

## COMMENTARY

**Structure of the Ordinance**

The Ordinance is structured in the following manner:

Part 1 of the Ordinance contains preliminary provisions. These provisions define the principal terms used in the Ordinance. Definitions of other terms used in the Ordinance can also be found in Schedule 1 of the Ordinance.

Part 2 of the Ordinance deals with the establishment of the FRC. Sections 9 and 10 of the Ordinance set out the functions and powers of the FRC. Section 14 of the Ordinance empowers the Chief Executive ("CE") to give the FRC written directions with respect to the performance of the Council's functions. Sections 17 to 20 of the Ordinance deal with the financial provisions of the FRC.

Part 3 of the Ordinance deals with relevant irregularities. Section 23 specifies when the FRC may exercise the powers under sections 25 to 28 of the Ordinance for the purpose of investigations concerning relevant irregularities, or direct the AIB to conduct such investigations with those powers. Section 35 of the Ordinance in turn requires the AIB to submit to the FRC written reports on the findings of investigations. Section 36 sets out what the FRC may do in relation to cases under investigation.

Part 4 of the Ordinance deals with relevant non-compliances under the provisions as so prescribed. Section 40 of the Ordinance specifies when the FRC may exercise the powers under subsequent section 43 for the purpose of enquiries concerning relevant non-compliances by listed companies. Section 47 of the Ordinance requires the Financial Reporting Review Committees ("FRRC") to submit to the FRC written reports on the findings of enquiries. Section 48 of the Ordinance sets out what the FRC may do in relation to cases under such enquiries. Sections 49 and 50 of the Ordinance empower the FRC to request a voluntary rectification of accounts and financial reports and to seek a court order to mandate such a rectification if not made voluntarily.

Parts 5 and 6 of the Ordinance deal with miscellaneous matters and consequential amendments.

Lastly, Schedules 2 to 6 contain provisions relating to the FRC, the Chief Executive Officer of the FRC, the AIB, the Financial Reporting Review Panel ("FRRP") and the FRRC.

**PART 1**  
**PRELIMINARY**

**Section 1: Short title**

- (1) This Ordinance may be cited as the Financial Reporting Council Ordinance.
- (2) (Omitted as spent)

## COMMENTARY

**Definition of "Ordinance"**

Section 3 of the Interpretation and General Clauses Ordinance (Cap.1) defines the term "Ordinance" as: [1.01]

- (a) any Ordinance enacted by the Legislative Council;
- (b) any Ordinance adopted by virtue of art.160 of the Basic Law as a law of the Hong Kong Special Administrative Region;
- (c) any subsidiary legislation made under any such Ordinance except any such subsidiary legislation which has pursuant to art.160 of the Basic Law been declared to be in contravention of the Basic Law; and
- (d) any provision or provisions of any such Ordinance or subsidiary legislation.

**Section 2: Interpretation**

(1) In this Ordinance, unless the context otherwise requires-  
"appointed member", in relation to the Council, means a member of the Council appointed under section 7(1)(c);  
"associated undertaking"-

- (a) in relation to a listed corporation, means-
  - (i) an undertaking that is a subsidiary undertaking, as construed in accordance with the Twenty-third Schedule to the Companies Ordinance (Cap 32), of the corporation;
  - (ii) an undertaking that is accounted for and consolidated in the accounts, or is required to be accounted for and consolidated in the next accounts, of the corporation as a subsidiary for the purposes of-
    - (A) the standards of accounting practices issued or specified, or deemed to be issued or specified, under section 18A of the Professional Accountants Ordinance (Cap 50), as in force at the material time;
    - (B) the International Financial Reporting Standards issued by the International Accounting Standards Board, as in force at the material time;
    - (C) the Listing Rules; or
    - (D) any generally acceptable accounting principles allowed for usage under the Listing Rules;
  - (iii) an undertaking in which the corporation has an interest (whether held by that corporation directly or indirectly through any other corporation or corporations) that is accounted for by that corporation in its accounts using the method generally known as equity accounting; or
  - (iv) a corporation a substantial shareholder of which is also a substantial shareholder of the corporation;

- (b) in relation to a listed collective investment scheme, means-
- (i) an undertaking that is accounted for and consolidated in the accounts, or is required to be accounted for and consolidated in the next accounts, of the scheme as a subsidiary for the purposes of-
    - (A) the standards of accounting practices issued or specified, or deemed to be issued or specified, under section 18A of the Professional Accountants Ordinance (Cap 50), as in force at the material time;
    - (B) the International Financial Reporting Standards issued by the International Accounting Standards Board, as in force at the material time;
    - (C) the Listing Rules; or
    - (D) any generally acceptable accounting principles allowed for usage under the Listing Rules; or
  - (ii) an undertaking in which the scheme has an interest (whether held by that scheme directly or indirectly through any other corporation or corporations) that is accounted for by that scheme in its accounts using the method generally known as equity accounting;

