

For Discussion

**Bills Committee on
Financial Reporting Council Bill**

**Component Two
Audit Investigation Board**

PURPOSE

In relation to Component Two¹ of the Financial Reporting Council Bill (the Bill), this paper aims to -

- (a) outline the major proposals contained in **Parts 1 and 3** of and **Schedule 4** to the Bill regarding the establishment of the Audit Investigation Board (AIB). These relevant provisions seek to provide for the (i) **organizational structure**; (ii) **jurisdiction**; (iii) **investigation powers**; (iv) **checks and balances**; and (v) **post-investigation actions** concerning the AIB; and
- (b) set out the responses of the Administration to the salient comments on these issues as discussed at the second Bills Committee's meeting held on 27 September 2005 or as reflected in the deputations' comments².

¹ For the grouping of components, please refer to the Administration's paper entitled "Proposed work plan" (LegCo Paper No. CB(1)2288/04-05(35)) as discussed by the Bills Committee at its meeting held on 27 September 2005.

² For details of the responses, please refer to the Administration's note entitled "Summary of submissions and Administration's responses" (LC Paper No. CB(1)166/05-06(03)).

BACKGROUND

2. An independent and effective investigation regime is a fundamental building block on which the public trust in the auditing profession rests. Following the collapse of Enron in 2001, the first step taken by Hong Kong to enhance the investigation regime was the enactment of the Professional Accountants (Amendment) Ordinance 2004³, which provides that the Chief Executive shall appoint 18 or more lay persons to an Investigation Panel of the Hong Kong Institute of Certified Public Accountants (HKICPA). Previously, such a panel comprised certified public accountants (CPA) only.

3. Notwithstanding these reforms, the HKICPA pointed out in its *Proposals to Strengthen the Regulatory Framework of the Accountancy Profession* in January 2003 that it was necessary to deal with the outstanding issues of -

- (a) the perception that greater independence is needed for investigation of auditing irregularities in relation to listed entities; and
- (b) the lack of effective powers under the Professional Accountants Ordinance (PAO, Cap. 50) to compel non-HKICPA members to provide information.

4. Furthermore, there was a general trend in major international financial centres towards greater **independence** from the accounting profession in the oversight of auditors. During the two consultation exercises conducted in September 2003 and February 2005, we received clear support from both the public and the accountancy profession to establish an investigation board independent of the professional bodies, as a second step, to investigate complaints against the public interest activities of the auditing profession. Most respondents also agreed that the board's function should be confined to investigation, leaving the disciplinary

³ The Professional Accountants (Amendment) Ordinance 2004 was enacted by the Legislative Council in July 2004.

function to the relevant professional bodies concerned⁴. In view of this background, we propose to set up, under the overall structure of the Financial Reporting Council (FRC), the **AIB** to investigate suspected irregularities of the auditing profession in relation to the audit of accounts and preparation of reporting accountants' reports for listed entities.

ORGANIZATIONAL STRUCTURE OF THE AIB

5. **Clause 22** of the Bill establishes the AIB, which is to consist of (i) the Chief Executive Office (CEO) of the FRC, as an ex officio member and chairman of the board; and (ii) *at least* one other member appointed by the FRC. The AIB shall operate as per the direction of the FRC pursuant to **clause 23**, and its policies and activities shall be overseen by the FRC pursuant to **clause 9(e)**. Moreover, investigation findings of the AIB shall be reported to the FRC for consideration by virtue of **clause 35**. It is the Administration's intention that the AIB shall be regarded as the FRC's executive arm which works on a day-to-day basis to undertake the ground investigation work. The AIB is to be headed by the CEO of the FRC who will be supported by full-time employees of the FRC and any other consultants, agents and advisers appointed by the FRC. Hence, at the Board level, the AIB shall consist of the CEO, and any senior officers of the FRC and other consultants, agents and advisers appointed by the FRC. Although, as some deputations have pointed out, the AIB is to consist of two members at a minimum, there is no upper limit of the number of Board members. This arrangement enables the FRC to have the flexibility to decide on the size of the AIB in the light of caseload and resources available.

6. **Schedule 4** to the Bill sets out the supplementary provisions relating to the AIB and its members. **Section 1 of the Schedule** provides that the terms and conditions of the appointment of a member of the AIB are to be determined by the FRC and that an appointed member is eligible for reappointment. **Section 2 of the Schedule** provides that the procedures for meetings and proceedings of the AIB are to be determined by the board itself, subject to any direction by the FRC.

⁴ Regarding the question of whether the FRC should be purely investigatory, please refer to the Administration's paper entitled "Functions of the Financial Reporting Council" (LegCo Paper No. [CB\(1\)2288/04-05\(34\)](#)).

JURISDICTION OF THE AIB

7. **Clause 9(b)** provides that one of the functions of the FRC is to investigate, in response to a complaint or otherwise, (i) relevant irregularities in relation to listed entities; and (ii) the question whether or not there are any relevant irregularities in relation to listed entities. **Clause 4** defines “**relevant irregularities**”. Simply put, a “relevant irregularity” means -

- (a) an “**auditing irregularity**” in relation to the auditor of a listed entity in respect of the audit of the accounts of the entity; or
- (b) a “**reporting irregularity**” in relation to the reporting accountant of a listed entity in respect of the preparation of a specified report required for a listing document issued by and on behalf of the entity.

“Auditor” and “Reporting Accountant” of Listed Entities

8. It is not intended that the AIB should take over all the investigation functions of the HKICPA under the PAO. Rather, the focus of the AIB is dealing with the activities of the auditing profession with a wider public interest dimension. Under **clause 2(1)**, “*auditor*”, in relation to a listed entity, means a person appointed to be an auditor of the entity, for the purposes of the Companies Ordinance (CO, Cap. 32)⁵, the relevant code published by the Securities and Futures Commission (SFC)⁶, or the Listing Rules⁷. The definition covers not only the person, firm or corporate

⁵ Section 140(1)(a) of the CO provides that an auditor of a company incorporated under the Ordinance shall be qualified for appointment as such auditor under the PAO. By virtue of section 29(2) of the PAO, unless a person is either the holder of a practising certificate or a corporate practice registered with the HKICPA, he shall not hold any appointment or render any services as an auditor of a company within the meaning of the CO.

⁶ **Clause 2(1)** defines “*relevant code*” to mean “a code or guideline published under section 399 of the Securities and Futures Ordinance (SFO, Cap. 571) for providing guidance in relation to the operation of section 104 of the Ordinance, and as in force at the material time”. Section 104 of the SFO concerns the authorization of collective investment schemes by the SFC. The SFC has published certain codes and guidelines to stipulate the authorization requirements of such schemes, including, among other things, the requirement to appoint an auditor for a scheme.

⁷ Listing Rules are, at present, non-statutory rules made by the Stock Exchange of Hong Kong (SEHK) governing the listing of securities on the Main Board and the Growth Enterprise Market. These rules are subject to the approval by the SFC under the SFO.

practice (i.e. a practice unit) who is appointed to be the “auditor” of the listed entity, but also a partner, employee, member, director, and/or agent of that unit who are involved in the relevant audit work.

9. In the listed sector, auditors can also work in the capacity of “reporting accountants” for the preparation and assurance of “specified reports” for inclusion in a listing document in relation to the listing of an entity. These “specified reports” cover, among other things, the financial information of the entity to be listed⁸. In view of the importance of this function as the investing public relies on such financial reports to appraise an entity pending listing, we propose that “reporting accountants”, appointed for the purposes of the CO, the relevant code published by the SFC, or the Listing Rules, should also be subject to investigations by the AIB. Similar to the definition of “auditor”, the meaning of “reporting accountant” in **clause 2(1)** is also extended to include a partner, employee, member, director, and/or agent of a practice unit so long as they are involved in the preparation of such financial reports.

