[21.04] Definitions

'Recognised exchange companies' refers to companies recognised as exchange companies under s 19(2) - currently the Stock Exchange of Hong Kong Limited ('SEHK'), a wholly owned subsidiary of the Hong Kong Exchanges and Clearing Limited ('HKEx'), which operates the Stock Exchange of Hong Kong;

'Stock market' means a place where persons regularly meet together to negotiate sales and purchases of securities (including prices), or a place at which facilities are provided for bringing together sellers and purchasers of securities, but does not include the office of an exchange participant of a recognised exchange company which may operate a stock market, or a recognised clearing house;

'Public' refers to the public of Hong Kong, including any class of that public;

'Exchange participants' means persons who, in accordance with the rules of a recognised exchange company, may trade through that exchange company or on a recognised stock market or a recognised futures market operated by that exchange company, and whose names are entered in a list, roll or register kept by that recognised exchange company as persons who may trade through that exchange company or on a recognised stock market or a recognised futures market operated by that exchange company;

'Financial resources rules' mean rules made under s 145 - see the Securities and Futures (Financial Resources) Rules (Cap 571N).

The terms 'futures market', 'futures contract', 'rules' and 'securities' are defined at length under Sch 1 Pt 1 s 1 below. 'OTC derivative product' is defined in Sch 1 Pt 1 s 1B below.

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22. Immunity, etc.

(1) Without limiting the generality of section 380(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 of the company under section 21 or in the performance or purported performance of its functions under its rules.

(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 a 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 request.

[22.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 17 of the repealed Securities and Futures (Clearing Houses) Ordinance (Cap 420) and s 56 of the repealed Securities and Future Commission Ordinance (Cap 24).

[22.02] General Note

A recognised exchange company or any person acting on behalf of a recognised exchange company in the discharge of its duties or in the performance of its functions in good faith are immunised under this section from civil liability, whether arising in contract, tort, defamation, equity. The immunity is expressly limited to civil liabilities. The same immunity is also given to a recognised clearing house and a recognised exchange controller under s 39 of this Ordinance.

[22.03] Definitions

For 'recognized exchange company', see [21.04] above.

'Directors' include shadow directors and any person occupying the position of a director by whatever name called;

'Function' is defined in Sch 1 as including power and duty (see s 6 above for duties of the SFC);

'Performance', in relation to a function, includes the discharge of duties or exercise of power;

'Recognised exchange controllers' refers to companies recognised as exchange controllers under s 59(2) - currently HKEx;

The term 'rules' is defined at length under Sch 1 Pt 1 s 1 below.

For 'controller', see s 18(1) above.

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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-

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(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 admission of securities which are regulated in a jurisdiction outside Hong Kong to trading on a recognized stock market operated by the recognized exchange company;

(f) the penalties or sanctions which may be imposed by the recognized exchange company for a breach of rules made under this section;

(g) 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;

(h) 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;

(i) 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.

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

(5) 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.

(6) The following persons or anyone who seeks to become any such person 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;

(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 or adviser of a listed corporation.

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

(Amended 23 of 2004 s. 56)

(8) 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 Institute of Certified Public Accountants, refer breaches of rules made under this section— (Amended 23 of 2004 s. 56)

(a) which are alleged to have been committed by a solicitor or certified public accountant in private practice; and (Amended 23 of 2004 s. 56)

(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 Institute of Certified Public Accountants (as the case may be), for determination of whether to make a finding, impose a penalty or sanction or take other disciplinary action.

(Amended 23 of 2004 s. 56)

(9) For the purposes of subsections (7) and (8), a person shall be regarded as acting in the capacity of a solicitor or certified public 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.

(Amended 23 of 2004 s. 56)

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[23.01] Enactment History

The wording of this section is based on s 34 of the repealed Stock Exchanges Unification Ordinance (Cap 361).

Subsections (7) and (9) were amended by replacing the phrase 'professional accountant' with 'certified public accountant' pursuant to s 56 and Sch 2 of the Professional Accountants (Amendment) Ordinance 2004 (23 of 2004), commencing 8 September 2004.

Subsection (8) was amended by replacing 'Hong Kong Society of Accountants' with 'Hong Kong Institute of Certified Public Accountants' pursuant to s 56 and Sch 2 of the Professional Accountants (Amendment) Ordinance 2004 (23 of 2004), commencing 8 September 2004.

[23.02] General Note

This section empowers a recognised exchange company to make rules for the proper regulation of the market which it operates, its exchange participants and holders of trading rights. It also provides for the establishment and maintenance of compensation arrangements for the investing public, subject to approval in writing of the Securities and Future Commission under s 24.

Under sub-s (3), the Commission may by notice in writing request a recognised exchange company to make or amend rules specified in the Commission's notice. The Commission may also make or amend the rules if it is satisfied that the recognised exchange company has not complied with the Commission's request: subsection (5).

The rules made by the recognised exchange company are not subsidiary legislation; see s 24(8) below.

The power of the SEHK to make rules in its operation of the exchange was affirmed in *The Stock Exchange of Hong Kong Ltd v New World Development Co Ltd and Others* (2006) 9 HKCFAR 234, [2006] 2 HKLRD 518, [2006] 2 HKC 533.

As to rules made under sub-s (2), see the Rules Governing the Listing of Securities ('Main Board Listing Rules') and the Rules Governing the Listing of Securities on the Growth Enterprise Market of the Exchange ('GEM Listing Rules').

Subsection (2)(d) provides that the recognised exchange company may make rules in respect of the observation of specified standards of conduct, or to perform, or refrain from performing, specified acts in connection with the listing or continued listing of securities.

[23.03] A self-regulating body

In *Sanyuan Group Ltd v The Stock Exchange of Hong Kong* [2008] 4 HKC 367, in the course of his submissions, the Exchange was characterised by Mr John Scott SC as 'essentially a self-regulating body'. The submission was based on the fact that the Exchange is tasked with maintaining an orderly, fair and informed market (under s 21(1) above) and must act in the interest of the public with particular regard to the interest of the investing public (under s 21(2) above). Under this section, the Exchange is authorised to promulgate the Listing Rules for the purposes of regulation and efficient operation of the market, bearing in mind the public interest. On this basis, it was argued that the Exchange could be characterised as a self-regulating body. Whilst the Securities and Futures Ordinance governs the securities markets and industries of Hong Kong, it only contains broad provisions that reflect the legislative policy. In respect of the day-to-day implementation of the Exchange's duties, the legislature must defer to the expertise of the Exchange itself. Clearly, the Exchange was meant to have considerable discretion in the formulation and enforcement of its rules.

It was thus argued that the Courts should be slow to substitute its views for those of the members of various committees of the Exchange, in particular, the Listing Committee of the Listing Division, the Listing Review Committee, and the Listing Appeals Committee. The Court should only overturn such decisions if it is evident that such a committee had failed to comply with some legal norm or came to a decision that was entirely unreasonable, but should not review the substantive merits of an administrative decision. The Courts should be restricted to examining the legality of a decision or the process by which it was reached. Reyes J fully accepted this analysis, but nevertheless felt in the material case that there had been a failure on the part of the Exchange to act fairly and transparently in its application of Listing Rule 13.24 in respect of *Sanyuan*. Reyes J accordingly quashed the Listing Appeals Committee's decision in respect of *Sanyuan* for procedural unfairness and inadequacy of reasons and remitted the matter to a differently constituted Listing Appeals Committee.

[23.04] Disciplinary proceedings

Rules 2A.09 to 2A.16 of the Main Board Listing Rules specifically deal with disciplinary proceedings. In *New World Development Co Ltd and Others v The Stock Exchange of Hong Kong Ltd* [2005] 2 HKC 506, an order of mandamus was issued by the Court of Appeal to compel the Disciplinary Committee to allow full legal representation, including the right of the legal advisers to address the Disciplinary Committee and to examine the witnesses at the hearing.

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[23.05] Statutory declaration

For the meaning of 'statutory declaration', see s 3 of the Interpretation and General Clauses Ordinance (Cap 1). The provisions of this subsection are intended to address the difficulty identified in *R v Low Robert Eli* [1996] 4 HKC 125, where the learned judge queried whether the Stock Exchange was entitled to insist that a statutory declaration must be executed when there was no statutory requirement to do so.

[23.06] Certified public accountant and Hong Kong Institute of Certified Public Accountants

The Professional Accountants (Amendment) Ordinance (23 of 2004) was enacted to change the title of the Hong Kong Society of Accountants to the Hong Kong Institute of Certified Public Accountants, as well as a resultant change in the designation of its members from 'professional accountants' to 'certified public accountants'.

A certified public accountant is defined in Sch 1 Pt 1 s 1 as having the same meaning as under s 2 of the Professional Accountants Ordinance (Cap 50) — 'a person registered as a certified public accountant by virtue of s 22 (of the Professional Accountants Ordinance)'.

[23.07] Definitions

For 'recognized exchange company', 'exchange participants', 'stock market', see **[21.04]** above.

For 'director', see **[22.03]** above.

'Corporation' means a company or other body corporate incorporated either in Hong Kong or elsewhere, but does not include a company or other body corporate which is prescribed by rules made under s 397 of this Ordinance for the purposes of this definition as being exempted from the provisions of this Ordinance, or to the extent that it is prescribed by

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 145; (Amended 28 of 2012 ss. 912 & 920)

(c) Parts II and XII of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32); and (Replaced 28 of 2012 ss. 912 & 920)

(d) Part 5 of the Companies Ordinance (Added 28 of 2012 ss. 912 & 920).

(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.

[25.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 47 of the repealed Securities and Future Commission Ordinance (Cap 24). Section 25(2) was amended by the Companies Ordinance (Cap 622) s 912 and Sch 9 s 301, effective 3 March 2014.

[25.02] General Note

The Securities and Futures Commission may request that the Chief Executive in Council make a transfer order to transfer certain functions it performs, either in whole or in part, to a recognised exchange company. Such a transfer is subject to a reservation that the Commission is to perform those functions concurrently with the designated exchange company, as well as such other conditions as the Commission considers appropriate. The purpose of this transfer mechanism is to minimise the overlapping of regulatory functions between the Commission and a recognised exchange company. It also allows the Commission to entrust to a recognised exchange company certain regulatory functions which it is willing and able to perform. The Chief Executive in Council may order the resumption of a transferred function by the Commission if it is in the public interest to do so.

This section applies to functions of the Commission under Pt V (provisions on licensing and registration); s 145 (financial resources of licensed corporations); the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) Pt II (provisions on prospectuses) and Pt XII (provisions relating to the restrictions on sale of shares and offers of shares for sale in respect of foreign companies); and the Companies Ordinance (Cap 622) Pt 5 (provisions on transactions in relation to share capital).

As to orders made under s 25(1), see the Securities and Futures (Transfer of Functions — Stock Exchange Company) Order (Cap 571 AE), commencing 1 April 2003. The order transfers certain functions of the Securities and Futures Commission in relation to prospectuses under the Companies Ordinance (Cap 32) (now re-titled as the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)) to The Stock Exchange of Hong Kong Limited.

[25.03] Definitions

For 'Chief Executive in Council' and 'Gazette', see s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

As to 'function' and 'performance', see **[22.03]**.

For 'exchange participants', see **[21.04]**.

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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.

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[26.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 10A of the repealed Stock Exchanges Unification Ordinance (Cap 361) and s 15 of the repealed Commodities Trading Ordinance (Cap 250).

[26.02] General Note

This section provides that the appointment of the chief executive of recognised exchange company is to be approved by the Securities and Futures Commission.

[26.03] Definitions

For 'recognized exchange company', see **[21.04]**. As to 'writing', see **[19.05]**.

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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, futures contracts or OTC derivative products; and

(b) such other information relating to its business or any trading in securities, futures contracts or OTC derivative products,

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

(Amended 6 of 2014 s. 4)

(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.

[27.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 103 of the Commodities Trading Ordinance (Cap 250). Subsection (1) was amended by the Securities and Futures (Amendment) Ordinance 2014 (6 of 2014) s 4, effective 10 July 2015.

[27.02] General Note

This section empowers the Securities and Futures Commission to require a recognised exchange company to produce such books and records and other information relating to its business or trading in securities, futures contracts or OTC derivative products as the Commission may require.

[27.03] Fine

As to level of fine, see s 113B and Sch 8 of the Criminal Procedure Ordinance (Cap 221).

[27.04] Definitions

For 'recognized exchange company', see **[21.04]**.

'Books' includes accounts and any accounting information and, in the case of a banker, any banker's books, however compiled or stored, and whether recorded in a legible form or recorded otherwise than in a legible form but is capable of being reproduced in a legible form;

'Record' means any record of information (however compiled or stored) and includes any books, deeds, contract or agreement, voucher, receipt or data material, or information which is recorded otherwise than in a legible form but is capable of being reproduced in a legible form, and any document, disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of other equipment) of being reproduced, and any film (including a microfilm), tape or other device in which visual images are embodied so as to be capable (with or without the aid of other equipment) of being reproduced;

'Information' includes data, text, images, sound codes, computer programmes, software and databases, and any combination thereof.

For 'performance' and 'functions', see **[22.03]**. As to 'writing', see **[19.05]**.

The terms 'futures contract' and 'securities' are defined at length under Sch 1 Pt 1 s 1 below. 'OTC derivative product' is defined in Sch 1 Pt 1 s 1B below.

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

(1) Subject to subsections (4), (5) and (6), 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.

(2) 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

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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

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

(3) Where the Commission has granted a permission to a recognized exchange company under subsection (2), 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).

(4) 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.

(5) Except where responding to a request under subsection (4)(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.

(6) Except where responding to a request under subsection (4)(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.

(7) 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.

(8) 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.

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

[28.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 36 of the Stock Exchanges Unification Ordinance (Cap 361) and ss 18 and 19 of the Commodities Trading Ordinance (Cap 250) and s 26 of the repealed Securities Ordinance (Cap 333).

[28.02] England

This section may be compared with ss 296 and 297 of the Financial Services and Markets Act 2000 (UK).

[28.03] General Note

This section provides for the circumstances in which the Securities and Futures Commission may withdraw the recognition of an exchange company or direct the company to cease provision of facilities or services.

Under sub-s (1), the Commission is empowered, upon consultation with the Financial Secretary, to withdraw a company's recognition as an exchange company, or direct the clearing house to cease the provision of facilities or services. Subsection (5) guarantees the recognised exchange company a reasonable opportunity to be heard in respect of such matters. The Commission is under a duty to publish any notice of withdrawal in the Gazette. Notice of withdrawal will not take effect unless the period in which an appeal against the notice may be lodged has expired, or the appeal is disposed of.

