

For discussion on
12 June 2001

Paper No. CE02/01

**Bills Committee on
Securities and Futures Bill and Banking (Amendment) Bill 2000**

Part III of and Schedule 3 to the Securities and Futures Bill
Clause-by-clause examination

Part III

At the Annex is the updated mark-up version of Part III of the Securities and Futures Bill, with the proposed amendments thereto. The reasons for the amendments are set out in the footnotes.

Schedule 3

2. We propose no Committee Stage Amendment to Schedule III to the Bill. Please refer to the Blue Bill.

**Securities and Futures Commission
Financial Services Bureau
7 June 2001**

PART III

EXCHANGE COMPANIES, CLEARING HOUSES, EXCHANGE CONTROLLERS, INVESTOR COMPENSATION COMPANIES AND AUTOMATED TRADING SERVICES

Division 1 – Interpretation

18. Interpretation of Part III

(1) In this Part, unless the context otherwise requires -

"associated person" (相聯者), in relation to a person entitled to exercise, or control the exercise of, voting power in relation to, or holding securities in, a corporation -

- (a) subject to paragraph (c), means any other person in respect of whom that first-mentioned person has an agreement or arrangement, whether oral or in writing, express or implied, with respect to the acquisition, holding or disposal of securities or other interests in that corporation or under which they act together in exercising their voting power in relation to it;
- (b) subject to paragraph (c), includes, in relation to such provisions of Division 4 as are specified in Part 2 of Schedule 3, a person, or a person belonging to a class of persons, specified in that Part to be an associated person;
- (c) excludes, in relation to such provisions of Division 4 as are specified in Part 3 of Schedule 3, a person, or a person belonging to a class of

persons, specified in that Part not to be an associated person;

"controller" (控制人), in relation to a corporation, means any person who is -

- (a) a shareholder controller of the corporation; or
- (b) an indirect controller of the corporation;

"default proceedings" (違責處理程序) means any proceedings or other action taken by a recognized clearing house under its default rules;

"default rules" (違責處理規則), in relation to a recognized clearing house, means the rules of the clearing house required by section 40(2);

"defaulter" (違責者) means a clearing participant who is the subject of any default proceedings;

"indirect controller" (間接控制人), in relation to a corporation -

- (a) subject to paragraph (b), means a person in accordance with whose directions or instructions the directors of the corporation or of another corporation of which it is a subsidiary are accustomed or obliged to act;
- (b) excludes, in relation to such provisions of Division 4 as are specified in Part 4 of Schedule 3, a person, or a person belonging to a class of persons, specified in that Part not to be an indirect controller;

"market charge" (市場押記) means a charge, whether fixed or floating, granted in favour of a recognized clearing house -

- (a) over any property which is held by or deposited with the clearing house; and
- (b) for the purpose of securing liabilities arising directly in connection with the clearing house's ensuring the settlement of a market contract;

"market collateral" (市場抵押品) means any property which is held by or deposited with a recognized clearing house for the purpose of securing liabilities arising directly in connection with the clearing house's ensuring the settlement of a market contract;

"relevant corporation" (相關法團) means a corporation of which the relevant recognized exchange controller is the controller;

"relevant office-holder" (有關人員) means -

- (a) the Official Receiver appointed under section 75 of the Bankruptcy Ordinance (Cap. 6);
- (b) a person acting in relation to a company as its liquidator, provisional liquidator, receiver or manager;
- (c) a person acting in relation to an individual as his trustee in bankruptcy or interim receiver of his property; or
- (d) a person appointed pursuant to an order for the administration in bankruptcy of an insolvent estate of a deceased person;

"relevant recognized exchange controller" (相關認可控制人) means a recognized exchange controller which is the controller of the Stock Exchange Company;

"settlement" (交收), in relation to a market contract, includes partial settlement;

"shareholder controller" (股東控制人), in relation to a corporation, means any person who, either alone or with any associated person or persons, is entitled to exercise, or control the exercise of, more than 35% of the voting power at any general meeting of the corporation or of another corporation of which it is a subsidiary.

(2) Where a charge is granted partly for the purpose specified in the definition of "market charge" in subsection (1) and partly for other purposes, the charge is in Division 3 a market charge in so far as it has effect for that specified purpose.

(3) Where any collateral is granted partly for the purpose specified in the definition of "market collateral" in subsection (1) and partly for other purposes, the collateral is in Division 3 market collateral in so far as it has been provided for that specified purpose.

(4) In Division 3, a reference to the law of insolvency includes a reference to every provision made by or under -

(a) the Bankruptcy Ordinance (Cap. 6);

(b) the Companies Ordinance (Cap. 32); and

- (c) any other enactment which is concerned with or in any way related to the insolvency of a person.

(5) In Division 3, a reference to settlement in relation to a market contract is a reference to the discharge of the rights and liabilities of the parties to the contract, whether by performance, compromise or otherwise.

(6) Where there is a reference in this or any other Ordinance to the controller of a recognized exchange company or recognized clearing house (however expressed), the term controller shall be construed in accordance with the provisions of this section.

Division 2 - Exchange companies

19. Recognition of exchange company

- (1) No person shall -
 - (a) operate a stock market unless the person is -
 - (i) the Stock Exchange Company;
 - (ii) a recognized exchange company of which a relevant recognized exchange controller is the controller; or
 - (iii) a relevant recognized exchange controller which is itself a recognized exchange company;
 - (b) operate a futures market unless the person is a recognized exchange company;

- (c) assist in the operation of a stock market which is
~~not operated by a person referred to in paragraph~~
~~(a),~~ operated in contravention of this subsection;¹
- (d) assist in the operation of a futures market which
~~is not operated by a recognized exchange~~
~~company~~ operated in contravention of this
subsection.¹

(2) Where the Commission is satisfied that it is appropriate to do so -

- (a) in the interest of the investing public or in the public interest; or
- (b) for the proper regulation of markets in securities or futures contracts,

it may, after consultation with the public and then the Financial Secretary, by notice in writing served on a company, recognize the company as an exchange company -

- (i) subject to such conditions as it considers appropriate specified in the notice; and
- (ii) with effect from a date specified in the notice for the purpose.

(3) Without limiting the generality of conditions which may be specified in a notice under subsection (2), the Commission may,

¹ The two amendments were proposed in Paper 3E/01 to remove the ambiguities that a person assisting in the operation of an overseas exchange which itself is not subject to the prohibition under clause 19, would be caught by the prohibition for his assistance to the overseas exchange rendered in Hong Kong.

by notice in writing served on a recognized exchange company, amend or revoke any condition specified in the first-mentioned notice or impose new conditions, where the Commission -

- (a) is satisfied that it is appropriate to do so on a ground specified in paragraph (a) or (b) of that subsection; and
- (b) has consulted the Financial Secretary.

(4) Where the Commission amends or revokes any condition or imposes any new condition by a notice under subsection (3), the amendment², revocation or imposition takes effect at the time of service of the notice or at the time specified in the notice, whichever is the later.

(5) A person who, without reasonable excuse², contravenes subsection (1) commits an offence and is liable -

- ~~(a) contravenes subsection (1); or~~
- ~~(b) without lawful authority or reasonable excuse, fails to comply with a condition imposed by a notice served on the person under subsection (2) or (3), commits an offence and is liable²~~
- (~~i~~**a**) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or

² We accept the market comments that the offence should not be a strict liability one; and that criminalization of a breach of conditions in the circumstances is not appropriate. A number of other provisions in this part of the Bill would be amended in a similar manner on the same ground.

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

(6) Where a company becomes a recognized exchange company, the Commission shall cause notice of that fact to be published in the Gazette.

(7) Where a company is seeking to be a recognized exchange company and the Commission is minded not to recognize the company under subsection (2), the Commission shall give the company a reasonable opportunity of being heard before making a decision not to recognize the company.

(8) A person shall not be regarded as contravening -

(a) subsection (1)(b) by reason only of -

(i) carrying on a business of providing automated trading services that constitutes an operation of a futures market if -

(A) that person is authorized to provide the services under section 95(2) or is an intermediary licensed or exempt for Type 7 regulated activity; and

(B) by virtue of the authorization, licence or exemption, that person is permitted to engage in activities that constitute an operation of a futures market; or

(ii) carrying on a business of dealing in futures contracts that constitutes an operation of a futures market if -

(A) that person is an intermediary licensed or exempt for Type 2 regulated activity; and

(B) by virtue of the licence or exemption, that person is permitted to engage in activities that constitute an operation of a futures market; or

(b) subsection (1)(d) by reason only of assisting in carrying on a business of providing automated trading services that constitutes an operation of a futures market or carrying on a business of dealing in futures contracts that constitutes an operation of a futures market if the conditions referred to in paragraph (a)(i)(A) and (B) or (ii)(A) and (B) (as the case may be) are fulfilled in relation to the business of providing automated trading services or the business of dealing in futures contracts.

(9) In subsection (1), "stock market" (證券市場) shall have the meaning assigned to it in the definition of "stock market" in section 1 of Part 1 of Schedule 1, except that a reference to

securities in that definition shall be construed as not including a reference to interests in any collective investment scheme.

20. Transactions that may be conducted on recognized stock market and recognized futures market

(1) No transaction may be conducted on a recognized stock market other than dealings in -

(a) securities; and

(b) other financial products which are approved ~~in~~

~~a~~ ~~writing~~ by the Commission by notice published in the Gazette³, either generally or in a particular case.

(2) No transaction may be conducted on a recognized futures market other than dealings in -

(a) futures contracts; and

(b) other financial products,

which are approved ~~in writing~~ by the Commission by notice published in the Gazette³, either generally or in a particular case.

(3) A notice under subsection (1) or (2) is not subsidiary legislation³.

³ We accept the comment of the Legal Service Division of the Legislative Council that there should be a statutory requirement to publish in the Gazette transactions of other financial products that can be conducted on a recognized stock market or futures market, as the case may be, given the market-wide implications.

21. Duties of recognized exchange company

(1) It shall be the duty of a recognized exchange company to ensure -

(a) so far as reasonably practicable, an orderly, informed and fair market -

(i) in the case of a recognized exchange company which operates a stock market, in securities that are traded on that stock market or through the facilities of that company; or

(ii) in the case of a recognized exchange company which operates a futures market, in futures contracts that are traded on that futures market or through the facilities of that company; and

(b) that risks associated with its business and operations are managed prudently.

(2) In discharging its duties under subsection (1), a recognized exchange company shall -

(a) act in the interests of the public, having particular regard to the interests of the investing public; and

(b) ensure that the interests of the public prevail where they conflict with the interests of the recognized exchange company ~~or the interests that~~

~~it is required to serve under any other applicable law¹.~~

(3) A recognized exchange company shall operate its facilities in accordance with the rules made under section 23 and approved under section 24.

(4) A recognized exchange company shall formulate and implement appropriate procedures for ensuring that its exchange participants comply with the rules of the company.

(5) A recognized exchange company shall immediately notify the Commission if it becomes aware -

- (a) that any of its exchange participants is unable to comply with any rules of the company or any financial resources rules; or
- (b) of a financial irregularity or other matter which in the opinion of the company may indicate that the financial standing or integrity of an exchange participant is in question, or that an exchange participant may not be able to meet his legal obligations.

(6) A recognized exchange company shall at all times provide and maintain -

¹ We accept the market comment that it is not appropriate to place upon a recognized exchange company the duty to disregard certain statutory requirements where the company considers the public interest so requires. The same amendment will be made to clause 38(2)(b) in respect of a recognized clearing house and clause 63(2)(b) in respect of a recognized exchange controller.

- (a) adequate and properly equipped premises;
- (b) competent personnel; and
- (c) automated systems with adequate capacity, facilities to meet contingencies or emergencies, security arrangements and technical support,

for the conduct of its business.

22. Immunity, etc.

(1) Without limiting the generality of section 368(1), no civil liability, whether arising in contract, tort, defamation, equity or otherwise, shall be incurred by -

- (a) a recognized exchange company; or
- (b) any person acting on behalf of a recognized exchange company, including -
 - (i) any member of the board of directors of the company; or
 - (ii) any member of any committee established by the company,

in respect of anything done or omitted to be done in good faith ~~in the discharge or purported discharge of the duties under section 21 or under the rules of the company.~~ in the discharge or

purported discharge of the duties of the company under section 21 or of its functions under its rules⁵.

~~— (2) Where a recognized exchange controller is the controller of a recognized exchange company, the company's duties referred to in subsection (1) are not applicable to the company in respect of anything done or omitted to be done in good faith by the company in consequence of the discharge or purported discharge by the recognized exchange controller of the recognized exchange controller's duties under section 63.~~

(2) Where, in the discharge or purported discharge of its duties under section 63, a recognized exchange controller gives an instruction or direction or makes a request to a recognized exchange company of which it is the controller, the company's duties under section 21 or under its rules are not applicable to the company in respect of anything done or omitted to be done in good faith by the company in compliance with the instruction, direction or request⁶.

⁵ We accept the comment of the Legal Service Division of the Legislative Council that by referring only to "duties", it may not be sufficient when the recognized exchange company is acting in accordance with its rules, which may cover the exercise of powers. In the context, we propose to refer to "functions", which includes powers and duties under Schedule 1 to the Bill. The same amendment will be made to clause 39(1) in respect of a recognized clearing house and clause 64(1) in respect of a recognized exchange controller.

⁶ This provision is revised to make the original legislative intent clearer.

(3) Any failure by a recognized exchange company to comply with its rules in relation to a matter does not prevent the matter from being treated for the purposes of this Ordinance as done in accordance with the rules so long as the failure does not substantially affect the rights of a person entitled to require compliance with the rules.

23. Rules by recognized exchange company

(1) Without limiting any of its other powers to make rules, a recognized exchange company may make rules for such matters as are necessary or desirable -

- (a) for the proper regulation and efficient operation of the market which it operates;
- (b) for the proper regulation of its exchange participants and holders of trading rights;
- (c) for the establishment and maintenance of compensation arrangements for the investing public.

(2) Without limiting the generality of subsection (1), a recognized exchange company which may operate a stock market may make rules for -

- (a) applications for the listing of securities and the requirements to be met before securities may be listed;
- (b) the entering into of agreements between the recognized exchange company and other persons in connection with the listing of securities, and the enforcement of those agreements by the company;

- (c) the cancellation and withdrawal of the listing of, and the suspension and resumption of dealings in, securities listed on the recognized stock market operated by the recognized exchange company;
- (d) the imposition on any person of obligations to observe specified standards of conduct or to perform, or refrain from performing, specified acts reasonably imposed in connection with the listing or continued listing of securities;
- (e) the penalties or sanctions which may be imposed by the recognized exchange company for a breach of rules made under this section;
- (f) procedures or conditions which may be imposed, or circumstances which are required to exist, in relation to matters which are provided for in the rules made under this section;
- (g) dealing with possible conflicts of interest that might arise where a relevant corporation or a relevant recognized exchange controller seeks to be or is a listed corporation;
- (h) such other matters as are necessary or desirable for the proper and efficient operation and management of the recognized exchange company.

