

For discussion on
18 July 2001

Paper No. CEB

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

Banking (Amendment) Bill 2000

At the Annex is the mark-up version of Banking (Amendment) Bill 2000, with the proposed amendments thereto. The reasons for the amendments are set out in the footnotes.

Hong Kong Monetary Authority
Financial Services Bureau
18 July 2001

BANKING (AMENDMENT) BILL 2000

A BILL

To

Amend the Banking Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Banking (Amendment) Ordinance 2000.

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

2. Interpretation

Section 2(1) of the Banking Ordinance (Cap. 155) is amended by adding -

"declaration of exemption" () means a declaration of exemption -

- (a) granted under section 118 of the Securities and Futures Ordinance (of 2000); and
- (b) which is in force;

"executive officer" (), in relation to an exempt authorized institution, means an executive officer

appointed under section 71D in respect of the institution;

"exempt authorized institution" () means an authorized institution -

- (a) to which section 25(a) or 32 of Schedule 9 to the Securities and Futures Ordinance (of 2000) applies; or
- (b) granted a declaration of exemption;

"Opportunity of being heard" () means a reasonable opportunity of being heard;"¹

"regulated activity" (), in relation to an exempt authorized institution, means a regulated activity -

- (a) within the meaning of Schedule 1 to the Securities and Futures Ordinance (of 2000); and
- (b) in respect of which the institution is exempted from the requirement to hold a licence -
 - (i) within the meaning of that Schedule;
 - (ii) to carry on the activity; and
 - (iii) by virtue of -
 - (A) in the case of an institution

¹ The term "reasonable opportunity of being heard" is used generally in the Securities and Futures Bill while "opportunity of being heard" is generally used in the Banking Ordinance. This amendment clarifies that the two terms carry the same meaning.

falling within paragraph (a) of the definition of "exempt authorized institution", section 25(a) or 32 of Schedule 9 to the Securities and Futures Ordinance (of 2000);

(B) in any other case, the declaration of exemption granted to it;

"Securities and Futures Commission" () means the Securities and Futures Commission referred to in the Securities and Futures Ordinance (of 2000);

"Securities and Futures Ordinance (of 2000)" ((2000)) means the Ordinance with that short title enacted after the introduction of the Banking (Amendment) Bill 2000 into the Legislative Council;".

3. Functions of Monetary Authority

Section 7(2) is amended -

(a) in paragraph (e), by repealing "and" at the end;

(b) in paragraph (f), by repealing the full stop and substituting "; and";

(c) by adding -

"(g) take all reasonable steps to ensure that

any banking business, any business of taking deposits, or any other business, carried on by an authorized institution is carried on -

- (i) with integrity, prudence and the appropriate degree of professional competence; and
- (ii) in a manner which is not detrimental, or likely to be detrimental, to the interests of depositors or potential depositors."

4. Register of authorized institutions, etc.

Section 20 is amended -

(a) in subsection (1) -

(i) in paragraph (e), by repealing "and" at the end;

(ii) by adding -

"(ea) in the case of an exempt authorized institution, and not later than 12 months after the commencement of this paragraph -

(i) the name and

business address of
every relevant
individual;

(ii) the capacity in
which every relevant
individual is
~~employed~~ engaged² in
relation to a
regulated function
in a regulated
activity; and

(iii) the date on which
every relevant
individual was ~~so~~
~~employed~~ first so
engaged³; and";

(b) by repealing subsections (3) and (4) and
substituting -

"(3) The Monetary Authority may require
an authorized institution (including an
authorized institution seeking to be an exempt
authorized institution) or local

² Amendment in response to market comments : front-line staff of exempt authorized institutions may not necessarily have an "employment" relationship with the institutions concerned.

³ Same rationale as Footnote (2) above.

representative office to submit such information for the purposes of subsection (1) as he may reasonably require in order to maintain the register in so far as it relates to that authorized institution or local representative office, as the case may be, and such information shall be submitted within such period and in such manner as the Monetary Authority may require.

(4) Where any information submitted to the Monetary Authority under subsection (3) changes subsequent to the submission, the authorized institution or local representative office which submitted the information shall give notice in writing to the Monetary Authority of such change -

(a) subject to paragraph (b), not later than 21 days after such change takes place;

(b) where subsection (1)(ea) is applicable, within 7 business days after such change takes place.