[28.04] Definitions

For 'recognized exchange company' and 'public', see **[21.04]**. For 'Gazette', see s 3 of the Interpretation and General Clauses Ordinance (Cap 1). For 'Financial Secretary', see **[19.06]** above. As to 'writing', see **[19.05]**.

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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 market 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 market 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.

[29.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 21 of the Commodities Trading Ordinance (Cap 250) and s 20 of the repealed Securities Ordinance (Cap 333).

[29.02] General Note

This section provides for certain circumstances in which the Securities and Futures Commission may, after consultation with the recognised exchange company, direct the company to cease to provide or operate specified facilities or services for a period not exceeding 5 business days. The Commission may only give such a direction if the orderly transaction of business on the stock or futures markets is, or is likely to be, impeded by an emergency, a natural disaster, an economic or financial crisis or other circumstances. Subsection (3) permits more than one extension of the relevant period not exceeding 10 business days in total.

In *Richardson Greenshields of Canada Pacific Ltd v Keung Chak Kiu (Hong Kong Futures Exchange Ltd, Third Party)* [1989] 2 HKLR 103, [1989] 1 HKC 275, it was been suggested that the then-Governor (now Chief Executive of the Hong Kong Special Administrative Region) could have directed the closure of the Commodities Exchange under s 21 of the now Commodities Trading Ordinance (Cap 250) because of the world stock market crash in October 1987.

[29.03] Definitions

For 'recognized exchange company' and 'stock market', see **[21.04]**.

'Business day' means a day other than a public holiday, a Saturday, and a gale warning day or a black rainstorm warning day as defined in section 71(2) of the Interpretation and General Clauses Ordinance (Cap 1), see Sch 1 Pt 1 s 1.

'Futures market' is defined at length under Sch 1 Pt 1 s 1 below.

As to 'writing', see **[19.05]**.

30. Contravention of notice constitutes offence

A person who, without reasonable excuse—

(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.

[30.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 27(4) of the repealed Securities Ordinance (Cap 333), with substantial changes.

[30.02] Fine

As to level of fine, a level 6 fine is set at HK$100,000 — see s 113B and Sch 8 of the Criminal Procedure Ordinance (Cap 221).

[30.03] Summary conviction

See **[19.07]**.

31. Prevention of entry into closed trading markets

(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 on which such facilities are kept or the premises on 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 on which such facilities are kept or the premises on which such services are provided.

[31.01] Enactment History

This section came into effect 1 April 2003. This section is based on ss 27(5) and (6) of the repealed Securities Ordinance (Cap 333) and s 24 of the Commodities Trading Ordinance (Cap 250), with substantial changes.

[31.02] General Note

Subsection (1) provides for the securing of the trading markets during a period of closure. Subsection (2) prohibits the use of the facilities or services, and entry into the premises of such facilities, during the period of closure. Subsection (2) also lays down the consequences of contravening the subsection.

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[31.03] Fine

As to level of fine, a level 5 fine is set at HK$50,000 — see s 113B and Sch 8 of the Criminal Procedure Ordinance (Cap 221).

[31.04] Definitions

The terms 'dealings', 'securities' and 'futures contracts' are defined at length under Sch 1 Pt 1 s1 below.

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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.

[32.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 28 of the repealed Securities Ordinance (Cap 333) and s 22 of the repealed Commodities Trading Ordinance (Cap 250), with substantial changes.

[32.02] General Note

This section provides for the publication of a notice of withdrawal of recognition of an exchange company, or a direction to cease to provide facilities or services, or an extension of such a direction.

For the circumstances in which the Commission may withdraw that recognition or direct a cessation of the provision of facilities or services, see s 28 above.

[32.03] Definitions

For 'recognized exchange company', see **[21.04]**. For 'Gazette', see **[20.03]**.

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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.

[33.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 29 of the repealed Securities Ordinance (Cap 333), s 25 of the Commodities Trading Ordinance (Cap 250) and s 37 of the Stock Exchanges Unification Ordinance (Cap 361).

[33.02] General Note

This section provides for an appeal mechanism to the Chief Executive in Council, against decisions of the Securities and Futures Commission. These are appeals against decisions of the Commission under ss 28 and 29 for the withdrawal of the recognition of an exchange company, or a direction to cease to provide facilities or services, or an extension of such a direction. The decision of the Chief Executive in such matters is final.

As to appeals to the Chief Executive in Council, see the Interpretation and General Clauses Ordinance (Cap 1) s 64.

[33.03] Definitions

As to 'Chief Executive in Council' and 'Gazette', see s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

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

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

(a) "stock exchange";
(b) "stock market";
(c) "commodity exchange";
(d) "futures exchange";
(e) "futures market";
(f) "unified exchange";
(g) "united exchange";
(h) "證券交易所";
(i) "股票交易所";
(j) "證券市場";
(k) "股票市場";
(l) "商品交易所";
(m) "期貨交易所";
(n) "期貨市場";
(o) "聯合交易所",

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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.

[34.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 21 of the repealed Securities Ordinance (Cap 333) and s 106 of the repealed Commodities Trading Ordinance (Cap 250), with substantial changes.

[34.02] General Note

The use of titles such as 'stock exchange', 'stock market', 'commodity exchange', or any other title which closely resembles these phrases is prohibited under this section in order to prevent investors from being misled.

[34.03] Title

'Title' includes name or description, see Sch 1 Pt 1 s 1 below.

[34.04] Fine

As to level of fine, see s 113B and Sch 8 of the Criminal Procedure Ordinance (Cap 221).

[34.05] Definitions

For 'stock market', see **[21.04]**. 'Futures market' is defined at length under Sch 1 Pt 1 s 1 below. For 'summary conviction', see **[19.07]**.

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35. Contract limits and reportable open position

(1) Without prejudice to section 398(7) and (8), the Commission may make rules to—

(a) prescribe limits on, or conditions relating to, the number of futures contracts which may be held or 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 398(7) and (8), 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, 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.

[35.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 146(1) of the repealed Securities Ordinance (Cap 333) and ss 59 and 60 of the Commodities Trading Ordinance (Cap 250), with substantial changes.

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[35.02] General Note

The Securities and Futures Commission is empowered under this section to make rules prescribing contract limits, requiring the lodging of notices of reportable positions, and prescribing the manner of lodging such notices and accompanying information. The Commission may make rules prohibiting trading or holding specified classes of futures or options contracts in excess of specified amounts. 'Reportable position' is defined in sub-s (6).

The Securities and Futures (Contracts Limits and Reportable Positions) Rules (Cap 571Y) (220 of 2002), commencing 1 April 2003, are made pursuant to the rule-making power provided under sub-s (1). These rules are made by the Securities and Futures Commission to prohibit persons (other than authorised persons) from holding or controlling futures contracts and stock options contracts in excess of the prescribed limit. The rules also require a person who holds or controls a reportable position in such futures contracts or stock options contracts to notify the recognised exchange company concerned. The rules provide for penalties for the contravention of such prohibition or requirement.

[35.03] Fine

As to level of fine, a fine at level 3 is set at HK$10,000 - see s 113B and Sch 8 of the Criminal Procedure Ordinance (Cap 221).

[35.04] Definitions

The term 'futures contracts' is defined at length under Sch 1 Pt 1 s 1 below.

For 'recognized futures market', 'recognized stock market', see **[20.03]**. For 'information', see **[27.04]**.

For 'Financial Secretary', see **[19.06]** above. For 'summary conviction', see **[19.07]**.

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36. Rules by Commission

(1) Without prejudice to section 398(7) and (8), 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

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by the Commission under subsection (1).

[36.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 14 of the repealed Securities Ordinance (Cap 333).

[36.02] General Note

The Securities and Futures Commission may, after consulting with the Financial Secretary, make rules relating to listing matters, and the proper regulation of the markets and exchange participants.

The Securities and Futures (Stock Market Listing) Rules (Cap 571V) (LN 217 of 2002), commencing 1 April 2003, are made pursuant to sub-s (1) of this section. The Rules:

- Prescribe that certain requirements must be met before securities may be listed;
- Provide for the cancellation of the listing of securities if the requirements are not met;
- Prescribe the circumstances in which, and the conditions subject to which a recognised exchange company shall suspend dealings in securities;
- Provide for the filing with the Securities and Futures Commission of copies of applications for the listing of securities and information disclosed to the public by issuers and certain other persons; and
- Provide for other requirements to be complied with by a recognised exchange company.

[36.03] Definitions

For 'listing', see **[23.07]**; 'recognized exchange company', 'exchange participant' and 'stock market', see **[21.04]**; 'information', see **[27.04]**; 'recognized futures market', see **[20.03]**; 'Financial Secretary', see **[19.06]**.

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.

(6) Where the Commission refuses to recognize a company as a clearing house under subsection (1), the Commission shall, by notice in writing served on the company, inform the company of the refusal and of the reasons for it.

[37.01] Enactment History

This section came into effect 1 April 2003. Subsections (1) and (4) are consolidations of s 3 of the repealed Securities and Futures (Clearing Houses) Ordinance (Cap 420) and s 3 of the repealed Exchanges and Clearing Houses (Merger) Ordinance (Cap 555). Subsections (2) and (3) are modelled on s 59, which is based on s 3 of the repealed Exchanges and Clearing Houses (Merger) Ordinance (Cap 555). Subsection (5) has no equivalent in the previous legislation.

[37.02] England

This section may be compared with ss 285(1)(b), 290 and 417(1) of the Financial Services and Markets Act 2000.

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[37.03] General Note

This section empowers the Securities and Future Commission to recognise a company as a clearing house, where it is satisfied that to do so is in the public interest, or necessary for the proper regulation of markets in securities or futures contracts. Subsections (2) and (3) empower the Commission to amend or revoke conditions or to impose new conditions. Subsection (5) ensures that a company is given a reasonable opportunity to be heard before the Commission makes a decision to withdraw its recognition of the company.

Where a company becomes a recognised clearing house, the Commission must cause notice of that fact to be published in the Gazette.

[37.04] Definitions

For 'public', see **[21.04]**. 'Securities', 'futures contracts' and 'clearing house' are defined at length under Sch 1 Pt 1 s 1 below. For 'Gazette', see **[20.03]**. For 'Financial Secretary', see **[19.06]**. As to 'writing', see **[19.05]**.

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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, futures contracts or OTC derivative products cleared or settled through its facilities; and (Amended 6 of 2014 s. 5)

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

(2) In discharging its duty under subsection (1), a recognized clearing house shall—

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

(b) ensure that the interest of the public prevails where it conflicts with the interest of the recognized clearing house.

(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.

[38.01] Enactment History

This section came into effect 1 April 2003. This section is modelled on s 21 of this Ordinance and is based on sub-s 8(1) and (2) of the repealed Exchanges and Clearing Houses (Merger) Ordinance (Cap 555). Subsection (1)(a) was amended by the Securities and Futures (Amendment) Ordinance 2014 (6 of 2014) s 5, effective 10 July 2015.

[38.02] General Note

This section imposes on a recognised clearing house the following duties:

- To ensure orderly, fair and expeditious clearing and settlement arrangements;
- To operate its facilities in accordance with its rules approved by the Securities and Future Commission;
- To formulate and implement appropriate procedures for ensuring that its clearing participants comply with its rules; and
- To provide and maintain adequate and properly equipped premises, competent personnel and adequate automated systems.

[38.03] Definitions

'Recognized clearing house' means a company recognised as a clearing house under s 37(1);

'Clearing participants' means persons who, in accordance with the rules of a recognised clearing house, may participate in one or more of the services provided by the clearing house in its capacity as a clearing house and whose names are entered in a list, roll or register kept by that recognised clearing house as persons who may participate in one or more of the services provided by that clearing house;

The term 'rules' is defined at length under Sch 1 Pt 1 s 1 below.

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39. Immunity, etc.

(1) Without limiting the generality of section 380(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—

(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

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dissipation of assets to defeat a judgment, and where the balance of convenience lies) do not limit the scope of the exercise of the statutory power, these traditional principles of equity nevertheless provide a sound basis for a preliminary assessment. Before any interim injunction can be granted, there must be established a prima facie case of contravention of a relevant provision of the statute and there is an appreciable, not a fanciful, risk that without the injunction, proper compliance under the statute would be frustrated. Kwan J cited the comments of Waddell CJ in *Corporate Affairs Commission (NSW) v Walker* (1986-1987) 11 ACLR 884 at 888 in relation to the situation where the application for an injunction is made at the initial stage of an investigation:

> What evidence is necessary before an order should be made will depend on the circumstances. In the case of an application made shortly after an investigation has begun, the evidence may be regarded as sufficient if it establishes the general circumstances, the nature of the investigation and the reason why it is thought that there may be some liability on the part of a relevant person.

Having found there was a risk of dissipation of assets which would prevent the enforcement of any order to disgorge profits or to pay a penalty, Kwan J also found there had been a material non-disclosure at the ex parte application, but that it did not justify setting aside the injunction. The SFC was not required to give an undertaking in damages.

[213.06] Directing of steps to be taken; rescission and restitution: s 213(2)(b)

Section 213(2)(b) enables an order to be made that would restore all the parties to their relevant financial position prior to the transaction impugned: *Securities and Futures Commission v Tsoi Bun* [2014] 2 HKLRD 1, [2014] 4 HKC 468.

It should be noted that s 213(2)(b) is wider than the comparable UK provision in s 6(2) of the Financial Services Act 1986 (UK). It was held by the English Court of Appeal in *Securities and Investment Board v Pantell SA (No 2)* [1993] 1 All ER 134 that since the purpose of an order under s 6(2) must be to restore the parties to the transaction to the position they were in before the transaction was entered into, an order ought not require a contravener to repay the purchase price for shares sold unless there is also provision for the return of shares by the other party to the transaction. In *Securities and Futures Commission v Tsoi Bun*, above, Lam J held that the position regarding s 213(2)(b) is distinguishable from the UK provision as the language of s 213(2)(b) is wider. While the nature of the steps that may be required in an order made under s 213(2)(b) would be limited by the spirit and intendment of the Ordinance and the context and purpose of the application under s 213, the provision is not confined to making full restitution in specie.

In *Securities and Futures Commission v Young Bik Fung* [2016] 1 HKLRD 1249, [2016] HKCU 116 at paras 267–270, the court accepted that an order can be made under s 213(2)(b) against a person who unknowingly became involved in a tainted transaction requiring the person to return the profits from the tainted transaction.

