

**For Discussion**

**Bills Committee on  
Financial Reporting Council Bill**

**(I) Appointment to; and (II) Checks and Balances on  
the Proposed Financial Reporting Council**

**PURPOSE**

At the Bills Committee's meeting held on 7 October 2005, Members discussed, among other things, the appointment to and checks and balances on the Financial Reporting Council (FRC). In response to Members' request, this paper elaborates further on the Administration's intention regarding these issues as well as the latest proposal to set up a new Process Review Panel (set out in paragraphs 16 to 19 below) as an additional "checks and balances" measure that underpins the operation of the FRC<sup>1</sup>.

**APPOINTMENT TO THE FRC**

2. To recapitulate, **clause 7** of the Bill sets out the composition of the FRC, which is to consist of not more than 11 members, namely -
  - (a) One ex officio member from Government, i.e. the Registrar of Companies or his representative;
  - (b) The Chief Executive Officer (CEO) of the FRC, as an ex officio member;

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<sup>1</sup> This paper should be read alongside the Administration's paper entitled "Component One – Establishment of the Financial Reporting Council" (LC Paper No. CB(1)2368/04-05(03)), which outlines the major proposals contained in Parts 1 and 2 of and Schedules 2 and 3 to the Bill regarding the establishment of the FRC.

- (c) Three members, each of whom to be nominated by the Securities and Futures Commission (SFC), Hong Kong Exchanges and Clearing Limited (HKEx) and the Hong Kong Institute of Certified Public Accountants (HKICPA) respectively; and
- (d) At least four and not more than six other appointed members.

**Clauses 7(1) and 8(1)** provide that, save the ex officio member from Government, all other members of the FRC (including the Chairman and the CEO) are to be appointed by the Chief Executive (CE). **Clause 7(2)** provides that the majority of the FRC members must be “**lay persons**”<sup>2</sup> (i.e. non-accountants).

3. In this respect, some Members raised the following concerns/questions -

- (a) As the qualification requirements of the FRC are not set out in the Bill, there may be a lack of transparency in the appointment process and it may be necessary to put in place measures to ensure that the membership of the FRC will include a wide and balanced composition of appointees with relevant experience and expertise but free of conflict of interests; and
- (b) the FRC may not be able to maintain true independence given that members of the FRC shall be appointed by the CE.

### ***Qualification requirements***

4. Regarding the qualification requirements of FRC members referred to in paragraph 3(a) above, **it is the Administration’s intention to establish a FRC with a wide and balanced composition.** The CE

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<sup>2</sup> **Clause 2(1)** defines a “*lay person*” to mean a person who is not a certified public accountant within the meaning of the Professional Accountants Ordinance (PAO, Cap. 50) or a member of an accountancy body that is a member of the International Federation of Accountants. This definition is modelled on the same definition appearing in section 2(1) of the PAO. The relevant provisions in other Ordinances cited in this paper are at **Annex**.

will consider appointment of candidates from different backgrounds and disciplines (such as those with experience in accounting, auditing, finance, banking, law, business administration, etc.) so that the FRC can discharge its functions and oversee the work of the Audit Investigation Board (AIB) and Financial Reporting Review Committees (FRRC) effectively.

5. That said, **the Administration does not propose to set out in detail the qualification requirements in the Bill, so as to facilitate the CE in appointing the best available candidates in the light of the actual circumstances.** In our view, setting out the qualification requirements so rigidly is unnecessary and undesirable, as this lacks flexibility and may undermine the Administration's ability to ensure that the FRC comprises a good mix of available appointees with the necessary expertise and experience.

6. The present proposed arrangement is consistent with the Professional Accountants (Amendment) Ordinance 2004<sup>3</sup>, which prescribes no detailed qualification requirements as regards appointment of lay members to the Council, and Disciplinary and Investigation Panels of the HKICPA. Moreover, a similar approach has been adopted in the appointment of members to many other statutory bodies including the SFC under the Securities and Futures Ordinance (SFO, Cap. 571), the Broadcasting Authority under the Broadcasting Authority Ordinance (Cap. 391), the Consumer Council under the Consumer Council Ordinance (Cap. 216), to name just a few.

