

PART VIII

SUPERVISION AND INVESTIGATIONS

* * * * *

173. Supervision of intermediaries and their
associated entities

* * * * *

(10) Before an authorized person exercises any power under this section (other than subsection (1)(c)(iii) or (3)(c))¹ in respect of a corporation -

- (a) where the corporation is an authorized financial institution or a corporation which, to the knowledge of the authorized person, is the controller of an authorized financial institution, or has as its controller an authorized financial institution, or has the same controller as an authorized financial

¹ **We propose a technical amendment to disapply the consultation requirement from the exercise of power under clause 173(1)(c)(iii) or (3)(c), both of which refer to inquiries for information made by the authorized person with persons other than the intermediary, its associated entity or related corporation in a routine supervisory exercise. Such inquiries will not require prior consultation among regulators. The consultation requirement should only apply when the authorized financial institution or the insurer (as the case may be) is the target of the supervisory action.**

institution, the authorized person shall consult the Monetary Authority; or

(b) where the corporation is an insurer authorized under the Insurance Companies Ordinance (Cap. 41), the authorized person shall consult the Insurance Authority.

* * * * *

**178. Application to Court of First Instance
relating to non-compliance with
requirements under section 172,
173, 174 or 176**

(1) If a person fails to do anything upon being required to do so by an authorized person under section 172, 173 or 174, or to do anything upon being required to do so by an investigator under section 176(1), (2) or (3), the authorized person or the investigator (as the case may be) may, by originating summons or originating motion, make an application to the Court of First Instance in respect of the failure, and the Court may inquire into the case and -

- (a) if the Court is satisfied that there is no reasonable ground for the person not to comply with the requirement, order the person to comply with the requirement within the period specified by the Court;
and

(b) if the Court is satisfied that the failure was without reasonable excuse, punish the person, and any other person ~~who appears to have been~~ knowingly² involved in the failure, in the same manner as if he and, where applicable, that other person had been guilty of contempt of court.

* * * * *

Financial Services Bureau
Securities and Futures Commission
4 January 2002

² At the Bills Committee meeting on 10 December 2001, Members considered that further clarifications should be made to the expression “any other person who appears to have been involved in the failure”. The policy intention is that the Court should be empowered to punish an accessory or accomplice who has been involved in the non-compliance of the authorized person’s requirement. In the light of Members’ comments, we propose to amend the provision to “any other person knowingly involved in the failure” to better reflect the policy intention. A similar amendment is also proposed to clauses 130B(3)(b) of Part V, 204(1)(b) of Part X and 352(3)(b) of Part XV. Some Members also made other comments on clause 178(1)(b) at the Bills Committee meeting on 10 December 2001. Please see the Annex for our response.

Clause 178(1)(b)

Some Members questioned the need for empowering the Court under clause 178(1)(b) to punish a person who has failed to comply with the requirements of an investigator or authorized person in the same manner as if the person had been guilty of contempt of court, given a breach of the relevant requirements under clauses 172(13), 173(14), 174(7) and 177(1) would already constitute an offence. Some Members also expressed concern over the lack of a prescribed penalty maxima under clause 178(1)(b).

2. The following sets out our observations in light of SFC's past regulatory experience in enforcing the forerunners of these provisions in existing law; and our consultation with the public, in particular the professional bodies whose members may assist the SFC in conducting the investigation -

- (a) the offence provisions under clauses 172(13), 173(14), 174(7) and 177(1) are necessary as deterrent and to encourage compliance. We also understand from some market practitioners that in certain circumstances (e.g. an auditor required to produce audit working papers concerning its client under clause 172), the offence provisions would assist them in managing their relationships with clients;
- (b) the Court's power to punish for contempt under clause 178(1)(b) complements the Court's power to order compliance under clause 178(1)(a) and does away with the need for separate criminal proceedings under the offence provisions. The SFC's overriding objective is to ensure effective compliance with the relevant requirements so that the SFC may obtain the relevant information without resorting to prosecution for non-compliance;

- (c) under clause 178(1)(b), the Court must first inquire into the case and be satisfied that the failure to comply with the requirements of an investigator or authorized person was without reasonable excuse, and should be trusted to act fairly in exercising its power to punish for contempt. The Courts have demonstrated in the past (*Kwan Wing Kim v. Cheung Ka Kim*) that they would not act lightly in punishing a person under existing similar provisions of the SFC Ordinance;
- (d) the Court can be trusted to impose a reasonable level of penalty when exercising its power to punish for contempt under clause 178(1)(b), and has demonstrated in a past case (*Jessie Wong Wing Yee v. Real Grant Limited*) that it will have regard to the sanctions under the offence provisions for the same conduct when punishing as if for contempt; and
- (e) it should be stressed that clause 178(3) provides that a person cannot be punished under clause 178(1)(b) if criminal proceedings have been instituted in respect of the failure, and vice versa.

3. Having considered the above, we believe that it is necessary on regulatory grounds to retain the provision which is modelled on existing law to allow the SFC to perform its investigative functions for the protection of investors against the misconduct of listed corporations and market intermediaries.