[213.07] Restraining a person from dealing with property: s 213(2)(c)

Section 213(2)(c) can be relied upon to restrain the disposal of property for the purpose of ensuring that the defendant has assets available to satisfy a potential financial liability (such as the disgorging of profits or a penalty in a disciplinary action) where it appears to the SFC that a person has breached the provisions of the Ordinance: *Securities and Futures Commission v A* [2008] 1 HKC 89. The value of the property to be subject to restraint would be by reference to the anticipated action that may be taken regarding the breach, and may include both the elements of profits and penalty, as these consequences are not mutually exclusive.

In *Securities and Futures Commission v C* [2008] HKCU 1709 (unreported, HCMP 727/2008, 22 October 2008), Kwan J dealt with the inter partes application to continue interim injunctions earlier granted under ss 213(2)(c) and (6) on an ex parte application to freeze the defendants' assets (in the usual *Mareva* form) in a sum equal to the loss avoided by the defendants suspected of engaging in insider dealing. The SFC sought the injunctions to ensure that the defendants would have sufficient funds to satisfy any order for the disgorgement of loss avoided. A number of the defendants were outside of the jurisdiction and leave had been granted in the ex parte application for service out of the jurisdiction pursuant to Rules of the High Court (Cap 4A) Order 11 rule 1(1)(b). However, in the inter partes proceedings, Kwan J set aside service outside of the jurisdiction and declined to continue the ex parte orders against them. (The one defendant who had been served in Hong Kong had given undertakings equivalent to the relief sought and hence the orders against her were discharged by consent.) The Court of Appeal allowed an appeal against Kwan J's decision: see *Securities and Futures Commission v C* [2009] 4 HKC 167. On further appeal, the Court of Final Appeal reversed the Court of Appeal's decision: *Kayden Ltd v Securities and Futures Commission* (2010) 13 HKCFAR 696, [2011] 2 HKC 44. This was on the basis that RHC O 11 r 1(1)(b) did not cover applications for *Mareva* relief in respect of which no ruling is made to decide upon and give effect to substantive rights. Similarly, the relief sought in the present case was interim in nature, mirroring pure *Mareva* relief, and thus RHC O 11 r 1(1)(b) could not be relied upon for service outside of the jurisdiction. On the other hand, where there is claim for final relief in addition to interim relief under s 213, it may be possible to rely on RHC O 11 r 1(1)(b): *Securities and Futures Commission v Lee Sung Ho* [2012] 5 HKC 20 (though service against a foreign company was not allowed in this case where the company had no apparent presence or assets in Hong Kong and where there could not be any effective injunction granted against it). In any event, RHC O 11 RHC has since been amended to permit leave for service outside the jurisdiction by adding r 1(1)(oc) to include a claim for interim relief. In the premises, a s 213 application should now be allowed to be served outside the jurisdiction whether or not the orders sought are for final orders, subject only to an application to set aside or stay by the defendant(s) under RHC O 12, r 8.

[213.08] Top up of assets subject to injunction

In *SFC v Wong Kwong Yu* [2009] HKCU 1367 (unreported, HCMP 1496/2009, 8 September 2009) the SFC obtained an *ex parte* injunction under s 213 requiring the defendants to lodge in court shares up to the value of approximately HK$1.6 billion. On the return date of the inter partes summons, the SFC, on account of the drop in prices of the shares lodged, sought to vary the order by requiring the defendants deposit further shares to make up for the drop in prices and for a provision to be made for a mechanism to take into consideration the fluctuation in the value of the shares concerned. The learned Judge refused the top up application on account of the narrow range of volatility exhibited; the incorporation of an automatic mechanism to top up was also refused on the ground that it would fetter the court's discretion in respect of the variation of interlocutory orders and that it could result in the freezing of a large portion of the defendants' assets beyond the limit in the order.

It should be noted, however, that in *Securities and Futures Commission v Du Jun (previously 'A')* [2010] HKCU 793 (unreported, HCMP 1407/2007, 12 April 2010), the court allowed a similar application by the SFC to amend its summons — the SFC had sought an order freezing $46,595,033 of the defendant's assets, which represented the SFC's estimate of twice the notional profits from the applicant's insider dealing. Over time, the value of the frozen assets was reduced by various court orders. The court allowed the amendments, subject to the SFC filing an affidavit identifying the counterparties or other persons who (it is alleged) have suffered loss as a result of the defendant's activities, and quantifying as best as can be just what that loss is.

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[213.09] Appointment of administrators

In *Securities and Futures Commission v Tiffit Securities (Hong Kong) Ltd* [2006] HKCU 1667 (unreported, HCMP 1479/2006, 4 October 2006), the Securities and Futures Commission sought an order for the appointment of administrators in respect of Tiffit Securities pursuant to s 213(2)(d). The contraventions in respect of Tiffit related to: ss 6(1) and 21 of the Securities and Futures (Financial Resources) Rules; s 146 SFO; ss 6(1) and 10 of the Securities and Futures (Client Securities) Rules; and s 151(4) SFO. The court granted the order for appointment of an administrator in circumstances where there were serious concerns as to the fitness of Tiffit to carry on the regulated activities for which it had been licensed and as to the fitness of the two directors to be concerned in such activities. The court also took into consideration the substantial liquid capital deficiency on Tiffit's part, the serious shortfall in client securities as client's securities have been dealt without their authorisation, and the fact that there were no longer any responsible officers or staff (one of the directors left Hong Kong, while the other was held in custody). All the aforementioned factors justified the Court appointing administrators for Tiffit Securities.

Similarly, in *Securities and Futures Commission v Whole Win Securities Ltd* [2006] HKCU 1094 (unreported, HCMP 1093/2006, 28 June 2006), _ the Securities and Futures Commission sought an order for the appointment of an administrator of Whole Win Securities Limited to administer its property pursuant to s 213(2)(d). The defendant had failed to comply with the requirement under Securities and Futures (Financial Resources) Rules to maintain liquid capital of not less than HK$3 million, and had failed to notify the Commission as soon as reasonably practicable of its ability to maintain financial resources. Under s 213(4), the court must satisfy itself, so far as it can reasonably do so, that it is desirable that the order be made, and that the order will not unfairly prejudice any person. There were concerns over the fitness of the management of the defendant. There was clear evidence showing serious liquidity deficiency, as well as clear evidence showing the clients' securities had been wrongfully pledged with the defendant's creditors, and there was also evidence that not all clients' money had been kept in a segregated trust account. On this basis, Sakhrani J granted the application appointing an administrator. Sakhrani J also considered the inherent jurisdiction of the court for directions regarding the disposal of the securities held by a company on trust for its clients.

[213.10] Variation or discharge: s 213(9)

In *Securities & Futures Commission v Jun Du (previously 'A')* [2008] HKCU 2041 (unreported, HCMP 1407/2007, 23 December 2008), the defendant applied for the discharge of an injunction against the defendant restraining him from disposing or transferring assets out of the jurisdiction on the basis that there had been a material change in circumstances (namely the decision to institute criminal proceedings against the defendant which was made after the interim injunction). The interim injunction had been sought to freeze a sum based on the possible fine that the SFC may impose in disciplinary action. The defendant argued that, in view of the penalty that could be imposed in the criminal proceedings, the amount of any fine in separate disciplinary action by the SFC would have to be a smaller amount than originally envisaged. The court rejected this argument, holding that the sum ordered to be frozen under s 213(2)(c) can be applied towards whatever type of penalty that is eventually imposed for whatever type of proceedings that may be brought against the particular act complained of, whether this be market misconduct proceedings, disciplinary action or a criminal prosecution. Just because the amount to be frozen was calculated with reference to a disciplinary action, it does not mean the frozen money can only be applied to a fine in a disciplinary action. The amount of HK$46.5 million frozen in the present case could equally be applied to satisfy a fine that would result from criminal prosecution. In the alternative, the defendant also argued for a variation of the injunction to release a sum to enable him to use the released funds for the defence in his criminal case. Applying by analogy the principles applicable in the variation of a *Mareva* injunction, the court

exercised its discretion to vary the interim injunction for the release of the funds in order for the defendant to pay his legal expenses in the sum of HK$10 million.

In *Securities & Futures Commission v Du Jun (previously 'A')* [2010] HKCU 793 (unreported, HCMP 1407/2007, 12 April 2010), the court allowed a similar application for variation to release funds for the purpose of payment of the fine imposed by the criminal court against the defendant in circumstances where the defendant would not be able to pay the fine without resorting to the frozen funds. The defendant's application for discharge of the balance of the freezing order entirely was, however, rejected. Even though the criminal proceedings were concluded, there was still the question of whether and to what extent the defendant should compensate anyone who lost money as a result of the defendant's insider dealing.

[213.11] Exchange participant

'Exchange participant' is defined in Sch 1 Pt 1 to mean a person—

(a) who, in accordance with the rules of a recognised exchange company, may trade through that exchange company or on a recognised stock market or a recognised futures market operated by that exchange company; and

(b) whose name is entered in a list, roll or register kept by that recognised exchange company as a person who may trade through that exchange company or on a recognised stock market or a recognised futures market operated by that exchange company.

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[213.12] Clearing participant

'Clearing participant' is defined in Sch 1 Pt 1 as a person—

(a) who, in accordance with the rules of a recognised clearing house, may participate in one or more of the services provided by the clearing house in its capacity as a clearing house; and

(b) whose name is entered in a list, roll or register kept by that recognised clearing house as a person who may participate in one or more of the services provided by that clearing house.

[213.13] Clearing house

'Clearing house' is defined in Sch 1 Pt 1 to mean a person—

(a) whose activities or objects include the provision of services for the clearing and settlement of transactions in securities effected on a recognised stock market or subject to the rules of a recognised exchange company;

(b) whose activities or objects include the provision of services for—

    (i) the clearing and settlement of transactions in futures contracts; or

    (ii) the day-to-day adjustment of the financial position of futures contracts,

effected on a recognized futures market or subject to the rules of a recognised exchange company; or

(c) who guarantees the settlement of any such transactions as are referred to in paragraph (a) or (b), but does not include a corporation operated by or on behalf of the Government.

214. Remedies in cases of unfair prejudice, etc. to interests of members of listed corporations, etc.

(1) Where, in relation to a corporation which is or was listed, it appears to the Commission that at any relevant time the business or affairs of the corporation have been conducted in a manner—

(a) oppressive to its members or any part of its members;

(b) involving defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members;

(c) resulting in its members or any part of its members not having been given all the information with respect to its business or affairs that they might reasonably expect; or

(d) unfairly prejudicial to its members or any part of its members,

the Commission may, subject to subsection (3), by petition apply to the Court of First Instance for an order under this section.

(2) If, on an application under this section, the Court of First Instance is of the opinion that the business or affairs of a corporation have been conducted in a manner described in subsection (1)(a), (b), (c) or (d), whether through conduct consisting of an isolated act or a series of acts or any failure to act, the Court may—

(a) make an order restraining the carrying out, or requiring the carrying out, of any act or acts;

(b) order that the corporation shall bring in its name such proceedings as the Court considers appropriate against such persons, and on such terms, as may be specified in the order;

(c) unless the corporation is an authorized financial institution, appoint a receiver or manager of the whole or any part of the property or business of the corporation and may specify the powers and duties of the receiver or manager and fix his remuneration;

(d) order that a person wholly or partly responsible for the business or affairs of the corporation having been so conducted shall not, without the leave of the Court—

(i) be, or continue to be, a director, liquidator, or receiver or manager of the property or business, of the corporation or any other corporation; or

(ii) in any way, whether directly or indirectly, be concerned, or take part, in the management of the corporation or any other corporation,

for such period (not exceeding 15 years) as may be specified in the order;

(e) make any other order it considers appropriate, whether for regulating the conduct of the business or affairs of the corporation in future, or for the purchase of the shares of any members of the corporation by other members of the corporation or by the corporation (and, in the case of a purchase by the corporation, for the reduction accordingly of the corporation's capital), or otherwise.

(3) The Commission shall not make an application under this section unless it has first consulted—

(a) (Repealed 9 of 2012 s. 18)

(b) where the corporation in question is an authorized financial institution or a corporation which, to the knowledge of the Commission, is a controller of an authorized financial institution, or has as its controller an authorized financial institution, or has a controller that is also a controller of an authorized financial institution, the Monetary Authority.

(4) Where the Court of First Instance makes an order under subsection (2)(d), the order shall be filed by the Court with the Registrar of Companies, as soon as reasonably practicable after it is made.

(5) Where an order under this section makes an alteration in or addition to the constitution of a company, notwithstanding any other provisions of the Companies Ordinance (Cap 622) or the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) but subject to the provisions of the order, the company shall not have the power, without the leave of the Court of First Instance, to make any further alteration in or addition to the constitution inconsistent with the order. (Amended 28 of 2012 ss. 912 & 920)

(6) Where any alteration in or addition to the constitution of a company is made by an order under this section, the alteration or addition (as the case may be) has the same effect as if duly made by a resolution of the company, and the Companies Ordinance (Cap 622) and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) apply to the constitution as altered or added to accordingly. (Amended 28 of 2012 ss. 912 & 920)

(7) An office copy of an order of the Court of First Instance altering or adding to, or of the leave of the Court to alter or add to, the constitution of a company shall, within 14 days after the order is made or the leave is given, be delivered by the company to the Registrar of Companies for registration.

(8) A company which contravenes subsection (7) commits an

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offence and is liable on conviction to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for every day during which the offence continues.

(9) In this section—

'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) —

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

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

[214.01] Enactment History

This section came into effect 1 April 2003. Section 214 is based on s 37A of the repealed Securities and Futures Commission Ordinance (Cap 24).

The Securities and Futures (Amendment) Ordinance 2012 (9 of 2012) repealed sub-s (3)(a), effective 4 May 2012, to remove the requirement for the SFC to consult the Financial Secretary before making an application to the Court of First Instance. Subsections (5) and (6) were amended by the Companies Ordinance (Cap 622), effective 3 March 2014 to update the references to the companies' legislation upon enactment of Cap 622.

[214.02] General Note

This section enables the Commission to obtain an appropriate order from the Court of First Instance where the affairs of a listed corporation are conducted in the manner set out in sub-s (1). Three conditions have to be satisfied under s 214(1): (1) the matter must relate to a listed corporation; (2) the business or affairs complained of are those of the corporation; and (3) the conduct complained of falls within one or more heads of 'misconduct' specified in sub-ss (a)–(d). The section sets out the procedure to be followed where such an application is made to the Court.

In *Re Riverhill Holdings Ltd; Securities and Futures Commission v Yick Chong San* [2007] 4 HKLRD 46, [2007] HKCU 930, the Securities and Futures Commission sought a disqualification order under section 214(2)(d). *Re Tiffit Securities (Hong Kong) Ltd* [2007] 1 HKLRD 267, [2007] HKCU 99 is a case where the Securities and Futures Commission had issued a restriction notice on a licensed securities dealer.

