

For discussion

**Bills Committee on
Financial Reporting Council Bill**

**Follow-up actions arising
from the eleventh to fourteenth meetings**

PURPOSE

This paper sets out the Administration's responses to the follow-up actions arising from the eleventh to fourteenth meetings.

PROTECTION OF INFORMERS' IDENTITY

2. Despite the secrecy provision at **clause 51** of the Financial Reporting Council Bill (the Bill), some Members have stressed that the Bill should contain express provisions to protect the anonymity of informers who have given information to the Financial Reporting Council (FRC) or of other persons who have assisted the FRC in an investigation or enquiry. In this regard, we are advised that the common law provides a degree of protection for informers generally and that this protection arguably extends to "informers" or "whistle-blowers" providing information to the FRC, irrespective of the existence of a specific statutory provision. Notwithstanding this, the Administration agrees to propose a Committee Stage Amendment (CSA) (at page 9 of **Annex A**), with reference to section 30A of Prevention of Bribery Ordinance (Cap. 201) and section 57 of the Dangerous Drugs Ordinance (Cap. 134) (at **Annex B**), to encode in statute this aspect of protection.

PRESERVATION OF SECRECY

3. In respect of **clause 51(3)**, a Member has invited the Administration to further elaborate on -

- (a) the policy intent of, and justification for, empowering the FRC to disclose information to a liquidator (under **clause 51(3)(c)**) and the Official Receiver (OR) (under **clause 51(3)(b)(ix)**);
- (b) whether such disclosure may put a liquidator in an advantageous position vis-à-vis other relevant parties; and
- (c) whether, and if so, how the scope of the disclosure gateway should be ring-fenced.

4. Regarding paragraph 3(a), the Administration considers it justifiable to open a disclosure gateway to enable the FRC to disclose information to a liquidator to enable the liquidator to perform his functions. In this respect, administration of the insolvent estate is not only a concern of the insolvent company and its creditors, but also carries public interest angles concerning the protection of shareholders, employees and the investing public¹. In particular, investigations instituted by a liquidator during liquidation proceedings may lead to, for example, the disqualification of directors or officers under section 168H of the Companies Ordinance (CO, Cap. 32) or prosecution of delinquent officers and members of the company under section 277 of the CO. In addition, given that a liquidator being an officer of the court is liable to be removed by the court, there are checks and balances to ensure that he will use the information available to him properly for the performance of his functions.

¹ See, for example, the House of Lord's decision in Re. Pantmaenog Timber Co Ltd [2004] 1 AC 156, as cited by Court of First Instance in Hong Kong in Re. Wing Fai Construction Co. Ltd [2004] 3 HKLRD 357 –

“From the earliest day of the joint stock company **the liquidator has exercised functions which serve the public interest** and not merely the financial interests of the creditors and contributories. The Cork Committee (Cmnd 8558) observed (in para 192 of its report) that: ‘The law of insolvency takes the form of a compact to which there are three parties: the debtor, his creditors and society.’ In consequence insolvency proceedings: ‘have never been treated in English law as an exclusively private matter between the debtor and his creditors; the community itself has always been recognized as having an important interest in them.’ (para 1734.).....” (para. 52 at p. 173, per Lord Millett) (Emphasis added)

5. As regards the OR, he may not only be a liquidator of a company² that is being wound up, but is also a regulator in the insolvency regime. Given that the OR has numerous statutory functions in the insolvency regime³, the Administration considers it also justifiable to create a disclosure gateway to enable the FRC to disclose information to the OR.

6. Regarding paragraph 3(b), we accept a Member's view that, where the FRC were to be empowered to disclose information to a liquidator of **any** company, it might be possible that the liquidator of "Company B" (being a creditor of "Company A" under an investigation undertaken by the FRC) might receive information concerning the solvency of "Company A" in advance and recover assets from "Company A" ahead of other creditors. To avoid such an anomaly, we agree to consider proposing a CSA, as demonstrated at page 3 of **Annex A**, to **clause 51(3)(c)** to restrict the scope of the FRC's disclosure so that the FRC may only disclose **information on a listed corporation** under investigation or enquiry to **the liquidator of *that* corporation**.