“Listed Entities”

10. We propose that the AIB should investigate only a relevant irregularity in relation to a listed entity as it involves a wider public interest. **Clause 3** defines a “*listed entity*” to mean a “*listed corporation*” or a “*listed collective investment scheme*”. Under **clause 2(1)**, “*corporation*” means “a company or other body corporate incorporated either in Hong Kong or elsewhere”; whereas a “*collective investment scheme*” means the same within the meaning of the SFO. The definitions will thus cover all corporations (be they incorporated in Hong Kong or elsewhere), together with collective investment schemes, listed on the Stock Exchange of Hong Kong.

⁸ In **clause 2(1)**, “*specified report*” refers to any financial report specified in Part II of the Third Schedule to the CO that is required under section 38 or 342 of the CO to be set out in a prospectus of a company; or, in relation to a listing document other than a prospectus, any report on the financial information on the entity, or business or undertaking to be acquired or disposed of by the entity, that is required for inclusion in a listing document issued for the purposes of the relevant code published by the SFC or the Listing Rules.

“Irregularities”

11. An accountant or an accountancy firm may be engaged to provide a wide range of services (for example, internal review assignment) for clients, quite apart from the audit of accounts. In this regard, we consider that the AIB should focus on those services which draw a wider public interest. Therefore, we propose that the AIB should only deal with irregularities of auditors/reporting accountants which occurred in respect of the provision of the following services -

- (a) **The audit of the accounts of a listed entity:** **Clause 2(1)** defines an “*audit*” as the audit of those accounts required for the purposes of CO, the relevant code published by the SFC or the Listing Rules. These accounts would need to be issued, circulated, published or distributed to the investing public accordingly; or
- (b) **The preparation of specified report required for a listing document:** **Clause 2(1)** defines “*specified report*” and “*listing document*”. Our intention is to cover those financial reports in a listing document (including a “prospectus” within the meaning of the CO) for the purpose of offering securities or interests in a collective investment scheme to the public for subscription or acquisition.

12. In response to Members’ view that there should be a smooth interface between (i) the investigations of the AIB and (ii) the disciplinary proceedings of the HKICPA, **clauses 4(3) to (6)** are modelled, so far as applicable, on sections 34 and 41A of the PAO⁹, which set out the areas of “irregularities” currently subject to the investigations by an Investigation Committee of the HKICPA. The Bill does not propose to create new types of “irregularities” in relation to auditors/reporting accountants, with a view to ensuring that the relevant irregularities investigated by the AIB can fall within the jurisdiction of the disciplinary proceedings under the PAO. In essence, so far as applicable, an auditor or reporting accountant has committed an “irregularity” if he -

⁹ See Annex.

- (a) falsified or caused to be falsified a document;
- (b) made a statement, in respect of a document, that was material and that he knew to be false or did not believe to be true;
- (c) has been negligent in the conduct of his profession;
- (d) has been guilty of professional misconduct;
- (e) did or omitted to do something that would reasonably be regarded as bringing or likely to bring discredit upon himself, the HKICPA or the accountancy profession;
- (f) failed to comply with a requirement concerning the registration of a corporate practice under the PAO;
- (g) rendered any service under a company/firm name other than the name that then appeared in relation to the corporate practice/firm in the CPA register kept under the PAO;
- (h) rendered any service as, or purporting to be, a director of a company whose name did not, at the time when the service was rendered, appear in the CPA register kept under the PAO;
- (i) practised accountancy without being covered by professional indemnity insurance at all or to the extent required by the PAO;
- (j) failed or neglected to observe, maintain, or otherwise apply a professional standard issued or specified by the HKICPA under the PAO; or
- (k) refused or neglected to comply with the provisions of any bylaw or rule made or any direction lawfully given by the Council of the HKICPA.

13. To sum up, we propose that the AIB may investigate any irregularity of an auditor in respect of the audit of published accounts, or of a reporting accountant in respect of the preparation of financial reports in a

listing document, in relation to an entity which is or has been listed. It should be emphasized that investigations of other cases concerning accountants' irregularities outside the above proposed jurisdiction of the AIB (including those cases concerning the non-listed sectors) would continue to be undertaken by the HKICPA, as would the disciplinary function.

POWERS OF THE AIB

Investigation Powers

14. It is necessary to sufficiently empower the AIB for it to carry out investigations effectively. The Bill proposes that the AIB's powers of investigation should be modelled on those currently possessed by the SFC in relation to an investigation of a listed corporation under sections 179, 182(1) and 183 of the SFO¹⁰. In this connection, **clause 23** specifies when the FRC may exercise the powers under **clauses 25 to 28** for the purposes of an investigation concerning a relevant irregularity or direct the AIB to conduct such an investigation. The relevant powers are as illustrated below -

- (a) **Preliminary Investigation:** **Clauses 23(1) and (2)** provide that the FRC may initiate a preliminary investigation if it appears to the FRC that *there are circumstances suggesting* that there is a relevant irregularity in relation to a listed entity. Once this threshold is passed, the investigator¹¹ may exercise its powers under **clauses 25 to 27** to require a person of a specified class (viz. the auditor/reporting accountant of the listed entity or of the entity's relevant undertaking¹²; the listed corporation; the responsible person¹³ of a listed collective investment scheme; a relevant undertaking of a listed entity; an

¹⁰ See **Annex**.

¹¹ Pursuant to **clause 21**, the term "*investigator*", whenever appearing in Part 3 of the Bill, means the "FRC", or the "AIB" (as directed by the FRC to conduct an investigation).

¹² "*Relevant undertaking*" is defined in **clause 2(1)**. In essence, it means a subsidiary of a listed entity.

¹³ **Clause 2(1)** defines a "*responsible person*", in relation to a listed collective investment scheme, to mean (a) the manager of the scheme; or (b) the person appointed as the trustee, or custodian, of the property of the scheme.

authorized institution; or other relevant persons prescribed under **clause 25(5) or 26(5)**¹⁴) to **produce relevant records or documents**, and to **give explanation** in relation to the records or documents, say, an entry in the records or an omission of an entry. These proposed powers, modelled on section 179 of the SFO, are aimed to enable the investigator to conduct a relatively quick and discreet preliminary investigation into suspected irregularities; and

- (b) **Extensive investigation:** **Clause 23(3)** provides that the FRC may initiate an extensive investigation if the FRC has *reasonable cause to believe* that there is or may be a relevant irregularity in relation to a listed entity. Once this threshold is passed, the investigator may exercise more extensive investigatory powers (including requirements for a person under investigation to **attend before the investigator to answer questions and give all other reasonable assistance**) under **clause 28**. These powers, as modelled on sections 182(1) and 183 of the SFO, will apply to the auditor/reporting accountant of the listed entity, or a person whom the investigator has reasonable cause to believe to be in possession of records or documents that contain, or are likely to contain, information relevant to the relevant irregularity or to the question whether or not there is such an irregularity, or otherwise in possession of such information.