“audit”-

- (a) in relation to the accounts of a listed corporation, means an audit of those accounts required for the purposes of the Companies Ordinance (Cap 32), as in force at the material time, or the Listing Rules;
- (b) in relation to the accounts of a listed collective investment scheme, means an audit of those accounts required for the purposes of the relevant code or the Listing Rules;
- (c) in relation to the accounts of a relevant undertaking of a listed entity, means-
  - (i) in the case where an audit of those accounts is required for the purposes of the Companies Ordinance (Cap 32), or the corporate law of a place outside Hong Kong, as in force at the material time, such an audit so required;
  - (ii) in any other case, the audit of those accounts, regardless of whether or not required for the purposes of any constitutional instrument of the undertaking;

“audit working paper” means a record, or document, that is prepared, or obtained and retained, by or on behalf of an auditor for, or in connection with, the auditor’s performance of his functions relating to an audit of accounts;

“auditor”-

- (a) in relation to a listed corporation-
  - (i) means a person appointed to be an auditor of the corporation for the purposes of the Companies Ordinance (Cap 32), as in force at the material time, or the Listing Rules, regardless of whether or not the person is qualified for the appointment; and

- (ii) includes-
  - (A) if the person so appointed is an individual, an employee or agent of that person involved in the audit of the accounts of the corporation;
  - (B) if the person so appointed is a partnership, a partner, employee or agent of that person involved in the audit of the accounts of the corporation; and
  - (C) if the person so appointed is a corporation, a member, director, employee or agent of that person involved in the audit of the accounts of the corporation;

(b) in relation to a listed collective investment scheme-

- (i) means a person appointed to be an auditor of the scheme for the purposes of the relevant code or the Listing Rules, regardless of whether or not the person is qualified for the appointment; and

(ii) includes-

- (A) if the person so appointed is an individual, an employee or agent of that person involved in the audit of the accounts of the scheme;
- (B) if the person so appointed is a partnership, a partner, employee or agent of that person involved in the audit of the accounts of the scheme; and
- (C) if the person so appointed is a corporation, a member, director, employee or agent of that person involved in the audit of the accounts of the scheme;

(c) in relation to a relevant undertaking or associated undertaking of a listed entity, or an undertaking that was formerly an associated undertaking of a listed entity-

(i) means-

- (A) in the case where an auditor of the undertaking is required to be appointed for the purposes of the Companies Ordinance (Cap 32), or the corporate law of a place outside Hong Kong, as in force at the material time, a person appointed to be such an auditor, regardless of whether or not the person is qualified for the appointment;
- (B) in any other case, a person appointed to be an auditor of the undertaking-

- (I) regardless of whether or not the person is appointed for the purposes of any constitutional instrument of the undertaking; and
- (II) regardless of whether or not the person is qualified for the appointment; and

(ii) includes-

- (A) if the person so appointed is an individual, an employee or agent of that person involved in the audit of the accounts of the undertaking;

- (B) if the person so appointed is a partnership, a partner, employee or agent of that person involved in the audit of the accounts of the undertaking; and
- (C) if the person so appointed is a corporation, a member, director, employee or agent of that person involved in the audit of the accounts of the undertaking;

“authorized institution” means an authorized institution within the meaning of section 2(1) of the Banking Ordinance (Cap 155);

“books” includes accounts and accounting information, 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;

“collective investment scheme” means a collective investment scheme within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571);

“Commissioner of Inland Revenue” means the Commissioner of Inland Revenue appointed under the Inland Revenue Ordinance (Cap 112);

“company” means a company within the meaning of section 2(1) of the Companies Ordinance (Cap 32);

“controller” means a person who is an indirect controller, or a majority shareholder controller, within the meaning of section 2(1) of the Banking Ordinance (Cap 155);

“corporation” means a company or other body corporate incorporated either in Hong Kong or elsewhere;

“Council” means the Financial Reporting Council established by section 6(1);

“debenture” means a debenture within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571);

“director” includes a shadow director and any person occupying the position of director by whatever name called;

“Director of Audit” means the Director of Audit appointed under section 3 of the Audit Ordinance (Cap 122);

“document” includes-

- (a) any register, books and tape recording;
- (b) any input or output, in whatever form, into or from an information system; and
- (c) any other document or similar material (whether produced mechanically, electronically, magnetically, optically, manually or by any other means);

“function” includes a power and a duty;

“HKEC” means the company incorporated under the Companies Ordinance (Cap 32) and registered under that Ordinance by the name Hong Kong Exchanges and Clearing Limited;

“HKICPA” means the Hong Kong Institute of Certified Public Accountants incorporated by section 3 of the Professional Accountants Ordinance (Cap 50);

“Independent Commission Against Corruption” means the Independent Commission Against Corruption established by section 3 of the Independent Commission Against Corruption Ordinance (Cap 204);

“information” includes data, text, images, sound codes, computer programmes, software and databases, and any combination thereof;

“information system” means an information system within the meaning of section 2(1) of the Electronic Transactions Ordinance (Cap 553);

“Insurance Authority” means the Insurance Authority appointed under section 4(1) of the Insurance Companies Ordinance (Cap 41);

“Investigation Board” means the Audit Investigation Board established by section 22(1);

“lay person” means a person who is not-

- (a) a certified public accountant within the meaning of the Professional Accountants Ordinance (Cap 50); or
- (b) a member of an accountancy body that is a member of the International Federation of Accountants;

“listing document”

- (a) in relation to a listed corporation, means-

- (i) a prospectus; or
- (ii) a document issued for the purposes of the Listing Rules that -
  - (A) offers any securities issued by the corporation to the public for subscription, or purchase, for a consideration; or
  - (B) is calculated to invite offers by the public to subscribe for, or purchase, for a consideration any securities issued by the corporation;

