

For Discussion

Paper No. CE07/01

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

**Part VIII of the Securities and Futures Bill
Clause-by-clause examination**

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

**Securities and Futures Commission
Financial Services Bureau
14 July 2001**

PART VIII
SUPERVISION AND INVESTIGATIONS

Division 1 - Interpretation

171. Interpretation of Part VIII

In this Part, unless the context otherwise requires -

"audit working papers" (審計工作材料) means -

- (a) any record or document prepared by or on behalf of an auditor; and
- (b) any record or document obtained and retained by or on behalf of an auditor,

for or in connection with the performance of any of his functions relating to the conduct of any audit of the accounts of a corporation;

"investigator" (調查員) means a person directed or appointed to investigate any matter under section 175(1);

"person under investigation" (受調查人) means a person in relation to whom any investigator is directed or appointed to investigate any matter under section 175(1).

Division 2 - Powers to require information, etc.

172. Power to require production of records and documents concerning listed corporations

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

- (a) it appears to the Commission that there are circumstances suggesting that the business of the corporation is being or has been conducted -
 - (i) with intent to defraud its creditors, or the creditors of any other person;
 - (ii) for any fraudulent or unlawful purpose; or
 - (iii) in a manner oppressive to its members or any part of its members;
- (b) it appears to the Commission that there are circumstances suggesting that the corporation was formed for any fraudulent or unlawful purpose;
- (c) it appears to the Commission that there are circumstances suggesting that persons concerned in the process by which the corporation became listed (including that for making the securities of the corporation available to the public in the course of such process) have engaged, in relation to such process, in defalcation, fraud, misfeasance or other misconduct;
- (d) it appears to the Commission that there are circumstances suggesting that persons involved in the management of the affairs of the corporation are

engaging¹ or have engaged, in relation to such management, in defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members;

- (e) it appears to the Commission that there are circumstances suggesting that members of the corporation or any part of its members have not been given all the information with respect to its affairs that they might reasonably expect; or
- (f) a matter in respect of the investigation of which the Commission decides to provide assistance under section 179 relates to the corporation and is, in the opinion of the Commission, of a nature similar to the matter described in paragraph (a), (b), (c), (d) or (e) as being suggested by the circumstances referred to in such paragraph,

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

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

¹ Technical amendment for greater clarity.

(iv) an auditor, other than the corporation or a corporation described in paragraph (ii);

(v) any other person,

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

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

(a) if the record or document is produced -

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

(ii) to require -

(A) the person;

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

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

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

(i) the person;

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

to state where it is.

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

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

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

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

- (a) the authorized financial institution is in possession of any record or document relating to the affairs of a corporation to which any direction has been or may be given under subsection (1)(i) or (ii); and
- (b) the record or document required to be produced under the direction -

- (i) relates to the affairs of such corporation or to a transaction with such corporation; and

- (ii) is relevant to the consideration of whether there is or has been the occurrence of -

- (A) where subsection (1)(a), (b), (c), (d) or (e) applies, the matter described in such subsection as being suggested by the circumstances referred to in such subsection; or

- (B) where subsection (1)(f) applies, the matter in respect of the investigation of which the Commission decides to provide assistance under section 179.

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

(a) the auditor is in possession of any record or document, which is in the nature of audit working papers, relating to the affairs of a corporation to which any direction has been or may be given under subsection (1)(i) or (ii); and

(b) the record or document required to be produced under the direction -

(i) relates to the affairs of such corporation; and

(ii) is relevant to the consideration of whether there is or has been the occurrence of -

(A) where subsection (1)(a), (b), (c), (d) or (e) applies, the matter described in such subsection as being suggested by the circumstances referred to in such subsection; or

(B) where subsection (1)(f) applies, the matter in respect of the investigation of which the Commission decides to provide assistance under section 179.

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

(a) the person has dealt or has had dealings, directly or indirectly, with, or is otherwise in possession of any record or document relating to the affairs of, a corporation to which any direction has been or may be given under subsection (1)(i) or (ii); and

(b) the record or document required to be produced under the direction -

(i) relates to the affairs of such corporation or to a transaction with such corporation;

(ii) is relevant to the consideration of whether there is or has been the occurrence of -

(A) where subsection (1)(a), (b), (c), (d) or (e) applies, the matter described in such subsection as being suggested by the circumstances referred to in such subsection; or

(B) where subsection (1)(f) applies, the matter in respect of the investigation of which the Commission decides to provide assistance under section 179; and

(iii) cannot be obtained by giving a direction to any other person under subsection (1)(i), (ii), (iii) or (iv).