15. A comparison between (i) the powers of “preliminary investigation” under **clauses 25 to 27** and (ii) those of the “extensive investigation” under **clause 28** is set out below -

- (a) Under **clause 25 or 26**, the investigator may require the production of records or documents from the auditor/reporting accountant of a listed entity or of its relevant undertaking, the listed entity or its relevant undertaking, an authorized

¹⁴ These refer to the other persons who (i) has directly or indirectly dealt with, or has had dealings directly or indirectly with, the listed entity or a relevant undertaking of the entity (i.e. transaction counter parties of the listed entity or its relevant undertaking); *or* (ii) is otherwise in possession of records or documents that relate to the audit of the accounts of the entity or its relevant undertaking or to the preparation of a specified report required for a listing document issued by or on behalf of the entity.

institution, the transaction counter parties of the listed entity or its relevant undertaking or any other person (as the last resort) whom the investigator has reasonable cause to believe that he is *in possession of records or documents* that (i) *relate* to the audit of the accounts of the listed entity or its relevant undertaking or to the preparation of a specified report required for a listing document; and (ii) *is relevant* to the irregularity or to the question whether there is such an irregularity. **Clause 28** provides for a wider scope, as it empowers the investigator to ask the auditor or reporting accountant of a listed entity, or any person whom the investigator has reasonable cause to believe to be (i) *in possession of records or documents that contain or are likely to contain* information relevant to the relevant irregularity or to the question whether there is such an irregularity, or (ii) *otherwise in possession of such information*, to provide information and assist in the investigation;

- (b) Where a person produces or does not produce a record or document pursuant to a requirement imposed on him under **clause 25 or 26**, the investigator may, pursuant to **clause 27**, in writing, require that person to *give an explanation regarding the record or document he has produced or does not produce*. However, **clause 28(1)(c)** empowers the investigator to ask the relevant person any written question *relating to any matter under investigation*. The scope of questions referred to in **clause 28(1)(c)** is therefore broader;
- (c) **Clause 28(1)(b)** provides for a further power to require the relevant person to *attend* before the investigator and *answer any question relating to any matter under investigation* that the investigator may raise with him. There is no similar power under **clauses 25 to 27**; and
- (d) **Clause 28(1)(d)** provides for a further power to require the relevant person to give the investigator *all other assistance in connection with the investigation* that the person is reasonably able to give. There is no similar power under **clauses 25 to 27**.

16. The Bill also proposes the following supplementary powers to enable the investigator to carry out an investigation -

- (a) **Statutory declaration** – Under **clauses 27(3) to (4) and 28(3) to (4)**, we propose that the investigator may require the person giving an explanation to verify his explanation by a statutory declaration. If a person does not give an explanation for the reason that the information concerned is not within his knowledge or possession, the investigator may require the person to verify by a statutory declaration that he was unable to comply with the requirement for the said reason. Similar powers are vested in the SFC under sections 179(3) to (4) and 183(2) to (3) of the SFO;
- (b) **Court order** – **Clause 32** empowers the investigator to apply to the Court for an inquiry of any unreasonable refusal or failure to comply with a requirement imposed on a person under **clause 25, 26, 27 or 28**. On such application, the Court may order the person to comply with such requirement or punish him as if he had been guilty of contempt of court. The provision, modelled on section 185 of the SFO¹⁵, is aimed to ensure compliance with the requirement imposed by the investigator to produce records or documents; and
- (c) **Magistrate's Warrants to Enter and Search: Clause 34** empowers the investigator to apply to a magistrate for a warrant to enter premises, and search for, seize and remove records or documents that may be required to produce during an investigation. The provision is modelled on section 191 of the SFO¹⁶.

Offences

17. **Clause 31** sets out the offences for failures to comply with the requirements imposed under **clause 25, 26, 27 or 28**, and is modelled on

¹⁵ See Annex.

¹⁶ See Annex.

sections 179(13) to (15) and 184(1) to (3) of the SFO. Similar to the situation under the SFO, a person who does not comply with the relevant requirement is protected from the “double jeopardy” of a criminal prosecution under **clause 31** and a court order under **clause 32** (as mentioned in clause 16(b) above). In other words, if a person who has not complied with a requirement imposed by the investigator is subject to a court order and punished as if he had been guilty of contempt of court under **clause 32**, he will not face a separate prosecution for a non-compliance with the same requirement under **clause 31**, and *vice versa*.

CHECKS AND BALANCES

18. In proposing the powers set out in paragraphs 14 to 16 above, care has been taken to ensure that they are proportionate. We are also mindful of the need to ensure that the exercise of such powers is properly checked and balanced. In addition to the general accountability measures of the FRC, we have put in place, for the exercise of the proposed investigatory powers, a set of specific checks and balances as set out below -

- (a) **Statutory Thresholds:** As mentioned in paragraph 14 above, the Bill proposes that the FRC may only initiate an investigation upon the passage of statutory thresholds (viz. the bars of “*circumstances suggesting*” and “*reasonable cause to believe*” set out in **clause 23**). Where documents, records or information are sought under **clause 25, 26 or 28**, the investigator must demonstrate that he has “*reasonable cause to believe*” that the person is in possession of such documents, records or information as required. The investigator must certify in writing that the requirements of these statutory thresholds have been satisfied. In this light, the investigator is not able to “fish” for evidence without having passed the aforesaid thresholds;
- (b) **Notification and Consultation with Other Regulatory Bodies – Clause 24** provides that the FRC shall give a written notice to the Monetary Authority, Insurance Authority, SFC, and Mandatory Provident Fund Schemes Authority *if* the

statutory thresholds in **clause 23** have been passed for the initiation of investigation powers against a relevant irregularity in relation to a listed entity and the entity concerned is a regulatee of the regulator concerned. **Clause 29** provides that the investigator shall consult the relevant regulator prior to imposing a requirement on a person under **clause 25, 26 or 28** if the person is a regulatee of the relevant regulator. In response to deputations' comments, we wish to clarify that the process of consultation will not undermine the independence of the FRC as such a process does not require the *consent* of the party being consulted. Indeed, the notification and consultation arrangements help ensure that the planned investigation of the FRC will be coordinated with the enforcement action of other financial service regulators where the situation warrants. A similar consultation arrangement is found in section 179(10) of the SFO;

- (c) **Prohibition of the Use of Incriminating Evidence in Criminal Proceedings** – Although **clause 31(9)** provides that a person is not excused from complying with an information-gathering requirement under **clause 25, 26, 27 or 28** only on the ground that to do so might tend to incriminate him, **clause 30(2)** expressly provides that such incriminating evidence is not admissible in evidence against the person in criminal proceedings¹⁷. **Clauses 31(9) and 30** are modelled

¹⁷ The common law privilege against self-incriminating evidence is abrogated by **clause 31(9)** and replaced with a statutory prohibition against the admissibility of self-incriminating evidence in criminal proceedings in a court of law other than those in which the person is charged with an offence under **clause 31** of the Bill (i.e. the failure to comply with the requirements imposed on the person under **clause 25, 26, 27 or 28**), or under Part V of the Crimes Ordinance (Cap. 200), or for perjury, in respect of the explanation, particulars or statement, or the answer or response given. **Clause 30(2)** requires the person giving the information to claim the use of the statutory prohibition with a view to assisting both parties to the proceedings to quickly identify evidence that might be self-incriminating and ensuring that that such evidence will not be admitted against the person who has given the information in the first place. The person will *first* be reminded or informed of this limitation by the investigator *before* giving information or answering questions in an investigation. This claim-based requirement is modelled on section 187 of the SFO and section 145(3A) of the CO.

