

Bills Committee on Securities and Futures (Amendment) Bill 2013

Clause-by-clause Examination

Members are invited to examine the English mark-up version of the relevant parts of the Bill at **Annex**, with the Administration's proposed Committee Stage Amendments ("CSAs") marked thereto. The reasons for these amendments are set out in the footnotes.

Financial Services and the Treasury Bureau
13 February 2014

Clause 9**101A. Interpretation of Part IIIA**

In this Part—

clearing obligation (結算責任)—

- (a) in relation to a prescribed person that is an authorized financial institution incorporated in Hong Kong, means—
 - (i) an obligation imposed by section 101C(1); or
 - (ii) an obligation imposed by section 101C(3); and
- (b) in relation to any other prescribed person, means an obligation imposed by section 101C(1);

clearing rules (《結算規則》) means rules made under section 101L;

deregistration (撤銷登記), in relation to a specific class, means the removal of—

- (a) a name under section 101S(1); or
- (b) an entry under section 101S(2);

designated CCP (指定中央對手方), in relation to a class or description of specified OTC derivative transactions, means a person designated as a central counterparty under section 101I for that class or description;

designated trading platform (指定交易平台), in relation to a class or description of specified OTC derivative transactions, means a person designated as a trading platform under section 101J for that class or description;

designation rules (《指定規則》) means rules made under section 101N;

notification (具報) means a notification required to be given for the purposes of section 101O(2);

notification level (具報水平), in relation to a specific class, means the threshold prescribed—

- (a) for that specific class; and
- (b) by rules made under section 101W(a)(i);

notification requirement (具報規定) means the requirement imposed by section 101O(2);

notification rules (《具報規則》) means rules made under section 101W;

prescribed fee (訂明費用) means a fee prescribed by rules made under section 395;

prescribed manner (訂明方式)—

- (a) in relation to an application for designation as a central counterparty, means in the manner prescribed by rules made under section 101N(a)(i); and
- (b) in relation to an application for designation as a trading platform, means in the manner prescribed by rules made under section 101N(a)(ii);

prescribed person (訂明人士)—

- (a) in relation to the reporting obligation, means—
 - (i) an authorized financial institution;
 - (ii) an approved money broker;
 - (iii) a licensed corporation; or
 - (iv) a person of a class or description specified in the reporting rules as being subject to the reporting obligation;
- (b) in relation to the clearing obligation, means—

- (i) an authorized financial institution;
 - (ii) an approved money broker;
 - (iii) a licensed corporation; or
 - (iv) a person of a class or description specified in the clearing rules as being subject to the clearing obligation; ~~and~~
- (c) in relation to the trading obligation, means—
- (i) an authorized financial institution;
 - (ii) an approved money broker;
 - (iii) a licensed corporation; or
 - (iv) a person of a class or description specified in the trading rules as being subject to the trading obligation; and
- (d) in relation to the record keeping obligation, means—
- (i) an authorized financial institution;
 - (ii) an approved money broker;
 - (iii) a licensed corporation; or
 - (iv) a person of a class or description specified in the record keeping rules as being subject to the record keeping obligation¹;
- record keeping obligation (備存紀錄責任)—**

¹ A record-keeping obligation is introduced under section 101DA – see footnote 9 below. This amendment is consequential to that addition. It echoes the existing structure of the Bill whereby the term “prescribed person” is defined by reference to each mandatory obligation.

_____ (a) in relation to a prescribed person that is an authorized financial institution incorporated in Hong Kong, means—

_____ (i) an obligation imposed by section 101DA(1);
or

_____ (ii) an obligation imposed by section 101DA(3);
and

_____ (b) in relation to any other prescribed person, means an obligation imposed by section 101DA(1);²

record keeping rules (《備存紀錄規則》) means rules made under section 101MA;³

registered SIP (已登記系統重要參與者) means a person whose name appears on the SIP register;

reporting obligation (匯報責任)—

(a) in relation to a prescribed person that is an authorized financial institution incorporated in Hong Kong, means—

- (i) an obligation imposed by section 101B(1); or
- (ii) an obligation imposed by section 101B(3);
and

(b) in relation to any other prescribed person, means an obligation imposed by section 101B(1);

² This amendment is consequential to the record keeping obligation under section 101DA. It echoes the existing structure of the Bill whereby each mandatory obligation is separately defined.

³ This amendment is consequential to the record keeping obligation under section 101DA. It echoes the existing structure of the Bill whereby rules made in respect of each mandatory obligation are separately defined.

reporting rules (《匯報規則》) means rules made under section 101K;

SIP register (系統重要參與者登記冊) means the register maintained under section 101P(1);

specific class (特定類別) means a particular class or description of OTC derivative transactions;

specified OTC derivative transaction (指明場外衍生工具交易)—

- (a) in relation to the reporting obligation, means a transaction specified in the reporting rules for the purposes of that obligation;
- (b) in relation to the clearing obligation, means a transaction specified in the clearing rules for the purposes of that obligation; ~~and~~
- (c) in relation to the trading obligation, means a transaction specified in the trading rules for the purposes of that obligation; and

(d) in relation to the record keeping obligation, means a transaction specified in the record keeping rules for the purposes of that obligation;⁴

systemically important participant (系統重要參與者) means a person—

- (a) to whom section 101O(1) applies; and
- (b) whose position in respect of a specific class has reached the notification level;

trading obligation (交易責任)—

⁴ This amendment is consequential to the record keeping obligation under section 101DA. It echoes the existing structure of the Bill whereby the term “specified OTC derivative transaction” is defined by reference to each mandatory obligation.

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- (a) in relation to a prescribed person that is an authorized financial institution incorporated in Hong Kong, means—
 - (i) an obligation imposed by section 101D(1); or
 - (ii) an obligation imposed by section 101D(3); and
 - (b) in relation to any other prescribed person, means an obligation imposed by section 101D(1);

trading rules (《交易規則》) means rules made under section 101M;

underlying subject matter (標的項目)—

- (a) in relation to a transaction in an OTC derivative product that falls within subsection (1)(a)(i) of section 1A of Part 1 of Schedule 1, means any type or combination of types of securities, commodity, index, property, interest rate, currency exchange rate or futures contract;
- (b) in relation to a transaction in an OTC derivative product that falls within subsection (1)(a)(ii) of section 1A of Part 1 of Schedule 1, means any basket of more than one type, or any combination of types, of securities, commodity, index, property, interest rate, currency exchange rate or futures contract; and
- (c) in relation to a transaction in an OTC derivative product that falls within subsection (1)(a)(iii) of section 1A of Part 1 of Schedule 1, means any specified event or events (excluding an event or events relating only to the issuer or guarantor of the instrument or to both the issuer and the guarantor).

Clause 9**Division 2—Reporting, ~~Clearing and Trading~~
Clearing, Trading and Record Keeping⁵ Obligations****101B. Reporting obligation**

- (1) A prescribed person must report an OTC derivative transaction to which subsection (2) applies—
 - (a) to the Monetary Authority; and
 - (b) in accordance with the reporting rules.
- (2) This subsection applies to an OTC derivative transaction that—
 - (a) is specified in the reporting rules—
 - (i) in relation to the prescribed person; and
 - (ii) as a transaction that is required to be reported to the Monetary Authority;
 - (b) falls within the circumstances and the criteria specified in those rules—
 - (i) in relation to the prescribed person; and
 - (ii) for the application of the requirement to report referred to in paragraph (a)(ii); and
 - (c) does not fall within the circumstances specified in those rules—
 - (i) in relation to the prescribed person; and
 - (ii) as circumstances in which the requirement to report is taken to have been complied with.

⁵ This heading is amended consequential to the record keeping obligation.

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- (3) In addition, a prescribed person that is an authorized financial institution incorporated in Hong Kong must ensure that a subsidiary of that institution specified under subsection (5) complies in relation to an OTC derivative transaction with the requirement set out in subsection (4).
 - (4) The requirement is that the subsidiary reports to the Monetary Authority, in accordance with the reporting rules, an OTC derivative transaction—
 - (a) to which the subsidiary is a counterparty; and
 - (b) that is specified in those rules as a transaction to which subsection (3) applies.
 - (5) The Monetary Authority may, by a written notice given to an authorized financial institution incorporated in Hong Kong, specify for the purposes of subsection (3)—
 - (a) a particular subsidiary;
 - (b) more than one subsidiary; or
 - (c) subsidiaries generally.
 - (6) The Monetary Authority may specify under subsection (5) a subsidiary incorporated outside Hong Kong or a subsidiary incorporated in Hong Kong.

(7) Subject to an express agreement to the contrary by the parties to the transaction, a contravention of the reporting obligation in relation to an OTC derivative transaction does not of itself invalidate the transaction or

affect any rights or obligations arising under, or relating to, the transaction.⁶

⁶ This amendment is proposed in response to the market feedback. The amendment aims to expressly clarify that even if a transaction contravenes the mandatory reporting, clearing, trading or record keeping obligation, this should not of itself affect the validity and enforceability of the transaction.

Clause 9**101C. Clearing obligation**

- (1) A prescribed person must clear an OTC derivative transaction to which subsection (2) applies—
 - (a) with a designated CCP; and
 - (b) in accordance with the clearing rules.
- (2) This subsection applies to an OTC derivative transaction that—
 - (a) is specified in the clearing rules—
 - (i) in relation to the prescribed person; and
 - (ii) as a transaction that is required to be cleared with a designated CCP;
 - (b) falls within the circumstances and the criteria specified in those rules—
 - (i) in relation to the prescribed person; and
 - (ii) for the application of the requirement to clear referred to in paragraph (a)(ii); and
 - (c) does not fall within the circumstances specified in those rules—
 - (i) in relation to the prescribed person; and
 - (ii) as circumstances in which the requirement to clear is taken to have been complied with.
- (3) In addition, a prescribed person that is an authorized financial institution incorporated in Hong Kong must ensure that a subsidiary of that institution specified under subsection (5) complies in relation to an OTC derivative transaction with the requirement set out in subsection (4).

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- (4) The requirement is that the subsidiary clears with a designated CCP, in accordance with the clearing rules, an OTC derivative transaction—
- (a) to which the subsidiary is a counterparty; and
 - (b) that is specified in those rules as a transaction to which subsection (3) applies.
- (5) The Monetary Authority may, by a written notice given to an authorized financial institution incorporated in Hong Kong, specify for the purposes of subsection (3)—
- (a) a particular subsidiary;
 - (b) more than one subsidiary; or
 - (c) subsidiaries generally.
- (6) The Monetary Authority may specify under subsection (5) a subsidiary incorporated outside Hong Kong or a subsidiary incorporated in Hong Kong.
- (7) Subject to an express agreement to the contrary by the parties to the transaction, a contravention of the clearing obligation in relation to an OTC derivative transaction does not of itself invalidate the transaction or affect any rights or obligations arising under, or relating to, the transaction.⁷

⁷ See footnote 6 above.

Clause 9**101D. Trading obligation**

- (1) A prescribed person must execute an OTC derivative transaction to which subsection (2) applies—
 - (a) only on a designated trading platform; and
 - (b) in accordance with the trading rules.
- (2) This subsection applies to an OTC derivative transaction that—
 - (a) is specified in the trading rules—
 - (i) in relation to the prescribed person; and
 - (ii) as a transaction that is required to be executed only on a designated trading platform;
 - (b) falls within the circumstances and the criteria specified in those rules—
 - (i) in relation to the prescribed person; and
 - (ii) for the application of the requirement to execute as described in paragraph (a)(ii); and
 - (c) does not fall within the circumstances specified in those rules—
 - (i) in relation to the prescribed person; and
 - (ii) as circumstances in which the requirement to execute as described in subsection (1) is taken to have been complied with.
- (3) In addition, a prescribed person that is an authorized financial institution incorporated in Hong Kong must ensure that a subsidiary of that institution specified under subsection (5) complies in relation to an OTC derivative transaction with the requirement set out in subsection (4).

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- (4) The requirement is that the subsidiary executes only on a designated trading platform and in accordance with the trading rules an OTC derivative transaction—
- (a) to which the subsidiary is a counterparty; and
 - (b) that is specified in those rules as a transaction to which subsection (3) applies.
- (5) The Monetary Authority may, by a written notice given to an authorized financial institution incorporated in Hong Kong, specify for the purposes of subsection (3)—
- (a) a particular subsidiary;
 - (b) more than one subsidiary; or
 - (c) subsidiaries generally.
- (6) The Monetary Authority may specify under subsection (5) a subsidiary incorporated outside Hong Kong or a subsidiary incorporated in Hong Kong.
- (7) Subject to an express agreement to the contrary by the parties to the transaction, a contravention of the trading obligation in relation to an OTC derivative transaction does not of itself invalidate the transaction or affect any rights or obligations arising under, or relating to, the transaction.⁸

101DA. Record keeping obligation

- (1) A prescribed person must keep, in accordance with the record keeping rules, records relating to an OTC derivative transaction to which subsection (2) applies.
- (2) This subsection applies to an OTC derivative transaction that—

⁸ See footnote 6 above.