7. Regarding paragraph 3(c), after further thought, and having noted Members' comments, we agree that it is not necessary to split the disclosure gateways according to the different capacities in which the OR acts. Instead, in order to respond to Members' concerns about the stringency of the secrecy provision, we agree to propose a CSA, as demonstrated at page 3 of **Annex A**, so that any disclosure to the relevant liquidator under **clause 51(3)(c)** will be subject to the same safeguards

² At present, the OR out-sources the administration of most liquidation cases to private-sector insolvency practitioners. Pursuant to section 194 of the CO, the OR shall, however, by virtue of his office, be the liquidator of a company being wound up by the court during any vacancy of the liquidator.

³ For example, pursuant to section 191(2) of the CO, the OR or a liquidator may make reports to the court on, among others, whether in his opinion any fraud has been committed by any person in the promotion or formation of the company. Section 204 of the CO provides that, if a liquidator does not faithfully perform his duties and observe all requirements imposed on him, the OR shall inquire into the matter and take such action as he may think expedient. The OR may also apply to the court for a disqualification order of directors made under section 168H of the CO.

under **clause 51(4)**⁴.

AVOIDANCE OF CONFLICT OF INTERESTS

8. Some Members have invited the Administration to elaborate on the following matters -

- (a) the consequence when a person performing the functions under the Ordinance has not complied with the requirement in **clause 52(2)** to disclose the nature of an interest in a matter being considered by the FRC, the AIB or a FRRC; and
- (b) whether particulars of the interests disclosed should be published or made known to the relevant parties who/which are the subjects of the investigation or enquiry.

9. Regarding paragraph 8(a), **clause 52(2)** provides that, if, in the course of performing a function under this Ordinance, a person is required to consider a matter in which he has an interest, he shall immediately disclose the nature of the interest to the FRC. After the disclosure, **clause 52(5)** excludes him from being present at the relevant deliberation and taking part in any decision with respect to the matter, unless the FRC determines otherwise. **Clause 52(7)** provides that a person who, without reasonable excuse, contravenes **clause 52(2)**, commits an offence and is liable to a fine or an imprisonment. We consider that this proposed arrangement has already provided the necessary safeguards to ensure compliance with the “disclosure of interests” requirement.

10. **Clause 9(e)** provides that one of the functions of the FRC is to approve and oversee the policies and activities of the AIB and a FRRC. If a contravention of **clause 52(2)** is revealed in the course of an

⁴ **Clause 51(4)** provides that the FRC shall not disclose information under **clause 51(3)(a) or (b)** unless the FRC is of the opinion that -

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

investigation or enquiry by the AIB or a FRRC, the FRC in performing its overseeing function will consider whether the contravention has affected the impartiality of the investigation and enquiry⁵. In this regard, whether the FRC should proceed with that investigation or enquiry, and whether the FRC should record the relevant matters in the investigation or enquiry reports, should be matters of discretion for the FRC, in the light of the specific circumstances of a case. In this regard, the Bills Committee noted at previous meetings that the AIB and a FRRC is **not** a tribunal with sanctioning powers. While an investigator or enquirer has to act fairly in the course of the investigation or enquiry, much greater latitude could be allowed to its procedures⁶. Where any contravention of **clause 52(2)** results in a change of the membership of the AIB or a FRRC, we do not think the change by itself constitutes a breach of natural justice. In deciding whether to continue the investigation/enquiry or change the composition of the AIB and the FRRC, the FRC will have to act reasonably and in good faith, and consider all relevant considerations including whether it will, or will be seen to be, acting fairly in pursuing the course of any decision.

11. Regarding paragraph 8(b), we agree with many Members' view that the publication of the disclosure particulars of a FRC/AIB/FRRC member may prematurely prejudice investigation or enquiry and the relevant parties concerned and jeopardize the operation of financial markets. As **clause 52(4)** already requires the FRC to keep a record of the particulars of any disclosures made, we consider that latitude should be given to the FRC concerning (i) whether to record the particulars separately in the investigation or enquiry reports, and (ii) whether, and if so to what extent, such reports should be published in accordance with the considerations set out in **clauses 35 and 47**.

⁵ In any event, the FRC already has the relevant powers to remove the relevant member who is no longer fit for the appointment in view of the contravention. As regards a FRRC which is appointed to deal with an individual case, section 42(b) of Interpretation and General Clauses Ordinance (Cap. 1) will empower the FRC to dissolve a FRRC in an unlikely case that the whole Committee should be dissolved.

⁶ Wade and Forsyth, *Administrative Law*, 9th edition, p. 548.

