stock market is operated.~~

~~(6) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 by reason of having entered into a transaction in listed securities of a corporation or their derivatives, it is a defence to the charge for the person to prove that—~~

- ~~(a) he entered into the transaction, otherwise than as a person who has counselled or procured the other party to the transaction to deal in listed securities or their derivatives; and~~
- ~~(b) at the time he entered into the transaction, the other party to the transaction knew, or ought reasonably to have known, that he was a person connected with the corporation.~~

~~(7) Where a person is charged with an offence under section 283(8) by reason of having contravened section 283 as a person who has counselled or procured another person to deal in listed securities of a corporation or their derivatives, it is a defence to the charge for the person to prove that~~

- ~~(a) the other person entered into the transaction, otherwise than as a person who has counselled or procured the other party to the transaction to deal in listed securities or their derivatives; and~~
- ~~(b) at the time the other person entered into the transaction, the other party to the transaction knew, or ought reasonably to have known, that the other person was a person connected with the corporation.~~

~~(8) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 by reason of having entered into a transaction in listed~~

~~securities or their derivatives, it is a defence to the charge for the person to prove that the transaction is a market contract.~~

<sup>6</sup>(3) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 taking place through his dealing in or counselling or procuring another person to deal in listed securities or derivatives or his disclosure of information, it is a defence to the charge for the person to prove that the purpose for which he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question or disclosed the information in question (as the case may be) was not, or, where there was more than one purpose, the purposes for which he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question or disclosed the information in question (as the case may be) did not include, the purpose of securing or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using relevant information.

<sup>7</sup>(4) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 taking place through his dealing in or counselling or

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<sup>6</sup> The amendments to this clause mirror that made to clause 262(3) in Part XIII. **Please see the relevant Notes in Part XIII for details of the latest amendments.**

<sup>7</sup> The amendments to this clause mirror that made to clause 262(4) in Part XIII. **Please see the relevant Notes in Part XIII for details of the latest amendments.**

procuring another person to deal in listed securities or derivatives, it is a defence to the charge for the person to prove that -

(a) he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question (as the case may be) as agent;

(b) he did not select or advise on the selection of such listed securities or derivatives; and

(c) he -

(i) did not know that the person for whom he acted as agent was a person connected with the corporation the listed securities of which were, or the derivatives of the listed securities of which were, such listed securities or derivatives; or

(ii) did not know that the person for whom he acted as agent had the relevant information in question.

<sup>8</sup>(5) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 taking place through his dealing in or counselling or

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<sup>8</sup> The amendments to this clause mirror that made to clause 262(5) in Part XIII. Please see the relevant Notes in Part XIII for details of the latest amendments.

procuring another person to deal in listed securities or derivatives, it is a defence to the charge for the person to prove that -

(a) at the time when he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question, the dealing in question was not required to be recorded on a recognized stock market or to be notified to a recognized exchange company under its rules; and

(b) (i) where the contravention took place through his dealing in listed securities or derivatives -

(A) he and the other party to the dealing in question entered into the dealing directly with each other; and

(B) at the time when he entered into the dealing, the other party to the dealing knew, or ought reasonably to have known, of the relevant information in question; or

(ii) where the contravention took place through his counselling or procuring



another person to deal in listed securities or derivatives -

(A) he counselled or procured the other party to the dealing in question to enter into the dealing directly with him; and

(B) at the time when he counselled or procured the other party to enter into the dealing, the other party knew, or ought reasonably to have known, of the relevant information in question.

<sup>9</sup>(6) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 taking place through his dealing in listed securities or derivatives, it is a defence to the charge for the person to prove that -

(a) he entered into the dealing in question, otherwise than as a person who has counselled or procured the other party to the dealing to deal in listed securities or their derivatives; and

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<sup>9</sup> The amendments to this clause mirror that made to clause 262(6) in Part XIII. **Please see the relevant Notes in Part XIII for details of the latest amendments.**

(b) at the time when he entered into the dealing, the other party to the dealing knew, or ought reasonably to have known, that he was a person connected with the corporation the listed securities of which were, or the derivatives of the listed securities of which were, the listed securities or derivatives in question.

<sup>10</sup>(7) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 taking place through his counselling or procuring another person to deal in listed securities or derivatives, it is a defence to the charge for the person to prove that -

(a) the other person did not counsel or procure the other party to the dealing in question to deal in listed securities or their derivatives; and

(b) at the time when he counselled or procured the other person to deal in the listed securities or derivatives in question, the other party to the dealing in question knew, or ought reasonably to have known, that the other person was a person connected with the corporation the listed securities of which were, or the

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<sup>10</sup> The amendments to this clause mirror that made to clause 262(7) in Part XIII. **Please see the relevant Notes in Part XIII for details of the latest amendments.**

derivatives of the listed securities of which  
were, such listed securities or derivatives.

<sup>11</sup>(7A)Where a person is charged with an offence under  
section 283(8) in respect of a contravention of section 283  
taking place through his dealing in or counselling or  
procuring another person to deal in listed securities or  
derivatives, it is a defence to the charge for the person to  
prove that -

(a) he acted -

(i) in connection with any dealing in  
listed securities or their  
derivatives (whether by himself or  
another person) which was under  
consideration or was the subject of  
negotiation, or in the course of a  
series of such dealings; and

(ii) with a view to facilitating the  
accomplishment of the dealing or the  
series of dealings; and

(b) the relevant information in question was market  
information arising directly out of his  
involvement in the dealing or the series of  
dealings.

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<sup>11</sup> The amendments to this clause mirror that made to clause 262(7A) in Part  
XIII. Please see the relevant Notes in Part XIII for details of the latest amendments.

<sup>12</sup>(8) Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 taking place through his dealing in or counselling or procuring another person to deal in listed securities or derivatives, it is a defence to the charge for the person to prove that the dealing in question is a market contract.

<sup>13</sup>(9) For the purposes of subsection (7A), "market information" (市場消息) means information consisting of one or more of the following facts -

- (a) that there has been or is to be any dealing in listed securities or derivatives of listed securities of a particular kind, or that any such dealing is under consideration or is the subject of negotiation;
- (b) that there has not been or is not to be any dealing in listed securities or derivatives of listed securities of a particular kind;
- (c) the quantity of listed securities or derivatives of listed securities in which there is or is to be any dealing, or in which any

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<sup>12</sup> The amendments to this clause mirror that made to clause 262(8) in Part XIII. **Please see the relevant Notes in Part XIII for details of the latest amendments.**

<sup>13</sup> Amendment to insert a definition of "market information" upon which the new defence in clause 284(7A) depends as in clause 272(9) in Part XIII. See Note 11. **Please see the relevant Note in Part XIII for details of the latest amendments.**

dealing is under consideration or is the  
subject of negotiation;

(d) the price (or range of prices) at which listed  
securities or derivative of listed securities  
have been or are to be dealt in, or the price  
(or range of prices) at which listed securities  
or derivatives of listed securities in which  
any dealing is under consideration or is the  
subject of negotiation may be dealt in;

(e) the identity of the persons involved or likely  
to be involved in any capacity in any dealing  
in listed securities or derivatives of listed  
securities.

**285. Insider dealing offence - defences for certain  
trustees and personal representatives**

<sup>14</sup>Where a person who is a trustee or personal  
representative is charged with an offence under section 283(8)  
in respect of a contravention of section 283 taking place  
through his dealing in or counselling or procuring by reason  
of having entered into a transaction another person to deal in  
listed securities or their derivatives and he entered into the  
transaction as a trustee or personal

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<sup>14</sup> The amendments to this clause mirror that made to clause 263 in Part  
XIII. Please see the relevant Notes in Part XIII for details of the latest amendments.

~~representative derivatives~~, it is a defence to the charge for the person to prove that -

(aa) he acted on advice obtained in good faith from another person, ~~and~~;

(a) that other person appeared to him to be an appropriate person from whom to seek the advice; and

(b) it did not appear to him that, had that other person ~~entered into the transaction, that other person would contravene section 283~~ dealt in the listed securities or derivatives in question, a contravention of section 283 would take place.

**286. Insider dealing offence - defences for certain persons exercising right to subscribe for or acquire securities or derivatives**

<sup>15</sup>Where a person is charged with an offence under section 283(8) in respect of a contravention of section 283 taking place through his dealing in listed securities or derivatives, it is a defence to the charge for the person to prove that -

(a) he dealt in the listed securities or derivatives in question by way of his exercise of a right to subscribe for or otherwise acquire the listed securities of a corporation

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<sup>15</sup> The amendments to this clause mirror that made to clause 264 in Part XIII. Please see the relevant Notes in Part XIII for details of the latest amendments.

~~or derivatives, it is a defence to the charge  
for the person to prove that such listed  
securities or derivatives; and~~

(b) the right was granted to him or was derived  
from securities or their derivatives that were  
held by him before he became aware of any  
relevant information in relation to the  
corporation the listed securities of which  
were, or the derivatives of the listed  
securities of which were, such listed  
securities or derivatives.