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- _____ (a) is specified in the record keeping rules—
 - _____ (i) in relation to the prescribed person; and
 - _____ (ii) as a transaction the records of which are required to be kept;
 - _____ (b) falls within the circumstances and criteria specified in those rules—
 - _____ (i) in relation to the prescribed person; and
 - _____ (ii) for the application of the requirement to keep record referred to in paragraph (a)(ii); and
 - _____ (c) does not fall within the circumstances specified in those rules—
 - _____ (i) in relation to the prescribed person; and
 - _____ (ii) as circumstances in which the requirement to keep record is taken to have been complied with.
 - _____ (3) In addition, a prescribed person that is an authorized financial institution incorporated in Hong Kong must ensure that a subsidiary of that institution specified under subsection (5) complies in relation to an OTC derivative transaction with the requirement set out in subsection (4).
 - _____ (4) The requirement is that the subsidiary keeps, in accordance with the record keeping rules, records relating to an OTC derivative transaction—
 - _____ (a) to which the subsidiary is a counterparty; and
 - _____ (b) that is specified in those rules as a transaction to which subsection (3) applies.
 - _____ (5) The Monetary Authority may, by a written notice given to an authorized financial institution incorporated in Hong Kong, specify for the purposes of subsection (3)—

- _____ (a) a particular subsidiary;
- _____ (b) more than one subsidiary; or
- _____ (c) subsidiaries generally.
- _____ (6) The Monetary Authority may specify under subsection (5) a subsidiary incorporated outside Hong Kong or a subsidiary incorporated in Hong Kong.
- _____ (7) A person specified in subsection (9)(a) must, when requested by the Commission—
 - _____ (a) give the Commission access to the records kept under this section; and
 - _____ (b) produce the records to the Commission within the time and at the place specified by the Commission.
- _____ (8) A person specified in subsection (9)(b) must, when requested by the Monetary Authority—
 - _____ (a) give the Monetary Authority access to the records kept under this section; and
 - _____ (b) produce the records to the Monetary Authority within the time and at the place specified by the Monetary Authority.
- _____ (9) The person specified—
 - _____ (a) for the purposes of subsection (7) is—
 - _____ (i) a prescribed person that is a licensed corporation; or
 - _____ (ii) a prescribed person that is a person of a class or description specified in the record keeping rules as being subject to the record keeping obligation; and
 - _____ (b) for the purposes of subsection (8) is—

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- (i) a prescribed person that is an authorized financial institution; or
 - (ii) a prescribed person that is an approved money broker.
- (10) Subject to an express agreement to the contrary by the parties to the transaction, a contravention of the record keeping obligation in relation to an OTC derivative transaction does not of itself invalidate the transaction or affect any rights or obligations arising under, or relating to, the transaction.⁹

⁹ This section introduces a record keeping obligation which will supplement each of the mandatory reporting, clearing and trading obligations. The record keeping obligation aims to better ensure that adequate records are maintained to evidence compliance with the mandatory obligations, and that these will be accessible by the regulators upon request for examination, investigation or other regulatory purposes. The introduction of the record keeping obligation is in line with the practices of other major jurisdictions. The structure of this section 101DA largely follows the structure of sections 101B, 101C and 101D in the Bill which set out the mandatory reporting, clearing and trading obligations, including provisions similar to section 101B(7) added per these Committee Stage Amendments (“CSAs”) – see footnote 6 above. In line with the existing structure of the Bill, details of the record keeping obligation will be prescribed by rules made by the Securities and Futures Commission (“SFC”) under section 101MA introduced in the CSAs.

Clause 9**101E. Application by Commission to Court of First Instance for contravention of obligations**

- (1) If a prescribed person that is not an authorized financial institution or an approved money broker contravenes the reporting obligation, clearing ~~obligation or trading obligation, trading obligation or record keeping~~¹⁰ obligation, the Commission may apply to the Court of First Instance in respect of the contravention.
- (2) The application must be made by originating summons that is in Form No. 10 in Appendix A to the Rules of the High Court (Cap. 4 sub. leg. A).
- (3) The Court of First Instance may inquire into the case and, if satisfied that there is no reasonable excuse for the contravention, impose a financial penalty not exceeding \$5,000,000 on the prescribed person.

¹⁰ This amendment is consequential to the record keeping obligation under section 101DA. It ensures that breach of the record keeping obligation triggers the same penalty as breach of the mandatory reporting, clearing and trading obligations.

Clause 9**101F. Application by Monetary Authority to Court of First Instance for contravention of obligations**

- (1) If a prescribed person that is an authorized financial institution or an approved money broker contravenes the reporting obligation, clearing ~~obligation or trading obligation, trading obligation or record keeping~~¹¹ obligation, the Monetary Authority may apply to the Court of First Instance in respect of the contravention.
- (2) The application must be made by originating summons that is in Form No. 10 in Appendix A to the Rules of the High Court (Cap. 4 sub. leg. A).
- (3) The Court of First Instance may inquire into the case and, if satisfied that there is no reasonable excuse for the contravention, impose a financial penalty not exceeding \$5,000,000 on the prescribed person.

¹¹ See footnote 10 above.

Clause 9**101G. Exemptions from obligations**

- (1) On application by a prescribed person and on payment of the prescribed fee, the Commission may, with the consent of the Monetary Authority—
 - (a) exempt the person from one or more of the following—
 - (i) the reporting obligation;
 - (ii) the clearing obligation;
 - (iii) the trading obligation; ~~and~~
 - (iv) the record keeping obligation; and¹²
 - (b) on granting the exemption, impose conditions.
- (2) The Commission may, with the consent of the Monetary Authority—
 - (a) suspend or withdraw an exemption on—
 - (i) the ground that a condition has not been complied with; or
 - (ii) any other ground that the Commission considers appropriate; or
 - (b) amend any condition.
- (3) The Commission must publish on the Internet particulars that it considers appropriate of an exemption granted, suspended or withdrawn under this section.

¹² This amendment is consequential to the record keeping obligation under section 101DA. It ensures that powers of exemption conferred by section 101G extend to the record keeping obligation as well.

Clause 9**101H. Guidelines on exemptions**

- (1) The Commission may, with the consent of the Monetary Authority and after consultation with the Financial Secretary, publish guidelines for granting exemptions from the reporting obligation, clearing ~~obligation or trading obligation, trading obligation or record keeping~~¹³ obligation.
- (2) The Commission—
 - (a) may exercise its powers under section 101G only after guidelines have been published; and
 - (b) must have regard to the published guidelines when exercising its powers under section 101G.
- (3) Guidelines published under subsection (1) are not subsidiary legislation.

¹³ This amendment is consequential to the record keeping obligation under section 101DA. It ensures that guidelines on exemption may cover exemptions from the record keeping obligation as well.

Clause 9**101K. Rule making power—reporting obligation**

- (1) The Commission may, with the consent of the Monetary Authority and after consultation with the Financial Secretary, make rules—
 - (a) generally for the purposes of the reporting obligation; and
 - (b) without limiting paragraph (a), to prescribe the particular matters set out in this section.
- (2) Rules made under this section—
 - (a) may specify for the purposes of paragraph (a)(iv) of the definition of *prescribed person* in section 101A, a class or description of persons; and
 - (b) must provide in relation to a person of such a class or description that the person is subject to the reporting obligation only if the person is a counterparty to a specified OTC derivative transaction.
- (3) Rules made under this section—
 - (a) may specify generally, or with reference to a class or description of transactions, the OTC derivative transactions that are subject to the reporting obligation; and
 - (b) without limiting paragraph (a), may provide that an OTC derivative transaction is subject to the reporting obligation—
 - (i) even if a counterparty or more than one counterparty is a person outside Hong Kong;
 - (ii) except in relation to a person of a class or description specified under subsection (2),

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- even if a prescribed person is not a counterparty to the transaction; or
- (iii) even if the transaction is entered into or conducted wholly or partially outside Hong Kong.
- (4) Without limiting subsection (3), OTC derivative transactions may be specified under that subsection with reference to any factor relating to an OTC derivative transaction, including—
- (a) the underlying subject matter of the transaction;
 - (b) the features or characteristics of the transaction; and
 - (c) the persons involved in the transaction.
- (5) Rules made under this section may specify—
- (a) the circumstances relating to a specified OTC derivative transaction in which the reporting obligation—
 - (i) applies;
 - (ii) does not apply; or
 - (iii) is taken to have been complied with;
 - (b) the criteria (including thresholds) for the application of the reporting obligation; and
 - (c) different circumstances and criteria for different prescribed persons or different OTC derivative transactions.
- (6) Rules made under this section may provide that a prescribed person is subject to the reporting obligation—
- (a) in relation to OTC derivative transactions entered into before the date on which the reporting obligation started to apply—

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- (i) to the class or description of persons to which the person belongs; or
 - (ii) in relation to the class or description of OTC derivative transactions to which the transaction belongs; and
 - (b) if the OTC derivative transaction referred to in paragraph (a)—
 - (i) belongs to a class or description of transactions that is specified by rules made under this section for the purposes of the reporting obligation; and
 - (ii) if at the time the reporting obligation started to apply to the person or the transaction, the transaction is still outstanding within the meaning given by rules made under this subsection.
- (7) Rules made under this section may specify—
- (a) the form and manner in which a specified OTC derivative transaction is to be reported to the Monetary Authority;
 - (b) without limiting paragraph (a), that any requirement as to the form and manner of reporting is complied with if the specified OTC derivative transaction is reported by means of an electronic system operated by or on behalf of¹⁴ the Monetary Authority for submitting and receiving reports on

¹⁴ This amendment enables the Monetary Authority (“MA”) to retain the flexibility in the longer run to outsource various aspects of the operational duties of its trade repository (“TR”), for example, the maintenance of computer systems.

OTC derivative transactions for the purposes of section 101B;

- (c) any documents, information or particulars that must be submitted for complying with the reporting obligation;
 - (d) the period within which the reporting obligation must be complied with; and
 - (e) any other matter relating to the procedure for complying with the reporting obligation.
- (8) Rules made under this section may specify—
- (a) that a prescribed person may report a specified OTC derivative transaction to the Monetary Authority directly or through a third party; and
 - (b) that a subsidiary specified under section 101B(5) that is a counterparty to a specified OTC derivative transaction may report the transaction to the Monetary Authority directly or through a third party; and.
 - ~~(c) where a specified OTC derivative transaction is reported through a third party, the circumstances in~~

~~which a prescribed person is liable for a failure to comply with the reporting obligation.~~¹⁵

101KA. Rule making power—fees

(1) The Chief Executive in Council may, after consultation with the Monetary Authority, make rules to require and provide for the payment to the Monetary Authority of the fees for using the electronic system referred to in section 101K(7)(b).

(2) Rules made under this section may provide—

(a) that the amount of any fees may be fixed by reference to a scale set out in the rules;

(b) for the payment of different fees by or in relation to persons or cases of different classes or descriptions;

(c) for the time and manner of payment of the fees;

(d) that the payment of any fees may, either generally or in a particular case, be reduced, waived or refunded;

(e) that the Monetary Authority may recover any outstanding amount of the fees as a civil debt due to the Monetary Authority; and

¹⁵ The amendment to sections 101K(8)(c), 101L(6)(f) and 101(6)(e) aim to ensure that rules made by the SFC under sections 101K, 101L and 101M respectively in the Bill do not interfere with the Court's power under sections 101E and 101F in the Bill. Under sections 101E and 101F, a prescribed person is liable for a contravention if the Court is satisfied that there is no reasonable excuse for it. However, if rules are made under sections 101K(8)(c), 101L(6)(f) and 101M(6)(e) prescribing circumstances under which a person is to be held liable, then this would seem to interfere with the Court's power to determine whether there is no reasonable excuse for the breach.

(f) for any other matters relating or incidental to a matter mentioned in paragraph (a), (b), (c), (d) or (e).

(3) This section is in addition to and not in derogation of sections 29 and 29A of the Interpretation and General Clauses Ordinance (Cap. 1).¹⁶

¹⁶ This addition is to enable the Chief Executive in Council, after consultation with the MA, to make rules to prescribe fees charged by the MA for the use of its TR.

