

Supplementary Note (2) to
Annex 1 to Paper No. CSA15/01
dated 6 December 2001

SCHEDULE 9 [ss. 230, 232, 234,
392, 393, 394 & 395]

SAVINGS, TRANSITIONAL, CONSEQUENTIAL AND
RELATED PROVISIONS, ETC.

PART 1
SAVINGS, TRANSITIONAL AND SUPPLEMENTAL ARRANGEMENTS

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Part V of this Ordinance (Licensing and Registration)

52. (1) Where, within 2 years from the commencement of Part V
of this Ordinance -

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¹(4) Where a person is deemed under section 22, 23, 24, 25,
26, 27, 28, 29, 30, 31 or 32 to have been licensed or registered
for a regulated activity or approved as a responsible officer, the
provisions of this Ordinance shall =

(a) apply to or in relation to the person as they apply
to or in relation to a person who is licensed or
registered for that regulated activity or approved
as a responsible officer (as the case may be); and

¹ We accept the drafting comment of the Legal Service Division of the Legislative Council and propose the amendment to put it beyond doubt the general application of clause 52(4) to the provisions specified therein, instead of confining only to cases involving sole proprietorship and partnership.

(b) in case the person is a partnership or an individual
(as the case may be) carrying on a business in that
regulated activity, so apply with such
modifications under section 131 of this Ordinance
as may be necessary ~~in case he is a partnership or~~
~~an individual carrying on a business in that~~
~~regulated activity (as the case may be).~~

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**Part VI of this Ordinance (Capital requirements,
client assets, records and audit relating
to intermediaries)**

²60. Where -

(a) ~~immediately before the commencement of Part VI of this Ordinance, any power could have been, but was not, exercised under -~~

(i) ~~an appointment of an auditor under section 52 or 53 of the repealed Commodities Trading Ordinance in relation to a dealer within the meaning of that section is still in force;~~

(ii) ~~an appointment of an auditor under section 90, 91, 121AW or 121AX of the repealed Securities Ordinance in relation to a dealer within the meaning of that section is still in force; or~~

² The amendments seek to combine old clauses 60 and 61. Moreover, the provision as revised clarifies the policy intention that where any power could have been but was not exercised under the specified provisions of the repealed Ordinances before the commencement of the SF Ordinance, it could still be exercised in accordance with the repealed Ordinances; as well as preserve the effect of any power that have been exercised before the commencement of the Ordinance.

~~(iii) an appointment of an auditor under section 121AW of the repealed Securities Ordinance in relation to a registered financier within the meaning of that section is still in force; or~~

~~(iiiv) an appointment of an auditor under section 33 or 34 of the repealed Leveraged Foreign Exchange Trading Ordinance in relation to a licensed leveraged foreign exchange trader within the meaning of that section is still in force; and or~~

(b) before such commencement any power has been exercised under any of the provisions referred to in sub-paragraphs (a)(i), (ii) and (iii), and the exercise of the power would, but for the enactment of this Ordinance, continue to have force and effect on or after such commencement.

then -

(i) (A) where paragraph (a) applies, the power may be exercised; or

(B) where paragraph (b) applies, the exercise of the power shall continue to have force and effect,

as if this Ordinance had not been enacted; and

(ii) the provisions of the repealed Commodities Trading Ordinance, the repealed Securities Ordinance or the repealed Leveraged Foreign Exchange Trading Ordinance (as the case may be) shall continue to apply to the exercise of the power and to any matters relating thereto (including any further exercise of power) as if this Ordinance had not been enacted.

~~(b) the dealer, the registered financier or the licensed leveraged foreign exchange trader (as the case may be) is under this Ordinance a licensed corporation,~~

~~the auditor shall upon such commencement be deemed to have been appointed under section 155 of this Ordinance, and section 155(4) and (5) and other provisions of this Ordinance shall apply accordingly.~~

~~61. Where —~~

~~(a) immediately before the commencement of Part VI of this Ordinance —~~

~~(i) an appointment of an auditor under section 53 of the repealed Commodities Trading Ordinance in relation to a dealer within the meaning of that section is still in force;~~

~~_____ (ii) an appointment of an auditor under section 91 of the repealed Securities Ordinance in relation to a dealer within the meaning of that section is still in force;~~

~~_____ (iii) an appointment of an auditor under section 121AX of the repealed Securities Ordinance in relation to a registered financier within the meaning of that section is still in force; or~~

