

# *Part I*

## PRELIMINARY

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### **Background**

Part 1 of this Ordinance largely sets out various terms used throughout this Ordinance. Section 2 contains a lengthy list of definitions, whilst section 3 specifically defines the term 'client assets' for the purposes of this Ordinance. Section 5 defines when a financial institution within the scope of this Ordinance is considered to no longer be viable – this must be considered in the context of section 25, which sets out the conditions for *initiating a resolution* under this Ordinance.

The powers of the Financial Secretary to designate certain matters under this Ordinance, such as bringing other financial institutions within scope, and naming a lead resolution authority in respect of a cross-sectoral group, are also set out herein.

### **1. Short title and commencement**

(1) This Ordinance may be cited as the Financial Institutions (Resolution) Ordinance.

(2) This Ordinance comes into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

## COMMENTARY

**Commencement**

- [1.001] Section 1 sets out the short title of this Ordinance. The Financial Institutions (Resolution) Ordinance shall commence operation on a day appointed by the Secretary for Financial Services and the Treasury.

**Financial Institutions (Resolution) Ordinance (Commencement) Notice 2017**

- [1.002] On 9 May, 2017, the Financial Institutions (Resolution) Ordinance (Commencement) Notice 2017 (LN 77 of 2017) appointed 7 July, 2017 as the day on which this Ordinance would come into operation, *though the vetting process for the (Commencement) Notice as well as the Financial Institutions (Resolution) (Protected Arrangements) Regulation has now been extended, and may affect the date of commencement.*

- [1.003] However, *excluded from commencing operation* were Part 8, section 192, and Division 10 of Part 15. Part 8 concerns Clawback of Remuneration, which shall only come into operation after the Chief Justice has made rules pursuant to section 145 concerning the practice and procedure of the Court in respect of applications under that section. Section 192 concerns Notice of Intention to present winding up petition to resolution authority, which shall only come into operation after the Chief Justice has made rules under section 192 in respect of the practice and procedure of the Court in respect of such Notice. Division 10 of Part 15 concerns Amendments to Insurance Companies (Amendment) Ordinance 2015 (12 of 2015), which was only to be adopted if certain provisions of the Insurance Companies (Amendment) Ordinance 2015 commenced operation after this Ordinance. As those provisions commence operation on 26 June, 2017, it is not necessary to commence Division 10 of Part 15.

## 2. Interpretation

- (1) In this Ordinance –  
**act** (作為) includes a series of acts;  
**Additional Tier 1 capital instrument** (額外一級資本票據) means a capital instrument issued by an authorized institution that meets the qualifying criteria set out in Schedule 4B to the Banking (Capital) Rules (Cap. 155 sub. leg. L), including the requirement that the terms and conditions of the instrument contain a point of non-viability provision;

**affected entity** (受影響實體) means any of the following in respect of which a Part 5 instrument is made under this Ordinance –

- (a) a within scope financial institution;
- (b) a holding company of a within scope financial institution;
- (c) an affiliated operational entity of a within scope financial institution;

**affiliated operational entity** (相聯營運實體), in relation to a within scope financial institution, means a body corporate that –

- (a) is a group company of the financial institution; and
- (b) provides services, directly or indirectly, to the financial institution;

**appeal tribunal** (上訴審裁處) means –

- (a) the Resolution Compensation Tribunal; or
- (b) the Resolvability Review Tribunal;

**appointing person** (委任人) – see section 95(1);

**asset management vehicle** (資產管理工具) – see section 51;

**assets** (資產) means any legal or equitable estate or interest (whether present or future, vested or contingent or personal or assignable) in real or personal property of any description and includes money, securities, choses in action and documents;

**authorized institution** (認可機構) has the meaning given by section 2(1) of the Banking Ordinance (Cap. 155);

**authorized institution incorporated in Hong Kong** (在香港成立為法團的認可機構) has the meaning given by section 2(1) of the Banking Ordinance (Cap. 155);

**authorized institution incorporated outside Hong Kong** (在香港以外成立為法團的認可機構) has the meaning given by section 2(1) of the Banking Ordinance (Cap. 155);

**authorized insurer** (獲授權保險人) has the same meaning as in the Insurance Companies Ordinance (Cap. 41);

**bail-in instrument** (內部財務重整文書) means an instrument made under section 58;

**bank** (銀行) has the meaning given by section 2(1) of the Banking Ordinance (Cap. 155);

**banking sector** (銀行界) means the sector comprised of banking sector entities;

**banking sector entity** (銀行界實體) means any of the following –

- (a) an authorized institution incorporated in Hong Kong;
- (b) an authorized institution incorporated outside Hong Kong;
- (c) a settlement institution, as defined by section 2 of the Payment Systems and Stored Value Facilities Ordinance



(Cap. 584), of a designated clearing and settlement system that is not otherwise an authorized institution (excluding a settlement institution that is wholly owned and operated by the Government);

- (d) a system operator, as defined by section 2 of the Payment Systems and Stored Value Facilities Ordinance (Cap. 584), of a designated clearing and settlement system (excluding a system operator that is wholly owned and operated by the Government);
- (e) a designated within scope financial institution of which the Monetary Authority is designated under section 6(1)(a)(ii) as the resolution authority;

**body corporate** (法人團體) has the meaning given by section 2(1) of the Companies Ordinance (Cap. 622);

**bridge institution** (過渡機構) – see section 43;

**business day** (營業日) means a day that is not –

- (a) a general holiday;
- (b) a Saturday; or
- (c) a black rainstorm warning day or gale warning day as defined by section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1);

**capital reduction instrument** (資本縮減文書) means an instrument made under section 31(1);

**chief executive officer** (行政總裁), in relation to an entity, means (except in Part 9) a person (by whatever name called) who is responsible (alone or jointly with others) under the immediate authority of the directors for the implementation of the general strategy of the entity and for the general management of the business of the entity and includes, if the entity is established or incorporated in a non-Hong Kong jurisdiction, the person who is responsible (alone or jointly with others) for the general management of the business of the entity in Hong Kong;

**claims outstanding** (未決申索) has the meaning given by paragraph 1(1) of Part 1 of the Third Schedule to the Insurance Companies Ordinance (Cap. 41);

**class 1 securities** (第1類證券) means shares or stock;

**class 2 securities** (第2類證券) means debentures and includes debenture stocks, loan stocks, bonds, certificates of deposit and any other instruments creating or acknowledging a debt;

**class 3 securities** (第3類證券) means warrants or other instruments that entitle the holder to acquire class 1 or class 2 securities;

**clawback order** (退扣令) – see section 146;

**client** (客戶), in relation to a within scope financial institution, means –

- (a) an entity for which the financial institution provides a service the provision of which constitutes a regulated activity and includes another financial institution that deposits with the financial institution securities or other property as collateral but, in connection with a leveraged foreign exchange contract, does not include a recognized counterparty; or
- (b) an entity for which the financial institution, or a holding company or an affiliated operational entity of the financial institution, holds securities or other property in the course of carrying on a business as a trustee or custodian of securities or other property, whether on trust or by contract;

**client assets** (客戶資產) – see section 3;

**condition 1** (條件1) means the condition set out in section 25(2);

**condition 2** (條件2) means the condition set out in section 25(3);

**condition 3** (條件3) means the condition set out in section 25(4);

**contract** (合約) includes an arrangement of any kind (made, or evidenced, in writing) that imposes obligations on, or creates rights for, a party to it that are intended to be legally enforceable;

**control function** (監控職能), in relation to an entity, means any of the following functions that is likely to enable the person responsible for the performance of the function to exercise a significant influence on the business carried on by the entity –

- (a) risk management function, that is, a function to establish the strategies, policies and procedures to manage different types of key risks of the entity;
- (b) financial control function, that is, a function to oversee all financial matters (including investments, accounting and financial reporting) of the entity;
- (c) compliance function, that is, a function to establish and formulate standards, policies and procedures to ensure compliance with legal and regulatory requirements that are applicable to the entity;
- (d) internal audit function, that is, a function to establish and implement an audit plan to examine and evaluate the adequacy and effectiveness of the controls to manage risks of the entity;
- (e) any other function specified in a notice under section 6(5);

**Court** means the Court of First Instance;

**critical financial function** (關鍵金融功能) means an activity or operation carried on, or a service provided, by a financial institution –

- (a) on which an entity (other than a group company of the financial institution) relies; and



- (b) that, if discontinued, would be likely to –
- (i) lead to the disruption of services that are essential to the economy of Hong Kong;
  - (ii) undermine the general confidence of participants in the financial market in Hong Kong; or
  - (iii) give rise to contagion within the financial system of Hong Kong, for any reason including the size, interconnectedness, complexity or cross-border activities of, or the market share held by, the financial institution or the group of companies of which the financial institution is a member;