(3) The Commission may, by notice in writing served on a recognized exchange company, request the company -

- (a) to make rules specified in the request within the period specified in that request; or

- (b) to amend rules referred to in the request in the manner and within the period specified in that request.

(3A) Before making a request under subsection (3), the Commission shall consult the Financial Secretary and the recognized exchange company to which the request relates⁷.

(4) Where the Commission is satisfied that a recognized exchange company has not complied with a request referred to in subsection (3) within the period specified in the request, the Commission may make or amend the rules specified in the request instead of the company.

(5) The following persons ***or anyone who seeks to become any such person***⁸ shall, if required to do so by the rules of a recognized exchange company, make a statutory declaration concerning such matters as may be specified in the rules -

- (a) an exchange participant or holder of trading rights of the company;

⁷ We accept the market comment that the SFC should be required to consult the Financial Secretary and the recognized exchange company before it can request the company to amend or make rules, similar to the requirement under clause 36(2) before the SFC can make rules under clause 36(1) itself.

⁸ We accept the market comment that the need for safeguarding the truthfulness of information submitted to a recognized exchange company through the requirement to make a statutory declaration, should apply equally to information submitted by a person seeking to become the persons specified.

- (b) a director of a corporation which uses the facilities of the company;
- (c) a director of a corporation which is seeking to have any of its securities listed; and
- (d) a director of a listed corporation or a person seeking approval from the company or the Commission, to his appointment as such; and
- ~~(e) an or^s adviser of a listed corporation.~~

(6) In making rules under this section, a recognized exchange company shall take into account that a solicitor or professional accountant acting in his professional capacity in private practice has duties imposed by law and under rules of professional conduct.

(7) A recognized exchange company shall, in circumstances stipulated in arrangements agreed from time to time between it and The Law Society of Hong Kong or the Hong Kong Society of Accountants, refer breaches of rules made under this section -

- (a) which are alleged to have been committed by a solicitor or professional accountant in private practice; and
- (b) which may also constitute a breach of duty imposed by law or under rules of professional conduct,

to The Law Society of Hong Kong or the Hong Kong Society of Accountants (as the case may be), for determination of whether to make a finding, impose a penalty or sanction or take other disciplinary action.

(8) For the purposes of subsections (6) and (7), a person shall be regarded as acting in the capacity of a solicitor or professional accountant in private practice if in the course of private practice he provides legal or professional accountancy services to a client, but shall not be regarded as so acting where, in respect of a matter governed by rules made under this section, he is also connected with the matter in any other capacity.

**24. Approval of rules or amendments to rules
of recognized exchange company**

(1) Subject to subsection (7), no rule (whether or not made under section 23) of a recognized exchange company or any amendment thereto shall have effect unless it has the approval in writing of the Commission.

(2) A recognized exchange company shall submit or cause to be submitted to the Commission -

- (a) for its approval the rules and every amendment thereto that require approval under subsection (1), together with explanations of their purpose and likely effect, including their effect on the investing public, in sufficient detail to enable the Commission to decide whether to approve them or refuse to approve them; and
- (b) for its information the rules which belong to a class the subject of a declaration under subsection

(7) and every amendment to the rules, as soon as reasonably practicable after they have been made.

(3) The Commission shall, not later than 6 weeks after the receipt of a submission under subsection (2)(a) from a recognized exchange company, by notice in writing served on the company, give its approval or refuse to give its approval (together with its reasons for the refusal) to the rules or amendment of the rules (as the case may be) or any part thereof, the subject of the submission.

(4) The Commission may give its approval under subsection (3) subject to requirements which shall be satisfied before the rules or amendment of the rules or any part thereof take effect.

(5) The Commission may in a particular case, with the agreement of the recognized exchange company concerned, extend the time prescribed in subsection (3).

(6) The Financial Secretary may, after consultation with the Commission and the recognized exchange company concerned, extend the time prescribed in subsection (3).

(7) The Commission may, by notice published in the Gazette, declare any class of rules of a recognized exchange company to be a class of rules which are not required to be approved under subsection (1) and, accordingly, any rules of the company which belong to that class (including any amendment thereto) shall have effect notwithstanding that they have not been so approved.

(8) Neither the rules under section 23 nor a notice under subsection (7) is subsidiary legislation.

**25. Transfer and resumption of functions
of Commission**

(1) The Commission may request the Chief Executive in Council to transfer, by order ("transfer order") published in the Gazette, to a recognized exchange company ("designated exchange company") -

- (a) a function to which this section applies; or
- (b) that function in so far as it applies to the exchange participants or applicants to be exchange participants of the designated exchange company,

if the Commission is satisfied that the designated exchange company is willing and able to perform the function.

(2) This section applies to a function of the Commission under -

- (a) Part V;
- (b) section 141; and
- (c) Parts II and XII of the Companies Ordinance (Cap. 32).

(3) A function to which this section applies may be transferred by a transfer order either in whole or in part, and the transfer may be subject to -

- (a) a reservation that the Commission is to perform the function concurrently with the designated exchange company; and
- (b) such other conditions as the Commission considers appropriate.

(4) A transfer order may contain such incidental, supplemental and consequential provisions as may be necessary or expedient for the purpose of giving full effect to the order.

(5) The Commission shall not request that a transfer order be made in respect of the making of financial resources rules unless the proposed designated exchange company has first supplied the Commission with a draft of the financial resources rules which it proposes to make, and the Commission is satisfied that the rules, if made, will afford the investing public an adequate level of protection.

(6) The Commission may at the request or with the consent of a designated exchange company resume a function transferred by a transfer order, but the resumption takes effect only by order of the Chief Executive in Council.

(7) The Chief Executive in Council may order that the Commission resume a function transferred to a designated exchange company by a transfer order if the Commission so requests and if it appears to the Chief Executive in Council to be in the public interest to do so.

(8) A transfer order may provide for a designated exchange company to retain all or any of the fees payable in relation to the performance of a transferred function, and an order made under subsection (6) or (7) may provide for the Commission to retain all or any such fees, from a date specified in the order.

**26. Appointment of chief executive of
recognized exchange company
requires approval of
Commission**

No appointment of a person as chief executive of a recognized exchange company shall have effect unless the appointment has the approval in writing of the Commission.

**27. Production of records, etc. by recognized
exchange company**

(1) The Commission may, by notice in writing served on a recognized exchange company, require the company to provide to the Commission, within such period as the Commission may specify in the notice -

- (a) such books and records kept by it in connection with or for the purposes of its business or in respect of any trading in securities or futures contracts; and
- (b) such other information relating to its business or any trading in securities or futures contracts,

as the Commission may reasonably require for the performance of its functions.

(2) A recognized exchange company served with a notice under subsection (1) which, without reasonable excuse, fails to comply with the notice commits an offence and is liable on conviction to a fine at level 5.

**28. Withdrawal of recognition of exchange
company and direction to cease to
provide facilities or services**

(1) Subject to subsections (2), (3) and (4), the Commission may, after consultation with the Financial Secretary, by notice in writing served on a recognized exchange company -

- (a) withdraw the company's recognition as an exchange company with effect from a date specified in the notice for the purpose; or
- (b) direct the company to cease with effect from a date specified in the notice for the purpose -
 - (i) to provide or operate such facilities as are specified therein; or
 - (ii) to provide such services as are specified therein.

⁹ (1A) The Commission may by the notice served under subsection (1) permit the recognized exchange company to continue, on or after the date on which the withdrawal or direction is to take effect, to carry on such activities affected by the withdrawal or direction as the Commission may specify in the notice for the purpose of -

- (a) *closing down the operations of the company or ceasing to provide the services specified in the notice; or*

⁹ We accept the market comment on the need for the continuation of certain activities for the smooth cessation of the recognized exchange company's operation. Similar amendments to clause 43 in respect of a clearing house, clause 85 in respect of a recognized investor compensation company and clause 98 in respect of authorized automated trading services.

(b) protecting the interest of the investing public or the public interest.

⁹ (1B) Where the Commission has granted a permission to a recognized exchange company under subsection (1A), the company shall not, by reason of its carrying on the activities in accordance with the permission, be regarded as having contravened section 19(1).

(2) The Commission may only serve a notice under subsection (1) in relation to a recognized exchange company that -

- (a) fails to comply with any requirement of this Ordinance or with a condition imposed under section 19;
- (b) is being wound up;
- (c) ceases to operate a market that it has been authorized to operate by virtue of section 19; or
- (d) requests the Commission to do so.

(3) Except where responding to a request under subsection (2)(d), the Commission shall not exercise its power under subsection (1) in relation to a recognized exchange company unless it has given the company a reasonable opportunity of being heard.

(4) Except where responding to a request under subsection (2)(d), the Commission shall give the recognized exchange company not less than 14 days' notice in writing of its intention to serve a notice under subsection (1) and the grounds for doing so.

(5) Where the Commission withdraws a company's recognition as an exchange company under subsection (1)(a), it shall cause notice of that fact to be published in the Gazette.

- (6) A notice served under subsection (1)(a) shall not take effect -
- (a) subject to paragraph (b), until the expiration of the period within which an appeal against the notice may be made under section 33; or
 - (b) if an appeal against the notice is made under section 33, until the appeal is withdrawn, abandoned or determined.
- (7) A notice served under subsection (1)(b) shall take effect immediately.

**29. Direction to cease to provide facilities
or services in emergencies**

(1) In addition to the powers of the Commission under section 28, the Commission may, after consultation with a recognized exchange company, by notice in writing served on the company, direct the company to cease to provide or operate such facilities or cease to provide such services as are specified in the notice for a period not exceeding 5 business days.

(2) The Commission may only serve a notice under subsection (1) if it is of the opinion that the orderly transaction of business on the stock or futures market (as the case may be) is being, or is likely to be, impeded because -

- (a) an emergency or natural disaster has occurred in Hong Kong; or
- (b) there exists an economic or financial crisis, whether in Hong Kong or elsewhere, or any other

circumstances, which is likely to prejudice orderly transaction of business on the stock or futures market (as the case may be).

(3) The Commission may, by notice in writing served on the recognized exchange company, extend the direction under subsection (1) for further periods not exceeding 10 business days in all.

(4) A notice served under this section shall take effect immediately.

30. Contravention of notice constitutes offence

A person who, *Without reasonable excuse*¹⁰ -

- (a) provides or operates facilities; or
- (b) provides services,

in contravention of a notice under section 28(1)(b) or 29(1) or (3) commits an offence and is liable -

- (i) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (ii) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

31. Prevention of entry into closed trading markets

¹⁰ We accept the market comment that the offence should not be a strict liability one. See Note (2).

(1) The Commission may take all necessary steps to ensure compliance with a notice under section 28(1)(b) or 29(1) or (3) and may, in particular, secure -

- (a) the facilities to which the notice relates; or
- (b) the premises at which such facilities are kept or the premises at which the services to which the notice relates are provided,

against use for dealings in securities or futures contracts or other purposes.

(2) A person commits an offence and is liable on conviction to a fine at level 5 if, without the authority of the Commission or reasonable excuse, he -

- (a) makes use of any facilities or services to which the notice under section 28(1)(b) or 29(1) or (3) relates; or
- (b) enters the premises at which such facilities are kept or the premises at which such services are provided.

32. Publication of directions

Where the Commission -

- (a) directs a recognized exchange company under section 28(1)(b) or 29(1) to cease to provide or operate any facilities or cease to provide any services; or
- (b) extends under section 29(3) a direction referred to in that section,

it shall cause notice of the particulars of the direction or extension (as the case may be) to be published in the Gazette.

33. Appeals

(1) A company served with a notice under section 28(1) or 29(1) or (3) may appeal against the notice to the Chief Executive in Council not later than 14 days after the date of service of the notice or such longer period (if any) as the Commission specifies in the notice.

(2) The decision of the Chief Executive in Council on an appeal under subsection (1) shall be final.

34. Restriction on use of titles relating to exchanges, markets, etc.

(1) A person commits an offence if he, without reasonable excuse and¹¹ without the authorization of the Commission, takes or uses the title -

- (a) "stock exchange";
- (b) "stock market";
- (c) "commodity exchange";
- (d) "futures exchange";
- (e) "futures market";
- ~~(ea)~~ "unified exchange"¹²;

¹¹ We accept the market comment that the offence should not be a strict liability one. See Note (2).

¹² The amendments were proposed in Paper 3A/01 in response to the comment of the Legal Service Division of the Legislative Council that certain titles which are

(eb) "united exchange"¹²;

(f) “證券交易所” ；

(g) “股票交易所” ；

(h) “證券市場” ；

(i) “股票市場” ；

(j) “商品交易所” ；

(k) “期貨交易所” ；

(l) “期貨市場”

(m) “聯合交易所”¹² ,

or anything which closely resembles any such title.

(2) A person who commits an offence under this section is liable -

(a) on conviction on indictment to a fine of \$200,000 and to imprisonment for 2 years; or

(b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

35. Contract limits and reportable open position

(1) Without prejudice to section 384(9) and (10), the Commission may make rules to -

(a) prescribe limits on, or conditions relating to, the number of futures contracts which may be held or

subject to prohibition against unauthorized use under existing law should remain applicable under the new regime.

controlled, directly or indirectly, by any person, whether or not such contracts are traded on a recognized futures market or through the facilities of a recognized exchange company;

- (b) prescribe limits on, or conditions relating to, the number of options contracts which may be held or controlled, directly or indirectly, by any person, whether or not such contracts are traded on a recognized stock market or recognized futures market or through the facilities of a recognized exchange company;
- (c) require a person holding or controlling a reportable position to lodge a notice of that reportable position with a recognized exchange company or the Commission;
- (d) prescribe the manner in which and the period within which a notice of a reportable position is to be lodged;
- (e) prescribe the information by which a notice of a reportable position is to be accompanied.

(2) The Commission shall consult the Financial Secretary before making rules under subsection (1)(e).

(3) Subsection (1) does not prohibit the Commission from prescribing different limits or conditions, or different reportable positions, for different types or classes of futures or options contracts, or from exempting specified futures or options contracts.

(4) Without limiting the generality of subsection (1) and without prejudice to section 384(9) and (10), the Commission may make rules for the purposes of this section to prohibit a person from -

- (a) directly or indirectly entering, during a specified period, into transactions of a specified class in excess of a specified amount; or
- (b) directly or indirectly holding or controlling positions of a specified class in excess of a specified position limit.

(5) Rules made under this section may provide that a person who *without reasonable excuse*¹³ contravenes any specified provision of the rules that applies to the person commits an offence and is liable to a specified penalty not exceeding -

- (a) on conviction on indictment a fine at level 6 and a term of imprisonment of 2 years;
- (b) on summary conviction a fine at level 3 and a term of imprisonment of 6 months.

(6) In this section "reportable position" (須申報的持倉量) means an open position in futures or options contracts the number or total value of which is in excess of a number or total value specified by rules made under this section.

36. Rules by Commission

¹³ We accept the market comment that the offence should not be a strict liability one. See Note (2).