~~_____ (iv) an appointment of an auditor under section 34 of the repealed Leveraged Foreign Exchange Trading Ordinance in relation to a licensed leveraged foreign exchange trader within the meaning of that section is still in force; and~~

~~(b) the dealer, the registered financier or the licensed leveraged foreign exchange trader (as the case may be) is under this Ordinance a licensed corporation,~~

~~the auditor shall upon such commencement be deemed to have been appointed under section 156 of this Ordinance, and section 156(8) and (9) and other provisions of this Ordinance shall apply accordingly.~~

Part VIII of this Ordinance (Supervision and investigations)

³62. Where -

(a) ~~any power has before the commencement of Part VIII of this Ordinance been exercised before such commencement, any power could have been, but was not, exercised~~ under -

(i) section 29A, 30, 31, 33 or 36 of the repealed Securities and Futures Commission Ordinance; or

(ii) section 12, 41, 42, 44 or 47 of the repealed Leveraged Foreign Exchange Trading Ordinance; ~~and~~or

(b) before such commencement any power has been exercised under any of the provisions referred to in sub-paragraphs (a)(i) and (ii), and the exercise of the power would, but for the enactment of this Ordinance, continue to have force and effect on or after such commencement,

then -

(i) (A) where paragraph (a) applies, the power may be exercised; or

³ The amendments to clauses 62(a) and (i)(A) clarify that where any power could have been, but was not, exercised under the relevant provisions of the repealed Ordinances before the commencement of the SF Ordinance, it could still be exercised under the repealed Ordinances. Clauses 62(b) and (i)(B), which are preserved from the Blue Bill, on the other hand provides that where such power has already been exercised prior to the commencement of the SF Ordinance, the power would continue to have force and effect after the commencement of the SF Ordinance.

(B) where paragraph (b) applies, the exercise of the power shall continue to have force and effect, as if this Ordinance had not been enacted; and

(ii) the provisions of the repealed Securities and Futures Commission Ordinance or the repealed Leveraged Foreign Exchange Trading Ordinance (as the case may be) shall continue to apply to the exercise of the power and to ~~any other~~ matters relating thereto (including any further exercise of power) as if this Ordinance had not been enacted.

⁴62A. Without prejudice to section 62, section 172 of this Ordinance applies even if -

(a) in the case of subsection (1)(a), (b), (c), (d) or (e) of that section 172, the matter described in such subsection as being suggested by the circumstances referred to in such subsection has occurred, or appears to the Commission as occurring, before the commencement of Part VIII of this Ordinance; or

⁴ New clause 62A seeks to put beyond doubt that clause 172 may apply also to conduct committed before the commencement of the SF Ordinance. Clause 172, which is designed to replace the existing section 29A of the SFC Ordinance, provides for the powers of the SFC to conduct a preliminary inquiry into suspected misconduct of a listed corporation. Similar policy was adopted for the investigatory powers conferred by the Organised and Serious Crimes Ordinance (Cap. 455), which also extend to offences or crimes committed before the commencement of that Ordinance. According to the Department of Justice, clause 62A does not contravene any relevant human rights or legal policy principles.

(b) in the case of subsection (1)(f) of that section 172, the matter in respect of the investigation of which the Commission decides to provide assistance under section 179 of this Ordinance has occurred, or appears to the Commission as occurring, before the commencement of that Part.

Part IX of this Ordinance (Discipline, etc.)

⁵63. Where ~~—~~

~~(a) before the commencement of Part IX of this Ordinance
—, any power could have been, but was not, exercised
under —~~

~~(a) any conduct, event, matter or thing that occurred
can be the subject of—~~

~~(i) the exercise of any power under section
35 or 36 of the repealed Commodities
Trading Ordinance;~~

~~(ii) the exercise of any power under section
55, 56, 60 or 61 section 55, 56, 60(5),
61(2), 121R, 121S, 121T, 121U, 121V or
121X of the repealed Securities
Ordinance; or~~

~~(iii) the exercise of any power under section
11 or 12 of the repealed Leveraged
Foreign Exchange Trading Ordinance;~~

~~and/or~~

~~the power has not been exercised before such
commencement; or~~

⁵ The amendments in clause 63 seek to rectify the inadvertent omission of references to sections 121R to 121V and 121X of the Securities Ordinance whereby disciplinary power can also be exercise against registered margin financiers in accordance with specified circumstances. Amendments are also proposed for conforming with the drafting of similar provisions under Part 1 of Schedule 9 to the SF Bill.