7. Internationally, no detailed qualification requirements are set out in any legislation regarding the appointment of directors of the United Kingdom's Financial Reporting Council, which is a company limited by guarantee. Furthermore, the Sarbanes-Oxley Act of the United States does not specify that the appointees to the Public Company Accounting Oversight Board should represent certain stakeholder groups, although the Act provides for a "lay majority", i.e. no more than two out of the five members of the Board shall be certified public accountants.

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<sup>3</sup> The Professional Accountants (Amendment) Ordinance 2004 was enacted by the Legislative Council in July 2004. The Amendment Ordinance introduces reforms in, among other things, the composition of the Council and Investigation and Disciplinary Panels of the HKICPA.

8. We recognize that it is crucial that members of the FRC should, and be seen to, provide objective and impartial advice to enable the Council to discharge its functions properly. In the appointment process, the CE will consider the candidate's background carefully with a view to avoiding, as far as practicable, any potential or perceived conflict of interests. However, as a conflict will only arise from the circumstances of an actual case to be or being considered by the FRC, **clause 52**<sup>4</sup> puts in place a reporting system whereby members of the FRC and other persons performing a function of the Ordinance shall disclose any conflict of interests where the situation warrants.

### *Independence of the FRC members*

9. On the issue of independence referred to in paragraph 3(b) above, it must be stressed that, save the ex officio members, all other members (including the Chairman) of the FRC are to be appointed by the CE to serve the Council on an *ad personam* basis. **They do not represent the Administration, nor are they obliged to follow the wishes or instructions of any person in performing their duties as FRC members.** The Registrar of Companies is one of the ex officio members. His presence will provide the contribution of his expertise on regulatory issues regarding companies. Furthermore, **clause 6(3)** of the Bill has expressly provided that the FRC is not a servant or agent of Government. Therefore, we do not see how the CE's power to appoint members to the FRC might impair the Council's independence of the Government. Internationally, similar bodies are also appointed by either the government or the regulator of the securities markets.

10. The proposed lay majority of the FRC will also help to ensure that the Council is independent of the accountancy profession. This is consistent with the international trend towards a greater degree of independence in the oversight of auditors. It should be noted that, with the commencement of the Professional Accountants (Amendment) Ordinance 2004 in November 2004, an Investigation Committee and a Disciplinary Committee of the HKICPA now also comprise a majority of

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<sup>4</sup> We note deputations' comments concerning the proportionality of the avoidance of conflict of interests provision in **clause 52**. We are reviewing the provision with the Department of Justice and, if necessary, will propose amendments to the clause for Members' consideration when the Bills Committee proceeds to the deliberation of Component Four of the Bill.

lay members.

## CHECKS AND BALANCES ON THE FRC

### *Directions of the CE*

11. **Clause 14** of the Bill enables the CE to give the FRC a written direction with respect to the performance of any of the Council's functions. Some Members were of the view that this clause might undermine the independence of the FRC.

12. The Administration considers that, in order to have a better understanding of **clause 14**, it is important to examine the clause in the context of the checks and balances to ensure the accountability and governance of the operation of the FRC. It must first be highlighted that this power of giving directions can only be exercised by the CE subject to the following restrictions -

- (a) the direction must be in the public interest;
- (b) the CE must first consult the Chairman of the FRC; and
- (c) the directions must be with respect to the performance of the FRC's function as stipulated in **clause 9**.

These three restrictions have been included in the Bill in order to strike a reasonable balance between protecting the public interest and ensuring the FRC's independence in performing its day-to-day functions.

13. **Clause 14** is a tool of last resort for the Administration, through the CE, to implement necessary remedial measures in the most pressing and extreme circumstances. The CE will not give directions to the FRC unless it is necessary in the public interest and that in doing so he will have taken into account all circumstances prevailing at the time. These circumstances may include whether there is any major malfunction on the part of the FRC, whether the reputation of Hong Kong as an international financial centre is at stake, the urgency of remedial actions

required of the FRC, and whether other checks and balances are performed effectively at the time, etc.