(1) Without prejudice to section 384(9) and (10), the Commission may make rules in respect of the following matters -

- (a) the listing of securities, and in particular -
 - (i) prescribing the requirements to be met before securities may be listed;
 - (ii) prescribing the procedure for dealing with applications for the listing of securities;
 - (iii) providing for the cancellation of the listing of any specified securities if the Commission's requirements for listing, or the requirements of the undertaking referred to in paragraph (e), are not complied with or the Commission considers that such action is necessary to maintain an orderly market in Hong Kong;
- (b) the conditions subject to which, and the circumstances in which, a recognized exchange company shall suspend dealings in securities or shall direct that dealings in securities recommence;
- (c) the procedure for and the method of allotment of any securities arising out of an offer made to members of the public in respect of those securities;

- (d) persons who may be admitted as an exchange participant of a recognized exchange company;
- (e) requiring companies the securities of which are listed or accepted for listing to enter into an undertaking in the form prescribed in the rules with a recognized exchange company which may operate a stock market under section 19 to provide such information at such times as may be specified, and to carry out such duties in relation to its securities as may be imposed, in the undertaking;
- (f) requiring a recognized exchange company which has become aware of any matter which adversely affects, or is likely to adversely affect, the ability of any exchange participant of the company to meet its obligations as an exchange participant, to make a report concerning the matter to the Commission as soon as reasonably practicable after becoming aware of the matter;
- (g) requiring a recognized exchange company when it expels any of its exchange participants, or suspends any of its exchange participants from trading on the recognized stock market or recognized futures market it operates or through its facilities, or requests any of its exchange participants to resign as an exchange participant, to notify the Commission of that fact within 3 business days after the expulsion, suspension or

making of the request (as the case may be) and, in addition, to cause the expulsion, suspension or request to be notified to the public in such manner and within such period as may be prescribed in the rules;

- (h) any matter which is to be or may be prescribed by rules made under section 23.

(2) Before making any rules in respect of any matter specified in subsection (1), the Commission shall consult -

- (a) the Financial Secretary; and
- (b) the recognized exchange company or all the recognized exchange companies (as the case may be) to which that matter relates.

(3) Nothing in this section prevents a recognized exchange company from making rules under section 23 on any matter referred to in subsection (1), but any such rules shall have effect only to the extent that they are not repugnant to any rule made by the Commission under subsection (1).

Division 3 - Clearing houses

37. Recognition of clearing house

- (1) Where the Commission is satisfied that it is appropriate to do so -
 - (a) in the interest of the investing public or in the public interest; or

- (b) for the proper regulation of markets in securities or futures contracts,

it may, after consultation with the Financial Secretary, by notice in writing served on a company, recognize the company as a clearing house -

- (i) subject to such conditions as it considers appropriate specified in the notice; and

- (ii) with effect from a date specified in the notice for the purpose.

(2) Without limiting the generality of conditions which may be specified in a notice under subsection (1), the Commission may, by notice in writing served on a recognized clearing house, amend or revoke any condition specified in the first-mentioned notice or impose new conditions, where the Commission -

- (a) is satisfied that it is appropriate to do so on a ground specified in paragraph (a) or (b) of that subsection; and

- (b) has consulted the Financial Secretary.

(3) Where the Commission amends or revokes any condition or imposes any new condition by a notice under subsection (2), the amendment, revocation or imposition takes effect at the time of service of the notice or at the time specified in the notice, whichever is the later.

(4) Where a company becomes a recognized clearing house, the Commission shall cause notice of that fact to be published in the Gazette.

(5) Where a company is seeking to be a recognized clearing house and the Commission is minded not to recognize the company under subsection (1), the Commission shall give the company a reasonable opportunity of being heard before making a decision not to recognize the company.

38. Duties of recognized clearing house

(1) It shall be the duty of a recognized clearing house to ensure -

- (a) so far as reasonably practicable, that there are orderly, fair and expeditious clearing and settlement arrangements for any transactions in securities or futures contracts cleared or settled through its facilities; and
- (b) that risks associated with its business and operations are managed prudently.

(2) In discharging its duties under subsection (1), a recognized clearing house shall -

- (a) act in the interests of the public, having particular regard to the interests of the investing public; and
- (b) ensure that the interests of the public prevail where they conflict with the interests of the recognized clearing house ~~or the interests that it~~

~~is required to serve under any other applicable law¹⁴.~~

(3) A recognized clearing house shall operate its facilities in accordance with the rules made under section 40 and approved under section 41.

(4) A recognized clearing house shall formulate and implement appropriate procedures for ensuring that its clearing participants comply with the rules of the clearing house.

(5) A recognized clearing house shall at all times provide and maintain -

- (a) adequate and properly equipped premises;
- (b) competent personnel; and
- (c) automated systems with adequate capacity, facilities to meet contingencies or emergencies, security arrangements and technical support,

for the conduct of its business.

39. Immunity, etc.

(1) Without limiting the generality of section 368(1), no civil liability, whether arising in contract, tort, defamation, equity or otherwise, shall be incurred by -

- (a) a recognized clearing house; or
- (b) any person acting on behalf of a recognized clearing house, including -

¹⁴ Same reason as in Note (4) in respect of clause 21(2)(b).

- (i) any member of the board of directors of the clearing house; or
- (ii) any member of any committee established by the clearing house,

in respect of anything done or omitted to be done in good faith in the discharge or purported discharge of the duties of the clearing house under sections 38 and 47 or of its functions under its rules, including its default rules.~~in the discharge or purported discharge of the duties under~~

- ~~— (i) section 38,~~
- ~~— (ii) section 47, or~~
- ~~— (iii) the rules of the clearing house, including its default rules.¹⁵~~

~~(2) Where a recognized exchange controller is the controller of a recognized clearing house, the clearing house's duties referred to in subsection (1) are not applicable to the clearing house in respect of anything done or omitted to be done in good faith by the clearing house in consequence of the discharge or purported discharge by the recognized exchange controller of the recognized exchange controller's duties under section 63.~~

(2) Where, in the discharge or purported discharge of its duties under section 63, a recognized exchange controller gives an instruction or direction or makes a request to a recognized clearing house of which it is the controller, the clearing house's

¹⁵ Same reason as in Note (5) in respect of clause 22(1). Consequential amendments in clause 39(3).

duties under sections 38 and 47 or under its rules (including its default rules) are not applicable to the clearing house in respect of anything done or omitted to be done in good faith by the clearing house in compliance with the instruction, direction or request¹⁶.

(3) Without limiting the generality of section 368(1), no civil liability, whether arising in contract, tort, defamation, equity or otherwise, shall be incurred by -

- (a) a person discharging, by virtue of a delegation under the default rules of a recognized clearing house, a ~~duty~~function¹⁵ of the clearing house in connection with any default proceedings; or
- (b) any person acting on behalf of a person referred to in paragraph (a), including -
 - (i) any member of the board of directors of that person; or
 - (ii) any member of any committee established by that person,

in respect of anything done or omitted to be done in good faith in the discharge or purported discharge of that ~~duty~~function¹⁵.

(4) Any failure by a recognized clearing house to comply with its rules in relation to a matter does not prevent the matter from being treated for the purposes of this Ordinance as done in accordance with the rules so long as the failure does not

¹⁶ Same reason as in Note (6) in respect of clause 22(2).

substantially affect the rights of a person entitled to require compliance with the rules.

(5) Where a relevant office-holder takes action in relation to property of a defaulter which is liable to be dealt with in accordance with the default rules of a recognized clearing house, and believes on reasonable grounds that he is entitled to take that action, he is not liable to any person in respect of any loss or damage resulting from his action except in so far as the loss or damage (as the case may be) is caused by the office-holder's own negligence.

40. Rules by recognized clearing houses

(1) Without limiting any of its other powers to make rules, a recognized clearing house may make rules for such matters as are necessary or desirable -

- (a) for the proper regulation and efficient operation of the clearing facilities which it operates;
- (b) for the proper regulation of its clearing participants;
- (c) for the establishment and maintenance of compensation arrangements for the investing public.

(2) A recognized clearing house shall make rules which -

- (a) provide for the taking of proceedings or other action if a clearing participant appears to be unable, or likely to become unable, to meet his obligations in respect of all unsettled or open market contracts to which he is a party; and

(b) comply with Part 5 of Schedule 3.

(3) Where a recognized clearing house takes default proceedings, all subsequent proceedings or other action taken under its rules for the settlement of market contracts to which the defaulter is a party shall be treated as taken under the default rules.

(4) The Commission may, by notice in writing served on a recognized clearing house, request the clearing house -

- (a) to make rules specified in the request within the period specified in that request; or
- (b) to amend rules referred to in the request in the manner and within the period specified in that request.

(4A) Before making a request under subsection (4), the Commission shall consult the Financial Secretary and the recognized clearing house to which the request relates¹⁷.

(5) Where the Commission is satisfied that a recognized clearing house has not complied with a request referred to in subsection (4) within the period specified in the request, the Commission may make or amend the rules specified in the request instead of the recognized clearing house.

41. Approval of rules or amendments to rules of recognized clearing house

¹⁷ Same reason as in Note (7) in respect of the new clause 23(3A).

(1) Subject to subsection (7), no rule (whether or not made under section 40) of a recognized clearing house or any amendment thereto shall have effect unless it has the approval in writing of the Commission.

(2) A recognized clearing house shall submit or cause to be submitted to the Commission -

- (a) for its approval the rules and every amendment thereto that require approval under subsection (1), together with explanations of their purpose and likely effect, including their effect on the investing public, in sufficient detail to enable the Commission to decide whether to approve them or refuse to approve them; and
- (b) for its information the rules which belong to a class the subject of a declaration under subsection (7) and every amendment to the rules, as soon as reasonably practicable after they have been made.

(3) The Commission shall, not later than 6 weeks after the receipt of a submission under subsection (2)(a) from a recognized clearing house, by notice in writing served on the clearing house, give its approval or refuse to give its approval (together with its reasons for the refusal) to the rules or amendment of the rules (as the case may be) or any part thereof, the subject of the submission.

(4) The Commission may give its approval under subsection (3) subject to requirements which shall be satisfied before the rules or amendment of the rules or any part thereof take effect.

(5) The Commission may in a particular case, with the agreement of the recognized clearing house concerned, extend the time prescribed in subsection (3).

(6) The Financial Secretary may, after consultation with the Commission and the recognized clearing house concerned, extend the time prescribed in subsection (3).

(7) The Commission may, by notice published in the Gazette, declare any class of rules of a recognized clearing house (except any default rules of the clearing house) to be a class of rules which are not required to be approved under subsection (1) and, accordingly, any rules of the clearing house which belong to that class (including any amendment thereto) shall have effect notwithstanding that they have not been so approved.

(8) Neither the rules under section 40 nor a notice under subsection (7) is subsidiary legislation.

42. Production of records, etc. by recognized clearing house

(1) The Commission may, by notice in writing served on a recognized clearing house, require the clearing house to provide to the Commission, within such period as the Commission may specify in the notice -

- (a) such books and records kept by it in connection with or for the purposes of its business or in respect of any clearing and settlement arrangements for any transactions in securities or futures contracts; and

- (b) such other information relating to its business or any clearing and settlement arrangements for any transactions in securities or futures contracts,

as the Commission may reasonably require for the performance of its functions.

(2) A recognized clearing house served with a notice under subsection (1) which, without reasonable excuse, fails to comply with the notice commits an offence and is liable on conviction to a fine at level 5.

43. Withdrawal of recognition of clearing house and direction to cease to provide facilities

(1) Subject to subsections (2), (3) and (4), the Commission may, after consultation with the Financial Secretary, by notice in writing served on a recognized clearing house -

- (a) withdraw the company's recognition as a clearing house with effect from a date specified in the notice for the purpose; or
- (b) direct the clearing house to cease to provide or operate with effect from a date specified in the notice for the purpose such clearing or settlement facilities as are specified therein.

¹⁸(1A) The Commission may by the notice served under subsection (1) permit the recognized clearing house to continue.

¹⁸ This is to provide for the continuation of certain activities for the smooth cessation of the recognized clearing house's operation.

on or after the date on which the withdrawal or direction is to take effect, to carry on such activities affected by the withdrawal or direction as the Commission may specify in the notice for the purpose of -

(a) closing down the operations of the clearing house; or

(b) protecting the interest of the investing public or public interest.

(2) The Commission may only serve a notice under subsection (1) in relation to a recognized clearing house that -

- (a) fails to comply with any requirement of this Ordinance or with a condition imposed under section 37;
- (b) is being wound up;
- (c) ceases to operate as a clearing house; or
- (d) requests the Commission to do so.

(3) Except where responding to a request under subsection (2)(d), the Commission shall not exercise its power under subsection (1) in relation to a recognized clearing house unless it has given the clearing house a reasonable opportunity of being heard.

(4) Except where responding to a request under subsection (2)(d), the Commission shall give the recognized clearing house not less than 14 days' notice in writing of its intention to serve a notice under subsection (1) and the grounds for doing so.

(5) Where the Commission withdraws a company's recognition as a clearing house under subsection (1)(a), it shall cause notice of that fact to be published in the Gazette.

(6) Where the Commission directs under subsection (1)(b) a recognized clearing house to cease to provide or operate any clearing or settlement facilities, it shall cause notice of the particulars of the direction to be published in the Gazette.

(7) A notice served under subsection (1)(a) shall not take effect -

(a) subject to paragraph (b), until the expiration of the period within which an appeal against the notice may be made under section 44; or

(b) if an appeal against the notice is made under section 44, until the appeal is withdrawn, abandoned or determined.

(8) A notice served under subsection (1)(b) shall take effect immediately.

44. Appeals

(1) A company served with a notice under section 43(1) may appeal against the notice to the Chief Executive in Council not later than 14 days after the date of service of the notice or such longer period (if any) as the Commission specifies in the notice.

(2) The decision of the Chief Executive in Council on an appeal under subsection (1) shall be final.

**45. Proceedings of recognized clearing
house take precedence over
law of insolvency**

(1) None of the following shall be regarded as to any extent invalid at law on the ground of inconsistency with the law relating to distribution of the assets of a person on insolvency, bankruptcy or winding up, or on the appointment of a receiver over any of the assets of a person -

- (a) a market contract;
- (b) the rules of a recognized clearing house relating to the settlement of a market contract;
- (c) any proceedings or other action taken under the rules of a recognized clearing house relating to the settlement of a market contract;
- (d) a market charge;
- (e) the default rules of a recognized clearing house; or
- (f) any default proceedings.

(2) The powers of a relevant office-holder in his capacity as such, and the powers of a court acting under the law of insolvency, shall not be exercised in such a way as to prevent or interfere with -

- (a) the settlement in accordance with the rules of a recognized clearing house of a market contract; or
- (b) any default proceedings.

(3) Subsection (2) shall not operate to prevent a relevant office-holder from recovering an amount under section 51 after the

completion of a matter referred to in paragraph (a) or (b) of that subsection.

46. Supplementary provisions as to default proceedings

(1) A court may, on an application by a relevant office-holder, make such order as it considers appropriate altering or releasing him from compliance with the functions of his office that are affected by the fact that default proceedings are pending or could be taken, or have been or could have been taken.

(2) The functions of the relevant office-holder referred to in subsection (1) shall be construed subject to an order made under that subsection.