(b) before such commencement any power has been exercised under any of the provisions referred to in sub-paragraphs (a)(i), (ii) and (iii), and the exercise of the power would, but for the enactment of this Ordinance, continue to have force and effect on or after such commencement,-

then -

(i) (A) where paragraph (a) applies, the power may be exercised; or

~~(i) (where paragraph (a) applies) the power may be exercised or (where paragraph (b) applies)~~

(B) where paragraph (b) applies, the exercise of the power shall continue to have force and effect,

as if this Ordinance had not been enacted; and

(ii) subject to section 65, the provisions of the repealed Commodities Trading Ordinance, the repealed Securities Ordinance or the repealed Leveraged Foreign Exchange Trading Ordinance (as the case may be) and the repealed Securities and Futures Commission Ordinance (where applicable) shall continue to apply to the exercise of the power and to any appeals and other matters relating thereto (including any further exercise of power) as if this Ordinance had not been enacted.

64. Where -

- (a) the exercise of any power under section 63 results in the revocation of any declaration of exemption or the revocation or suspension of any registration or licence of any person, or the suspension of any such registration or licence continues to have force and effect by virtue of that section; and
- (b) the person has, by reason of the declaration or registration or licence referred to in paragraph (a), been deemed under any of the provisions of sections 22 to 37~~7~~ to have been registered or licensed under this Ordinance,~~_~~

the registration or licence of the person under this Ordinance shall, notwithstanding sections 22 to 37, be regarded as having been revoked or suspended (as the case may be) on the same terms and conditions on which the declaration or registration or licence referred to in paragraph (a) is revoked or suspended~~7~~, and sections 192(1) to (3), 193(2) and (5), 194 and 195 of this Ordinance shall apply, with necessary modifications, in relation to the revocation or suspension as if it were a revocation or suspension under Part IX of this Ordinance.

⁶ The amendment seeks to clarify the policy intention that a suspension or revocation consequent to the exercise of power under clause 63 of Schedule 9 shall have similar effect as a suspension or revocation under Part IX of the SF Bill.

⁷65. Where any power is exercised under section 63, an application for review in respect of the exercise of the power may be made to the Securities and Futures Appeals Tribunal and disposed of in all respects ~~in respect of the exercise of the power~~ as if the power had been exercised under Part IX of this Ordinance.

⁷ Minor technical drafting amendment.

**Part X of this Ordinance (Powers of intervention
and proceedings)**

66. Where -

- (a) before the commencement of Part X of this Ordinance, ~~there has been served on any person a notice~~any power could have been, but was not, exercised under -
- (i) ~~section 39(1), 40, 41(1), 42(4) or 43(1),~~40, 41 or 43 of the repealed Securities and Futures Commission Ordinance; or
 - (ii) ~~section 50, 51, 52(1), 53(4) or 54(1)~~ of the repealed Leveraged Foreign Exchange Trading Ordinance; ~~and or~~
- (b) ~~the prohibition or requirement to which the notice relates~~before such commencement any power has been exercised under any of the provisions referred to in sub-paragraphs (a)(i) and (ii), and the exercise of the power would, but for the enactment of this Ordinance, continue to have force and effect on or after such commencement,

then -

⁸ The amendments to clauses 66(a) and (i)(A) clarify that where any power could have been, but was not, exercised under the relevant provisions of the repealed Ordinances before the commencement of the SF Ordinance, it could still be exercised under the repealed Ordinances. Clauses 66(b) and (i)(B), which are preserved from the Blue Bill, on the other hand provide that where such power has already been exercised prior to the commencement of the SF Ordinance, the power would continue to have force and effect after the commencement of the SF Ordinance.

(i) (A) where paragraph (a) applies, the power may be exercised; or

~~(i) the prohibition or requirement~~

(B) where paragraph (b) applies, the exercise of the power shall continue to have force and effect, as if this Ordinance had not been enacted; and

(ii) subject to section 67, the provisions of the repealed Securities and Futures Commission Ordinance or both the repealed Securities and Futures Commission Ordinance and the repealed Leveraged Foreign Exchange Trading Ordinance (as the case may be) shall continue to apply to the ~~prohibition or requirement~~exercise of the power and to any appeals and other matters relating thereto (including any further exercise of power) as if this Ordinance had not been enacted.

⁹67. Where any power is exercised under section 66, an application for review in respect of the exercise of the power may be made to the Securities and Futures Appeals Tribunal and disposed of in all respects as if the power had been exercised under Part X of this Ordinance.