- (b) in relation to a listed collective investment scheme, means a document issued for the purposes of the relevant code or the Listing Rules that-

- (i) offers any interests in the scheme to the public for acquisition for a consideration;
- (ii) offers the scheme to the public for participation for a consideration; or
- (iii) is calculated to invite offers by the public to acquire for a consideration any interests, or participate for a consideration, in the scheme;

“Listing Rules” means-

- (a) the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited; or
- (b) the Rules Governing the Listing of Securities on the Growth Enterprise Market of the Stock Exchange of Hong Kong Limited, approved by the Securities and Futures Commission under section 24 of the Securities and Futures Ordinance (Cap 571), and as in force at the material time;

“manager”, in relation to a listed collective investment scheme, means the person who is responsible, for the purposes of the relevant code or the Listing Rules, for the operation, and the management of the property, of the scheme for the benefit of those who hold interests in the scheme;

“Mandatory Provident Fund Schemes Authority” means the Mandatory Provident Fund Schemes Authority established by section 6(1) of the Mandatory Provident Fund Schemes Ordinance (Cap 485);

## COMMENTARY

**The Financial Reporting Council's further powers and options once the investigation is concluded**

[36.01]

Once an investigation report has been prepared, either on an interim basis or at the conclusion of an investigation, the FRC may either: (i) close the case; (ii) suspend the investigation; or (iii) carry out any other follow-up action including referral to the appropriate regulatory bodies and/or any law enforcement agencies as it considers appropriate. The FRC will notify the relevant auditor or reporting accountant once it comes to a decision unless it is satisfied that the notification may prejudice the investigation, or any other action which the FRC, a regulatory body and/or law enforcement agency intends to take in relation to the investigation.

By contrast to section 23(4) of the Ordinance, the power to close a case or suspend an investigation under this section is only exercisable after the Council has taken into account the report prepared under previous section 35 of the Ordinance.

One of the possible situations where the FRC may direct the AIB to cease an investigation is when the investigation reveals evidence of a possible criminal offence. Another is where the circumstances no longer suggest that there is a relevant irregularity, or when the FRC no longer has reasonable cause to believe in the occurrence of an irregularity.

The FRC may also refer its investigation reports to the HKICPA for possible follow-up action. If the irregularities are related to the Listing Rules, the reports may be referred to the Stock Exchange or to the SFC for subsequent remedial action. As previously stated, the investigation reports may also be referred and given to other regulatory bodies and law enforcement agencies for such follow-up action as deemed appropriate.

In exercising its powers under the Ordinance, the FRC acts as investigator and not as prosecutor; the fact that the roles are divided between separate and independent parties is intended to introduce a system of proper checks and balances. In particular, the FRC should be an impartial and effective "fact finder" to assist (but not become a party to) any subsequent disciplinary proceedings. In this way, the FRC can assist the Registrar of the HKICPA to present a case against an auditor in disciplinary proceedings, potentially attending proceedings and giving evidence as a witness.

**Section 37: Costs and expenses of investigation** Ver Date: 16/07/2007

(1) If, on a prosecution instituted as a result of an investigation under this Part, a person is convicted by a court or magistrate, the court or magistrate may order the person to pay to the Council the sum the court or magistrate considers appropriate for the costs and expenses in relation or incidental to the investigation reasonably incurred by the Council.

(2) The Council may recover the sum so ordered as a civil debt due to it.

## COMMENTARY

**Financial Reporting Council's right to recover costs and expenses of the investigation conducted**

In any prosecution following an investigation, a Court or magistrate can order any person convicted to pay to the Council the costs and expenses of the investigation. However, the Council can only recover such costs and expenses where there has been a prosecution and conviction, and not otherwise. [37.01]

**PART 4  
RELEVANT NON-COMPLIANCES****Division 1: Preliminary****Section 38: Interpretation**

Ver Date: 16/07/2007

- (1) In this Part, "enquirer" means, subject to subsection (2), the Council.
- (2) If a Review Committee is appointed under section 40(1)(b) to make an enquiry concerning a relevant non-compliance, a reference to "enquirer" means, for the purpose of the non-compliance, the Committee "enquirer".

## COMMENTARY

**Defining an "enquirer" under Section 38 of the Ordinance**

The FRC may initiate an enquiry into possible non-compliances with relevant requirements on the part of listed entities in their financial reports, in its own right or upon receipt of a complaint. An enquiry is undertaken to determine if the listed entity's financial reporting complies with relevant accounting requirements. Under the Ordinance, it is defined as an enquiry into a relevant non-compliance. See section 40 of the Ordinance. [38.01]

**Section 39: Financial Reporting Review Panel** Ver Date: 01/12/2006

(1) The Chief Executive shall, in consultation with the Council, appoint a Financial Reporting Review Panel of at least 20 persons, whom the Chief Executive considers suitable for appointment under section 40(1)(b) as members of a Review Committee either because of their experience in accounting, auditing, finance, banking, law, administration or management, or because of their professional or occupational experience.

(2) The Chief Executive shall appoint, from amongst the members of the Review Panel, at least 3 Panel Convenors.