(3) Sections 12, 14 ~~and~~ 20 ~~to 20K~~¹⁹ of the Bankruptcy Ordinance (Cap. 6) and sections 166, 181, 183, 186 and 254 of the Companies Ordinance (Cap. 32) do not prevent or interfere with any default proceedings.

47. Duty to report on completion of default proceedings

(1) A recognized clearing house shall, upon the completion by it of any default proceedings, make a report on such proceedings stating in respect of each defaulter -

¹⁹ The amendment was proposed in Paper 3A/01 in response to the comment of the Legal Service Division of the Legislative Council that provisions of the Bankruptcy Ordinance referred to under existing legislation should remain.

(a) the net sum (if any) certified by the clearing house to be payable by or to the defaulter; or

(b) the fact that no sum is so payable,

(as the case may be) and the clearing house may include in that report such other particulars in respect of such proceedings as it considers appropriate.

(2) A recognized clearing house which has made a report pursuant to subsection (1) shall supply the report to -

(a) the Commission; and

(b) (i) any relevant office-holder acting in relation to -

(A) the defaulter to whom the report relates; or

(B) that defaulter's estate; or

(ii) if there is no relevant office-holder referred to in subparagraph (i), the defaulter to whom the report relates.

(3) Where the Commission receives pursuant to subsection (2) a report made pursuant to subsection (1), it may publish notice of that fact in such manner as it considers appropriate to bring it to the attention of creditors of the defaulter to whom the report relates.

(4) Where a relevant office-holder or defaulter receives pursuant to subsection (2) a report made pursuant to subsection (1), he shall, at the request of a creditor of the defaulter to whom the report relates -

- (a) make the report available for inspection by the creditor;
 - (b) on payment of such reasonable fee as the relevant office-holder or defaulter (as the case may be) determines, supply to the creditor all or any part of that report.
- (5) In subsections (2), (3) and (4), "report" (報告) includes a copy of a report.

48. Net sum payable on completion of default proceedings

(1) This section applies with respect to any net sum referred to in section 47(1)(a).

(2) Where a bankruptcy or winding-up order has been made, or a resolution for voluntary winding up has been passed, any net sum shall, notwithstanding any provision of section 34 or 35 of the Bankruptcy Ordinance (Cap. 6) or section 264 of the Companies Ordinance (Cap. 32), be -

- (a) provable in the bankruptcy or winding up or (as the case may be) payable to the relevant office-holder; and
- (b) taken into account, where appropriate, under section 35 of the Bankruptcy Ordinance (Cap. 6) or that section as applied in the case of a winding-up order under the Companies Ordinance (Cap. 32).

**49. Disclaimer of property, rescission
of contracts, etc.**

(1) Section 59 of the Bankruptcy Ordinance (Cap. 6) and section 268 of the Companies Ordinance (Cap. 32) do not apply in relation to -

- (a) a market contract;
- (b) a contract effected by a recognized clearing house for the purpose of realizing property provided as market collateral;
- (c) a market charge; or
- (d) any default proceedings.

(2) Section 42 of the Bankruptcy Ordinance (Cap. 6) and section 182 of the Companies Ordinance (Cap. 32) do not apply in relation to any act, matter or thing which has been done pursuant to -

- (a) a market contract;
- (b) a disposal of property pursuant to a market contract;
- (c) the provision of market collateral;
- (d) a contract effected by a recognized clearing house for the purpose of realizing property provided as market collateral, or any disposal of property pursuant to such a contract;
- (e) a disposal of property in accordance with the rules of a recognized clearing house as to the application of property provided as market collateral;

- (f) a disposal of property as a result of which the property becomes subject to a market charge, or any transaction pursuant to which that disposal is made;
- (g) a disposal of property made in enforcing a market charge;
- (h) a market charge; or
- (i) any default proceedings.

50. Adjustment of prior transactions

(1) No order shall be made pursuant to -

- (a) section 49 or 50 of the Bankruptcy Ordinance (Cap. 6);
- (b) section 266 of the Companies Ordinance (Cap. 32); or
- (c) section 60 of the Conveyancing and Property Ordinance (Cap. 219),

in relation to any matter to which this section applies.

(2) The matters to which this section applies are -

- (a) a market contract;
- (b) a disposal of property pursuant to a market contract;
- (c) the provision of market collateral;
- (d) a contract effected by a recognized clearing house for the purpose of realizing property provided as market collateral;

- (e) a disposal of property in accordance with the rules of a recognized clearing house as to the application of property provided as market collateral;
- (f) a market charge; and
- (g) any default proceedings.

51. Right of relevant office-holder to recover certain amounts arising from certain transactions

(1) Where a clearing participant ("the first participant") enters into a transaction for the sale or purchase of securities with another clearing participant ("the second participant") at an undervalue or an over-value in circumstances described in subsection (2), and thereafter a relevant office-holder is acting in relation to -

- (a) the second participant;
- (b) the person who was, in respect of the transaction, the principal of the second participant ("the second principal"); or
- (c) the estate of the second participant or the second principal,

then, unless a court otherwise orders, the relevant office-holder may recover, from the first participant, or the person who was, in respect of the transaction, the principal of the first participant ("the first principal"), an amount equal to the prescribed gain obtained under the transaction by the first participant or the first principal (as the case may be). The amount is recoverable

even if the transaction may have been discharged in accordance with the rules of a recognized clearing house and replaced by a market contract.

(2) The circumstances referred to in subsection (1) in which a transaction is entered into occur when -

- (a) a prescribed event has occurred in relation to the second participant or the second principal; or
- (b) the first participant or the first principal knew or ought reasonably to have known -
 - (i) in the case of the first participant, that a prescribed event was likely to occur in relation to the second participant or the second principal;
 - (ii) in the case of the first principal, that a prescribed event was likely to occur in relation to the second principal,

and the event occurs within the period of 6 months immediately following the date on which the transaction was so entered into.

(3) In this section -

"prescribed event" (訂明事件), in relation to a second participant or a second principal, means -

- (a) ~~a bankruptcy order has been made~~ grounds exist for a creditor to present a bankruptcy petition²⁰ against the second participant or the second principal (as the case may be);
- (b) the making of a statutory declaration in respect of the second participant or the second principal (as the case may be) pursuant to section 228A(1) of the Companies Ordinance (Cap. 32);
- (c) a meeting of creditors summoned in relation to the second participant or the second principal (as the case may be) pursuant to section 241 of the Companies Ordinance (Cap. 32); or
- (d) the presentation of a petition for the winding up of the second participant or the second principal (as the case may be) by a court;

"prescribed gain" (訂明收益), in relation to a transaction referred to in subsection (1), means the difference between -

- (a) the market value of the securities the subject of the transaction; and
- (b) the value of the consideration for the transaction, as at the time the transaction was entered into.

²⁰ The amendment was proposed in Paper 3A/01 in response to the comment of the Legal Service Division of the Legislative Council that the ground under existing legislation would be more appropriate.

52. Application of market collateral not affected by certain other interests, etc.

(1) The provisions of this section have effect with respect to the application by a recognized clearing house of property provided as market collateral.

(2) So far as necessary to enable the property to be applied in accordance with the rules of a recognized clearing house, it may be so applied notwithstanding any prior equitable interest or right, or any right or remedy arising from a breach of fiduciary duty, unless the clearing house had actual notice of the interest, right or breach of duty (as the case may be) at the time the property was provided as market collateral.

(3) No right or remedy arising subsequently to the property being provided as market collateral may be enforced so as to prevent or interfere with the application of the property by the recognized clearing house in accordance with its rules.

(4) Where a recognized clearing house has power by virtue of the provisions of this section to apply property notwithstanding an interest, right or remedy, a person to whom the clearing house disposes of the property in accordance with its rules takes free from that interest, right or remedy.

53. Enforcement of judgments over property subject to market charge, etc.

(1) Where property is subject to a market charge or has been provided as market collateral, no execution or other legal process for the enforcement of a judgment or order may be commenced or

continued, and no distress may be levied, against the property by a person not seeking to enforce any interest in or security over the property, except with the consent of the recognized clearing house concerned.

(2) Where by virtue of this section a person would not be entitled to enforce a judgment or order against any property, any injunction or other remedy granted with a view to facilitating the enforcement of any such judgment or order shall not extend to that property.

54. Law of insolvency in other jurisdictions

(1) A court shall not, pursuant to any enactment or rule of law, recognize or give effect to -

- (a) an order of a court exercising jurisdiction under the law of insolvency in a place outside Hong Kong; or
- (b) an act of a person appointed in that place to perform a function under the law of insolvency there,

in so far as making the order or doing the act would be prohibited in the case of a court in Hong Kong or a relevant office-holder by provisions made by or under this Ordinance.

(2) In this section, "law of insolvency" (破產清盤法), in relation to a place outside Hong Kong, means any law of that place which is similar to, or serves the same purposes as, any part of the law of insolvency in Hong Kong.

55. Clearing participant to be party to certain transactions as principal

(1) Where a clearing participant -

(a) in his capacity as such enters into any transaction (including a market contract) with a recognized clearing house; and

(b) but for this subsection, would be a party to that transaction as agent,

then, notwithstanding any other enactment or rule of law, as between, but only as between, the clearing house and any other person (including the clearing participant and the person who is his principal in respect of that transaction), the clearing participant shall for all purposes (including any action, claim or demand, either civil or criminal) -

(i) be deemed not to be a party to that transaction as agent; and

(ii) be deemed to be a party to that transaction as principal.

(2) Where -

(a) 2 or more clearing participants in their capacities as such enter into any transaction; and

(b) but for this subsection, any such clearing participant would be a party to that transaction as agent,

then, notwithstanding any other enactment or rule of law, any such clearing participant to whom paragraph (b) applies shall for all

purposes (including any action, claim or demand, either civil or criminal), except as between, but only as between, him and the person who is his principal in respect of that transaction -

- (i) be deemed not to be a party to that transaction as agent; and
- (ii) be deemed to be a party to that transaction as principal.

56. ~~Property~~Securities deposited with recognized clearing house

(1) Subject to subsections (2) and (3), where ~~securities are deposited~~any property is deposited as market collateral²¹ by a clearing participant with a recognized clearing house in accordance with the rules of the clearing house, then, notwithstanding any other enactment or rule of law, no action, claim or demand, either civil or criminal, in respect of any right, title or interest in ~~those securities~~such property held or enjoyed by any person lies, or shall be commenced or allowed, against the clearing house or its nominees.

(2) The operation of subsection (1) in respect of ~~securities deposited~~any property deposited as market collateral with a recognized clearing house is subject to the modifications and exclusions provided in the rules of the clearing house.

²¹ The amendment proposed is in recognition of that other property, in addition to securities, may be held as market collateral and which inclusion is required for the proper operation of a recognized clearing house.

(3) This section does not operate to prejudice the operation of section 100 of the Companies Ordinance (Cap. 32).

57. Preservation of rights, etc.

Except to the extent that they expressly provide, the provisions of this Division do not operate to limit, restrict or otherwise affect -

- (a) any right, title, interest, privilege, obligation or liability of a person;
- (b) any investigation, legal proceeding or remedy in respect of any such right, title, interest, privilege, obligation or liability.

58. Amendment of Schedule 3

(1) The Financial Secretary may, by notice published in the Gazette, amend Part 5 of Schedule 3.

(2) For the avoidance of doubt, it is hereby declared that the power of the Financial Secretary under subsection (1) to amend Part 5 of Schedule 3 may be exercised in such a way as to include in that Part a provision which requires a recognized clearing house to have, as part of its default rules, rules which prohibit the clearing house from taking any proceedings or other action specified in the provision, either generally or in a particular case.

Division 4 - Exchange controllers

59. Recognition of exchange controller

(1) Subject to subsection (19) and section 62, no person shall become or continue to be the controller of a recognized exchange company or recognized clearing house unless the person is a recognized exchange controller.

(2) Where the Commission is satisfied that it is appropriate to do so -

(a) in the interest of the investing public or in the public interest; or

(b) for the proper regulation of markets in securities or futures contracts,

it may, with the consent in writing of the Financial Secretary, by notice in writing served on a company, recognize the company as an exchange controller -

(i) subject to such conditions as it considers appropriate specified in the notice; and

(ii) with effect from a date specified in the notice for the purpose.

(3) Without limiting the generality of conditions which may be specified in a notice under subsection (2), the Commission may, by notice in writing served on a recognized exchange controller, amend or revoke any condition specified in the first-mentioned notice or impose new condition, where the Commission -

(a) is satisfied that it is appropriate to do so on a ground specified in paragraph (a) or (b) of that subsection; and

(b) has the consent in writing of the Financial Secretary to do so.

(4) Where the Commission amends or revokes any condition or imposes any new condition by a notice under subsection (3), the amendment, revocation or imposition takes effect at the time of service of the notice or at the time specified in the notice, whichever is the later.

(5) Subject to subsection (6), a person who –
~~(a) contravenes subsection (1), or~~

~~* (b) fails to comply with a condition imposed by a
 notice served on the person under subsection (2) or
 (3),²² commits an offence and is liable –
 — (a) on conviction on indictment to a fine of
 \$1,000,000 and to imprisonment for 2 years; or
 — (b) on summary conviction to a fine at level
 6 and to imprisonment for 6 months.~~

(6) Where a person is charged with an offence under subsection (5), it is a defence to the charge for the person to prove –

~~(a) in the case of subsection (5)(a), that the person did not know that the acts or circumstances by virtue of which the person became the controller of the recognized exchange company or~~

²² We accept the market comment that it is not appropriate to criminalise a breach of the conditions imposed on the recognised exchange controller. Some consequential amendments in this clause.

recognized clearing house concerned were such as to have that effect.

~~(b) in the case of subsection (5) (b), that the person exercised reasonable diligence to comply with the condition concerned.~~

(7) Where a person -

- (a) is a controller of a recognized exchange company or recognized clearing house in contravention of subsection (1) (and whether or not the person is charged with an offence under subsection (5) in relation to the contravention);
- (b) did not know and had no reason to suspect the existence of any of the acts or circumstances by virtue of which the person became the controller of the recognized exchange company or recognized clearing house; and
- (c) subsequently becomes aware of the fact that the person has become such a controller,

the person shall serve on the Commission, not later than 14 days after becoming aware of that fact, a notice in writing stating that the person has become such a controller.

(8) The Commission may, upon the service of a notice under subsection (7) -

- (a) recognize the person as an exchange controller in accordance with subsection (2); or
- (b) refuse to recognize the person as an exchange controller.

(9) Where a person is a controller of a recognized exchange company or recognized clearing house in contravention of subsection (1) (and whether or not the person is charged with an offence under subsection (5) in relation to the contravention) -

- (a) the Commission may, by notice published in the Gazette -
 - (i) declare that any votes cast at any meeting of the recognized exchange company or recognized clearing house (as the case may be) by the person after the person became the controller shall be void and of no effect; and
 - (ii) give such directions as it considers appropriate for any such meetings to be reconvened for voting anew on the business on which such votes were cast;
- (b) the person or any of his associated persons shall not exercise any rights conferred on the person as a holder of securities in the recognized exchange company or recognized clearing house, or any rights in securities in any such company which are otherwise controlled by the person; and
- (c) the Commission may, by notice in writing served on the person, direct the person to take such steps as are specified in the notice -
 - (i) for the purpose of causing the person to cease to be such controller; and

- (ii) within such period as is specified in the notice for the purpose.