⁹ **Old clause 67 is now subsumed in clause 69 to follow the general transitional appeals arrangement provided for in clause 69. New clause 67 specifies that any exercise of power under clause 66 would be subject to the review of the Securities and Futures Appeals Tribunal.**

~~267. Where~~

~~(a) before the commencement of Part X of this Ordinance an appeal has not been made in respect of a prohibition or requirement referred to in section 66—~~

~~(i) under section 44 of the repealed Securities and Futures Commission Ordinance, whether by virtue of the application of section 66(ii) or not; or~~

~~(ii) under section 56 of the repealed Leveraged Foreign Exchange Trading Ordinance, whether by virtue of the application of section 66(ii) or not; and~~

~~(b) the time within which the appeal may be made under such section is running and has not expired or, in a case where section 66 applies, is running and has not expired or has not begun to run, upon such commencement,~~

~~an application for review in respect of the prohibition or requirement may be made to the Securities and Futures Appeals Tribunal and disposed of in all respects as if the prohibition or requirement had been imposed under that Part as a result of the exercise of any of the powers under sections 196, 197, 198 and 201 of this Ordinance.~~

¹⁰67A. Section 207 of this Ordinance applies even if the conduct of business or affairs in question has occurred, or appears to the Commission as occurring, before the commencement of Part X of this Ordinance.

¹⁰ In line with the new clause 62A in Part VIII, new clause 67A in Schedule 9 seeks to clarify the policy intention of clause 207 in Part X to avoid any doubts that clause 207 may only apply to conduct committed after the commencement of the SF Ordinance. Clause 207, which is designed to replace existing section 37A of the SFC Ordinance, provides that the SFC may apply to the Court for a range of civil remedies where it appears to the SFC that the businesses of a listed corporation have been conducted in a manner that is, for example, oppressive or prejudicial to its members or involved fraud or misfeasances, etc. The principal objective of this provision is to prevent the continuation of the specified unfair conduct or to stop or rectify the adverse effects on investors. In practice, such misconduct may only be discovered some time (e.g. months or years) after it is committed and it is necessary that clause 207 should apply to such conduct to better protect investors. According to the Department of Justice, applying clause 207 to pre-commencement conduct does not contravene any relevant legal policy principle and is in line with the legal principles or policy applicable to this area of the common law. As an extra safeguard against possible unfairness, the remedies under clause 207 are to be made available at the discretion of the Court.

**Part XI of this Ordinance (Securities and
Futures Appeals Tribunal)**

¹¹69. ~~Subject to sections 65 and 67, w~~Where -

- (a) before the commencement of Part XI of this Ordinance
an appeal has not been made under -
 - (i) Part III of the repealed Securities and
Futures Commission Ordinance; or
 - (ii) Part IX of the repealed Leveraged Foreign
Exchange Trading Ordinance; and
- (b) the time within which the appeal may be made under
such Part is running and has not expired upon such
commencement,

the appeal may be made to the Securities and Futures Appeals Panel
and disposed of in all respects as if this Ordinance had not been
enacted.

¹²70. Where, by virtue of sections ~~66, 68 and or~~ 69, any appeal is
or is to be made or continued, and disposed of, under -

- (a) Part III of the repealed Securities and Futures
Commission Ordinance; or
- (b) Part IX of the repealed Leveraged Foreign Exchange
Trading Ordinance,

¹¹ **The amendment to remove “Subject to sections 65 and 67” is of technical nature and is proposed for the reason that clauses 65 and 67 (which deal with application for review of decisions made after commencement of the SF Ordinance) bear no relevance to clause 69 (which deals with appeal against decisions made before commencement of the SF Ordinance).**

¹² **The amendment to remove reference to “section 66” is of technical nature and is proposed as the position is covered by clauses 68 and 69.**

then, without limiting the generality of sections~~66~~, 68 and 69 (including the power to appoint any person as a member (whether as the chairman, deputy chairman or other member) of the Securities and Futures Appeals Panel established by section 18 of the repealed Securities and Futures Commission Ordinance or as a member of a tribunal appointed under that Ordinance) --

- (i) any person who immediately before the commencement of Part XI of this Ordinance holds any office as a member (whether as the chairman, deputy chairman or other member) of the Securities and Futures Appeals Panel or as a member of the tribunal to determine the appeal shall, for the purposes of the appeal, continue to hold the same office on the same terms and conditions as if this Ordinance had not been enacted; and
- (ii) the Securities and Futures Appeals Panel and the tribunal shall, for the purposes of the appeal, continue in existence as if this Ordinance had not been enacted.

Financial Services Bureau
Securities and Futures Commission
6 February 2002