### **Division 3 - Other market misconduct offences**

#### **287. Offence of false trading**

~~——<sup>16</sup>(1) A person shall not, in Hong Kong or elsewhere,  
intentionally or recklessly —~~

~~(a) create;~~

~~(b) cause to be created; or~~

~~(c) do anything that is likely to create,~~

do anything or cause anything to be done, with the intention  
that, or being reckless as to whether, it has, or is likely to  
have, the effect of creating a false or misleading  
appearance -

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<sup>16</sup> The amendments to this clause mirror that made to clause 265(1) in Part  
XIII. Please see the relevant Notes in Part XIII for details of the latest amendments.

~~(i)(a)~~ of active trading in securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services; or

~~(ii)(b)~~ with respect to the market for, or the price for dealings in, securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services.

<sup>17</sup>(2) A person shall not, in Hong Kong, ~~intentionally or recklessly~~

~~(a) create;~~

~~(b) cause to be created; or~~

~~(c) do anything that is likely to create,~~

do anything or cause anything to be done, with the intention that, or being reckless as to whether, it has, or is likely to have, the effect of creating a false or misleading appearance -

~~(i)(a)~~ of active trading in securities or futures contracts traded on a relevant overseas market; or

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<sup>17</sup> The amendments to this clause mirror that made to clause 265(2) in Part XIII. Please see the relevant Notes in Part XIII for details of the latest amendments.



~~(i)(b)~~with respect to the market for, or the price  
for dealings in, securities or futures  
contracts traded on a relevant overseas market.

(3) A person shall not, in Hong Kong or elsewhere, take part in, be concerned in, or carry out, directly or indirectly, one or more transactions (whether or not any of them is a dealing in securities or futures contracts), with the intention that, or being reckless as to whether, it or they has or have, or is or are likely to have, the effect of creating an artificial price, or maintaining at a level that is artificial (whether or not it was previously artificial) a price, for dealings in securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services.

(4) A person shall not, in Hong Kong, take part in, be concerned in, or carry out, directly or indirectly, one or more transactions (whether or not any of them is a dealing in securities or futures contracts), with the intention that, or being reckless as to whether, it or they has or have, or is or are likely to have, the effect of creating an artificial price, or maintaining at a level that is artificial (whether or not it was previously artificial) a price, for dealings in securities or futures contracts traded on a relevant overseas market.

(5) Without limiting the generality of subsection (1) or (2), where a person<sup>18</sup> -

- (a) enters into or carries out, directly or indirectly, any transaction of sale or purchase, or any transaction which purports to be a transaction of sale or purchase, of securities that does not involve a change in the beneficial ownership of them;
- (b) offers to sell securities at a price that is substantially the same as the price at which he has made or proposes to make, or knows that an associate of his has made or proposes to make, an offer to purchase the same or substantially the same, number of them; or
- (c) offers to purchase securities at a price that is substantially the same as the price at which he has made or proposes to make, or knows that an associate of his has made or proposes to make, an offer to sell the same or substantially the same, number of them,

then, unless the transaction in question is an off-market transaction, the person<sup>19</sup> shall, for the purposes of subsection

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<sup>18</sup> Technical amendment. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.

~~(1) or (1) and~~<sup>20</sup> (2), be regarded as doing something or causing something to be done, with the intention having intentionally or recklessly created, caused to be created, or done something that is likely to create, that, or being reckless as to whether, it has, or is likely to have, the effect of creating<sup>21</sup> a false or misleading appearance -

(i) where the securities are traded on a relevant recognized market or by means of authorized automated trading services, of active trading in securities so traded or with respect to the market for, or the price for dealings in, securities so traded; or

(ii) where the securities are traded on a relevant overseas market, of active trading in securities so traded or with respect to the market for, or the price for dealings in, securities so traded.

(6) Subject to subsection (7), a person who contravenes subsection (1), (2), (3) or (4) commits an offence.

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<sup>19</sup> The amendment mirrors that made to clause 265(5) in Part XIII. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**

<sup>20</sup> The amendment mirrors that made to clause 265(5) in Part XIII. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**

<sup>21</sup> Amendment consequential to that made to clause 265(1). **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**

(7) Where a person is charged with an offence under subsection (6) in respect of a contravention of subsection (1) or (2) ~~by reason of having committed~~ taking place through the commission of<sup>22</sup> an act referred to in subsection (5)(a), (b) or (c), it is a defence to the charge for the person to prove that the purpose for which he committed the act was not, or, where there was more than one purpose, the purposes for which he committed the act did not include, the purpose of creating a false or misleading appearance of active trading in securities, or with respect to the market for, or the price for dealings in, securities, referred to in subsection (1) or (2) (as the case may be).

<sup>23</sup>(7A) In subsection (5), "off-market transaction" (場外交易) means a transaction which -

- (a) in the case of securities traded on a relevant recognized market, is not required to be recorded on the relevant recognized market, or to be notified, under the rules of the person by whom the relevant recognized market is operated, to such person;
- (b) in the case of securities traded by means of authorized automated trading services, is not

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<sup>22</sup> **Technical amendment for consistency with clause 265(6).**

<sup>23</sup> Amendment to add definition of "off-market transaction" consequential to amendment to that described in Note 19. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**

required to be recorded by means of authorized automated trading services, or to be notified, under the rules of the person by whom the authorized automated trading services are operated, to such person; or

(c) in the case of securities traded on a relevant overseas market, is not required to be recorded on the relevant overseas market, or to be notified, under the rules of the person by whom the relevant overseas market is operated, to such person.

(8) In this section -

- (a) a reference to a transaction of sale or purchase, in relation to securities, includes an offer to sell or purchase securities and an invitation (however expressed) that expressly or impliedly invites a person to offer to sell or purchase securities; and
- (b) a reference to entering into or carrying out a transaction of sale or purchase shall, in the case of an offer or an invitation referred to in paragraph (a), be construed as a reference to making the offer or the invitation (as the case may be).

## 288. Offence of price rigging

- (1) A person shall not, in Hong Kong or elsewhere -
- (a) enter into or carry out, directly or indirectly, any transaction of sale or purchase of securities that does not involve a change in the beneficial ownership of those securities, which has the effect of maintaining, increasing, reducing, stabilizing, or causing fluctuations in, the price of securities traded on a relevant recognized market or by means of authorized automated trading services; or
  - (b) enter into or carry out, directly or indirectly, any fictitious or artificial transaction or device, with the intention that, or being reckless as to whether, it has the effect of maintaining, increasing, reducing, stabilizing, or causing fluctuations in, the price of securities, or the price for dealings in futures contracts, that are traded on a relevant recognized market or by means of authorized automated trading services.
- (2) A person shall not, in Hong Kong -
- (a) enter into or carry out, directly or indirectly, any transaction of sale or purchase of securities that does not involve a change in

the beneficial ownership of those securities, which has the effect of maintaining, increasing, reducing, stabilizing, or causing fluctuations in, the price of securities traded on a relevant overseas market; or

- (b) enter into or carry out, directly or indirectly, any fictitious or artificial transaction or device, with the intention that, or being reckless as to whether, it has the effect of maintaining, increasing, reducing, stabilizing, or causing fluctuations in, the price of securities, or the price for dealings in futures contracts, that are traded on a relevant overseas market.

(3) For the purposes of subsections (1)(b) and (2)(b), the fact that a transaction is, or at any time was, intended to have effect according to its terms is not conclusive in determining whether the transaction is, or was, not fictitious or artificial.

(4) Subject to subsection (5), a person who contravenes subsection (1) or (2) commits an offence.

(5) Where a person is charged with an offence under subsection (4) in respect of a contravention of subsection (1)(a) or (2)(a) taking place through any transaction of sale or purchase of securities that does not involve a change in the

~~beneficial ownership of those~~<sup>24</sup> securities, it is a defence to the charge for the person to prove that the purpose for which the securities were sold or purchased was not, or, where there was more than one purpose, the purposes for which the securities were sold or purchased did not include, the purpose of creating a false or misleading appearance with respect to the price of securities.

(6) In this section -

- (a) a reference to a transaction of sale or purchase, in relation to securities, includes an offer to sell or purchase securities and an invitation (however expressed) that expressly or impliedly invites a person to offer to sell or purchase securities; and
- (b) a reference to entering into or carrying out a transaction of sale or purchase shall, in the case of an offer or an invitation referred to in paragraph (a), be construed as a reference to making the offer or the invitation (as the case may be).

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<sup>24</sup> **Technical amendment to clarify application of the defence.**



**289. Offence of disclosure of information about prohibited transactions**

(1) A person shall not disclose, circulate or disseminate, or authorize or be concerned in the disclosure, circulation or dissemination of, information to the effect that the price of securities of a corporation, or the price for dealings in futures contracts, that are traded on a relevant recognized market or by means of authorized automated trading services will be maintained, increased, reduced or stabilized, or is likely to be maintained, increased, reduced or stabilized, because of a prohibited transaction relating to securities of either the corporation or a related corporation of the corporation or to the futures contracts (as the case may be), if he, or an associate of his -

- (a) has entered into or carried out, directly or indirectly, the prohibited transaction; or
- (b) has received, or expects to receive, directly or indirectly, a benefit as a result of the disclosure, circulation or dissemination of the information.