As advised by the Department of Justice, **clause 30(2)** is capable of being given effect in a manner which is consistent with Article 14(3)(g) of the International Covenant on Civil and Political Rights (replicated in Article 11(2)(g) of the Hong Kong Bill of Rights), which guarantees that a person is not to be compelled to testify against himself or to confess guilt in the determination of any criminal charge against him. The relevant provisions of the SFO, CO and Hong Kong Bill of Rights are at **Annex**.

on sections 184(4) and 187 of the SFO respectively; and

- (d) **Magistrate’s Warrants Required to Enter and Search** – As mentioned in paragraph 16(c) above, **clause 34** provides that the investigator may enter premises and search and seize documents only if a magistrate’s warrant is obtained.

Reasonable Opportunity of Being Heard

19. We note from some of the deputations’ submissions that there are concerns on whether a reasonable opportunity of being heard will be allowed during an investigation undertaken by the AIB, in view of the absence of an express provision to this effect in the Bill. We are advised by the Department of Justice that the fact that the Bill does not expressly provide for a reasonable opportunity of being heard does not mean that the common law rules of natural justice do not apply. The AIB is very much the same as the inspectors in *Re. Pergamon Press Ltd.*¹⁸, in terms of the administrative nature of their tasks and the likely consequences of their findings. It was decided in that case that inspectors appointed under the United Kingdom’s Companies Act whose task included investigation of the affairs of a company and the preparation of a report must act fairly because their findings might adversely affect the persons being condemned or criticized by the inspector’s report. Thus, before the inspectors finalized their report which condemned or criticized a person, the investigator must give the person a fair opportunity for correcting or contradicting what was said against him¹⁹.

20. We wish to clarify that there is no provision in the Bill which seeks to override this procedural safeguard as required under the common law and that consequently the common law principles on natural justice will continue to apply. However, in view of the deputation’s comments and to state our intent explicitly, we will consider proposing a Committee Stage Amendment (CSA) to the effect that the AIB shall, before submission of a written report to the Council on the findings of an investigation, give any

¹⁸ *Re. Pergamon Press Ltd.* [1971] 1 Ch. 388 involved inspectors appointed under the United Kingdom’s Companies Act to investigate the affairs of a company.

¹⁹ According to Lord Denning in *Re. Pergamon Press Ltd.*, “(the inspectors) need not quote chapter and verse. An outline of the charge will usually suffice.”

person who may be the subject of any criticism in the report a reasonable opportunity of being heard.

POST-INVESTIGATION ACTIONS

Investigation Reports and Follow-up Actions

21. **Clause 35** requires the AIB to submit to the FRC written reports on the findings of the investigation. **Clause 36** provides that, upon the consideration of the investigation report, the FRC may (i) close or suspend the case; or (ii) carry out such other follow-up action as the FRC thinks fit. The follow-up action may include the referral of the case to a specified body for further action. **Clause 36(3)** provides that the FRC shall notify the auditor or reporting accountant concerned of the decision about the follow-up action upon the completion of the investigation, unless the FRC is satisfied itself that the notification may prejudice the investigation or any other action by the FRC or a specified body.

22. **Clause 35(5)** provides that, in any proceedings before a court or magistrate or the Market Misconduct Tribunal or any disciplinary proceedings under the PAO, a copy of the investigation report is admissible as evidence of the facts stated in the report. This provision is important to address Members' concerns that there should be a smooth interface between (i) the investigations of the FRC and (ii) the disciplinary proceedings of the HKICPA and proceedings arising from the actions of the law enforcement agencies to which the cases are referred by the FRC. Having considered the comments of some deputations regarding the use of hearsay evidence, we have reviewed with the Department of Justice **clause 35(5)** concerning the admissibility of evidence in relevant proceedings. We accept that we should not easily create statutory exceptions to the rule against hearsay in **criminal** proceedings. We will consider proposing a CSA to carve out the admissibility of the investigation reports in **criminal** proceedings as evidence of the facts stated therein. As for the admissibility of investigation reports in other proceedings, it should be stressed that such reports are not automatically considered as conclusive evidence of such facts. The persons concerned may produce other evidence to rebut the findings in the report before the Court, the Market Misconduct Tribunal or a

Disciplinary Committee of the HKICPA, which will then decide on the issue after considering all evidence before it.

Publication of Investigation Reports

23. Having regard to the public interest and the need to ensure the transparency of the FRC, we consider that there is a case for the FRC to publish investigation reports as it sees fit. However, we are mindful of any prejudicial effect arising from such publication. In this light, **clause 35(3)** provides that the FRC *may* cause to be published an investigation report or any part thereof. **Clause 35(4)** requires the FRC to take into account, when deciding whether or not to publish an investigation report, the following considerations –

- (a) whether or not the publication may adversely affect any criminal proceedings before a court or magistrate, any proceedings before the Market Misconduct Tribunal, or any disciplinary proceedings under the PAO, that have been or are likely to be instituted;
- (b) whether or not the publication may adversely affect any person named in the report; and
- (c) whether or not the report should be published in the interest of the investing public or in the public interest.

24. Coupled with the proposed statutory safeguard of a “reasonable opportunity of being heard” as referred to in paragraph 20 above, we consider that the provisions has struck a reasonable balance between the need to enhance the transparency of the FRC investigation and any prejudicial effect that may arise in respect of any publication of an investigation report.

COMPARISON WITH THE INVESTIGATORY POWERS UNDER THE PAO

25. The above sets out the overall framework of the AIB under the Bill. As the proposal to establish the AIB is partly driven by the need to give stronger teeth to the investigation function for the auditing profession, it may be useful, as a final note, to compare, for reference, the existing investigatory powers vested in an Investigation Committee of the HKICPA under the PAO with those proposed for the AIB. In this regard, the following key enhancements are noted -

- (a) **The Triggering Point to Initiate an Investigation:** Under section 42C(2)(a) of the PAO²⁰, an investigation can be pursued only where the Council of the HKICPA *reasonably suspects or believes* that a CPA (i.e. a member of the HKICPA) or a practice unit has committed an irregularity. However, as explained in paragraph 14(a) above, the AIB will be empowered to initiate a preliminary investigation if it appears to the FRC that there are *circumstances suggesting* that there is a relevant irregularity in relation to a listed entity. The lower threshold will enable the AIB to embark on an investigation expediently to deal with cases in relation to listed entities which are of a wider public interest;
- (b) **Information-gathering Powers:** Although section 42D of the PAO²¹ empowers an Investigation Committee of the HKICPA to require, under certain circumstances, *any person* to produce records or documents, the HKICPA does not have sufficient powers (for instance, the power to sanction a non-compliance) to effectively enforce this requirement against a non-HKICPA member. This significantly limits the effectiveness of investigations undertaken by the HKICPA. On the contrary, the AIB will have a wider range of investigation powers exercisable over non-auditors (for example, an officer or employee of a listed entity and its relevant undertakings). Moreover, as mentioned in

²⁰ See Annex.

²¹ See Annex.

paragraphs 16(b) and 17 above, a failure to comply with the information-gathering requirements imposed by the AIB may result in a court order or a criminal offence. Furthermore, as set out in paragraph 16(a) above, a person may be required to make a statutory declaration regarding his explanation about the reason and the fact that he is unable to comply with such a requirement. These proposed arrangements altogether provide for a stronger deterrent effect against a non-compliance with the requirements relating to the production of information;

- (c) **Magistrate's Warrant to Enter and Search:** An Investigation Committee constituted by the HKICPA has no power to apply for a magistrate's warrant to enter premises, and search for and seize documents. As set out in paragraph 16(c) above, we propose that, for timely investigation and avoidance of important evidence from being destroyed, the AIB should be able to enter premises, and search for and seize documents, provided that it has obtained a magistrate's warrant.