(3) The Chief Executive shall give notice of each appointment under subsection (1) or (2) by notice published in the Gazette.

(4) Schedule 5 has effect with respect to the Review Panel and its members.

#### COMMENTARY

##### Chief Executive's power to appoint members to the Financial Reporting Review Panel

[39.01]

Section 39 of the Ordinance envisaged, with reference to the membership base of the UK FRRP, that the CE would consider appointing professionals with expertise and backgrounds in the accounting, auditing, legal, banking, financial services or business administration fields as members of the FRRP.

In response to the views of some members of the Bills Committee, the drafters of the Ordinance agreed, to the extent that the ability of the CE to appoint the best available candidates in the light of circumstances will not be unduly hampered, that further guidance as to how the CE may exercise the appointment power could be provided in the Ordinance more explicitly. In line with previous section 7(1) of the Ordinance on the appointment of members of the FRC, the drafters of the Ordinance amended this section 39(1) of the Ordinance to set out explicitly the backgrounds and disciplines that the CE shall consider in the appointment of members of the FRRP.

##### Section 40: Initiating enquiry concerning relevant non-compliance Ver Date: 16/07/2007

(1) If it appears to the Council that there is or may be a question whether or not there is a relevant non-compliance in relation to a listed entity, and the Council certifies in writing to that effect-

- (a) the Council may, for the purpose of enquiring into the non-compliance or the question, exercise the powers under Division 2; or
- (b) the Council may appoint a Financial Reporting Review Committee consisting of-
  - (i) a Panel Convenor appointed under section 39(2), who is to be the Chairman of the Review Committee; and
  - (ii) at least 4 other members of the Review Panel, to enquire, with those powers, into the non-compliance and the question.

(2) On making an appointment under subsection (1)(b), the Council shall notify the listed entity in writing of the names of the members of the Review Committee.

(3) The Council shall, on making an appointment under subsection (1)(b), specify the terms of reference of the Review Committee, and the Committee shall act in accordance with those terms.

(4) If a Review Committee is appointed to make an enquiry concerning a relevant non-compliance, the Council shall not, for the purpose of enquiring into the non-compliance or the question whether or not there is such a non-compliance, exercise the powers under Division 2.

#### COMMENTARY

##### Initiating an enquiry by the Financial Reporting Council

Under the Ordinance, the FRC may initiate its enquiry powers or appoint a FRRP to enquire into a case, if it appears to the FRC that there is or may be a question as to whether or not there is a relevant non-compliance in relation to a listed entity as prescribed in this section 40(1) of the Ordinance. For the purpose of the enquiry, the enquirer (*i.e.* FRC or FRRP) may require persons from specified classes to produce any record or document, or any information or explanation, relevant to the non-compliance as prescribed in subsequent section 43 of the Ordinance.

[40.01]

The Bills Committee noted that the powers of the FRRP in Hong Kong were largely similar to those possessed by the UK FRRP.

In order to decide whether or not an enquiry should be initiated, the available information and evidence will be reviewed accordingly by the FRC. The auditor, reporting accountant, and/or listed entity concerned may be asked to provide additional information and an explanation of certain matters.

According to the FRC's website, the time taken to complete an enquiry, not including the action needed to remove any non-compliance, is around four to six months depending on the circumstances and complexity of the individual case.

##### The difference between an investigation under Part 3 of the Ordinance and an enquiry under this Part 4 of the Ordinance

When an investigation is commenced by either the FRC or AIB, the target of this investigation is the auditor or reporting accountant of the listed entity. In contrast, the purpose of an enquiry by the FRC is to determine whether or not there is any non-compliance with accounting requirements in the financial statements of a listed entity. The auditor may still be required to provide information and assistance but is not the target of an enquiry. The target of an enquiry is the preparer of the financial statements, usually directors of listed entities.

[40.02]

##### Financial Reporting Council's discretion to initiate an enquiry

Once the FRC considers and then decides that there appears to be, or even that there appears to be a question whether or not there is, a relevant non-compliance with the

[40.03]

accounting requirements for listed companies, the FRC has discretion to initiate an enquiry on the suspected matter after it certifies this suspicion in writing. The FRC will normally appoint a FRRC to act as the enquirer and conduct an enquiry but in exceptional cases the FRC may choose to conduct the enquiry on its own. Where the FRC does appoint a FRRC to conduct the enquiry, the FRC will specify the terms of reference and will notify the listed entity in writing of the names of the members of the FRRC.

#### Criteria for being appointed to the Financial Reporting Review Committee

[40.04]

During the drafting stage, concerns were expressed about the arrangement and criteria under which the FRC may appoint members of a FRRC. The drafters of the Ordinance advised that in exercising the power to appoint a FRRC, the FRC must act reasonably, in good faith and on lawful and relevant grounds of public interest. The drafters of the Ordinance envisaged that the FRC would have to consider, among other things, the background and expertise of FRRP members, who shall not have any conflict of interest in that particular case, in making the appointment. In this light, the drafters of the Ordinance considered that there was no need to provide for any additional provisions relating to appointment arrangements (including the administrative procedures) and criteria in the Ordinance. There is no upper limit on the number of FRRP members who may be appointed to a FRRC.