14. We consider **clause 14** necessary to enable the Administration to continue to account to the Legislative Council and the public for effective regulation of the accountancy profession. The reserve power for the Administration to take remedial and other necessary action is not unique to the FRC and is, in fact, fairly common in the case of comparable statutory bodies. Similar provisions providing for the CE's reserve power are found in, for example, sections 11 of the SFO and section 6E(3) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485). Indeed, no direction has ever been given by the CE in the past in accordance with the aforementioned Ordinances, as this reserve power is not intended to be used lightly.

***“Public Interest” Test to Restrict the Initiation of Investigation/Enquiry***

15. We note that there were concerns about the need to include provisions in the Bill to empower the FRC to initiate investigations or enquiries into suspected irregularities or non-compliances involving the “public interest”. **We do not consider it necessary to introduce the additional “public interest” threshold** for the following reasons -

- (a) The FRC will investigate auditors' irregularities and enquire into non-compliances of financial reports only in relation to listed entities. **Cases concerning listed entities should be of sufficient public interest *per se***, as such irregularities and non-compliances have a bearing on the quality of listed entities' financial reporting which underpins our market quality and investor confidence in Hong Kong as an international financial centre. There is no need to further require those cases involving listed entities to satisfy any “public interest” test, as there is already a demonstrably far greater degree of “public interest” in “listed entities” than “unlisted entities” and the term “listed entities” is capable of more precise and objective definition under **clause 3**;

- (b) **Clauses 23 and 40** have already set out the proposed statutory thresholds which the FRC must satisfy before exercising the investigation/enquiry powers under **clauses 25 to 28** and **43**<sup>5</sup>. Hence, there are already restrictions governing the exercise of the powers by the FRC. Moreover, the FRC is required to exercise its powers legally and reasonably and its actions are subject to judicial reviews by the Court;
- (c) As a reference, sections 179(1) and 182(1) of the SFO empower the SFC to initiate an investigation when, among other situations, it appears to the SFC that there are circumstances suggesting that, or the SFC has reasonable cause to believe that, there is suspected intermediary's misconduct or market misconduct. Once this threshold has been passed, the SFC does not need to demonstrate whether the suspected intermediary's misconduct/market misconduct "raises or appears to raise important issues affecting the public interest in Hong Kong" before exercising its investigation powers under the relevant sections. Indeed, a "public interest" test is an exception rather than the norm in the enforcement action of Hong Kong's financial services regulators.

### *Setting up of a Process Review Panel*

16. Despite the "checks and balances" measures set out in paragraphs 18 and 19 of the Administration's paper entitled "Component One – Establishment of the FRC", some Members of the Bills Committee have raised concerns about the transparency of the FRC's operations, particularly in respect of its decisions to initiate an investigation or otherwise, and have urged the Administration to put in place a mechanism

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<sup>5</sup> In essence, the FRC may direct the AIB to investigate an irregularity concerning auditors or reporting accountants when it appears to the Council that there are *circumstances suggesting* that there is an irregularity in relation to a listed entity (c.f. **clauses 23(1) and (2)**); or when the Council has *reasonable cause to believe* that there is or may be a relevant irregularity in relation to a listed entity (c.f. **clause 23(3)**). Moreover, the FRC may direct a FRRC to carry out an enquiry if it appears to the FRC that *there is or may be a question* whether or not there is a relevant non-compliance in relation to a listed entity. The Bills Committee may deliberate these thresholds during its discussion on Components Two and Three of the Bill.

to review the operations of the FRC.

17. The Administration has given considerable thought to these concerns vis-à-vis the already proposed “checks and balances” measures. We appreciate that it is important for the FRC to earn public confidence and trust. However, part of its work, together with its investigatory decisions, is necessarily subject to the secrecy requirements under **clause 51**. We are also particularly mindful of any suggestion mandating the disclosure of information of “non-pursuable” cases, as this may affect adversely and unfairly the relevant persons in connection with such cases. That said, we understand that some members of the public may wish to know whether or not the FRC is taking or has taken appropriate action in response to a complaint.