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

- (a) subsection (1)(e); or
- (b) subsection (1)(f), if, and only if, the matter in respect of the investigation of which the Commission decides to provide assistance under section 179 is, in the opinion of the Commission, of a nature similar to the matter described in ~~paragraph subsection (1)(e)~~ as being suggested by the circumstances referred to in that ~~paragraph subsection (1)(e)~~².

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

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

² Technical amendment for greater clarity.

institution, the authorized person shall consult the Monetary Authority; or

- (b) where the corporation is an insurer authorized under the Insurance Companies Ordinance (Cap. 41), the authorized person shall consult the Insurance Authority.

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

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

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

- (a) on conviction on indictment to a fine of \$200,000 and to imprisonment for 1 year; or
- (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

(14) A person who -

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

(b) knows that, or is reckless as to whether, the record or document or the explanation or statement is false or misleading in a material particular,

commits an offence and is liable -

(i) on conviction on indictment to a fine of \$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.

(15) A person who -

(a) with intent to defraud -

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

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

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

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

(ii) in purported compliance with a requirement imposed on it by an authorized person under

this section, produce any record or document
or provide or make an explanation or
statement which is false or misleading in a
material particular,

commits an offence and is liable -

- (i) on conviction on indictment to a fine of \$1,000,000 and
to imprisonment for 7 years; or
- (ii) on summary conviction to a fine at level 6 and to
imprisonment for 6 months.

(15A)³ A person is not excused from complying with a requirement imposed on him by an authorized person under this section only on the ground that to do so might tend to incriminate the person.

— (16) In this section -

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

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

"relevant time" (有關時間) means -

³ Members and some market respondents have raised concerns as to whether clauses 172, 173, 174 and 177 have abrogated the privilege against self-incrimination. Our policy intention is that as in existing sections 29A and 33 of the Securities and Futures Commission Ordinance (Cap. 24), in a preliminary inquiry into misconduct of listed corporations (now clause 172) and in an investigation (now clause 177) by the SFC, a person is obliged to provide the information required even though the information might tend to incriminate him, but in doing so he is protected from self-incrimination in that if he so claims, the information provided by him must not be used in any criminal proceedings against him, except in well-accepted situations specified in clause 180 (e.g. perjury). The protection (or the so-called "use immunity") has been preserved in the Bill under clause 180. The amendments to clauses 172 and 177, therefore, seek only to put beyond doubt the statutory requirement (originally set out in clause 180) on the part of the person to provide the information required in the first place. As in existing section 30 of the SFC Ordinance, no such requirement is imposed on a person when the SFC exercises its day-to-day supervisory powers in respect of the intermediaries it regulates (now preserved in clauses 173 and 174 of the Bill). Nothing in clauses 173 and 174 is intended to affect the privilege. No clarification is required in terms of drafting of these provisions.

- (a) where subsection (1) (a), (b), (c), (d) or (e) applies, the time at which the matter described in such subsection as being suggested by the circumstances referred to in such subsection appears to the Commission ~~to be occurring or have occurred as~~ occurring⁴; or
- (b) where subsection (1) (f) applies, the time at which the matter in respect of the investigation of which the Commission decides to provide assistance under section 179 appears to the Commission ~~to be occurring as~~ occurring.⁵
- ~~or have occurred.~~

173. Supervision of intermediaries and their associated entities

(1) Subject to subsections (9) and (10), an authorized person may at any reasonable time, for the purpose of ascertaining whether an intermediary or an associated entity of an intermediary is complying or has complied with, or is likely to be able to comply with, the requirement specified in subsection (2) -

(a) enter -

(i) in the case of an intermediary -

⁴ Technical amendment for greater clarity.

⁵ Technical amendment for greater clarity.

- (A) where it is a licensed corporation, its premises as approved by the Commission under section 129(1); or
 - (B) where it is an exempt person, the premises of the exempt person; or
 - (ii) in the case of an associated entity of an intermediary, the premises of the associated entity;
- (b) inspect, and make copies or otherwise record details of, any record or document relating to -
- (i) the business conducted by the intermediary or the associated entity (as the case may be);
 - (ii) any transaction carried out by a related corporation of the intermediary or the associated entity (as the case may be); or
 - (iii) any transaction or activity which was undertaken in the course of, or which may affect, the business conducted by the intermediary or the associated entity (as the case may be); and
- (c) make inquiries of -
- (i) the intermediary or the associated entity (as the case may be);
 - (ii) a related corporation of the intermediary or the associated entity (as the case may be);

(iii) subject to subsection (7), any other person, whether or not connected with the intermediary or the associated entity (as the case may be), whom the authorized person has reasonable cause to believe has information relating to, or is in possession of, any record or document referred to in paragraph (b),

concerning any record or document referred to in paragraph (b), or concerning any transaction or activity which was undertaken in the course of, or which may affect, the business conducted by the intermediary or the associated entity (as the case may be).