[214.03] 'Business or affairs': section 214(1)

For 'business or affairs', it is possible that, depending on the facts, the business or affairs of one company may also be that of another company — a realistic approach should be adopted in considering whether the affairs of a subsidiary may be regarded as that of the holding company: *Securities and Futures Commission v Fung Chiu* [2009] 6 HKC 423.

[214.04] Defalcation, fraud, misfeasance or other misconduct: s 214(1)(b)

'Defalcation' is defined in Sch 1 Pt 1 to mean misapplication, including misappropriation, of any property. 'Misfeasance' is defined in Sch 1 Pt 1 to mean the performance of an otherwise lawful act in a wrongful manner. 'Other misconduct' connotes improper or wrong behaviour or mismanagement, culpable neglect of duties: *Securities and Futures Commission v Fung Chiu* [2009] 6 HKC 423 at para 21. In *Re Riverhill Holdings Ltd; Securities and Futures Commission v Yick Chong San* [2007] 4 HKLRD 46, [2007] HKCU 930 at para 15, the court was satisfied that a case of misconduct under s 214(1)(b) was made out against a director who was found to have failed to exercise the degree of skill and care as may reasonably be expected of a person of his knowledge and experience and holding his office and functions within the company in question.

[214.05] Unfairly prejudicial: s 214(1)(d)

Conduct which is unfairly prejudicial is conduct which results in harm to the members of the company or part of the membership in their capacity as members of the company. It covers a range of conduct. At one end of the scale is fraud. At the other end of the scale the conduct can take the form of neglect or inaction on the part of those to whom the affairs of a company are entrusted: *Securities and Futures Commission v Chesterfield Ltd* (unreported, HCMP 3504/1994, 22 May 1995); *Securities and Futures Commission v Fung Chiu* [2009] 6 HKC 423 at para 22. The body of cases on unfair prejudice under Companies Ordinance (Cap 622) ss 724 and 725 (and the predecessor Companies Ordinance (Cap 32) s 168A) would be relevant for determining what amounts to unfair prejudice.

[214.06] Authorised financial institution

An 'authorized financial institution' is defined in Sch 1 Pt 1 as a bank, a restricted licence bank, or a deposit taking company.

[214.07] Applications for disqualification orders and the Carecraft procedure: s 214(2)(d)

The summary procedure as sanctioned in *Re Carecraft Construction Ltd* [1994] 1 WLR 172 and clarified by the English Court of Appeal in *Secretary of State for Trade and Industry v Rogers* [1996] 1 WLR 1569 has been repeatedly adopted in proceedings under s 214.

In *Re Riverhill Holdings Ltd; Securities and Futures Commission v Yick Chong San* [2007] 4 HKLRD 46, [2007] HKCU 930, a petition presented from the Securities and Futures Commission seeking a disqualification order against Yick Chong San pursuant to s 214(2)(d) to be disposed by way of *Carecraft* procedure, it was made clear that the court would need to be satisfied, on the agreed facts, that the business or affairs of the listed corporation have been conducted in a manner described in s 214(1)(a), (b), (c) or (d), whether through conduct consisting of an isolated act or a series of acts or any failure to act. If the court is so satisfied and decides to make an order under section 214(2)(d) against a person who was wholly or partly responsible for the business or affairs of the corporation, the court must decide on the scope and the duration of that order. Taking into consideration the facts of the case before Her Ladyship, Kwan J disqualified the respondent for four years and decreed that for a period of four years, the respondent would not, without leave of the court, be a director of any listed company or of any company that is a subsidiary or an affiliate of a listed company, and be in any way, whether directly or indirectly, concerned, or take part in the management of any listed company or of any company that is a subsidiary or an affiliate of a listed company.

It was noted in *Securities and Futures Commission v Fung Chiu* [2009] 2 HKC 19 that the

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Carecraft procedure does not simply involve the making of a consent order. Two important objectives were emphasised in the exercise of this jurisdiction to make disqualification orders: first, protection of the public against the future conduct of persons whose past records as directors of listed companies have shown them to be a danger to those who have dealt with the companies, including creditors, shareholders, investors and consumers; and secondly, general deterrence in that the sentence must reflect the gravity of the conduct complained of so that members of the business community are given a clear message that if they break the trust reposed in them they will receive proper punishment.

In deciding whether to make the disqualification orders to which the SFC and the respondents have agreed, the Court is not bound by the parties' agreement on either liability or the scope/duration of the disqualification orders. Instead the Court must be satisfied, based on the agreed facts, that s 214(1) was contravened and, if so satisfied, determine the scope and duration of disqualification orders to be made: see *Re Riverhill Holdings Ltd; Securities and Futures Commission v Yick Chong San* [2007] 4 HKLRD 46, [2007] HKCU 930. The Court in practice is likely to be guided by the agreement that the SFC and the respondents have reached on the sanction to be imposed: see *Securities and Futures Commission v Yeung Kui Wong* [2010] HKCU 778 (unreported, HCMP 1742/2009, 9 April 2010).

In *Securities and Futures Commission v Cheung Keng Ching* [2010] HKCU 622 (unreported, HCMP 1869/2008, 18 March 2010), only the 3rd respondent agreed to the adoption of *Carecraft* procedure but the 1st and 2nd respondents did not challenge the facts alleged against them. The Court adopted the contents in the *Carecraft* schedule insofar as it referred to the status and activities of the 1st and 2nd respondents and ordered their disqualification. On appeal, see *Securities and Futures Commission v Cheung Keng Ching* [2011] 4 HKC 453.

Practice Direction 5.2 (Case management) applies to proceedings for a disqualification order brought under s 214(2)(d): *Re Inno-Tech Holdings Ltd* [2016] 5 HKLRD 111, [2017] HKCU 23 (dealing with admissibility of expert evidence on PRC law).

[214.08] Disqualification orders: length

The three brackets of disqualification period laid down by the English Court of Appeal in *Re Sevenoaks Stationers Ltd* [1991] Ch 164, namely: (1) the top bracket of over 10 years for particularly serious cases, such as where a director faces a second disqualification; (2) a middle bracket of 6 to 10 years for serious cases which do not merit the top bracket; and (3) a minimum bracket of 2 to 5 years should be applied where relatively speaking, a case is not very serious, have been adopted for the purposes of s 214 proceedings, see eg *Securities and Futures Commission v Fung Chiu* [2009] 2 HKC 19 and *Re Styland Holdings Ltd* [2011] 1 HKLRD 96, [2010] HKCU 2560, except that the minimum bracket can be for any period under 5 years because there is no minimum period of disqualification under the SFO, see *Re First China Financial Network Holdings Ltd* [2015] 5 HKLRD 530, [2015] HKCU 2357 (unreported, HCMP 2502 & 2502A/2012, 30 September 2015). In deciding which bracket applies, the Court has stressed that it might not be necessary or desirable to go through the facts of previous cases but one should apply the principles to the facts of the particular case. The relevant factors as set out in *Re Westmid Packing Services Ltd* [1998] 2 BCLC 646 would be taken into account: see *Securities and Futures Commission v Yeung Kui Wong* [2010] HKCU 778 (unreported, HCMP 1742/2009, 9 April 2010) at para 9, per Harris J, and they are:

(1) It is of the greatest importance that any individual who undertakes the statutory and fiduciary obligations of being a company director should realise that these are personal responsibilities.

(2) The primary purpose of disqualification is to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies showed them to be a danger to creditors and others. Other factors also come into play in the wider interests of protecting the public, ie a deterrent element in relation to the director himself and a deterrent element as far as other directors are concerned.

(3) The period of disqualification must reflect the gravity of the offence.

(4) The period of disqualification may be fixed by starting with an assessment of the correct period to fit the gravity of the conduct, and a discount is then given for mitigating factors.

(5) A wide variety of factors, including the former director's age and state of health, the length of time he has been in jeopardy, whether he has admitted the offence, his general conduct before and after the offence, and the periods of disqualification of his co-directors that may have been ordered by other courts, may be relevant and admissible in determining the appropriate period of disqualification.

Harris J (at para 10) also cited Australian cases which have held that there are 8 criteria which govern the court's exercise of the power of disqualification: (1) the character of the offenders; (2) the nature of breaches; (3) the structure of the companies and the nature of their business; (4) the interests of shareholders, creditors and employees; (5) the risks to others from the continuation of offenders as company directors; (6) the honesty and competence of offenders; (7) the hardship to offenders and their personal and commercial interests; and (8) the offenders' appreciation that future breaches could result in future proceedings.

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An appellate court will only interfere with the period of disqualification imposed in accordance with the usual, well-established principles concerning circumstances in which the court will intervene in a judge's exercise of discretion vested in him: see *Securities and Futures Commission v Cheung Keng Ching* [2011] 4 HKC 453.

In *Re Styland Holdings Ltd (No 2); Securities and Futures Commission v Kenneth Cheung Chi Shing* [2012] 2 HKLRD 325, [2012] HKCU 545 after hearing, two directors received disqualification orders in the top bracket due to the fact that they had obtained personal benefit. A third director, although not obtaining personal benefit, was found to have failed to exercise any independent judgment and further, resisted the application of the SFC rather than accepting the allegations and agreeing to have the proceedings disposed of by way of *Carecraft* procedure, and thus received a disqualification order at the mid-point of the middle bracket.

In *Securities and Futures Commission v Yeung Kui Wong* [2011] HKCU 418 (unreported, HCMP 1742/2009, 1 March 2011), an alternate non-executive director was disqualified for a shorter period (of 2 years) compared with that for the executive directors (of 5 years) in view of his lesser responsibility in the day-to-day management of the company's affairs.

[214.09] Disqualification orders: mitigating factors

Mitigating factors set out in the Statement of Facts agreed would be taken into account: see *Securities and Futures Commission v Fung Chiu* [2009] HKCU 140 (unreported, HCMP 2524/2006, 30 January 2009). In *Re Styland Holdings Ltd* [2011] 1 HKLRD 96, [2010] HKCU 2560 (unreported, HCMP 1702/2008, 23 November 2010), the Court dismissed matters not reducing the respondent's personal responsibility as a director as mitigating factors; allegations not included in the agreed facts and which were inconsistent with them were not taken into account.

The purpose of disqualification orders is to protect the public from companies being run

by persons who are not fit to do so, and pose a danger to creditors and investors — deterrence is also an objective. The failures in the case of *Re Styland Holdings Ltd (No 2)*; *Securities and Futures Commission v Kenneth Cheung Chi Shing* [2012] 2 HKLRD 325, [2012] HKCU 545, in respect of their breaches of duty, and the obtaining of personal benefits, were held by the Court not to be mitigated by the fact that the investment made by the directors remained generally profitable (though it should be noted that the Court accepted that if an investment made by a company is not profitable, by itself this is not evidence of negligence on the part of the directors who resolved to make such an investment).

On what factors may be taken into account in mitigation, see also *Re First China Financial Network Holdings Ltd* [2015] 5 HKLRD 530, [2015] HKCU 2357.

[214.10] Orders other than disqualification

In *Securities and Futures Commission v Cheung Keng Ching* [2010] HKCU 622 (unreported, HCMP 1869/2008, 18 March 2010), the court ruled that ss 214(2)(b) and 214(2)(e) are drafted in wide and flexible terms. Upon being satisfied that the company suffered losses arising out of the transactions in question and arising out of the findings made against the respondents, the court made directions in respect of the commencement of civil proceedings by the company against the respondents to seek compensation for the losses. The court also made a direction that the company shall have the authority to enter into a compromise with the respondents subject to the approval of the court. On appeal, the respondents argued that the court erred in requiring the court's sanction to enter into compromise of the civil proceedings: *Securities and Futures Commission v Cheung Keng Ching* [2011] 4 HKC 453. The Court of Appeal dismissed the appeal, noting that the company was slow, if not actually reluctant, to seek compensation for its losses caused by the actions of its former directors. The history of events leading to the need for the court to direct the company to commence litigation was relevant and could be relied upon by the trial judge in the exercise of his discretion to make the order requiring court approval of any settlement of the proceedings.

[214.11] Level 3 fine

The reference to a Level 3 fine is a reference to a maximum of $10,000: s 113C and Sch 8 of the Criminal Procedural Ordinance (Cap 221).

[214.12] Costs order and impecuniosity of defendant

In the absence of agreement, a defendant will be ordered to pay the SFC's costs of the disqualification proceedings attributable to him. Normally a defendant's impecuniosity is irrelevant to the Court's exercise of discretion on costs: *MB Building Contractors v Ahmed* (The Independent, 23 November 1998), see *Securities and Futures Commission v Fan Di* [2011] HKCU 961 (unreported, HCMP 1761/2009, 24 May 2011).

PART XI

SECURITIES AND FUTURES APPEALS TRIBUNAL

Introduction to Part XI

Part XI creates the Securities and Futures Appeals Tribunal (**SFAT**), the body that hears appeals from many of the SFC's most important administrative powers, including the powers to refuse a licence or other regulatory approval under Pt V, to discipline a regulated intermediary under Pt IX or to intervene in a regulated intermediary's affairs under Pt X. As such, it creates a key buttress in the architecture of checks and balances on the SFC's administrative powers in the SFO, though it has expressly stated that it does not exist as an alternative regulator or to impose an alternative approach to regulation, but to address issues of fundamental fairness. Under the old law, a similar body, the Securities and Futures Appeals Panel (**SFAP**) heard appeals from the same SFC decisions. It was part-time and consisted of a senior counsel and two lay members. The procedures of the body were rather sketchy and left largely to the Panel's own discretion: ss 18–22 of the repealed Securities and Futures Commission Ordinance (Cap 24) and the repealed Securities and Futures Appeals Panel Proceedings Rules (Cap 24E). The new SFAT builds on the nature and procedures of the old SFAP. It is headed by a present or retired High Court Judge, assisted by two lay members. It has the power to review a wider range of SFC decisions than the old SFAP and a number of HKMA and investor compensation company decisions relating to the regulatory scheme created by the SFO and the provisions of the Banking Ordinance relating to registered institutions: Sch 8 Pt 2. The SFAT can uphold, strike down or vary a decision, substitute it with any decision that the body that made it is empowered to make or remit the decision back to that body with directions: s 218(2). The SFAT follows a procedure set out in Pt XI and Sch 7 Pt 1. Like the SFAP, it is inquisitorial and must give the parties a hearing before deciding a matter. It has extensive powers to compel and receive evidence and regulate its own proceedings: s 219. The appeal period has been shortened from that under the old law to 21 days after the decision in question, but scope is allowed for late appeals if good cause is shown: s 217. An SFAT decision on a question of law is appealable to the Court of Appeal (s 229), otherwise decisions are final: s 231. Appeal to the SFAT usually stays the SFC's decision, with a few exceptions, until the outcome of the appeal or the appeal is withdrawn. SFC decisions typically do not take effect until the appeal period expires: s 232.