#### Defining "relevant non-compliance" and "relevant financial report" under this Section 40 of the Ordinance

[40.05]

Relevant non-compliance means an entity has not complied with the accounting requirements of International Financial Reporting Standards/Hong Kong Financial Reporting Standards ("IFRS/HKFRS"), relevant SFC codes, the Listing Rules or the Hong Kong Companies Ordinance in a relevant financial report. See section 5 and Schedule 1 of the Ordinance.

The definition of what makes up a relevant financial report includes the annual financial statements and half-yearly financial statements prepared in accordance with IAS/HKAS 34 Interim Financial Reporting of a Hong Kong listed entity, as well as an accountant's report included in a prospectus or other listing documents.

#### Section 41: Financial Reporting Review Committee Ver Date: 16/07/2007

- (1) A Review Committee may perform any of its functions, and its proceedings are valid, despite-
- a vacancy in the membership of the Committee;
  - a defect in the appointment or qualification of a person purporting to be a member of the Review Panel or the Committee; or
  - a minor irregularity in the convening of any meeting of the Committee.
- (2) Schedule 6 has effect with respect to a Review Committee and its members.

## COMMENTARY

### Validity of the Financial Reporting Review Committee's findings despite any slight irregularities

Section 41 of the Ordinance confirms that a FRRC may perform any of its functions, and that its proceedings are valid, despite: (i) a vacancy in its membership; (ii) a defect in the appointment or qualification of a person purporting to be a member of the FRRP or a FRRC; or (iii) a minor irregularity in the convening of any meeting of a FRRC. [41.01]

The drafters of the Ordinance also agreed to adopt similar provisions in sections 7 and 22 of the Ordinance in respect of the FRC and AIB.

### Section 42: Council to notify certain bodies of powers under Division 2 being exercisable

Ver Date: 16/07/2007

- (1) If the Council certifies under section 40(1) that it appears to the Council that there is or may be a question whether or not there is a relevant non-compliance in relation to a listed entity to which this section applies, the Council shall give a written notice in accordance with subsections (3) and (4).
- (2) This section applies to a listed entity-
- that-
    - is an authorized institution; or
    - to the Council's knowledge-
      - is a controller of an authorized institution;
      - has as its controller an authorized institution; or
      - has a controller that is also a controller of an authorized institution;
  - that is an insurer authorized under the Insurance Companies Ordinance (Cap 41);
  - that is-"
    - a licensed person within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571); or
    - a collective investment scheme authorized under section 104 of that Ordinance; or
  - that is an approved trustee within the meaning of section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap 485).
- (3) The notice is to be given to-
- in the case of a listed entity that falls within subsection (2)(a), the Monetary Authority;
  - in the case of a listed entity that falls within subsection (2)(b), the Insurance Authority;

- (c) in the case of a listed entity that falls within subsection (2)(c), the Securities and Futures Commission;
- (d) in the case of a listed entity that falls within subsection (2)(d), the Mandatory Provident Fund Schemes Authority.

(4) The notice is to specify that the powers under Division 2 are exercisable for the purpose of enquiring into the relevant non-compliance or the question whether or not there is such a non-compliance.

#### COMMENTARY

##### Duty to inform certain parties once the Council certifies that there may a question of relevant non-compliance in relation to a listed entity

[42.01]

Section 42 is the notice provision of the Ordinance pertaining to questions of non-compliance with the relevant requirements on the part of listed companies in their respective financial reports, which prescribes that all necessary and relevant parties are to be given notice once a complaint is received by or if an enquiry is enacted on its own by the FRC.

Where the FRC decides to appoint a FRRC to conduct the enquiry, the FRC is obligated to specify the terms of reference and is duty-bound to notify the listed entity in writing of the names of the members of the FRRC. See section 40 of the Ordinance.

#### Division 2: Powers for the purpose of enquiry

##### Section 43: Powers to require production of records and documents and provision of information and explanation Ver Date: 16/07/2007

- (1) The enquirer may, in writing, require-
  - (a) where the listed entity is a listed corporation, the listed corporation;
  - (b) where the listed entity is a listed collective investment scheme, a person who is, or was at the material time, a responsible person of the listed collective investment scheme;
  - (c) a relevant undertaking of the listed entity;
  - (d) a person who is, or was at the material time, an auditor of the corporation, scheme or undertaking; or
  - (e) a person who is, or was at the material time, an officer or employee of the corporation, responsible person or undertaking, to produce or give, within the time and at the place specified in the requirement, any record or document, or any information or explanation, specified in the requirement if the enquirer has reasonable cause to believe, and certi-

fies in writing that it has reasonable cause to believe, that the record or document, or the information or explanation, is relevant to the relevant non-compliance or to the question whether or not there is such a non-compliance.

- (2) The enquirer shall not impose a requirement on a person under subsection (1) unless, before doing so, the enquirer has consulted-
  - (a) if the person-
    - (i) is an authorized institution; or
    - (ii) to the Council's knowledge-
      - (A) is a controller of an authorized institution;
      - (B) has as its controller an authorized institution; or
      - (C) has a controller that is also a controller of an authorized institution, the Monetary Authority;
  - (b) if the person is an insurer authorized under the Insurance Companies Ordinance (Cap 41), the Insurance Authority;
  - (c) if the person is-
    - (i) a licensed person within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571); or
    - (ii) a responsible person of a collective investment scheme authorized under section 104 of that Ordinance, the Securities and Futures Commission; and
  - (d) if the person is an approved trustee within the meaning of section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap 485), the Mandatory Provident Fund Schemes Authority.
- (3) A person is not excused from complying with a requirement imposed on him under subsection (1) only on the ground that to do so might tend to incriminate him.