26. We consider such proposed enhancements justified and proportionate, given the need to promote confidence in the integrity of the auditing profession of Hong Kong and the operational experience of the Investigation Committees of the HKICPA.

Financial Services and the Treasury Bureau
November 2005

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Chapter: 50 Title: PROFESSIONAL ACCOUNTANTS ORDINANCE Gazette Number: L.N. 152 of 2004

Section: 34 Heading: **Disciplinary provisions** Version Date: 26/11/2004

(1) A complaint that-

(a) a certified public accountant- (Amended 23 of 2004 s. 54)

- (i) has been convicted of any offence under Part V (Perjury) of the Crimes Ordinance (Cap 200);
- (ii) has been convicted in Hong Kong or elsewhere of any offence involving dishonesty;
- (iii) whether as a certified public accountant or not- (Amended 23 of 2004 s. 54)
 - (A) falsified or caused to be falsified any document;
 - (B) made any statement which is material and which he knows to be false or does not believe to be true, in respect of any document;
- (iv) has been negligent in the conduct of his profession;
- (v) without reasonable excuse, failed or neglected to comply with any direction issued under section 32F(2) and with which he was required by the Practice Review Committee to comply;
- (vi) failed or neglected to observe, maintain or otherwise apply a professional standard;
- (vii) without reasonable excuse, failed or neglected to comply with any requirement made under section 42D in relation to him by an Investigation Committee;
- (viii) has been guilty of professional misconduct;
- (ix) refused or neglected to comply with the provisions of any bylaw or rule made or any direction lawfully given by the Council;
- (x) was guilty of dishonourable conduct;
- (xi) while a director of a corporate practice, rendered any service as, or purporting to be, a director of a company whose name did not appear in Part II of the register at the time when the service was rendered; or
- (xii) being such a director, practised accountancy as such a director at a time when the corporate practice was covered by professional indemnity insurance either not at all or not to the extent required by this Ordinance;

(b) a corporate practice-

- (i) or any of its directors-
 - (A) falsified or caused to be falsified any document;
 - (B) made any statement which is material and which any of its directors knows to be false or does not believe to be true, in respect of any document;
- (ii) failed to comply with a requirement referred to in section 28D(6)(a) or (7) or ceased or failed to comply with any requirement of section 28D(2)(b) or (c) applying to it;
- (iii) rendered any service under a company name other than the name which then appeared in relation to the practice in the register;
- (iv) being such a practice, practised accountancy without being covered by professional indemnity insurance at all or to the extent required by this Ordinance; or
- (v) did or omitted to do something which, were the practice an individual certified public accountant, would reasonably be regarded as being dishonourable conduct by an individual,

shall be made to the Registrar who shall submit the complaint to the Council which may, in its discretion but subject to section 32D(7), refer the complaint to the Disciplinary Panels. (Amended 14 of 1992 s. 6)

(1AAA) If the Council decides not to refer the complaint to the Disciplinary Panels, the complainant who is aggrieved by the Council's decision may request the Council to refer the complaint to the Disciplinary Panels, whereupon the Council shall, unless it is of the opinion that no prima facie case has been shown for the complaint, or that the complaint is frivolous or vexatious, refer the complaint to the Disciplinary Panels. (Added 23 of 2004 s. 36)

(1AA) The provisions of subparagraphs (iv) to (ix) of paragraph (a) of subsection (1) shall apply mutatis mutandis in relation to a corporate practice and accordingly, in addition to those specified in subsection (1)(b), a complaint under subsection (1) may be made against such a practice on any 1 or more of the grounds specified in those subparagraphs as so applied. (Added 85 of 1995 s. 16)

(1A) Where the Registrar has reason to believe that subsection (1)(a) or (b), or subsection (1)(a) as applied by subsection (1AA), applies to a certified public accountant or a corporate practice, he shall submit the facts to the Council which may, in its discretion, refer the complaint to the Disciplinary Panels. (Added 22 of 1977 s. 12. Amended 14 of 1985 s. 10)

(2) For the purposes of subsection (1)(a)(x) and (b)(v), "dishonourable conduct" (不名譽的行為) means an act or omission of a certified public accountant, whether or not in the course of carrying out professional work or as a certified public accountant, which would reasonably be regarded as bringing or likely to bring discredit upon the certified public accountant himself, the Institute or the accountancy profession.

(3) A person who was a member of the Practice Review Committee at any time when a complaint was made by it under section 32D(5) shall not take part as a member of a Disciplinary Committee in any proceedings relating to such complaint. (Added 14 of 1992 s. 6)

(Amended 96 of 1994 s. 22; 85 of 1995 s. 16; 23 of 2004 ss. 36 & 54)

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Chapter:	50	Title:	PROFESSIONAL ACCOUNTANTS ORDINANCE	Gazette Number: L.N. 152 of 2004
Section:	41A	Heading:	Application of disciplinary provisions to firms	Version Date: 26/11/2004

Sections 33B, 34(1) (other than subparagraphs (i), (ii), (iii), (xi) and (xii) of paragraph (a)), 34(1A) except in so far as it relates to those subparagraphs, 34(1)(b)(iii), 35, 35B, 36(1A), 37, 38, 39, 40 and 41 shall apply mutatis mutandis to a firm of certified public accountants (practising) as they apply to a certified public accountant or, as the case may be, to a corporate practice and so that in any proceedings against a firm of certified public accountants (practising) it shall be sufficient to prove that the act or omission complained of was the act or omission of any of the partners of the firm.

(Added 96 of 1994 s. 28. Amended 85 of 1995 s. 19; 23 of 2004 ss. 43 & 54)

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Chapter: 50 Title: PROFESSIONAL ACCOUNTANTS ORDINANCE Gazette Number: L.N. 152 of 2004
Section: 42C Heading: **Appointment of Investigation Committee** Version Date: 26/11/2004

- (2) (a) Where the Council reasonably suspects or believes that-
- (i) a certified public accountant has acted in a manner described in section 34(1)(a)(iii), (xi) or (xii); (Amended 80 of 1997 s. 102)
 - (ii) subparagraph (iv), (v), (vi), (vii), (viii), (ix) or (x) of section 34(1)(a) applies to a certified public accountant or a firm of certified public accountants (practising), (Amended 80 of 1997 s. 102)
 - (iii) section 34(1)(a) or (b), as applied by section 34(1AA), applies to a corporate practice, (Added 23 of 2004 s. 46)
- the Council may, in its discretion, constitute an Investigation Committee and direct the Committee, having considered the matter, to inform the Council as to whether in its opinion, were a complaint made against him or it, the certified public accountant or firm or corporate practice concerned would have a case to answer.