18. To bridge this possible gap, the Administration now proposes to convene a *non-statutory* **Process Review Panel (PRP)**, which is independent of the FRC. This proposed PRP is essentially aimed to conduct reviews of the FRC’s operational procedures to ensure that they are fair and reasonable, and to determine whether, in handling cases or taking actions or decisions, the FRC has followed its internal due process procedures (including procedures for ensuring consistency). The concept of a PRP is modelled on a similar non-statutory Panel for the SFC, in which case the Panel focuses on process rather than reviewing the merits of any case. Under our proposal, the PRP for the FRC may call for and review FRC’s files to verify whether the decisions made and the actions taken in relation to a case or complaint have adhered to and are consistent with the relevant internal procedures and operational guidelines and advise the FRC accordingly. We propose that the PRP shall make regular reports to the Secretary for Financial Services and the Treasury on its findings. Through the publication of such reports, to the extent permitted within the statutory constraints of secrecy and confidentiality, the public will be better able to know FRC’s activities.

19. We will make reference to the existing PRP for the SFC in devising the detailed framework (including the terms of reference and membership) for the convening of the PRP for the FRC, after the Bill has been passed and prior to the establishment of the FRC.



### ***Oversight by The Ombudsman***

20. One of the proposed “checks and balances” measures of the FRC is oversight by The Ombudsman. **Clause 76** of the Bill includes an amendment to Part I of the Schedule 1 to The Ombudsman Ordinance (Cap. 397) to the effect that complaints against the actions of the FRC may be lodged with the Office of The Ombudsman.

21. In response to Members’ queries about the functions of The Ombudsman, we wish to clarify that, under section 7(1) of The Ombudsman Ordinance, The Ombudsman may investigate any action taken by or on behalf of an organization set out in Part I of Schedule 1 to the Ordinance in the exercise of its administrative functions, in any case where a complainant claims to, or The Ombudsman is of the opinion that any person may, have sustained injustice in consequence of maladministration in connection with that action. This will provide effective checks and balances against any maladministration on the part of the FRC, where “*maladministration*” is defined in section 2 of The Ombudsman Ordinance to mean “inefficient, bad or improper administration” and include “(a) unreasonable conduct, including delay, discourtesy and lack of consideration for a person affected by any action; (b) abuse of any power (including any discretionary power) or authority including any action which (i) is unreasonable, unjust, oppressive or improperly discriminatory or which is in accordance with a practice which is or may be unreasonable, unjust, oppressive or improperly discriminatory; or (ii) was based wholly or partly on a mistake of law or fact; or (c) unreasonable, unjust, oppressive or improperly discriminatory procedures”.

### ***Communication with other bodies***

22. The Administration was requested to consider a Member’s suggestion of providing in the Bill a mechanism for the FRC to reach a *consensus* with the relevant body before making its decision of not initiating an investigation or enquiry into suspected irregularities or non-compliances.

23. We recognize that, during the operation of the FRC, other professional bodies (such as the HKICPA) or regulators (such as the SFC and HKEx) may refer complaints falling within the ambit of the FRC for investigation or enquiry. To the extent permitted by the secrecy provision in **clause 51**, the FRC may communicate with these bodies or regulators before or in the process of the investigation with a view to having better coordination with the latter's actions and institution of any necessary proceedings subsequent to the FRC's investigation/enquiry. **Clause 51(4)** of the Bill permits the disclosure of information in such communications if the FRC is of the opinion that the disclosure will enable or assist the recipient of the information to perform its functions and that the disclosure is not contrary to the interest of the investing public or the public interest.

24. In addition, **clauses 24** and **42** require the FRC to notify the relevant financial regulators where the listed entity in relation to which an investigation/enquiry has been initiated is a regulatee of the regulators. **Clauses 29** and **43(2)** require the FRC to consult relevant financial regulators before imposing a requirement on a person who is a regulatee of the regulators. These provisions will also contribute to the coordination and cooperation between the FRC and other regulators.

25. That said, we do not consider it appropriate to oblige the FRC, in each and every case, to seek the *consent* or reach *consensus* with a third party in making its decision of initiating an investigation/enquiry or otherwise. This suggestion will hamper the independence of the FRC, as it will in effect render the FRC, whose investigatory decisions should not be unnecessarily fettered, an agent of another party.

## **ADVICE SOUGHT**

26. Members are invited to note -

- (a) the above elaboration with respect to the Administration's intention regarding the appointment to and checks and balances on the FRC; and

- (b) the Administration's latest proposal to set up a new PRP (set out in paragraphs 16 to 19 below) as an additional "checks and balances" measure that underpins the operation of the FRC.