**cross-sectoral group** (跨界別集團) means a group of companies that includes within scope financial institutions from more than one sector;

**current** (最新), in relation to a list published by the Financial Stability Board, means the list as updated or supplemented by that Board from time to time;

**deposit** (存款) has the meaning given by section 2(1) of the Deposit Protection Scheme Ordinance (Cap. 581);

**deputy chief executive officer** (副行政總裁), in relation to an entity, means a person (by whatever name called) who is responsible (alone or jointly with others) under the immediate authority of the chief executive officer of the entity for the implementation of the general strategy of the entity and for the general management of the business of the entity and includes, if the entity is established or incorporated in a non-Hong Kong jurisdiction, the person who is responsible (alone or jointly with others) under the immediate authority of the chief executive officer of the entity for the general management of the business of the entity in Hong Kong;

**designated clearing and settlement system** (指定結算及交收系統) has the meaning given by section 2 of the Payment Systems and Stored Value Facilities Ordinance (Cap. 584);

**designated within scope financial institution** (指定受涵蓋金融機構) means a financial institution that is designated under section 6(1)(a) as a within scope financial institution;

**director** (董事), except in Part 9, has the meaning given by section 2(1) of the Companies Ordinance (Cap. 622);

**document** (文件) includes any form of input into, or output from, an information system and any writing or similar material (whether produced mechanically, electronically, magnetically, optically, manually or by any other means);

**entity** (實體) means a person;

**entity in resolution** (被處置實體) means a within scope financial institution, or a holding company or affiliated operational entity of

a within scope financial institution, the resolution of which has been initiated and is ongoing;

**financial institution** (金融機構) means an entity that is primarily engaged in the provision of financial services or the conduct of financial activities and includes a bank, an insurer, a licensed corporation and financial market infrastructure;

**financial market infrastructure** (金融市場基建) means a multilateral system among participating financial institutions used for clearing, settling or recording payments, securities, derivatives or other financial transactions and includes any payment system, central securities depository, securities settlement system, central counterparty and trade repository;

**financial services holding company** (金融服務控權公司) means a holding company that is, or all the subsidiaries of which are, primarily engaged in the provision of, or in supporting the provision of, financial services or the conduct of financial activities;

**Financial Stability Board** (金融穩定理事會) means the Financial Stability Board established under that name by the Heads of State and Government of the Group of Twenty (G20) forum of 19 countries and the European Union at a summit held in London, United Kingdom on 2 April 2009 and includes any successor body of that Board;

**fixed remuneration** (固定報酬) means remuneration (whether in cash or non-cash benefits) that is payable to a person of an amount that is fixed at the beginning of a period in respect of services provided by the person to a financial institution during that period excluding any payment that is in the nature of a bonus or incentive payment related to the performance of the person, or the performance (including profitability) of the financial institution or of any part of the business of the financial institution, during any period;

**function** (職能) includes power, authority and duty;

**global systemically important bank** (具全球系統重要性銀行) means an entity that is, or is a member of a group of companies that is or that includes a company that is, included in –

- (a) the current list of global systemically important banks published by the Financial Stability Board; or
- (b) any other current list published by that Board that is designated by the Financial Secretary under section 6(4) as being equivalent to the list mentioned in paragraph (a);

**global systemically important insurer** (具全球系統重要性保險人) means an entity that is, or is a member of a group of companies that is or that includes a company that is, included in –

- (a) the current list of global systemically important insurers published by the Financial Stability Board; or



- (b) any other current list published by that Board that is designated by the Financial Secretary under section 6(4) as being equivalent to the list mentioned in paragraph (a);
- group company** (集團公司), in relation to a financial institution, means a body corporate that is (or, but for the performance of a function by a resolution authority or a non-Hong Kong resolution authority, would be) a member of the same group of companies as the financial institution;
- group of companies** (公司集團) means a holding company and its subsidiaries, irrespective of where any of them is incorporated;
- holding company** (控股公司), in relation to a body corporate, has the meaning given by section 13 of the Companies Ordinance (Cap. 622);
- independent valuer** (獨立估值師) means a person appointed under section 96(2);
- information** (資訊、資料、消息) includes data, text, images, sound codes, computer programmes, software and databases, and any combination of them;
- information system** (資訊系統) has the meaning given by section 2(1) of the Electronic Transactions Ordinance (Cap. 553);
- Insurance Authority** (保險業監督) means the Insurance Authority appointed under section 4 of the Insurance Companies Ordinance (Cap. 41);
- insurance sector** (保險界) means the sector comprised of insurance sector entities;
- insurance sector entity** (保險界實體) means any of the following –
- (a) an authorized insurer that is a global systemically important insurer;
  - (b) a designated within scope financial institution of which the Insurance Authority is designated under section 6(1)(a)(ii) as the resolution authority;
- insurer** (保險人) has the meaning given by section 2(1) of the Insurance Companies Ordinance (Cap. 41);
- lead resolution authority** (主導處置機制當局) means a resolution authority designated under section 7;
- liabilities** (法律責任、負債、債務) means any liabilities, duties or obligations (whether present or future, vested or contingent or personal or assignable) and includes any liabilities under class 2 or class 3 securities;
- licensed corporation** (持牌法團) has the meaning given by section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571);
- loss-absorbing capacity requirement rule** (《吸收虧損能力規定規則》) means a rule made under section 19(1);

- Monetary Authority** (金融管理專員) means the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap. 66);
- non-bank non-insurer global systemically important financial institution** (具全球系統重要性非銀行非保險人金融機構) means an entity that is, or is a member of a group of companies that is or that includes a company that is, included in –
- (a) the current list of non-bank non-insurer global systemically important financial institutions published by the Financial Stability Board; or
  - (b) any other current list published by that Board that is designated by the Financial Secretary under section 6(4) as being equivalent to the list mentioned in paragraph (a);
- non-Hong Kong financial institution** (非香港金融機構) means a financial institution established or incorporated in a non-Hong Kong jurisdiction;
- non-Hong Kong group company** (非香港集團公司), in relation to a non-Hong Kong financial institution, means an entity that is (or, but for the performance of a function by a resolution authority or a non-Hong Kong resolution authority, would be) a member of the same group of companies as the non-Hong Kong financial institution;
- non-Hong Kong jurisdiction** (非香港司法管轄區) means a jurisdiction other than Hong Kong;
- non-Hong Kong law** (非香港法律) means the law of a non-Hong Kong jurisdiction;
- non-Hong Kong property** (非香港財產) means any property in respect of which any issue arising in any proceedings would have to be determined (in accordance with the rules of private international law) by reference to non-Hong Kong law;
- non-Hong Kong resolution action** (非香港處置行動) means an action under the law of a non-Hong Kong jurisdiction to manage the failure or likely failure of a non-Hong Kong financial institution or non-Hong Kong group company –
- (a) the anticipated results of which are, in relation to the non-Hong Kong financial institution or non-Hong Kong group company, broadly comparable to results that could have been anticipated from the exercise of a power conferred by Part 5, or by Schedule 3, 4 or 6, on a resolution authority in respect of an entity in Hong Kong; and
  - (b) the objectives of which are, in relation to that jurisdiction, broadly comparable to the resolution objectives as they apply in relation to Hong Kong;



**non-Hong Kong resolution authority** (非香港處置機制當局) means an entity in a non-Hong Kong jurisdiction that performs in that jurisdiction functions broadly corresponding to those performed by a resolution authority in Hong Kong;

**non-Hong Kong resolution plan** (非香港處置計劃) means a plan developed or approved by a non-Hong Kong resolution authority to support strategies devised by it for securing the orderly resolution of an entity;

**officer** (高級人員), in relation to an entity, means (except in Part 8) a person who is –

- (a) a director of the entity;
- (b) the chief executive officer or deputy chief executive officer of the entity; or
- (c) a person who is employed by, or acts for or on behalf of or under an arrangement with, the entity and is principally responsible, alone or jointly with others, for –
  - (i) the management of part of the business of the entity; or
  - (ii) the performance of one or more of the control functions of the entity;

**omission** (不作為、遺漏) includes a series of omissions;

**onward bridge institution** (後續過渡機構) – see section 44;

**Part 5 instrument** (第5部文書) means any of the following instruments made under Part 5 –

- (a) a securities transfer instrument;
- (b) a property transfer instrument;
- (c) a bail-in instrument;

**party** (關涉方) –

- (a) in relation to a proceeding in the Resolution Compensation Tribunal, means –
  - (i) the applicant under section 98(2) or 107(1), including, in the case of an application under section 107(1), an applicant as the representative of 2 or more entities;
  - (ii) an applicant under regulations made under section 184;
  - (iii) a person who is joined as a party to an application in accordance with rules made by the Chief Justice under section 140;
  - (iv) the relevant resolution authority, if it is not the applicant; or
  - (v) the independent valuer, except in the case of an application under regulations made under section 184;
- (b) in relation to a proceeding in the Resolvability Review Tribunal, means –
  - (i) the applicant under section 17(1) or under a loss-absorbing capacity requirement rule;