Documents relevant to Part XI:

- Schedule 8 of this Ordinance
- Securities and Futures (Registration of Appeals Tribunal Orders) Rules
- Order 62 of the Rules of the High Court

Division 1

Interpretation

215. Interpretation of Part XI

In this Part, unless the context otherwise requires—

'application for review' (覆核申請) means an application made under section 217(1);

'judge' (法官) means—

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(a) a judge or a deputy judge of the Court of First Instance;
(b) a former Justice of Appeal of the Court of Appeal;
(v) a former judge or a former deputy judge of the Court of First Instance;

'parties' (各方) , in relation to a review, means—

(a) the relevant authority making the specified decision in question; and
(b) the person making the application for review in question;

'relevant authority' (有關當局) —

(a) in relation to a specified decision within the meaning of paragraph (a) of the definition of "specified decision" in this section, means the Commission;
(b) in relation to a specified decision within the meaning of paragraph (b) of the definition of "specified decision" in this section, means the Monetary Authority; or
(c) in relation to a specified decision within the meaning of paragraph (c) of the definition of "specified decision" in this section, means the Commission or the recognized investor compensation company by which the decision is made (as the case may be);

'review' (覆核) means a review of a specified decision by the Tribunal under section 218(1);

'specified decision' (指明決定) means—

(a) a decision of the Commission which—
  (i) is made under or pursuant to any of the provisions set out in column 2 of Division 1 of Part 2 of Schedule 8; and
  (ii) is within the description set out, opposite such provisions, in column 3 of Division 1 of Part 2 of Schedule 8;
(b) a decision of the Monetary Authority which—
  (i) is made under or pursuant to any of the provisions set out in column 2 of Division 2 of Part 2 of Schedule 8; and
  (ii) is within the description set out, opposite such provisions, in column 3 of Division 2 of Part 2 of Schedule 8; or
(c) a decision of the Commission or a recognized investor compensation company which—
  (i) is made under or pursuant to any of the provisions set out in column 2 of Division 3 of Part 2 of Schedule 8; and

  (ii) is within the description set out, opposite such provisions, in column 3 of Division 3 of Part 2 of Schedule 8;

'Tribunal' (審裁處) means the Securities and Futures Appeals Tribunal established by section 216.

[215.01] Enactment History

This section came into effect 1 April 2003.

[215.02] 'Judge'

'Court of First Instance' means the Court of First Instance of the High Court: Interpretation and General Clauses Ordinance (Cap 1) s 3. 'Court of Appeal' means the Court of Appeal of the High Court: ibid. The High Court is established under the High Court Ordinance (Cap 4).

[215.03] 'Relevant authority'

'Commission' means the Securities and Futures Commission referred to in s 3(1): Sch 1 Pt 1. 'Monetary Authority' means the Monetary Authority appointed under s 5A of the Exchange Fund Ordinance (Cap 66): ibid. For further information on the Monetary Authority, see the Monetary Authority's website at <http://www.hkma.gov.hk>.

[215.04] 'Specified decision'

Decisions which are 'specified decisions' and which can be reviewed under s 217 are listed in Pt 2 of Sch 8. Division 1 of that Part lists the decisions of the Securities and Futures Commission which can be reviewed; Div 2 lists the decisions of the Monetary Authority which can be reviewed; and Div 3 lists the decisions in relation to investor compensation claims which can be reviewed. The decisions which can be reviewed are those set out in column 3, made pursuant to the provisions set out in column 2 of each Division.

The Monetary Authority is appointed under s 5A of the Exchange Fund Ordinance (Cap 66). Certain types of decision made by the Authority under the Banking Ordinance (Cap 155) may be reviewed by the Securities and Futures Appeals Tribunal.

Investor compensation claims are made under Pt XII of the Ordinance dealing with the investor compensation fund and the rules made under that Part. The power to make decisions in relation to the payment of claims is vested in the Securities and Futures Commission, and to the recognised investor compensation company (recognised under Pt III Div 5). Various decisions made under the Securities and Futures (Investor Compensation — Claims) Rules (Cap 571T) are listed under Sch 8 Pt 2 Div 3, as amended by LN 231 of 2002 (effective from 1 April 2003).

Division 2

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Securities and Futures Appeals Tribunal

216. Securities and Futures Appeals Tribunal

(1) There is established a Tribunal to be known as the Securities and Futures Appeals Tribunal which shall have jurisdiction to review specified decisions, and to hear and determine any question or issue arising out of or in connection with any review, in accordance with this Part and Schedule 8.

(2) Except as otherwise provided in this Part or in Schedule 8, the Tribunal—

(a) shall consist of a chairman and 2 other members; and

(b) shall be presided over by the chairman who shall sit with the 2 other members.

(3) The chairman of the Tribunal shall be a judge and the 2 other members of the Tribunal shall not be public officers.

(4) Part 1 of Schedule 8 shall have effect in relation to the appointment of members of the Tribunal, and to the proceedings and sittings of, and procedural and other matters concerning, the Tribunal.

(5) Where the Chief Executive considers appropriate, additional Tribunals may be established for the purposes of any reviews, whereupon the provisions of this or any other Ordinance shall apply, subject to necessary modifications, to each of such additional Tribunals (including appointment of the chairman and other members of, and all matters concerning, each of such additional Tribunals) as they apply to the Tribunal.

(6) With the exception of the chairman of the Tribunal who is a judge within the meaning of paragraph (a) of the definition of "judge" in section 215, a member of the Tribunal may be paid, as a fee for his services, such amount as the Financial Secretary considers appropriate, and that amount shall be a charge on the general revenue.

(7) Where a person who is a judge within the meaning of paragraph (a) of the definition of "judge" in section 215 is appointed as the chairman of the Tribunal, neither the appointment nor the service or removal of the person as the chairman affects—

(a) the tenure of office of, and the exercise of powers by, the person as a judge within the meaning of that paragraph;

(b) the person's rank, title, status, precedence, salary or other rights or privileges as a holder of that office;

(c) the terms and conditions to which the person is subject as a holder of that office.

[216.01] Enactment History

This section came into effect 1 April 2003.

[216.02] General Note

The Securities and Futures Appeals Tribunal (SFAT) was a new tribunal established under the Securities and Futures Ordinance to replace the Securities and Futures Appeals Panel, which previously operated under the now repealed Securities and Futures Commission Ordinance. The SFAT is a permanent body and has wider jurisdiction than the Panel previously had: see further the SFC's *Guide to Legislative Proposals on Establishing a Securities and Futures Appeals Tribunal*, (5 July 1999); and the SFC's *Consultation Document on the Securities and Futures Bill*, April 2000, Ch 9.

The SFAT is a full-time review body which may review, on application, the merits of a range of regulatory decisions made under the Ordinance by the SFC, the Hong Kong Monetary Authority and an investor compensation company recognised by the SFC, and to hear and determine any question or issue arising out of or in connection with any review.

The SFAT has jurisdiction to review 'specified decisions', a term defined in s 215 to include a wide range of decisions of the SFC made under the Ordinance. The jurisdiction of the SFAT is to review those decisions on the merits: see s 218. The SFAT has the power to make a full merits review, exercising its independent judgment, which it is obliged to do so, and arriving at its own decision: see *Tsien Pak Cheong David v SFC* [2011] 3 HKLRD 535, [2011] 4 HKC 410, see above **[194.07]** and below **[216.04]**.

The jurisdiction of the SFAT includes the power to hear and determine any abuse of power of the SFC connected with the decision under review, including failures by the SFC to comply with procedural fairness in internal inquiries made in connection with the decision under review: *Berich Brokerage Ltd v Securities and Futures Commission* [2005] 2 HKLRD 583, [2005] HKCU 88. Persons aggrieved by such conduct falling within the SFAT's jurisdiction under s 216 should generally seek redress through this appeal process under Pt XI rather than applying for judicial review, since judicial review is a remedy of last resort which should not generally be available if the aggrieved person has an alternative remedy: *Berich Brokerage Ltd v Securities and Futures Commission* [2005] 2 HKLRD 583, [2005] HKCU 88 and *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* [2006] 2 HKLRD 518, [2006] 2 HKC 533.

[216.03] Composition of the SFAT

The SFAT consists of a chairman, who is a full-time member of the Tribunal, and is a judge (as defined in s 215), and two members appointed in relation to specified reviews: ss 216(2)–(4). The two non-permanent members (referred to as 'ordinary members': see Sch 8 Pt 1, ss 12-15) are not to be public officers: s 216(3). A public officer is a person holding an office of emolument under the HKSAR government whether such office is permanent or temporary: Interpretation and General Clauses Ordinance (Cap 1) s 3. Whilst the two ordinary members are appointed in relation to a specific case for review, they may from time to time be reappointed: Sch 8 Pt 1, s 13. In some instances, it is possible for the chairman to sit as the sole member of the tribunal in the determination of a review: Sch 8 Pt 1, s 31.

The SFAT is intended to be independent of the SFC. The chairman is appointed by the Chief Executive of the HKSAR on the recommendation of the Chief Justice of the Court of Final Appeal: Sch 8 Pt 1, s 7; and see also Interpretation and General Clauses Ordinance (Cap 1) s 3. The Chief Executive shall appoint members of the appeal panel and the two ordinary members, selected from the appeal panel and recommended by the Chairman, are

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appointed by the Secretary for Financial Services for the purposes of a review: Sch 8 Pt 1, ss 2 and 12.

[216.04] Approach of the SFAT

In *Radland International Ltd v SFC* (unreported, SFAT 3/2008, 7 August 2008) per Stone J, Chairman of the SFAT:

> 56. In its published decisions over the past 5 years the SFAT has time and again emphasized that it does not exist in order to 'second-guess' the regulator by attempting to impose its own (frequently uneducated) view of what should, or should not, take place within any particular market activity — viewed thus, the SFAT is not in any sense to be regarded by applicants for review as an 'alternative regulator', or as a 'regulator of last resort', but represents an arbiter of fundamental fairness within the context of regulatory disciplinary decision-making, no more and no less, the Tribunal being minded to interfere with any particular regulatory disciplinary decision only if and when it is clear that something obviously has gone wrong, and thus requires to be rectified.
>
> 57. It has also frequently been made clear, as a matter of primary philosophy, that the SFAT does not regard its function as that of forming an independent view as to what is, or is not, happening in the market at any given time. It simply is in no position to know. Formation of such a view must lie within the purview of the market regulator, which professionally oversees the infinite variety of securities' market practices upon a daily basis, and chooses to act in regulating those practices on the basis of its published regulatory guidelines, and at all times in a manner perceived to be in the best interest of maintaining the fundamental integrity of the markets.

This approach was entrenched in *Li Kwok Keung Asser v SFC* [2011] 1 HKC 565, where the Court of Appeal observed without objection that the established jurisprudence within the SFAT jurisdiction then was that the SFAT interfered only with the decisions of the SFC when something patently had gone wrong with its decision, and manifestly required to be put right. But such a standard of review should change in light of *Tsien Pak Cheong David v SFC* [2011] 3 HKLRD 533, [2011] 4 HKC 410 where the Court of Appeal stressed that the SFAT, in order to perform its role as a powerful safeguard to ensure that the SFC decisions are correct, proper and fair, has to carry out independent a full review on the merits and it has the expertise to do so. In *Tsien Pak Cheong David v SFC* [2011] 3 HKLRD 533, [2011] 4 HKC 410, the Court of Appeal rejected the suggestion that the SFAT should accord the decisions of the SFC under s 194 with 'special respect' and noted that:

> 53....The power and function of the SFAT is different from that of the SFC. As I have said, and quite unlike the role of a professional disciplinary tribunal, the SFC is both prosecutor and judge, amply brought home by the fact that [the Director of Enforcement] signed both the notice of proposed disciplinary action and the notice of final decision. SFAT on the other hand is designed to ensure an independent and impartial decision. It is chaired by a judge, and its members must not be public officers and are chosen by the Chief Executive:
> '...from persons in the community with expertise in the financial services field...'
> 'and as I have said eminently suited to decide fairly independently and impartially what punishment is necessary to safeguard the integrity and reputation of the financial markets in Hong Kong...'
>
> 57. ...It is the SFAT's decision which should command the court's special respect.... One must bear in mind that, a SFAT is an administrative tribunal chaired by a judge with two lay members, and is:

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> 'an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with (persons in the financial services) and to protect the public interest.'

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217. Applications for review of specified decisions

(1) Subject to subsections (2) and (3), a person aggrieved by a specified decision of the relevant authority made in respect of him may, by notice in writing given to the Tribunal, apply to the Tribunal for a review of the decision.

(2) A notice given to the Tribunal under subsection (1) shall set out the grounds for the application to which the notice relates.

(3) An application for review of a specified decision of the relevant authority shall be made within 21 days after—

- (a) subject to paragraph (b)—
  - (i) where there is any requirement in this or any other Ordinance for notice in writing in respect of the decision to be served, the notice has been served in accordance with such requirement; or
  - (ii) where there is no such requirement, a notice in writing in respect of the decision has been served on the person in respect of whom it is made;
- (b) where the decision is a specified decision which is described in column 2 of Division 1 of Part 3 of Schedule 8 and to which the provision set out, opposite such description of the specified decision, in column 3 of that Division applies, a notice in respect of the decision has been given to the person in respect of whom it is made.

(4) Notwithstanding subsection (3), the Tribunal, upon application in writing by any person, may, subject to subsection (5), by order extend the time within which an application for review of a specified decision of the relevant authority shall be made under subsection (3), whereupon the time within which such an application shall be made under subsection (3) shall be extended accordingly.

(5) The Tribunal shall not grant an extension under subsection (4) unless—

- (a) the person who has applied for the grant of the extension pursuant to that subsection and the relevant authority have been given a reasonable opportunity of being heard; and
- (b) it is satisfied that there is a good cause for granting the extension.

(6) Where the Tribunal receives a notice under subsection (1), it shall as soon as reasonably practicable thereafter serve a copy of the notice on the relevant authority.

[217.01] Enactment History

This section came into effect 1 April 2003.

[217.02] General Note

Applications to the Securities and Futures Appeals Tribunal (SFAT) for review of certain decisions may be made under s 271(1). The SFAT has jurisdiction under s 216 to review 'specified decisions' of 'relevant authorities'. These two terms are defined in s 215.