#### COMMENTARY

##### Financial Reporting Council's wide range of powers once an enquiry is initiated

The powers granted to the FRC and the FRRC in this section 43 of the Ordinance to require the production of records, documents, provision of information and explanations, are the same as those powers granted in previous sections 25 and 26 of the Ordinance.

Once an enquiry is initiated by either the FRC or FRRC, either party, in writing, may seek to require certain persons such as auditors, listed entities, and those listed entities' offices or employees to produce those records and documents as requested and also produce such information or explanations as so required. The FRC or FRRC is required to certify that it has reasonable cause to believe that such requested information, documents, information, and explanations are relevant to that listed entity's possible non-compliance.

[43.01]

- (b) in the case of a company, it is-
- (i) delivered to any officer of the company by hand;
  - (ii) left at, or sent by post to, the registered office of the company within the meaning of the Companies Ordinance (Cap 32);
  - (iii) sent by facsimile transmission to its last known facsimile number; or
  - (iv) sent by electronic mail transmission to its last known electronic mail address;
- (c) in the case of a company to which Part XI of the Companies Ordinance (Cap 32) applies, it is-
- (i) delivered by hand to, or sent by post to, the person resident in Hong Kong who is authorized to accept service of process and notices on its behalf for the purposes of that Part at his address delivered to the Registrar of Companies under that Ordinance;
  - (ii) sent by facsimile transmission to the last known facsimile number of the person; or
  - (iii) sent by electronic mail transmission to the last known electronic mail address of the person;
- (d) in the case of a partnership, it is-
- (i) delivered to any partner of the partnership by hand;
  - (ii) left at, or sent by post to, the last known principal place of business of the partnership;
  - (iii) sent by facsimile transmission to the last known facsimile number of the partnership; or
  - (iv) sent by electronic mail transmission to the last known electronic mail address of the partnership;
- (e) in the case of a body corporate (other than a company, or a company to which Part XI of the Companies Ordinance (Cap 32) applies) or an unincorporated association (other than a partnership), it is-
- (i) delivered to any officer of the body or association by hand;
  - (ii) left at, or sent by post to, the last known principal place of business of the body or association;
  - (iii) sent by facsimile transmission to the last known facsimile number of the body or association; or
  - (iv) sent by electronic mail transmission to the last known electronic mail address of the body or association.

#### COMMENTARY

##### Proper service of notice when so required under the Ordinance

[60.01] Section 60 of the Ordinance is self-explanatory and simply lists the ways and methods for the FRC to effect service of notice upon an individual, a partnership or corporate entity where such notice is so required to be served and given under the Ordinance.

#### Section 61: Amendment of Schedules

Ver Date: 01/12/2006

- (1) The Secretary may, by notice published in the Gazette, amend Schedule 1.
- (2) The Chief Executive in Council may, by notice published in the Gazette, amend Schedule 2, 3, 4, 5 or 6.

#### COMMENTARY

##### Division of authority to amend the schedules listed in the Ordinance

Section 60 of the Ordinance divides the authority to amend the schedules as so listed in the Ordinance, so that the Secretary has the power to amend Schedule 1 of the Ordinance when so needed, while the CE has the authority to amend the remaining Schedules 2, 3, 4, 5 and 6 of the Ordinance. [61.01]

#### PART 6

##### CONSEQUENTIAL AND RELATED AMENDMENTS

Section 62: (Omitted as spent)	Ver Date: 20/04/2007
Section 63: (Omitted as spent)	Ver Date: 20/04/2007
Section 64: (Omitted as spent)	Ver Date: 14/12/2007
Section 65: (Omitted as spent)	Ver Date: 1/12/2006
Section 66: (Omitted as spent)	Ver Date: 20/04/2007
Section 67: (Omitted as spent)	Ver Date: 01/12/2006
Section 68: (Omitted as spent)	Ver Date: 01/12/2006
Section 69: (Omitted as spent)	Ver Date: 01/12/2006
Section 70: (Omitted as spent)	Ver Date: 01/12/2006
Section 71: (Omitted as spent)	Ver Date: 01/12/2006
Section 72: (Omitted as spent)	Ver Date: 01/12/2006
Section 73: (Omitted as spent)	Ver Date: 16/07/2007

Section 74: (Omitted as spent)	Ver Date: 16/07/2007
Section 75: (Omitted as spent)	Ver Date: 16/07/2007
Section 76: (Omitted as spent)	Ver Date: 16/07/2007
Section 77: (Omitted as spent)	Ver Date: 01/12/2006
Section 78: (Omitted as spent)	Ver Date: 01/12/2006
Section 79: (Omitted as spent)	Ver Date: 01/12/2006
Section 80: (Omitted as spent)	Ver Date: 01/12/2006
Section 81: (Omitted as spent)	Ver Date: 01/12/2006
Section 82: (Omitted as spent)	Ver Date: 01/12/2006
Section 83: (Omitted as spent)	Ver Date: 01/12/2006
Section 84: (Omitted as spent)	Ver Date: 01/12/2006
Section 85: (Omitted as spent)	Ver Date: 16/07/2007
Section 86: (Omitted as spent)	Ver Date: 01/12/2006

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COMMENTARY

**Consequential and related amendments**

Sections 62 to 86 contained consequential and related amendments to other Ordinances, and are now omitted as spent.