Clause 9**101L. Rule making power—clearing obligation**

- (1) The Commission may, with the consent of the Monetary Authority and after consultation with the Financial Secretary, make rules—
 - (a) generally for the purposes of the clearing obligation; and
 - (b) without limiting paragraph (a), to prescribe the particular matters set out in this section.
- (2) Rules made under this section—
 - (a) may specify for the purposes of paragraph (b)(iv) of the definition of *prescribed person* in section 101A, a class or description of persons; and
 - (b) must provide in relation to a person of such a class or description that the person is subject to the clearing obligation only if the person is a counterparty to a specified OTC derivative transaction.
- (3) Rules made under this section—
 - (a) may specify generally, or with reference to a class or description of transactions, the OTC derivative transactions that are subject to the clearing obligation; and
 - (b) without limiting paragraph (a), may provide that an OTC derivative transaction is subject to the clearing obligation—
 - (i) even if a counterparty or more than one counterparty is a person outside Hong Kong;
 - (ii) except in relation to a person of a class or description specified under subsection (2),

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- even if a prescribed person is not a counterparty to the transaction; or
- (iii) even if the transaction is entered into or conducted wholly or partially outside Hong Kong.
- (4) Without limiting subsection (3), OTC derivative transactions may be specified under that subsection with reference to any factor relating to an OTC derivative transaction, including—
- (a) the underlying subject matter of the transaction;
 - (b) the features or characteristics of the transaction; and
 - (c) the persons involved in the transaction.
- (5) Rules made under this section may specify—
- (a) the circumstances relating to a specified OTC derivative transaction in which the clearing obligation—
 - (i) applies;
 - (ii) does not apply; or
 - (iii) is taken to have been complied with;
 - (b) the criteria (including thresholds) for the application of the clearing obligation; and
 - (c) different circumstances and criteria for different prescribed persons or different OTC derivative transactions.
- (6) Rules made under this section may specify—
- (a) the manner in which a specified OTC derivative transaction is to be cleared with a designated CCP;

- (b) the period within which the clearing obligation must be complied with;
- (c) the circumstances in which a specified OTC derivative transaction that is cleared otherwise than with a designated CCP is treated, for the purposes of the clearing obligation, as having been cleared with a designated CCP;
- (d) that a prescribed person may clear a specified OTC derivative transaction with a designated CCP directly or through a third party; and
- (e) that a subsidiary specified under section 101C(5) that is a counterparty to a specified OTC derivative transaction may clear the transaction with a designated CCP directly or through a third party; and.
- ~~— (f) where a specified OTC derivative transaction is cleared with a designated CCP through a third party, the circumstances in which a prescribed person is liable for a failure to comply with the clearing obligation.~~¹⁷

¹⁷ See footnote 15 above.

Clause 9**101M. Rule making power—trading obligation**

- (1) The Commission may, with the consent of the Monetary Authority and after consultation with the Financial Secretary, make rules—
 - (a) generally for the purposes of the trading obligation; and
 - (b) without limiting paragraph (a), to prescribe the particular matters set out in this section.
- (2) Rules made under this section—
 - (a) may specify for the purposes of paragraph (c)(iv) of the definition of *prescribed person* in section 101A, a class or description of persons; and
 - (b) must provide in relation to a person of such a class or description that the person is subject to the trading obligation only if the person is a counterparty to a specified OTC derivative transaction.
- (3) Rules made under this section—
 - (a) may specify generally, or with reference to a class or description of transactions, the OTC derivative transactions that are subject to the trading obligation; and
 - (b) without limiting paragraph (a), may provide that an OTC derivative transaction is subject to the trading obligation—
 - (i) even if a counterparty or more than one counterparty is a person outside Hong Kong;
 - (ii) except in relation to a person of a class or description specified under subsection (2),

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- even if a prescribed person is not a counterparty to the transaction; or
- (iii) even if the transaction is entered into or conducted wholly or partially outside Hong Kong.
- (4) Without limiting subsection (3), OTC derivative transactions may be specified under that subsection with reference to any factor relating to an OTC derivative transaction, including—
- (a) the underlying subject matter of the transaction;
 - (b) the features or characteristics of the transaction; and
 - (c) the persons involved in the transaction.
- (5) Rules made under this section may specify—
- (a) the circumstances relating to a specified OTC derivative transaction in which the trading obligation—
 - (i) applies;
 - (ii) does not apply; or
 - (iii) is taken to have been complied with;
 - (b) the criteria (including thresholds) for the application of the trading obligation; and
 - (c) different circumstances and criteria for different prescribed persons or different OTC derivative transactions.
- (6) Rules made under this section may specify—
- (a) the manner in which a specified OTC derivative transaction is to be executed on a designated trading platform;

- (b) the circumstances in which a specified OTC derivative transaction that is executed otherwise than on a designated trading platform is treated, for the purposes of the trading obligation, as having been executed on a designated trading platform;
- (c) that a prescribed person may execute a specified OTC derivative transaction on a designated trading platform directly or through a third party; and
- (d) that a subsidiary specified under section 101D(5) that is a counterparty to a specified OTC derivative transaction may execute the transaction on a designated trading platform directly or through a third party; and.

~~— (e) where a specified OTC derivative transaction is executed on a designated trading platform through a third party, the circumstances in which a prescribed person is liable for a failure to comply with the trading obligation.~~¹⁸

101MA. Rule making power—record keeping obligation

(1) The Commission may, with the consent of the Monetary Authority and after consultation with the Financial Secretary, make rules—

(a) generally for the purposes of the record keeping obligation; and

(b) without limiting paragraph (a), to prescribe the particular matters set out in this section.

(2) Rules made under this section—

¹⁸ See footnote 15 above.

_____ (a) may specify for the purposes of paragraph (d)(iv) of the definition of *prescribed person* in section 101A, a class or description of persons; and

_____ (b) must provide in relation to a person of such a class or description that the person is subject to the record keeping obligation only if the person is a counterparty to a specified OTC derivative transaction.

_____ (3) Rules made under this section may specify—

_____ (a) generally, or with reference to a class or description of transactions, the OTC derivative transactions that are subject to the record keeping obligation;

_____ (b) the records to be kept;

_____ (c) different records to be kept under different circumstances or by different classes or descriptions of prescribed persons;

_____ (d) the manner in which, the location at which and the minimum duration for which the records must be kept;

_____ (e) the circumstances relating to a specified OTC derivative transaction in which the record keeping obligation—

_____ (i) applies;

_____ (ii) does not apply; or

_____ (iii) is taken to have been complied with; and

(f) any other matter relating to the records to be kept.¹⁹

¹⁹ This addition is consequential to the record keeping obligation under section 101DA. It aims to enable the SFC to make rules prescribing the details of the record keeping obligation. It echoes the existing structure of the Bill whereby details of each of the mandatory reporting, clearing and trading obligations may be prescribed by rules.

Clause 9**101O. Persons who must notify positions in OTC derivative transactions**

- (1) This section applies to a person who—
- (a) is not—
 - (i) an authorized financial institution;
 - (ii) an approved money broker; ~~or~~
 - (iii) a licensed corporation; ~~and~~
 - (iv) a recognized exchange company;
 - (v) a recognized clearing house; or
 - (vi) a person authorized under section 95(2) to provide automated trading services; and²⁰
 - (b) engages in OTC derivative transactions.
- (2) A person to whom this section applies must notify the Commission in accordance with subsection (3) if the person's position in a specific class reaches the notification level.

²⁰ This amendment aims to better clarify the ambit of persons who may fall within the definition of systemically important participant. In particular, the exclusion of recognized exchange companies, recognized clearing houses (“RCHs”) and Part III automated trading services providers is to ensure that these entities do not fall within the ambit of systemically important participant merely because of the nature of their operations. The nature of the operations of recognized exchange companies, RCHs, or Part III automated trading services providers is such that they may hold significant positions in over-the-counter (“OTC”) derivative transactions. However, these operations are already regulated and as part of that regulation they put in place different risk management measures and controls. It is therefore not necessary to capture them under the systemically important participant regime as well.

(2A) For the purposes of subsection (2), a reference to a person's position includes the position of another person to the extent to which the performance of the obligations arising from that other person's position is guaranteed by the person.²¹

- (3) A notification must be given—
 - (a) in writing and within the period prescribed by the notification rules; and
 - (b) in accordance with subsection (4).
- (4) A notification must contain—
 - (a) sufficient information—
 - (i) to identify the systemically important participant;
 - (ii) to identify the specific class to which the notification relates; and
 - (iii) to show that the notification level has been reached; and
 - (b) any information prescribed by the notification rules (including additional information so prescribed, relating to the matters referred to in paragraph (a)).
- (5) A person who without reasonable excuse fails to comply with subsection (2) commits an offence.

²¹ This amendment aims to extend the scope of the positions to be taken into account when determining if a person has reached the notification level for systemically important participants. The objective is to avoid a person circumventing the systemically important participant regime by spreading its positions to subsidiaries and other companies but still retaining the exposure by acting as a guarantor, thereby posing the same systemic risk but avoiding detection and regulation.

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- (6) A person who commits an offence under subsection (5) is liable—
- (a) on conviction on indictment to a fine of \$5,000,000 and to imprisonment for 7 years and, if the offence is a continuing offence, to a further fine of \$100,000 for every day during which the offence continues, until the cut-off date for the further fine; or
 - (b) on summary conviction to a fine of \$500,000 and to imprisonment for 2 years and, if the offence is a continuing offence, to a further fine of \$10,000 for every day during which the offence continues, until the cut-off date for the further fine.
- (7) For the purposes of subsection (6), the cut-off date for a further fine for which the person is liable is the date on which the person, in writing, notifies the Commission in accordance with subsection (4) of the person's position in that specific class.²²

²² The amendment to subsection (6) and addition of subsection (7) are to make it a continuing offence to breach the notification obligation under section 101O(2). They aim to encourage systemically important participants to rectify any late or incorrect notification as early as possible. They are also consistent with the nature of a notification obligation in that it subsists until fulfilled.

Clause 9**101Q. Registration in SIP register**

- (1) The Commission may enter in the SIP register in respect of a person who has complied with the notification requirement—
 - (a) the name of the person; and
 - (b) the specific class in respect of which the notification level has been reached.
- (2) The Commission may enter in the SIP register in respect of a person who has purportedly given a notification, but not in accordance with section 101O(3)—
 - (a) the name of the person; and
 - (b) the specific class in respect of which the notification level has been reached.
- (3) If the conditions in subsection (6) are satisfied in relation to a person, the Commission may enter in the SIP register—
 - (a) the name of the person; and
 - (b) the specific class referred to in subsection (6)(b).
- (4) Before making an entry in the SIP register under subsection (3)(a) or (b) in respect of a person, the Commission must—
 - (a) inform the Monetary Authority; and
 - (b) give the person concerned a reasonable opportunity of being heard in respect of the proposed entry.
- (5) The Commission must inform the person concerned by a written notice as soon as practicable after making an entry in the SIP register under subsection (1)(a) or (b), (2)(a) or (b) or (3)(a) or (b).

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- (6) The conditions referred to in subsection (3) are that—
- (a) section 101O(1) applies to the person; and
 - (b) either—
 - (i) the Commission has reasonable cause to believe that the person's position in a specific class has reached the notification level but the person has not given a notification in respect of the specific class; or
 - (ii) the Monetary Authority informs the Commission that the Monetary Authority has reasonable cause to believe that the person's position in a specific class has reached the notification level but the person has not given a notification in respect of the specific class.

(6A) For the purposes of subsection (6)(b), a reference to a person's position includes the position of another person to the extent to which the performance of the obligations arising from that other person's position is guaranteed by the person.²³

- (7) A decision to make an entry in the SIP register under subsection (1), (2) or (3) takes effect at the time of the service of the notice under subsection (5) on the person or at the time specified in the notice, whichever is the later.

²³ See footnote 21 above.

Clause 9**101R. Notification not required after registration for specific class**

- (1) If a person is registered for a specific class, as long as the name of the person remains on the SIP register for that specific class, the person is not required to comply with the notification requirement in respect of that specific class.
- (2) Subsection (1) does not affect any liability incurred for a failure by a person who is registered for a specific class under section 101Q(2) or (3) to comply with the notification requirement in respect of that specific class.
- (3) Also, subsection (1) does not affect the application of section 101O(2) to a person whose position in a specific class reaches the notification level after the first or any subsequent deregistration for that specific class.
- (4) For the purposes of this section, a person is taken to be registered for a specific class if the SIP register shows that the person's position in that specific class has reached the notification level.

(5) For the purposes of subsections (3) and (4), a reference to the position of a person or a person's position includes the position of another person to the extent to which the performance of the obligations arising from that other person's position is guaranteed by the person.²⁴

²⁴ See footnote 21 above.

Clause 9**101U. Power to require registered SIPs to take certain action**

- (1) The Commission may, with the consent, or at the request, of the Monetary Authority, take the action specified in subsection (2), if the Commission has reasonable cause to believe that the registered SIP's activities or transactions in OTC derivative products pose, or may pose, a systemic risk—
 - (a) in the securities and futures industry; or
 - (b) to the financial stability of Hong Kong.
- (2) The action the Commission may take is to require, by a written notice, the registered SIP to do one or more of the following acts specified in the notice—
 - (a) to refrain from increasing, or to reduce, the registered SIP's ~~positions-exposure arising from its~~ positions²⁵ in one or more specific classes;
 - (b) to collect collateral or to increase the amount of collateral collected;
 - (c) to post collateral or to increase the amount of collateral posted;
 - (d) to restrict the use of collateral ~~as specified in the~~ notice²⁶,

²⁵ This amendment together with the addition of subsection 101U(2A) aim to better reflect the policy intention which is to enable the SFC to require a registered SIP to reduce exposures arising from not only the positions the systemically important participant holds, but also those that it has guaranteed, so that it can reduce both its actual as well as contingent liabilities.