12. Given that the relevant auditor or listed entity will be aware of the composition of the AIB or the FRRC⁷, the Administration concurs with a Member's suggestion to have a CSA, as demonstrated as new **clause 52(6A)** at page 13 of **Annex A**, which expressly requires the FRC to notify such relevant auditor/entity of the FRC's determination under **clause 52(5)** that the relevant FRC/AIB/FRRC member is not to be excluded from participating in the investigation or enquiry notwithstanding his disclosure of certain interests.

CONSEQUENTIAL AMENDMENTS TO THE PROFESSIONAL ACCOUNTANTS ORDINANCE

13. The Bills Committee noted the intention for the HKICPA and the FRC to enter into a memorandum of understanding (MoU) to set out the arrangements under which the HKICPA would refer cases or complaints to the FRC for investigation. While noting that the details of such an arrangement might be enunciated in the MoU, some Members have considered that, in view of the importance of this arrangement, the Professional Accountants Ordinance (PAO, Cap. 50) should contain an express provision to require the HKICPA to, upon receipt of a complaint concerning a "relevant irregularity" of a listed entity (c.f. **clause 4** of the Bill), refer such a complaint to the FRC. Having consulted the HKICPA, the Administration will propose an additional CSA, as demonstrated at page 17 of **Annex A**, to the PAO to the aforesaid effect.

REFERRAL OF CASES TO SPECIFIED AUTHORITIES

14. **Clause 12** provides that the FRC may, subject to a set of specified conditions, refer any case concerning a relevant irregularity or

⁷ The appointment of the AIB will be published in the Gazette by virtue of **clause 22(3)**. We will also propose a CSA to require the FRC to inform the relevant listed entity of the names of the members of a FRRC appointed under **clause 40**.

non-compliance to a “*specified authority*”⁸ and assist the authority to investigate, enquire into, or deal with the case. **Clause 12(6)** provides that the FRC shall, as soon as practicable, after the satisfaction of the specified conditions, cause the name of the “*specified authority*” to be published in the Gazette. A Member has invited the Administration to assess what authorities in the Mainland may fall within the scope of “*specified authority*” for the purposes of **clause 12**.

15. While it is for the FRC to exercise its power under **clause 12**, the Administration notes that the Chinese Institute of Certified Public Accountants is an accountancy body that is a member of the International Federation of Accountants and thus falls within paragraph (a)(ii) of the definition of “*specified authority*” in **clause 2(1)**⁹.

LEGAL PROFESSIONAL PRIVILEGE

16. **Clause 25** empowers the FRC to require relevant persons to produce records and documents in an investigation. A Member has asked whether it is necessary to state that the relevant powers under **clause 25** are subject to legal professional privilege.

17. By virtue of **clause 55(1)**, the provisions of this Ordinance (including **clause 25**) do not affect any claims, rights or entitlements that would, apart from this Ordinance, arise on the ground of legal professional privilege. As such, it is not necessary for **clause 25** to be expressed to be subject to **clause 55**. In fact, if **clause 25** is so

⁸ **Clause 2(1)** provides that a “*specified authority*” –

(a) means –

(i) an authority, or regulatory organization, whether in Hong Kong or elsewhere, or
(ii) an accountancy body, whether in Hong Kong or elsewhere, that is a member of the International Federation of Accountants; but

(b) does not include a specified enforcement agency.

⁹ For a referral to, or an assistance to, an authority or regulatory organization (paragraph (a)(i) of the definition of “*specified authority*” in **clause 2(1)**), the FRC is required by **clause 12(4)** to satisfy itself that the authority performs functions similar to certain FRC functions or regulates, supervises or investigates accountants, banking, insurance or other financial services, or corporation affairs. The latter requirement is broadly similar to that specified under section 186(5) of the Securities and Futures Ordinance (SFO, Cap. 571). In this connection, the SFC advised that the names of the China Securities Regulatory Commission, the People’s Bank of China, the Shanghai Securities Exchange and the Shenzhen Securities Exchange had been published in the Gazette under section 186(5) of the SFO. This may shed light on how **clause 12(4)** of the Bill may be construed in future.

expressed, and another provision possibly with a legal professional privilege implication is not, that may cast a doubt as to the effect of that other provision.

18. From the drafting angle, we consider that the “Contents” of an Ordinance will be a useful tool to assist a reader to acquaint himself regarding the provisions of the Ordinance. They outline the structure of the Ordinance so that a reader will have a quick idea of how the provisions on different subjects are structured under different parts and divisions of the Ordinance.