- (ii) a person who is joined as a party to an application in accordance with rules made by the Chief Justice under section 122; or

- (iii) the relevant resolution authority;

**point of non-viability provision** (陷入不可持續經營狀況條文) –

- (a) in relation to an Additional Tier 1 capital instrument, means a provision mentioned in section 1(q) of Schedule 4B to the Banking (Capital) Rules (Cap. 155 sub. leg. L); and
- (b) in relation to a Tier 2 capital instrument, means a provision mentioned in section 1(k) of Schedule 4C to the Banking (Capital) Rules (Cap. 155 sub. leg. L);

**policy holder** (保單持有人) has the meaning given by section 2(1) of the Insurance Companies Ordinance (Cap. 41);

**pre-resolution creditor** (處置前債權人), in relation to an affected entity, means a person who was a creditor of the affected entity immediately before the resolution of the entity was initiated;

**pre-resolution shareholder** (處置前股東), in relation to an affected entity, means a person who, immediately before the resolution of the entity was initiated, held a security issued by the affected entity;

**property transfer instrument** (財產轉讓文書) – see section 2(1) of Schedule 4;

**protected deposit** (受保障存款) has the meaning given by section 2(1) of the Deposit Protection Scheme Ordinance (Cap. 581);

**recognition instrument** (確認文書) means an instrument made under section 187(2);

**recognized clearing house** (認可結算所) means a company recognized, or deemed to have been recognized, under section 37(1) of the Securities and Futures Ordinance (Cap. 571) as a clearing house;

**recognized exchange company** (認可交易所) means a company recognized, or deemed to have been recognized, under section 19(2) of the Securities and Futures Ordinance (Cap. 571) as an exchange company;

**recognized stock market** (認可證券市場) has the meaning given by section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571);

**record** (紀錄) means any record of information (however compiled or stored) and includes –

- (a) any books, deeds, registers, contracts, vouchers, receipts or data material, or information that is recorded otherwise than in a legible form but is capable of being reproduced in a legible form;
- (b) any 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

- (c) 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;

**resolution** (處置) means the process for addressing the fact that a within scope financial institution has ceased, or is likely to cease, to be viable that involves the application of one or more stabilization options and the performance of related functions;

**resolution authority** (處置機制當局) means –

- (a) in relation to a banking sector entity, the Monetary Authority;  
(b) in relation to an insurance sector entity, the Insurance Authority; or  
(c) in relation to a securities and futures sector entity, the Securities and Futures Commission;

**Resolution Compensation Tribunal** (處置補償審裁處) means the Tribunal established by section 127(1);

**resolution funding account** (處置資金帳戶) – see section 176;

**resolution funds** (處置資金) – see section 176;

**resolution objectives** (處置目標) means the objectives specified in section 8(1);

**Resolvability Review Tribunal** (處置可行性覆檢審裁處) means the Tribunal established by section 110(1);

**rights** (權利) means any rights, powers, privileges or immunities (whether present or future, vested or contingent or personal or assignable);

**Scheme member** (計劃成員) has the meaning given by section 2(1) of the Deposit Protection Scheme Ordinance (Cap. 581);

**section 10 entity** (第 10 條實體) means an entity appointed by a resolution authority under section 10;

**sector** (界別) means the banking sector, the insurance sector or the securities and futures sector;

**securities** (證券), subject to subsection (6) and section 3(2), includes anything falling within any of the following classes –

- (a) class 1 securities;  
(b) class 2 securities;  
(c) class 3 securities;

**Securities and Futures Commission** (證監會) means the Securities and Futures Commission referred to in section 3(1) of the Securities and Futures Ordinance (Cap. 571);

**securities and futures sector** (證券及期貨界) means the sector comprised of securities and futures sector entities;

**securities and futures sector entity** (證券及期貨界實體) means any of the following –

- (a) a licensed corporation that is a non-bank non-insurer global systemically important financial institution;  
(b) a licensed corporation that is a branch or subsidiary of, or a subsidiary of a holding company of, a global systemically important bank or a global systemically important insurer;  
(c) a recognized clearing house;  
(d) a designated within scope financial institution of which the Securities and Futures Commission is designated under section 6(1)(a)(ii) as the resolution authority;  
(e) a recognized exchange company that is designated under section 6(1)(b) as a within scope financial institution;

**securities transfer instrument** (證券轉讓文書) – see section 2(1) of Schedule 3;

**stabilization option** (穩定措施) means an option mentioned in section 33(2)(a), (b), (c), (d) or (e);

**subsidiary** (附屬公司), in relation to a body corporate, has the meaning given by section 15 of the Companies Ordinance (Cap. 622);

**Tier 2 capital instrument** (二級資本票據) means a capital instrument issued by an authorized institution that, subject to subsection (7), meets the qualifying criteria set out in Schedule 4C to the Banking (Capital) Rules (Cap. 155 sub. leg. L), including the requirement that the terms and conditions of the instrument contain a point of non-viability provision;

**title transfer arrangement** (所有權轉讓安排) – see section 74;

**TPO company** (暫時公有公司) means a temporary public ownership company referred to in section 69;

**transfer date** (轉讓日期) means the date on which, or time at which, a securities transfer instrument or property transfer instrument (or the relevant part of it) takes effect;

**transferor** (出讓人), in relation to a transfer of securities, assets, rights or liabilities, means the entity that held them, or in which they were vested, immediately before the transfer;

**variable remuneration** (浮動報酬) means remuneration (whether in cash or non-cash benefits), other than fixed remuneration, that is payable to a person in respect of services provided by the person to a financial institution;

**wages** (工資) has the meaning given by section 2(1) of the Employment Ordinance (Cap. 57);

**winding up hierarchy principles** (清盤等級原則) means –

- (a) the principle that holders of securities issued by, or creditors of, a financial institution should as a general rule be treated in relation to a bail-in provision in accordance with the priority they would enjoy on a winding up of the institution; and

[31.012] Section 2(7) above also modifies the definition of Tier 2 capital instrument to *exclude the words* “and the recognition of the instrument in regulatory capital in the remaining 5 years before maturity is amortized on a straight line basis of 20% per year” from the qualifying criteria of Schedule 4C of the Banking (Capital) Rules (Cap. 155L).

**Section 10 entity**

[31.013] Under section 10 of this Ordinance, a resolution authority may appoint entities for the purposes of assisting in the performance of resolution functions under this Ordinance.

**32. Capital reduction instruments: supplementary matters**

The following provisions apply in relation to a capital reduction instrument in the same way as they apply in relation to a bail-in instrument –

- (a) section 62 (bail-in instrument may include directions);
- (b) section 2 of Schedule 6 (procedure);
- (c) section 3(1) and (4) of Schedule 6 (effect of bail-in instrument);
- (d) section 4 of Schedule 6 (continuity);
- (e) section 7 of Schedule 6 (instruments);
- (f) section 8 of Schedule 6 (incidental provision etc.).

**COMMENTARY**

**Provisions applicable to capital reduction instruments**

[32.001] This section specifies provisions under Part 5 and Schedule 6 of this Ordinance that are applicable to a capital reduction instrument in the same way those sections would apply to a bail-in instrument under Part 5.

# Part 5

## RESOLUTION

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**Background**

This Part sets out the extensive provisions in relation to the resolution of financial institutions under this Ordinance. It consists of five divisions: (i) statutory options to stabilize financial institutions; (ii) directions in respect of continued performance of essential services; (iii) the suspension of obligations during resolution; (iv) provisions in respect of default event provisions; and (v) a general provision in relation to the functions of a resolution authority.

Division 1 of this Part sets out under its subdivisions the five stabilization options that may be applied to a financial institution for the purposes of stabilizing those parts of the financial institution's business that perform critical financial functions and protect the stability of the financial system. Those options may be deployed individually, in combination or sequentially, to part or the whole of the financial institution's business.

These options have been derived from the 'General resolution powers' as set out in the 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (KA) published by the Financial Stability Board in 2011. As provided as part of our ProView e-book exclusive content.

Division 1 also sets out provisions for the protection of the economic effect of set-off and netting arrangements, security arrangements, structured finance arrangements and clearing and settlement systems arrangements that may otherwise be affected by the application of stabilization options. It also provides for the deferral of authorization requirements that might otherwise be applicable in the application of the bridge institution or asset management vehicle stabilization options.

Division 2 empowers a resolution authority to direct a financial institution in resolution or its affiliated operational entity to continue to provide services which are essential for the continued performance of functions critical to the financial system of Hong Kong. It also provides for certain protections,

such as from winding up proceedings against such a financial institution in those circumstances.