(2) The requirement specified for the purposes of subsection (1) is the requirement not to contravene -

- (a) any provision of this Ordinance;
- (b) any notice or requirement given or made under or pursuant to any of the relevant provisions;
- (c) any of the terms and conditions of a licence or an exemption under this Ordinance;
- (d) any other condition imposed under or pursuant to any provision of this Ordinance.

(3) Subject to subsections (9) and (10), an authorized person in exercising any of his powers under subsection (1) (b) may require -

- (a) the intermediary or the associated entity (as the case may be);

- (b) a related corporation of the intermediary or the associated entity (as the case may be);
- (c) subject to subsection (8), any other person, whether or not connected with the intermediary or the associated entity (as the case may be), whom the authorized person has reasonable cause to believe has information relating to, or is in possession of, any record or document referred to in subsection (1)(b),

to -

- (i) give the authorized person access to any record or document referred to in subsection (1)(b), and produce, within the time and at the place specified by him, the record or document; and

- (ii) answer any question regarding the record or document.

(4) Subject to subsections (9) and (10), an authorized person in exercising any of his powers under subsection (1)(c) may require the intermediary or the associated entity, the related corporation or the other person (as the case may be) referred to in subsection (1)(c),

to -

- (a) give the authorized person access to any record or document referred to in subsection (1)(b), and produce, within the time and at the place specified by him, the record or document; and
- (b) answer any question raised for the purposes of subsection (1)(c).

(5) An authorized person may in writing require the person giving an answer under this section to verify within a reasonable period specified in the requirement the answer by statutory declaration, which may be taken by the authorized person.

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

(7) An authorized person shall not exercise any of his powers under subsection (1)(c)(iii) unless he has reasonable cause to believe that the information sought cannot be obtained by the exercise of any of the powers under subsection (1)(c)(i) or (ii).

(8) An authorized person shall not exercise any of his powers under subsection (3)(c) unless he has reasonable cause to believe that the record or document or the information sought cannot be obtained by the exercise of any of the powers under subsection (3)(a) or (b).

(9) This section shall not be construed as requiring an authorized financial institution ~~which is not an~~ not being the intermediary or the associated entity in question as referred to in subsection (1) or a related corporation of the intermediary or the

associated entity (as the case may be)⁶, to disclose any information or produce any record or document relating to the affairs of a customer unless the relevant authority is satisfied, and certifies in writing that it is satisfied, that the disclosure or production is necessary for the purposes of this section.

(10) Before an authorized person exercises any power under this section in respect of a corporation~~which is not an intermediary~~⁷ -

- (a) where the corporation is an authorized financial institution or a corporation which, to the knowledge of the authorized person, is the controller of an authorized financial institution, or has as its controller an authorized financial institution, or has the same controller as an authorized financial institution, the authorized person shall consult the Monetary Authority; or
- (b) where the corporation is an insurer authorized under the Insurance Companies Ordinance (Cap. 41), the

⁶ The amendment is included to address concerns from the Hong Kong Association of Banks by extending the protection to an authorized financial institution, including an exempt authorized financial institution, in relation to its dealings with another entity other than the regulated activities performed by itself (or its related corporation).

⁷ The amendment would better reflect the policy intention that the HKMA should be consulted when the authorized person imposes a requirement on an authorized financial institution and the Insurance Authority should be consulted when the authorized person imposes a requirement on an insurance company, irrespective of whether such an authorized financial institution or insurance company is an intermediary or not.

authorized person shall consult the Insurance Authority.

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

(12) The relevant authority shall furnish an authorized person authorized by it with a copy of his authorization, and the authorized person, when exercising any power under this section, shall as soon as reasonably practicable produce a copy of the authorization for inspection.

(13) Where a copy of any record or document is supplied or made for the purpose of complying with a requirement imposed under this section and a facility of a person other than the relevant authority is used to make the copy, the relevant authority shall reimburse the expenses which, in the opinion of the relevant authority, have been reasonably incurred by the person in making the copy.

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

(a) on conviction on indictment to a fine of \$200,000 and to imprisonment for 1 year; or

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

(15) A person who -

(a) in purported compliance with a requirement imposed on him by an authorized person under this section,

produces any record or document or gives an answer which is false or misleading in a material particular; and
(b) knows that, or is reckless as to whether, the record or document or the answer is false or misleading in a material particular,

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.

(16) A person who -

(a) with intent to defraud -

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

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

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

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

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

commits an offence and is liable -

- (i) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 7 years; or
- (ii) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(17) In this section -

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

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

"relevant authority" (有關當局) means -

- (a) ⁸where -

⁸ The amendment is to better reflect the policy intention that the HKMA will be the relevant authority where the intermediary in question is an exempt person, and it will also be the relevant authority in respect of the associated entity of an exempt person, whether or not the associated entity is an authorized financial institution. On the other hand, the SFC will be the relevant authority for the intermediary which is a licensed corporation and its associated entities, whether or not the associated entity is an authorized financial institution or exempt person.