LEGAL REPRESENTATION

19. **Clause 28(1)(b)** provides that the investigator may require a relevant person to attend before the investigator and answer any relevant question. A Member has asked about the right to legal representation entitled by the relevant person.

20. The Administration has previously explained this matter in paragraph 18 of our paper entitled “Follow-up actions arising from the meeting held on 6 December 2005” (LC Paper No. CB(1)665/05-06(01)). In essence, Article 35 of the Basic Law provides, among other things, that “Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies”. Following this, in the course of an investigation undertaken by the FRC, any person who is requested to attend before the investigator or to give explanation or produce documents, shall always be entitled to seek his own legal advice and to have choice of lawyers for timely protection of his lawful rights and interests. Given that the Bill contains no provision which has the effect of abrogating or restricting such rights, we do not consider it necessary to repeat in the Bill the rights

guaranteed under the Basic Law¹⁰.

DOUBLE JEOPARDY PROVISIONS IN CLAUSES 31 AND 32

21. **Clause 31** prescribes the offences for a failure to comply with an information-gathering requirement imposed under **clauses 25 to 28**. **Clause 32** provides that the investigator may apply to the Court for an inquiry into any such failure and that the Court may, on being satisfied that the failure was without reasonable excuse, punish the relevant person as if he had been guilty of contempt of court. Both **clauses 31(10) and 32(4)** protect the person from “double jeopardy” of a criminal prosecution under **clause 32** and a punishment given in the proceedings under **clause 31**. The Legal Adviser to the Bills Committee has asked whether the limitation provided under **clause 32(4)** should apply only to criminal proceedings instituted under **clause 31(1)** (which concern a failure to comply without reasonable excuse) but not to those under **clauses 31(2) to (8)** (which concern a failure to comply with intent to defraud, or the giving of false and misleading information).

22. In the Administration’s view, all offences under **clauses 31(1) to (8)** relate to any failure to comply with an information-gathering

¹⁰ Apart from the protection guaranteed under the Basic Law, the common law rules of procedural fairness and proportionality will apply to investigation procedures of the FRC. In this regard, the Court of Final Appeal (CFA) has considered the issues relating to legal representation in a recent judgment The Stock Exchange of Hong Kong Limited (SEHK) v New World Development Company Ltd and others [2006]. Although the case concerns proceedings in the Disciplinary Committee of the SEHK which was ruled as not being a “court” for the purposes of Article 35 of the Basic Law, the judgment may shed light on the common law rules of legal representation applying to an investigation undertaken by the FRC (which is neither a court nor tribunal determining legal rights and obligations). The CFA stated that –

“More recent authority clearly establishes that there is no absolute right to have counsel address the tribunal or to question witnesses, any such entitlement depending on whether such procedures are required as a matter of fairness (para. 98).....It is therefore common ground, and obviously correctly so, that what fairness requires depends on the circumstances. SEHK’s policy.....of limiting the role of lawyers at the hearing is based upon the belief that limited representation suffices in most cases; that an informal, expert, lay tribunal, stepped in the ways of the stock exchange, is best placed to deal effectively and swiftly with disciplinary issues; that the public interest in maintaining confidence in the market requires swift investigation and treatment of suspected infringements; and that ‘over-lawyering’ the procedures would undermine many of these objectives, substantially lengthening and complicating proceedings, and making it difficult to persuade qualified individuals to accept unremunerated appointment to a Disciplinary Committee. These are plainly legitimate concerns. But they can only be pursued with proper regard for the needs of procedural fairness and for proportionality in any procedural restrictions imposed. (para. 109)”.

requirement, although the elements of each offence vary depending on whether an intent to defraud, or false or misleading representation, is involved. Therefore, in order to protect the person from “double jeopardy”, it is necessary that the limitations under **clause 32(4)** should apply to criminal proceedings instituted against the person under **clause 31(1), (2), (3), (4), (5), (6), (7) or (8)** in respect of the same conduct. We consider the present drafting to be appropriate. A similar approach is used in section 185(3) of the SFO.