Division 3 of this Part provides for the suspension of obligations under a contract to which the financial institution in resolution or its subsidiary are party to. However, it also provides for obligations that are excluded from the exercise of that power.

Division 4 applies to those contracts which continue to be performed by the financial institution. It provides for the disregarding of the triggering of early termination rights by the exercise of resolution powers, and the suspension of termination rights that would otherwise be exercisable.

Finally, Division 5 contains a general provision in respect of the powers of a resolution authority in respect of a financial institution in resolution.

### Division 1 – Stabilization Options

#### Subdivision 1 – Overview

#### 33. Stabilization options

(1) There are 5 stabilization options that a resolution authority may apply to a within scope financial institution in resolving the institution.

**Note –**

See section 28 on the application of stabilization options to a holding company of a within scope financial institution and section 29 on the application of such options to an affiliated operational entity of such an institution.

(2) Those options are –

- (a) transfer to a purchaser;
- (b) transfer to a bridge institution;
- (c) transfer to an asset management vehicle;
- (d) bail-in;
- (e) transfer to a TPO company.

(3) Consideration that is fair and reasonable in the circumstances, the determination of which is informed by a valuation made under section 35(1), is due to the transferor in respect of any transfer under a Part 5 instrument.

(4) Consideration mentioned in subsection (3) may be comprised of a monetary payment or take any other form, including the assumption of liabilities, as may be appropriate in the circumstances.

### COMMENTARY

#### Powers to stabilize financial institutions

This section sets out 5 options to stabilize a financial institution or those parts of a financial institution's business which need to be continued to ensure the continuity of critical functions performed by that financial institution or to protect the stability of the financial system. [33.001]

The options allow the resolution authority to transfer the securities, assets, rights or liabilities to other entities, publicly or privately owned, and for the bail-in of the financial institution. [33.002]

The options are derived from the 'General resolution powers' under the 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (KA) published by the Financial Stability Board in 2011. KA 3.2 states: "Resolution authorities should have at their disposal a broad range of resolution powers, which should include powers to do the following: [33.003]

- (vi) Transfer or sell assets and liabilities, legal rights and obligations, including deposit liabilities and ownership in shares, to a solvent third party, notwithstanding any requirements for consent or novation that would otherwise apply;
- (vii) Establish a temporary bridge institution to take over and continue operating certain critical functions and viable operations of a failed firm;
- (viii) Establish a separate asset management vehicle (for example, as a subsidiary of the distressed firm, an entity with a separate charter, or as a trust or asset management company) and transfer to the vehicle for management and run-down non-performing loans or difficult-to-value;
- (ix) Carry on bail-in within resolution as a means to achieve or help achieve continuity of essential functions either (i) by recapitalising the entity hitherto providing these functions that is no longer viable, or, alternatively, (ii) by capitalizing a newly established entity or bridge institution to which these functions have been transferred following closure of the non-viable firm (the residual business of which would then be wound up and the firm liquidated);

..."



**Jurisdiction extended**

- [33.004] Under sections 28 and 29 above, the jurisdiction of a resolution authority is extended to holding companies and affiliated operational entities, subject to the additional conditions under those sections.

**Purchaser**

- [33.005] For transfer to a purchaser, see Subdivision 2 below.

**Bridge institution**

- [33.006] A bridge institution is a company owned by the Government created to receive a transfer and effect a timely disposal. For bridge institutions, see Subdivision 3 below.

**Asset management vehicle**

- [33.007] An asset management vehicle is a company owned by the Government created to receive a transfer of assets, rights or liabilities from a within scope financial institution or a bridge institution. For asset management vehicles, see Subdivision 4 below.

**Bail-in**

- [33.008] For bail-in, see Subdivision 5 below.

**TPO company**

- [33.009] A TPO company is a temporary public ownership company. For TPO companies, see Subdivision 6 below.

**Consideration for transfer**

- [33.010] As the stabilization options require the transfer the securities, assets, rights or liabilities to other entities, consideration must be provided for such a transfer. This section requires that the consideration given must be fair and reasonable in the circumstances, and shall be based upon the valuation performed under section 35 below. The form of such consideration is also provided for.

**34. Application of stabilization options**

- (1) A resolution authority, having regard to the resolution objectives, may choose to apply to a within scope financial institution –
- one stabilization option at a time;
  - a combination of more than one stabilization option at the same time; or
  - 2 or more stabilization options sequentially.

(2) Without limiting subsection (1)(b), different stabilization options may be applied at the same time to different parts of the business of a financial institution.

(3) A resolution authority may choose not to apply a stabilization option to any part of the business of a financial institution while applying one or more to the other part or parts.

**COMMENTARY****Application of powers**

Under KA 3.8 in respect of 'Exercise of resolution powers' that "Resolution authorities should have the legal and operational capacity to: [34.001]

- apply one or a combination of resolution powers, with resolution actions being either combined or applied sequentially;
- apply different types of resolution powers to different parts of the firm's business (for example, retail and commercial banking, trading operations, insurance); and
- initiate a wind-down for those operations that, in the particular circumstances, are judged by the authorities to be not critical to the financial system or the economy."

This section sets out the power of the resolution authority to apply the stabilization options singly, concurrent to one another, or sequentially, and to apply such options to segregated parts of a financial institution's business. [34.002]

**Stabilization not applied**

Under subsection 34(3), the resolution authority may also choose not to apply stabilization options to any part of the business of a financial institution, reflective of the wind-down of non-critical parts of such a financial institution under KA 3.8(iii). This raises the issue of whether or not such a wind-down would occur under the powers and provisions of this Ordinance, or whether the resolution authority may exercise its ordinary powers in respect of winding-up i.e. under section 122 of the Banking Ordinance (Cap. 155) for the Hong Kong Monetary Authority; Part 6 of the Insurance Companies Ordinance (Cap. 41) for the Insurance Authority; or section 212 of the Securities and Futures Ordinance (Cap. 571) in respect of the Securities and Futures Commission. [34.003]

**35. Valuation to be made**

(1) Subject to subsection (2), before a resolution authority applies a stabilization option to, or makes a capital reduction instrument in respect



of, a within scope financial institution, it must make a valuation for informing any decisions to be made by the resolution authority as to any of the following matters –

- (a) whether the conditions for applying a stabilization option or making a capital reduction instrument are satisfied;
- (b) if the conditions for applying a stabilization option are satisfied, which stabilization option to apply;
- (c) the extent to which –
  - (i) any Additional Tier 1 capital instrument or Tier 2 capital instrument should be written off or converted through the making of a capital reduction instrument; or
  - (ii) any liabilities or securities eligible to be the subject of a bail-in provision should be cancelled, modified, converted or otherwise dealt with through the making of a bail-in provision in a bail-in instrument;
- (d) what is to be transferred by a securities transfer instrument or property transfer instrument;
- (e) the value of any consideration due in respect of whatever is so transferred.

(2) If a valuation was made before a resolution authority made a capital reduction instrument in respect of a within scope financial institution, it may apply a stabilization option without making a fresh valuation.

#### COMMENTARY

##### Valuation

[35.001] This section requires that a valuation must be made by the resolution authority before applying one of the stabilization options or a capital reduction instrument.

[35.002] The valuation must be capable of informing decisions made by the resolution authority in respect of the satisfaction of the requisite conditions for applying a stabilization option or making a capital reduction instrument, which stabilization option to apply, the extent of the write-off or conversion under the capital reduction instrument or the extent of a bail-in, the extent of any transfer under a securities transfer instrument or property transfer instrument, and the value of consideration in respect of such transfer.

[35.003] The same valuation can be used in respect of a capital reduction instrument as for a stabilization option.

Section 36 below sets out the requirements for a valuation. [35.004]

##### Conditions

The conditions for initiating the resolution of a financial institution are set out under section 25 above. Additional conditions are imposed in respect of holding companies and affiliated operational entities under previous sections 28 and 29, respectively. [35.005]

##### Capital reduction instrument

For capital reduction instrument, see section 31 above. [35.006]

#### 36. Nature of valuation

A valuation made under section 35(1) must –

- (a) be fair in all the circumstances, be based on prudent and realistic assumptions, including assumptions as to rates of default and severity of losses, and take into account –
  - (i) if appropriate, available information from which a market price for assets and liabilities could be derived; and
  - (ii) accounting principles to the extent that they are relevant in assisting in the making of a valuation that is suitable for the purpose for which it is being made;
- (b) not assume that any financial support or assistance will be provided, directly or indirectly, to the financial institution by the Government, a public body or a public officer, other than in the ordinary course of business;
- (c) take account of the fact that expenses incurred by the resolution authority in connection with the application of a stabilization option to the financial institution may be recovered from the financial institution; and
- (d) take account of the fact that, if the application of a stabilization option to the financial institution includes the use of resolution funds for a purpose mentioned in section 178(4)(a) or (b), interest or fees may be charged in respect of the funds used and recovered from the financial institution.