[217.03] Person aggrieved

The person who may apply for review of a decision is the 'person aggrieved' by the decision: s 271(1). Any person who has a decision made against him or her will be a person aggrieved for the purposes of appealing against that decision: *Cook v Southend Borough Council* [1990] 2 QB 1, [1990] 1 All ER 243. The categories of persons who are aggrieved may, however, be wider than that. Whilst the meaning of 'person aggrieved' must be determined in the specific statutory context (*Arsenal Football Club Ltd v Smith (Valuation Officer)* [1979] AC 1 at 27, [1977] 2 All ER 267 at 280; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 at 185), the modern approach of the courts is to adopt a more generous interpretation of who a person aggrieved may be: *Cook v Southend Borough Council*, above; *Attorney-General of the Gambia v N'Jie* [1961] AC 617, [1961] 2 All ER 504. In the latter case, it was stated that: 'The words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests' (at AC 634, All ER 511). This approach was followed by the Court of Appeal in *Eagle Queen Co Ltd v First Bangkok City Finance Ltd* [1989] 2 HKLR 71, [1989] 1 HKC 59. In Australia it has been held that an applicant will be a person aggrieved if the applicant 'can show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public': *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64 at 79; see also *Australian Institute of Marine and Power Engineers v Secretary, Dept of Transport* (1986) 13 FCR 124, 71 ALR 73 at 80–81.

[217.04] Time limit for application

An application for review must be made within 21 days of the service of the notice in respect of the decision to be reviewed: s 217(3). As to service of documents, see s 400.

In calculating time, a period of days from the date of service is deemed to be exclusive of the date of service: see Interpretation and General Clauses Ordinance (Cap 1) s 71(1)(a). If the last day of the period is a public holiday, a gale warning day or black rainstorm warning day, the period includes the following day: see Interpretation and General Clauses Ordinance (Cap 1) ss 71(1)(b) and 71(2).

Upon application by any person, the SFAT may extend the time in which an application for review may be made if there is good cause for granting the extension: ss 217(4) and 217(5).

In *Mona Wong Wai King v SFC* (unreported, SFAT 4/2003, 16 December 2003) the SFAT indicated that in the context of proceedings before the SFAT, an application for extension of time is not simply subject to the exercise of a wide judicial discretion, often liberally

exercised, subject to the usual considerations of prejudice, compensation in costs and so forth. Stone J ruled that:

> The framers of this legislation, and in particular the provisions of section 217(5) (Cap 571), have seen fit to lay down that an extension 'shall not' be granted unless the Tribunal is satisfied that there is 'good cause' for such grant. In the circumstances it seems reasonable to posit that, whilst putting in place a safety net for what are considered to be excusable cases of delay, the legislative intent in laying down the 21 day time limit for making an application for review was to impose an element of certainty in terms of commencement of service of such penalties as are meted out by the SFC *qua* industry regulator. Hence the requirement of 'good cause', however that may be interpreted in the circumstances of any given case.

Subsequent cases demonstrate that the Tribunal takes a stringent approach in this regard. In *Ko's Brother Securities Co Ltd v SFC*(unreported, SFAT 7/2010, 26 August 2010) no extension was granted albeit the delay was one day caused by admitted carelessness; no extension was granted in *Chung Nam Securities Ltd & Anor v SFC* (unreported, SFAT 7/2010, 26 August 2010) where the Notice of Review was faxed to the SFC on the last day after office hours and received by the Secretary of the Tribunal on the following afternoon. In *Luk Ka Cheung Steve v SFC* (unreported, SFAT 9/2010, 22 August 2010) the Tribunal rejected the argument that financial difficulties amounted to good cause but an extension was granted on the basis that the life ban imposed by the SFC was arguably manifestly excessive.

Cases on 'good cause' in other areas thus have to be read subject to the above comments of the SFAT. In any event, to establish 'good cause', there must be sufficient reason or reasons: *Jones v Jones* [1970] 2 QB 576 at 588 (extension of time for service of writ). The Court of Appeal in *Secretary for Justice v Hong Kong and Yaumatei Ferry Co Ltd* [2001] 1 HKC 125 set out the general principles to be applied in deciding whether to allow an extension of time for appealing from a decision of a court. Relevant factors to take into account are: the length of the delay; the reasons for the delay; the chances of the appeal succeeding if an extension is granted; and the degree of prejudice to the would-be respondent if the application is granted. The fact that the omission to appeal within time was due to a mistake on the part of the legal adviser may be a sufficient cause to justify an extension of time. The merits of the applicant's case are less important if the delay is short and wholly excusable. Where the delay is substantial, strong merits are required to overcome it. Where the ground for extension of time is that the applicant was not ready due to the necessary information not having been obtained, this may not be sufficient to constitute good cause, at least where the applicant's grounds for extension are stated in general terms only, with no dates or details given: cf *Re Vandbergen* (a bankrupt); ex parte the *Trustee of the Property of the Bankrupt v Vandbergen* [1955] 1 All ER 40, [1955] 1 WLR 20 (appeal against decision of trustee in bankruptcy). For further cases in relation to extension of time under other legislation, see *R v Lo Hing Wai* [1993] 2 HKC 623; *Chan Sik Cheung v Director of Lands* [1995] 3 HKC 199 and *Conroy v Thomas Wilkinson & Sons Ltd* [1938] 1 All ER 668.

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218. Proceedings before Tribunal

(1) After an application for review has been made, the Tribunal shall review the specified decision to which the application relates.

(2) Following the review of a specified decision under subsection (1), the Tribunal may—

  (a) confirm, vary or set aside the decision, and, where the

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acting or proposing to act in a professional capacity in connection with a matter arising under a specified provision;

(d) in connection with any judicial or other proceedings to which the person is a party;

(e) in accordance with an order of a court, or in accordance with a law or a requirement made under a law;

(f) to a person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap 66), if the disclosure will enable or assist the person to assist the Monetary Authority in performing a function referred to in that section; or

(g) to the Hong Kong Deposit Protection Board established by section 3 of the Deposit Protection Scheme Ordinance (Cap 581) for the purpose of enabling or assisting the Board to perform its functions under that Ordinance.

(5) A person who contravenes subsection (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.

(6) In this section—

'information' (資料) means a matter referred to in subsection (2)(a) or a record or document referred to in subsection (2)(c).

[381A.01] Enactment History

This section was added by the Securities and Futures (Amendment) Ordinance 2014 (6 of 2014), effective 10 July 2015. The wording of this section may be compared with that of s 378(1), (2) and (11) in respect of the preservation of secrecy by the SFC.

[381A.02] General Note

This section was enacted as a part of the amendments introduced by the Securities and Futures (Amendment) Ordinance 2014 for the regulation of over-the-counter (OTC) derivative products and transactions. OTC derivatives are regulated by both the HKMA and SFC under the new Part IIIA. This new Division 1A was added to Part XVI to impose a confidentiality requirement on the HKMA and other persons involved in the performance of the HKMA's functions under the proposed regulatory regime.

This section provides that the HKMA and persons involved in performing the HKMA's functions under the OTC derivatives regulatory regime must preserve the secrecy of information that comes into their possession when performing those functions. This section also sets out certain circumstances in which the HKMA and persons involved in the performing of its functions may disclose such information.

[381A.03] Specified Provision

For the definition, see Sch 1 Pt 1 s 1.

381B. Disclosure by Monetary Authority

(1) Despite section 381A(2), the Monetary Authority may disclose information—

(a) in the performance of a function under, or for the purpose of carrying into effect or doing anything required or authorized under, any Ordinance (other than this Ordinance);

(b) to a person who is a liquidator appointed under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32);

(c) to the Securities and Futures Appeals Tribunal;

(d) to the Market Misconduct Tribunal;

(e) to the Banking Review Tribunal established under section 101A of the Banking Ordinance (Cap 155);

(f) to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Review Tribunal established under section 55 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615); or

(g) for the purpose of enabling or assisting the Monetary Authority to perform the Monetary Authority's functions under a specified provision, to an auditor or a former auditor of—

(i) an authorized financial institution or a former authorized financial institution; or

(ii) an approved money broker or a former approved money broker.

(2) Despite section 381A(2), the Monetary Authority may disclose information obtained by an MA investigator under section 184B to—

(a) the Financial Secretary; or

(b) the Secretary for Justice.

(3) Despite section 381A(2), but subject to section 381E(1), the Monetary Authority may disclose to the Commission—

(a) information relating to a person other than an authorized financial institution or an approved money broker; and

(b) information relating to an authorized financial institution or an approved money broker if the Monetary Authority is of the opinion that—

(i) it is desirable or expedient that the information

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should be disclosed to the Commission in the interests of the investing public or in the public interest; or

(ii) the disclosure will enable or assist the Commission to perform its functions and it is not contrary to the interests of the investing public or to the public interest.

(4) Despite section 381A(2), the Monetary Authority may disclose information in the form of a summary compiled from any information in the Monetary Authority's possession, including information provided by a person under a specified provision, if the summary is so compiled as to prevent particulars relating to the business or identity of any person from being ascertained from it.

(5) Despite section 381A(2), the Monetary Authority may disclose information with the consent of the person from whom the information was obtained or received, and if the information relates to a different person, with the consent also of that person.

(6) The Monetary Authority may, in disclosing information under this section, impose any condition that the Monetary Authority considers appropriate.

(7) In this section—

'information' (資料) means a matter referred to in section 381A(2)(a) or a record or document referred to in section 381A(2)(c).

[381B.01] Enactment History

This section was added by the Securities and Futures (Amendment) Ordinance 2014 (6 of 2014), effective 10 July 2015. The wording of this section may be compared with the wording of s 378(3) in respect of the preservation of secrecy by the SFC.

[381B.02] General Note

This section sets out situations in which the HKMA (only) can disclose information that comes into its possession when performing its functions under the new regulatory regime on OTC derivatives. See also **[381A.02]**.

[381B.03] Specified Provision

For the definition, see Sch 1 Pt 1 s 1.

381C. Disclosure if Monetary Authority considers condition satisfied

(1) Despite section 381A(2), if in the opinion of the Monetary Authority, the condition in subsection (3) is satisfied, the Monetary Authority may disclose information—

(a) to the Chief Executive;

(b) to the Financial Secretary;

(c) to the Secretary for Justice;

(d) to the Commissioner of Police;

(e) to the Commissioner of the Independent Commission Against Corruption;

(f) to the Insurance Authority;

(g) to the Registrar of Companies;

(h) to the Official Receiver;

(i) to the Mandatory Provident Fund Schemes Authority;

(j) to the Privacy Commissioner for Personal Data;

(k) to the Ombudsman;

(l) to a public officer authorized under subsection (8);

(m) to the Financial Reporting Council established by section 6(1) of the Financial Reporting Council Ordinance (Cap 588);

(n) to an inspector appointed by the Financial Secretary to investigate the affairs of a corporation;

(o) to a recognized exchange company;

(p) to a recognized clearing house;

(q) to a recognized exchange controller;

(r) to a recognized investor compensation company;

(s) to a person authorized under section 95(2) to provide authorized automated trading services; or

(t) with a view to the institution of, or otherwise for the purposes of, any disciplinary proceedings relating to the performance of professional duties by an auditor or a former auditor of an authorized financial institution or a former authorized financial institution.

(2) Despite section 381A(2), if in the opinion of the Monetary Authority, the condition in subsection (3) is satisfied, the Monetary Authority may also disclose information to—

(a) an authority or regulatory organization outside Hong Kong which, in the opinion of the Monetary Authority, satisfies the requirements referred to in subsection (4); or

(b) a companies inspector outside Hong Kong who, in the opinion of the Monetary Authority, satisfies the

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requirements referred to in subsection (5).

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

(a) it is desirable or expedient that the information should be disclosed in the interests of the investing public or in the public interest; or

(b) the disclosure of the information will enable or assist the recipient of the information to perform the recipient's functions and it is not contrary to the interests of the investing public or to the public interest.

(4) The requirements referred to in subsection (2)(a) are that the authority or regulatory organization outside Hong Kong—

(a) performs functions similar to the functions of the Monetary Authority or regulates, supervises or investigates banking, insurance or other financial services; and

(b) is subject to adequate secrecy provisions.

(5) The requirements referred to in subsection (2)(b) are that the companies inspector outside Hong Kong—

(a) performs functions similar to the functions of the Registrar of Companies or regulates, supervises or investigates the affairs of corporations; and

(b) is subject to adequate secrecy provisions.

(6) If the Monetary Authority is satisfied of the matters referred to in subsection (4)(a) and (b) or (5)(a) and (b), the Monetary Authority must, as soon as reasonably practicable after being so satisfied, publish in the Gazette, the name of the authority, regulatory organization or companies inspector.

(7) The Monetary Authority may, in disclosing information under this section, impose any condition that the Monetary Authority considers appropriate.

(8) The Financial Secretary may authorize a public officer as a person to whom information may be disclosed under subsection (1)(l).

(9) A matter published under subsection (6) is not subsidiary legislation.

(10) In this section—

'companies inspector' (公司審查員), in relation to a place outside Hong Kong, has the meaning given by section 378(15);

'information' (資料) has the meaning given by section 381B(7).

[381C.01] Enactment History

This section was added by the Securities and Futures (Amendment) Ordinance 2014 (6 of 2014), effective 10 July 2015. The wording of this section may be compared with the wording of s 378(3), (5), (6) and (9) in respect of the preservation of secrecy by the SFC.

[381C.02] General Note

This section sets out circumstances in which the HKMA may disclose information that comes into its possession when performing its functions under the new regulatory regime on OTC derivatives, subject to the condition found in sub-s (3) above in respect of the investing public or public interest. See also **[381A.02]**.

381D. Restrictions on disclosure by persons to whom information is disclosed

(1) If information is disclosed pursuant to section 381A(2) or in any of the circumstances described in section 381A(4), 381B(1) or (2) or 381C(1), unless subsection (2) applies—

(a) the person to whom the information is disclosed; and

(b) any other person obtaining or receiving the information from the person to whom the information is disclosed, either directly or indirectly,

must not disclose the information or any part of it to any other person.

(2) Information disclosed as described in subsection (1) may be disclosed to any other person if—

(a) the Monetary Authority consents to the disclosure;

(b) the information has already been made available to the public;

(c) the disclosure is of a part that has already been made available to the public;

(d) the disclosure is for the purpose of seeking advice from, or giving advice by, counsel or a solicitor or other professional adviser acting or proposing to act in a professional capacity in connection with a matter arising under a specified provision;

(e) the disclosure is in connection with any judicial or other proceedings to which the person or other person referred to in subsection (1)(a) or (b) is a party; or

(f) the disclosure is in accordance with an order of a court, or in accordance with a law or a requirement made under a law.

