

LEGISLATIVE COUNCIL BRIEF

Banking Ordinance
(Chapter 155)

BANKING (AMENDMENT) BILL 2000

INTRODUCTION

At the meeting of the Executive Council on 7 November 2000, the Council **ADVISED** and the Chief Executive **ORDERED** that the Banking (Amendment) Bill 2000 should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

2. At present, the Securities and Futures Commission (SFC) grants exempt status to authorized institutions (exempt AIs) conducting activities regulated by the SFC (“regulated activities”), in recognition of the fact that they are already subject to statutory provisions of the Banking Ordinance (BO) and to close supervision of the Hong Kong Monetary Authority (HKMA). The supervision by the HKMA is exercised on a consolidated basis so that the “regulated activities” of an AI are supervised in the context of the AI as a whole.

3. With the introduction of a new licensing regime under the Securities and Futures Bill (the SF Bill) for intermediaries regulated by the SFC, it is necessary to make corresponding changes to the BO to enable the HKMA to enhance the regulatory functions in relation to AI activities that are exempt under the SF Bill. Our guiding principles in developing this new regulatory framework are to provide, as far as possible, adequate protection to investors, minimize regulatory overlap and thus reduce unnecessary regulatory costs, and level the playing field between exempt AIs and SFC licensees.

4. The proposed changes are embodied in the Banking (Amendment) Bill 2000 (the Bill). The new regulatory framework will be

underpinned by a revised Memorandum of Understanding to be drawn up between the HKMA and the SFC.

Powers and duties in relation to exempt AIs’ “regulated activities”

5. Under the scheme of co-operative supervision agreed by the HKMA and SFC, the HKMA will remain as the front line regulator in so far as exempt AIs are concerned. HKMA will perform its regulatory functions in a manner and according to standards that are consistent with those applied by the SFC to its licensees. This may involve the HKMA exercising its statutory powers under section 16(9) or 52 of the BO to enforce compliance with rules and guidelines in relation to “regulated activities” issued by the SFC and/or the HKMA.

6. In considering the legal feasibility of the proposed system of co-operative supervision, there were doubts as to whether the powers of the HKMA extend beyond the supervision of “banking business” or “deposit-taking business” to securities activities conducted by exempt AIs. To put the matter beyond doubt, we propose to amend the BO to make it clear that the HKMA’s supervisory responsibilities cover the whole of AIs businesses, that is, not simply banking or deposit-taking business. This will be wider than what the SF Bill would envisage SFC may exempt, and should obviate the need for specifying in and amending the BO for every other business which AIs may conduct in future.

Exchange of Information

7. Under the proposed scheme of co-operative supervision, the HKMA will be the front line regulator, looking after routine supervision, while the SFC will focus on investigations of alleged misconduct and fraud. The HKMA will need to share a wide range of supervisory information about exempt AIs’ “regulated activities” with the SFC.

8. At present, the HKMA may disclose information to the SFC under section 120(5)(f) of the BO if -

- (a) it is desirable or expedient that information should be so disclosed in the interests of depositors or potential depositors or the public interest; or
- (b) such disclosure will enable or assist the recipient of the information (i.e. the SFC) to perform his functions and it is

not contrary to the interests of depositors or potential depositors or the public interest that the information be so disclosed.

While this already provides flexibility for HKMA to make the disclosure necessary under co-operative supervision, it is desirable to remove any uncertainty which may create barrier to disclose to the SFC in respect of AIs' "regulated activities".

9. We therefore propose that section 120 of the BO should be amended to allow the HKMA to share supervisory information in relation to exempt AIs' "regulated activities" with the SFC without the need to satisfy the conditions set out in section 120(5)(f). However, the disclosure should remain subject to the HKMA's general power to attach conditions to the information disclosed in order to restrict the recipient from passing the information to a third party without the HKMA's consent. In addition, the SFC, on receipt of information from the HKMA, should be subject to statutory constraints of secrecy and confidentiality as stipulated in the SFC Ordinance, which are to be re-enacted in the SF Bill.

Power to issue reprimands

10. To ensure a level playing field with the treatment of SFC licensees and to provide greater transparency to investors, we propose that the range of sanctions available to the HKMA under the BO should be widened to include the issue of reprimands (both publicly and privately depending on the seriousness of the misconduct) against exempt AIs which have committed misconduct in their "regulated activities". Apart from creating the deterrent effect, this would enable investors to assess the quality of the institutions with which they are dealing.

11. The grounds for issuing a reprimand are similar to those applicable to SFC licensees as set out in the SF Bill. The exempt AIs against which the HKMA intends to issue a reprimand will be given an opportunity of being heard and provided with the right to appeal to the Chief Executive in Council. This is in line with the existing channel for other appealable HKMA decisions in the BO, and the right for SFC licensees to appeal to the Securities and Futures Appeals Tribunal under the SF Bill.