#### COMMENTARY

##### Making a valuation

This section sets out the criteria for making a valuation under section 35 above. It sets out the assumptions and methodologies to be applied, including the taking into account of various matters. [36.001]



**37. Section 10 entity may assist in making valuation**

(1) A resolution authority may appoint a section 10 entity to assist in the making of a valuation under section 35(1).

(2) However, a section 10 entity that is appointed must be one that the resolution authority is satisfied –

(a) has the expertise, experience and resources that are, in the opinion of the resolution authority, necessary for the entity to be able to assist in the making of a valuation under section 35(1); and

(b) does not have an actual or material interest in common or in conflict with either of the following that could influence, or be reasonably perceived to influence, the entity's judgement in assisting in the making of a valuation under section 35(1) in relation to the entity concerned –

(i) the entity concerned;

(ii) an entity that is a member of the same group of companies as the entity concerned.

(3) The acts of an entity acting as a section 10 entity are valid despite the fact that it is afterwards discovered that there was a defect in the appointment of the section 10 entity, other than a defect arising because the section 10 entity did not meet the criteria specified in subsection (2).

**COMMENTARY**

**Assistance from a section 10 entity**

[37.001] A section 10 entity is one appointed by the resolution authority under section 10 to assist in the performance of its resolution functions.

[37.002] This section allows for such an entity to be appointed to assist in making a valuation under previous section 35, but sets out requirements in respect of such an appointment.

**Validity of acts**

[37.003] This section also provides for the validity of the acts of the section 10 entity appointed under this section, even if there were defects in their appointment – unless that defect is because the section 10 entity did not meet the requirements under subsection 37(2).

**Subdivision 2 – Transfer to Purchaser**

**38. Application of Subdivision**

This Subdivision deals with the stabilization option mentioned in section 33(2)(a) (transfer to a purchaser).

**COMMENTARY**

**Transfer to purchaser option**

This Subdivision deals with the transfer to purchaser stabilization option. Such a transfer involves the compulsory transfer of an entire financial institution, or some or all of that financial institution's business, to a purchaser. [38.001]

The purchaser shall then be responsible for continuing to provide that financial institution's critical financial services and for meeting the claims transferred in full. [38.002]

Transferred customers should continue to enjoy uninterrupted services that they rely on for day-to-day activities. [38.003]

This stabilization option is most appropriate where one (or more) willing and suitable purchasers can be found in a timely manner. [38.004]

**39. Transfer instruments**

(1) A resolution authority may transfer securities issued by a within scope financial institution to a purchaser by making one or more securities transfer instruments.

(2) A resolution authority may transfer assets, rights or liabilities of a within scope financial institution to a purchaser by making one or more property transfer instruments.

(3) Schedule 3 has effect with respect to securities transfer instruments under this Subdivision.

(4) Schedule 4 has effect with respect to property transfer instruments under this Subdivision.



COMMENTARY

**Transferring securities and property**

[39.001] The transfer of securities and property to a purchaser is effected by way of securities transfer instruments and property transfer instruments under this section. The securities issued by, and assets, rights and liabilities of the financial institution are transferred to the purchaser by way of the instruments made under this section.

[39.002] Schedule 3 of this Ordinance sets out provisions in respect of securities transfer instruments, including procedure, effect of such instruments, as well as providing for the making of supplemental securities transfer instruments and reverse transfer instruments. Schedule 4 similarly provides for property transfer instruments.

**Initiation of resolution**

[39.003] Under section 2(2) of the Ordinance, the resolution of a financial institution is initiated at the point when an instrument under this Part is first made in respect of the financial institution.

**40. Report**

(1) This section applies if a resolution authority transfers to a purchaser under section 39 any securities issued by, or any assets, rights or liabilities of, a within scope financial institution.

(2) The resolution authority must report to the Financial Secretary about the transfer.

(3) A report under subsection (2) must be made as soon as practicable after the transfer is completed.

(4) The Financial Secretary must cause a copy of each report under subsection (2) to be laid on the table of the Legislative Council.

COMMENTARY

**Report on transfer**

[40.001] This section requires that where a transfer to a purchaser has been made by an instrument under section 39 above, the resolution authority shall report such a transfer to the Financial Secretary as soon as practicable on completion of the transfer. The Financial Secretary shall then make a copy of the report available to the Legislative Council.

**Subdivision 3 – Transfer to Bridge Institution**

**41. Application of Subdivision**

This Subdivision deals with the stabilization option mentioned in section 33(2)(b) (transfer to a bridge institution).

COMMENTARY

**Transfer to bridge institution option**

This Subdivision deals with the transfer to bridge institution stabilization option. [41.001]

Under KA 3.4, "Resolution authorities should have the power to establish one or more bridge institutions to take over and continue operating certain critical functions and viable operations of a failed firm, including: [41.002]

- (i) the power to enter into legally enforceable agreements by which the authority transfers, and the bridge institution receives, assets and liabilities of the failed firm as selected by the authority;
- (ii) the power to establish the terms and conditions under which the bridge institution has the capacity to operate as a going concern, including the manner under which the bridge institution obtains capital or operational financing and other liquidity support; the prudential and other regulatory requirements that apply to the operations of the bridge institution; the selection of management and the manner by which the corporate governance of the bridge institution may be conducted; and the performance by the bridge institution of such other temporary functions as the authority may from time to time prescribe;
- (iii) the power to reverse, if necessary, asset and liability transfers to a bridge institution subject to appropriate safeguards, such as time restrictions; and
- (iv) the power to arrange the sale or wind-down of the bridge institution, or the sale of some or all of its assets and liabilities to a purchasing institution, so as best to effect the objectives of the resolution authority."

A transfer under this Subdivision involves the compulsory transfer of an entire financial institution, or some or all of that financial institution's business, to a company owned by the Government. Such a transfer would enable the company, the bridge institution, to continue the critical financial functions performed by the relevant financial institution. [41.003]



[41.004] This stabilization option is most appropriate where there may be a willing and suitable purchaser, but that such a purchase (under Subdivision 2) cannot be arranged immediately i.e. in order to facilitate more detailed due diligence where it cannot be completed in the pre-resolution planning period.

#### 42. Transfer instruments

(1) A resolution authority may transfer securities issued by a within scope financial institution to a bridge institution by making one or more securities transfer instruments.

(2) A resolution authority may transfer assets, rights or liabilities of a within scope financial institution to a bridge institution by making one or more property transfer instruments.

(3) Schedule 3 has effect with respect to securities transfer instruments under this Subdivision.

(4) Schedule 4 has effect with respect to property transfer instruments under this Subdivision.

#### COMMENTARY

##### Transferring securities and property

[42.001] The transfer of securities and property to a bridge institution is effected by way of securities transfer instruments and property transfer instruments under this section, which may be compared with section 39 above. The securities issued by, and assets, rights and liabilities of the financial institution are transferred to the bridge institution by way of the instruments made under this section.

[42.002] Schedule 3 of this Ordinance sets out provisions in respect of securities transfer instruments, including procedure, effect of such instruments, as well as providing for the making of supplemental securities transfer instruments and reverse transfer instruments. Schedule 4 similarly provides for property transfer instruments.

##### Initiation of resolution

[42.003] Under section 2(2) of the Ordinance, the resolution of a financial institution is initiated at the point when an instrument under this Part is first made in respect of the financial institution.

#### 43. Bridge institution

A bridge institution is a company that is –

- (a) incorporated under the Companies Ordinance (Cap. 622);
- (b) limited by shares;
- (c) wholly or partially owned by the Government; and
- (d) created for receiving a transfer, and effecting a timely disposal, under this Subdivision.

#### COMMENTARY

##### Definition

This section sets out a definition of a *bridge institution*, which is a company owned by the Government created to receive a transfer and effect a timely disposal under this Subdivision. [43.001]

#### 44. Onward bridge institution

(1) This section applies if any securities issued by, or any assets, rights or liabilities of, a within scope financial institution are first transferred by a securities transfer instrument or a property transfer instrument to a bridge institution and later transferred (whether or not by the exercise of a power under this Part) to another company that meets the requirements of section 43.

(2) Any company that meets the requirements of section 43 to which the securities, assets, rights or liabilities are transferred (including through a series of transactions from one such company to another) is an onward bridge institution for the purposes of this Ordinance.

#### COMMENTARY

##### Transfer to another bridge institution

This section applies the term *onward bridge institution* where securities, assets, rights or liabilities are transferred from a bridge institution to another bridge institution – the second institution in such a case is referred to as the onward bridge institution. [44.001]



**45. Bridge institution – onward transfer**

(1) This section applies if a resolution authority has made a securities transfer instrument or a property transfer instrument under section 42 (*original instrument*) in respect of a bridge institution.