- (i) the intermediary in question as referred to
in subsection (1), ~~is an exempt person; or~~
- (ii) the associated entity ~~referred to in that~~
~~subsection, or in question as referred to in~~
~~that subsection is~~ (iii) ~~the~~
~~intermediary of which referred to in that~~
~~subsection is such associated entity,~~
the associated entity of an exempt person,
~~is an exempt person,~~ the Monetary Authority;
or

(b) in any other case, the Commission.

174. Information relating to transactions

(1) An authorized person may, for the purpose of performing a function of the Commission under any of the relevant provisions, require -

- (a) a person registered as the holder of securities in a register of members kept under the Companies Ordinance (Cap. 32);
- (b) a person whom the authorized person has reasonable cause to believe holds any securities, futures contract, leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme;

- (c) a person whom the authorized person has reasonable cause to believe has acquired or disposed of any securities, futures contract, leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme, whether directly or through a nominee, trustee or agent, and whether as beneficial owner, nominee, trustee, agent or otherwise;
- (d) a licensed or exempt person through whom the authorized person has reasonable cause to believe any securities, futures contract, leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme has been acquired, disposed of, dealt with, traded or arranged,

to furnish to him any of the information specified in subsection (2) within the time and in the form specified by him.

(2) The information specified for the purposes of subsection (1) is -

- (a) the particulars (including, in so far as applicable, the name and aliases, address, telephone and facsimile numbers, electronic mail address, occupation and particulars of any document of identity (including, if not an individual, any document evidencing incorporation or registration)) that are reasonably

capable of establishing the identity of the person on whose behalf, or by, from, to or through whom, the securities, futures contract, leveraged foreign exchange contract, or the interest in securities, futures contract, leveraged foreign exchange contract or collective investment scheme in question is held, or has been acquired, disposed of, dealt with, traded or arranged (as the case may be);

- (b) the particulars (including the quantity) of and, in the case of acquisition or disposal, the consideration (if any) for the securities, futures contract, leveraged foreign exchange contract, or the interest in securities, futures contract, leveraged foreign exchange contract or collective investment scheme; and
- (c) the instructions (if any) given to or by the person referred to in paragraph (a), or any officer, employee or agent of such person, in relation to the holding, acquisition, disposal, dealing, trading, arrangement of or in respect of the securities, futures contract, leveraged foreign exchange contract, or the interest in securities, futures contract, leveraged foreign exchange contract or collective investment scheme.

(3) An authorized person may in writing require the person furnishing any information under this section to verify within a reasonable period specified in the requirement the information by statutory declaration, which may be taken by the authorized person.

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

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

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

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

(a) on conviction on indictment to a fine of \$200,000 and to imprisonment for 1 year; or

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

(8) A person who -

(a) in purported compliance with a requirement imposed on him by an authorized person under this section,

- furnishes to the authorized person information which is false or misleading in a material particular; and
- (b) knows that, or is reckless as to whether, the information is false or misleading in a material particular,

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.

(9) A person who -

(a) with intent to defraud -

- (i) fails to comply with a requirement imposed on him by an authorized person under this section; or
- (ii) in purported compliance with a requirement imposed on him by an authorized person under this section, furnishes to the authorized person information which is false or misleading in a material particular; or

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

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

(ii) in purported compliance with a requirement imposed on it by an authorized person under this section, furnish to the authorized person information which is false or misleading in a material particular, commits an offence and is liable -

- (i) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 7 years; or
- (ii) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(10) In this section -

"authorized person" (獲授權人) means a person authorized under subsection (5);

"interest" (權益) includes an interest of any nature, whether legal, equitable, proprietary or otherwise.

Division 3 - Powers of investigations

175. Investigations

(1) Where -

- (a) the Commission has reasonable cause to believe that an offence under any of the relevant provisions may have been committed;
- (b) the Commission has reasonable cause to believe that a person may have engaged in defalcation, fraud, misfeasance or other misconduct in connection with -

- (i) dealing in any securities or futures contract or trading in any leveraged foreign exchange contract;
 - (ii) the management of investment in any securities, futures contract or leveraged foreign exchange contract;
 - (iii) offering or making any leveraged foreign exchange contract or collective investment scheme;
 - (iv) giving advice in relation to the allotment of securities, or the acquisition or disposal of, or investment in, any securities, futures contract, leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme; or
 - (v) any transaction involving securities margin financing;
- (c) the Commission has reasonable cause to believe that market misconduct may have taken place;
- (d) the Commission has reasonable cause to believe that the manner in which a person has engaged or is engaging in any of the activities referred to in paragraph (b) (i) to (v) is not in the interest of the investing public or in the public interest;