(2) Subject to subsection (3), a person who contravenes subsection (1) commits an offence.

(3) Where a person is charged with an offence under subsection (2) in respect of a contravention of subsection (1) on the basis that he, or an associate of his, received, or

expected to receive, directly or indirectly, a benefit ~~as a result of any disclosure, circulation or dissemination of information~~referred to in subsection (1)(b)<sup>25</sup>, it is a defence to the charge for the person to prove that -

- (a) the benefit which he or the associate of his (as the case may be) received, or expected to receive, was not from a person who has entered into or carried out, directly or indirectly, the prohibited transaction in question, or an associate of such person; or
- (b) the benefit which he or the associate of his (as the case may be) received, or expected to receive, was from a person who has entered into or carried out, directly or indirectly, the prohibited transaction in question, or an associate of such person, but up to (and including) the time of the disclosure, circulation or dissemination of the information he has acted in good faith.

(4) In this section -

- (a) a reference to a prohibited transaction means any conduct or transaction which constitutes market misconduct or a contravention of any of the provisions of Divisions 2 to 4; and

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<sup>25</sup> Technical amendment to clarify application of the defence.

- (b) a reference to any person having entered into or carried out the prohibited transaction shall be construed accordingly.

**290. Offence of disclosure of false or misleading information inducing transactions**

(1) A person shall not, in Hong Kong or elsewhere, disclose, circulate or disseminate, or authorize or be concerned in the disclosure, circulation or dissemination of, information that is likely -

- (a) to induce another person to subscribe for securities, or deal in futures contracts, in Hong Kong;
- (b) to induce the sale or purchase in Hong Kong of securities by another person; or
- (c) to maintain, increase, reduce or stabilize the price of securities, or the price for dealings in futures contracts, in Hong Kong,

if -

- (i) the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact; and

(ii) the person knows that, or is reckless or negligent<sup>26</sup> as to whether, the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact.

(2) Subject to subsections (3) to (5), a person who contravenes subsection (1) commits an offence.

<sup>27</sup>(3) Where a person is charged with an offence under subsection (2) in respect of a contravention of subsection (1) ~~taking place in relation to any disclosure, circulation or dissemination of information, it is a defence by reason only of the issue or reproduction of information, it is a defence to the to the charge for the person to prove that~~

~~(a) he 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 information was issued or reproduced by him in the ordinary course of that business;~~

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<sup>26</sup> **With Members' agreement reached at the Bills Committee meeting on 3 October 2001, we have removed "negligent" as the mental element in clause 290. This takes into account concerns of the media expressed to the Bills Committee and of some Members.**

<sup>27</sup> **Amendment consequential to amendment of similar conduit defences in Part IV to clarify that the conduit defences apply both to a firm and people acting for that firm, with necessary adaptations. We have considered the comments of some Members expressed at the meeting on 3 October 2001, and believe that the present draft would best reflect the policy intention of the provision and address market concerns.**

- ~~(c) the contents of the information 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 information was such that he did not select, modify or otherwise exercise control over the contents of the information prior to its issue or reproduction; and~~
- ~~(e) at the time he issued or reproduced the information, he did not know that it was false or misleading as to a material fact or was false or misleading through the omission of a material fact.~~

~~— (4) Where a person is charged with an offence under subsection (2) in respect of a contravention of subsection (1) taking place in relation to any disclosure, circulation or dissemination of information, it is a defence to the charge for the person to prove that —~~

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

~~(c) the contents of the information 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 information 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 information and that he neither took responsibility for it nor endorsed its accuracy; and~~

~~(e) at the time he re-transmitted the information~~

~~\_\_\_\_\_ (i) he did not know that it was false or misleading as to a material fact or was false or misleading through the omission of a material fact; or~~

~~\_\_\_\_\_ (ii) he knew that it was false or misleading as to a material fact or was false or misleading through the omission of a material fact, but in~~

~~the circumstances of the case he  
could not reasonably be expected to  
prevent the re-transmission.~~

~~(5) Where a person is charged with an offence under  
subsection (2) in respect of a contravention of subsection (1)  
taking place in relation to any disclosure, circulation or  
dissemination of information, it is a defence to the charge  
for the person to prove that -~~

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

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

~~(c) he did not modify the contents of the  
information 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) charge for the person to  
prove that -~~

~~(a) the issue or reproduction of the information  
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 information 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 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 information; and

(d) at the time of the issue or reproduction, he did not know that the information was false or misleading as to a material fact or was false or misleading through the omission of a material fact.

<sup>28</sup>(4) Where a person is charged with an offence under subsection (2) in respect of a contravention of subsection (1) taking place by reason only of the re-transmission of

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<sup>28</sup> Amendment consequential to amendment of the conduit defences in Part IV to clarify that the internet hyperlink defences apply both to a firm and people acting for that firm, with necessary adaptations. **We have considered the comments of some Members expressed at the meeting on 3 October 2001, and believe that the present draft would best reflect the policy intention of the provision and address market concerns.**



information, it is a defence to the charge for the person to  
prove that -

(a) the re-transmission of the information 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 information 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 information;

(d) the re-transmission of the information 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 information, 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 information was false or misleading as to a material fact or was false or misleading through the omission of a material fact; or

(ii) he knew that the information was false or misleading as to a material

fact or was false or misleading  
through the omission of a material  
fact, 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  
information 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).

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<sup>29</sup>(5) Where a person is charged with an offence under  
subsection (2) in respect of a contravention of subsection (1)

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<sup>29</sup> Amendment consequential upon amendment to the live broadcast defences in Part IV to clarify that those defences apply to both to a firm and people acting for that firm, with necessary adaptations. **We have considered the comments of some Members expressed at the meeting on 3 October 2001, and believe that the present draft would best reflect the policy intention of the provision and address market concerns.**

taking place by reason only of the live broadcast of information, it is a defence to the charge for the person to prove that -

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

(b) the contents of the information 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 information;

(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) 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 information  
was false or misleading as to a  
material fact or was false or  
misleading through the omission of a  
material fact; or

(ii) he knew that the information was  
false or misleading as to a material  
fact or was false or misleading

through the omission of a material fact, but –

(A) where he was the broadcaster<sup>29</sup>, 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 information 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)<sup>29</sup>.

(6) In this section, "issue" (發出), in relation to any material (including any information), includes publishing, circulating, distributing or otherwise disseminating the material or the contents thereof<sup>30</sup>, whether –

(a) by any visit in person;

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<sup>30</sup> Technical amendment for consistency with other similar definitions of "issue" (e.g. clause 101). Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.

- (b) in a newspaper, magazine, journal or other publication;
- (c) by the display of posters or notices;
- (d) by means of circulars, brochures, pamphlets or handbills;
- (e) by an exhibition of photographs or cinematograph films;
- (f) by way of sound or television broadcasting;
- (g) by ~~computer~~ any information system<sup>31</sup> 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.

#### **291. Offence of stock market manipulation**

- (1) A person shall not, in Hong Kong or elsewhere -
  - (a) enter into or carry out, directly or indirectly, 2 or more transactions in securities of a corporation that by themselves

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<sup>31</sup> 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.

or in conjunction with any other transaction increase, or are likely to increase, the price of any securities traded on a relevant recognized market or by means of authorized automated trading services, with the intention of inducing another person to purchase or subscribe for, or to refrain from selling, securities ~~issued by~~<sup>of</sup><sup>32</sup> the corporation or ~~by~~<sup>of</sup><sup>32</sup> a related corporation of the corporation;

- (b) enter into or carry out, directly or indirectly, 2 or more transactions in securities of a corporation that by themselves or in conjunction with any other transaction reduce, or are likely to reduce, the price of any securities traded on a relevant recognized market or by means of authorized automated trading services, with the intention of inducing another person to sell, or to refrain from purchasing, securities ~~issued by~~<sup>of</sup><sup>32</sup> the corporation or ~~by~~<sup>of</sup><sup>32</sup> a related corporation of the corporation; or
- (c) enter into or carry out, directly or indirectly, 2 or more transactions in

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<sup>32</sup> Technical amendment for tallying with clause 7 of Schedule 1. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**



securities of a corporation that by themselves or in conjunction with any other transaction maintain or stabilize, or are likely to maintain or stabilize, the price of any securities traded on a relevant recognized market or by means of authorized automated trading services, with the intention of inducing another person to sell, purchase or subscribe for, or to refrain from selling, purchasing or subscribing for, securities ~~issued by~~<sup>of<sup>32</sup></sup> the corporation or ~~by~~<sup>of<sup>32</sup></sup> a related corporation of the corporation.