(4A) For the purposes of enabling any

member of the public to ascertain whether a person he is dealing with is a relevant individual in relation to an exempt authorized institution and, if so, the capacity in which the relevant individual is ~~employed~~engaged⁴ in relation to a regulated function in a regulated activity and the date on which the relevant individual was ~~so employed~~ first so engaged⁵, the information contained in the register under subsection (1)(ea) shall be made available to public inspection under subsection (5).";

(c) in subsection (7), by repealing "a bank, deposit-taking company or restricted licence bank" and substituting "an authorized institution";

(d) in subsection (8) -

(i) by repealing "bank, local representative office, deposit-taking company or restricted licence bank" and substituting "authorized institution or local representative office";

(ii) by repealing "bank, deposit-taking

⁴ Same rationale as Footnote (2) above.

⁵ Same rationale as Footnote (2) above.

company or restricted licence bank" and substituting "authorized institution";

(e) by adding -

"(9) It is hereby declared that -

(a) the fact that an authorized institution falls within section ~~26(a) or 33~~ 25(a) or 32⁶ of Schedule 9 to the Securities and Futures Ordinance (of 2000) is not a ground for the institution to fail to comply with a requirement under subsection (3) seeking the submission of information for the purposes of subsection (1)(ea), and subsections (4), (7) and (8) shall be construed accordingly;

(b) the fact that a relevant individual falls within section 26(a) or 33 of Schedule 9 to the Securities and Futures

⁶ Sections 25(a) and 32 of Schedule 9 to the Securities and Futures Bill are more relevant in this context since the two sections are related to institutions. Sections 26(a) and 33, on the other hand, are related to individuals.

Ordinance (of 2000) shall not prohibit the inclusion in the register of any information referred to in subsection (1)(ea) relating to the individual.

(10) In this section -

"business day" () means any day other than -

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

~~"regulated function" (), in relation to a regulated activity, means any function (other than work ordinarily performed by a clerk, cashier or accountant) of the exempt authorized institution concerned in that regulated activity;~~

"regulated function" (), in relation to a regulated activity carried on as a

business by an exempt authorized institution, means any function performed for or on behalf of or by an arrangement with the institution relating to the regulated activity, other than work ordinarily performed by an accountant, clerk or cashier;⁷

~~"relevant individual" (————), in relation to an exempt authorized institution, means an individual who is employed by the institution to perform for or on behalf of the institution any regulated function in a regulated activity."~~

"relevant individual" (), in relation to an exempt authorized institution, means an individual who performs for or on behalf of or by an arrangement with the institution any regulated function in a regulated activity."⁸

5. Section added

The following is added in Part X -

⁷ Technical amendment : to adopt the same definition as in clause 113 of the Securities and Futures Bill.

⁸ Technical amendment : same rationale as in Footnote (2) above.

~~"58A. Reprimand in respect of exempt
authorized institution~~

~~(1) Subject to subsections (2) and (3), where an exempt authorized institution is, or has at any time been, guilty of misconduct, the Monetary Authority may publicly or privately reprimand the institution.~~

~~(2) The Monetary Authority shall not exercise his power under subsection (1) against an exempt authorized institution without first giving the institution an opportunity of being heard.~~

~~(3) Where the Monetary Authority decides to exercise his power under subsection (1) against an exempt authorized institution, the Monetary Authority shall inform the institution of his decision to do so by notice in writing served on it, and the notice shall include —~~

~~(a) a statement of the reasons for which the decision is made; and~~

~~(b) a statement advising that the decision shall take effect on the date —~~

~~(i) the institution serves a notice in writing on the Monetary Authority stating that it does not propose to appeal under section 132A(2A) against the decision;~~

~~(ii) the period specified in the~~

~~Administrative Appeals Rules (Cap. 1
sub. leg.) within which the
institution may appeal under section
132A(2A) against the decision
expires without any such appeal
having been made; or~~

~~(iii) an appeal under section 132A(2A) by
the institution against the decision
is unsuccessful,
whichever first occurs.~~

~~(4) In this section~~

~~"exempt authorized institution" () includes a
company which is a former exempt authorized institution
where the company was an exempt authorized institution
at the time when the company was guilty of misconduct,
and section 132A(2A) shall be construed accordingly;~~

~~"misconduct" (), in relation to an exempt authorized
institution, means~~

~~(a) a contravention of any of the relevant
provisions of the Securities and Futures
Ordinance (of 2000) which are applicable
to the institution;~~

~~(b) a contravention of any of the terms and
conditions of a declaration of exemption;~~