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Chapter:	50	Title:	PROFESSIONAL ACCOUNTANTS ORDINANCE	Gazette Number: 23 of 2004
Section:	42D	Heading:	Powers of Investigation Committee as regards its proceedings	Version Date: 08/09/2004

(1) The following provisions shall apply as regards the proceedings of an Investigation Committee-

(a) any person to whom this paragraph applies, and whom the relevant Investigation Committee reasonably believes to have in his possession or under his control any record or other document which appears to that Committee as containing or being likely to contain information relevant to the proceedings of the Committee, shall subject to subsection (5)-

(i) produce to the Committee or afford to the Committee access to, any record or other document specified by the Committee which is of a class or description so specified and which is in his possession or under his control being in either case a record or other document which is or appears to the Committee to be relevant to the proceedings, within such time and at such place as the Committee may reasonably require;

(ii) if so required by the Committee, give to it or him such explanation or further particulars in respect of anything produced or to which access is given in compliance a requirement under subparagraph (i) as the Committee shall specify;

(iii) give to the Committee all assistance in connection with its proceedings which he is reasonably able to give;

(b) where any information or matter relevant to the proceedings of an Investigation Committee is recorded otherwise than in legible form, any power to require the production of any record or other document conferred under paragraph (a), shall include the power to require the production of a reproduction of any such information or matter or of the relevant part of it in legible form;

(c) an Investigation Committee may inspect, examine or make copies of or take any abstract of or extract from a record or document which may be required to be produced under paragraph (a) or (b);

(d) where-

(i) a copy of any record or document is supplied by any person for the purposes of this section;

(ii) a copy of any record or document is made in the exercise of any power conferred under this section and a photocopying machine or other facility of

a person is used to make such copy,
the Institute shall reimburse the person concerned the reasonable
photocopying or other expenses incurred in making such copy; (Amended
23 of 2004 s. 54)

(e) a person exercising any power under this section by virtue of a delegation
under section 42E shall, if so required by a person affected by such exercise,
produce for inspection by such person the relevant instrument referred to in
section 42E or a copy thereof.

(2) Subsection (1)(a) applies-

(a) to the certified public accountant, firm of certified public accountants
(practising) or corporate practice to whom the Investigation Committee's
proceedings relate and-

(i) where the proceedings relate to a certified public accountant, also to that
accountant's employer and former employer (if any) and to any employee or
former employee of such accountant; and

(ii) where the proceedings relate to a firm of certified public accountants
(practising) or corporate practice, also to any employee or former employee
of such firm or corporate practice; and

(b) to any certified public accountant, firm of certified public accountants
(practising) or corporate practice other than those specified in paragraph (a), and
any employee or former employee of such accountant, firm or corporate practice
who is a certified public accountant or a student registered with the Institute.
(Replaced 23 of 2004 s. 47)

(3) A person who complies with a requirement of an Investigation Committee which is made by
virtue of subsection (1) shall not incur any liability to any other person by reason only of the
compliance.

(4) A person is not excused from complying with a requirement of an Investigation Committee under
subsection (1) on the ground that to do so might tend to incriminate him but, where that person
claims, before he answers a question put to him under subsection (1)(a)(ii), that the answer might
tend to incriminate him, neither the question nor the answer is admissible in evidence against him in
criminal proceedings.

(5) Nothing in this section shall be taken to compel the production by a person of a record or
document containing a privileged communication by or to a legal practitioner in that capacity.

(Part VA added 96 of 1994 s. 29)

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Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number: L.N. 12 of 2003
Section:	179	Heading:	Power to require production of records and documents concerning listed corporations, etc.	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.

(2) A power under this section to require the production of any record or document by any person includes the power-

(a) if the record or document is produced-

(i) to make copies or otherwise record details of the record or document;
and

(ii) to require-

(A) the person;

(B) in the case of a corporation, any person who is a present or past officer of the corporation, or is or was at any time employed by the corporation,

to provide or make any explanation or statement in respect of the record or document (including, in so far as applicable, a description of the circumstances under which it was prepared or created, details of all instructions given or received in connection with it, and an explanation of the reasons for the making of entries contained in it or the omission of entries from it); or

(b) if the record or document is not produced, to require-

(i) the person;

(ii) in the case of a corporation, any person who is a present or past officer of the corporation, or is or was at any time employed by the corporation, to state where it is.

(3) An authorized person may in writing require the person providing or making an explanation or statement under this section to verify within a reasonable period specified in the requirement the explanation or statement by statutory declaration, which may be taken by the authorized person.

(4) If a person does not provide or make an explanation or statement in accordance with a requirement under this section for the reason that the explanation or statement was not within his knowledge or in his possession, an authorized person may in writing require the person to verify within a reasonable period specified in the requirement by statutory declaration, which may be taken by the authorized person, that he was unable to comply or fully comply (as the case may be) with the requirement for that reason.

(5) An authorized person shall not give any direction under subsection (1)(i) or (ii) to require the production of any record or document unless the authorized person has reasonable cause to believe that the record or document relates to the affairs of the corporation to which the direction is to be given or a corporation of which such corporation is, or was at the material time, a related corporation.

(6) An authorized person shall not give any direction to an authorized financial institution under subsection (1)(iii) to require the production of any record or document unless the authorized person has reasonable cause to believe, and the Commission certifies in writing that the authorized person

has reasonable cause to believe, that-

- (a) the authorized financial institution is in possession of any record or document relating to the affairs of a corporation to which any direction has been or may be given under subsection (1)(i) or (ii); and
- (b) the record or document required to be produced under the direction-
 - (i) relates to the affairs of such corporation or to a transaction with such corporation; and
 - (ii) is relevant to the consideration of whether there has been the occurrence of-
 - (A) where subsection (1)(a), (b), (c), (d) or (e) applies, the matter described in such subsection as being suggested by the circumstances referred to in such subsection; or
 - (B) where subsection (1)(f) applies, the matter in respect of the investigation of which the Commission decides to provide assistance under section 186.

(7) An authorized person shall not give any direction to an auditor under subsection (1)(iv) to require the production of any record or document unless the authorized person has reasonable cause to believe, and the Commission certifies in writing that the authorized person has reasonable cause to believe, that-

- (a) the auditor is in possession of any record or document, which is in the nature of audit working papers, relating to the affairs of a corporation to which any direction has been or may be given under subsection (1)(i) or (ii); and
- (b) the record or document required to be produced under the direction-
 - (i) relates to the affairs of such corporation; and
 - (ii) is relevant to the consideration of whether there has been the occurrence of-
 - (A) where subsection (1)(a), (b), (c), (d) or (e) applies, the matter described in such subsection as being suggested by the circumstances referred to in such subsection; or
 - (B) where subsection (1)(f) applies, the matter in respect of the investigation of which the Commission decides to provide assistance under section 186.

(8) An authorized person shall not give any direction to a person under subsection (1)(v) to require the production of any record or document unless the authorized person has reasonable cause to believe, and the Commission certifies in writing that the authorized person has reasonable cause to believe, that-

- (a) the person has dealt or has had dealings, directly or indirectly, with, or is otherwise in possession of any record or document relating to the affairs of, a corporation to which any direction has been or may be given under subsection (1)(i) or (ii); and
- (b) the record or document required to be produced under the direction-
 - (i) relates to the affairs of such corporation or to a transaction with such corporation;
 - (ii) is relevant to the consideration of whether there has been the occurrence of-
 - (A) where subsection (1)(a), (b), (c), (d) or (e) applies, the matter described in such subsection as being suggested by the circumstances referred to in such subsection; or

- (B) where subsection (1)(f) applies, the matter in respect of the investigation of which the Commission decides to provide assistance under section 186; and
- (iii) cannot be obtained by giving a direction to any other person under subsection (1)(i), (ii), (iii) or (iv).

(9) The power of an authorized person to give any direction under subsection (1) (other than subsection (1)(iii)) to any corporation which is an authorized financial institution may be exercised only in respect of-

- (a) subsection (1)(e); or
- (b) subsection (1)(f), if, and only if, the 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 subsection (1)(e) as being suggested by the circumstances referred to in that subsection (1)(e).

(10) Before an authorized person gives any direction under subsection (1) (other than subsection (1)(iii)) to any corporation-

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

(11) The Commission may authorize in writing any person as an authorized person for the purposes of this section.

(12) The Commission shall furnish an authorized person with a copy of his authorization, and the authorized person, before exercising any power under this section, shall produce a copy of the authorization to the person in respect of whom the power is exercised for inspection.