OTHER MISCELLANEOUS MATTERS

23. Finally, a Member has asked whether, in devising relevant interpretation clauses about “auditors” and “reporting accountants” under **clauses 2 and 4**, consideration should be given to the different categories of membership of the HKICPA. Section 22 of the Professional Accountants By-laws (Cap. 50A) permits a certified public accountant (CPA) who satisfies the relevant conditions about professional experiences and standing to apply to the HKICPA for use of the designation “Fellow of the Hong Kong Institute of Certified Public Accountants” (FCPA). Nevertheless, this is merely a matter of designation of a CPA and the use of the “FCPA” designation will not affect the scope of the application of the disciplinary provisions of the PAO to all CPA (including those with a “FCPA” designation). The matter has no bearing on the Bill.

Financial Services and the Treasury Bureau
April 2006

Financial Reporting Council Bill

Committee Stage Amendments¹

51. Preservation of secrecy

(1) Except in the performance of any function under this Ordinance or for carrying into effect the provisions of this Ordinance, a specified person -

(a) shall not suffer or permit any person to have access to any matter relating to the affairs of any person that comes to the specified person's knowledge in the performance of any function under this Ordinance; and

(b) shall not communicate any such matter to any person other than the person to whom such matter relates.

(2) Despite subsection (1), a specified person may -

(a) disclose information that has already been made available to the public;

(b) disclose information for the purpose of any criminal proceedings in Hong Kong or an investigation conducted with a view to bringing any such proceedings;

(c) disclose information for the purpose of seeking advice from, or giving advice by,

¹ The wording of the CSA is subject to further refinement by the Law Draftsman.

counsel, or a solicitor, or other professional adviser, acting or proposing to act in a professional capacity in connection with any matter arising under this Ordinance;

- (d) disclose information in connection with any judicial or other proceedings to which the specified person is a party; and
- (e) disclose information in accordance with an order of a court, magistrate or tribunal, or in accordance with a law or a requirement made under a law.

(3) Despite subsection (1), the Council may -

- (a) subject to subsection (4), disclose information to a specified authority for the purpose of referring a case or complaint, or providing assistance, to the authority under section 12;
- (b) subject to subsection (4), disclose information to -
 - (i) the Chief Executive;
 - (ii) the Financial Secretary;
 - (iii) the Secretary for Justice;
 - (iv) the Secretary for Financial Services and the Treasury;
 - (v) the Commissioner of Police of Hong Kong;

- (vi) the Commissioner of the Independent Commission Against Corruption;
- (vii) the Commissioner of Inland Revenue;
- (viii) the Registrar of Companies;
- (ix) the Official Receiver;
- (x) the Monetary Authority;
- (xi) the Securities and Futures Commission;
- (xii) the Market Misconduct Tribunal;
- (xiii) the Insurance Authority;
- (xiv) the Mandatory Provident Fund Schemes Authority;
- (xv) the HKICPA;
- (xvi) an inspector appointed by the Financial Secretary under section 142 or 143 of the Companies Ordinance (Cap. 32) to investigate the affairs of a corporation;
- (xvii) a public officer authorized by the Secretary under subsection (12); or
- (xviii) a company recognized as an exchange company under section 19(2) of the Securities and Futures Ordinance (Cap. 571);

(c) subject to subsection (4), if there is or has been an investigation under Part 3 concerning

a relevant irregularity, or an enquiry under Part 4 concerning a relevant non-compliance, in relation to a listed corporation, disclose information on the listed corporation to a person who -

(i) is a liquidator or provisional liquidator of the listed corporation appointed under the Companies Ordinance (Cap. 32); or

(ii) acts in a similar capacity in relation to the listed corporation under any law of a place outside Hong Kong;

~~(c) disclose information to a person who -~~

~~(i) is a liquidator or provisional liquidator appointed under the Companies Ordinance (Cap. 32); or~~

~~(ii) acts in a similar capacity under any law of a place outside Hong Kong,~~

~~for the purpose of enabling or assisting the person to perform his functions as such liquidator or provisional liquidator or in such similar capacity;~~

(d) disclose information with the consent of -

(i) the person from whom the information was obtained or received; and

(ii) if the information does not relate to such person, the person to whom it relates;

(e) disclose information in summary form that is so framed as to prevent particulars relating to any person from being ascertained from it; and

(f) disclose information for the purpose of, or in connection with, an audit under section 19.

(4) The Council shall not disclose information under subsection (3)(a) ~~or (b)~~, (b) or (c) unless the Council is of the opinion that -

(a) the disclosure will enable or assist the recipient of the information to perform his functions; and

(b) it is not contrary to the interest of the investing public or to the public interest that the information should be so disclosed.