(10) Without limiting the generality of steps referred to in subsection (9)(c) which may be specified in a notice under that subsection to be served on a person referred to in that subsection, such steps may consist in whole or in part of steps proposed in writing to the Commission by that person.

(11) The steps specified in a notice under subsection (9)(c) may be framed so as to afford the person on whom the notice is served a choice between different ways of ceasing to be the controller of the recognized exchange company or recognized clearing house concerned.

(12) A notice served under subsection (9)(c) shall not take effect -

- (a) subject to paragraph (b), until the expiration of the period within which an appeal against the notice may be made under section 73; or
- (b) if an appeal against the notice is made under section 73, until the appeal is withdrawn, abandoned or determined.

(13) Subject to subsection (14), a person served with a notice under subsection (9)(c) who fails to comply with the notice commits an offence and is liable -

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(14) It is a defence for a person charged with an offence under subsection (13) to prove that the person exercised reasonable diligence to comply with the notice concerned under subsection (9) (c) served on the person.

(15) Where a person served with a notice under subsection (9) (c) fails to comply with the notice (and whether or not the person is charged with an offence under subsection (13) in relation to the contravention), the provisions of Part 6 of Schedule 3 shall immediately apply.

(16)^a The provisions of this section, except subsection (5) ~~(a)~~, shall apply to a person who became the controller of a recognized exchange company or recognized clearing house before the commencement of this section as they apply to a person who became the controller of a recognized exchange company or recognized clearing house on or after that commencement.

(17) Where a company becomes a recognized exchange controller, the Commission shall cause notice of that fact to be published in the Gazette.

(18) Where a company is seeking to be a recognized exchange controller and the Commission is minded not to recognize the company under subsection (2), the Commission shall give the company a reasonable opportunity of being heard before making a decision not to recognize the company.

(19) Subsection (1) shall not apply to a person who is the controller of a recognized exchange company or recognized clearing house if the recognized exchange company or recognized clearing house is itself a recognized exchange controller.

(20) A notice under subsection (9)(a) is not subsidiary legislation.

60. Interest of recognized exchange controller in recognized exchange company or recognized clearing house cannot be increased or decreased except with approval of Commission

Where a recognized exchange controller is a controller of a recognized exchange company or recognized clearing house, then, by virtue of this section and notwithstanding any other enactment or rule of law -

- (a) any interest the recognized exchange controller has in the recognized exchange company or recognized clearing house (as the case may be) as such controller cannot be increased or decreased except with the approval in writing of the Commission;
- (b) any attempt (whether in the form of an agreement or otherwise and by whomsoever) to increase or decrease any such interest in contravention of paragraph (a) is void for all purposes.

61. Person not to become minority controller of exchange controller, etc. without approval of Commission

(1) Subject to subsections (2) and (16), on and after the commencement of this section, a person shall not -

- (a) be or become a minority controller of a recognized exchange controller, recognized exchange company or recognized clearing house except with the approval

in writing of the Commission after consultation with the Financial Secretary; and

- (b) if such approval is given, and subject to any condition specified in the approval disapplying this paragraph in whole or in part, increase the interest the person has as such minority controller except with the further approval in writing of the Commission after consultation with the Financial Secretary.

(2) ²³ The Commission shall not give an approval under subsection (1) (a) or (b) unless it is satisfied that it is appropriate to do so in the interest of the investing public or in the public interest.

(3) Where the Commission refuses to give an approval under subsection (1) (a) or (b), it shall give notice in writing of its reasons for the refusal to the person concerned.

(4) Subject to subsection (5), a person who -
~~(a) contravenes subsection (1), or~~
~~(b) fails to comply with a condition specified in an approval under subsection (1),~~²³ commits an offence and is liable -

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

²³ We accept the market comment that it is not appropriate to criminalise a breach of the conditions imposed on the minority controller. Some consequential amendments in this clause.

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

(5) Where a person is charged with an offence under subsection (4), it is a defence to the charge for the person to prove -

~~(a) in the case of subsection (4)(a), that the person -~~

~~—— (ai) did not know that the acts or circumstances by virtue of which the person became a minority controller, or increased the interest the person has as a minority controller (as the case may be) of the recognized exchange controller, recognized exchange company or recognized clearing house concerned were such as to have that effect; or~~

~~—— (bii) exercised reasonable diligence to avoid contravening subsection (1).~~

~~(b) in the case of subsection (4)(b), that the person exercised reasonable diligence to comply with the condition concerned.~~

(6) Where a person -

(a) is a minority controller of a recognized exchange controller, recognized exchange company or recognized clearing house in contravention of subsection (1) (and whether or not the person is charged with an offence under subsection (4) in relation to the contravention);

(b) did not know and had no reason to suspect the existence of any of the acts or circumstances by

virtue of which the person became the minority controller of that recognized exchange controller, recognized exchange company or recognized clearing house; and

- (c) subsequently becomes aware of the fact that the person has become such a minority controller,

the person shall serve on the Commission, not later than 14 days after becoming aware of that fact, a notice in writing stating that the person has become such a minority controller.

- (7) The Commission may, upon the service of a notice under subsection (6) -

- (a) approve the person as a minority controller in accordance with subsection (1); or
 - (b) refuse to approve the person as a minority controller.

(8) Where a person is the minority controller of a recognized exchange controller, recognized exchange company or recognized clearing house in contravention of subsection (1) (and whether or not the person is charged with an offence under subsection (4) in relation to the contravention), the Commission may, by notice published in the Gazette -

- (a) declare that any votes cast at any meeting of the recognized exchange controller, recognized exchange company or recognized clearing house (as the case may be) by the person after the person became the minority controller, shall be void and of no effect; and

- (b) give such directions as it considers appropriate for any such meetings to be reconvened for voting anew on the business on which such votes were cast.

(9) Where a person has contravened subsection (1) or failed to comply with a condition specified in an approval under that subsection (and whether or not the person is charged with an offence under subsection (4) in relation to the contravention or failure) -

- (a) the person or any of his associated persons shall not exercise any rights conferred on the person as a holder of securities in the recognized exchange controller, recognized exchange company or recognized clearing house concerned or any rights in securities in any such company which are otherwise controlled by the person; and
- (b) the Commission may, by notice in writing served on the person, direct the person to take such steps as are specified in the notice -
 - (i) for the purpose of causing the person to cease to be a minority controller of the recognized exchange controller, recognized exchange company or recognized clearing house the subject of that contravention or failure; and
 - (ii) within such period as is specified in the notice for the purpose.

(10) Without limiting the generality of steps referred to in subsection (9)(b) which may be specified in a notice under that subsection to be served on a person referred to in that subsection, such steps may consist in whole or in part of steps proposed in writing to the Commission by that person.

(11) The steps specified in a notice under subsection (9)(b) may be framed so as to afford the person on whom the notice is served a choice between different ways of ceasing to be a minority controller of the recognized exchange controller, recognized exchange company or recognized clearing house concerned.

(12) A notice served under subsection (9)(b) shall not take effect -

- (a) subject to paragraph (b), until the expiration of the period within which an appeal against the notice may be made under section 73; or
- (b) if an appeal against the notice is made under section 73, until the appeal is withdrawn, abandoned or determined.

(13) Subject to subsection (14), a person served with a notice under subsection (9)(b) who fails to comply with the notice commits an offence and is liable -

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(14) It is a defence for a person charged with an offence under subsection (13) to prove that the person exercised

reasonable diligence to comply with the notice concerned under subsection (9)(b) served on the person.

(15) Where a person served with a notice under subsection (9)(b) fails to comply with the notice (and whether or not the person is charged with an offence under subsection (13) in relation to the contravention), the provisions of Part 6 of Schedule 3 shall immediately apply.

(16) The Commission may, after consultation with the Financial Secretary, make rules to exempt a person, or a person belonging to a class of persons, specified in the rules from one or more of the requirements of subsection (1) subject to such conditions (if any) as are specified in the rules.

(17) Where a person is seeking to be a minority controller of a recognized exchange controller, recognized exchange company or recognized clearing house and the Commission is minded not to give approval under subsection (1) in relation thereto, the Commission shall give the person a reasonable opportunity of being heard before making a decision not to give such approval.

(18) Nothing in this section shall operate to prevent the Commission from approving under this or any other Ordinance the provisions of the constitution, or the provisions of an amendment to the constitution, of a recognized exchange controller, recognized exchange company or recognized clearing house which impose requirements additional to this section in relation to -

- (a) interests held in the recognized exchange controller, recognized exchange company or recognized clearing house (as the case may be)

including, but not limited to, the exercise, or the control of the exercise, of voting power at any general meeting of the recognized exchange controller, recognized exchange company or recognized clearing house (as the case may be); or

- (b) steps to be taken for the purpose of causing a person to dispose of any such interest including, but not limited to, ceasing to be a minority controller (by whatever name called) of the recognized exchange controller, recognized exchange company or recognized clearing house (as the case may be).

(19) A notice under subsection (8) is not subsidiary legislation.

(20) In this section, "minority controller" (次要控制人), in relation to a recognized exchange controller, recognized exchange company or recognized clearing house -

- (a) subject to paragraph (b), means any person who, either alone or with any associated person or persons, is entitled to exercise, or control the exercise of, 5% or more of the voting power at any general meeting of the recognized exchange controller, recognized exchange company or recognized clearing house (as the case may be) or of a corporation of which the recognized exchange controller, recognized exchange company or

recognized clearing house (as the case may be) is a subsidiary;

(b) does not include -

(i) a recognized exchange controller; or

(ii) a person, or a person belonging to a class of persons, specified in Part 7 of Schedule 3 not to be a minority controller for the purposes of this Division.

**62. Exemption from section 59(1)
and revocation of exemption**

(1) Where the Financial Secretary is satisfied that it is appropriate to do so -

(a) in the interest of the investing public or in the public interest; or

(b) for the proper regulation of markets in securities or futures contracts,

he may, by notice in writing served on a person, exempt the person from section 59(1) -

(i) subject to such conditions as he considers appropriate specified in the notice; and

(ii) with effect from a date specified in the notice for the purpose.

(2) Where the Financial Secretary is satisfied that it is appropriate to do so -

- (a) in the interest of the investing public or in the public interest; or
- (b) for the proper regulation of markets in securities or futures contracts,

he may, by notice in writing served on a person the subject of an exemption under subsection (1) stating the reasons in support of the ground or grounds for the notice, revoke the exemption -

- (i) subject to such conditions as he considers appropriate specified in the notice; and
- (ii) with effect from a date specified in the notice for the purpose, being a date reasonable in all the circumstances of the case.

(3) Subject to subsection (4), a person who fails to comply with a condition specified in a notice under subsection (1) or (2) commits an offence and is liable -

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(4) It is a defence for a person charged with an offence under subsection (3) to prove that the person exercised reasonable diligence to comply with the notice concerned under subsection (1) or (2) served on the person.

(5) Without limiting the generality of the Financial Secretary's power under subsection (1), a person is exempt from section 59(1) in the cases specified in Part 8 of Schedule 3.

(6) For the avoidance of doubt, it is hereby declared that the Financial Secretary's power under subsection (2) to revoke an exemption under subsection (1) includes the power to revoke and replace the exemption.

63. Duties of recognized exchange controller

(1) It shall be the duty of a recognized exchange controller which is the controller of a recognized exchange company or recognized clearing house to ensure so far as reasonably practicable -

- (a) an orderly, informed and fair market in securities or futures contracts traded on the stock market or futures market operated by the recognized exchange company or through the facilities of the company;
- (b) that there are orderly, fair and expeditious clearing and settlement arrangements for any transactions in securities or futures contracts cleared or settled through the facilities of the recognized clearing house;
- (c) that risks associated with its business and operations are managed prudently;
- (d) that the recognized exchange company or recognized clearing house (as the case may be) complies with any lawful requirement placed on it under any enactment or rule of law and with any other legal requirement placed on it.

(2) In discharging its duty under subsection (1)(a), (b) or (c), a recognized exchange controller shall -

- (a) act in the interests of the public, having particular regard to the interests of the investing public; and
- (b) ensure that the interests of the public prevail where they conflict with the interests of the recognized exchange controller ~~or the interests that it is required to serve under any other~~²⁴ applicable law.

64. Immunity, etc.

(1) Without limiting the generality of section 368(1), no civil liability, whether arising in contract, tort, defamation, equity or otherwise, shall be incurred by -

- (a) a recognized exchange controller; or
- (b) any person acting on behalf of a recognized exchange controller, including -
 - (i) any member of the board of directors of the recognized exchange controller; or
 - (ii) any member of any committee established by the recognized exchange controller,

in respect of anything done or omitted to be done in good faith in the discharge or purported discharge of the duties of the

²⁴ Same reason as in Note (4) in respect of clause 21(2)(b).

~~controller~~ under section 63 or ~~under the rules of the~~
~~controller of its functions under its rules~~²⁵.

(2) Any failure by a recognized exchange controller to comply with its rules in relation to a matter does not prevent the matter from being treated for the purposes of this Ordinance as done in accordance with the rules so long as the failure does not substantially affect the rights of a person entitled to require compliance with the rules.

65. Establishment and functions of Risk Management Committee

(1) A recognized exchange controller shall establish and keep established a committee, to be called the Risk Management Committee, to formulate policies on risk management matters relating to the activities of the recognized exchange controller and of any recognized exchange company or recognized clearing house of which the recognized exchange controller is the controller and to submit such policies to the recognized exchange controller for its consideration.

(2) The Risk Management Committee shall consist of -

- (a) the chairman of the recognized exchange controller who shall also be the chairman of the Committee;
and
- (b) not less than ~~34~~²⁶ or more than 7 other members.

²⁵ Same reason as in Note (5) in respect of clause 22(1).

(3) The Financial Secretary shall appoint not less than 3 or more than 5 of the members referred to in subsection (2)(b).

(4) The recognized exchange controller shall appoint not more than 2 of the members referred to in subsection (2)(b) of whom not less than one shall be a member of the board of directors of the recognized exchange controller who -

(a) is such a member otherwise than by virtue of an appointment under section 77(1); and

(b) is not the chief executive of the recognized exchange controller.

66. Rules by recognized exchange controllers

(1) Without limiting any of its other powers to make rules, a recognized exchange controller may make rules for such matters as are necessary or desirable -

(a) for the performance of its duties under section 63;

(b) for the establishment and maintenance of compensation arrangements for the investing public.

(2) The Commission may, after consultation with the Financial Secretary, by notice published in the Gazette, declare a person or body of persons specified in the notice to be a person or body of persons (as the case may be) to which paragraph

²⁶ This is to rectify the anomaly that the minimum number of members appointed by the Financial Secretary and the recognized exchange controller respectively under sub-clauses (3) and (4) do not add up to the total minimum under sub-clause (2).

(c)(ii)(C) of the definition of "rules" in section 1 of Part 1 of Schedule 1 shall apply.