(13) A person who, without reasonable excuse, fails to comply with a requirement imposed on him by an authorized person under this section commits an offence and is liable-

- (a) on conviction on indictment to a fine of \$200000 and to imprisonment for 1 year; or
- (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

(14) A person who-

- (a) in purported compliance with a requirement imposed on him by an authorized person under this section, produces any record or document or provides or makes an explanation or statement which is false or misleading in a material particular; and
- (b) knows that, or is reckless as to whether, the record or document or the explanation or statement is false or misleading in a material particular,

commits an offence and is liable-

- (i) on conviction on indictment to a fine of \$1000000 and to imprisonment for 2 years; or

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

(15) A person who-

(a) with intent to defraud-

(i) fails to comply with a requirement imposed on him by an authorized person under this section; or

(ii) in purported compliance with a requirement imposed on him by an authorized person under this section, produces any record or document or provides or makes an explanation or statement which is false or misleading in a material particular; or

(b) being an officer or employee of a corporation, with intent to defraud causes or allows the corporation to-

(i) fail to comply with a requirement imposed on it by an authorized person under this section; or

(ii) in purported compliance with a requirement imposed on it by an authorized person under this section, produce any record or document or provide or make an explanation or statement which is false or misleading in a material particular,

commits an offence and is liable-

(i) on conviction on indictment to a fine of \$1000000 and to imprisonment for 7 years; or

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

(16) A person is not excused from complying with a requirement imposed on the person by an authorized person under this section only on the ground that to do so might tend to incriminate the person.

(17) In this section-

"authorized person" (獲授權人) means a person authorized under subsection (11);

"controller" (控制人) means a person who is an indirect controller or a majority shareholder controller as defined in section 2(1) of the Banking Ordinance (Cap 155);

"material time" (關鍵時間) means-

(a) where subsection (1)(a), (b), (c), (d) or (e) applies, the time at which the matter described in such subsection as being suggested by the circumstances referred to in such subsection appears to the Commission as occurring; or

(b) where subsection (1)(f) applies, the time at which the matter in respect of the investigation of which the Commission decides to provide assistance under section 186 appears to the Commission as occurring;

"relevant time" (有關時間)-

(a) in relation to a corporation which is listed, means any time since the formation of the corporation; or

(b) in relation to a corporation which was listed, means any time since the formation of the corporation but before the corporation ceased to remain listed.

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Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number: L.N. 12 of 2003
Section:	182	Heading:	Investigations	Version Date: 01/04/2003

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).

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Chapter: 571 Title: SECURITIES AND FUTURES ORDINANCE Gazette Number: L.N. 12 of 2003
Section: 183 Heading: **Conduct of investigations** Version Date: 01/04/2003

(1) The person under investigation or a person whom the investigator has reasonable cause to believe has in his possession any record or document which contains, or which is likely to contain, information relevant to an investigation under section 182, or whom the investigator has reasonable cause to believe otherwise has such information in his possession, shall-

- (a) produce to the investigator, within the time and at the place the investigator reasonably requires in writing, any record or document specified by the investigator which is, or may be, relevant to the investigation and which is in his possession;
- (b) if required by the investigator, give the investigator an explanation or further particulars in respect of any record or document produced under paragraph (a);
- (c) attend before the investigator at the time and place the investigator reasonably requires in writing, and answer any question relating to the matters under investigation that the investigator may raise with him; and
- (d) give the investigator all assistance in connection with the investigation which he is reasonably able to give, including responding to any written question raised by the investigator.

(2) An investigator may in writing require the person giving or making an explanation, particulars, answer or statement under this section to verify within a reasonable period specified in the requirement the explanation, particulars, answer or statement by statutory declaration, which may be taken by the investigator.

(3) If a person does not give or make an explanation, particulars, answer or statement in accordance with a requirement under this section for the reason that the explanation, particulars, answer or statement was not within his knowledge or in his possession, an investigator may in writing require the person to verify within a reasonable period specified in the requirement by statutory declaration, which may be taken by the investigator, that he was unable to comply or fully comply (as the case may be) with the requirement for that reason.

(4) Neither section 182 nor this section shall be construed as requiring an authorized financial institution to disclose any information or produce any record or document relating to the affairs of a customer to the investigator unless-

- (a) the customer is a person whom the investigator has reasonable cause to believe may be able to give information relevant to the investigation; and
- (b) the Commission is satisfied, and certifies in writing that it is satisfied, that the

disclosure or production is necessary for the purposes of the investigation.

(5) The investigator may, and if so directed by the Commission shall, make interim reports on his investigation to the Commission, and on the conclusion of his investigation shall make a final report on his investigation to the Commission.

(6) The Commission may, with the consent of the Secretary for Justice, cause a report under this section to be published.

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Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number: L.N. 12 of 2003
Section:	184	Heading:	Offences in relation to investigations	Version Date: 01/04/2003

(1) A person who, without reasonable excuse-

- (a) fails to produce any record or document required to be produced under section 183(1)(a);
- (b) fails to give an explanation or further particulars required under section 183(1)(b);
- (c) fails to attend before the investigator as required under section 183(1)(c);
- (d) fails to answer a question raised by the investigator under section 183(1)(c);
- (e) fails to comply with section 183(1)(d); or
- (f) fails to comply with a requirement under section 183(2) or (3),

commits an offence and is liable-

- (i) on conviction on indictment to a fine of \$200000 and to imprisonment for 1 year; or
- (ii) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

(2) A person-

- (a) who-
 - (i) in purportedly complying with a requirement imposed by the investigator under section 183(1)(a), produces any record or document which is false or misleading in a material particular;
 - (ii) in purportedly complying with a requirement imposed by the investigator under section 183(1)(b), gives any explanation or further particulars which are false or misleading in a material particular;
 - (iii) in purportedly answering any question raised by the investigator under section 183(1)(c), says anything which is false or misleading in a material particular; or
 - (iv) in purportedly responding to any written question raised by the investigator under section 183(1)(d), states anything which is false or misleading in a material particular; and
- (b) who knows that, or is reckless as to whether, the record or document, the

explanation or further particulars, the thing or the statement (as the case may be) is false or misleading in a material particular,

commits an offence and is liable-

- (i) on conviction on indictment to a fine of \$1000000 and to imprisonment for 2 years; or
- (ii) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(3) A person who-

(a) with intent to defraud-

- (i) fails to do anything as described in subsection (1)(a), (b), (c), (d), (e) or (f);
- (ii) in purportedly complying with a requirement imposed by the investigator under section 183(1)(a), produces any record or document which is false or misleading in a material particular;
- (iii) in purportedly complying with a requirement imposed by the investigator under section 183(1)(b), gives any explanation or further particulars which are false or misleading in a material particular;
- (iv) in purportedly answering any question raised by the investigator under section 183(1)(c), says anything which is false or misleading in a material particular; or
- (v) in purportedly responding to any written question raised by the investigator under section 183(1)(d), states anything which is false or misleading in a material particular; or

(b) being an officer or employee of a corporation, with intent to defraud causes or allows the corporation to-

- (i) fail to do anything as described in subsection (1)(a), (b), (c), (d), (e) or (f);
- (ii) in purportedly complying with a requirement imposed by the investigator under section 183(1)(a), produce any record or document which is false or misleading in a material particular;
- (iii) in purportedly complying with a requirement imposed by the investigator under section 183(1)(b), give any explanation or further particulars which are false or misleading in a material particular;
- (iv) in purportedly answering any question raised by the investigator under section 183(1)(c), say anything which is false or misleading in a material particular; or
- (v) in purportedly responding to any written question raised by the investigator under section 183(1)(d), state anything which is false or misleading in a material particular,

commits an offence and is liable-

- (i) on conviction on indictment to a fine of \$1000000 and to imprisonment for 7 years; or
- (ii) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(4) A person is not excused from complying with a requirement imposed on the person by an investigator under section 183 only on the ground that to do so might tend to incriminate the person.