(5) Subject to subsection (6), if information is disclosed pursuant to subsection (1), (2) or (3) (other than subsection (2)(a) or (3)(e)) -

(a) the person to whom the information is so disclosed; or

(b) any other person obtaining or receiving the information from that person,

shall not disclose the information to any other person.

(6) Subsection (5) does not prohibit the person referred to in subsection (5)(a) or (b) from disclosing the information to any other person if -

- (a) the Council consents to the disclosure;
- (b) the information has already been made available to the public;
- (c) the disclosure is for the purpose of seeking advice from, or giving advice by, counsel, or a solicitor, or other professional adviser, acting or proposing to act in a professional capacity in connection with any matter arising under this Ordinance;
- (d) the disclosure is in connection with any judicial or other proceedings to which the person so referred to is a party; or
- (e) the disclosure is in accordance with an order of a court, magistrate or tribunal, or in accordance with a law or a requirement made under a law.

(7) The Council may attach such conditions as it considers appropriate to -

- (a) a disclosure of information made by it pursuant to subsection (3); or
- (b) a consent granted by it pursuant to subsection

(6)(a).

(8) Subsection (1) does not affect the operation of section 13(3) of The Ombudsman Ordinance (Cap. 397) or section 44(8) of the Personal Data (Privacy) Ordinance (Cap. 486).

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

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

or

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

(10) A person commits an offence if -

(a) he discloses any information in contravention of subsection (5); and

(b) at the time of the disclosure -

(i) he knew, or ought to have known, that the information was previously disclosed to him or any other person pursuant to subsection (1), (2) or (3)

(other than subsection subsections (2)(a) or (3)(e)); and

(ii) he had no reasonable grounds to believe that subsection (5) does not apply to him by virtue of subsection (6).

(11) A person who commits an offence under subsection (10)

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.

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

(13) In this section, "specified person" (指明人士) means

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- (a) the Council; or
- (b) any person who -
 - (i) is or has been -
 - (A) a member of the Council, the Investigation Board, a Review Committee or a committee established by the Council;
 - (B) a related person of the Council; or
 - (C) a person employed by or assisting a related person of the Council;
 - (ii) performs or has performed any function under this Ordinance.

51A. Protection of informers

(1) Any information on the identity of a relevant person is not admissible in evidence in -

(a) any civil or criminal proceedings before a court or magistrate;

(b) any proceedings before the Market Misconduct Tribunal; or

(c) any proceedings under Part V of the Professional Accountants Ordinance (Cap. 50).

(2) In such proceedings, a witness is not obliged -

(a) to disclose the name or address of a relevant person who is not a witness in those proceedings; or

(b) to state any matter that would lead, or would tend to lead, to discovery of the name or address of a relevant person who is not a witness in those proceedings.

(3) If a book, document or paper that is in evidence, or liable to inspection, in such proceedings contains an entry

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(a) in which a relevant person is named or described; or

(b) that might lead to discovery of a relevant

person,
the court, the magistrate, the Market Misconduct Tribunal or
the Disciplinary Committee constituted under section 33(3) of
the Professional Accountants Ordinance (Cap. 50), as the case
may be, shall cause all such passages to be concealed from view,
or to be obliterated, so far as may be necessary to protect
the relevant person from discovery.

(4) In such proceedings, the court, the magistrate, the
Market Misconduct Tribunal or the Disciplinary Committee, as
the case may be, may, despite subsection (1), (2) or (3), permit
inquiry, and require full disclosure, concerning a relevant
person if -

(a) it is of the opinion that justice cannot be
fully done between the parties to the
proceedings without disclosure of the name of
the relevant person; or

(b) in the case of a relevant person within the
meaning of paragraph (a) of the definition of
"relevant person" in subsection (6), it is
satisfied that the relevant person made a
material statement that he -

(i) knew or believed to be false; or

(ii) did not believe to be true.

(5) This section has effect despite sections 35 and 47.

(6) In this section, "relevant person" (有關人士) means

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(a) an informer who has given information to the Council, the Investigation Board or a Review Committee with respect to an investigation under Part 3 or an enquiry under Part 4; or

(b) a person who has assisted the Council, the Investigation Board or a Review Committee with respect to such an investigation or enquiry.