- (2) A person shall not, in Hong Kong -
- (a) enter into or carry out, directly or indirectly, 2 or more transactions in securities of a corporation that by themselves or in conjunction with any other transaction increase, or are likely to increase, the price of any securities traded on a relevant overseas market, with the intention of inducing another person to purchase or subscribe for, or to refrain from selling, securities ~~issued by~~<sup>of<sup>32</sup></sup> the corporation or ~~by~~<sup>of<sup>32</sup></sup> a related corporation of the corporation;
  - (b) enter into or carry out, directly or indirectly, 2 or more transactions in

securities of a corporation that by themselves or in conjunction with any other transaction reduce, or are likely to reduce, the price of any securities traded on a relevant overseas market, with the intention of inducing another person to sell, or to refrain from purchasing, securities ~~issued by~~<sup>of<sup>32</sup></sup> the corporation or ~~by~~<sup>of<sup>32</sup></sup> a related corporation of the corporation; or

- (c) enter into or carry out, directly or indirectly, 2 or more transactions in securities of a corporation that by themselves or in conjunction with any other transaction maintain or stabilize, or are likely to maintain or stabilize, the price of any securities traded on a relevant overseas market, with the intention of inducing another person to sell, purchase or subscribe for, or to refrain from selling, purchasing or subscribing for, securities ~~issued by~~<sup>of<sup>32</sup></sup> the corporation or ~~by~~<sup>of<sup>32</sup></sup> a related corporation of the corporation.

(3) A person who contravenes subsection (1) or (2) commits an offence.

(4) In this section -

- (a) a reference to a transaction includes an offer and an invitation (however expressed); and
- (b) a reference to entering into or carrying out a transaction shall, in the case of an offer or an invitation referred to in paragraph (a), be construed as a reference to making the offer or the invitation (as the case may be).

#### Division 4 - Other offences

#### 292. Offence involving fraudulent or deceptive devices, etc. in transactions in securities, futures contracts or leveraged foreign exchange trading

(1) A person shall not, directly or indirectly, in a transaction involving securities, futures contracts or leveraged foreign exchange trading -

- (a) employ any device, scheme or artifice with intent to defraud or deceive; or
- (b) engage in any act, practice or course of business which is fraudulent or deceptive<sup>33</sup>, or

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<sup>33</sup> In response to a comment on whether "deceptive" adds anything to "fraudulent" ,we have sought the advice of the Director of Public Prosecutions (DPP). Case law suggests that deceit is not an essential ingredient of fraud, as to deceive is to induce "someone" to believe that a thing is true which is false, and a person can be defrauded without being deceived (e.g. his right being prejudiced without his knowledge/consent). DPP's view is that "deceptive" should be retained as it allows the Prosecution, in situation where there is "deception", to directly allege that specific mode of offence. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**

would operate as a fraud or deception.

(2) A person who contravenes subsection (1) commits an offence.

(3) In this section, a reference to a transaction includes an offer and an invitation (however expressed).

**293. Offence of disclosure of false or misleading information inducing others to enter into leveraged foreign exchange contracts**

(1) A person shall not, in Hong Kong or elsewhere, disclose, circulate or disseminate, or authorize or be concerned in the disclosure, circulation or dissemination of, information that is likely to induce another person to enter into a leveraged foreign exchange contract in Hong Kong, if -

- (a) the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact; and
- (b) the person knows that, or is reckless ~~or~~ negligent<sup>34</sup> as to whether, the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact.

(2) Subject to subsections (3) to (5), a person who contravenes subsection (1) commits an offence.

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<sup>34</sup> Consistent with the amendment to clause 290, we agreed with Members at the Bills Committee meeting on 3 October 2001 to remove "negligent" from clause 293 as well.

<sup>35</sup>(3) Where a person is charged with an offence under subsection (2) in respect of a contravention of subsection (1) taking place ~~in relation to any disclosure, circulation or dissemination of information, it is a defence by reason only of the issue or reproduction of information, it is a defence to the~~ to the charge for the person to prove that—

~~(a) he 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 information was issued or reproduced by him in the ordinary course of that business;~~

~~(c) the contents of the information 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 information was such that he did not select, modify or otherwise exercise control over the contents of the information prior to its issue or reproduction; and~~

~~(e) at the time he issued or reproduced the information, he did not know that it was false or misleading as to a material fact or was~~

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<sup>35</sup> See Note 27. **We have considered the comments of some Members expressed at the meeting on 3 October 2001, and believe that the present draft would best reflect the policy intention of the provision and address market concerns.**

~~false or misleading through the omission of a material fact.~~

~~(4) Where a person is charged with an offence under subsection (2) in respect of a contravention of subsection (1) taking place in relation to any disclosure, circulation or dissemination of information, it is a defence to the charge for the person to prove that—~~

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

~~(c) the contents of the information 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 information 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 information and that he neither took responsibility for it nor endorsed its accuracy; and~~

~~(c) at the time he re-transmitted the information—~~

~~(i) he did not know that it was false or misleading as to a material fact or was false or misleading through the omission of a material fact; or~~

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

~~(5) Where a person is charged with an offence under subsection (2) in respect of a contravention of subsection (1) taking place in relation to any disclosure, circulation or dissemination of information, it is a defence to the charge for the person to prove that—~~

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

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

~~(c) he did not modify the contents of the information 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 —~~

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~~(i) he did not know that the information was false or misleading as to a material fact or was false or misleading through the omission of a material fact; or~~

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~~(ii) he knew that the information was false or misleading as to a material fact or was false or misleading through the omission of a material fact, but in the circumstances of the case he could not reasonably be expected to prevent the broadcast.~~



charge for the person to prove that -

(a) the issue or reproduction of the information 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 information 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 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 information; and

(d) at the time of the issue or reproduction, he did not know that the information was false or misleading as to a material fact or was false

or misleading through the omission of a  
material fact.

<sup>36</sup>(4) Where a person is charged with an offence under  
subsection (2) in respect of a contravention of subsection (1)  
taking place by reason only of the re-transmission of  
information, it is a defence to the charge for the person to  
prove that -

(a) the re-transmission of the information 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 information 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

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<sup>36</sup> See Note 28. We have considered the comments of some Members expressed at the meeting on 3 October 2001, and believe that the present draft would best reflect the policy intention of the provision and address market concerns.

(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  
information;

(d) the re-transmission of the information 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 information,  
and neither took responsibility for it nor  
endorsed its accuracy; and

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

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(i) he did not know that the information  
was false or misleading as to a  
material fact or was false or  
misleading through the omission of a  
material fact; or

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(ii) he knew that the information was  
false or misleading as to a material  
fact or was false or misleading  
through the omission of a material  
fact, 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  
information 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).

<sup>37</sup>(5) Where a person is charged with an offence under subsection (2) in respect of a contravention of subsection (1) taking place by reason only of the live broadcast of information, it is a defence to the charge for the person to prove that -

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

(b) the contents of the information 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

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<sup>37</sup> See Note 29. **We have considered the comments of some Members expressed at the meeting on 3 October 2001, and believe that the present draft would best reflect the policy intention of the provision and address market concerns.**

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

(d) in relation to the broadcast -

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

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(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 -

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(i) he did not know that the information was false or misleading as to a material fact or was false or misleading through the omission of a material fact; or

(ii) he knew that the information was

false or misleading as to a material  
fact or was false or misleading  
through the omission of a material  
fact, 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  
information 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).

(6) In this section, "issue" (發出), in relation to any material (including any information), includes publishing, circulating, distributing or otherwise disseminating the material or the contents thereof<sup>30</sup>, 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;
- (e) by an exhibition of photographs or cinematograph films;
- (f) by way of sound or television broadcasting;
- (g) by ~~computer~~ any information system<sup>31</sup> 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.

**294. Offence of falsely representing dealings in futures contracts on behalf of others, etc.**

(1) A person shall not represent to another person that he has on behalf of the other person dealt in, or facilitated or arranged for any dealing in, a futures contract traded on a recognized futures market or by means of authorized automated trading services, if -



(a) in fact he has not so dealt in, or facilitated or arranged for the dealing in, the futures contract<sup>38</sup>; and

~~when~~(b) he knows that, or is reckless as to whether<sup>38</sup>, in fact he has not so dealt in, or facilitated or arranged for the dealing in, the futures contract.

(2) A person shall not represent to another person that he has dealt in, or facilitated or arranged for any dealing in, a contract or other instrument substantially resembling a futures contract on behalf of the other person in accordance with the rules of a futures market outside Hong Kong, if -

(a) in fact he has not so dealt in, or facilitated or arranged for the dealing in, the contract or other instrument;<sup>38</sup> and

~~when~~(b) he knows that, or is reckless as to whether,<sup>38</sup> in fact he has not so dealt in, or facilitated or arranged for the dealing in, the contract or other instrument.

(3) ~~Subject to subsection (4), a~~<sup>39</sup> person who contravenes subsection (1) or (2) commits an offence.