²⁶ The phrase “specified in the notice” already appears in section 101U(2).

(da) to restrict the type of collateral collected or posted;²⁷

(e) to take any other action prescribed by the notification rules.

(2A) For the purposes of subsection (2)(a), a reference to the registered SIP's exposure arising from its positions is a reference to the risk to which the registered SIP is exposed in respect of—

(a) the positions of the registered SIP; and

(b) the positions of another person to the extent to which the performance of the obligations arising from those positions is guaranteed by the registered SIP.²⁸

(3) A requirement in a notice served under this section takes effect at the time of the service of the notice or at the time specified in the notice, whichever is the later.

²⁷ This addition aims to enable the SFC to restrict the type of collateral collected or posted. It will enable the SFC to require a systemically important participant to use or not use certain financial products as collateral, for example, to use less risky or less volatile financial products. It thus serves as an additional risk management measure to reduce the systemic risk posed by a systemically important participant.

²⁸ See footnote 25 above.

Clause 9**101W. Rule making power—notifications etc.**

The Commission may, with the consent of the Monetary Authority and after consultation with the Financial Secretary, make rules to prescribe—

- (a) in relation to a specific class—
 - (i) the threshold for the application of the notification requirement;
 - (ii) the period within which the notification requirement must be complied with; ~~and~~
 - (iii) the conditions, circumstances and criteria for deregistration; and
 - (iv) the conditions, circumstances and criteria for regarding a person's position as reaching the notification level.²⁹
- (b) additional information to be given by a person under section 101O(4)(b);
- (c) matters on which information may be required to be given under section 101T(1)(c) and (2)(c);
- (d) action a registered SIP may be required to take under section 101U(2)(e); and
- (e) generally for better carrying out the purposes of this Division.

²⁹ This amendment is to ensure that the rules may specify not only a quantitative threshold for the notification level, but also a formula for determining if a person's position in a specific class has reached that level.

Clause 14**145A. Commission may vary financial resources rules for particular licensed corporations**

- (1) The Commission may, by a written notice served on a licensed corporation that engages in acts involving³⁰ OTC derivative transactions, vary any financial resources rule applicable to the corporation, if satisfied, on reasonable grounds, that it is prudent to make the variation, taking into account risks associated with the corporation.
- (2) If the Commission proposes to serve a notice under subsection (1) on a licensed corporation, it must serve a draft of the notice (*draft notice*) on the corporation.
- (3) A draft notice must—
 - (a) specify—
 - (i) the financial resources rule proposed to be varied;
 - (ii) the manner in which that rule is proposed to be varied; and
 - (iii) the grounds for the proposed variation; and
 - (b) include a statement that the corporation may, within 14 days, or a longer period the Commission allows in a particular case, from the date of service of the draft notice, make written representations to

³⁰ This amendment is to better reflect the policy intention which is to empower the SFC to vary the financial resources rules requirements applicable to a licensed corporation that engages in dealing-like or non-dealing like activities involving OTC derivative transactions, as both may affect its risk profile. The existing wording may be construed restrictively as referring only to dealing-like activities.

the Commission on any or all of the matters specified in the draft notice.

- (4) If representations are made in accordance with subsection (3)(b) on a draft notice served on a licensed corporation, the Commission may, after considering the representations—
 - (a) serve a notice on the corporation under subsection (1) in substantially the same terms as the draft notice;
 - (b) serve a notice on the corporation under subsection (1) in terms modified to take account of any one or more of those representations that satisfy the Commission that the modification ought to be made; or
 - (c) elect not to serve a notice on the corporation under subsection (1) because one or more of those representations satisfy the Commission that it should neither take the action mentioned in paragraph (a) nor take the action mentioned in paragraph (b).
- (5) If no representations are made in accordance with subsection (3)(b) on a draft notice served on a licensed corporation, the Commission may serve a notice on the corporation under subsection (1) in substantially the same terms as the draft notice.
- (6) If a financial resources rule applicable to a licensed corporation that engages in OTC derivative transactions is varied under this section, this Part (including rules made under section 145) applies, in relation to that corporation, with all necessary modifications to take account of the financial resources rule so varied.
- (7) To avoid doubt—

- (a) the Commission may serve a draft notice on a licensed corporation in substitution for an earlier draft notice served on the corporation; and
 - (b) the reference to substantially the same terms as the draft notice in subsections (4)(a) and (5) is not to be construed to include the statement required to be included in a draft notice under subsection (3)(b).
- (8) The variation of a financial resources rule under subsection (1) takes effect at the time of the service of the written notice of the variation on the licensed corporation under that subsection or at the time specified in the notice, whichever is the later.”.

Clause 18**18. Section 182 amended (investigations)**

- (1) Section 182, heading—

Repeal**“Investigations”****Substitute****“Investigations by Commission”.**

- (2) Section 182(1)(b)(iv)—

Repeal**“; or”****Substitute a semicolon.**

- (3) After section 182(1)(b)(v)—

Add**“(vi) dealing in OTC derivative products or advising on OTC derivative products; or****(vii) providing ~~clearing agency client clearing~~³¹ services for OTC derivative transactions;”.**

- (4) Section 182(1)(d)—

Repeal**“(v)”**

³¹ This amendment changes the description of the Type 12 Regulated Activity (“RA”) in response to market feedback. There are two client clearing models, and are commonly referred to by market participants as “the agency model” and “the principal model”. The word “agency” in the original description of the Type 12 RA may suggest that only activities adopting the agency model are targeted. To avoid confusion, the title is amended to remove reference to “agency”.

Substitute

“(vii)”.

- (5) After section 182(1)(d)—

Add

- “(da) the Commission has reasonable cause to believe that a prescribed person other than an authorized financial institution or an approved money broker may have contravened the reporting obligation, clearing ~~obligation~~ or trading obligation, trading obligation or record keeping³² obligation;
- (db) the Commission has reasonable cause to believe that a registered SIP may have failed to comply with a requirement made under section 101U;”.

- (6) Section 182(1)(g)—

Repeal

“(d),”

Substitute

“(d), (da), (db),”.

³² This amendment is consequential to the record keeping obligation under section 101DA.

Clause 20**184A. Investigations by Monetary Authority**

- (1) If the Monetary Authority has reasonable cause to believe that an authorized financial institution or an approved money broker may have contravened the reporting obligation, clearing ~~obligation or trading obligation, trading obligation or record keeping~~³³ obligation, the Monetary Authority may—
 - (a) direct in writing one or more persons appointed under section 5A(3) of the Exchange Fund Ordinance (Cap. 66) to investigate the matter; or
 - (b) with the consent of the Financial Secretary, appoint in writing one or more other persons to investigate the matter.
- (2) The Monetary Authority must give an MA investigator a copy of—
 - (a) the direction, if the MA investigator is directed under subsection (1)(a); and
 - (b) the appointment, if the MA investigator is appointed under subsection (1)(b).
- (3) The MA investigator must, before first imposing a requirement on a person under section 184B(1), (2) or (3), produce a copy of the direction or appointment for inspection by the person.

³³ This amendment is consequential to the record keeping obligation under section 101DA.

Clause 37**203A. Disciplinary action by Monetary Authority**

- (1) If an authorized financial institution or an approved money broker contravenes an obligation, the Monetary Authority may exercise, in respect of a person who is subject to disciplinary action, one or more of the following powers as the Monetary Authority considers appropriate in the circumstances of the case—
 - (a) publicly or privately reprimand the person;
 - (b) prohibit the person, for a period, or until the occurrence of an event, specified by the Monetary Authority—
 - (i) from continuing to carry on the business of OTC derivative transactions, if at the time the power is exercised the person is carrying on that business; or
 - (ii) from carrying on the business of OTC derivative transactions, if at that time the person is not carrying on that business;
 - (c) order the person to pay a pecuniary penalty not exceeding the amount that is the greater of the following—
 - (i) \$10,000,000;
 - (ii) 3 times the amount of the profit gained, or loss avoided, by the person as a result of the contravention.
- (2) The exercise of the disciplinary power—
 - (a) under subsection (1)(a) and (b) is subject to section 203B; and

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- (b) under subsection (1)(c) is subject to sections 203B and 203C.
- (3) If the Monetary Authority exercises a disciplinary power, the Monetary Authority may disclose to the public details of the decision including the reasons for it and any material facts relating to the case.
- (4) The Monetary Authority may, in reaching a decision to exercise a disciplinary power, have regard to any information or material in the Monetary Authority's possession that is relevant to the decision, regardless of how it came into the Monetary Authority's possession.
- (5) For the purposes of subsection (1), the persons who are subject to disciplinary action are—
- (a) a person that is, or was, an authorized financial institution at the time of a contravention;
 - (b) in relation to a contravention by a person referred to in paragraph (a), a person who is, or was, involved in the management of the business of OTC derivative transactions of the authorized financial institution at the time of the contravention;
 - (c) a person that is, or was, an approved money broker at the time of a contravention; and
 - (d) in relation to a contravention by a person referred to in paragraph (c), a person who is, or was, involved in the management of the business of OTC derivative transactions of the approved money broker at the time of the contravention.
- (6) In this section—
- contravention*** (違責) means a contravention of an obligation;

obligation (責任) means the reporting obligation, clearing ~~obligation or trading obligation, trading obligation or~~ record keeping³⁴ obligation.

³⁴ This amendment is consequential to the record keeping obligation under section 101DA.

Clause 40**381B. Disclosure by Monetary Authority**

- (1) Despite section 381A(2), the Monetary Authority may disclose information—
 - (a) in the performance of a function under, or for the purpose of carrying into effect or doing anything required or authorized under, any Ordinance (other than this Ordinance);
 - (b) to a person who is a liquidator appointed under the Companies (Winding Up and Miscellaneous Provisions)³⁵ Ordinance (Cap. 32);
 - (c) to the Securities and Futures Appeals Tribunal;
 - (d) to the Market Misconduct Tribunal;
 - (e) to the Banking Review Tribunal established under section 101A of the Banking Ordinance (Cap. 155);
 - (f) to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Review Tribunal established under section 55 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615); or
 - (g) for the purpose of enabling or assisting the Monetary Authority to perform the Monetary Authority's functions under a specified provision, to an auditor or a former auditor of—
 - (i) an authorized financial institution or a former authorized financial institution; or

³⁵ This amendment updates the reference to the “Companies Ordinance” to read “Companies (Winding Up and Miscellaneous Provisions) Ordinance”.

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- (ii) an approved money broker or a former approved money broker.
 - (2) Despite section 381A(2), the Monetary Authority may disclose information obtained by an MA investigator under section 184B to—
 - (a) the Financial Secretary; or
 - (b) the Secretary for Justice.
 - (3) Despite section 381A(2), but subject to section 381E(1), the Monetary Authority may disclose to the Commission—
 - (a) information relating to a person other than an authorized financial institution or an approved money broker; and
 - (b) information relating to an authorized financial institution or an approved money broker if the Monetary Authority is of the opinion that—
 - (i) it is desirable or expedient that the information should be disclosed to the Commission in the interests of the investing public or in the public interest; or
 - (ii) the disclosure will enable or assist the Commission to perform its functions and it is not contrary to the interests of the investing public or to the public interest.
 - (4) Despite section 381A(2), the Monetary Authority may disclose information in the form of a summary compiled from any information in the Monetary Authority's possession, including information provided by a person under a specified provision, if the summary is so compiled as to prevent particulars relating to the

business or identity, ~~or the trading particulars,~~³⁶ of any person from being ascertained from it.

- (5) Despite section 381A(2), the Monetary Authority may disclose information with the consent of the person from whom the information was obtained or received, and if the information relates to a different person, with the consent also of that person.
- (6) The Monetary Authority may, in disclosing information under this section, impose any condition that the Monetary Authority considers appropriate.
- (7) In this section—
information (資料) means a matter referred to in section 381A(2)(a) or a record or document referred to in section 381A(2)(c).

³⁶ This amendment is made subsequent to the discussions between the MA and international regulators. The amendment ensures that the disclosure by the MA aligns with international practice.

Clause 40**381F. Disclosure of information to overseas persons with similar functions**

- (1) Despite section 381A(2), the Monetary Authority may disclose information received or obtained by the Monetary Authority because of the reporting obligation to a person in a place outside Hong Kong (*overseas person*) who, in the opinion of the Monetary Authority, satisfies the requirements specified in subsection (2).
- (2) The requirements are that the overseas person—
 - (a) performs a function similar to that of the Monetary Authority in collecting and maintaining records for the purposes of the reporting obligation;
 - (b) is subject to adequate regulation and supervision (including adequate requirements to preserve secrecy) under the law of the place in which the overseas person operates; and
 - (c) operates in accordance with international standards that are acceptable to the Monetary Authority.
- (3) When disclosing any information to an overseas person, the Monetary Authority may consent to the information being disclosed by the overseas person to any other person subject to conditions imposed by the Monetary Authority.
- (4) If the Monetary Authority is satisfied of the matters referred to in subsection (2) regarding an overseas person, the Monetary Authority must, as soon as

reasonably³⁷ practicable, publish in the Gazette the name of the overseas person.