**Financial Services and the Treasury Bureau  
October 2005**

# 雙語法例資料系統 Bilingual Laws Information System

## Individual Section Mode

Previous section of enactment	Next section of enactment	Switch language	Back to the List of Laws
----------------------------------	------------------------------	-----------------	-----------------------------

### Contents of Section

Chapter:	50	Title:	PROFESSIONAL ACCOUNTANTS ORDINANCE	Gazette Number:	10 of 2005
Section:	2	Heading:	<b>Interpretation</b>	Version Date:	08/07/2005

(1) In this Ordinance, unless the context otherwise requires- (Amended 10 of 2005 s. 48)

\*\*\*"appointed day" (指定日期) means the day appointed by the Secretary for Financial Services and the Treasury under section 1(3) of the Professional Accountants (Amendment) Ordinance 2004 (23 of 2004); (Added 23 of 2004 s. 3)

"appointed member" (委任理事) means a member of the Council appointed by the Chief Executive under section 10(2)(e); (Added 23 of 2004 s. 3)

"certified public accountant" (會計師) means a person registered as a certified public accountant by virtue of section 22; (Replaced 23 of 2004 s. 3)

"certified public accountant (practising)" (執業會計師) means a certified public accountant holding a practising certificate; (Added 23 of 2004 s. 3)

"co-opted member" (增選理事) means a member of the Council co-opted under section 10(4); (Added 96 of 1994 s. 2)

"corporate practice" (執業法團) means a company which is for the time being registered under section 28E; (Added 85 of 1995 s. 2)

"Council" (理事會) means the Council of the Institute established under section 10; (Amended 23 of 2004 s. 54)

"Disciplinary Committee" (紀律委員會) means a Disciplinary Committee constituted under section 33(3); (Replaced 96 of 1994 s. 2)

"Disciplinary Committee Convenor" (紀律委員會召集人) means the Disciplinary Committee Convenor appointed under section 33(1)(a); (Added 23 of 2004 s. 3)

"Disciplinary Panels" (紀律小組) means the Disciplinary Panel A and Disciplinary Panel B constituted under section 33(1) and "Disciplinary Panel A" and "Disciplinary Panel B" shall be construed accordingly; (Added 23 of 2004 s. 3)

"elected member" (當選理事) means a member of the Council elected under section 10(2)(c);

"firm name" (事務所名稱) means, in relation to a certified public accountant (practising) practising on his own account, the name or style under which he practises if that name or style is otherwise than his own name without any addition as registered under section 22(2), and in relation to a certified public accountant (practising) practising in partnership, the name or style under which the partnership practises; (Added 96 of 1994 s. 2. Amended 23 of 2004 s. 3)

"Institute" (公會) means the Hong Kong Institute of Certified Public Accountants (香港會計師公

會) incorporated by section 3; (Added 23 of 2004 s. 3)

"Investigation Committee" (調查委員會) means the committee appointed under section 42C; (Added 96 of 1994 s. 2)

"Investigation Committee Convenor" (調查委員會召集人) means the Investigation Committee Convenor appointed under section 42B(1)(a); (Added 23 of 2004 s. 3)

"Investigation Panels" (調查小組) means the Investigation Panel A and Investigation Panel B constituted under section 42B(1) and "Investigation Panel A" and "Investigation Panel B" shall be construed accordingly; (Added 23 of 2004 s. 3)

"lay person" (業外人士) means a person who is not-

- (a) a certified public accountant; or
- (b) a member of an accountancy body which is a member of the International Federation of Accountants; (Added 23 of 2004 s. 3)

"practice review" (執業審核), in relation to a practice unit, means an examination or a review described in section 32B(1)(b);

"Practice Review Committee" (執業審核委員會) means the committee established under section 32A; (Added 14 of 1992 s. 2)

"practice unit" (執業單位) means-

- (a) a firm of certified public accountants (practising) practising accountancy pursuant to this Ordinance; (Replaced 23 of 2004 s. 3)
- (b) a certified public accountant (practising) practising accountancy on his own account pursuant to this Ordinance; or (Added 14 of 1992 s. 2. Amended 85 of 1995 s. 2; 23 of 2004 s. 3)
- (c) a corporate practice; (Added 85 of 1995 s. 2)