(e) ²the Commission -

(i) has reason to inquire whether any person, who is or was at any time a licensed person or a responsible officer of or a person involved in the management of the business of a licensed person, is or was at any time guilty of misconduct within the meaning of Part IX; or

(ii) has reason to inquire whether any such person is or was at any time otherwise not a fit and proper person to remain licensed, or to remain a responsible officer of or a person involved in the management of the business of the licensed person (as the case may be) (having regard, among other matters, to the matters specified in section 128);

(f) the Commission has reason to inquire whether any of the conditions imposed in respect of an authorization under section 103 or 104 are being complied with; or

⁹ The policy intention, reflecting the regulatory approach agreed between the HKMA and the SFC, is that the SFC should have the requisite investigatory powers on not only licensed persons (and relevant individuals of licensed corporations) but also exempt persons (and relevant individuals of exempt AIs). We will therefore propose amendments to clause 175(1) (e) to extend the investigatory powers of the SFC to cover exempt persons (and relevant individuals of exempt AIs) as in the case of licensed persons.

(g) a matter in respect of the investigation of which the Commission decides to provide assistance under section 179 is, in the opinion of the Commission, of a nature similar to the matter described in paragraph (a), (b), (c), (d), (e) or (f) as that which the Commission has reasonable cause to believe or has reason to inquire (as the case may be),

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

(2) The costs ~~and~~¹⁰ expenses incurred by an investigator, other than an employee of the Commission, are to be paid out of moneys provided by the Legislative Council.

(3) The Commission shall furnish an investigator with a copy of his direction or appointment (as the case may be), and the investigator, before first imposing any requirement on a person under section 176(1), (2) or (3), shall produce a copy of the direction or appointment (as the case may be) to that person for inspection.

176. Conduct of investigations

(1) The person under investigation or a person whom the investigator has reasonable cause to believe has in his possession any record or document which contains, or which is likely to contain,

information relevant to an investigation under section 175, or whom the investigator has reasonable cause to believe otherwise has such information in his possession, shall -

- (a) produce to the investigator, within the time and at the place the investigator reasonably requires in writing, any record or document specified by the investigator which is, or may be, relevant to the investigation and which is in his possession;
- (b) if required by the investigator, give to the investigator an explanation or further particulars in respect of any record or document produced under paragraph (a);
- (c) attend before the investigator at the time and place the investigator reasonably¹¹ requires in writing, and answer any question relating to the matters under investigation that the investigator may raise with him; and
- (d) give to the investigator all assistance in connection with the investigation which he is reasonably able to

¹⁰ Technical amendment to ensure that both costs and expenses would be covered, and for consistency with clause 155(4).

¹¹ In response to a comment from the Legal Services Division of the Legislative Council, we propose to add the word "reasonably" for consistency with clause 176 (1) (a). The word "reasonably" both in paragraphs (a) and (c) qualifies the time and place specified by the investigator.

give, including responding to any written question raised by the investigator.

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

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

(4) Neither section 175 nor this section shall be construed as requiring an authorized financial institution to disclose any information or produce any record or document relating to the affairs of a customer to the investigator unless -

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

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

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

177. Offences in relation to investigations

(1) A person who, without reasonable excuse -

- (a) fails to produce any record or document required to be produced under section 176(1)(a);
- (b) fails to give an explanation or further particulars required under section 176(1)(b);
- (c) fails to attend before the investigator as required under section 176(1)(c);
- (d) fails to answer a question raised by the investigator under section 176(1)(c);
- (e) fails to comply with section 176(1)(d); or
- (f) fails to comply with a requirement under section 176(2) or (3),

commits an offence and is liable -

- (i) on conviction on indictment to a fine of \$200,000 and to imprisonment for 1 year; or
- (ii) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

(2) A person -

(a) who -

- (i) in purportedly complying with a requirement imposed by the investigator under section 176(1)(a), produces any record or document which is false or misleading in a material particular;
- (ii) in purportedly complying with a requirement imposed by the investigator under section 176(1)(b), gives any explanation or further particulars which are false or misleading in a material particular;
- (iii) in purportedly answering any question raised by the investigator under section 176(1)(c), says anything which is false or misleading in a material particular; or
- (iv) in purportedly responding to any written question raised by the investigator under section 176(1)(d), states anything which is false or misleading in a material particular; and