**67. Approval of rules or amendments to rules
of recognized exchange controller**

(1) Subject to subsection (7), no rule (whether or not made under section 66) of a recognized exchange controller or any amendment thereto shall have effect unless it has the approval in writing of the Commission.

(2) A recognized exchange controller shall submit or cause to be submitted to the Commission -

- (a) for its approval the rules and every amendment thereto that require approval under subsection (1), together with explanations of their purpose and likely effect, including their effect on the investing public, in sufficient detail to enable the Commission to decide whether to approve them or refuse to approve them; and
- (b) for its information the rules which belong to a class the subject of a declaration under subsection (7) and every amendment to the rules, as soon as reasonably practicable after they have been made.

(3) The Commission shall, not later than 6 weeks after the receipt of a submission under subsection (2)(a) from a recognized exchange controller, by notice in writing served on the controller, give its approval or refuse to give its approval (together with its reasons for the refusal) to the rules or

amendment of the rules (as the case may be) or any part thereof, the subject of the submission.

(4) The Commission may give its approval under subsection (3) subject to requirements which shall be satisfied before the rules or amendment of the rules or any part thereof take effect.

(5) The Commission may in a particular case, with the agreement of the recognized exchange controller concerned, extend the time prescribed in subsection (3).

(6) The Financial Secretary may, after consultation with the Commission and the recognized exchange controller concerned, extend the time prescribed in subsection (3).

(7) The Commission may, by notice published in the Gazette, declare any class of rules of a recognized exchange controller to be a class of rules which are not required to be approved under subsection (1) and, accordingly, any rules of the controller which belong to that class (including any amendment thereto) shall have effect notwithstanding that they have not been so approved.

(8) Neither the rules under section 66(1) nor a notice under subsection (7) is subsidiary legislation.

68. Transfer and resumption of functions of Commission

(1) The Commission may request the Chief Executive in Council to transfer, by order ("transfer order") published in the Gazette, to a recognized exchange controller ("designated exchange controller"), a function to which this section applies, if the

Commission is satisfied that the designated exchange controller is willing and able to perform the function.

(2) This section applies to a function of the Commission under -

- (a) Part V;
- (b) section 141; and
- (c) Parts II and XII of the Companies Ordinance (Cap. 32).

(3) A function to which this section applies may be transferred by a transfer order either in whole or in part, and the transfer may be subject to -

- (a) a reservation that the Commission is to perform the function concurrently with the designated exchange controller; and
- (b) such other conditions as the Commission considers appropriate.

(4) A transfer order may contain such incidental, supplemental and consequential provisions as may be necessary or expedient for the purpose of giving full effect to the order.

(5) The Commission shall not request that a transfer order be made in respect of the making of financial resources rules unless the proposed designated exchange controller has first supplied the Commission with a draft of the financial resources rules which it proposes to make, and the Commission is satisfied that the rules, if made, will afford the investing public an adequate level of protection.

(6) The Commission may at the request or with the consent of a designated exchange controller resume a function transferred by a transfer order, but the resumption takes effect only by order of the Chief Executive in Council.

(7) The Chief Executive in Council may order that the Commission resume a function transferred to a designated exchange controller by a transfer order if the Commission so requests and if it appears to the Chief Executive in Council to be in the public interest to do so.

(8) A transfer order may provide for a designated exchange controller to retain all or any of the fees payable in relation to the performance of a transferred function, and an order made under subsection (6) or (7) may provide for the Commission to retain all or any such fees, from a date specified in the order.

69. Chairman of recognized exchange controller

(1) No person shall be the chairman of a company which is a recognized exchange controller unless he has the approval in writing of the Chief Executive to hold that office.

(2) Where the Chief Executive is satisfied that it is appropriate to do so -

(a) in the interest of the investing public or in the public interest; or

(b) for the proper regulation of markets in securities or futures contracts,

he may, by notice in writing served on a person who is the chairman of a recognized exchange controller, remove the person

from that office with effect from a date specified in the notice for the purpose.

70. Appointment of chief executive or chief operating officer of recognized exchange controller requires approval of Commission

(1) No appointment of a person as chief executive or chief operating officer of a company which is a recognized exchange controller shall have effect unless the appointment has the approval in writing of the Commission.

(2) Where the Commission, after consultation with the Financial Secretary and the chairman of a recognized exchange controller, is satisfied that it is appropriate to do so -

(a) in the interest of the investing public or in the public interest; or

(b) for the proper regulation of markets in securities or futures contracts,

it may, by notice in writing served on a person who is the chief executive or chief operating officer of the controller, remove the person from that office with effect from a date specified in the notice for the purpose.

(3) A notice served under subsection (2) shall take effect immediately.

71. Production of records, etc. by recognized exchange controller

(1) The Commission may, by notice in writing served on a recognized exchange controller, require the controller to provide

to the Commission, within such period as the Commission may specify in the notice -

- (a) such books and records kept by it -
 - (i) in connection with or for the purposes of its business;
 - (ii) in respect of any trading in securities or futures contracts traded on the stock market or futures market operated by the recognized exchange company of which it is a controller, or through the facilities of that company; or
 - (iii) in respect of any clearing and settlement arrangements for any transactions in securities or futures contracts cleared or settled through the facilities of the recognized clearing house of which it is a controller; and
- (b) such other information relating to its business or any such trading or clearing and settlement arrangements,

as the Commission may reasonably require for the performance of its functions.

(2) A recognized exchange controller served with a notice under subsection (1) which, without reasonable excuse, fails to comply with the notice commits an offence and is liable on conviction to a fine at level 5.

72. Withdrawal of recognition of exchange controller

(1) Subject to subsection (2), where the Commission is satisfied that it is appropriate to do so -

- (a) in the interest of the investing public or in the public interest; or
- (b) for the proper regulation of markets in securities or futures contracts,

it may, with the consent in writing of the Financial Secretary, by notice in writing served on a recognized exchange controller stating the reasons in support of the ground or grounds for the notice -

- (i) withdraw the company's recognition as an exchange controller with effect from a date specified in the notice for the purpose; or
- (ii) direct the company to take such steps as are specified in the notice -
 - (A) for the purpose of causing the company to cease to be such controller; and
 - (B) within such period as is specified in the notice for the purpose.

(2) The Commission shall not exercise its power under subsection (1) in relation to a recognized exchange controller unless it has given the controller a reasonable opportunity of being heard.

(3) Without limiting the generality of steps referred to in subsection (1)(ii) which may be specified in a notice under that

subsection to be served on a company referred to in that subsection, such steps may consist in whole or in part of steps proposed in writing to the Commission by that company.

(4) The steps specified in a notice under subsection (1)(ii) may be framed so as to afford the company on which the notice is served a choice between different ways of ceasing to be the controller of the recognized exchange company or recognized clearing house concerned.

(5) Where the Commission withdraws a company's recognition as an exchange controller under subsection (1)(i), it shall cause notice of that fact to be published in the Gazette.

(6) A notice served under subsection (1) shall not take effect -

- (a) subject to paragraph (b), until the expiration of the period within which an appeal against the notice may be made under section 73; or
- (b) if an appeal against the notice is made under section 73, until the appeal is withdrawn, abandoned or determined.

(7) Subject to subsection (8), a company served with a notice under subsection (1) which fails to comply with the notice commits an offence and is liable -

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(8) It is a defence for a person charged with an offence under subsection (7) to prove that the person exercised reasonable diligence to comply with the notice concerned under subsection (1) served on the person.

(9) Where a company served with a notice under subsection (1) fails to comply with the notice (and whether or not the company is charged with an offence under subsection (7)), the provisions of Part 6 of Schedule 3 shall immediately apply.

73. Appeals

(1) A person served with a notice under section 59(9)(c), 61(9)(b), 70(2), 72(1) or 75(1) may appeal against the notice to the Chief Executive in Council not later than 14 days after the date of service of the notice or such longer period (if any) as the Commission specifies in the notice.

(2) The decision of the Chief Executive in Council on an appeal under subsection (1) shall be final.

74. Provisions applicable where recognized exchange controller, etc. seeks to be listed corporation

(1) The relevant recognized exchange controller, or a relevant corporation, shall not become a listed corporation unless and until the Commission states in writing that it is satisfied that -

- (a) subject to subsection (2), rules made under section 23 adequately deal with possible conflicts of interest that might arise if the relevant

recognized exchange controller or relevant corporation (as the case may be) were to be a listed corporation; and

(b) the relevant recognized exchange controller or relevant corporation (as the case may be) has entered into arrangements with the Commission that adequately ensure -

(i) the integrity of the market in securities or futures contracts traded on the stock market or futures market operated by the recognized exchange company concerned or through the facilities of that recognized exchange company; and

(ii) the compliance with obligations as a listed corporation which would fall on the relevant recognized exchange controller or relevant corporation (as the case may be) if it were to become a listed corporation.

(2) Rules referred to in subsection (1)(a) shall make provision to the effect that the Commission shall, instead of the Stock Exchange Company, take all actions and make all decisions in relation to the relevant recognized exchange controller or relevant corporation that would be taken by the Stock Exchange Company in the case of a corporation that was neither a recognized exchange controller nor a relevant corporation except in the case of any action or decision in respect of which the Commission

states in writing that it is satisfied that a conflict of interest will not arise if that action or decision were to be taken or made (as the case may be) by the Stock Exchange Company.

(3) By virtue of this section, the Commission shall have such functions as are provided for it under -

- (a) rules made for the purposes of subsections (1)(a) and (2);
- (b) arrangements referred to in subsection (1)(b).

(4) Where a fee is payable to the Stock Exchange Company by a person for the taking of an action or the making of a decision which may be taken or made (as the case may be) by the Commission by virtue of subsections (1)(a) and (2), then, notwithstanding any other enactment or rule of law, that person shall pay that fee to the Commission in any case where the Commission takes that action or makes that decision (as the case may be) by virtue of those subsections.

**75. Commission may give directions to
recognized exchange controller
where it is satisfied that
conflict of interest
exists, etc.**

(1) Where the Commission is satisfied that -

- (a) a conflict of interest exists or may come into existence between -
 - (i) the interest of a recognized exchange controller or a relevant corporation; and
 - (ii) the interest of the proper performance of the functions conferred by this or any

other Ordinance (including any rules made under any Ordinance, whether or not they are subsidiary legislation) on the controller or the relevant corporation; or

- (b) such a conflict of interest has existed in circumstances that make it likely that the conflict of interest will continue or be repeated,

then the Commission may by notice in writing served on the controller or relevant corporation (as the case may be) stating the reasons in support of the ground or grounds for the notice, direct the controller or relevant corporation (as the case may be) to forthwith take such steps as are specified in the notice (including steps in relation to any of its affairs, business and property whatsoever) for the purposes of remedying the conflict of interest or the matters occasioning the conflict of interest (as the case may be).

- (2) A notice served under subsection (1) shall take effect immediately.

- (3) A recognized exchange controller or relevant corporation served with a notice under subsection (1) which, without reasonable excuse²⁷, fails to comply with the notice commits an offence and is liable -

²⁷ We accept the market comment that the offence should not be a strict liability one.

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

76. Fees to be approved by Commission

- (1) No fee imposed on or after the commencement of this section by -
 - (a) a recognized exchange controller in its capacity as a recognized exchange controller; or
 - (b) a recognized exchange company or recognized clearing house -
 - (i) of which the recognized exchange controller is the controller; and
 - (ii) in its capacity as a recognized exchange company or recognized clearing house (as the case may be),

shall have effect unless the fee is specified in the rules of the recognized exchange controller, recognized exchange company or recognized clearing house (as the case may be) and has the approval in writing of the Commission.

- (2) The Commission shall, in deciding whether or not to approve a fee referred to in subsection (1), have regard to, among other matters -
 - (a) the level of competition (if any) in Hong Kong for the matter for which the fee is to be imposed; and

- (b) the level of fee (if any) imposed by another recognized exchange controller, recognized exchange company or recognized clearing house or any similar body outside Hong Kong, for the same or a similar matter to which the fee relates.

77. Financial Secretary may appoint not more than 8 persons to board of directors of ~~recognized exchange controller~~HKEC

(1) Notwithstanding any enactment or rule of law but subject to subsection (2), the Financial Secretary may appoint not more than 8 persons to be members of the board of directors of a ~~recognized exchange controller~~the HKEC²⁸ where the Financial Secretary is satisfied that it is appropriate to do so in the interest of the investing public or in the public interest.

(2) The Financial Secretary shall exercise his power under subsection (1) in such a way that, immediately following the annual general meeting of the ~~HKEC~~recognized exchange controller held in 2003 and thereafter, the number of members of its board of directors who are such members by virtue of an appointment under that subsection is not more than the maximum number of members of that board who may be such members otherwise than by virtue of

²⁸ The appointment of members to the board of directors by the Financial Secretary is carried down from the Exchanges and Clearing House (Merger) Ordinance which has been tailored for the unique circumstances in relation to the set up of the Hong Kong Exchanges and Clearing Limited.

such an appointment (but excluding the chief executive of the ~~recognized exchange controller~~**HKEC**).

(3) Subject to subsection (4), a member of the board of directors of the ~~recognized exchange controller~~**HKEC** who is such a member by virtue of an appointment under subsection (1) shall have the same rights, privileges, obligations and liabilities under any enactment or rule of law as a member of that board who is such a member otherwise than by virtue of such an appointment.

(4) Notwithstanding any enactment or rule of law, no person appointed under subsection (1) as a member of the board of directors of the ~~recognized exchange controller~~**HKEC** may be removed from that office by a resolution of the other directors of the board or a special resolution of the ~~recognized exchange controller~~**HKEC**.

(5) In this section, "HKEC (交易結算公司) means the company incorporated under the Companies Ordinance (Cap. 32) and registered under that Ordinance by the name Hong Kong Exchanges and Clearing Limited.

78. Amendment of Schedule 3

The Chief Executive in Council may, by order published in the Gazette, amend Parts 2, 3, 4, 6, 7 or 8 of Schedule 3.

Division 5 - Investor compensation companies

79. Recognition of investor compensation company

(1) Where the Commission is satisfied that it is appropriate to do so -

- (a) in the interest of the investing public or in the public interest; or
- (b) for the facilitation of the management and administration of the compensation fund under Part XII,

it may, after consultation with the Financial Secretary, by notice in writing served on a company, recognize the company as an investor compensation company -

- (i) subject to such conditions as it considers appropriate specified in the notice; and
- (ii) with effect from a date specified in the notice for the purpose.

(2) Without limiting the generality of conditions which may be specified in a notice under subsection (1), the Commission may, by notice in writing served on a recognized investor compensation company, amend or revoke any condition specified in the first - mentioned notice or impose new condition, where the Commission -

- (a) is satisfied that it is appropriate to do so on a ground specified in paragraph (a) or (b) of that subsection; and
- (b) has consulted the Financial Secretary.

(3) Where the Commission amends or revokes any condition or imposes any new condition by a notice under subsection (2), the amendment, revocation or imposition takes effect at the time of

service of the notice or at the time specified in the notice, whichever is the later.

(4) Where a company becomes a recognized investor compensation company, the Commission shall cause notice of that fact to be published in the Gazette.