(3) The Monetary Authority may, in giving any consent under subsection (2)(a), impose any condition that the Monetary Authority considers appropriate.

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(4) A person referred to in subsection (1)(a) to whom information is disclosed commits an offence if the person—

(a) discloses information in contravention of that subsection; and

(b) at the time of the disclosure knew or ought reasonably to have known that the information was previously disclosed to the person pursuant to section 381A(2) or in any of the circumstances described in section 381A(4), 381B(1) or (2) or 381C(1),

unless the person proves that the person had reasonable grounds to believe that subsection (2) applied to the disclosure by the person.

(5) A person referred to in subsection (1)(b) who obtains or receives information commits an offence if the person—

(a) discloses information in contravention of that subsection; and

(b) at the time of the disclosure knew or ought reasonably to have known that the information was previously disclosed to the person referred to in subsection (1)(a) under section 381A(2) or in any of the circumstances described in section 381A(4), 381B(1) or (2) or 381C(1),

unless the person proves that the person had reasonable grounds to believe that subsection (2) applied to the disclosure by the person.

(6) A person who commits an offence under subsection (4) or (5) 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.

(7) To avoid doubt—

(a) this section does not apply to information disclosed to the Commission under this Division; and

(b) section 378 applies to information disclosed to the Commission under this Division.

(8) In this section—

'information' (資料) has the meaning given by section 381B(7).

[381D.01] Enactment History

This section was added by the Securities and Futures (Amendment) Ordinance 2014 (6 of 2014), effective 10 July 2015. The wording of this section may be compared with the wording of s 378(7) and (11) in respect of the preservation of secrecy by the SFC.

[381D.02] General Note

This section imposes restrictions upon persons to whom information is disclosed regarding the onward disclosure of the information. It is an offence to breach the restrictions in this section. The reference to a level 6 fine in s 381D(6) is a reference to a fine at the level of $100,000: Criminal Procedure Ordinance s 113C and Sch 8.

381E. Certain information to be given to Commission

(1) Despite section 381A(2), if requested by the Commission, the Monetary Authority must give to the Commission any information received or obtained by the Monetary Authority that relates to—

(a) an OTC derivative transaction that is reported (whether directly or indirectly) under section 101B(1) by a prescribed person that is not an authorized financial institution or an approved money broker;

(b) an OTC derivative transaction that—

(i) is reported (whether directly or indirectly) under section 101B(1) or (3) by an authorized financial institution or an approved money broker; and

(ii) is a transaction to which a prescribed person other than an authorized financial institution or an approved money broker is a counterparty; or

(c) an OTC derivative transaction that is reported (whether directly or indirectly) under section 101B(1) or (3) by an authorized financial institution or an approved money broker and is a transaction—

(i) in an OTC derivative product of which the underlying subject matter includes securities, futures contracts, indices of securities or futures contracts or any combination of those; or

(ii) in an OTC derivative product that falls within subsection (1)(a)(iii) of section 1A of Part 1 of Schedule 1 and the underlying subject matter is a credit event.

(2) In this section—

'credit event' (信用事件), in relation to a transaction in an OTC derivative product that—

(a) falls within subsection (1)(a)(iii) of section 1A of Part 1 of Schedule 1; and

(b) transfers credit risk in relation to a reference obligation from one party to the other party,

means an event, which, if it occurs, obliges one party to make payment to the other party;

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'credit risk' (信用風險) means the risk of loss from default by a party in a contract of indebtedness;

'reference obligation' (參照義務), in relation to an OTC derivative transaction, means the obligation specified in the transaction of an entity specified in the transaction, pursuant to which the basis for the settlement of the transaction is determined.

[381E.01] Enactment History

This section was added by the Securities and Futures (Amendment) Ordinance 2014 (6 of 2014), effective 10 July 2015.

[381E.02] General Note

This section sets out the circumstances in which the HKMA is required to disclose information to the SFC.

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

(1) Despite section 381A(2), the Monetary Authority may disclose information received or obtained by the Monetary Authority because of the reporting obligation to a person in a place outside Hong Kong (***overseas person***) who, in the opinion of the Monetary Authority, satisfies the requirements specified in subsection (2).

(2) The requirements are that the overseas person—

(a) performs a function similar to that of the Monetary Authority in collecting and maintaining records for the purposes of the reporting obligation;

(b) is subject to adequate regulation and supervision (including adequate requirements to preserve secrecy) under the law of the place in which the overseas person operates; and

(c) operates in accordance with international standards that are acceptable to the Monetary Authority.

(3) When disclosing any information to an overseas person, the Monetary Authority may consent to the information being disclosed by the overseas person to any other person subject to conditions imposed by the Monetary Authority.

(4) If the Monetary Authority is satisfied of the matters referred to in subsection (2) regarding an overseas person, the Monetary Authority must, as soon as reasonably practicable, publish in the Gazette the name of the overseas person.

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

[381F.01] Enactment History

This section was added by the Securities and Futures (Amendment) Ordinance 2014 (6 of 2014), effective 10 July 2015. The wording of this section may be compared with the wording of s 186 in respect of assistance to regulators outside Hong Kong by the SFC.

[381F.02] General Note

This section empowers the HKMA to disclose information to overseas persons performing similar functions to the HKMA, subject to the requirements set out in sub-s (2) in respect of such overseas persons.

Division 2

General provisions regarding proceedings and offences

382. Obstruction

(1) A person who, without reasonable excuse, obstructs any specified person in the performance of a function under or in carrying into effect any provision of this Ordinance 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.

(2) In this section, ***specified person*** (指明人士) means—

(a) the Commission;

(b) any member, employee, or consultant, agent or adviser, of the Commission; or

(c) any person appointed to investigate any matter under section 182(1).

[382.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 145(a) of the repealed Securities Ordinance, s 108(a) of the repealed Commodities Trading Ordinance and s 64(a) of the repealed Leveraged Foreign Exchange Trading Ordinance.

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[382.02] Comparative Legislation

England

See ss 18 and 177 of the Financial Services and Markets Act 2000 (UK).

Australia

See also Corporations Act 2001 (Aust) s 1310; Australian Securities and Investments Commission Act 2001 (Aust) s 65.

[382.03] General Note

Under s 382(1), it is an offence for any person to obstruct a person specified under s 382(2) in the performance of a function or in carrying into effect of any provision of this Ordinance. To obstruct is to do any act which makes it more difficult for the person to carry out his or her duty: *Rice v Connolly* [1966] 2 All ER 649; *Lewis v Cox* [1984] 2 All ER 672; *R v Li Tsz Hei* [1984] 1 HKC 490. For example, the following might amount to obstruction: the retention of documents, to which access is being sought, in a room accompanied by secretion of the key (*O'Reilly v Commissioner of State Bank of Victoria (No 2)* (1983) 46 ALR 225 at 236); and warning persons to give them an opportunity of hiding, disposing or altering documents (*Tankey v Smith* (1981) 36 ACTR 19 at 20–21; *Green v Moore* [1982] 1 All ER 428). A person is entitled to seek legal advice as to whether certain documents are privileged, and in doing so would not be treated as obstructing the persons seeking production of those documents: *Swan v Scanlan* (1982) 13 ATR 420; *FCT v CitibankLtd* (1989) 20 FCR 4085 ALR 588. There will also be no obstruction where the person refuses to answer a question where there is no statutory duty to answer (*Tankey v Smith* (1981) 36 ACTR 19 at 21), or where a person refuses to allow another access to premises where the person does not have a lawful right to enter (*Halliday v Nevill* (1984) 57 ALR 331 at 333; *Dobie v Pinker* [1983] WAR 48; and *Plenty v Dillon* (1991) 98 ALR 353).

[382.04] Reasonable excuse

In *Securities and Futures Commission v Liu Su Ke* [2010] 2 HKLRD 673, [2009] 6 HKC 489, it was held that 'without reasonable excuse' was not an ingredient of the offence in s 328. As to the burden of proof on the defendant, s 94A of the Criminal Procedure Ordinance (Cap 221) would be read down in the context of s 328 so that an evidential burden only was imposed on the defendant to point to evidence that raises the issue of a reasonable excuse. If the defendant raises evidence supporting such exculpatory matter which is sufficiently substantial that it raises a reasonable doubt as to the defendant's guilt, then the prosecution fails to prove its case unless it raises evidence to remove such reasonable doubt. If, on the other hand, the defendant fails to adduce or point to any evidence on the relevant issue or if the evidence adduced is rejected or is not sufficiently substantial to raise a reasonable doubt, the potentially exculpatory matter places no obstacle in the way of the prosecution proving its case beyond reasonable doubt. In the present case, as there was an absence of any evidence as to why the defendant had failed in his duty to make the relevant disclosures, it was held that there was no reasonable excuse. Leave to the Court of Final Appeal in this case was refused: [2010] HKCU 247 (unreported, HCMA 518, 518B/2009, 18 January 2010). Contrast *Securities and Futures Commission v Yu Ka Tak* [2008] 2 HKLRD 626, where in the context of s 114 of the Securities and Futures Ordinance, it was held that the words 'without reasonable excuse' relates to the elements of the offence that the prosecution has to establish: see **[114.03]**.

To determine whether an excuse is reasonable, it is necessary to take into account the purpose of the provision to which the defence is an exception: *Securities and Futures Commission v Lam Fai Man* [2016] 1 HKC 303 at paras 34, 36, 40.

An excuse has to be both genuine and reasonable in order to constitute a reasonable excuse. In assessing whether an excuse is reasonable, not only is an objective assessment of the particular facts of each case called for; it also requires a consideration of not merely the person's belief and state of mind but also the application of community standards. A 'reasonable excuse' was found to mean a cause which a reasonable man would regard as an excuse, a cause consistent with a reasonable standard of conduct (*Pascoe v The Nominal Defendant (Queensland) (No 2)* [1964] Qd R 373 (Aust)). See also *HKSAR v Adams Secuforce (Int'l) Ltd* [2008] 1 HKLRD 207, [2007] HKCU 217; *Securities and Futures Commission v Lam Fai Man* [2016] 1 HKC 303 at paras 34–35. In *R v Unah* [2011] EWCA Crim 1837, it was held that a genuine belief was a relevant factor to consider when determining whether or not a reasonable excuse existed.

[382.05] Level 6 fine

The reference to a level 6 fine is a reference to a maximum of $100,000: s 113C and Sch 8 of the Criminal Procedure Ordinance.

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383. False or misleading representations in applications to Commission

(1) A person commits an offence if—

(a) he, in support of any application made to the Commission under or pursuant to any provision of this Ordinance, whether for himself or for another person, makes a representation, whether in writing, orally or otherwise, that is false or misleading in a material particular; and

(b) he knows that, or is reckless as to whether, the representation is false or misleading in a material particular.

(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.

(3) In this section, ***representation*** (陳述) means a representation or statement—

(a) of a matter of fact, either present or past;

(b) about a future event; or

(c) about an existing intention, opinion, belief, knowledge or other state of mind.

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[383.01] Enactment History

This section came into effect 1 April 2003. This section is based on ss 62, 121F(4) and 121F(5) of the repealed Securities Ordinance, s 40 of the repealed Commodities Trading Ordinance, and s 10 of the repealed Leveraged Foreign Exchange Trading Ordinance.

[383.02] General Note

This section creates an offence where a person makes a representation, which is false or misleading in a material particular, in support of any application made to the SFC under the Ordinance: s 383(1). The mens rea elements of the offence are that the person knows the representation is false or misleading in a material particular, or is reckless as to whether the representation is false or misleading in a material particular: s 383(1)(b).

For 'knows', see **[291.06]**.

For 'recklessness', the nature of the statement maker's state of mind is relevant. It has to be shown that the state of mind was culpable in that the statement maker was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. A statement maker could not be regarded as reckless, if due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions (*R v G* [2004] 1 AC 1034, followed in *Sin Kam Wah v HKSAR* (2005) 8 HKCFAR 194).

Evidence of deception is not conclusive (*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 per Gibbs CJ). In *ASC v McLeod* (2000) 22 WAR 255, the Supreme Court of Western Australia considered that, in determining whether a statement was materially misleading, the primary question is 'when the document is examined in the light of the [then prevailing circumstances], would it have been likely to induce members of the public to purchase securities?'. The primary question was then divided into 2 sub-questions:

(i) whether the impugned statement had a tendency to convey a meaning inconsistent with the true state of affairs?

(ii) whether the natural and probable result of the impugned statement would be to induce the reader to act in belief that is inconsistent with the true state of affairs? (at 265).

Statements may be false or misleading when looked at as a whole, even if each individual statement looked at individually is literally true: *Aaron's Reefs Ltd v Twiss* [1896] AC 273 at 281; *R v Kylsant* [1932] 1 KB 442; *R v Bishirigian* [1936] 1 All ER 586 at 591–592. A statement can only be false or misleading in respect of an existing fact. However, when a statement of intention or opinion is made by a person, there is an implied statement of existing fact being made, namely that the person honestly holds the intention or opinion, and that there are reasonable grounds for holding the intention or opinion: *Edgington v Fitzmaurice* (1885) 29 Ch D 459; *British Airways Board v Taylor* [1976] 1 All ER 65; and *Thompson v Mastertouch TV Services Pty Ltd* (1977) 15 ALR 487.

The requirement that the statement be false or misleading in a material particular means that minor or trivial inaccuracies would not lead to the contravention of this section.

[383.03] Level 6 fine

The reference to a level 6 fine is a reference to a maximum of $100,000: s 113C and Sch 8 of the Criminal Procedure Ordinance.

384. Provision of false or misleading information

(1) Subject to subsection (2), a person commits an offence if—

(a) he, in purported compliance with a requirement to provide information imposed by or under any of the relevant provisions, provides to a specified recipient any information which is false or misleading in a material particular; and

(b) he knows that, or is reckless as to whether, the information is false or misleading in a material particular.

(2) Subsection (1) does not apply to the provision of information which is false or misleading in a material particular if the provision of such information in purported compliance with a requirement imposed by or under any of the relevant provisions would, apart from subsection (1), also constitute an offence under any of the relevant provisions.

(3) Subject to subsection (4), a person commits an offence if—

(a) he, otherwise than in purported compliance with a requirement to provide information imposed by or under any of the relevant provisions but in connection with the performance by a specified recipient of a function under any of the relevant provisions, provides to the specified recipient any record or document which is false or misleading in a material particular; and

(b) he—

(i) knows that, or is reckless as to whether, the record or document is false or misleading in a material particular; and

(ii) has, in relation to the provision of the record or document, received prior written warning from the specified recipient to the effect that the provision of any record or document which is false or misleading in a material particular in the circumstances of the case would constitute an offence under this subsection.