(b) who knows that, or is reckless as to whether, the record or document, the explanation or further particulars, the thing or the statement (as the case may be) is false or misleading in a material particular,

commits an offence and is liable -

- (i) on conviction on indictment to a fine of \$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.
- (3) A person who -
- (a) with intent to defraud -
 - (i) fails to do anything as described in subsection (1) (a), (b), (c), (d), (e) or (f);
 - (ii) in purportedly complying with a requirement imposed by the investigator under section 176(1) (a), produces any record or document which is false or misleading in a material particular;
 - (iii) in purportedly complying with a requirement imposed by the investigator under section 176(1) (b), gives any explanation or further particulars which are false or misleading in a material particular;
 - (iv) in purportedly answering any question raised by the investigator under section 176(1) (c), says anything which is false or misleading in a material particular; or
 - (v) in purportedly responding to any written question raised by the investigator under section 176(1) (d), states anything which is

false or misleading in a material
particular; or

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

- (i) fail to do anything as described in
subsection (1) (a), (b), (c), (d), (e) or (f);
- (ii) in purportedly complying with a requirement
imposed by the investigator under section
176(1) (a), produces any record or document
which is false or misleading in a material
particular;
- (iii) in purportedly complying with a requirement
imposed by the investigator under section
176(1) (b), gives any explanation or further
particulars which are false or misleading in
a material particular;
- (iv) in purportedly answering any question raised
by the investigator under section 176(1) (c),
say anything which is false or misleading in
a material particular; or
- (v) in purportedly responding to any written
question raised by the investigator under
section 176(1) (d), state anything which is
false or misleading in a material
particular,

commits an offence and is liable -

- (i) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 7 years; or
- (ii) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(3A)¹² A person is not excused from complying with a requirement imposed on him by an investigator under section 176 only on the ground that to do so might tend to incriminate the person.

(4) ¹³Where any person is convicted by a court on a prosecution instituted as a result of an investigation under section 175, the court may order him to pay to the Commission the whole or ~~a~~ part of the costs ~~or~~ and expenses of the investigation and the Commission may recover ~~such~~ the whole or the part (as the case may be) of the costs and expenses as a civil debt due to it.

(5) ¹⁴Where the Commission receives an amount under an order made under subsection (4) in respect of any of the costs ~~or~~ and expenses of an investigation, and all or any of the costs ~~or~~ and expenses have been paid out of moneys provided by the Legislative Council, the Commission shall pay to the Financial Secretary the amount received under the order to the extent that it has already been paid out of moneys provided by the Legislative Council.

¹² See Note 3.

¹³ Technical amendment to ensure that the order would cover both costs and expenses, and for consistency with clause 155(4).

¹⁴ Technical amendment to ensure that the order would cover both costs and expenses, and for consistency with clause 155(4).

Division 4 - Miscellaneous

**178. Certification to Court of First Instance
relating to non-compliance with
requirements under section 172,
173, 174 or 176**

(1) If a person, without reasonable excuse, fails to do anything upon being required to do so by an authorized person under section 172, 173 or 174, or to do anything upon being required to do so by an investigator under section 176(1), (2) or (3), the authorized person or the investigator (as the case may be) may, by originating summons or originating motion, certify the failure to the Court of First Instance, and the Court may inquire into the case and -

- (a) order the person to comply with the requirement within the period specified by the Court; and
- (b) if the Court is satisfied that the failure was without reasonable excuse, punish the person, and any other person who appears to have been involved in the failure, in the same manner as if he and, where applicable, that other person had been guilty of contempt of court.

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

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

- (a) no proceedings may be instituted against any person under subsection (1)(b) in respect of any conduct if -
 - (i) criminal proceedings have previously been instituted against the person under section

172, 173, 174 or 177 in respect of the same conduct; and

- (ii) (A) those criminal proceedings remain pending; or
- (B) by reason of the previous institution of those criminal proceedings, no criminal proceedings may again be lawfully instituted against that person under such section in respect of the same conduct;

(b) no criminal proceedings may be instituted against any person under section 172, 173, 174 or 177 in respect of any conduct if -

- (i) proceedings have previously been instituted against the person under subsection (1) (b) in respect of the same conduct; and
- (ii) (A) those proceedings remain pending; or
- (B) by reason of the previous institution of those proceedings, no proceedings may again be lawfully instituted against that person under such subsection in respect of the same conduct.

**179. Assistance to regulators outside
Hong Kong**

(1) Where the Commission receives, from an authority or regulatory organization outside Hong Kong which in the opinion of the Commission satisfies the requirements referred to in subsection (5) (a) and (b), a request for assistance to investigate whether a person specified by the authority or regulatory organization has contravened or is contravening legal or regulatory requirements which -

- (a) the authority or regulatory organization enforces or administers; and
- (b) relate to such transactions regarding any securities, futures contract, leveraged foreign exchange contract, collective investment scheme or other similar transactions as are regulated by the authority or regulatory organization,

the Commission may, where it is of the opinion that the condition specified in subsection (3) is satisfied, provide the assistance to investigate the matter by exercising any of its powers under sections 172, 174, 175 and 176.