(5) Where a company is seeking to be a recognized investor compensation company and the Commission is minded not to recognize the company under subsection (1), the Commission shall give the company a reasonable opportunity of being heard before making a decision not to recognize the company.

80. Transfer and resumption of functions of Commission

(1) The Commission may request the Chief Executive in Council to transfer, by order ("transfer order") published in the Gazette, to a recognized investor compensation company ("designated investor compensation company"), a function to which this section applies, if the Commission is satisfied that the designated investor compensation company is willing and able to perform the function.

(2) This section applies to a function of the Commission under Part XII (other than section 236(2)) or rules made under that Part.

(3) For the purposes of subsection (2), the function of the Commission under Part XII to maintain the compensation fund includes a function to maintain all or any part of the

compensation fund, and the other provisions of this Ordinance shall apply accordingly.

(4) A function to which this section applies may be transferred by a transfer order either in whole or in part, and the transfer may be subject to -

(a) a reservation that the Commission is to perform the function concurrently with the designated investor compensation company; and

(b) such other conditions as the Commission considers appropriate.

(5) A transfer order may contain such incidental, supplemental and consequential provisions as may be necessary or expedient for the purpose of giving full effect to the order.

(6) The Commission may at the request or with the consent of a designated investor compensation company resume a function transferred by a transfer order, but the resumption takes effect only by order of the Chief Executive in Council.

(7) The Chief Executive in Council may order that the Commission resume a function transferred to a designated investor compensation company by a transfer order if the Commission so requests and if it appears to the Chief Executive in Council to be in the public interest to do so.

81. Immunity, etc.

(1) Without limiting the generality of section 368(1), no civil liability, whether arising in contract, tort, defamation, equity or otherwise, shall be incurred by -

- (a) a recognized investor compensation company; or
- (b) any person acting on behalf of a recognized investor compensation company, including -
 - (i) any member of the board of directors of the company; or
 - (ii) any member of any committee established by the company,

in respect of anything done or omitted to be done in good faith in the discharge or purported discharge of the duties to which this subsection applies.

(2) The duties to which subsection (1) applies are those -

- (a) that relate to or arise out of a function that has been transferred to the recognized investor compensation company under section 80; or
- (b) to which the company is subject under rules made under Part XII.

(3) Any failure by a recognized investor compensation company to comply with its rules in relation to a matter does not prevent the matter from being treated for the purposes of this Ordinance as done in accordance with the rules so long as the failure does not substantially affect the rights of a person entitled to require compliance with the rules.

82. Rules by recognized investor compensation company

Without limiting any of its other powers to make rules, a recognized investor compensation company may make rules for such matters as are necessary or desirable -

- (a) for the proper and efficient management and operation of the company;
- (b) for the obtaining of such insurance, surety, guarantee or other security or the making of such financial arrangement by the company as may be necessary or appropriate for the purposes of its operation;
- (c) for the proper and efficient performance of a function transferred to the company under section 80.

83. Approval of rules or amendments to rules of recognized investor compensation companies

(1) Subject to subsection (7), no rule (whether or not made under section 82) of a recognized investor compensation company or any amendment thereto shall have effect unless it has the approval in writing of the Commission.

(2) A recognized investor compensation company shall submit or cause to be submitted to the Commission -

- (a) for its approval the rules and every amendment thereto that require approval under subsection (1), together with explanations of their purpose and likely effect, including their effect on the investing public, in sufficient detail to enable the Commission to decide whether to approve them or refuse to approve them; and

- (b) for its information the rules which belong to a class the subject of a declaration under subsection (7) and every amendment to the rules, as soon as reasonably practicable after they have been made.

(3) The Commission shall, not later than 6 weeks after the receipt of a submission under subsection (2)(a) from a recognized investor compensation company, by notice in writing served on the company, give its approval or refuse to give its approval (together with its reasons for the refusal) to the rules or amendment of the rules (as the case may be) or any part thereof, the subject of the submission.

(4) The Commission may give its approval under subsection (3) subject to requirements which shall be satisfied before the rules or amendment of the rules or any part thereof take effect.

(5) The Commission may in a particular case, with the agreement of the recognized investor compensation company concerned, extend the time prescribed in subsection (3).

(6) The Financial Secretary may, after consultation with the Commission and the recognized investor compensation company concerned, extend the time prescribed in subsection (3).

(7) The Commission may, by notice published in the Gazette, declare any class of rules of a recognized investor compensation company to be a class of rules which are not required to be approved under subsection (1) and, accordingly, any rules of the company which belong to that class (including any amendment thereto) shall have effect notwithstanding that they have not been so approved.

(8) A recognized investor compensation company shall make its rules available to the public in a manner approved by the Commission.

(9) Neither the rules under section 82 nor a notice under subsection (7) is subsidiary legislation.

84. Production of records, etc. by recognized investor compensation company

(1) The Commission may, by notice in writing served on a recognized investor compensation company, require the company to provide to the Commission, within such period as the Commission may specify in the notice -

- (a) such books and records kept by it in connection with or for the purposes of its business or in respect of the management and administration of the compensation fund under Part XII; and
- (b) such other information relating to its business or the management and administration of the compensation fund under Part XII,

as the Commission may reasonably require for the performance of its functions.

(2) A recognized investor compensation company served with a notice under subsection (1) which, without reasonable excuse, fails to comply with the notice commits an offence and is liable on conviction to a fine at level 5.

85. Withdrawal of recognition of investor compensation company

(1) Subject to subsections (2), (3) and (4), the Commission may, after consultation with the Financial Secretary, by notice in writing served on a recognized investor compensation company, withdraw the company's recognition as an investor compensation company with effect from a date specified in the notice for the purpose.

²⁹(1A) The Commission may by the notice served under subsection (1) permit the recognized investor compensation company to continue, on or after the date on which the withdrawal is to take effect, to carry on such activities affected by the withdrawal as the Commission may specify in the notice for the purpose of -

(a) closing down the operations of the company; or

(b) protecting the interest of the investing public or the public interest.

(2) The Commission may only serve a notice under subsection (1) in relation to a recognized investor compensation company that -

- (a) fails to comply with any requirement of this Ordinance or with a condition imposed under section 79;
- (b) is being wound up;
- (c) ceases to perform any function transferred to it under section 80; or
- (d) requests the Commission to do so.

²⁹ This is to provide for continuation of certain activities for the smooth cessation of the recognized investor compensation company's operation.

(3) Except where responding to a request under subsection (2)(d), the Commission shall not exercise its power under subsection (1) in relation to a recognized investor compensation company unless it has given the company a reasonable opportunity of being heard.

(4) Except where responding to a request under subsection (2)(d), the Commission shall give the recognized investor compensation company not less than 14 days' notice in writing of its intention to serve a notice under subsection (1) and the grounds for doing so.

(5) Where the Commission withdraws a company's recognition as an investor compensation company under subsection (1), it shall cause notice of that fact to be published in the Gazette.

(6) A notice served under this section shall take effect immediately.

86. Appeals

(1) A company served with a notice under section 85(1) may appeal against the notice to the Chief Executive in Council not later than 14 days after the date of service of the notice or such longer period (if any) as the Commission specifies in the notice.

(2) The decision of the Chief Executive in Council on an appeal under subsection (1) shall be final.

87. Subrogation of recognized investor compensation company to rights, etc. of claimant on payment from compensation fund

(1) Where a recognized investor compensation company makes any payment out of the compensation fund in respect of any claim made under rules made under Part XII -

- (a) ¹⁰the company shall be subrogated, to the extent which that payment bears to the actual loss sustained by the claimant by reason of the default on which the claim was based of that payment, to all the rights and remedies of the claimant in relation to the loss ~~sustained by him by reason of the default on which the claim was based~~; and
- (b) ¹⁰the respective rights of the claimant and the company ~~shall have no right in bankruptcy or winding up or by legal proceedings or otherwise to receive in respect of the loss any sum out of the assets of the exchange participant or other person concerned who is in default, or where the loss was caused by the defalcation, fraud or misfeasance of an employee of that exchange participant or that other person, the assets of that employee, until~~

¹⁰ As mentioned at the Bills Committee meeting on 4 May 2001, the amendments were proposed to reflect the High Court decision in the Forluxe case in interpreting the origin provision of clause 87(1)(a) (i.e. section 118 of the Securities Ordinance), being that the SFC should have no priority in the distribution of the "assets" recovered over investors who have received compensation from the compensation fund; and to apply similar principle in clause 87(1)(b).

~~the company has been reimbursed the full amount of
its payment.~~ **shall rank equally.**

(2) All amounts recovered by the recognized investor compensation company under subsection (1) shall be paid in such manner as the Commission may direct and shall become part of the compensation fund.

88. Financial statements of a recognized investor compensation company

(1) Subject to subsection (3), a recognized investor compensation company shall -

- (a) prepare such financial statements and other documents, for such periods, as are prescribed by rules made under section 384 for the purposes of this section; and
- (b) submit the financial statements and other documents, together with an auditor's report, to the Commission not later than 4 months after the end of the financial year to which they relate.

(2) Without limiting the generality of subsection (1), the requirements under that subsection relating to the financial statements and other documents, and the auditor's report, referred to in that subsection include the requirements that -

- (a) the financial statements and other documents are to relate to such matters and contain such particulars as are prescribed by rules made under section 384 for the purposes of this section;

- (b) the auditor's report is to contain such particulars, including such statement of opinion, as are prescribed by the rules;
- (c) the financial statements and other documents, and the auditor's report, are to be prepared in accordance with such principles or bases as are prescribed by the rules; and
- (d) without limiting the generality of section 129B of the Companies Ordinance (Cap. 32), the financial statements and other documents are to be signed by the chief executive officer of the recognized investor compensation company, by which they are prepared.

(3) On an application in writing by the recognized investor compensation company by which any financial statements and other documents, and any auditor's report, are required under subsection (1) to be submitted, the Commission may, where it is satisfied that there are special reasons for so doing, extend the period within which the financial statements and other documents, and the auditor's report, are required to be submitted, for such period and subject to such conditions as the Commission considers appropriate, and upon the Commission granting the extension, subsection (1) shall apply subject to the extension accordingly.

(4) A recognized investor compensation company shall cause a copy of each of the financial statements and other documents and the auditor's report that are required under subsection (1) to be

submitted by it to be sent to the Financial Secretary and to be published in the Gazette.

**89. Employees of and delegations by a
recognized investor compensation
company**

(1) The Commission may arrange for any of its officers, employees, agents or consultants to assist in the operations of a recognized investor compensation company.

(2) A recognized exchange company or recognized exchange controller may, with the consent of a recognized investor compensation company, arrange for any of its officers, employees agents or consultants to assist in the operations of that recognized investor compensation company.

(3) A recognized investor compensation company may by resolution and subject to the approval of the Commission, with or without restrictions or conditions as the company considers appropriate, delegate in writing to any person any of its powers and duties other than its power under section 82.

**90. Further activities of recognized
investor compensation company**

(1) A recognized investor compensation company may, in addition to performing a function transferred to it under section 80, conduct such activities or businesses as may be approved in writing by the Commission.

(2) The Commission shall not approve the conduct of any activities or businesses referred to in subsection (1) unless it

is satisfied that such activities or businesses are incidental to the management or administration of the compensation fund under Part XII.

**Division 6 - General - Exchange companies, clearing houses,
exchange controllers and investor compensation companies**

91. Supply of information

(1) The Commission, a recognized exchange company, a recognized clearing house, a recognized exchange controller or a recognized investor compensation company shall be entitled to supply each other with information about its affairs and -

- (a) in the case of a recognized exchange company, the affairs of any of its exchange participants;
- (b) in the case of a recognized clearing house, the affairs of any of its clearing participants;
- (c) in the case of a recognized exchange controller, the affairs of any of its subsidiaries; or
- (d) in the case of a recognized investor compensation company, any claim made against the compensation fund.

(2) The Commission may, by notice in writing served on a recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company, require it to supply the Commission with such information as the Commission may reasonably require for the performance of the

functions of the Commission under the relevant provisions, including information in its possession relating to -

- (a) in the case of a recognized exchange company, the affairs of any of its exchange participants;
- (b) in the case of a recognized clearing house, the affairs of any of its clearing participants;
- (c) in the case of a recognized exchange controller, the affairs of any of its subsidiaries; or
- (d) in the case of a recognized investor compensation company, any claim made against the compensation fund.

(3) The supply of information under subsection (1) or (2) shall not be treated as publication for the purposes of the law of defamation and, without limiting the generality of section 368(3) but subject to section 366, a person supplying the information does not incur liability as a consequence thereof.

(4) Where any information is supplied under subsection (1) to a recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company, the company concerned, the clearing house or the controller to whom the information is supplied shall not disclose the information, or any part of it, to any other person without the consent of the Commission.

**92. Additional powers of Commission -
restriction notices**

(1) Subject to subsections (2), (5) and (13), where the Commission is satisfied that it is appropriate to do so -

- (a) in the interest of the investing public or in the public interest;
- (b) for the protection of investors; or
- (c) for the proper regulation of a recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company,

it may by notice in writing ("restriction notice") served on the exchange company, clearing house, exchange controller or investor compensation company do any or all of the following -

- (i) require the exchange company, clearing house, exchange controller or investor compensation company before the expiry of a period specified in the notice -
 - (A) to amend, supplement, withdraw or revoke, in the manner specified in the notice, a provision of its rules or other instrument so specified;
 - (B) to take such action relating to the management, conduct or operation of its business as may be so specified;
- (ii) prohibit the exchange company, clearing house, exchange controller or investor compensation company from doing, during a period so specified, such act or other thing relating to the management,

conduct or operation of its business as may be so specified.

- (2) The Commission shall not serve a restriction notice unless -
 - (a) it has previously consulted the Financial Secretary in relation to the notice;
 - (b) it has previously requested in writing the exchange company, clearing house, exchange controller or investor compensation company concerned to put, or cause to be put, into effect a provision (which includes a request to refrain from doing any act or other thing) specified in the request and similar in effect to the requirement or prohibition specified in the restriction notice or, where there is more than one such requirement or prohibition so specified, provisions the combined effect of all of which is similar to the combined effect of the requirements or prohibitions so specified; and
 - (c) in the case of a request under paragraph (b) which -
 - (i) contains a provision requesting the exchange company, clearing house, exchange controller or investor compensation company concerned to amend, supplement, withdraw or revoke any provision of its constitution under subsection (1)(i), the provision has not been complied with before the expiration

of the period specified in relation thereto in the request being not less than 45 days; or

- (ii) contains a provision requesting the exchange company, clearing house, exchange controller or investor compensation company concerned to do or refrain from doing any act or other thing, the Commission is satisfied that the provision has not been complied with.

(3) A recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company may appeal to the Chief Executive in Council against a restriction notice that requires the exchange company, clearing house, exchange controller or investor compensation company to amend, supplement, withdraw or revoke any provision of its constitution.

(3A) The decision of the Chief Executive in Council on an appeal under subsection (3) shall be final³¹.

- (4) A restriction notice served under this section shall take effect immediately.