~~(c) a contravention of any other condition imposed~~

~~under any provision of the Securities and
Futures Ordinance (— of 2000); or~~

~~(d) an act or omission relating to the carrying on
of any regulated activity by the institution
which, in the opinion of the Monetary
Authority, is or is likely to be prejudicial
to the interest of the investing public or to
the public interest,~~

~~— and "guilty of misconduct" (—) shall be construed
accordingly.~~

~~(5) For the avoidance of doubt, it is hereby declared
that the power under this section of the Monetary Authority
to reprimand an authorized institution is in addition to any
other power of the Monetary Authority, whether under this
Ordinance or otherwise and whether explicit or implicit, to
reprimand an authorized institution (and whether or not the
institution is an exempt authorized institution).".⁹~~

"58A. Disciplinary action in respect of relevant individuals

~~(1) Where -~~

~~(a) a relevant individual is, or was at any time,
guilty of misconduct; or~~

⁹ The original s.58A relates to the power of the Monetary Authority to reprimand relevant individuals. As mentioned in Paper No. 8D/01 issued on 28 May 2001, we proposed that the power be vested with the Securities and Futures Commission under Part IX of the Securities and Futures Bill (now in the new clause 189A).

(b) the Monetary Authority is of the opinion that a relevant individual is not, or has ceased to be, a fit and proper person in his capacity as that type of relevant individual,

then the Monetary Authority may, after consultation with the Securities and Futures Commission -

(c) remove all or part of the individual's relevant particulars from the register; or

(d) suspend all or part of the individual's relevant particulars from the register for such period or until the occurrence of such event as the Monetary Authority specifies.¹⁰

(2) Without limiting the generality of subsection (1) or the operation of any other provisions of this Ordinance, for the avoidance of doubt it is hereby declared that the Monetary Authority may exercise his power under that subsection wholly or partly on the basis of information disclosed to the Monetary Authority by the Securities and Futures Commission, and whether or not the information arises

¹⁰ As a disciplinary action against front-line securities staff of exempt authorized institutions where such staff have been found guilty of misconduct or no longer fit and proper, it is proposed that the Monetary Authority should be empowered to take all or part of the particulars of such securities staff off the register, or to suspend all or part of such particulars from the register, to be maintained by the Monetary Authority under section 20(1)(ea) of the Banking Ordinance. This effectively amounts to revocation and suspension of the staff from conducting regulated activities on behalf of the exempt authorized institution concerned, and is equivalent to the same disciplinary sanction against licensed representatives of a licensed corporation on the same grounds under clause 187 of the Securities and Futures Bill.

from an investigation under section 175 of the Securities and Futures Ordinance (of 2001).¹¹

(3) The Monetary Authority shall not exercise his power under subsection (1) against a relevant individual without first giving the individual an opportunity of being heard.¹²

(4) Where the Monetary Authority decides to exercise his power under subsection (1) against a relevant individual, the Monetary Authority shall inform the individual of his decision to do so by notice in writing served on him, and the notice shall include -

(a) a statement of the reasons for which the decision is made;

(b) the time at which the decision is to take effect; and

(c) in so far as applicable, the duration and terms of the removal or suspension of particulars from the register to be imposed under the decision.¹³

(5) Without prejudice to the exercise of any powers by

¹¹ This subsection ensures that the Monetary Authority, in exercising his revocation/suspension power against front-line securities staff of an exempt AI, can rely on information provided by the SFC, e.g. the findings of an SFC investigation.

¹² Procedural requirement : same as that under the new clause 191(1) of the Securities and Futures Bill.

¹³ Procedural requirement : same as that under the new clause 191(2) of the Securities and Futures Bill.

the Securities and Futures Commission under the Securities and Futures Ordinance (_____ of 2001), the Monetary Authority may make such recommendations to the Securities and Futures Commission concerning any relevant individual in respect of the exercise of the power under section 189A or 190 of that Ordinance as he considers appropriate.¹⁴

_____ (6) In this section -

"misconduct" (_____), in relation to a relevant individual, means -

(a) a contravention of any of the relevant provisions, within the meaning of Schedule 1 to the Securities and Futures Ordinance (_____ of 2001), which are applicable to the individual; or

(b) an act or omission of the individual relating to the carrying on of any regulated activity -

(i) by the exempt authorized institution in relation to which the individual is a relevant individual; and

(ii) which, in the opinion of the Monetary Authority, is or is likely to be

¹⁴ A new subsection added to enable the Monetary Authority to make recommendations to the SFC in respect of front-line staff of exempt AIs. A similar provision has been added to the Securities and Futures Bill (the new clause 189A(7)) to enable the SFC to make similar recommendations to the Monetary Authority.

prejudicial to the interest of the
investing public or to the public
interest,

and "guilty of misconduct" () shall be
construed accordingly;¹⁵

"relevant individual" () means relevant
individual within the meaning of section 20(10);

"relevant particulars" (), in relation to a
relevant individual, means the information contained in the
register under section 20(1)(ea) in relation to the
individual."