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<sup>38</sup> Amendment in response to market comment (group of nine investment bankers) to remove the due diligence defence for "bucketing" offence as it may capture innocent mistakes. We are satisfied that the change will not prejudice investors as most bucket shops are fraudulent operations and a mental element of intention or recklessness would cover most conduct that it is necessary to cover to protect investors. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**

~~<sup>40</sup>(4) Where a person is charged with an offence under subsection (3) in respect of a contravention of subsection (1) or (2) by reason of the making of a representation, it is a defence to the charge for the person to prove that up to (and including) the time of the making of the representation he acted in good faith and did not know, and could not in the circumstances of the case reasonably have known, that in fact he has not —~~

~~(a) in the case of a contravention of subsection (1), dealt in, or facilitated or arranged for the dealing in, the futures contract referred to in that subsection in the manner described in that subsection; or~~

~~(b) in the case of a contravention of subsection (2), dealt in, or facilitated or arranged for the dealing in, the contract or other instrument referred to in that subsection in the manner described in that subsection.~~

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<sup>39</sup> Amendment consequential upon the amendment described in Note 38.  
**Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**

## Division 5 - Miscellaneous

### 295. Penalties

(1) A person who commits an offence under this Part is liable -

- (a) on conviction on indictment to a fine of \$10,000,000 and to imprisonment for 10 years;  
or
- (b) on summary conviction to a fine of \$1,000,000 and to imprisonment for 3 years.

(2) Where a person is convicted of an offence under this Part, the court before which the person is so convicted may, in addition to any penalty specified in subsection (1), make one, ~~or more than one,~~<sup>40</sup> of the following orders in respect of the person -

- (a) an order that the person shall not, without the leave of the court, be or continue to be a director, liquidator, or receiver or manager of the property or business, of a listed corporation or any other specified corporation or in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation or any other specified

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<sup>40</sup> **Technical amendment for consistency with clause 249 in Part XIII.**

corporation for the period (not exceeding 5 years) specified in the order;

(b) an order that the person shall not, without the leave of the court, in Hong Kong, directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities, futures contract or leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme for the period (not exceeding 5 years) specified in the order;

(c) an order that any body which may take disciplinary action against the person as one of its members be recommended to take disciplinary action against him.

(3) When making any order in respect of a person under subsection (2), the court may take into account any conduct by the person which -

(a) previously resulted in the person being convicted of an offence in Hong Kong;

(b) previously resulted in the person being identified by the Market Misconduct Tribunal as having engaged in any market misconduct pursuant to section 244(3)(b); or

(c) at any time before the commencement of Part XIII resulted in the person being identified as an insider dealer in a determination under section 16(3), or in a written report prepared and issued under section 22(1), of the repealed Securities (Insider Dealing) Ordinance.

(4) Where the court makes an order under subsection (2)(a), the court may specify a corporation by name or by reference to a relationship with any other corporation.

(5) Where the court makes an order under subsection (2)(a), the order shall be filed by the court with the Registrar of Companies, as soon as reasonably practicable after it is made.

(6) Where the court makes an order under subsection (2)(b), the Commission may notify any licensed ~~or exempt~~<sup>41</sup> person or registered institution<sup>41</sup> of the order in such manner as it considers appropriate.

(7) A person commits an offence if he ~~refuses or~~<sup>42</sup> fails to comply with an order made under subsection (2)(a) or (b) and is liable -

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<sup>41</sup> **We accept the comment of some Members that the term “exempt person” is a misnomer and does not reflect the proposed regulatory framework whereby authorized institutions engaging in regulated activities are subject to a wide range of regulatory requirements and disciplinary sanctions. We informed Members at the meeting on 14 September 2001 that we would replace “exempt person” with “registered institution” and “exempt” with “registered” throughout the Bill to duly reflect the policy intention.**

<sup>42</sup> **Technical amendment for consistency with other similar provisions (e.g. clause 245(2) in Part XIII). Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 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.

<sup>43</sup> **295A. Transactions relating to contravention of Divisions 2 to 4 not void or voidable**

A transaction is not void or voidable by reason only that a contravention of any of the provisions of Divisions 2 to 4 has taken place in relation to or as a result of it.

**296. Civil liability for contravention of this Part**

(1) Subject to subsections (2) and (3), a person who contravenes any of the provisions of Divisions 2 to 4 shall, ~~apart from whether or not he also incurs<sup>44</sup> any other liability~~ ~~he may incur~~ (whether under section 295 or otherwise), 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 the contravention, whether or not<sup>44</sup> the loss arises from the other person having entered into a transaction or dealing at a price affected by the contravention, ~~or otherwise<sup>44</sup>~~.

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<sup>43</sup> **Clause 295A is added for consistency with clause 271 in Part XIII.**

<sup>44</sup> **The amendment mirrors that made to clause 272(1) in Part XIII. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**

(2) No person shall be liable to pay compensation under subsection (1) unless it is fair, just and reasonable in the circumstances of the case that he should be so liable.

(3) A defence under this Part to a charge for an offence in respect of a contravention of any of the provisions of Divisions 2 to 4 shall also be a defence in an action brought under subsection (1) in respect of the same contravention.

(4) A person may bring an action under subsection (1) in respect of a contravention of any of the provisions of Divisions 2 to 4 even though the person against whom the action is brought has not been charged with or convicted of an offence by reason of the contravention.

(5) 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 de se for an injunction<sup>45</sup>, grant an injunction in addition to, or in substitution for, damages, on such terms and conditions as it considers appropriate.

(6) Without prejudice to section 62 of the Evidence Ordinance (Cap. 8), in an action brought under subsection (1) -

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<sup>45</sup> The amendment mirrors that made to clause 272(6) in Part XIII. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**

- (a) the fact that there is<sup>46</sup> a determination by the Market Misconduct Tribunal pursuant to section 244(3)(a) that market misconduct has taken place;
- (b) the fact that there is<sup>46</sup> a determination by the Market Misconduct Tribunal pursuant to section 244(3)(b) identifying a person (whether or not a party to the action) as having engaged in market misconduct,

shall, in so far the determination is still subsisting, be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in the action -

- (i) in the case of a determination referred to in paragraph (a), that the market misconduct has taken place; or
- (ii) in the case of a determination referred to in paragraph (b), that the person has engaged in market misconduct.

(7) In an action brought under subsection(1) -

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<sup>46</sup> The amendment mirrors that made to clause 272(7) in Part XIII. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**



~~(a) where, where the fact that~~<sup>47</sup> there is a determination referred to in subsection (6)(a) or (b) is admissible in evidence under subsection (6)<sup>47</sup> -

(a) then -

(i) in the case of a determination referred to in subsection (6)(a), the market misconduct that is the subject of the determination shall, unless the contrary is proved, be taken to have taken place; or

(ii) in the case of a determination referred to in subsection (6)(b), the person that is the subject of the determination shall, unless the contrary is proved, be taken to have engaged in market misconduct; and

(b) without prejudice to the reception of any other admissible evidence as evidence of the determination or<sup>47</sup> for the purpose of identifying the facts on which the determination was based, the contents of a report of the Market Misconduct Tribunal containing the determination and published

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<sup>47</sup> Amendment consequential upon amendments described in Note 46. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**

under section 254(2)(b)(i), or the contents of a copy of a report of the Market Misconduct Tribunal containing the determination and made available under subsection (8), shall also be admissible in evidence for ~~that~~<sup>such</sup><sup>48</sup> purpose.

(8) Where in an action brought under subsection (1) -

(a) the fact that there is<sup>49</sup> a determination referred to in subsection (6)(a) or (b) is admissible in evidence under subsection (6); and

(b) a report of the Market Misconduct Tribunal containing the determination has not been published under section 254(2)(b)(i),

the court having jurisdiction to determine the action may, where it considers appropriate, require that a copy of the report be made available to the court to enable it to be used for the purposes of subsection (7)(b), whereupon -

(i) the Market Misconduct Tribunal shall cause a copy of the report to be made available to the court to enable it to be used for the purposes of subsection (7)(b); and

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<sup>48</sup> Technical amendment. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.

<sup>49</sup> See Note 46. Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.

(ii) the contents of the report shall be admissible  
for the purpose specified in subsection (7)(b).

(9) In this section, a reference to a transaction  
includes an offer and an invitation (however expressed).

(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.

## **297. ~~Transactions~~Conduct<sup>50</sup> not to constitute offences**

~~<sup>51</sup>(1) Subject to subsections (2) and (3), the Commission  
may, where it considers it is in the public interest to do so,  
make rules to prescribe the circumstances in which any conduct  
that would otherwise constitute an offence under this Part  
(other than section 292 or 294) shall not be regarded as  
constituting such an offence.~~

~~<sup>52</sup>(2) Where the Commission proposes to make rules under  
subsection (1), it shall prepare and publish a draft of the  
rules, in such manner as it considers appropriate, for the~~

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<sup>50</sup> Technical amendment to tie in with the wording in clause 297. **Members considered the amendment and did not propose further changes at the Bills Committee meeting on 3 October 2001.**

<sup>51</sup> The amendment mirrors that made to clause 273(1) in Part XIII. Please see the relevant Note in Part XIII for details of the latest amendments.