(5) A period specified in a restriction notice in relation to a prohibition under subsection (1)(ii) shall not exceed 6 months beginning on the date of the notice.

³¹ The amendment is proposed to rectify the inconsistency among other provisions on "appeals". Please see, for example, clause 33(2).

(6) The Commission may, after consultation with the Financial Secretary, by notice in writing served on the exchange company, clearing house, exchange controller or investor compensation company concerned, extend, for a period or successive periods of not more than 3 months each, the period during which a restriction notice is to remain in force.

(7) Where a restriction notice is issued or extended under this section, the Commission may publish in the Gazette a copy of the notice or, as may be appropriate, particulars of the extension.

(8) A restriction notice may, on the application of the Commission to the Court of First Instance, be enforced by an order of the Court as if it were a judgment or order of the Court.

(9) Where a recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company is in breach of a requirement in a restriction notice under subsection (1)(i)(A) relating to a provision of its rules or other instrument -

- (a) in the case of a requirement to amend or supplement such provision, the provision shall be deemed to have effect as if the requirement had been complied with; or
- (b) in the case of a requirement to withdraw or revoke such provision, the provision ceases to have effect.

(10) Where -

- (a) a restriction notice includes a requirement described in subsection (1)(i)(A) and the requirement relates to the constitution of a company; and
- (b) by virtue of subsection (9) the provision to which the requirement relates has effect as if the requirement had been complied with or has ceased to have effect (as the case may be),

the Commission shall, as soon as may be, deliver to the Registrar of Companies a copy of the notice.

(11) If there is an appeal under subsection (3) against the notice and the appeal is not withdrawn, the Commission shall, as soon as may be, inform the Registrar of Companies in writing of the outcome of the appeal.

(12) Without limiting the generality of section 368(1), no civil liability, whether arising in contract, tort, defamation, equity or otherwise, shall be incurred by -

- (a) a recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company;
- (b) an officer or employee of a recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company;
- (c) an exchange participant; or
- (d) a clearing participant,

in respect of anything done or omitted to be done in good faith in compliance or purported compliance with a restriction notice.

(13) This section shall not be construed as enabling the Commission to do under this section anything which may be done by the Commission by direction under section 28(1)(b) or 29.

**93. Additional powers of Commission -
suspension orders**

(1) Where the Commission is satisfied that it is appropriate to do so -

- (a) in the interest of the investing public or in the public interest;
- (b) for the protection of investors; or
- (c) for the proper regulation of a recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company,

it may, after consultation with the Financial Secretary, issue ~~an~~ **order** ("**suspension order**" (暫停職能令))³² relating to all or any of the following -

³² The amendment was in response to the comment of the Legal Service Division of the Legislative Council that the original presentation of "suspension order" might be interpreted as that the order would concern only about "suspension" and would be stretching the meaning to cover for example, the person to be specified under clause 93(2)(b) who could perform the function in the interim. Thus, the exact formulation under existing legislation is replicated for the avoidance of doubt.

- (i) the functions of the board of directors or governing body of the exchange company, clearing house, exchange controller or investor compensation company;
 - (ii) the functions of a director of a board or a member of a body referred to in paragraph (i);
 - (iii) the functions of a committee, including a sub-committee, established by a board or body referred to in paragraph (i);
 - (iv) the functions of the chief executive officer (by whatever name called), of the exchange company, clearing house, exchange controller or investor compensation company.
- (2) While a suspension order is in force the following provisions apply -
- (a) neither the recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company to which the order relates nor any board, governing body, committee or officer of it shall perform a function to which the order relates;
 - (b) a function to which paragraph (a) applies may be performed by the person specified in the order in relation to that function;
 - (c) a person referred to in paragraph (a) shall not, by act or omission, either directly or indirectly,

affect the manner in which a function referred to in that paragraph is performed.

(3) Subject to subsection (7), a suspension order shall continue in force for the period not exceeding 6 months specified in the order.

(4) A suspension order or an extension of it under subsection (7) shall take effect when a copy of the order or notice of the extension is served under subsection (8)(a) on the exchange company, clearing house, exchange controller or investor compensation company to which the order relates.

(5) Where a suspension order is made or extended under this section, the Commission shall, as soon as reasonably practicable to do so, give a copy of a suspension order or, as may be appropriate, notice of its extension to the chief executive officer of the exchange company, clearing house, exchange controller or investor compensation company to which the order relates and to the directors or members of its committee (if any) as the Commission considers appropriate in the circumstances.

(6) Nothing in subsection (5) affects subsection (4).

(7) The Commission may, after consultation with the Financial Secretary, extend for a period or successive periods of not more than 3 months each the period during which a suspension order is to remain in force.

(8) Where a suspension order is made or extended under this section, the Commission shall -

(a) forthwith serve a copy of the order or notice in writing of the extension on the exchange company,

clearing house, exchange controller or investor compensation company to which the order relates; and

- (b) publish in the Gazette and publish through at least one other medium a copy of the suspension order or, as may be appropriate, notice of its extension.

(9) A suspension order may, on the application of the Commission to the Court of First Instance, be enforced by an order of the Court as if it were a judgment or order of the Court.

(10) The exchange company, clearing house, exchange controller or investor compensation company concerned shall pay to the Commission on demand costs or expenses reasonably incurred by the Commission or a member or employee of the Commission in connection with a suspension order.

(11) The amount of the costs or expenses demanded under subsection (10) are recoverable by the Commission as a civil debt.

(12) A person who knowingly contravenes subsection (2)(c) commits an offence and is liable -

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

94. Application of Companies Ordinance

Where there is any inconsistency between this Part and the Companies Ordinance (Cap. 32) in its application to a recognized exchange company, a recognized clearing house, a recognized

exchange controller or a recognized investor compensation company, this Part prevails.

Division 7 - Automated trading services

95. Authorization for providing automated trading services³³

- (1) ³⁴No person shall provide automated trading services unless that person -
- (a) is so authorized under subsection (2);
 - (b) is an employee or agent of a person so authorized under subsection (2), in so far as the employee or agent is acting in that capacity for or on behalf of that person;
 - (c) is an intermediary licensed or exempt for Type 7 regulated activity;
 - (d) is a licensed representative for Type 7 regulated activity, in so far as the representative is acting

³³ The amendments proposed to clauses 95 to 99 were in the light of the market comment that the authorization regime to an overseas exchange to provide automated trading services should be similar to that applicable to any person, in the interest of maintaining a level playing field.

³⁴ We are working on a possible CSA to reflect clearly our policy intention to cover in this part of the Bill also those ATS activities conducted overseas but targeting at investors in Hong Kong. This is in line with the arrangements in overseas jurisdictions.

in that capacity for the licensed corporation to whom the representative is accredited; or

- (e) is an individual who has his name entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance (Cap. 155) as that of a person employed by an exempt person for Type 7 regulated activity in respect of that regulated activity, in so far as the individual is acting in that capacity for the exempt person.

(2) Where the Commission is satisfied that it is appropriate to do so, the Commission may -

~~(a)~~ upon application by a person, by notice in writing served on that person, authorize that person to provide automated trading services -

—— ~~(a)~~ subject to such conditions as it considers appropriate specified in the notice; and

—— ~~(b)~~ with effect from a date specified in the notice for the purpose; ~~or~~

~~(b) authorize a stock exchange or futures exchange outside Hong Kong to provide automated trading services with effect from a date specified in the notice for the purpose.~~

(3) Where a person ~~or a stock exchange or futures exchange outside Hong Kong~~ is granted an authorization under subsection (2), the Commission shall cause notice of that fact to be published in the Gazette.

(4) Where a person ~~or a stock exchange or futures exchange~~ outside Hong Kong is seeking an authorization to provide automated trading services and the Commission is minded not to grant the authorization under subsection (2), the Commission shall give the person ~~or (as the case may be) the stock exchange or futures exchange~~ a reasonable opportunity of being heard before making a decision not to grant the authorization.

(5) The Commission shall prepare and publish in the Gazette or otherwise guidelines setting out the principles, procedures and standards in relation to authorization for providing automated trading services under this section.

(6) Guidelines published under subsection (5) are not subsidiary legislation.

96. Application for authorization¹¹

(1) An application under section 95(2) ~~(a)~~ shall be accompanied by -

- (a) such information and particulars as the Commission may reasonably require; and
- (b) an application fee prescribed by rules made under section 382 for the purposes of this section.

(2) Without limiting the generality of subsection (1)(a), an application under section 95(2) ~~(a)~~ shall also be accompanied by such information as may reasonably be required by the Commission regarding -

- (a) the services and facilities which the applicant will hold itself out as being able to provide if the application is allowed;
- (b) the business which the applicant proposes to carry on and to which the application relates, any person whom the applicant proposes to employ or with whom the applicant intends to be associated in the course of carrying on the business;
- (c) the business which the applicant is carrying on, the officers it employs and the persons with whom the applicant is associated in the course of carrying on the business; and
- (d) its directors and substantial shareholders and, if any of its substantial shareholders is a corporation, the directors and substantial shareholders of that corporation.

(3) In considering an application under section 95(2), the Commission may have regard to any information in its possession whether provided by the applicant or not.

97. Conditions for authorization³³

(1) Without limiting the generality of conditions which may be specified in a notice under section 95(2), the Commission may, by notice in writing served on a person authorized under that section, amend or revoke any conditions specified under that section or impose new conditions, where the Commission is satisfied that it is appropriate to do so.

(2) Where the Commission amends or revokes any condition or imposes any new condition under subsection (1), the amendment, revocation or imposition takes effect at the time of service of the notice or at the time specified in the notice, whichever is the later.

(3) Without limiting the generality of subsection (1) or section 95(2)(a), a notice served thereunder may contain a condition that the person authorized to provide automated trading services shall comply with all or any of the following requirements, that is to say, the person shall -

- (a) provide the services according to rules approved by the Commission for the purpose;
- (b) ensure as far as is reasonably practicable that there is an orderly, informed and fair market in relation to all transactions which are carried out by means of or through the services;
- (c) ensure that the securities or futures contract, the sale or purchase of which is to be negotiated or concluded by means of or through the services, belongs to a class of securities or futures contracts specified in the notice by the Commission for this purpose;
- (d) ensure that the transaction that is to be novated, cleared, settled or guaranteed by means of or through the services belongs to a class of transactions specified in the notice by the Commission for this purpose;

- (e) disclose to the Commission within the time and in the manner specified in the notice, such information as the Commission may request for the purpose of performing its functions under this Ordinance;
- (f) permit any person authorized in that behalf by the Commission to enter at any reasonable time the premises at which the services are provided and to inspect the electronic facilities by means of which the services are provided;
- (g) provide and maintain automated systems with adequate capacity, facilities to meet contingencies or emergencies, security arrangements and technical support for the provision of the services;
- (h) notify the Commission of any changes to the information and particulars required by the Commission under section 96(1) or (23);
- (i) pay to the Commission a fee prescribed by rules made under section 382 for the purposes of this section.

98. Withdrawal of authorization³³

(1) Subject to subsection (2), where the Commission is satisfied that it is appropriate to do so in the interest of the investing public or in the public interest, it may, by notice in writing served on a person ~~or a stock exchange or futures exchange~~ granted an authorization under section 95(2), stating the reasons

in support of the ground or grounds for the notice, withdraw the authorization with effect from a date specified in the notice for the purpose.

³⁵(1A) The Commission may by the notice served under subsection (1) permit the person to continue, on or after the date on which the withdrawal is to take effect, to carry on such activities affected by the withdrawal as the Commission may specify in the notice for the purpose of -

- (a) ceasing to provide the automated trading services to which the withdrawal relates; or
- (b) protecting the interest of the investing public or the public interest.

³⁵(1B) Where the Commission has granted a permission to a person under subsection (1A), the person shall not, by reason of its carrying on the activities in accordance with the permission, be regarded as having contravened section 95.

(2) The Commission shall not exercise its power under subsection (1) in relation to a person ~~or a stock exchange or futures exchange~~ granted an authorization under section 95(2) unless it has given the person ~~or (as the case may be) the stock exchange or futures exchange~~ a reasonable opportunity of being heard.

³⁵ This is to provide for continuation of certain activities for the smooth cessation of the automated trading services.

(3) Where the Commission withdraws an authorization under subsection (1), it shall cause notice of that fact to be published in the Gazette.

(4) A notice served under this section shall take effect immediately.

99. Rules by Commission³³

(1) Without prejudice to section 384(9) and (10), the Commission may make rules to -

- (a) require a person authorized to provide automated trading services to supply the Commission with such information as the Commission requires to satisfy the Commission that the conditions specified in a notice served on the person under section 95(2) or 97 are complied with;
- (b) provide for the time within which and the manner in which the information under paragraph (a) shall be provided;
- (c) provide for the regulation of automated trading services and any other matters incidental thereto.

(2) Without limiting the generality of rules which may be made under subsection (1), such rules may -

- (a) provide for the standards of conduct and practices to be complied with in relation to the provision of automated trading services;
- (b) prohibit the use of misleading or deceptive advertisements in relation to the provision of

automated trading services or impose conditions for the use of advertisements in relation to the provision of such services;

- (c) require a person authorized to provide automated trading services -
 - (i) to take steps to avoid conflicts of interests, and specify the steps that shall be taken in the event that there is a potential or actual conflict of interest; and
 - (ii) to take such steps as the Commission may specify to ensure that there is integrity, orderliness, transparency and fairness in transactions conducted through the services, including steps to ensure that -
 - (A) a request for the services is to be dealt with properly and as expeditiously as is appropriate in the circumstances; and
 - (B) access rights to the services and the relevant trading conventions relating to the transactions to be conducted through the services are properly explained to the persons to whom the services are provided;

- (d) provide for measures designed to discourage and identify any money laundering activities.

(3) Rules made under this section may provide that a person who, without reasonable excuse, contravenes any specified provision of the rules that apply to the person commits an offence and is liable to a specified penalty not exceeding -

- (a) on conviction on indictment a fine ~~at level 6~~³⁶ of \$500,000³⁶ and a term of imprisonment of 2 years;
- (b) on summary conviction a fine at level ~~3~~³⁶ and a term of imprisonment of 6 months.

100. Breach of ~~condition of~~ authorization

A person who, ~~without reasonable excuse~~ -

- ~~(a) contravenes section 95(1) or~~
 - ~~(b) fails to comply with a condition specified in a notice under section 95(2)(a) or 97 served on the person,³⁷~~
- commits an offence and is liable -

- (i) on conviction on indictment to a fine of \$5,000,000 and to imprisonment for 7 years and, in the case of a continuing offence, to a further fine of \$100,000

³⁶ For the sake of consistency, we propose to align the penalty level with that in clause 35(5) as the offences are similar. For reference, a level 6 fine is \$100,000, and a level 3 fine \$10,000.

³⁷ We accept the market comment that the offence should not be a strict liability one and that criminalisation of a breach of conditions imposed on authorized persons in the circumstances is not appropriate.

for every day during which the offence continues; or

- (ii) on summary conviction to a fine of \$500,000 and to imprisonment for 2 years and, in the case of a continuing offence, to a further fine of \$10,000 for every day during which the offence continues.