

PART IV

OFFERS OF INVESTMENTS

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

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

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

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

(~~i~~B) a regulated investment agreement;

or

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

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

or participate in, a collective investment scheme; and.

~~(b) he makes the misrepresentation for the purpose of inducing the other person to do any act referred to in paragraph (a)(i) or (ii).~~

(2) A person who commits an offence under subsection (1) is liable -

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 7 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(3) For the purposes of this section -

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

means -

- (i) any statement which, at the time when it is made, is to the knowledge of its maker false, misleading or deceptive;
- (ii) any promise which, at the time when it is made, its maker has no intention of fulfilling, or is to the knowledge of its maker not capable of being fulfilled;
- (iii) any forecast which, at the time when it is made, is to the knowledge of

its maker not justified on the facts then known to him; or

- (iv) <sup>2</sup>any statement, ~~promise~~ or forecast from which, at the time when it is made, its maker intentionally omits a material fact, with the result that -
- (A) in the case of the statement, the statement is rendered false, misleading or deceptive; or
- ~~(B) in the case of the promise, the promise is not capable of being fulfilled or is rendered misleading or deceptive; or~~
- ~~(C) in the case of the forecast, the forecast is not capable of being justified or is rendered misleading or deceptive.~~

(b) "reckless misrepresentation" (罔顧實情的失實陳述)

means -

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

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

- (i) any statement which, at the time when it is made, is false, misleading or deceptive and is made recklessly;
- (ii) any promise which, at the time when it is made, is not capable of being fulfilled and is made recklessly;
- (iii) any forecast which, at the time when it is made, is not justified on the facts then known to its maker and is made recklessly; or
- (iv) <sup>2</sup>any statement, ~~promise~~ or forecast from which, at the time when it is made, its maker recklessly omits a material fact, with the result that -
  - (A) in the case of the statement, the statement is rendered false, misleading or deceptive; or
  - ~~(B) in the case of the promise, the promise is not capable of being fulfilled or is rendered misleading or deceptive; or~~
  - ~~(C) in the case of the forecast, the forecast is not capable of being justified or is rendered misleading or deceptive.~~

**107. Civil liability for inducing others to invest money in certain cases**

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

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

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

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

~~(ii)~~ to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme; ~~and,~~

~~(b) in the case of the fraudulent misrepresentation or reckless misrepresentation, the first-mentioned person makes the misrepresentation for the purpose of inducing the other person to do any act referred to in paragraph (a)(i) or (ii),~~

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

the first-mentioned person shall, whether or not he also incurs any other liability (whether under this Part or otherwise), be liable to pay compensation by way of damages to the other person for any pecuniary loss that the other person has sustained as a result of the reliance by the other person on the misrepresentation.

<sup>4</sup>(2) For the purposes of this section, where a company or other body corporate has made any fraudulent misrepresentation, reckless misrepresentation or negligent misrepresentation by which another person is induced to do any act referred to in subsection (1)(a)(~~i~~) or (~~ii~~), any person who was a director of the company or body corporate at the time when the misrepresentation was made shall, unless it is proved that he did not authorize the making of the misrepresentation, be presumed also ~~-(a)~~to have made the misrepresentation. ~~;~~ and

~~(b) in the case of the fraudulent misrepresentation or reckless misrepresentation, where the company or body corporate has made the misrepresentation for the purpose of inducing the other person to do any act referred to in subsection (1)(a)(i) or (ii), to have made the misrepresentation for such purpose.~~

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<sup>4</sup> **Technical amendment consequential to the amendments proposed to clause 107(1).**

(3) For the avoidance of doubt, where a court has jurisdiction to determine an action brought under subsection (1), it may, where it is, apart from this section, within its jurisdiction to entertain an application for an injunction, grant an injunction in addition to, or in substitution for, damages, on such terms and conditions as it considers appropriate.

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

(5) A person may bring an action under subsection (1) even though the person against whom the action is brought has not been charged with or convicted of an offence by reason of a contravention of this Part.

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

(7) For the purposes of this section -

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

means -

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

- (ii) any promise which, at the time when it is made, its maker has no intention of fulfilling, or is to the knowledge of its maker not capable of being fulfilled;
- (iii) any forecast which, at the time when it is made, is to the knowledge of its maker not justified on the facts then known to him; or
- (iv) <sup>5</sup>any statement, ~~promise~~ or forecast from which, at the time when it is made, its maker intentionally omits a material fact, with the result that -
  - (A) in the case of the statement, the statement is rendered false, misleading or deceptive; or
  - ~~-(B) in the case of the promise, the promise is not capable of being fulfilled or is rendered misleading or deceptive; or~~

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

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

~~(CB)~~ in the case of the forecast, the  
forecast ~~is not capable of being~~  
~~justified or~~ is rendered  
misleading or deceptive;

(b) "reckless misrepresentation" (罔顧實情的失實陳述)

means -

- (i) any statement which, at the time when it is made, is false, misleading or deceptive and is made recklessly;
- (ii) any promise which, at the time when it is made, is not capable of being fulfilled and is made recklessly;
- (iii) any forecast which, at the time when it is made, is not justified on the facts then known to its maker and is made recklessly; or
- (iv) <sup>5</sup>any statement, ~~promise~~ or forecast from which, at the time when it is made, its maker recklessly omits a material fact, with the result that -
  - (A) in the case of the statement, the statement is rendered false, misleading or deceptive; or
  - ~~-(B) in the case of the promise, the~~  
~~promise is not capable of being~~

~~fulfilled or is rendered~~

~~misleading or deceptive; or~~

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

~~forecast is not capable of being~~

~~justified or is rendered~~

misleading or deceptive;

(c) "negligent misrepresentation" (疏忽的失實陳述) means -

(i) any statement which, at the time when it is made, is false, misleading or deceptive and is made without reasonable care having been taken to ensure its accuracy;

(ii) any promise which, at the time when it is made, is not capable of being fulfilled and is made without reasonable care having been taken to ensure that it can be fulfilled;

(iii) any forecast which, at the time when it is made, is not justified on the facts then known to its maker and is made without reasonable care having been taken to ensure the accuracy of those facts; or

(iv) <sup>5</sup>any statement, ~~promise~~ or forecast from which, at the time when it is

made, its maker negligently omits a material fact, with the result that -

(A) in the case of the statement, the statement is rendered false, misleading or deceptive; or

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

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

Financial Services Bureau  
Securities and Futures Commission  
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