(4) Subject to subsection (5), no person shall be convicted of an offence under subsection (3) unless the prosecution proves that—

(a) the specified recipient to which the record or document in question has been provided has reasonably relied on the record or document; or

(b) the person intended that the specified recipient would rely on the record or document.

(5) Nothing in subsection (4)(a) requires it to be proved that the

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specified recipient who has reasonably relied on any record or document—

(a) was misled;

(b) suffered any detriment; or

(c) incurred any loss,

as a result of such reliance.

(6) 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 1 year.

(7) A person who commits an offence under subsection (3) is liable—

(a) on conviction on indictment to a fine of $500,000 and to imprisonment for 6 months; or

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

(8) In this section, ***specified recipient*** (指明收受者) means—

(a) the Commission;

(b) a recognized exchange company;

(c) a recognized clearing house; or

(d) a recognized exchange controller.

[384.01] Enactment History

This section came into effect 1 April 2003. This section is based on s 109A of the repealed Commodities Trading Ordinance, s 56A of the repealed Securities and Futures Commission Ordinance, s 38A of the repealed Stock Exchanges Unification Ordinance, and s 15A of the Securities and Futures (Clearing Houses) Ordinance.

[384.02] Comparative Legislation

England

For comparison, see ss 177 and 398 Financial Services and Markets Act 2000 (UK).

Australia

See also s 64 Australian Securities and Investments Commission Act 2001 (Aust).

[384.03] General Note

Two offences are created under s 384. First, where a person provides false or misleading information in purported compliance with a requirement under this Ordinance: s 384(1). Second, where a person otherwise provides a false or misleading record or document to

the SFC or other specified recipient in connection with the recipient's performance of its statutory functions: s 384(3).

[384.04] Knows or is reckless

For 'knows', see **[291.06]**.

For 'recklessness', the nature of the statement maker's state of mind is relevant. It has to be shown that the state of mind was culpable in that the statement maker was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. A statement maker could not be regarded as reckless, if due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions (*R v G* [2004] 1 AC 1034, followed in *Sin Kam Wah v HKSAR* (2005) 8 HKCFAR 194).

In *To Shu Fai v Securities and Futures Commission* (2009) 12 HKCFAR 758, [2009] HKCU 423, a majority shareholder and director (the appellant) of a listed company instructed another to arrange a sale of 200 million shares in the company held indirectly by the appellant. When the shares were sold, the appellant was not notified that the sale was to be concluded that day. The stock exchange made an enquiry with the listed company about the sale. The company delivered to the stock exchange an announcement that the board was not aware of the reason for the increase in trading volume of the company's shares. The notice was clearly false and misleading. The company (with the knowledge of the appellant as director attributed to it) was held by the magistrate to have been at least reckless as to whether the announcement was false or misleading. This finding was upheld on appeal. The appellant was also convicted as accessory pursuant to s 390.

On an alternative charge relating to attempt, it was argued on behalf of the appellant in *To Shu Fai v Securities and Futures Commission* (2009) 12 HKCFAR 758, [2009] HKCU 423 that an attempt to commit an offence under s 384(1) required a graver mental state than for the substantive offence. It was submitted that the mental state required for the substantive offence was proof of knowledge or recklessness of the conduct; but the mental state required for an attempt was an intention to commit the crime. The Court rejected this argument by applying *R v Khan* [1990] 1 WLR 813. It held that both the substantive offence and the attempt had the same mental state requirement.

In *SFC v Chan Shui Sheung Ivy* [2016] 3 HKC 185, where an executive director of a listed company was charged with providing false or misleading information to the SFC by way of three public announcements, Zervos J held that it was open to the magistrate to make a finding that the obligation of ensuring that the announcements were true and accurate fell on the company secretary and the respondent did not knowingly or recklessly cause the company to make public announcements which were false or misleading in a material particular.

[384.05] Information provided in purported compliance with legislation: s 384(1)

A person commits an offence under s 384(1) where: (a) the person provides information to a 'specified recipient' which is false or misleading in a material particular, in purported compliance with a requirement to provide information under any of the 'relevant provisions'; and (b) the person knows, or is reckless as to whether the information is false or misleading as to a material particular.

Specified recipient is defined in s 384(8) to mean the SFC, or a recognised exchange company, clearing house or exchange controller (which are recognised under ss 19, 37 and 59 respectively — being the Stock Exchange of Hong Kong Ltd, Hong Kong Futures

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Exchange Ltd, Hong Kong Securities Clearing Company Ltd, and Hong Kong Exchanges and Clearing Ltd).

'Relevant provisions' means (a) the provisions of this Ordinance; (b) Pts II and XII of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) in respect of functions relating to prospectuses; (c) Part 5 of the Companies Ordinance (Cap 622) in respect of functions relating to buy-backs by a corporation of its own shares, or a corporation giving financial assistance for the acquisition of its own shares; and (d) Part 2 (except section 6) of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615): Sch 1 Pt 1 s 1.

If the provision of the false or misleading information constitutes an offence under any other relevant provision, then no offence is committed under s 384(1): s 384(2). The effect of this provision is that the person only commits one offence in relation to the same act of providing the false or misleading information.

In *To Shu Fai v Securities and Futures Commission* (2009) 12 HKCFAR 758, [2009] HKCU 423 (discussed above at **[384.04]**), the announcement (which contained the false and misleading information) had been provided by the company for the purposes of s 7(1) of the Securities and Futures (Stock Market Listing) Rules (Cap 571V). The obligation in s 7(1) is to file the announcement with the SFC but the company filed the announcement with the stock exchange as permitted under s 7(3). The 'specified recipient' (as defined in s 384(8)) in the present case was the SFC pursuant to s 7(1) of the Rules. However, the stock exchange had not in fact passed on the copy of the announcement to the SFC. Nonetheless, it was held that the announcement was 'provided' to the specified recipient (SFC) within s 384(1). The court noted the ordinary meaning of the word 'provide', which was applicable to s 384(1) — namely to 'supply, furnish for use or make available'. It was held that filing a copy with the stock exchange pursuant to the statutory provisions which permitted filing with the exchange as constituting compliance with the obligation to file with the SFC meant that the company had 'provided' the information to the SFC within s 384(1).

[384.06] Provision of record or document which is false or misleading: s 384(3)

Section 384(3) applies where the person provides a record or document to a specified recipient (as defined in s 384(8)) otherwise than in purported compliance with a requirement to provide information under any of the relevant provisions (as defined in Sch 1 Pt 1 s 1). In these circumstances, the person may be guilty of an offence if the record or document is false or misleading in a material particular, the person knows that to be the case (or is reckless in respect of it), and the person received prior written warning from the specified recipient that the provision of false or misleading information would constitute an offence under sub-s (3).

For a person to be convicted of an offence under s 384(3), it is also necessary to prove that either the specified recipient had reasonably relied on the record or document, or the person intended that the specified recipient would rely on the record or document: s 384(4). However, it is not necessary to prove that the specified recipient, in relying on the record or document, was misled, or suffered any detriment or loss: s 384(5).

[384.07] False or misleading in a material particular

Evidence of deception is not conclusive (*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 per Gibbs CJ).In *ASC v McLeod* (2000) 22 WAR 255, the Supreme Court of Western Australia considered that, in determining whether a statement was materially misleading, the primary question is 'when the document is examined in the

light of the [then prevailing circumstances], would it have been likely to induce members of the public to purchase securities?'. The primary question was then divided into 2 sub-questions:

(i) whether the impugned statement had a tendency to convey a meaning inconsistent with the true state of affairs?

(ii) whether the natural and probable result of the impugned statement would be to induce the reader to act in belief that is inconsistent with the true state of affairs? (at 265).

Statements may be false or misleading when looked at as a whole, even if each individual statement looked at individually is literally true: *Aaron's Reefs Ltd v Twiss* [1896] AC 273 at 281; *R v Kylsant* [1932] 1 KB 442; *R v Bishirigian* [1936] 1 All ER 586 at 591–592. A statement can only be false or misleading in respect of an existing fact. However, when a statement of intention or opinion is made by a person, there is an implied statement of existing fact being made, namely that the person honestly holds the intention or opinion, and that there are reasonable grounds for holding the intention or opinion: *Edgington v Fitzmaurice* (1885) 29 Ch D 459; *British Airways Board v Taylor* [1976] 1 All ER 65; and *Thompson v Mastertouch TV Services Pty Ltd* (1977) 15 ALR 487.

Section 384 does not contain a provision equivalent to s 383(3), to the effect that representations about a future event, opinion or intention could be false or misleading within the section. Under the common law, a statement may be false or misleading only if the statement relates to an existing fact. However, the courts have taken the approach under the common law that a statement of existing fact is impliedly made when a person makes a statement about a future matter or a statement of opinion or intention — the existing fact being the person honestly holds the belief (about the future matter or opinion or intention), and has reasonable grounds for that belief: *Edgington v Fitzmaurice* .

The requirement that the information be false or misleading in a material particular means that minor or trivial inaccuracies will not lead to the contravention of this section.

[384.08] Level 5 and level 6 fines

The reference to a level 5 fine and a level 6 fine is a reference to fines of a maximum of $50,000 and $100,000 respectively: s 113C and Sch 8 of the Criminal Procedure Ordinance.

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385. Power of Commission to intervene in proceedings

(1) Where—

(a) there are any judicial or other proceedings (other than criminal proceedings) which concern a matter provided for in any of the relevant provisions, or in which the Commission has an interest by virtue of its functions under any of the relevant provisions; and

(b) the Commission is satisfied that it is in the public interest for the Commission to intervene and be heard in the proceedings,

the Commission, after consultation with the Financial Secretary, may, by an application made in accordance with subsection (2) to the court hearing or otherwise having competent authority to hear

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the proceedings, apply to intervene and be heard in the proceedings.

(2) An application made for the purposes of subsection (1) shall be—

(a) made in writing; and

(b) supported by an affidavit showing that the conditions set out in subsection (1)(a) and (b) are satisfied.

(3) A copy of the application made for the purposes of subsection (1) shall be served on each of the parties to the proceedings to which the application relates as soon as reasonably practicable after the application is made.

(4) Subject to subsection (5), the court to which an application is made for the purposes of subsection (1) may by order—

(a) allow the application, subject to such terms as it considers just; or

(b) refuse the application.

(5) The court to which an application is made for the purposes of subsection (1) shall not make an order pursuant to subsection (4)(a) or (b) without first giving the Commission, and each of the parties to the proceedings to which the application relates, a reasonable opportunity of being heard.

(6) Where an application made for the purposes of subsection (1) is allowed under subsection (4)(a), the Commission, subject to the terms referred to in subsection (4)(a)—

(a) may intervene and be heard in the proceedings to which the application relates; and

(b) shall be regarded for all purposes as a party to the proceedings and shall have the rights, duties and liabilities of such a party.

(7) Nothing in this section prejudices Order 15, rule 6 of the Rules of the High Court (Cap 4 sub. leg. A).

(8) In this section, ***court*** (法院) includes a magistrate and a tribunal, other than the Market Misconduct Tribunal and the Securities and Futures Appeals Tribunal.

(Amended ER 2 of 2012)

[385.01] Enactment History

This section came into effect 1 April 2003.

[385.02] Comparative Legislation

Australia

Section 385 is modelled on s 1330 of the Corporations Act 2001 (Aust).

[385.03] General Note

This section allows the SFC to intervene in proceedings between private litigants. The provision was introduced so that the SFC could provide its regulatory perspective and expert opinion to private disputes which have an impact on the financial markets and which affect the wider public interest: *Consultation Document on the Securities and Futures Bill*, April 2000, para 14.12.

The SFC may apply to intervene in any proceedings (except criminal proceedings) in any court or tribunal (except the Market Misconduct Tribunal and Securities and Futures Appeals Tribunal: s 385(8)) concerning a matter provided for in any of the 'relevant provisions', or in which the SFC has an interest by virtue of its functions under any of the 'relevant provisions', where to intervene and be heard in the proceedings would be in the public interest: s 385(1). The court or tribunal, as the case may be, determines whether or not to allow the application after giving the SFC and the parties to the proceedings a reasonable opportunity to be heard on the matter: ss 385(4) and (5).

'Relevant provisions' means (a) the provisions of this Ordinance; and (b) Pts II and XII of the Companies Ordinance (Cap 32) 'Relevant provisions' means (a) the provisions of this Ordinance; (b) Pts II and XII of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Capin respect of functions relating to prospectuses; (c) Part 5 of the Companies Ordinance (Cap 622) in respect of functions relating to buy-backs by a corporation of its own shares or a corporation giving financial assistance for the acquisition of its own shares; and (d) Part 2 (except section 6) of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615): Sch 1 Pt 1 s 1.

Where the litigation involves matters of importance for companies or securities law and regulation, or difficult issues of interpretation of the legislation, it may be appropriate for the statutory agency to intervene, so that the agency can provide assistance on the meaning of the statutory language and the purposes which it is intended to achieve: *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 3705 ACSR 720 at 723; *BTR Plc v Westinghouse Brake & Signal Co (Aust)* (1992) 7 ACSR 122 at 140–141. The approach of the Australian Securities and Investments Commission (ASIC) in relation to s 1330 of the Corporations Act 2001 (upon which s 385 is based) is to intervene where the case involves issues affecting the integrity of the financial markets or which have a particular financial or commercial significance, construction of the legislation, or matters in relation to which ASIC has relevant information (acquired through its investigations): see ASIC Policy Statement 4 — ASC Policy on Intervention.

If the SFC's application is allowed, the SFC is regarded as a party to the proceedings, and has the rights, duties and liabilities of such a party: s 385(6). In *BTR Plc v Westinghouse Brake & Signal Co (Aust)* (1992) 7 ACSR 122 at 140–141, the Federal Court of Australia expressed the view that where the proceedings involve issues of a purely commercial nature, and where the parties are well able to properly adduce evidence and make submissions on all relevant facts to the court, the regulatory agency should not assume the role of an active party and present substantive arguments in respect to those issues. The position would be different where the commercial issue is not fully or properly canvassed by the other parties: ibid. In *Re PCCW Ltd* [2009] HKCU 1267 (unreported, CACV 85/2009, 26 August 2009), the Court of Appeal confirmed in a hearing on costs that the SFC's claim to recover its costs after intervening in previous proceedings was sound. Being regarded for all purposes as a party to proceedings includes the issue of costs.

[385.04] Power to intervene in criminal proceedings

In *HKSAR v Chan Kau Tai* (unreported, CACC 26/2004, 26 January 2006), a case in which the ICAC sought to intervene, the Court of Appeal discussed the power of the SFC to intervene in criminal proceedings. Noting that s 385 expressly excludes criminal proceedings

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