(5) A matter published under subsection (4) is not subsidiary legislation.³⁸

³⁷ This amendment is to ensure consistency with existing section 378(6) in the Securities and Futures Ordinance (“SFO”) and section 381C(6) introduced in the CSAs.

³⁸ This amendment rectifies an inadvertent omission.

Clause 52**52. Schedule 1 amended (interpretation and general provisions)****(1) Schedule 1—****Repeal**

“[ss. 2, 19, 66, 102, 164, 171, 174, 175, 202”

Substitute

“[ss. 2, 19, 66, 101A, 102, 164, 171, 174, 175, 202, 381E, 392A”.

(2) Schedule 1, Part 1, section 1—**Repeal the definition of *market contract*****Substitute**

~~“*market contract* (市場合約) means—~~

- ~~—— (a) a contract that is subject to the rules of a recognized clearing house, entered into by the clearing house with a clearing participant pursuant to a novation—~~
- ~~—— (i) that is in accordance with those rules; and~~
- ~~—— (ii) which is for the purpose of the clearing and settlement of a transaction in securities and futures contracts effected on a recognized stock market or a recognized futures market or which is subject to the rules of a recognized exchange company; or~~
- ~~—— (b) an OTC derivative transaction cleared through—~~
- ~~—— (i) a recognized clearing house; or~~
- ~~—— (ii) a designated CCP (as defined by section 101A of this Ordinance) that is a provider of authorized automated trading services and~~

~~specified by the Commission by notice published in the Gazette under section 1C;”~~

market contract (市場合約) means—

(a) a contract that is subject to the rules of a recognized clearing house and entered into by the clearing house with a clearing participant, whether or not pursuant to a novation, for the purpose of the clearing and settlement of a transaction in securities or futures contracts that is—

(i) effected on a recognized stock market or a recognized futures market; or

(ii) subject to the rules of a recognized exchange company;

(b) a contract that is subject to the rules of a recognized clearing house and entered into by the clearing house with a clearing participant, whether or not pursuant to a novation, for the purpose of the clearing and settlement of an OTC derivative transaction; or

(c) a contract that is—

(i) subject to the rules of a designated CCP (as defined by section 101A of this Ordinance) that is a provider of authorized automated trading services and specified by the Commission by notice published in the Gazette under section 1C; and

(ii) entered into by the designated CCP with any one of its members, whether or not pursuant to a novation, for the purpose of the clearing

and settlement of an OTC derivative transaction;”³⁹.

- (3) Schedule 1, Part 1, section 1—

Add in alphabetical order

“advising on OTC derivative products (就場外衍生工具產品提供意見) has the meaning given by Part 2 of Schedule 5;

approved money broker (核准貨幣經紀) has the meaning given by section 2(1) of the Banking Ordinance (Cap. 155);

clearing obligation (結算責任) has the meaning given by section 101A of this Ordinance;

dealing in OTC derivative products (場外衍生工具產品交易) has the meaning given by Part 2 of Schedule 5;

MA investigator (金管局調查員) has the meaning given by section 178 of this Ordinance;

OTC derivative product (場外衍生工具產品) has the meaning given by section 1B;

OTC derivative transaction (場外衍生工具交易) means a transaction in an OTC derivative product;

prescribed person (訂明人士) has the meaning given by section 101A of this Ordinance;

³⁹ This amendment is proposed in response to further suggestions made by Hong Kong Exchanges and Clearing Limited (“HKEx”) after its submission to the Bills Committee. Paragraph (a) is amended so that it covers the clearing and settlement of securities and futures contracts, irrespective of whether or not this is done pursuant to a novation. The original paragraph (b) is divided into new paragraphs (b) and (c) for better clarity so that paragraph (b) deals only with contracts cleared through an RCH, and paragraph (c) deals only with contracts cleared through a designated CCP. Both paragraphs (b) and (c) are consistent with paragraph (a).

~~providing clearing agency services for OTC derivative transactions~~ (為場外衍生工具交易提供結算代理人 client clearing services for OTC derivative transactions (為場外衍生工具交易提供客戶結算服務)⁴⁰ has the meaning given by Part 2 of Schedule 5;

record keeping obligation (備存紀錄責任) has the meaning given by section 101A of this Ordinance;⁴¹

registered SIP (已登記系統重要參與者) has the meaning given by section 101A of this Ordinance;

reporting obligation (匯報責任) has the meaning given by section 101A of this Ordinance;

SIP register (系統重要參與者登記冊) has the meaning given by section 101A of this Ordinance;

specified provision (指明條文) means each of the following—

- (a) Part IIIA of this Ordinance and subsidiary legislation made under it;
- (b) Division 3A of Part VIII of this Ordinance;
- (c) sections 185, 187, 190 and 191 of this Ordinance to the extent to which they relate to an investigation of any matter under section 184A of this Ordinance;
- (d) sections 186A, 385A and 388A of this Ordinance;
- (e) Divisions 4 and 5 of Part IX of this Ordinance;
- (f) Division 1A of Part XVI of this Ordinance;

⁴⁰ See footnote 31 above.

⁴¹ This amendment is consequential to the record keeping obligation under section 101DA.

trading obligation (交易責任) has the meaning given by section 101A of this Ordinance;”.

- (4) Schedule 1, Part 1, after section 1A—

Add

“1B. Meaning of *OTC derivative product*

- (1) In this Ordinance, subject to subsections (2) and (3)—

OTC derivative product (場外衍生工具產品) means a structured product.

- (2) An *OTC derivative product* does not include—

- (a) securities that are traded on a recognized stock market;
- (b) a futures contract that is traded on a recognized futures market;
- (c) a securities or futures contract that is—
 - (i) traded on a stock market or futures market prescribed under section 392A of this Ordinance; and
 - (ii) cleared through a clearing house prescribed under that section;
- (d) a structured product that is offered to the public, the issue of any advertisement, invitation or document relating to which is authorized under section 105(1) of this Ordinance;
- (e) a structured product in the form of debt security the payment under which is derived from cash flows generated by an underlying pool of assets;
- (f) an instrument that—
 - (i) is in the form of shares, stocks, debentures, loan stocks, funds, bonds, notes, deposits or

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- certificates of deposits or in the form of any other type of instrument prescribed under section 392A of this Ordinance; and
- (ii) has an embedded feature that makes it a structured product;
 - (g) a spot contract;
 - (h) a structured product that is offered—
 - (i) within an offer period that is not more than 2 weeks; and
 - (ii) to multiple persons on identical terms, other than the consideration to be paid for the product; or
 - (i) a structured product, or a structured product of a class or description, prescribed under section 392(1)(b)(vii) of this Ordinance as a product that is not to be regarded as an OTC derivative product in accordance with the notice.
- (3) An OTC derivative product also includes a product prescribed by notice under section 392(1)(a)(vii) of this Ordinance as a product that is to be regarded as an OTC derivative product in accordance with the notice.
- (4) In this section—
- spot contract*** (現貨合約) means a contract for the sale of any type or combination of types of securities, commodity, index, property, interest rate or currency exchange rate under the terms of which the settlement of the contract is scheduled to be made within the longest of the following periods—
- (a) if the contract is—
 - (i) entered into in Hong Kong, 2 business days after the date of entering into the contract; or

- (ii) settled outside Hong Kong, 2 days on which each settlement facility necessary to settle the transaction is open for business, after the date of entering into the contract;
 - (b) the period generally accepted in the market for that type or combination of types of securities, commodity, index, property, interest rate or currency exchange rate as the standard delivery period.”.
- (5) Schedule 1, Part 1, before section 2—

Add

“1C. Specification of designated CCPs

- (1) The Commission may, by notice published in the Gazette, specify a designated CCP (as defined by section 101A of this Ordinance) for the purposes of ~~paragraph (b)(ii)~~ paragraph (c)(i)⁴² of the definition of *market contract* in section 1.
- (2) A notice published under subsection (1) is not subsidiary legislation.”.

⁴² This amendment is consequential to the amendment to the definition of “market contract”. See footnote 39 above.

Clause 53**53. Schedule 5 amended (regulated activities)**

- (1) Schedule 5, Part 1, entry relating to Type 10—

Repeal the full stop

Substitute a semicolon.

- (2) Schedule 5, Part 1, after entry relating to Type 10—

Add

“Type 11 : dealing in OTC derivative products or advising on OTC derivative products;

Type 12 : providing ~~clearing agency client clearing~~⁴³ services for OTC derivative transactions.”.

- (3) Schedule 5, Part 2, definition of *advising on futures contracts*, after paragraph (ii)—

Add

“(iia) a person who is licensed for Type 11 regulated activity, if the giving of the advice, or the issuing of the analyses or reports, by the person constitutes advising on OTC derivative products;”.

- (4) Schedule 5, Part 2, definition of *advising on futures contracts*, paragraph (iva)(B), after “person”—

Add

“that the person is permitted to provide under that licence or registration”.

- (5) Schedule 5, Part 2, definition of *advising on securities*, after paragraph (ii)—

Add

⁴³ See footnote 31 above.

“(iia) a person who is licensed for Type 11 regulated activity, if the giving of the advice, or the issuing of the analyses or reports, by the person constitutes advising on OTC derivative products;”.

- (6) Schedule 5, Part 2, definition of *advising on securities*, paragraph (iva)(B), after “person”—

Add

“that the person is permitted to provide under that licence or registration”.

(6A) Schedule 5, Part 2, definition of *advising on securities*—

Repeal

“such advice that”

Substitute

“such advice or issuing of such analyses or reports that”.⁴⁴

- (7) Schedule 5, Part 2, definition of *asset management*—

- (a) paragraph (a)—

Repeal

“; or”

Substitute a semicolon;

- (b) paragraph (b)—

Repeal the semicolon

Substitute

⁴⁴ This amendment aims to make clear that both the giving of advice and the issuing of analyses or reports that fall within the meaning of “advising on corporate finance” or “providing credit rating services” are carved out from “advising on securities”. A similar amendment is made to the definition of “advising on OTC derivative products” under clause 53(21) – see footnote 46 below.

“; or”;

- (c) after paragraph (b)—

Add

“(c) OTC derivative products management;”.

- (8) Schedule 5, Part 2, definition of *automated trading services*, after paragraph (a)—

Add

“(ab) offers to enter into OTC derivative transactions are regularly made or accepted in a way that forms or results in a binding transaction in accordance with established methods;”.

- (9) Schedule 5, Part 2, definition of *automated trading services*, paragraph (b)—

Repeal

“; or”

Substitute a semicolon.

- (10) Schedule 5, Part 2, definition of *automated trading services*, after paragraph (b)—

Add

“(ba) persons are regularly introduced, or identified to other persons—

(i) in order that they may negotiate or conclude OTC derivative transactions in a way that forms or results in a binding transaction in accordance with established methods; or

(ii) with the reasonable expectation that they will negotiate or conclude OTC derivative transactions in such a way;”.

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- (11) Schedule 5, Part 2, definition of *automated trading services*, paragraph (c)—

Repeal

“guaranteed,”

Substitute

“guaranteed; or”.

- (12) Schedule 5, Part 2, definition of *automated trading services*, after paragraph (c)—

Add

“(d) transactions—

(i) referred to in paragraph (ab); or

(ii) resulting from the activities referred to in paragraph (ba),

may be novated, cleared, settled or guaranteed.”.

- (13) Schedule 5, Part 2, definition of *automated trading services*, after “Government”—

Add

“or any excluded services”.

- (14) Schedule 5, Part 2, definition of *dealing in futures contracts*, after paragraph (iii)—

Add

“(iia) is licensed for Type 11 regulated activity and the act also constitutes dealing in OTC derivative products;

(iib) is licensed for Type 12 regulated activity and the act is carried out wholly incidentally to the carrying on of that regulated activity;”.

- (15) Schedule 5, Part 2, definition of *dealing in securities*, after paragraph (iii)—

Add

- “(iia) is licensed for Type 11 regulated activity and the act also constitutes dealing in OTC derivative products;
 - (iiib) is licensed for Type 12 regulated activity and the act is carried out wholly incidentally to the carrying on of that regulated activity;”.
- (16) Schedule 5, Part 2, definition of *dealing in securities*, paragraph (xv)—

Repeal

“within the meaning of section 2(1) of the Banking Ordinance (Cap. 155)”.