<sup>52</sup> The amendments mirror that made to clauses 273(2) and (3) in Part XIII. Please see the relevant Notes in Part XIII for details of the latest amendments.

~~purpose of inviting representations on the rules by the public.~~

~~<sup>52</sup>(3) After a draft of the rules which the Commission proposes to make under subsection (1) is published under subsection (2), the Commission may, after consultation with the Financial Secretary, modify the rules, taking into consideration any representation on the rules received as a result of the publication, in such manner as it considers appropriate, for the purpose of having the rules made under subsection (1).~~

<sup>51</sup>(1A4) Notwithstanding anything in this Part, where a person is charged with an offence under this Part (other than section 292 or 294) by reason of any conduct, it is a defence to the charge for the person to prove that the conduct is, according to the rules made under subsection (1), not to be regarded as constituting an offence.

<sup>51</sup>(1) For the purposes of subsection (1A), the Commission, after consultation with the Financial Secretary, may, where it considers it is in the public interest to do so, make rules to prescribe the circumstances in which any conduct that would otherwise constitute an offence under this Part (other than section 292 or 294) shall not be regarded as constituting such an offence.

- (5) Notwithstanding anything in this Part, where -
- (a) a person is charged with an offence under section 287, 288 or 291 by reason of any conduct; and
  - (b) the person is charged on the basis that the conduct was carried out not in respect of securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services, but in respect of securities or futures contracts traded on a relevant overseas market,

the person shall not be convicted of the offence unless the prosecution proves that in any place in which such relevant overseas market is situated the conduct would have constituted a criminal offence had it been carried out there.

**298. No further proceedings after Part XIII**

**market misconduct proceedings**

Notwithstanding anything in this Part, no criminal proceedings may be instituted against any person under this Part in respect of any conduct if -

- (a) proceedings have previously been instituted against the person under section 244 in respect of the same conduct; and

- (b)
  - (i) those proceedings remain pending; or
  - (ii) by reason of the previous institution of those proceedings, no proceedings may again be lawfully instituted against that person under section 244 in respect of the same conduct.

SCHEDULE 8 [ss. 243, 244, 245,  
248 & 260]

MARKET MISCONDUCT TRIBUNAL

1. In this Schedule, unless the context otherwise requires -

"chairman" (主席) means the chairman of the Tribunal;

"judge" (法官) has the meaning assigned to it by section 237(1) of this Ordinance;

"member" (成員) means a member of the Tribunal;

"ordinary member" (普通成員) means a member other than the chairman;

"Presenting Officer" (提控官) has the meaning assigned to it by section 237(1) of this Ordinance;

"proceedings" (研訊程序) means proceedings instituted under section 244 of this Ordinance;

~~"temporary member" (暫委成員) means a temporary~~ replacement member" (代  
替成員) means a replacement member of the Tribunal appointed under section 9;

"Tribunal" (審裁處) has the meaning assigned to it by section 237(1) of this Ordinance.

**Appointment of members**

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<sup>1</sup> The revised term of "replacement member" is to clarify that such a member is to sit in place of an ordinary member, who is unable to continue serving, until the conclusion of the proceedings.

2. The chairman shall be appointed by the Chief Executive on the recommendation of the Chief Justice.
  
3. Subject to sections ~~6 to~~, 6A and<sup>2</sup> 8, the chairman shall be appointed for a term of 3 years or appointed to act in relation to any specified proceedings, and may, subject to the other provisions of this Ordinance, from time to time be reappointed.
  
4. The ordinary members shall be appointed by the Chief Executive.
  
5. Subject to sections ~~6 to~~ 8 and 7<sup>2</sup>, an ordinary member shall be appointed to act in relation to any specified proceedings, and may, subject to the other provisions of this Ordinance, from time to time be reappointed.
  
6. A member may at any time resign his office by notice in writing to the Chief Executive.
  
- ~~7. A member may be removed from office by the Chief Executive for incapacity, bankruptcy, neglect of duty, conflict of interest or misconduct proved to the satisfaction of the Chief Executive.~~

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<sup>2</sup> Amendments consequential upon the addition of new Clause 6A and amendments to Clauses 7 and 8.



<sup>3</sup>6A. The Chief Executive, after consultation with the Chief Justice, may by notice in writing remove the chairman from office on the grounds of incapacity, bankruptcy, neglect of duty, conflict of interest or misconduct.

7. The Chief Executive may by notice in writing remove an ordinary member from office on the grounds of incapacity, bankruptcy, neglect of duty, conflict of interest or misconduct.

~~<sup>4</sup>8. If any proceedings have been commenced by the Tribunal but not completed before the expiry of the chairman's term of office or before the resignation from or vacation of office by a member takes effect, the Chief Executive may authorize the chairman or the member (as the case may be) to continue to act as the chairman or a member (as the case may be) of the Tribunal for the purpose of completing the proceedings.~~

#### **Appointment of ~~temporary~~<sup>1</sup>replacement members**

9. Subject to sections ~~11 and~~<sup>9A</sup> to 12, the Chief Executive may appoint a person to act as a ~~temporary~~<sup>1</sup>replacement member of the Tribunal in

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<sup>3</sup> In the light of the comment made by some Members at the Bills Committee meeting on 19 September 2001, we propose to include a new Clause 6A, as a procedural safeguard, to require the Chief Executive to consult the Chief Justice before he may remove the chairman from office. As a consequence, Clause 7 will only apply to ordinary members of the Tribunal.

<sup>4</sup> In the light of the comments made by some Members at the Bills Committee meeting on 19 September 2001, we accept that where the chairman or an ordinary member of the Tribunal resigns or vacates from office for one reason or another it would not be practical to authorise him to continue to serve as chairman or an ordinary member. The amendment seeks to delete references to the above circumstances.

~~the place of any ordinary member<sup>5</sup> if the ordinary member has died, or has resigned from office under section 6 or has been removed from office under section 7<sup>6</sup>member for any period during which the member is precluded by illness, absence from Hong Kong or any other cause from performing his functions, or considers it improper or undesirable that he should perform his functions in relation to any specified matter, and the person may, subject to the other provisions of this Ordinance, from time to time be reappointed.~~

~~<sup>5</sup>9A. The Chief Executive shall not appoint a person to act as a replacement member of the Tribunal unless the chairman of the Tribunal -~~

~~(a) has recommended that a person should be so appointed having regard to the interests of justice; and~~

~~(b) has given a reasonable opportunity of being heard to -~~

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<sup>5</sup> **At the Bills Committee meeting on 19 September 2001, some Members questioned the need for appointing “temporary members” to the MMT and asked for sufficient safeguards to ensure fair hearing. The proposal for “temporary members” is adopted from the existing arrangements for the Insider Dealing Tribunal (IDT). It is intended to allow flexibility to cater for unforeseen situations and to save cost and time for the parties concerned.**

**To address Members’ concerns, we propose to make explicit the safeguards on the appointment of a replacement member (as explained in Footnote (1), we have replaced “temporary members” with “replacement members” to reflect the nature of such appointment). These safeguards are (a) that the appointment can only be made on the recommendation of the MMT chairman (who is a High Court Judge) having regard to the interest of justice; and (b) that the appointment is made only after the MMT chairman has given a reasonable opportunity of being heard to the parties concerned.**

**Our legal advisers have pointed out to us the practical need to allow for both “replacement chairman” and replacement ordinary members” to facilitate the smooth operation of the MMT, in light of their experience with the IDT. They are particularly concerned about the possible time and costs implications to parties to the proceedings and asked us to put these to Members. On balance, having considered the legal advice and the views expressed by Members, we propose to delete the arrangement for replacement chairman. In effect, it means that when an MMT chairman becomes incapacitated, a new Tribunal would have to be appointed to start the MMT proceedings afresh.**

<sup>6</sup> **In the light of the comments made by some Members at the Bills Committee meeting on 19 September 2001, we propose to rationalise the circumstances under which a replacement member should be appointed, namely upon death, resignation or removal from office.**

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(i) any person whose identity is specified pursuant to section 14(b) in the statement for the proceedings as described in section 14; and

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(ii) the Presenting Officer appointed for the proceedings.

<sup>7</sup>10. ~~A temporary member who is appointed to act in the place of the chairman shall be a judge, and a temporary member who is appointed to act in the place of an ordinary member.~~ A replacement member shall not be a person who would be disqualified under section 243(3) of this Ordinance from appointment as such an ordinary member.

<sup>7</sup>11. ~~A temporary member appointed to act in the place of a replacement member may at any time resign his office by notice in writing to the Chief Executive.~~

<sup>7</sup>12. ~~A temporary member appointed to act in the place of a member may be removed from office by t~~The Chief Executive for may by notice in writing remove a replacement member from office on the grounds of incapacity, bankruptcy, neglect of duty, conflict of interest or misconduct proved to the satisfaction of the Chief Executive.