- (2) The resolution authority may –
- (a) by making one or more securities transfer instruments, transfer to another entity –
    - (i) securities issued by the bridge institution; or
    - (ii) securities issued by a within scope financial institution and held by the bridge institution; or
  - (b) by making one or more property transfer instruments, transfer assets, rights or liabilities of the bridge institution (whether accruing or arising before or after the original instrument is made) to another entity.

(3) A securities transfer instrument may relate to securities held by the bridge institution whether or not they were transferred to that institution by an instrument made under this Subdivision.

(4) A property transfer instrument may relate to assets, rights or liabilities of the bridge institution whether or not they were transferred to that institution by an instrument made under this Subdivision.

**COMMENTARY****Further transfers**

[45.001] This section empowers a resolution authority to make transfers of securities or property from bridge institutions to other entities.

**46. Report**

(1) If a resolution authority transfers to a bridge institution any securities issued by, or any assets, rights or liabilities of, a within scope financial institution, the resolution authority must report to the Financial Secretary about –

- (a) the activities and audited financial position of the bridge institution; and
- (b) the progress that has been made towards transferring to a purchaser securities issued by, or assets, rights or liabilities of, the bridge institution.

(2) The first report under subsection (1) must be made as soon as practicable after audited financial statements are available for the year in which a transfer is first made to the bridge institution.

(3) A report under subsection (1) must be made for each subsequent year after the year mentioned in subsection (2).

(4) The reporting obligation under subsection (3) does not apply in respect of any year during which the bridge institution does not hold any assets or rights, or have any liabilities, mentioned in subsection (1).

(5) The Financial Secretary must cause a copy of each report under subsection (1) to be laid on the table of the Legislative Council.

**COMMENTARY****Report on transfer**

This section requires that where a transfer to a bridge institution has been made by an instrument under section 42 above, the resolution authority shall report such a transfer and the audited financial position of the bridge institution to the Financial Secretary as soon as practicable after audited financial statements are available. The Financial Secretary shall then make a copy of the report available to the Legislative Council.

[46.001]

**Report on progress**

The resolution authority must also report upon the progress of transferring the securities, assets, rights or liabilities from the bridge institution to a purchaser.

[46.002]

**Annual report**

This section also imposes an annual reporting requirement for subsequent years after the first report where the bridge institution continues to hold securities, assets, rights or liabilities.

[46.003]

**47. Winding up of bridge institution**

(1) A resolution authority must, without delay, take all necessary steps to wind up a bridge institution if –

- (a) all, or substantially all, of its assets, rights and liabilities have been transferred to a third party; or
- (b) following a transfer to the bridge institution under this Subdivision, no further transfer to it is made under this Subdivision during the applicable post-transfer period.

(2) However, subsection (1) does not apply if the bridge institution has ceased to be wholly owned by the Government.

(3) After consultation with the Financial Secretary, the resolution authority may extend (or further extend) the applicable post-transfer period by one year if it is satisfied that the extension –



(7) All persons are, by force of this subsection, exempt from any obligation arising in relation to the listed entity under the Code on Takeovers and Mergers (including an obligation to make an offer for shares or to enter into a takeover or merger transaction or to make an announcement of an offer or disclose information of any kind).

(8) All dealings in any securities of the listed entity on a recognized stock market are suspended by force of this subsection until the suspension is lifted by the resolution authority by a notice served under subsection (9).

(9) The resolution authority must, as soon as practicable after becoming aware that a suspension under subsection (2) has ceased to have effect, by notice in writing served on the listed entity, inform it that dealings in the securities of the listed entity on a recognized stock market are no longer suspended.

(10) The resolution authority must send to the Securities and Futures Commission and the recognized exchange company a copy of a notice under subsection (9) as soon as practicable after serving it on the listed entity.

#### COMMENTARY

##### Automatic suspension

[153.001] This section serves to automatically suspend disclosure obligations under the Securities and Futures Ordinance (Cap. 571) where the bail-in stabilization option under that section 33(2)(d) of the SFO has been applied to a listed entity.

[153.002] For obligations under section 307B of the Securities and Futures Ordinance (Cap. 571), see [150.001] above. For other obligations pursuant to sections 23 and 36, see [150.003]. For duties under sections 310 and 341 of the SFO, see [151.001]. Notice may be given by the resolution authority as to when such an automatic suspension is lifted.

[153.003] Dealings in the securities of the listed entity on the stock market shall also be suspended, though those dealings shall only be suspended whilst the suspension of the disclosure obligation under section 307B of the SFO is in effect, and notice in writing of the same must be given by the resolution authority.

##### Further exemptions

[153.004] The automatic suspension of disclosures is extended to exemptions of the listed entity to obtain shareholder approval, however such an obligation may arise, and from the provisions of the Takeovers Code.

## Part 10

# INFORMATION GATHERING, INSPECTION AND INVESTIGATION POWERS

### Division 1 – Preliminary

Section 154	Interpretation
Section 155	When powers are exercisable
Section 156	Authorization of persons
Section 157	Appointment of investigator

### Division 2 – Information Gathering

Section 158	Power to demand information, records or documents
Section 159	Offences in relation to section 158

### Division 3 – Inspection

Section 160	Powers of inspection
Section 161	Offences in relation to section 160

### Division 4 – Investigation

Section 162	Powers of investigation
Section 163	Powers of investigator to require production of records or documents or attendance for examination
Section 164	Offences for non-compliance with requirements imposed under section
Section 165	Use of incriminating evidence in proceedings

### Division 5 – Miscellaneous

Section 166	Magistrates' warrants
Section 167	Lien claimed on records or documents
Section 168	Production of information in information systems etc.



<b>Section 169</b>	Inspection of records and documents seized etc.
<b>Section 170</b>	Destruction of documents etc.
<b>Section 171</b>	Recovery of expenses

### Background

Part 10 sets out a number of different powers in relation to information. Division 2 of this Part sets out the general information gathering power of resolution authorities, which includes the power to have facts verified by statutory declaration. Division 3 concerns entry and inspections by persons authorized by resolution authorities for the purposes of resolution objectives and the facilitation of orderly resolution. These powers extend to requiring that questions of authorized persons be answered. Division 4 deals with investigations of offences under this Ordinance and the non-compliance with requirements made under this Ordinance, and the reporting requirements for such investigations.

### Division 1 – Preliminary

#### 154. Interpretation

In this Part –

**authorized person** (獲授權人士) means a person authorized by a resolution authority under section 156(1);

**business premises** (業務處所), in relation to a controlled entity or a third party entity, includes any premises (other than domestic premises) used by the entity in connection with its business;

**controlled entity** (受規管實體) means –

- (a) a within scope financial institution; or
- (b) a group company of a within scope financial institution;

**domestic premises** (住宅處所) means any premises used exclusively for residential purposes;

**investigator** (調查員) means a person appointed by a resolution authority under section 157(1);

**third party entity** (第三方實體) means an entity other than a controlled entity.

### COMMENTARY

#### Definitions

[154.001] This section sets out the definitions of phrases used in this Part, including persons empowered to carry out certain functions under the provisions in this Part.

#### 155. When powers are exercisable

(1) The powers conferred by this Part are exercisable with respect to a within scope financial institution, or a group company of a within scope financial institution, whether or not the financial institution has ceased, or is likely to cease, to be viable and whether or not resolution of the financial institution has been initiated.

(a) The powers conferred by this Part are only exercisable with respect to a third party entity if the resolution authority has reasonable cause to believe that –

- (a) the third party entity has information, or is in possession of a record or document, relating to a controlled entity; and
- (b) the information, record or document cannot be obtained from the controlled entity, including by the exercise of powers under this Part.

### COMMENTARY

#### Scope of application

This section sets out the scope of application of the powers in this Part, which may be exercised in respect of within scope financial institutions whether or not they have ceased or are likely to cease to be viable or resolution has been initiated.

[155.001]

#### Application to third parties

Subsection 155(2) sets out the application of the powers in this Part to third parties where there is a reasonable belief that they have information, records or documents in respect of a controlled entity and such material cannot be obtained from the controlled entity.

[155.002]

#### 156. Authorization of persons

(1) A resolution authority may, in writing, authorize a person, or a person belonging to a class of persons, as an authorized person for the purposes of this Part.

(2) The resolution authority must provide an authorized person with a copy of the instrument of authorization.

(3) An entity in relation to which an authorized person is exercising a power under this Part may request the authorized person to produce a copy of the instrument of authorization.

(4) An authorized person must, as soon as reasonably practicable after being requested to do so under subsection (3), produce a copy of the instrument of authorization for inspection.