"practising certificate" (執業證書) means a current practising certificate issued under section 30;

"President" (會長) means the President of the Institute elected under section 4 and any person acting as President; (Amended 23 of 2004 s. 54)

"professional accountant" (專業會計師) means a person registered as a professional accountant before the relevant day; (Replaced 23 of 2004 s. 3)

"professional indemnity insurance" (專業彌償保險) includes insurance indemnifying a certified public accountant, a firm of certified public accountants (practising) or a corporate practice against liability to compensate a third party who has sustained financial loss or any other damage or injury due to a breach of professional duty by or to professional negligence of such accountant, firm or practice (including such negligence by any director of the practice) or fraud or dishonesty; (Added 85 of 1995 s. 2. Amended 23 of 2004 s. 3)

"professional standards" (專業標準) means any-

- (a) statement of professional ethics; or
- (b) standards of accounting, auditing and assurance practices, (Amended 23 of 2004 s. 3)

issue or specified or deemed to be issued or specified under section 18A; (Added 14 of 1992 s. 2)

"public accountant" (註冊核數師) means a person registered as a professional accountant by virtue of the repealed section 24(2) before the relevant day; (Replaced 23 of 2004 s. 3)

"register" (註冊紀錄冊) means the register of certified public accountants kept under section 22; (Amended 23 of 2004 s. 54)

"registered address" (註冊地址) means any address of a certified public accountant which is

entered in the register under section 22(2); (Amended 23 of 2004 s. 54)

"registered office" (註冊辦事處) means the registered office referred to in section 31;

"Registrar" (註冊主任) means the Registrar appointed under section 21;

"relevant day" (有關日期) means the day on which the Professional Accountants (Amendment) Ordinance 2004 (23 of 2004) comes into operation\* under section 1(2) of that Ordinance; (Added 23 of 2004 s. 3)

"repealed section 24(2)" (已廢除的第24(2)條) means section 24(2) of this Ordinance repealed by the Professional Accountants (Amendment) Ordinance 2004 (23 of 2004); (Added 23 of 2004 s. 3)

"reviewer" (審核人員) means any person appointed or engaged by the Council under section 32B (1)(d); (Added 14 of 1992 s. 2)

"Vice-President" (副會長) means the Vice-President of the Institute elected under section 4 and any person acting as Vice-President. (Amended 23 of 2004 s. 54)

 雙語法例資料系統  
**Bilingual Laws Information System**

**Individual Section Mode**

Previous section of  
enactment

Next section of  
enactment

Switch language

Back to the List of  
Laws

**Contents of Section**

---



Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	11	Heading:	<b>Directions to Commission</b>	Version Date:	01/04/2003

(1) After consultation with the chairman of the Commission, the Chief Executive may, upon being satisfied that it is in the public interest to do so, give the Commission written directions as to the furtherance of any of its regulatory objectives or the performance of any of its functions.

(2) The Commission shall comply with any written direction given under subsection (1).

(3) Where any written direction is given under subsection (1), any requirement under any other provision of this or any other Ordinance that the Commission shall, for the purpose of performing any of the functions to which the written direction relates-

(a) form any opinion;

(b) be satisfied as to any matter (including existence of particular circumstances);  
or

(c) consult any person,

shall not apply for all purposes connected with the performance of functions pursuant to, or consequent upon, the written direction.

(4) Written directions given under subsection (1) are not subsidiary legislation.


---

Previous section of  
enactment

Next section of  
enactment

Switch language

Back to the List of  
Laws

 雙語法例資料系統  
*Bilingual Laws Information System*

Individual Section Mode

Previous section of  
enactment

Next section of  
enactment

Switch language

Back to the List of  
Laws

Contents of Section



Chapter:	485	Title:	MANDATORY PROVIDENT FUND SCHEMES ORDINANCE	Gazette Number:	2 of 2002
Section:	<b>6E</b>	Heading:	<b>Functions of Authority</b>	Version Date:	15/02/2002

(3) The Chief Executive may give directions, either generally or in a particular case, with respect to the exercise by the Authority of its functions. The Authority must comply with any such directions unless they are inconsistent with this Ordinance.