52. Avoidance of conflict of interests

(1) This section applies to a person who -

(a) is a member of the Council, the Investigation Board, a Review Committee or a committee established by the Council; or

(b) performs a function under this Ordinance.

(2) If, in the course of performing a function under this Ordinance, a person is required to consider a matter in which he has an interest, he shall immediately disclose the nature of the interest to the Council.

(3) For the purposes of subsection (2), a person has an interest in a matter if the matter relates to -

(a) a listed corporation in the securities of which he has an interest;

(aa) a listed collective investment scheme in the interests of which he has an interest; or²

~~(a) a listed entity in which he has an interest;~~
~~or~~

(b) another person -

(i) by whom he is or was employed;

(ii) of whom he is or was a client;

(iii) who is or was his associate; or

(iv) whom he knows is or was a client of a third person -

(A) by whom he is or was employed; or

(B) who is or was his associate.

(4) The Council shall record, in a record kept for the purpose, the particulars of any disclosure made under this section.

(5) After a person has disclosed the nature of any interest in any matter, he shall not, unless the Council otherwise determines -

(a) be present during any deliberation of the Council, Investigation Board or Review Committee, or a committee established by the Council, with respect to the matter; ~~or~~

(b) take part in any decision of the Council,

² A technical amendment to specify more clearly what constitute the "interests" that are subject to the disclosure requirement.

Investigation Board or Review Committee, or such a committee, with respect to the matter;ⁱ

~~or-~~

(c) keep or be given any document, or the relevant part of any document, that contains a record of, or is issued for the purpose of, such deliberation or decision.

(6) For the purpose of the making of a determination by the Council under subsection (5), a person who has an interest in a matter to which the disclosure relates shall not -

(a) be present during any deliberation of the Council for the purpose of making the determination;~~or-~~

(b) take part in the making of the determination by the Council;ⁱ ~~or-~~

(c) keep or be given any document, or the relevant part of any document, that contains a record of, or is issued for the purpose of, such deliberation or the making of such determination.³

(6A) If the Council determines under subsection (5) that

³ In response to some Members' view expressed at the meeting on 10 February 2006, we agree to propose a CSA to expressly provide that the person excluded under clause 52(5) or (6) shall not be given any document that contains a record of the relevant deliberation, decision and determination. Please refer to paragraph 15 of the Administration's paper entitled "Follow-up actions arising from the meeting held on 10 February 2006" (LC Paper No. CB(1)963/05-06(02)).

a person may be present during any deliberation, or take part in any decision, of the Council, Investigation Board or Review Committee, or a committee, the Council shall give a written notice of the determination to -

(a) in the case of a deliberation or decision with respect to an investigation under Part 3 concerning an auditing irregularity, the auditor concerned;

(b) in the case of a deliberation or decision with respect to an investigation under Part 3 concerning a reporting irregularity, the reporting accountant concerned; or

(c) in the case of a deliberation or decision with respect to an enquiry under Part 4 concerning a relevant non-compliance, the listed entity concerned.⁴

(7) A person who, without reasonable excuse, contravenes subsection (2) commits an offence and is liable -

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

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

⁴ See paragraph 12 of the paper.

(8) A contravention of this section does not invalidate a decision of the Council, Investigation Board or Review Committee, or a committee established by the Council.

(9) In this section -
"associate" (有聯繫者), in relation to a person, means -

- (a) the spouse, or any minor child (natural or adopted) or minor step-child, of the person;
- (b) any corporation of which the person is a director;
- (c) any employee or partner of the person;
- (d) the trustee of a trust of which the person, his spouse, minor child (natural or adopted) or minor step-child, is a beneficiary or a discretionary object;
- (e) another person in accordance with whose directions or instructions the person is accustomed or obliged to act;
- (f) another person accustomed or obliged to act in accordance with the directions or instructions of the person;
- (g) a corporation in accordance with the directions or instructions of which, or the directions or instructions of the directors of which, the person is accustomed or obliged to act;

- (h) a corporation which is, or the directors of which are, accustomed or obliged to act in accordance with the directions or instructions of the person;
- (i) a corporation at general meetings of which the person, either alone or together with another, is directly or indirectly entitled to exercise or control the exercise of 33% or more of the voting power;
- (j) a corporation of which the person controls the composition of the board of directors; or

~~(k) if the person is a corporation –~~

~~(i) each of its directors and its related corporations and each director or employee of any of its related corporations; and~~

~~(ii) a pension fund, provident fund or employee share scheme of the corporation or of a related corporation of the corporation; or⁵~~

- (k) without limiting the circumstances in which paragraphs (a) to (jk) apply, in

⁵ Since a person making a disclosure under this section will be a natural person, clause 52(9)(k) has no application. A technical amendment is thus proposed to remove this anomaly.

circumstances concerning the securities of or other interest in a corporation, or rights arising out of the holding of such securities or 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 interest; or

(ii) under which they undertake to act together in exercising their voting power at general meetings of the corporation.