COMMENTARY

Authorized person

[156.001] This section provides for a resolution authority to authorize in writing a person or persons to exercise the powers under Division 3 of this Part in relation to inspections of records, documents or other information. This section may be compared to sections 179(11)–179(12) of the Securities and Futures Ordinance (Cap. 571).

157. Appointment of investigator

(1) A resolution authority may, in writing, appoint a person as an investigator for the purposes of this Part.

(2) The resolution authority must provide an investigator with a copy of the instrument of appointment.

(3) An entity in relation to which an investigator is exercising a power under this Part may request the investigator to produce a copy of the instrument of appointment.

(4) An investigator must, as soon as reasonably practicable after being requested to do so under subsection (3), produce a copy of the instrument of appointment for inspection.

COMMENTARY

Investigator

[157.001] This section provides for a resolution authority to appoint in writing a person or persons to exercise the powers under Division 4 of this Part in relation to investigations of offences and non-compliance with directions. This section may be compared to sections 179(11) – 179(12) of the Securities and Futures Ordinance (Cap. 571).

Division 2 – Information Gathering

158. Power to demand information, records or documents

(1) A resolution authority may, by notice in writing given to a controlled entity or a third party entity, require it –

(a) to provide (including periodically) specified information or information of a specified description; or

(b) to produce (including periodically) specified records or documents or records or documents of a specified description.

(2) The information, records or documents specified in a notice under subsection (1) must be information, records or documents that the resolution authority reasonably requires in connection with the performance of its functions under this Ordinance.

(3) A notice under subsection (1) may specify the period within which (or, if required periodically, the date by which), and the manner and form in which, the information is to be provided or the record or document produced.

(4) The resolution authority may, by notice in writing given to a controlled entity or a third party entity, require it –

(a) to verify any information provided by it under this section in any manner that the resolution authority may reasonably require, which may include by statutory declaration, and within any period that the resolution authority may reasonably require; or

(b) to authenticate any record or document produced by it under this section in any manner that the resolution authority may reasonably require and within any period that the resolution authority may reasonably require.

(5) If information is not provided as required under subsection (1) for the reason that it is not within the knowledge of the controlled entity or third party entity, the resolution authority may, by notice in writing given to the entity, require it to verify, within any period that the resolution authority may reasonably require, that fact and reason by statutory declaration.

(6) If a record or document is not produced as required under subsection (1) for the reason that it is not in the possession of the controlled entity or third party entity, the resolution authority may, by notice in writing given to the entity, require it to verify, within any period that the resolution authority may reasonably require, that fact and reason by statutory declaration.

COMMENTARY

Requiring information, records or documents

This section empowers resolution authorities to require entities to provide information, records or documents. It is broadly comparable to the power of requirement under section 179 of the Securities and Futures Ordinance (Cap. 571), the power of requirement under section 34 of the Insurance Companies

[158.001]



Ordinance (Cap. 41), and to a lesser extent, the powers of examination and investigation under section 55 of the Banking Ordinance (Cap. 155).

[158.002] This power of requirement extends beyond controlled entities to third parties as well.

[158.003] This section also empowers resolution authorities to require the verification of certain facts by way of statutory declaration, and the authentication of records and documents required under this section.

[158.004] Requirements made under this section must be for the purposes of the performance of functions under this Ordinance.

**Offence**

[158.005] Section 159 below sets out an offence provision in respect of requirements under this section.

**159. Offences in relation to section 158**

(1) A controlled entity or third party entity that, without reasonable excuse, fails to comply with a requirement under section 158(1), (4), (5) or (6) commits an offence and is liable –

- (a) on conviction on indictment to a fine of \$200,000 and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues; or
- (b) on summary conviction to a fine at level 5 and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues.

(2) A controlled entity or a third party entity commits an offence if –

- (a) in purported compliance with a requirement under section 158(1), (4), (5) or (6), it provides any information, or produces any record or document, that is false or misleading in a material particular; and
- (b) it knows that, or is reckless as to whether, the information, record or document is false or misleading in a material particular.

(3) A controlled entity or third party entity that commits an offence under subsection (2) is liable –

- (a) on conviction on indictment to a fine of \$1,000,000; or
- (b) on summary conviction to a fine at level 6.

(4) If a controlled entity or third party entity commits an offence under subsection (1) or (2), an officer of the entity also commits an offence under that subsection if the officer –

- (a) authorized or permitted the commission of the offence by the entity; or

(b) was knowingly concerned in any way (whether by act or omission) in the commission of the offence by the entity.

(5) An officer who commits an offence under subsection (1) is liable –

(a) on conviction on indictment to a fine of \$200,000 and to imprisonment for one year and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues; or

(b) on summary conviction to a fine at level 5 and to imprisonment for 6 months and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues.

(6) An officer who commits an offence under subsection (2) 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) An officer of an entity may commit an offence under subsection (1) or (2) whether or not the entity has been prosecuted for, or found guilty of, an offence under that subsection.

**COMMENTARY**

**Offences in respect of requirements for information, records or documents**

This section sets out the offence provisions in respect of requirements under section 158 above. It is broadly comparable with the offences under section 184 of the Securities and Futures Ordinance (Cap. 571) and section 41 of the Insurance Companies Ordinance (Cap. 41).

[159.001]

It is an offence to fail to comply with a requirement under previous section 158, or to provide materially false or misleading information in purported compliance with such a requirement.

[159.002]

**Liability of officers**

This section provides not only for the liability of controlled and third party entities, but also officers of such entities.

[159.003]

**Statutory reasonable excuse**

Unlike similar offence provisions in other Ordinances, 'reasonable excuse' is provided for under this Ordinance. See section 197 below.

[159.004]



**Division 3 – Inspection**

**160. Powers of inspection**

- (1) This section applies in relation to a controlled entity.
- (2) An authorized person may exercise a power under this section if, in the opinion of the authorized person, doing so will enable the authorized person to inspect a record or document, or otherwise obtain information, that will assist the resolution authority in performing its functions under this Ordinance.
- (3) A resolution authority may cause an authorized person to exercise a power under this section if it has reasonable cause to believe that –
  - (a) an examination of the records or documents of a controlled entity needs to be made to find out whether the resolution authority needs to exercise any power under this Ordinance in respect of a within scope financial institution, or a holding company or affiliated operational entity of a within scope financial institution, and, if so, which power; or
  - (b) the manner in which a within scope financial institution or a holding company of a within scope financial institution has engaged, or is engaging, in any activity is preventing effective resolution planning being done under this Ordinance or is otherwise not conducive to facilitating the resolution of the financial institution.
- (4) An authorized person may at any reasonable time –
  - (a) enter the business premises of the controlled entity;
  - (b) inspect, and make copies or otherwise record details of, any record or document located, or accessible from, there; and
  - (c) make inquiries of the controlled entity concerning any record or document mentioned in paragraph (b).
- (5) In exercising a power under subsection (4)(b) or (c), an authorized person may require the controlled entity –
  - (a) to give the authorized person access to any record or document mentioned in subsection (4)(b) and, for that purpose, to produce it within the time and at the place specified by the authorized person; and
  - (b) to answer any question regarding the record or document.
- (6) If a record or document is not produced as required under subsection (5)(a) for the reason that it is not in the possession of the controlled entity, the resolution authority may, by notice in writing given to the entity, require it to verify, within any period that the resolution authority may reasonably require, that fact and reason by statutory declaration.

(7) If a controlled entity gives an answer as required under subsection (5)(b), the authorized person may, in writing, require the entity to verify the answer in any manner that the authorized person may reasonably require, which may include by statutory declaration, and within any period that the authorized person may reasonably require.

(8) If a controlled entity does not give an answer as required under subsection (5)(b) for the reason that it is not within the entity's knowledge, the authorized person may, in writing, require the entity to verify, within any period that the authorized person may reasonably require, that fact and reason by statutory declaration.

**COMMENTARY**

**Inspection by authorized person**

Pursuant to an appointment of an authorized person by a resolution authority under section 156 above, this section provides powers of entry and inspection to such authorized persons. This section may broadly be compared with section 180 of the Securities and Futures Ordinance (Cap. 571).

[160.001]

Further to the powers of entry and inspection, other powers conferred by this section include powers to make copies and to make inquiries, as well as to require that questions be answered, and facts be verified by statutory declaration.

[160.002]

**Grounds for exercising powers**

The grounds for an authorized person to exercise their powers may be based on the opinion of the authorized person themselves that to do so would assist the performance of functions of this Ordinance. A resolution authority may also cause the powers to be exercised by authorized persons in the reasonable belief that such an exercise of power will help determine whether or not other powers under this Ordinance need to be exercised, or resolution planning or the facilitation of a resolution is being prevented.