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Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number: L.N. 12 of 2003
Section:	185	Heading:	Application to Court of First Instance relating to non-compliance with requirements under section 179, 180, 181 or 183	Version Date: 01/04/2003

Division 4-Miscellaneous

(1) If a person fails to do anything upon being required to do so by an authorized person under section 179, 180 or 181, or to do anything upon being required to do so by an investigator under section 183(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 excuse 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 knowingly involved in the failure, in the same manner as if he and, where applicable, that other person had been guilty of contempt of court.

(2) An originating summons under subsection (1) shall be in Form No. 10 in Appendix A to the Rules of the High Court (Cap 4 sub. leg. A).

(3) Notwithstanding anything in this section and any other provisions of this Ordinance-

- (a) no proceedings may be instituted against any person for the purposes of subsection (1)(b) in respect of any conduct if-
 - (i) criminal proceedings have previously been instituted against the person under section 179, 180, 181 or 184 in respect of the same conduct; and
 - (ii) (A) those criminal proceedings remain pending; or
(B) by reason of the previous institution of those criminal proceedings, no criminal proceedings may again be lawfully instituted against that person under such section in respect of the same conduct;
- (b) no criminal proceedings may be instituted against any person under section 179, 180, 181 or 184 in respect of any conduct if-
 - (i) proceedings have previously been instituted against the person for the purposes of subsection (1)(b) in respect of the same conduct; and
 - (ii) (A) those proceedings remain pending; or
(B) by reason of the previous institution of those proceedings, no proceedings may again be lawfully instituted against that person for the purposes of such subsection in respect of the same conduct.

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Chapter: 571 Title: SECURITIES AND FUTURES ORDINANCE Gazette Number: L.N. 12 of 2003
Section: 187 Heading: **Use of incriminating evidence in proceedings** Version Date: 01/04/2003

(1) Where-

- (a) an authorized person within the meaning of section 179 requires a person to provide or make an explanation or statement under that section; or
- (b) an investigator requires a person to give an explanation or further particulars or to give an answer to any question under section 183,

the authorized person or the investigator (as the case may be) shall ensure that the person has first been informed or reminded (as the case may be) of the limitations imposed by subsection (2) on the admissibility in evidence of the requirement and of the explanation or statement, the explanation or further particulars, or the question and answer (as the case may be).

(2) Notwithstanding any other provisions of this Ordinance, where-

- (a) an authorized person within the meaning of section 179 requires a person to provide or make an explanation or statement under that section; or
- (b) an investigator requires a person to give an explanation or further particulars or to give an answer to any question under section 183,

and the explanation or statement, the explanation or further particulars, or the answer (as the case may be) might tend to incriminate the person and the person so claims before providing or making the explanation or statement, giving the explanation or further particulars, or giving the answer (as the case may be), then the requirement as well as the explanation or statement, the explanation or further particulars, or the question and answer (as the case may be) shall not be admissible in evidence against the person in criminal proceedings in a court of law other than those in which the person is charged with an offence under section 179(13), (14) or (15) or 184, or under section 219(2) (a), 253(2)(a) or 254(6)(a) or (b), or under Part V of the Crimes Ordinance (Cap 200), or for perjury, in respect of the explanation or statement, the explanation or further particulars, or the answer (as the case may be).

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Chapter: 571 Title: SECURITIES AND FUTURES ORDINANCE Gazette Number: L.N. 12 of 2003
Section: 191 Heading: Magistrate's warrants Version Date: 01/04/2003

(1) If a magistrate is satisfied on information on oath laid by-

- (a) an employee of the Commission or, where the exercise of powers under section 180 is concerned, of the relevant authority within the meaning of that section; or
- (b) an authorized person within the meaning of section 179 or 180, or an investigator,

that there are reasonable grounds to suspect that there is, or is likely to be, on premises specified in the information any record or document which may be required to be produced under this Part, the magistrate may issue a warrant authorizing a person specified in the warrant, a police officer, and such other persons as may be necessary to assist in the execution of the warrant to-

- (i) enter the premises so specified, if necessary by force, at any time within the period of 7 days beginning on the date of the warrant; and
- (ii) search for, seize and remove any record or document which the person specified in the warrant or police officer has reasonable cause to believe may be required to be produced under this Part.

(2) A person specified in, or a police officer or any other person authorized by, a warrant issued under subsection (1) may-

- (a) require any person on the premises specified in the warrant whom he has reasonable cause to believe to be employed in connection with a business which is, or which has been, conducted on the premises to produce for examination any record or document which is in the possession of the person and which he has reasonable cause to believe may be required to be produced under this Part;
- (b) prohibit any person found on the premises specified in the warrant from-
 - (i) removing from the premises any record or document required to be produced under paragraph (a);
 - (ii) erasing, adding to or otherwise altering an entry or other particulars contained in, or otherwise interfering in any manner with, or causing or permitting any other person to interfere with, the record or document;
- (c) take, in relation to any record or document required to be produced under

paragraph (a), any other step which may appear necessary for preserving it and preventing interference with it.

(3) Any record or document removed under this section may be retained for any period not exceeding 6 months beginning on the day of its removal or, where the record or document is or may be required for criminal proceedings or for any proceedings under this Ordinance, for such longer period as may be necessary for the purposes of those proceedings.

(4) Where a person removes any record or document under this section, he shall as soon as reasonably practicable thereafter give a receipt for it, and he may permit any person who would be entitled to inspect it but for the removal to inspect the record or document and to make copies or otherwise record details of it at all reasonable times.

(5) Section 102 of the Criminal Procedure Ordinance (Cap 221) applies to any property which has by virtue of this section come into the possession of the Commission or, where the exercise of powers under section 180 is concerned, of the relevant authority within the meaning of that section, as it applies to property which has come into the possession of the police.

(6) A person commits an offence if he-

(a) without reasonable excuse, fails to comply with a requirement or prohibition under subsection (2); or

(b) obstructs a person exercising a power conferred by subsection (2).

(7) A person who commits an offence under subsection (6) is liable-

(a) on conviction on indictment to a fine of \$1000000 and to imprisonment for 2 years; or

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

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Chapter:	32	Title:	COMPANIES ORDINANCE	Gazette Number:	
Section:	145	Heading:	Production of documents, and evidence, on investigation	Version Date:	30/06/1997

(3A) A person is not excused from answering a question put to him under this section by an inspector on the ground that the answer might tend to incriminate him but, where such person claims, before answering the question, that the answer might tend to incriminate him, neither the question nor the answer shall be admissible in evidence against him in criminal proceedings other than proceedings in relation to a charge of perjury or proceedings for an offence under section 36 of the Crimes Ordinance (Cap 200) in respect of the answer. (Added 6 of 1984 s. 99. Amended 72 of 1994 s. 2)

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Chapter:	383	Title:	HONG KONG BILL OF RIGHTS ORDINANCE	Gazette Number:	
Section:	8	Heading:	Hong Kong Bill of Rights	Version Date:	30/06/1997

PART II

THE HONG KONG BILL OF RIGHTS

Article 11

Rights of persons charged with or
convicted of criminal offence

(2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality-

(g) not to be compelled to testify against himself or to confess guilt.

[cf. ICCPR Art. 14.2 to 7]