- (17) Schedule 5, Part 2, definition of *leveraged foreign exchange trading*, after paragraph (i)—

Add

- “(ia) by a person for the purpose of performing the person’s functions as a recognized clearing house;”.
- (18) Schedule 5, Part 2, definition of *leveraged foreign exchange trading*, paragraph (iv)—

Repeal

“within the meaning of section 2(1) of the Banking Ordinance (Cap. 155)”.

- (19) Schedule 5, Part 2, definition of *leveraged foreign exchange trading*, after paragraph (v)—

Add

- “(va) if it is performed by a person who is licensed for Type 11 regulated activity and the act also constitutes dealing in OTC derivative products;”.
- (20) Schedule 5, Part 2, definition of *leveraged foreign exchange trading*, after paragraph (xi)—

Add

“(xia) that is an OTC derivative dealing act carried out by a person who is licensed for Type 12 regulated activity and is carried out wholly incidentally to the carrying on of that regulated activity;

“(xib) that is an act that constitutes entering into a market contract;⁴⁵”.

(21) Schedule 5, Part 2—

Add in alphabetical order

“*advising on OTC derivative products* (就場外衍生工具產品提供意見), subject to Part 2A, means—

- (a) giving advice on whether an OTC derivative transaction should be entered into, which transaction should be entered into, the time at which or the terms and conditions on which a transaction should be entered into; or
- (b) issuing analyses or reports, for the purpose of facilitating the recipients to make decisions on whether an OTC derivative transaction should be entered into, which transaction should be entered into, the time at which or the terms and conditions on which a transaction should be entered into,

⁴⁵ This amendment is proposed in response to HKEx’s suggestion in item 7 of its submission to the Bills Committee. The amendment aims to ensure that members of a local RCH who operate from outside Hong Kong do not need to be licensed for Type 3 RA simply because they are entering into a market contract (i.e. entering into a contract with the RCH). The amendment also ensures consistency with the carve-out from Type 11 RA under section 2(j) of Part 2A of Schedule 5 to the Bill. This is necessary since the activities of a person dealing in foreign exchange derivatives fall within the ambit of both Type 3 and Type 11 RA.

but does not include the giving of ~~such advice that such advice or issuing of such analyses or reports that~~⁴⁶ falls within the meaning of *advising on corporate finance* or *providing credit rating services*;

dealing in OTC derivative products (場外衍生工具產品交易), in relation to a person and subject to Part 2A, means—

- (a) entering into or offering to enter into an OTC derivative transaction; or
- (b) inducing or attempting to induce another person to enter into or to offer to enter into an OTC derivative transaction;

~~— (c) entering into or offering to enter into an arrangement with another person, on a discretionary basis or otherwise, to facilitate an act referred to in paragraph (a) or (b); or~~

~~— (d) inducing or attempting to induce a person to enter into an arrangement with another person, on a discretionary basis or otherwise, to facilitate an act referred to in paragraph (a) or (b);⁴⁷~~

excluded services (豁除服務) means—

- (a) services for trading in OTC derivative products that do not fall within paragraph (a), (b) or (c) of the definition of *automated trading services* and which are provided—
 - (i) by an authorized financial institution or an approved money broker;

⁴⁶ See footnote 44 above.

⁴⁷ This amendment deletes paragraphs (c) and (d), which are unnecessary as they provide for matters that fall within the scope of the expanded Type 9 RA.

- (ii) by means of electronic facilities; and
 - (iii) wholly incidentally in carrying out an act that would constitute dealing in OTC derivative products but for the exclusion under section 2(f) of Part 2A;
- (b) services for clearing OTC derivative products that—
 - (i) also constitute Type 12 regulated activity; and
 - (ii) are provided by a person licensed for that regulated activity; and
- (c) services for clearing OTC derivative products that—
 - (i) would constitute Type 12 regulated activity but for the exclusion under section 4(b) of Part 2A; and
 - (ii) are provided by an authorized financial institution or an approved money broker;

OTC derivative advising act (就場外衍生工具提供意見作為) means an act referred to in paragraph (a) or (b) of the definition of ***advising on OTC derivative products***;

OTC derivative dealing act (場外衍生工具交易作為) means an act referred to in paragraph (a) or (b) of the definition of ***dealing in OTC derivative products***;

OTC derivative products management (場外衍生工具產品管理) means providing the service of managing a portfolio of OTC derivative products for another person but does not include—

- (a) such a service provided by an authorized financial institution or an approved money broker wholly incidentally in carrying out an act that would

constitute dealing in OTC derivative products but for the exclusion under section 2(f) of Part 2A;

- (b) such a service provided by a person who—
 - (i) is licensed for Type 11 regulated activity; and
 - (ii) provides such service wholly incidentally in carrying on that regulated activity;
- (c) the provision of a service that would constitute securities or futures contracts management but for the exclusions under paragraphs (a), (b), (c), (d), (e), (f), (g) and (h) of the definition of *securities or futures contracts management*;

~~*providing clearing agency services for OTC derivative transactions* (為場外衍生工具交易提供結算代理人服務), in relation to a person and subject to Part 2A, means providing clearing and settlement services in respect of OTC derivative transactions—~~

- ~~— (a) through a central counterparty (whether located in Hong Kong or elsewhere);~~
- ~~— (b) directly as a member of the central counterparty or indirectly through another person that is such a member; and~~
- ~~— (c) on behalf of another person;~~

providing client clearing services for OTC derivative transactions (為場外衍生工具交易提供客戶結算服務), in relation to a person and subject to Part 2A, means providing services to another person for the clearing and settlement of OTC derivative transactions through a central counterparty (whether located in Hong Kong or

elsewhere), whether or not as a member of the central counterparty;⁴⁸.

(22) Schedule 5, after Part 2—

Add

“Part 2A

1. In Part 2, *advising on OTC derivative products* does not include the following—
 - (a) an act that falls within—
 - (i) Type 4 regulated activity, carried out by a person licensed to carry on that regulated activity; or
 - (ii) Type 5 regulated activity, carried out by a person licensed to carry on that regulated activity;
 - (b) an act that is excluded from the definition of *advising on futures contracts* in Part 2 under paragraph (ii) of that definition;
 - (c) an act that is excluded from the definition of *advising on securities* in Part 2 under paragraph (ii) of that definition;

⁴⁸ This amendment is to amend the description of the Type 12 RA and its definition. See footnote 31 with respect to the amendment to the description of the Type 12 RA. With respect to the amendment to the definition of the Type 12 RA, the amendment is to clarify that: (i) the clearing and settlement services are provided *to* the client rather than *on behalf of* the client; and (ii) the requirement to be licensed for Type 12 RA applies to persons providing indirect client clearing activities, no matter how many levels of intermediation there are between the central counterparty and the service provider.

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- (d) an OTC derivative advising act carried out in the ordinary course of business by—
 - (i) an authorized financial institution; or
 - (ii) an approved money broker;
 - (e) an OTC derivative advising act carried out by a person licensed for Type 9 regulated activity who—
 - (i) provides a service of OTC derivative products management that the person is permitted to provide under that licence; and
 - (ii) carries out the act solely for the purpose of providing that service;
 - (f) an OTC derivative advising act carried out by a person who—
 - (i) falls within a class prescribed by rules made under section 397 of this Ordinance for the purposes of this paragraph; or
 - (ii) carries on a type or description of business so prescribed;
 - (g) an OTC derivative advising act carried out by a corporation, if the giving of the advice or issuing of the analyses or reports constituting the act is solely to—
 - (i) any of its wholly owned subsidiaries; or
 - (ii) a holding company that holds all its issued shares or to other wholly owned subsidiaries of that holding company;
 - (h) an OTC derivative advising act carried out by—
 - (i) a solicitor, if carrying out that act is wholly incidental to his or her practice as a solicitor

in a Hong Kong firm or foreign firm (both as defined by section 2(1) of the Legal Practitioners Ordinance (Cap. 159));

- (ii) counsel, if carrying out that act is wholly incidental to his or her practice as counsel;
 - (iii) a certified public accountant, if carrying out that act is wholly incidental to his or her practice as a certified public accountant in a practice unit (as defined by section 2(1) of the Professional Accountants Ordinance (Cap. 50)); or
 - (iv) a trust company registered under Part VIII of the Trustee Ordinance (Cap. 29), if carrying out that act is wholly incidental to the discharge of its duties as such a trust company;
 - (i) an OTC derivative advising act carried out by a person through—
 - (i) a newspaper, magazine, book or other publication that is made generally available to the public; or
 - (ii) a television broadcast or radio broadcast for reception by the public, whether on subscription or otherwise.
2. In Part 2, *dealing in OTC derivative products* does not include the following—
- (a) an act that falls within—
 - (i) Type 1 regulated activity, carried out by a person licensed to carry on that regulated activity;

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- (ii) Type 2 regulated activity, carried out by a person licensed to carry on that regulated activity; or
 - (iii) Type 3 regulated activity, carried out by a person licensed to carry on that regulated activity;
 - (b) an act that is excluded from the definition of ***dealing in securities*** in Part 2 under paragraph (iv) or (xiii) of that definition;
 - (c) an act that is excluded from the definition of ***dealing in futures contracts*** in Part 2 under paragraph (ii) of that definition;
 - (d) an act that is excluded from the definition of ***leveraged foreign exchange trading*** in Part 2 under paragraph (i), (iii), (vii) or (xiv) of that definition;
 - (e) an act carried out by a person for the purpose of performing the person's functions as—
 - (i) a recognized clearing house;
 - (ii) a recognized exchange company; or
 - (iii) a provider of automated trading services authorized under section 95(2) of this Ordinance;
 - (f) an act carried out in the ordinary course of business by—
 - (i) an authorized financial institution; or
 - (ii) an approved money broker;

~~(g) an OTC derivative dealing act carried out by a person who is a price taker;~~

(g) an act referred to in paragraph (a) of the definition of *dealing in OTC derivative products* in Part 2 that is carried out by a person as a price taker;⁴⁹

- (h) an OTC derivative dealing act carried out by a person licensed for Type 9 regulated activity who—
 - (i) provides a service of managing a portfolio of OTC derivative products for another person that the person is permitted to provide under that licence; and
 - (ii) carries out the act solely for the purpose of providing that service;
- (i) an OTC derivative dealing act—
 - (i) carried out by a person who is licensed for Type 12 regulated activity; and
 - (ii) is carried out wholly incidentally to the carrying on of that regulated activity;
- (j) an act that constitutes entering into a market contract;
- (k) an act carried out by a person who—
 - (i) falls within a class prescribed by rules made under section 397 of this Ordinance for the purposes of this paragraph; or
 - (ii) carries on a type or description of business so prescribed;

⁴⁹ This amendment is to ensure that the price-taker carve-out only applies: (i) in respect of activities falling within paragraph (a) of the definition of *dealing in OTC derivative products*, (i.e. it does not apply in respect of marketing or inducing activities), and (ii) it only applies in respect of transactions where the person is acting as price-taker for that transaction.

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- (l) an OTC derivative dealing act carried out only on a market referred to in section 3(a), (b) or (c) of the Commodity Exchanges (Prohibition) Ordinance (Cap. 82);
 - (m) an OTC derivative dealing act carried out by a person who—
 - (i) is a member of a commodity exchange referred to in section 3(d) of the Commodity Exchanges (Prohibition) Ordinance (Cap. 82); and
 - (ii) carries out the act only on an exchange referred to in subparagraph (i);
 - (n) an OTC derivative dealing act that is carried out by a person (*first person*) through another person (*OTC derivative products dealer*) who is—
 - (i) licensed for Type 11 regulated activity;
 - (ii) an authorized financial institution;
 - (iii) an approved money broker;
 - (iv) an officer or employee of an authorized financial institution, acting in the person's capacity as such; or
 - (v) an officer or employee of an approved money broker, acting in the person's capacity as such,

except that the first person is to be regarded as dealing in OTC derivative products if that person, in return for a commission, rebate or other remuneration carries out an act set out in section 3.
3. The acts referred to in section 2(n) are that the first person (within the meaning of that section)—

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- (a) receives from a third person an offer or invitation to enter into an OTC derivative transaction, and communicates it, either in the first person's name or in the name of the third person to the OTC derivative products dealer (within the meaning of section 2(n));
 - (b) effects an introduction between the OTC derivative products dealer or that dealer's representative and a third person, so that the third person may enter into, or offer or invite to enter into, an OTC derivative transaction with the OTC derivative products dealer;
 - (c) effects the entering into an OTC derivative transaction by a third person through the OTC derivative products dealer;
 - (d) makes an offer for the OTC derivative products dealer to a third person to enter into an OTC derivative transaction; or
 - (e) accepts for the OTC derivative products dealer an offer by a third person to enter into an OTC derivative transaction.
4. In Part 2, *providing ~~clearing~~ agency-client clearing*⁵⁰ *services for OTC derivative transactions* does not include the following—
- (a) an act carried out by a central counterparty, whether located in Hong Kong or elsewhere, for the purpose of performing the person's functions as a central counterparty;

⁵⁰ See footnote 31 above.