<b>Schedule 1: DEFINITIONS OF "RELEVANT FINANCIAL REPORT" AND "RELEVANT REQUIREMENT"</b>	Ver Date: 01/12/2006
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PART 1

In this Ordinance (except sections 5(2) and 50 of this Ordinance)-  
"relevant financial report"

- (a) in relation to a listed corporation, means-
- (i) a balance sheet of the corporation, together with any accounts annexed to it for the purposes of section 129C(1) of the Companies Ordinance (Cap 32), a copy of which was sent at the relevant time under section 129G of that Ordinance to a person entitled to be sent the copy;
  - (ii) the accounts of the corporation, a certified copy of which was delivered at the relevant time to the Registrar of Companies for registration under section 336 of the Companies Ordinance (Cap 32);
  - (iii) a summary financial report of the corporation, a copy of which was sent at the relevant time in compliance with section 141CA of the Companies Ordinance (Cap 32) to a person entitled to be sent the copy;
  - (iv) a set of financial statements of the corporation-
    - (A) providing information on the results of the operations or cash flows of the corporation in a period of at least 3 months;
    - (B) providing information on the state of affairs of the corporation as at the end of that period; and
    - (C) issued, circulated, published or distributed at the relevant time for the purposes of the Listing Rules; or
  - (v) a specified report required for a listing document issued at the relevant time by or on behalf of the corporation;
- (b) in relation to a listed collective investment scheme, means-
- (i) a set of financial statements of the scheme-
    - (A) providing information on the results of the operations or cash flows of the scheme in a period of at least 3 months;
    - (B) providing information on the state of affairs of the scheme as at the end of that period; and
    - (C) issued, circulated, published or distributed at the relevant time for the purposes of the relevant code or the Listing Rules; or
  - (ii) a specified report required for a listing document issued at the relevant time by or on behalf of the scheme;

"relevant requirement"-

- (a) in relation to a relevant financial report of a listed corporation, means an accounting requirement as to the matters or information to be included in the report, as provided in-
- (i) the Companies Ordinance (Cap 32), as in force at the material time;
  - (ii) the standards of accounting practices issued or specified, or deemed to be issued or specified, under section 18A of the Professional Accountants Ordinance (Cap 50), as in force at the material time;
  - (iii) the International Financial Reporting Standards issued by the International Accounting Standards Board, as in force at the material time;
  - (iv) the Listing Rules; or
  - (v) any generally acceptable accounting principles allowed for usage under the Listing Rules;

- (b) in relation to a relevant financial report of a listed collective investment scheme, means an accounting requirement as to the matters or information to be included in the report, as provided in-
- (i) the standards of accounting practices issued or specified, or deemed to be issued or specified, under section 18A of the Professional Accountants Ordinance (Cap 50), as in force at the material time;
  - (ii) the International Financial Reporting Standards issued by the International Accounting Standards Board, as in force at the material time;
  - (iii) the Listing Rules;
  - (iv) any generally acceptable accounting principles allowed for usage under the Listing Rules; or
  - (v) the relevant code.

## PART 2

In sections 5(2) and 50 of this Ordinance-  
“relevant financial report”, in relation to a listed corporation, means-

- (a) a balance sheet of the corporation, together with any accounts annexed to it for the purposes of section 129C(1) of the Companies Ordinance (Cap 32), a copy of which was sent at the relevant time under section 129G of that Ordinance to a person entitled to be sent the copy;
- (b) a summary financial report of the corporation, a copy of which was sent at the relevant time in compliance with section 141CA of the Companies Ordinance (Cap 32) to a person entitled to be sent the copy; or
- (c) a specified report required for a prospectus issued at the relevant time by or on behalf of the corporation;

“relevant requirement”, in relation to a relevant financial report of a listed corporation, means an accounting requirement as to the matters or information to be included in the report, as provided in the Companies Ordinance (Cap 32), as in force at the material time.

## COMMENTARY

### Distinguishing the different interpretation and application of “relevant financial report” and “relevant requirement” as it applies to the Ordinance

[Sch1.01]

Part 1 of Schedule 1 of the Ordinance supplies the definition of “relevant financial report” and “relevant requirement” as it applies to all listed companies and listed collective investment schemes as defined in all sections of the Ordinance except section 5(2) and section 50 of the Ordinance.

Part 2 of Schedule 1 of the Ordinance supplies the definition of “relevant financial report” and “relevant requirement” as it applies to all listed companies as so *particularly defined* in section 5(2) and section 50 of the Ordinance.

## Schedule 2: PROVISIONS RELATING TO COUNCIL AND ITS MEMBERS Ver Date: 01/12/2006

### 1. Seal

(1) The affixing of the common seal of the Council is to be authenticated by the signature of-

- (a) the Chairman of the Council; or
- (b) such other member of the Council authorized by it for the purpose.