(2) Where the Commission receives, from a companies inspector outside Hong Kong who in the opinion of the Commission satisfies the requirements referred to in subsection (5) (a) and (b), a request for assistance to investigate whether a person specified by the companies inspector has contravened or is contravening legal or regulatory requirements which relate to transactions regarding any securities, futures contract, leveraged foreign exchange contract, collective investment scheme or other similar transactions, the Commission may, where it is of the opinion that the condition specified in subsection

(3) is satisfied, provide the assistance to investigate the matter by exercising any of its powers under sections 172, 174, 175 and 176.

(3) The condition referred to in subsections (1) and (2) is that -

- (a) it is desirable or expedient that the assistance requested under subsection (1) or (2) (as the case may be) should be provided in the interest of the investing public or in the public interest; or
- (b) the assistance will enable or assist the recipient of the assistance to perform its or his functions and it is not contrary to the interest of the investing public or to the public interest that the assistance should be provided.

(4) In deciding whether the condition specified in subsection (3) is satisfied in a particular case, the Commission shall take into account -

- (a) where the recipient of the assistance is an authority or regulatory organization referred to in subsection (1), whether the authority or regulatory organization will -

- (i) pay to the Commission any of the¹⁵ costs and expenses incurred in providing the assistance; and
 - (ii) be able and willing to provide reciprocal assistance within its jurisdiction in

¹⁵ Technical amendment for greater clarity.

response to a comparable request for assistance from Hong Kong; or

(b) where the recipient of the assistance is a companies inspector referred to in subsection (2), whether -

(i) the companies inspector will pay to the Commission any of the¹⁶ costs and expenses incurred in providing the assistance; and

(ii) under the laws of the country or territory in which the companies inspector is appointed, reciprocal assistance will be provided in response to a comparable request for assistance from Hong Kong.

(5) Where the Commission is satisfied, for the purposes of subsection (1) or (2), that an authority, regulatory organization or companies inspector outside Hong Kong -

(a) performs any function similar to a function of the Commission or the Registrar of Companies, or regulates, supervises or investigates banking, insurance or other financial services or the affairs of corporations; and

(b) is subject to adequate secrecy provisions,

the Commission shall as soon as reasonably practicable thereafter cause the name of the authority, regulatory organization or companies inspector (as the case may be) to be published in the Gazette.

(6) If a person is ~~obliged~~¹⁷ required -

¹⁶ Technical amendment for greater clarity.

(a) to provide or make an explanation or statement as required by an authorized person within the meaning of section 172 exercising pursuant to subsection (1) or (2) a power under section 172; or

(b) to give an explanation or further particulars as required by, or to give an answer to any question as raised by, an investigator exercising pursuant to subsection (1) or (2) a power under section 176,

and the explanation or statement, the explanation or further particulars, or the answer (as the case may be) might tend to incriminate him and he so claims before providing or making the explanation or statement, giving the explanation or further particulars, or giving the answer (as the case may be), then, without limiting the provisions of section 180, the authorized person or investigator (as the case may be) shall not provide evidence of the requirement and the explanation or statement, the explanation or further particulars, or the question and answer (as the case may be) to an authority, regulatory organization or companies inspector outside Hong Kong for use in criminal proceedings against him in the jurisdiction of the authority, regulatory organization or companies inspector (as the case may be).

(7) ¹⁸Where the Commission receives from an authority, regulatory organization or companies inspector outside Hong Kong an amount paid

¹⁷ Technical amendment for consistency with amendments to clause 180.

¹⁸ Technical amendment to ensure that both costs and expenses would be covered, and for consistency with clause 155(4).

in respect of any of the costs ~~or~~and expenses incurred in providing assistance under this section, and all or any of the costs ~~or~~and expenses have been paid out of moneys provided by the Legislative Council, the Commission shall pay to the Financial Secretary the amount received to the extent that it has already been paid out of moneys provided by the Legislative Council.

(8) Any matter published under subsection (5) is not subsidiary legislation.

(9) In this section, "companies inspector" (公司審查員), in relation to a place outside Hong Kong, means a person whose functions under the laws of that place include the investigation of the affairs of a corporation carrying on business in that place.