[160.003]

**161. Offences in relation to section 160**

- (1) A controlled entity that, without reasonable excuse, fails to comply with a requirement under section 160(5), (6), (7) or (8) commits an offence and is liable –
  - (a) on conviction on indictment to a fine of \$200,000 and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues; or



- (b) on summary conviction to a fine at level 5 and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues.
- (2) A controlled entity commits an offence if –
- (a) in purported compliance with a requirement under section 160(5), (6), (7) or (8), it produces any record or document, or gives any answer, that is false or misleading in a material particular; and
- (b) it knows that, or is reckless as to whether, the record, document or answer is false or misleading in a material particular.
- (3) A controlled entity that commits an offence under subsection (2) is liable –
- (a) on conviction on indictment to a fine of \$1,000,000; or
- (b) on summary conviction to a fine at level 6.
- (4) If a controlled entity commits an offence under subsection (1) or (2), an officer of the entity also commits an offence under that subsection if the officer –
- (a) authorized or permitted the commission of the offence by the entity; or
- (b) was knowingly concerned in any way (whether by act or omission) in the commission of the offence by the entity.
- (5) An officer who commits an offence under subsection (1) is liable –
- (a) on conviction on indictment to a fine of \$200,000 and to imprisonment for one year and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues; or
- (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues.
- (6) An officer who commits an offence under subsection (2) 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) An officer of an entity may commit an offence under subsection (1) or (2) whether or not the entity has been prosecuted for, or found guilty of, an offence under that subsection.

COMMENTARY

**Offences in respect of requirements for information, records or documents**

This section sets out the offence provisions in respect of requirements under section 160 above. It is broadly comparable with the offences under section 180 of the Securities and Futures Ordinance (Cap. 571) and section 41 of the Insurance Companies Ordinance (Cap. 41).

[161.001]

It is an offence to fail to comply with a requirement under previous section 160, or to provide materially false or misleading information in purported compliance with such a requirement.

[161.002]

**Liability of officers**

This section provides not only for the liability of controlled entities, but also officers of such entities.

[161.003]

**Statutory reasonable excuse**

Unlike similar offence provisions in other Ordinances, 'reasonable excuse' is provided for under this Ordinance. See section 197 below.

[161.004]

**Division 4 – Investigation**

**162. Powers of investigation**

A resolution authority may cause an investigation under section 163 to be carried out by an investigator if it has reasonable cause to believe that –

- (a) an offence under this Ordinance may have been committed; or
- (b) a direction given to, or requirement imposed on, a controlled entity under this Ordinance has not been complied with.

COMMENTARY

**Investigations**

This section sets out when an investigation may be carried out by an investigator appointed by a resolution authority under section 157 above. This section may broadly be compared with section 182 of the Securities and Futures Ordinance (Cap. 571).

[162.001]



[162.002] Investigations are carried out in respect of offences under this Ordinance or where directions or requirements of resolution authorities to controlled entities are not complied with.

**163. Powers of investigator to require production of records or documents or attendance for examination**

(1) This section applies to a person whom an investigator, carrying out an investigation in any circumstance set out in section 162, has reasonable cause to believe –

- (a) to be in possession of a record or document that contains, or is likely to contain, information relevant to any matter under investigation by the investigator; or
- (b) to be otherwise in possession of information relevant to a matter mentioned in paragraph (a).

(2) An investigator may, in writing, require a person –

- (a) to produce to the investigator, within the time and at the place specified in the requirement, any record or document specified in the requirement that –
  - (i) is or may be relevant to any matter under investigation; and
  - (ii) is in the person's possession;
- (b) to attend before the investigator at the time and place specified in the requirement, and answer any question relating to any matter under investigation that may be raised by the investigator;
- (c) to respond to any written question relating to any matter under investigation that may be raised by the investigator; and
- (d) to give the investigator all other assistance in connection with the investigation that the person is reasonably able to give.

(3) If a person produces a record or document as required under subsection (2)(a), the investigator may require the person to give an explanation or further particulars in respect of the record or document.

(4) On or before imposing a requirement under subsection (2) or (3), the investigator must ensure that the person is informed or reminded of the limitations imposed by section 165 on the admissibility in evidence of the requirement and of the question and answer or response, or the explanation or further particulars.

(5) If a record or document is not produced as required under subsection (2) for the reason that it is not in the possession of the person, the

resolution authority may, by notice in writing given to the person, require the person to verify, within any period that the resolution authority may reasonably require, that fact and reason by statutory declaration.

(6) If a person gives any answer, response, explanation or further particulars as required under subsection (2) or (3), the investigator may, in writing, require the person to verify, within the time specified in the requirement, the answer, response, explanation or further particulars by statutory declaration.

(7) If a person does not give any answer, response, explanation or further particulars as required under subsection (2) or (3) for the reason that the information concerned is not within the person's knowledge, the investigator may, in writing, require the person to verify, within the time specified in the requirement, that fact and reason by statutory declaration.

(8) An investigator –

- (a) may make interim reports on an investigation to the resolution authority; and
- (b) must make interim reports on an investigation to the resolution authority as soon as reasonably practicable after being required by the resolution authority to do so.

(9) An investigator must, as soon as reasonably practicable after completing an investigation, make a final report on the investigation to the resolution authority.

**COMMENTARY**

**Powers of investigator**

This section sets out the powers of an investigator appointed under previous section 157 in respect of investigations under section 162 above. It may broadly be compared with section 183 of the Securities and Futures Ordinance (Cap. 571) in respect of the conduct of investigations.

The powers of the investigator under this section include the powers to require the production of records and documents, and to attend examinations and answer questions in relation to matters under investigation.

**Possession**

Unlike in the Securities and Futures Ordinance (Cap. 571), the term 'possession' is not defined under this Ordinance. The case of *Securities and Futures Commission v Ernst & Young* [2015] HKLRD 293 may be applicable in this regard, although they refer to the statutory definition of 'possession'

[163.001]

[163.002]

[163.003]



under the SFO (which includes custody, control and power of or over the matter) to include the right to the possession of a document – thus not requiring actual physical possession.

**[163.004] Offences and substituted privilege**

Section 164 below makes it an offence to fail to comply with requirements under this section. It is not a defence to an offence under section 164 that to comply with the requirement might tend to incriminate the person. Later section 165 thus provides for a substituted privilege against the right against self-incrimination, and this section requires that persons on whom a requirement is imposed must be reminded of this substituted privilege.

**Reports**

**[163.005]** This section provides that an investigator may make interim reports in respect of an investigation either of their own volition or on the requirement of the resolution authority. A final report must be made on completion of the investigation.

**164. Offences for non-compliance with requirements imposed under section 163**

- (1) A person commits an offence if the person, without reasonable excuse, fails to comply with a requirement under section 163(2), (3), (5), (6) or (7).
- (2) A person who commits an offence under subsection (1) is liable –
  - (a) on conviction on indictment to a fine of \$200,000 and to imprisonment for one year and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues; or
  - (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues.
- (3) A person commits an offence if –
  - (a) in purported compliance with a requirement under section 163(2), (3), (5), (6) or (7), the person produces any record or document, or gives any answer, response, explanation or further particulars, that is or are false or misleading in a material particular; and
  - (b) the person knows that, or is reckless as to whether, the record or document, or the answer, response, explanation or further particulars, is or are false or misleading in a material particular.

- (4) A person who commits an offence under subsection (3) 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.
- (5) A person is not excused from complying with a requirement under section 163 only on the ground that to do so might tend to incriminate the person.

**COMMENTARY**

**Offences in respect of investigations**

This section sets out the offence provisions in respect of requirements under section 163 above. It is broadly comparable with the offences under section 184 of the Securities and Futures Ordinance (Cap. 571), particularly as regards self-incrimination under subsection 164(5).

**[164.001]**

It is an offence to fail to comply with a requirement under previous section 163, or to provide materially false or misleading information in purported compliance with such a requirement.

**[164.002]**

**Self-incrimination**

In contrast with other offences in this Part, under subsection 164(5), self-incrimination shall not be a reasonable excuse or valid defence for failing to comply with a requirement under previous section 163. This is further reinforced under subsequent section 165 below, which limits the uses to which such self-criminating evidence may be put.

**[164.003]**

**Statutory reasonable excuse**

Unlike similar offence provisions in other Ordinances, 'reasonable excuse' is provided for under this Ordinance. See section s.197 below.

**[164.004]**

**165. Use of incriminating evidence in proceedings**

- (1) This section applies if –
  - (a) an investigator requires a person to give an answer or response to a question or to give an explanation or further particulars under section 163(2) or (3);
  - (b) the answer or response, or the explanation or further particulars, might tend to incriminate the person; and
  - (c) the person claims, before giving the answer or response or giving the explanation or further particulars, that it might so tend.