Appointment of executive officers

12. To ensure that the controlling minds of a licensed corporation are competent to discharge their supervisory duties, a “management responsibility” concept has been introduced under the SF Bill whereby each licensed intermediary has to nominate at least two persons directly supervising the “regulated activities” as “responsible officers” for approval by SFC. It is proposed that this concept should be mirrored in the BO insofar as the conduct of “regulated activities” by exempt AIs are concerned.

13. Accordingly, it is proposed to amend the BO to require persons appointed by an exempt AI as executive officers, who are responsible for directly supervising the AI’s “regulated activities”, to be approved by the HKMA.

Register of employees

14. Employees who act for or on behalf of an exempt AI in respect of its “regulated activities” should be fit and proper. The primary responsibility for ensuring this will rest with the management of the exempt AIs on the basis of criteria set down by the HKMA. Specifically, exempt AIs will be required to demonstrate that suitable arrangements have been put in place to ensure that such employees receive appropriate training in line with the expectations of the SFC for its licensees. To enable the HKMA to maintain a record of these employees for public inspection and conduct appropriate background checks on them with the law enforcement authorities and the SFC, we propose to require an exempt AI to notify the HKMA of the appointment of such employees.

15. The proposed arrangement is not entirely the same as the SF Bill, under which persons engaged in “regulated activities” have to apply to the SFC for a representative licence. Nevertheless, if background checks conducted by the HKMA reveal anything negative against an individual, or there are circumstances where the individual is found to be not fit and proper, the HKMA will expect, and if necessary use its powers under the BO to require the concerned AI to take appropriate action in relation to such individual, such as to remove him from the performance of “regulated activities”. We believe this is a reasonable approach and is consistent with the existing regulatory requirements for AIs.

Other Amendments

16. The other proposed amendments seek to bring the BO more in line with the SF Bill in relation to requirements for the notification by AIs of end of financial year and immediate reporting by auditors on matters adversely affecting the financial position of an AI to a material extent.

THE BILL

17. The main provisions of the Bill are: -

- (a) clause 3 amends section 7(2) to put it beyond doubt that the HKMA's regulatory powers extend to business conducted by AIs which is not banking business or the business of taking deposits;
- (b) clause 4 amends section 20 to require the HKMA to keep the register of persons employed by exempt AIs to act for them in respect of their "regulated activities";
- (c) clause 5 introduces a new section 58A to empower the HKMA to publicly or privately reprimand an exempt AI which is guilty of misconduct. Clause 12(b) provides a channel of appeal to the Chief Executive in Council;
- (d) clauses 6, 7 and 8 introduce new sections 59B and 63A to bring the BO more in line with the SF Bill in relation to reporting and auditing requirements;
- (e) clause 9 introduces new sections 71C, 71D, 71E and 71F to provide for the proposed regime of appointment of executive officers of exempt AIs. Section 71C requires the HKMA to consent to a person becoming an executive officer. Section 71D requires an exempt AI to appoint not less than two executive officers. Section 71E empowers the HKMA to give a person provisional consent to be an executive officer pending determination of his application under section 71C. Section 71F disapplies sections 71C and 71D to exempt AIs during the transitional period; and
- (f) clause 11(a) amends section 120(5) to allow the HKMA to share supervisory information in relation to exempt AIs' "regulated activities" with the SFC without the need to satisfy the conditions set out in section 120(5)(f).

LEGISLATIVE TIMETABLE

18. The legislative timetable is as follows: -

Publication in the Gazette	24 November 2000
First Reading and commencement of Second Reading debate	29 November 2000
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

BASIC LAW IMPLICATIONS

19. The Department of Justice advises that the proposed Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

20. The Department of Justice advises that the proposed Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

21. The Bill does not affect the current binding effect of the existing provisions of the BO.

FINANCIAL AND STAFFING IMPLICATIONS

22. There will be additional workload to the HKMA as a result of the strengthening of the regulatory functions in relation to exempt AIs. The HKMA has increased the number of specialist securities teams to supervise the “regulated activities” of AIs. The cost is absorbed by the HKMA through redeployment of existing resources from the Exchange Fund. There shall be no other financial and staffing implications for Government.

ECONOMIC IMPLICATIONS

23. Measures to enhance the regulatory framework for exempt AIs and ensure a level playing field with other participants in the securities and futures markets is conducive to maintaining Hong Kong's status as a major international financial centre.

PUBLIC CONSULTATION

24. The Banking Advisory Committee, the Deposit-taking Companies Advisory Committee, the Hong Kong Association of Banks, the Deposit-taking Companies Association and the Hong Kong Society of Accountants have been consulted. They are generally supportive of the legislative proposals and their comments have been taken into account in finalising the Bill.

PUBLICITY

25. We will brief the Legislative Council Panel on Financial Affairs on 10 November on this Bill and the SF Bill. A press release will also be issued. Both Bills will be published in the Gazette on 24 November. An electronic copy of the Bill will be put on the websites of the Financial Services Bureau at www.info.gov.hk/fsb and the HKMA at www.hkma.gov.hk on 17 November.

ENQUIRIES

26. Enquiries about this brief may be directed to Mr Edward Mak, Assistant Secretary for Financial Services at 2527 3974.

Financial Services Bureau
10 November 2000