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<sup>7</sup> Amendments consequential to amendments to clauses governing the removal of members and appointment of replacement members.

~~13. A replacement member who acts in the place of an ordinary member~~<sup>7</sup>~~13. A temporary member who acts in the place of a member~~ in accordance with an appointment under section 9 shall be deemed for all purposes to be the ordinary member.

~~Written s~~Statements<sup>8</sup> for institution of proceedings

14. The ~~written~~ statement<sup>8</sup> required to be contained in a notice given by the Financial Secretary ~~to the chairman~~<sup>9</sup> under section 244(2) of this Ordinance shall specify -

- (a) the provision or provisions of Part XIII of this Ordinance by reference to which any person appears to have perpetrated any conduct which constitutes market misconduct; and
- (b) the identity of the person, and<sup>10</sup> such brief particulars as are sufficient to disclose reasonable information concerning the nature and essential elements of the market misconduct.

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<sup>8</sup> **Technical amendment consequential to the same amendment in Clause 244(2) of Part XIII.**

<sup>9</sup> Technical amendment in line with amendment to cl 244(2) of Part XIII. See Footnote (9) to mark-up draft of Part XIII. Also consistent with clause 211(1) of the Blue Bill. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 19 September 2001.**

<sup>10</sup> Technical amendment to set out more clearly that the identity of the persons who appear to have perpetrated any conduct constituting market misconduct should be specified, among other things, in a written statement for the institution of the MMT proceedings. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 19 September 2001.**

15. Where it appears to the Financial Secretary that a person may have perpetrated any conduct which constitutes market misconduct by reference to more than one provision of Part XIII of this Ordinance, the written<sup>8</sup> statement described in section 14 may specify separately or in the alternative the market misconduct by reference to those provisions.

~~<sup>11</sup>16. Where during the course of any proceedings it appears to the Tribunal that a person, other than a person who appears to have perpetrated any conduct which constitutes market misconduct according to the written statement described in section 14, may have perpetrated any conduct which constitutes market misconduct by reference to any provision or provisions of Part XIII of this Ordinance, the Tribunal may, on its own motion or on the application of the Presenting Officer appointed for the proceedings —~~

- ~~(a) order the Presenting Officer to provide the Tribunal with a written statement concerning such market misconduct specifying, in relation to the person, the matters referred to in section 14(a) and (b) and, where applicable, the matters referred to in section 15; and~~
- ~~(b) make such additional order as it considers appropriate.~~

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<sup>11</sup> At the Bills Committee meeting on 19 September 2001, Members questioned the need for bringing additional persons to the MMT proceedings in the middle of such proceedings, and expressed concern over the protection given to them to ensure fair hearing. On reflection, we agree that the original arrangements should be dispensed with. Should the MMT consider that persons other than those mentioned in the statement in Clause 14 are possibly guilty of market misconduct, we propose that such situation be dealt with separately in Clause 19A. See Footnote (18).

17. The Tribunal may at any time during the course of any proceedings order the Presenting Officer appointed for the proceedings to amend ~~a written~~<sup>8</sup> the statement for the proceedings as described in section 14, or provided under section 16,<sup>12</sup> in such manner as it considers appropriate, subject to the requirement<sup>13</sup> that -

(a) there shall be no amendment to the identity of the person originally specified pursuant to section 14(b) in the statement; and

(b) after the amendment the financial product which is the subject of any market misconduct specified in the statement shall remain the same as the financial product which is the subject of the market misconduct originally specified in the statement.<sup>14</sup>

18. For the avoidance of doubt, ~~the Tribunal may identify pursuant to section 244(3)(b) of this Ordinance a person as having engaged in market misconduct by reason of any conduct referred to in a written statement provided under section 16, or a written~~ shall have jurisdiction

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<sup>12</sup> Consequential amendment upon deletion of Clause 16.

<sup>13</sup> Technical amendment for greater clarity in response to the drafting comment made by a Member at the Bills Committee meeting on 19 September 2001.

<sup>14</sup> The amendment is to provide expressly for the remit of the MMT's power to amend a statement provided under clause 14 of this Schedule. **Members considered the amendments and did not propose any further changes at the Bills Committee meeting on 19 September. We have since made some consequential and drafting amendments upon deletion of Clause 19.**

exercisable by reference to<sup>15</sup> a written statement provided under section 16, or a written<sup>8</sup> statement as amended under section 17, in the same manner as it may so identify a person as having engaged in market misconduct by reason of any conduct referred to in a written<sup>has</sup> jurisdiction exercisable by reference to a statement described in section 14.

<sup>16</sup>18A. Notwithstanding anything in Part XIII of this Ordinance, unless the identity of a person is specified pursuant to section 14(b) in a statement described in section 14 -

- (a) he shall not be identified as having engaged in market misconduct pursuant to section 244(3)(b) of this Ordinance; and
- (b) no order shall be made in respect of him under section 249 or 250 of this Ordinance.

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<sup>15</sup> A technical amendment to clarify that the MMT has jurisdiction to identify people who were not named in the initial written statement given by FS to the MMT to initiate proceedings under cl 244(1) and (2) of Part XIII and cl 14 of this Schedule, but whom the MMT identifies in subsequent written statements **amended** under clause 17 of this Schedule. **Members considered the amendment and made some drafting comments. The Law Draftsman has since explored other drafting options and consider that the proposed formulation best reflects our policy intention.**

<sup>16</sup> Amendment to ensure that the MMT may only identify a person as having engaged in market misconduct under Clause 244(3)(b) or punish a person under Clause 249 or 250 if he has been identified in a written statement under Clause 14 of this Schedule and has hence had a right to be heard in person or represented at MMT proceedings under Clause 27 of this Schedule. **This provision is essentially Clause 28 in the previous marked up draft issued to Members in September 2001. Members considered the amendment and did not propose any further changes at the Bills Committee meeting on 19 September 2001. Since then we have made some technical amendments for greater clarity and relocated the provision here as the new Clause 18A.**

19. <sup>17</sup>Any person in relation to whom whose identity is specified pursuant to section 14(b) in a written<sup>8</sup> statement described in section 14, or provided under section 16, specifies the matters required under such section shall be provided with a copy of the written statement and, where the written statement is amended under section 17, of the written<sup>8</sup> statement as so amended, in such manner as the Tribunal may direct.

<sup>18</sup>19A. After the conduct of any proceedings instituted under section 244 of this Ordinance, where it appears to the Tribunal that market misconduct has or may have taken place by reference to the conduct of any person, it may, where it considers appropriate, include in the report prepared by it in respect of the proceedings under section 254(1) of this Ordinance a recommendation to the Financial Secretary to institute proceedings under section 244 of this Ordinance concerning the matter.

<sup>19</sup>19B. In section 17, "financial product" (金融產品) means -

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<sup>17</sup> Technical amendment for greater clarity consequential to amendments to clause 14. See Footnote (10). **Members considered the amendment and did not propose any further changes at the Bills Committee meeting on 19 September 2001. We have since made some consequential amendments upon deletion of Clause 16.**

<sup>18</sup> **As we mentioned in Annex C to Paper No. CE12/01 and informed Members at the Bills Committee meeting on 19 September 2001, the amendment is intended to give the MMT the power, where it considers appropriate, to refer to the Financial Secretary any person whom it identifies in the course of proceedings as being possibly guilty of market misconduct but who was not named in the statement referred to in Clause 14. The Financial Secretary may make a decision to start new MMT proceedings in relation to such a person just as he does on receiving a report from the SFC with the advice of the Department of Justice. Such a recommendation will appear in the MMT's report issued at the end of the proceedings.**

<sup>19</sup> To define "financial product" in clause 17, as amended, of this Schedule. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 19 September 2001. This clause is Clause 19A in the previous marked up version issued to the Bills Committee, renumbered because of the addition of new Clause 19A.**



- (a) where the market misconduct in question is an insider dealing, listed securities or derivatives of listed securities as defined in section 237(2) of Part XIII of this Ordinance; or
- (b) where the market misconduct in question is any other market misconduct, securities or futures contracts as defined in Schedule 1 of this Ordinance.

### **Presenting Officer**

20. Without prejudice to any powers and functions of a Presenting Officer under Part XIII of this Ordinance, a Presenting Officer shall, in respect of the proceedings for which he is appointed, present to the Tribunal such available evidence, including any evidence which the Tribunal requests him to present to it, as shall enable the Tribunal to reach an informed decision as to whether market misconduct has taken place and, if so, the nature of the market misconduct.

21. The Secretary for Justice may at any time replace a Presenting Officer or any person appointed to assist a Presenting Officer.

### **Sittings**

22. The chairman shall convene such sittings of the Tribunal as are necessary to hear and determine any question or issue arising out of or in connection with the proceedings.