6. Section added

The following is added -

**"59B. Notification by authorized
institution of end of
financial year, etc.**

(1) An authorized institution shall -

(a) in the case of an institution which was
authorized before the commencement of this
section, not later than 1 month after that
commencement;

(b) in any other case, not later than 1 month
after the date on which it was authorized,

¹⁵ To define misconduct in this context, which is the definition specified in section 186(1) of the Securities and Futures Bill as applied to front-line securities staff of exempt AIs.

give notice in writing to the Monetary Authority of the date on which its financial year ends.

(2) An authorized institution shall not -

- (a) alter the date on which its financial year ends as specified in its notice under subsection (1) except with the approval under subsection (3)(a) of the Monetary Authority;
- (b) have its financial year exceed 12 months except with the approval under subsection (3)(b) of the Monetary Authority.

(3) The Monetary Authority may, on the application of an authorized institution, by notice in writing served on the institution -

- (a) approve an alteration of the date on which its financial year ends subject to such conditions as the Monetary Authority thinks fit specified in the notice;
- (b) approve a financial year of more than 12 months for the institution subject to such conditions as the Monetary Authority thinks fit specified in the notice.

(4) Every director and every manager of an authorized institution which contravenes subsection (1) or (2), or any condition specified in a notice under subsection (3), commits an offence and is liable -

- (a) on conviction upon indictment to a fine at

tier 7 ~~and to imprisonment for 2 years~~¹⁶and, in the case of a contravention of subsection (1), to a further fine at tier 3 for every day for which the institution fails to give the notice required under that subsection to the Monetary Authority; or

(b) on summary conviction to a fine at tier 5 ~~and to imprisonment for 6 months~~¹⁷and, in the case of a contravention of subsection (1), to a further fine at tier 2 for every day for which the institution fails to give the notice required under that subsection to the Monetary Authority."

7. Returns and information to be submitted to the Monetary Authority

Section 63(3A)(b)(iii) and (3E) is repealed.

8. Section added

The following is added -

"63A. Auditor to report to Monetary Authority any matter which adversely affects

¹⁶ The imprisonment arrangement is deleted in response to market comments. This is in line with the penalty level for a similar offence under the Banking Ordinance, e.g. failure to publish audited annual accounts under section 60(3) of the Banking Ordinance. This is also in line with the arrangement in the Securities and Futures Bill.

¹⁷ Same rationale as Footnote (16) above.

**financial position of authorized
institution to material extent**

(1) Where a person in the course of performing his duties as an auditor appointed under -

- (a) section 59(2) or 63(3) or (3A); or
- (b) section 131 of the Companies Ordinance (Cap. 32),

becomes aware of a matter which, in his opinion, adversely affects the financial position of an authorized institution to a material extent, he shall, as soon as is reasonably practicable after he becomes aware of the matter, submit to the Monetary Authority a report in writing on the nature of the matter and the reason why he is of that opinion.

(2) In relation to any authorized institution incorporated outside Hong Kong, subsection (1) shall only apply to its principal place of business in Hong Kong and its local branches, and shall do so as if that principal place of business and those branches were collectively a separate authorized institution."

8A. Section added

The following is added -

**"63B. Auditors of exempt authorized
institutions to submit report
to the Monetary Authority
in certain cases**

Where a person in the course of performing his

functions as an auditor -

(a) appointed under -

(i) section 59(2) or 63(3) or (3A); or

(ii) section 131 of the Companies Ordinance (Cap. 32); and

(b) in relation to an exempt authorized institution, becomes aware of a matter that, in the opinion of the person, is a matter that constitutes on the part of the institution a failure to comply with any prescribed requirements within the meaning of section 153 of the Securities and Futures Ordinance (of 2001)(but excluding any requirements under section 145 of that Ordinance or of rules made under that section), then he shall, as soon as reasonably practicable after he becomes aware of the matter, submit to the Monetary Authority a report in writing on the matter."¹⁸.