- (b) an act carried out by an authorized financial institution or an approved money broker in the ordinary course of business;
- (c) an act of an acceptable participant of a central counterparty located in Hong Kong; or
- (d) an act of an agent, who does not handle client money or client assets, of such an acceptable participant.

5. In section 4—

acceptable participant (可接受參與者) means a person—

- (a) who does not have a place of business in Hong Kong;
- (b) who is, or has applied to become, a member of a central counterparty located in Hong Kong;
- (c) who does not market its services to persons in Hong Kong other than through an authorized financial institution or a licensed corporation; and
- (d) the provision by whom of clearing and settlement services (other than acts referred to in section 4) in respect of OTC derivative transactions or other similar transactions on behalf of another person and through a central counterparty (either directly as a member of the central counterparty or indirectly through another person that is such a member) is governed by legal or regulatory requirements of a comparable overseas jurisdiction;

comparable overseas jurisdiction (相若的海外司法管轄區) means a jurisdiction—

- (a) which the Commission is satisfied has legal or regulatory requirements comparable to those of

Hong Kong for regulating the provision of clearing and settlement services (other than acts referred to in section 4) in respect of OTC derivative transactions or other similar transactions on behalf of another person and through a central counterparty (either directly as a member of the central counterparty or indirectly through another person that is such a member); and

- (b) with the regulators of which the Commission has adequate cooperative arrangements or agreements.”.

Clause 55**3. Deemed licensing of corporations**

- (1) A person who applies in accordance with section 116(1) to be licensed to carry on a specified regulated activity is deemed to be licensed under that section to carry on the specified regulated activity concerned⁵¹ if the conditions in subsection (3) are satisfied.
- (2) A person who applies in accordance with section 127(1) for variation of the regulated activity specified in the person's licence by adding a specified regulated activity is deemed to be licensed under section 116(1) to carry on the specified regulated activity concerned⁵² if the conditions in subsection (3) are satisfied.
- (3) The conditions are that—
 - (a) the corporate applicant is a person referred to in section 116(2)(a);
 - (b) the application is made within the application period;
 - (c) an application for the purposes of section 130(1) is lodged, unless—

⁵¹ This amendment is for better drafting consistency among sections 4 and 5 of Schedule 11 to the Bill given that all three sections deal with applications for a deemed status in respect of Type 11 RA and Type 12 RA. It is accepted that the phrase “the specified regulated activity” and the phrase “the specified regulated activity concerned” (as used in Schedule 11 to the Bill) mean the same and could not be construed differently. The amendment is merely to ensure drafting consistency among similar provisions so as to avoid any doubt or confusion.

⁵² See footnote 51 above.

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- (i) the corporate applicant is a licensed corporation; and
 - (ii) the premises proposed to be used for keeping records or documents for the purposes of section 130(1) are the subject of an existing approval under that section;
 - (d) not less than 2 individuals, at least one of whom is an executive director of the corporate applicant, have applied under section 126 to be approved as responsible officers of the corporate applicant in relation to the specified regulated activity concerned, and at least 2 of them, including at least 1 executive director of the corporate applicant, have not been issued a no-deeming notice before the corporate applicant is deemed;
 - (e) every executive director of the corporate applicant has applied under section 126 to be approved as a responsible officer of the corporate applicant in relation to the specified regulated activity concerned and none of them has been issued a no-deeming notice before the corporate applicant is deemed;
 - (f) subsection (4) is complied with; and
 - (g) the corporate applicant has not been issued a no-deeming notice before the deeming date.
- (4) The corporate applicant must submit, together with the application, a confirmation form confirming—
- (a) if the application relates to Type 11 regulated activity, that the corporate applicant has been carrying on in Hong Kong a qualifying activity for the qualification period;

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- (b) if the application relates to Type 12 regulated activity, that the corporate applicant or any other corporation in the same group of companies as that applicant has been carrying on in Hong Kong or elsewhere a qualifying activity for the qualification period;
 - (c) that not less than 2 individuals, at least one of whom is an executive director of the corporate applicant—
 - (i) have applied under section 126 to be approved as responsible officers of the corporate applicant in relation to the specified regulated activity concerned; and
 - (ii) satisfy the conditions in section 5(2)(a), (b) and (d) of this Schedule;
 - (d) that every executive director of the corporate applicant who is an individual—
 - (i) has applied under section 126 to be approved as a responsible officer of the corporate applicant in relation to the specified regulated activity concerned; and
 - (ii) satisfies the conditions in section 5(2)(a), (b) and (d) of this Schedule;
 - (e) either that—
 - (i) the corporate applicant has lodged an application under section 130(1) and the premises concerned satisfy the requirements of section 130(2)(a) and (b); or
 - (ii) the premises proposed to be used for keeping records or documents for the purposes of

section 130(1) are the subject of an existing approval under that section;

- (f) that the corporate applicant is in compliance, or has arrangements in place to ensure compliance, with any requirements of the Securities and Futures (Financial Resources) Rules (Cap. 571 sub. leg. N) applicable to a licensed corporation that carries on the specified regulated activity concerned; and
 - (g) that the corporate applicant is in compliance, or has arrangements in place to ensure compliance, with any provisions of this Ordinance, the guidelines and codes of conduct applicable to a licensed corporation that carries on the specified regulated activity concerned.
- (5) The deeming under subsections (1) and (2)—
- (a) takes effect on the date immediately after the end of the transitional period for the specified regulated activity concerned; and
 - (b) ends in accordance with section 6 of this Schedule.

Clause 55**33. Deemed licensing of corporations**

- (1) This section applies if—
 - (a) a person is not licensed to carry on the existing Type 7 RA; and
 - (b) the person indicates in the application referred to in subsection (2) or (3) that the person does not intend to carry on the existing Type 7 RA ~~except to the extent that it also constitutes carrying on the new Type 7 activity.~~⁵³
- (2) Subject to subsection (4), a person who applies in accordance with section 116(1) to be licensed to carry on the expanded Type 7 RA is deemed to be licensed under that section to carry on the expanded Type 7 RA if the conditions in subsection (5) are satisfied.
- (3) Subject to subsection (4), a person who applies in accordance with section 127(1) for variation of the regulated activity specified in the person's licence by adding the expanded Type 7 RA is deemed to be licensed under section 116(1) to carry on the expanded Type 7 RA if the conditions in subsection (5) are satisfied.
- (4) During the period the person is deemed to be licensed to carry on the expanded Type 7 RA, the person is also deemed to be subject to the condition that the person must not carry on the existing Type 7 RA ~~except to the~~

⁵³ This amendment is to avoid potential confusion regarding the scope of the existing Type 7 RA and the new Type 7 RA.

~~extent that it also constitutes carrying on the new Type 7 activity.~~⁵⁴

- (5) The conditions are that—
- (a) the corporate applicant is a person referred to in section 116(2)(a);
 - (b) the application is made within the application period;
 - (c) an application for the purposes of section 130(1) is lodged, unless—
 - (i) the corporate applicant is a licensed corporation; and
 - (ii) the premises proposed to be used for keeping records or documents for the purposes of section 130(1) are the subject of an existing approval under that section;
 - (d) not less than 2 individuals, at least one of whom is an executive director of the corporate applicant, have applied under section 126 to be approved as responsible officers of the corporate applicant in relation to the expanded Type 7 RA, and at least 2 of them, including at least 1 executive director of the corporate applicant, have not been issued a no-deeming notice before the corporate applicant is deemed;
 - (e) every executive director of the corporate applicant has applied under section 126 to be approved as a responsible officer of the corporate applicant in relation to the expanded Type 7 RA and none of

⁵⁴ See footnote 53 above.

- them has been issued a no-deeming notice before the corporate applicant is deemed;
- (f) the corporate applicant indicates in the application that, if it is deemed to be licensed to carry on the expanded Type 7 RA, the corporate applicant does not intend to carry on the existing Type 7 RA during the period that it is so deemed ~~except to the extent that it also constitutes carrying on the new Type 7 activity~~⁵⁵;
 - (g) subsection (6) is complied with; and
 - (h) the corporate applicant has not been issued a no-deeming notice before the deeming date.
- (6) The corporate applicant must submit, together with the application, a confirmation form confirming—
- (a) that the corporate applicant has been carrying on in Hong Kong a qualifying activity for the qualification period;
 - (b) that the corporate applicant does not intend to carry on the existing Type 7 RA ~~except to the extent that it also constitutes carrying on the new Type 7 activity~~⁵⁶—during the period that it is deemed for the expanded Type 7 RA;
 - (c) that not less than 2 individuals, at least one of whom is an executive director of the corporate applicant—
 - (i) have applied under section 126 to be approved as responsible officers of the

⁵⁵ See footnote 53 above.

⁵⁶ See footnote 53 above.

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- corporate applicant in relation to the expanded Type 7 RA; and
- (ii) satisfy the conditions in section 35(2)(a), (b) and (d) of this Schedule;
- (d) that every executive director of the corporate applicant who is an individual—
- (i) has applied under section 126 to be approved as a responsible officer of the corporate applicant in relation to the expanded Type 7 RA; and
 - (ii) satisfies the conditions in section 35(2)(a), (b) and (d) of this Schedule;
- (e) either that—
- (i) the corporate applicant has lodged an application under section 130(1) and the premises concerned satisfy the requirements of section 130(2)(a) and (b); or
 - (ii) the premises proposed to be used for keeping records or documents for the purposes of section 130(1) are the subject of an existing approval under that section;
- (f) that the corporate applicant is in compliance, or has arrangements in place to ensure compliance, with any requirements of the Securities and Futures (Financial Resources) Rules (Cap. 571 sub. leg. N) applicable to a licensed corporation that carries on the expanded Type 7 RA; and
- (g) that the corporate applicant is in compliance, or has arrangements in place to ensure compliance, with any provisions of this Ordinance, the guidelines

and codes of conduct applicable to a licensed corporation that carries on the new Type 7 activity.

- (7) The deeming under subsections (2) and (3)—
 - (a) takes effect on the date immediately after the end of the transitional period for the new Type 7 activity; and
 - (b) ends in accordance with section 36 of this Schedule.

Clause 55**42. Application and interpretation of this Division**

- (1) This Division applies despite sections 2, 12 and 32 of this Schedule.
- (2) This Division applies to—
 - (a) a person (other than an individual) who—
 - (i) applies under section 116(1) or 127(1) during the application period to carry on a new regulated activity; and
 - (ii) has been issued a no-deeming notice in respect of the application;
 - (b) an individual who—
 - (i) applies under section 120(1) or 127(1) to carry on a new regulated activity; and
 - (ii) carries on the new regulated activity for a person referred to in paragraph (a);
 - (c) an authorized financial institution that—
 - (i) applies under section 119(1) or 127(1) during the application period for registration to carry on a new regulated activity; and
 - (ii) has been issued a no-deeming notice in respect of the application;
 - (d) an individual who carries on the new regulated activity for an applicant referred to in paragraph (c);
 - (e) a person who—
 - (i) is deemed under this Schedule to be licensed under section 116 in respect of a new regulated activity; and

-
- (ii) becomes an unsuccessful appellant or is a non-appellant;
 - (f) an individual who—
 - (i) is licensed, or deemed under this Schedule to be licensed, under section 120(1) to carry on a new regulated activity; and
 - (ii) carries on the new regulated activity for a person referred to in paragraph (e);
 - (g) an authorized financial institution that—
 - (i) is deemed under this Schedule to be registered under section 119 or 127 for a new regulated activity; and
 - (ii) becomes an unsuccessful appellant or is a non-appellant; and
 - (h) an individual who carries on the new regulated activity for an authorized financial institution referred to in paragraph (g).
- (3) For the purposes of this Division, a person (other than an individual) or an authorized financial institution becomes an unsuccessful appellant, if—
- (a) the person or the authorized financial institution applies for a review of a decision to refuse to—
 - (i) grant a licence under section 116 to carry on a new regulated activity;
 - (ii) ~~grant registration~~⁵⁷ grant a certificate of registration under section 119 to carry on a new regulated activity; or

⁵⁷ This amendment ensures consistency with similar provisions under Schedule 11 to the Bill, for example, section 24(1)(b) and (c).

- (iii) vary ~~a regulated activity~~ the regulated activity specified in the licence or certificate of registration⁵⁸ by adding a new regulated activity under section 127; and
- (b) the decision is confirmed on review.
- (4) For the purposes of this Division, a person (other than an individual) or an authorized financial institution is a non-appellant, if the person or the authorized financial institution does not apply for a review of a decision to refuse to—
 - (a) grant a licence under section 116 to carry on a new regulated activity;
 - (b) ~~grant registration~~ grant a certificate of registration⁵⁹ under section 119 to carry on a new regulated activity; or
 - (c) vary ~~a regulated activity~~ the regulated activity specified in the licence or certificate of registration⁶⁰ by adding a new regulated activity under section 127.