23. Subject to section 24, at any sitting of the Tribunal -
- (a) the chairman and 2 ordinary members shall be present;
  - (b) the chairman shall preside; and
  - (c) every question before the Tribunal shall be determined by the opinion of the majority of the members except a question of law which shall be determined by the chairman alone.

24. At any sitting of the Tribunal held in respect of any matter which is determined by the chairman alone as the sole member of the Tribunal under section 34, the chairman only shall be present, and every question before the Tribunal shall be determined by him.

25. Every sitting of the Tribunal shall be held in public unless the Tribunal -

(a) on its own motion; or

(b) on the application of -

<sup>20</sup>(i) any person whose identity is specified

pursuant to section 14(b) in the statement

for the proceedings as described in section

14; or

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<sup>20</sup> Consequential amendment as a result of that to clause 14(b). See also Footnote (21) below. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 19 September 2001. The Law Draftsman has since made some drafting improvements to enhance clarity.**

(ii) the Presenting Officer appointed for the proceedings,  
or of any person whose conduct is the subject, whether wholly or in part, of the proceedings, or who is implicated or concerned in the subject matter of the proceedings, determines that in the interests of justice a sitting or any part thereof shall not be held in public in which case it may hold the sitting or the part thereof (as the case may be) in private.

26. Where an application is made pursuant to section 25 for a determination that a sitting or any part thereof shall not be held in public, any hearing of the application shall be held in private.

~~27. A person whose conduct is the subject, whether wholly or in part, of any proceedings, or who is implicated or concerned in the subject matter of any proceedings, shall, at any sitting of the Tribunal relating to the any proceedings, a person whose identity is specified pursuant to section 14(b) in the statement for the proceedings as described in section 14 shall<sup>21</sup> be entitled to be heard<sup>22</sup> -~~

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<sup>21</sup> The reference to "[a person] who is implicated, or concerned in the subject matter of any [MMT] proceedings", which is adapted from existing provisions in sections 16 and 17 of the Schedule to the S(ID)O, is not sufficiently clear. The amendment is to clarify that all persons who may be punished by the MMT would have the right of being heard and legal representation. These are the persons whose identity is specified in written statements for the MMT proceedings under clause 14 of this Schedule. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 19 September 2001. We have since made consequential amendments to reflect the deletion of Clause 16.**

<sup>22</sup> Under Part XIII, the MMT shall not identify a person as having engaged in market misconduct, or shall not make an order in respect of a person, without first giving that person a reasonable opportunity of being heard. Clauses 244(6) and 249(3) are relevant. The reference to a narrower right "to be present" in clause 27

- (a) ~~to be present in person or, in the case of a corporation, through an officer or employee<sup>23</sup> of the corporation; and~~
- (b) ~~to be represented by a through counsel or a solicitor or, with the leave of the Tribunal, by through any other person.~~

<sup>24</sup>~~28. For the purposes of sections 25 and 27, the Tribunal shall determine —~~

- ~~(a) whether the conduct of any person is the subject, whether wholly or in part, of any proceedings;~~
- ~~(b) whether any person is implicated or concerned in the subject matter of any proceedings.~~

<sup>25</sup>~~29. In section 27, "sitting" (聆訊) does not include any sitting of the Tribunal which is held solely for the purpose of deliberating on any question before the Tribunal.~~

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here is inadvertent and rectified with the proposed amendment. **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 19 September 2001.**

<sup>23</sup> **We propose to build in greater flexibility by allowing an employee to represent a corporation in the MMT proceedings.**

<sup>24</sup> Amendment consequential to the amendment to dispense with the less certain reference to "implicated or concerned" persons. See Footnote (21). **Members considered this amendment and did not propose further changes at the Bills Committee meeting on 19 September 2001.**

<sup>25</sup> **Clause 28 was intended to provide that MMT members might sit privately to discuss among themselves any issues raised before the Tribunal. On reflection, we consider the provision unnecessary as members are certainly entitled to hold private conferences among themselves.**

30. The chairman shall prepare or cause to be prepared a record of the proceedings at any sitting of the Tribunal, which shall contain such particulars relating to the proceedings as he considers appropriate.

**Preliminary conferences and consent orders<sup>26</sup>**

31. At any time after any proceedings have been instituted under section 244 of this Ordinance, the chairman may -

(aa) on his own motion or on the application of -

(i) any person whose identity is specified pursuant to section 14(b) in the statement for the proceedings as described in section 14; or

(ii) the Presenting Officer appointed for the proceedings;

(a) if he considers it appropriate to do so, after consideration of any material that has been submitted to the Tribunal in relation to the proceedings by ~~the parties to the proceedings;~~ and any person who is entitled to make an application pursuant to paragraph (aa)(i) or (ii); and

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<sup>26</sup> To address the concerns expressed by some Members at the Bills Committee meeting on 19 September 2001, we propose the amendments-

(a) to provide that any person named in a statement under Clause 14 and the Presenting Officer may apply to the MMT chairman for preliminary conferences to be held;

(b) to ensure that no person other than the chairman will preside over preliminary conferences; and

(c) to set out the purposes of preliminary conferences.

- (b) if the parties all persons who are entitled to make, but have not made, an application pursuant to paragraph (aa)(i) or (ii)<sup>27</sup> agree,

direct that a conference, to be attended by the parties to the proceedings or their representatives and presided over by the chairman or such ordinary member or other person as he may specify, shall be held., shall be held for the purposes of -

- (i) enabling the parties to prepare for the conduct of the proceedings;
- (ii) assisting the Tribunal to determine issues for the purposes of the proceedings; and
- (iii) generally securing the just, expeditious and economical conduct of the proceedings.

<sup>28</sup>31A. At a conference held in accordance with a direction of the chairman under section 31, the chairman may -

- (a) give any direction he considers necessary or desirable for securing the just, expeditious and economical conduct of the proceedings; and
- (b) endeavour to secure that the parties to the proceedings make all agreements as they ought reasonably to have made in relation to the proceedings.

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<sup>27</sup> **Technical amendment for greater clarity.**

<sup>28</sup> **A new clause to provide expressly that the MMT chairman may give directions at a preliminary conference for efficient case management.**

<sup>29</sup>31B. After a conference has been held in accordance with a direction of the chairman under section 31, the chairman shall report to the Tribunal on such matters relating to the conference as he considers appropriate.

32. At any time after any proceedings have been instituted under section 244 of this Ordinance, the Tribunal or the chairman may make any order which it or he is entitled to make under any provision of this Ordinance, whether or not the requirements otherwise applicable to the making of the order have been complied with, if -

- (a) the parties to the proceedings request, and agree to, the making of the order under this section by the Tribunal or the chairman (as the case may be); and
- (b) the parties consent to all of the terms of the order.

33. Notwithstanding Part XIII of this Ordinance or any other provisions of this Schedule, where under section 32 the Tribunal or the chairman makes any order, the order shall, for all purposes, be regarded as an order made by the Tribunal or the chairman (as the case may be) under the provision in question in compliance with the requirements otherwise applicable to the making of the order.

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<sup>29</sup> **In the light of Members' comment, we propose to put in place a procedural safeguard to require the MMT chairman to report to the full Tribunal the operation and outcome of preliminary conferences as he considers appropriate.**

<sup>30</sup>33A. In sections 32 and 33, "order" (命令) includes any finding, determination and any other decision.

**Chairman as sole member of Tribunal**

34. Where, at any time after any proceedings have been instituted under section 244 of this Ordinance but before any sitting of the Tribunal is held to hear and determine any question or issue arising out of or in connection with the proceedings, the parties to the proceedings have, by notice in writing ~~served on~~given to<sup>31</sup> the Tribunal, informed the Tribunal that they have agreed that any such question or issue may be determined by the chairman alone as the sole member of the Tribunal, the chairman may determine the question or issue as the sole member of the Tribunal.

35. Where section 34 applies, the Tribunal constituted by the chairman as the sole member of the Tribunal shall, for all purposes, be regarded as the Tribunal constituted also by 2 ordinary members.

<sup>32</sup>35A. After the chairman has made any determination under section 34, the chairman shall report to the Tribunal the making of the determination

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<sup>30</sup> **Technical amendment for greater clarity.**

<sup>31</sup> **Technical drafting amendment in the light of the comment of a Member expressed at the Bills Committee meeting on 17 September 2001, in respect of similar provisions under Part XI.**

<sup>32</sup> **A new clause to put in place a procedural safeguard to require the MMT chairman to report to the full Tribunal any determinations which he has made as the sole member of the Tribunal.**



and the reasons therefor and such other matters relating to the determination as he considers appropriate.

### **Miscellaneous**

36. Without limiting the generality of sections 248 and 368 of this Ordinance, the Tribunal and its members, any Presenting Officer, and any party, witness, counsel, solicitor, or any other person involved, in any proceedings, shall have the same privileges and immunities in respect of the proceedings as they would have if the proceedings were civil proceedings before the Court of First Instance.