(Added 4 of 1998 s. 2)

Previous section of  
enactment

Next section of  
enactment

Switch language

Back to the List of  
Laws



 雙語法例資料系統  
**Bilingual Laws Information System**

**Individual Section Mode**

Previous section of  
enactment

Next section of  
enactment

Switch language

Back to the List of  
Laws

**Contents of Section**



Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	179	Heading:	<b>Power to require production of records and documents concerning listed corporations, etc.</b>	Version Date:	01/04/2003

**Division 2-Powers to require information, etc.**

(1) Where, in relation to a corporation which is or was listed-

- (a) it appears to the Commission that there are circumstances suggesting that at any relevant time the business of the corporation has been conducted-
  - (i) with intent to defraud its creditors, or the creditors of any other person;
  - (ii) for any fraudulent or unlawful purpose; or
  - (iii) in a manner oppressive to its members or any part of its members;
- (b) it appears to the Commission that there are circumstances suggesting that the corporation was formed for any fraudulent or unlawful purpose;
- (c) it appears to the Commission that there are circumstances suggesting that persons concerned in the process by which the corporation became listed (including that for making the securities of the corporation available to the public in the course of such process) have engaged, in relation to such process, in defalcation, fraud, misfeasance or other misconduct;
- (d) it appears to the Commission that there are circumstances suggesting that at any relevant time persons involved in the management of the affairs of the corporation have engaged, in relation to such management, in defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members;
- (e) it appears to the Commission that there are circumstances suggesting that at any relevant time members of the corporation or any part of its members have not been given all the information with respect to its affairs that they might reasonably expect; or
- (f) a matter in respect of the investigation of which the Commission decides to provide assistance under section 186 relates to the corporation and is, in the opinion of the Commission, of a nature similar to the matter described in paragraph (a), (b), (c), (d) or (e) as being suggested by the circumstances referred to in such paragraph,

an authorized person may, subject to subsections (5) to (10), give a direction to-

- (i) the corporation;
- (ii) a corporation that is, or was at the material time, a related corporation of the corporation;
- (iii) an authorized financial institution, other than the corporation or a corporation described in paragraph (ii);
- (iv) an auditor, other than the corporation or a corporation described in paragraph (ii);
- (v) any other person,

requiring the production, within the time and at the place specified in the direction, of any record and document specified in the direction.


**雙語法例資料系統**  
**Bilingual Laws Information System**

**Individual Section Mode**

Previous section of  
enactment

Next section of  
enactment

Switch language

Back to the List of  
Laws

**Contents of Section**

Chapter: 571 Section: 182	Title: SECURITIES AND FUTURES ORDINANCE Heading: <b>Investigations</b>	Gazette Number: L.N. 12 of 2003 Version Date: 01/04/2003
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**Division 3-Powers of investigations**

(1) Where-

- (a) the Commission has reasonable cause to believe that an offence under any of the relevant provisions may have been committed;
- (b) the Commission has reasonable cause to believe that a person may have engaged in defalcation, fraud, misfeasance or other misconduct in connection with-
  - (i) dealing in any securities or futures contract or trading in any leveraged foreign exchange contract;
  - (ii) the management of investment in any securities, futures contract or leveraged foreign exchange contract;
  - (iii) offering or making any leveraged foreign exchange contract or collective investment scheme;
  - (iv) giving advice in relation to the allotment of securities, or the acquisition or disposal of, or investment in, any securities, futures contract, leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme; or
  - (v) any transaction involving securities margin financing;
- (c) the Commission has reasonable cause to believe that market misconduct may have taken place;
- (d) the Commission has reasonable cause to believe that the manner in which a person has engaged or is engaging in any of the activities referred to in paragraph (b)(i) to (v) is not in the interest of the investing public or in the public interest;
- (e) the Commission-
  - (i) for the purpose of considering whether to exercise any power under section 194 or 196, has reason to inquire whether any person is or was at any time guilty of misconduct, or is not a fit and proper person, as described in section 194(1) or (2) or 196(1) or (2); or
  - (ii) for the purpose of assisting the Monetary Authority to consider whether to exercise any power under section 58A or 71C of the Banking Ordinance (Cap 155), has reason to inquire whether any person-
    - (A) is or was at any time guilty of misconduct, or is not or has ceased to be a fit and proper person, as described in section 58A(1) of that Ordinance; or