180. Use of incriminating answers in proceedings

(1) Where -

(a) an authorized person within the meaning of section 172 requires a person to provide or make an explanation or statement under that section; or

(b) an investigator requires a person to give an explanation or further particulars or to give an answer to any question under section 176,

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

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

- (a) an authorized person within the meaning of section 172 requires a person to provide or make an explanation or statement under that section; or
- (b) ¹⁹an investigator requires a person to give an explanation or further particulars or to give an answer to any question under section 176,

~~the person is obliged to provide or make the explanation or statement, to give the explanation or further particulars, or to give the answer (as the case may be), but if and the explanation or statement, the explanation or further particulars, or the answer (as the case may be) might tend to incriminate the person, and he so be), the requirement and the explanation or statement, the explanation or further particulars, or the question and answer (as the case may be) the requirement and the explanation or statement, the explanation or further particulars, or the question and answer (as the case may be)~~

=

- (i) shall, if the person claims before providing or making the explanation or statement, giving the explanation or further particulars, or giving the answer (as the case may be) that the same might tend to incriminate
~~(i) are, subject to subparagraph (ii), not him, not be~~
admissible in evidence against him in criminal

proceedings in a court of law other than those in which he is charged with an offence under section 172(13), (14) or (15) or 177 or under Part V of the Crimes Ordinance (Cap. 200), or for perjury, in respect of the explanation or statement, the explanation or further particulars, or the answer (as the case may be);

- (ii) ~~shall, notwithstanding subparagraph (i), be~~ admissible in evidence for all the purposes of Part XIII (including any proceedings (civil or criminal) instituted under or pursuant to that Part).

181. Lien claimed on records or documents

Where the person in possession of any record or document required to be produced under this Part claims a lien on the record or document -

- (a) the requirement to produce the record or document shall not be affected by the lien;
- (b) no fees shall be payable for or in respect of the production; and
- (c) the production shall be without prejudice to the lien.

182. Production of computerized information

Where any information or matter contained in any record or document required to be produced under this Part is recorded otherwise

¹⁹ Technical amendments for better flow and for consistency with amendments made to clauses 172 and 177. Also see Note 3.

than in a legible form, any power conferred by this Part to require the production of the record or document includes the power to require the production of a reproduction of the recording of the information or matter or of the relevant part of it -

- (a) where the recording enables the information or matter to be reproduced in a legible form, in a legible form; and
- (b) where the information or matter is recorded in a computer, in a form which enables the information or matter to be reproduced in a legible form.

183. Inspection of records or documents seized, etc.

Where an authorized person within the meaning of section 172, 173 or 174 or an investigator has taken possession of any record or document under this Part, the authorized person or the investigator (as the case may be) shall, subject to any reasonable conditions he imposes as to security or otherwise, permit a person who would be entitled to inspect the record or document had he not taken possession of it under this Part, to inspect it and to make copies or otherwise record details of it at all reasonable times.

184. Magistrate's warrants

- (1) If a magistrate is satisfied on information on oath laid by -
 - (a) an employee of the Commission or, where the exercise of powers under section 173 is concerned, of the

relevant authority within the meaning of that section;

or

- (b) an authorized person within the meaning of section 172 or 173, or an investigator,

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

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

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

- (a) require any person on the premises specified in the warrant whom he has reasonable cause to believe to be employed in connection with a business which is, or which has been, conducted on the premises to produce for examination any record or document which is in the possession of the person and which he has reasonable

cause to believe may be required to be produced under this Part;

(b) prohibit any person found on the premises specified in the warrant from -

(i) removing from the premises any record or document required to be produced under paragraph (a);

(ii) erasing, adding to or otherwise altering an entry or other particulars contained in, or otherwise interfering in any manner with, or causing or permitting any other person to interfere with, the record or document;

(c) take, in relation to any record or document required to be produced under paragraph (a), any other step which may appear necessary for preserving it and preventing interference with it.

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

(4) Where a person removes any record or document under this section, he shall as soon as reasonably practicable thereafter give a receipt for it, and he may permit any person who would be entitled to inspect it but for the removal to inspect the record or document

and to make copies or otherwise record details of it at all reasonable times.

(5) Section 102 of the Criminal Procedure Ordinance (Cap. 221) applies to any property which has by virtue of this section come into the possession of the Commission or, where the exercise of powers under section 173 is concerned, of the relevant authority within the meaning of that section, as it applies to property which has come into the possession of the police.

(6) A person commits an offence if he -

- (a) without reasonable excuse, fails to comply with a requirement or prohibition under subsection (2); or
- (b) obstructs a person exercising a power conferred by subsection (2).

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

- (a) on conviction on indictment to a fine of \$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.

185. Destruction of documents, etc.

(1) A person commits an offence if he destroys, falsifies, conceals or otherwise disposes of, or causes or permits the destruction, falsification, concealment or disposal of, any record or document required to be produced under this Part, with intent to

conceal, from the person by whom the requirement to produce was imposed, facts or matters capable of being disclosed by the record or document.

(2) A person who commits an offence under subsection (1) 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.