⁵⁸ See footnote 57 above.

⁵⁹ See footnote 57 above.

⁶⁰ See footnote 57 above.

Clause 56

56. Securities and Futures Ordinance amended

The Securities and Futures Ordinance (Cap. 571) is amended as set out in this Part.

Clause 57**57. Section 18 amended (interpretation of Part III)**

- (1) Section 18(1), definition of *default rules*, after “40(2)”—

Add

“or made under section 40(2A)”.

(1A) Section 18(1), definition of *defaulter*—**Repeal**

“a clearing participant who”

Substitute

“a recognized clearing house, or a clearing participant, that”.⁶¹

- (2) After section 18(6)—

Add

“(7) In this section—

- (a) to avoid doubt, the reference to property held by or deposited with a recognized clearing house for the purpose described in the definition of *market collateral* in subsection (1) includes property held or deposited as collateral, margin or guarantee fund contributions (by whatever name called in the rules of the ~~recognized~~ clearing house) and whether the

⁶¹ This amendment is proposed in response to HKEx’s suggestion in item 5 of its submission to the Bills Committee. The amendment expands the definition of “defaulter” to include an RCH. The effect is that the term “defaulter” (as used in sections 39, 40(3) and 47 of the SFO) can also refer to an RCH if the RCH’s rules include provisions for dealing with its own default or insolvency. The amendment is also consistent with the amended section 40(2A)(a) in the CSAs which contemplates that the “default rules” of an RCH may include provisions relating to its own default or insolvency.

property is held or deposited by way of charge, transfer or other arrangement; and

(b) ***guarantee fund contribution*** (保證基金供款) means any contribution by a recognized clearing house or its clearing participants to a fund that—

(i) is maintained by the ~~recognized~~⁶²—clearing house to cover losses, including losses arising in connection with—

(A) it being unable or likely to become unable to meet its obligations in respect of any unsettled or open market contract; or

(B) a clearing participant being unable, or appearing to be, or likely to become, unable to meet obligations in respect of unsettled or open market contracts to which that participant is a party; and

(ii) may be applied for that purpose under the default rules of the ~~recognized~~⁶³—clearing house.”.

⁶² This is a technical drafting amendment. The reference to “recognized” is not necessary as the phrase “recognized clearing house” already appears in the same paragraph or section.

⁶³ See footnote 62 above.

Clause 58**58. Section 40 amended (rules by recognized clearing houses)**

(1) After section 40(2)—

Add

“(2A) A recognized clearing house may make rules to provide for the following purposes—

(a) taking proceedings or other action if—

(i) the ~~recognized~~⁶⁴—clearing house is unable, or likely to become unable, to meet its obligations in respect of any unsettled or open market contract to which it is a party as those obligations fall due; and

(ii) it becomes necessary or desirable for the ~~recognized~~⁶⁵—clearing house to cease to provide or operate any clearing and settlement facilities provided or operated by it;

~~—(b) taking proceedings or other action in relation to contracts entered into between a clearing participant in its capacity as a clearing agent and its clearing clients, if those contracts relate to unsettled or open market contracts to which the clearing participant is a party;~~

~~—(c) taking proceedings or other action in relation to positions or collateral of a clearing client held by a clearing participant in its capacity as a clearing agent, if those positions or collateral relate to~~

⁶⁴ See footnote 62 above.

⁶⁵ See footnote 62 above.

~~unsettled or open market contracts to which the clearing participant is a party.~~

~~(b) taking proceedings or other action in relation to any contracts entered into between a clearing participant and its clients if—~~

~~(i) the clearing participant appears to be unable, or likely to become unable, to meet its obligations in respect of all unsettled or open market contracts to which it is a party; and~~

~~(ii) those contracts relate to such unsettled or open market contracts recorded in a client account;~~

~~(c) taking proceedings or other action in relation to any positions or collateral relating to a contract entered into between a clearing participant and its clients referred to in paragraph (b) if—~~

~~(i) the clearing participant appears to be unable, or likely to become unable, to meet its obligations in respect of all unsettled or open market contracts to which it is a party; and~~

(ii) those positions or collateral relate to such unsettled or open market contracts recorded in a client account.”⁶⁶

(2) After section 40(6)—

Add

“(7) In this section—

client account (客戶帳戶), in relation to a clearing participant, means an account held with a recognized clearing house in the name of the clearing participant, other than a house account in which positions or collateral are recorded;

house account (結算所帳戶), in relation to a clearing participant, means an account—

(a) which is held with a recognized clearing house in the name of the clearing participant; and

(b) in which the following are recorded—

(i) the clearing participant’s own positions or collateral;

(ii) the positions or collateral of other persons that are regarded by the rules of the

⁶⁶ The amendments to paragraphs (b) and (c) are proposed in response to HKEx’s suggestion in item 2 of its submission to the Bills Committee. Specifically, they have asked for more specificity so that the context and purpose of the proceedings described in paragraphs (b) and (c) are clearer. They are concerned that the terms “clearing client” and “clearing agent” (used in the Bill) may be unclear. The amended paragraphs (b) and (c) no longer refer to these terms and provides better clarity that the rules may provide for the taking of proceedings or other action such that: (i) contracts entered into between a defaulting participant and its clients may be transferred to another participant that is not in default; and (ii) related positions and collateral may also be similarly transferred to the other participant.

recognized clearing house to be the clearing participant's own positions or collateral.”⁶⁷

58A. Section 45 amended (proceedings of recognized clearing house take precedence over law of insolvency)

After section 45(1)(d)—

Add

“(da) the provision of market collateral;”⁶⁸

⁶⁷ This amendment adds definitions for *client account* and *house account* and is consequential to the amendments to sections 40(2A)(b) and (c).

⁶⁸ This amendment is proposed in response to HKEx's suggestion in paragraph 6 of its submission to the Bills Committee. The amendment ensures that market collateral provided to an RCH by way of an outright transfer rather than by way of a charge is protected from the operation of the law of insolvency. It will therefore cover margins and contributions to the default fund so that they are not susceptible to clawback on insolvency.

Clause 59

59. Section 47 amended (duty to report on completion of default proceedings)

Section 47(1)(a)—

Repeal

“the net sum (if any)”

Substitute

“any net sum”.

Clause 60**60. Schedule 3 amended (exchange companies, clearing houses and exchange controllers)**

Schedule 3, Part 5, after section 1—

Add

~~“2. If the RCH rules envisage that a clearing participant may record market contracts in separate capacities, as referred to in section 3, paragraphs (a), (b), (c), (d), (e) and (f) of section 1 must be complied with separately in respect of each capacity. If—~~

(a) the RCH rules envisage that a clearing participant may record market contracts in separate capacities, as referred to in section 3; and

(b) the recognized clearing house operates in such a manner that paragraphs (a), (b), (c), (d), (e) and (f) of section 1 may be complied with separately in respect of each of the capacities,

paragraphs (a), (b), (c), (d), (e) and (f) of section 1 must be complied with separately in respect of each capacity.⁶⁹

3. For the purposes of section 2—

⁶⁹ This amendment is proposed in response to further suggestions made by HKEx after its submission to the Bills Committee. The amendment aims to clarify that when calculating net sums payable by (or to) a defaulting clearing participant to (or by) the RCH, the calculation process should be carried out separately in respect of each capacity as elaborated in section 3 under Schedule 3 – see footnote 70, but only if the RCH’s operation allows for such separate calculation process. This is necessary because the structure and processes of RCHs may differ.

-
- ~~— (a) a clearing participant will be regarded as recording market contracts in separate capacities if it enters into —~~
 - ~~— (i) transactions that are required or permitted by the RCH rules to be recorded in any of the clearing participant's house accounts with the recognized clearing house;~~
 - ~~— (ii) transactions that are required or permitted by the RCH rules to be recorded in any of the clearing participant's client accounts with the recognized clearing house;~~
 - (a) a clearing participant will be regarded as recording market contracts in a separate capacity in respect of its house accounts and each of its client accounts if —
 - (i) for house accounts—transactions that are required or permitted by the RCH rules to be recorded in any of the clearing participant's house accounts with the recognized clearing house have been so recorded; and
 - (ii) for each client account—transactions that are required or permitted by the RCH rules to be recorded in any of the clearing participant's client accounts with the clearing house have been so recorded;⁷⁰

⁷⁰ This amendment is proposed in response to HKEx's suggestion in item 3 of its submission to the Bills Committee. The amendment aims to better clarify what constitutes a separate capacity. In particular, it clarifies that where an RCH's rules allow for individual or segregated client accounts, each individual or segregated client account is to be regarded as a separate capacity.

- (b) any net sum payable to the clearing participant in respect of transactions recorded in ~~client accounts,~~ a client account, as calculated under section 1(c), must not be ~~set-off set-off~~ against any net sum payable by the clearing participant in respect of transactions recorded in any house account, as calculated under that section, regardless of any provision to the contrary in the RCH rules;
- (c) any net sum payable to the clearing participant in respect of transactions recorded in house accounts, as calculated under section 1(c), may be ~~set-off set-off~~ off⁷¹ against any net sum payable by the clearing participant in respect of transactions recorded in any client account, as calculated under that section, if the RCH rules so provide or ~~permit permit;~~
- (d) any net sum payable to the clearing participant in respect of transactions recorded in a client account, as calculated under section 1(c), may not be set-off against any net sum payable by the clearing participant in respect of transactions recorded in any other client account, as calculated under that section, if the RCH rules so provide.⁷²

4. To avoid doubt—

⁷¹ The amendments to paragraphs (b) and (c) rectify inadvertent errors.

⁷² This amendment is proposed in response to HKEx's suggestion at item 3(iii) of its submission to the Bills Committee. The amendment aims to clarify that if the rules of an RCH so provide, collateral or positions recorded in an individual or segregated client account cannot be used to offset collateral or positions recorded in other client accounts.

- (a) a transfer of a defaulting participant's positions under an unsettled market contract and collateral in a client account to one or more other clearing participants of the recognized clearing house in accordance with the RCH rules constitutes settlement of that contract for the purposes of section 1(a); and
- (b) without limiting section 1(b), the reference in that section to the rights and liabilities of the clearing participant under or in respect of the contract concerned includes the rights and liabilities that arise as a result of action taken under the RCH rules authorizing or permitting⁷³ the transfer of the clearing participant's positions under the contract and collateral in a client account to one or more other clearing participants of the recognized clearing house.

5. Sections 1, 2, 3 and 4 apply despite section 55 of this Ordinance.

5A. In this Part, a reference to a set-off or offset includes a netting arrangement.

⁷³ This amendment is proposed in response to HKEx's suggestion in item 4 of the Appendix to its submission to the Bills Committee. The amendment aims to cater for the different situations under the rules of an RCH.

5B. For the purposes of this Part, a sum of money payable by, or payable to, a person includes a value to be taken into account under a netting arrangement to which the person is a party.⁷⁴

6. In this Part—

client account (客戶帳戶), in relation to a ~~recognized clearing house, means an account held by the recognized clearing house in the name of a clearing participant~~ clearing participant, means an account held with a recognized clearing house in the name of the clearing participant,⁷⁵ other than a house account in which positions or collateral are recorded;

house account (結算所帳戶), in relation to a clearing participant, means an account—

- (a) ~~held by the~~ which is held with a⁷⁶ recognized clearing house in the name of the clearing participant; and
- (b) in which the following are recorded—
 - (i) the clearing participant's own positions ~~and~~ or⁷⁷ collateral;

⁷⁴ The addition of new sections 5A and 5B is in response to HKEx's suggestion in item 4 of its submission to the Bills Committee. The addition aims to clarify that references to "set-off" or "offset" should be construed as including the concept of netting. Likewise, references to amounts being payable by or payable to should also encompass amounts to be taken into account when netting. A definition for "netting" is also added for better clarity – see footnote 80 below.

⁷⁵ This amendment rectifies a few inadvertent errors.

⁷⁶ This amendment rectifies an inadvertent error.

- (ii) the ~~positions and positions or~~⁷⁸ collateral of other persons that are regarded by the RCH rules to be the clearing participant's own ~~positions and positions or~~⁷⁹ collateral;

netting (淨額結算) means the determination of a net balance by taking account of the values (whether positive or negative) attributed to an accelerated or terminated payment, or to a delivery obligation or entitlement;⁸⁰

RCH rules (《認可結算所規章》), in relation to a recognized clearing house, means the rules of ~~the recognized-the~~⁸¹ clearing house referred to in section 1.”.

⁷⁷ The amendments to paragraph (b)(i) and (b)(ii) are in response to HKEx's suggestion in item 7 of the Appendix to its submission to the Bills Committee. The amendment better reflects the fact that existing RCHs provide clearing participants with separate house accounts to record house positions and collateral.

⁷⁸ See footnote 77 above.

⁷⁹ See footnote 77 above.

⁸⁰ This amendment adds a definition for netting in light of its use in this section as introduced in the CSAs.

⁸¹ See footnote 62 above.