~~"related corporation" (有連繫法團) means a related corporation within the meaning of section 3 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571).⁶~~

A new section to be added to Professional Accountants Ordinance (Cap. 50)⁷

42CA. Referral of matter to FRC

(1) Where it appears to the Council that there are circumstances suggesting -

(a) that -

⁶ See footnote 5.

⁷ See paragraph 13 of the paper.

(i) a certified public accountant has acted in a manner described in section 34(1)(a)(iii), (xi) or (xii);

(ii) paragraph (iv), (vi), (viii), (ix) or (x) of section 34(1)(a) applies to a certified public accountant or a firm of certified public accountant (practising); or

(iii) section 34(1)(a) or (b), as applied by section 34(1AA), applies to a corporate practice; and

(b) that the matter constitutes a relevant irregularity in relation to a listed entity for the purposes of the Financial Reporting Council Ordinance (of 2006),

the Council shall refer the matter to the FRC and shall not, even if it may do so under section 42C(2)(a), constitute an Investigation Committee in relation to the matter.

(2) Subsection (1) does not apply if a complaint of the matter is submitted to the Council, or the matter otherwise comes to the Council's attention, before the commencement of this section.



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Chapter: 201 Title: PREVENTION OF BRIBERY Gazette Number:
ORDINANCE
Section: 30A Heading: **Protection of informers** Version Date: 30/06/1997

(1) Save as provided in subsection (2)-

- (a) no information for an offence under this Ordinance shall be admitted in evidence in any civil or criminal proceeding; and
- (b) no witness in any civil or criminal proceeding shall be obliged-
 - (i) to disclose the name or address of any informer who has given information to the Commissioner with respect to an offence under this Ordinance or of any person who has assisted the Commissioner in any way with respect to such an offence; or
 - (ii) to answer any question if the answer thereto would lead, or would tend to lead, to discovery of the name or address of such informer or person,if, in either case, such informer or person is not himself a witness in such proceeding,

and, if any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding contain an entry in which any such informer or person is named or described or which might lead to his discovery, the court shall cause all such passages to be concealed from view or to be obliterated so far as may be necessary to protect the informer or such person from discovery.

(2) If in any proceeding before a court for an offence under this Ordinance the court, after full inquiry into the case, is satisfied that an informer wilfully made a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding a court is of opinion that justice cannot be fully done between the parties thereto without disclosure of the name of an informer or a person who has assisted the Commissioner, the court may permit inquiry and require full disclosure concerning the informer or such person.

(Added 28 of 1980 s. 13)

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Chapter: 134 Title: DANGEROUS DRUGS Gazette Number:
ORDINANCE
Section: 57 Heading: **Protection of informers** Version Date: 30/06/1997

(1) Save as provided in subsection (2)-

- (a) no information for an offence under this Ordinance shall be admitted in evidence in any civil or criminal proceeding; and
- (b) no witness in any civil or criminal proceeding shall be obliged-
 - (i) to disclose the name or address of any informer who has given information to the police with respect to an offence under this Ordinance or of any person who has assisted the police in any way with respect to such an offence; or
 - (ii) to answer any question if the answer thereto would lead, or would tend to lead, to discovery of the name or address of such informer or person,
if, in either case, such informer or person is not himself a witness in such proceeding,

and, if any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding contain an entry in which any such informer or person is named or described or which might lead to his discovery, the court shall cause all such passages to be concealed from view or to be obliterated so far as may be necessary to protect the informer or such person from discovery.

(2) If in any proceeding before a court for an offence under this Ordinance the court, after full inquiry into the case, is satisfied that an informer wilfully made a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding a court is of opinion that justice cannot be fully done between the parties thereto without disclosure of the name of an informer or a person who has assisted the police, the court may permit inquiry and require full disclosure concerning the informer or such person.