(B) is or was at any time guilty of misconduct, or should cease to be regarded as a fit and proper person, as described in section 71C(4) of that Ordinance;

(f) the Commission has reason to inquire whether any of the conditions imposed in respect of an authorization under section 104 or 105 are being complied with; or

(g) a matter in respect of the investigation of which the Commission decides to provide assistance under section 186 is, in the opinion of the Commission, of a nature similar to the matter described in paragraph (a), (b), (c), (d), (e) or (f) as that which the Commission has reasonable cause to believe or has reason to inquire (as the case may be),

the Commission may in writing direct one or more of its employees or, with the consent of the Financial Secretary, appoint one or more other persons, to investigate any of the matters referred to in paragraphs (a) to (g).

 雙語法例資料系統  
*Bilingual Laws Information System*

Individual Section Mode

Previous section of  
enactment

Next section of  
enactment

Switch language

Back to the List of  
Laws

Contents of Section

---

▼				
Chapter:	397	Title:	THE OMBUDSMAN ORDINANCE	Gazette Number: L.N. 273 of 2001
Section:	7	Heading:	<b>Functions and powers of Ombudsman</b>	Version Date: 19/12/2001

PART III

FUNCTIONS AND POWERS OF THE OMBUDSMAN


(Amended 74 of 1996 s. 11; 30 of 2001 s. 8)

(1) The Ombudsman may investigate any action taken by or on behalf of-

- (a) an organization set out in Part I of Schedule 1 in the exercise of its administrative functions; or
- (b) an organization set out in Part II of Schedule 1 in the exercise of its administrative functions in relation to the Code on Access to Information published by the Government,

in any case where-

- (i) a complaint is made by a person who claims to have sustained injustice in consequence of maladministration in connection with that action; or
- (ii) notwithstanding that no complaint has been made to him, he is of the opinion that any person may have sustained injustice in consequence of maladministration in connection with that action. (Replaced 74 of 1996 s. 6)


**雙語法例資料系統**  
**Bilingual Laws Information System**

**Individual Section Mode**

Previous section of  
enactment

Next section of  
enactment

Switch language

Back to the List of  
Laws

**Contents of Section**

▼

Chapter:	397	Title:	THE OMBUDSMAN ORDINANCE	Gazette Number:	L.N. 273 of 2001
Section:	2	Heading:	<b>Interpretation</b>	Version Date:	19/12/2001

(1) In this Ordinance, unless the context otherwise requires-  
"action" (行動) includes omission, recommendation or decision;  
"head" (首長) in relation to-

- (a) an organization other than the Government Secretariat means the head, director or equivalent officer of the organization;
- (b) the Government Secretariat means the head of a subdivision thereof to whom the officer whose action is the subject of the relevant complaint is responsible;  
(Replaced 44 of 1994 s. 3)

"investigation" (調查) means an investigation by the Ombudsman under this Ordinance; (Amended 74 of 1996 s. 11)

"maladministration" (行政失當) means inefficient, bad or improper administration and, without derogation from the generality of the foregoing, includes-

- (a) unreasonable conduct, including delay, discourtesy and lack of consideration for a person affected by any action;
- (b) abuse of any power (including any discretionary power) or authority including any action which-
  - (i) is unreasonable, unjust, oppressive or improperly discriminatory or which is in accordance with a practice which is or may be unreasonable, unjust, oppressive or improperly discriminatory; or
  - (ii) was based wholly or partly on a mistake of law or fact; or
- (c) unreasonable, unjust, oppressive or improperly discriminatory procedures;

"officer" (人員) includes employee;

"Ombudsman" (專員) means The Ombudsman referred to in section 3(1); (Added 74 of 1996 s. 4. Amended 30 of 2001 s. 2)

"organization" (機構) means an organization specified in Schedule 1. (Replaced 44 of 1994 s. 3)  
(Amended 74 of 1996 s. 4)

(2) Any reference in this Ordinance to an organization includes a reference to the officers of that organization. (Amended 44 of 1994 s. 3)