(2) Any document purporting to be a document duly executed under the seal of the Council is to be received in evidence and is, unless the contrary is proved, to be deemed to be a document so executed.

### 2. Tenure of appointed members

(1) An appointed member of the Council is to be appointed for a term not exceeding 3 years.

(2) On the expiry of his period of appointment or reappointment, an appointed member of the Council is eligible for reappointment.

(3) An appointed member of the Council may resign from office by giving notice in writing to the Chief Executive. A notice of resignation takes effect on the date specified in the notice or, if no date is specified, on the date of receipt by the Chief Executive of the notice.

### 3. Acting Chairman or temporary member

(1) If-

- (a) because of absence from Hong Kong or any other reason, the Chairman of the Council is unable to perform the functions of his office as Chairman; or
- (b) there is a vacancy in the office of Chairman of the Council, the Chief Executive may appoint another appointed member of the Council who is a lay person to act as Chairman of the Council during the absence, incapacity or vacancy.

(2) If, because of absence from Hong Kong or any other reason, an appointed member of the Council, other than the Chairman, is unable to perform the functions of his office as member, the Chief Executive may, subject to subsection (3), appoint another person to be a temporary member in his place during his absence or incapacity.

(3) If the Chief Executive is to appoint a person to be a temporary member in the place of an appointed member of the Council who was appointed under section 7(1)(c)(i), (ii) or (iii) of this Ordinance on the nomination of another person, the Chief Executive shall make the appointment on the nomination of that other person.

(4) If a person is appointed to act as Chairman of the Council, the person may perform all the functions of the Chairman.

(5) If a person is appointed as a temporary member of the Council, the person may perform all the functions of the member in whose place the person is appointed.

#### 4. Terms and conditions of appointment of members

All matters relating to the terms and conditions of the appointment of an appointed member of the Council are to be determined by the Chief Executive.

#### 5. Removal of appointed members

- (1) If the Chief Executive is satisfied that an appointed member of the Council—
  - (a) has become a public officer;
  - (b) has become bankrupt;
  - (c) is incapacitated by physical or mental illness;
  - (d) is convicted in Hong Kong of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in Hong Kong of an offence that, if committed in Hong Kong, would be an offence so punishable; or
  - (e) is otherwise unable or unfit to perform the functions of a member of the Council, the Chief Executive may declare his office as member of the Council to be vacant, and upon such declaration the office becomes vacant.

(2) The Chief Executive shall give notice of a declaration under subsection (1) in such manner as he thinks fit.

(3) Subsection (4) applies if notice of a declaration is given under subsection (2) otherwise than by notice published in the Gazette.

(4) The Chief Executive shall, as soon as practicable after having given notice under subsection (2), give another notice of the declaration by notice published in the Gazette.

#### 6. Meetings and proceedings of Council

(1) Meetings are to be held as often as necessary to enable the Council to perform its functions.

(2) A meeting of the Council may be convened by the Chairman of the Council. The Chairman of the Council is to convene a meeting of the Council on being given a notice for that purpose by 2 or more other members of the Council.

(3) The procedure for convening meetings of the Council and for the conduct of business at those meetings is, subject to this Ordinance, to be determined by the Council.

(4) The quorum for a meeting of the Council is two thirds of the members of the Council.

(5) A member of the Council is regarded as being present at a meeting of the Council if—

- (a) he participates in the meeting by telephone, video conferencing or other electronic means; and

- (b) he is able to communicate with the other members present at the meeting and they are able to communicate with him.

(6) If a member of the Council is required under section 53(5) or (6) of this Ordinance not to be present during any deliberation of, or not to take part in any decision of or the making of a determination by, the Council, he is not to be counted for the purpose of forming a quorum at such part of a meeting of the Council that is held for such deliberation or decision or the making of such determination.

(7) The Chairman of the Council shall preside at all meetings of the Council. Subject to section 3(1), if the Chairman is absent from any meeting or any part of the meeting, he may nominate an appointed member of the Council who is a lay person to preside in his absence as Chairman at the meeting or that part of the meeting.

(8) At a meeting of the Council, each member of the Council present has one vote.

(9) Subject to subsection (10), every matter for decision at a meeting of the Council is to be determined by a majority of the votes of the members of the Council present. In the case of an equality of votes, the Chairman of the Council, or the member of the Council nominated by the Chairman to preside at the meeting, has a casting vote.

(10) For the purposes of subsection (9), the number of the votes that constitutes the majority, apart from the casting vote (if any), is to be 4 or more.

#### 7. Transaction of business by circulation of papers

(1) The Council may transact any of its business by circulation of papers.

(2) A written resolution that is approved in writing by all the members of the Council present in Hong Kong (being not less than the number required to constitute two thirds of the members of the Council) is as valid and effectual as if it had been duly passed at a meeting of the Council by the votes of the members of the Council so approving the resolution.

#### 8. Committees

(1) The Council may establish committees for any general or special purposes as it thinks fit.

(2) The Council shall appoint one of its members to be the chairman of such a committee.

(3) The Council may appoint other members of such a committee. The number of such other members who are members of the Council is to exceed the number of those who are not.

(4) The procedure for convening meetings of such a committee and for the conduct of business at those meetings is, subject to any direction of the Council, to be determined by the committee.