9. Sections added

The following are added -

"71C. Executive officers of exempt authorized institutions require Monetary Authority's consent

- (1) Subject to sections 71E and 71F, no person shall -
- (a) become an executive officer of an exempt

¹⁸ A new section added which, together with the proposed section 63A, have the same legislative effect as the reporting requirements under clause 153 of the Securities and Futures Bill.

authorized institution without the consent in writing of the Monetary Authority;

- (b) if he becomes such executive officer without such consent, act or continue to act as such executive officer without such consent;
- (c) fail to comply with a condition attached under subsection (2)(b) or (5) as such condition is in force from time to time; or
- (d) act or continue to act as such executive officer after such consent has been withdrawn under subsection (4).

(2) The Monetary Authority -

- (a) shall refuse to give consent under subsection (1) unless the Monetary Authority is satisfied that the person concerned -

~~(i) is a fit and proper person to be an executive officer of the exempt authorized institution concerned;~~

~~————— (ii) is competent to carry out the duties of such executive officer; and~~

~~————— (iii) has sufficient authority within the institution to be such executive officer;~~

~~————— (i) is a fit and proper person to be an executive officer of the exempt~~

authorized institution concerned;

and

(ii) has sufficient authority within the
institution to be such executive
officer;¹⁹

(b) may give consent under subsection (1) subject to such conditions as the Monetary Authority thinks proper to attach thereto.

(3) Where the Monetary Authority gives consent, or refuses to give consent, under subsection (1), he shall as soon as is reasonably practicable thereafter give notice in writing -

(a) in the case of the consent, to the person concerned and the exempt authorized institution concerned and specifying any conditions attached to the consent;

(b) in the case of the refusal, to the person concerned and the exempt authorized institution concerned and specifying his reasons.

~~———— (4) Where the Monetary Authority ————~~

¹⁹ The original subsection (2)(a)(ii) specifies that the Monetary Authority should take into account the competence of an applicant to carry out the duties of an executive officer in addition to taking a view on whether the applicant is a fit and proper person. This is not necessary since the “fit and proper” criteria already cover the concept of “competence” (see clause 128(1)(c) of the Securities and Futures Bill). This amendment is intended to remove the unnecessary overlap.

~~(a) has decided that he has ceased to be satisfied that an executive officer of an exempt authorized institution -~~

~~----- (i) is a fit and proper person to be such executive officer;~~

~~----- (ii) is competent to carry out the duties of such executive officer; or~~

~~----- (iii) has sufficient authority within the institution to be such executive officer;~~

~~(b) has given to the executive officer not less than 7 days' advance notice of his decision, specifying his reasons, and accompanied by a copy of this section; and~~

~~(c) has taken into account any written representation received by him from the executive officer,~~

~~the Monetary Authority may, by notice in writing served on the executive officer and the institution, withdraw the consent.²⁰~~

(4) Where -

(a) an executive officer is, or was at any time, guilty of misconduct; or

²⁰ Original section replaced by a more elaborate section on the revocation/suspension of consent granted to an executive officer : see the new subsections (4) to (4D) below.

(b) the Monetary Authority has ceased to be satisfied that an executive officer of an exempt authorized institution -

(i) is a fit and proper person to be such type of officer; or

(ii) has sufficient authority within the institution to be such officer,

then the Monetary Authority may, after consultation with the Securities and Futures Commission, by notice in writing served on the officer and the institution -

(c) withdraw the consent; or

(d) suspend the consent for such period or until the occurrence of such event as the Monetary Authority specifies.²¹

(4A) Without limiting the generality of subsection (4) or the operation of any other provisions of this Ordinance, for the avoidance of doubt it is hereby declared that the Monetary Authority may exercise his power under that subsection wholly or partly on the basis of information disclosed to the Monetary Authority by the Securities and Futures Commission, and whether or not the information arises

²¹ It is proposed that the Monetary Authority should be empowered to revoke or suspend the consent granted to an executive officer where such an officer is found guilty of misconduct or is no longer a fit and proper person. This is equivalent to the suspension and revocation of an approval granted to a responsible officer of a licensed corporation on the same grounds under clause 187 of the Securities and Futures Bill.

from an investigation under section 175 of the Securities and Futures Ordinance (of 2001).²²

(4B) The Monetary Authority shall not exercise his power under subsection (4) against an executive officer without first giving the officer an opportunity of being heard.²³

(4C) Where the Monetary Authority decides to exercise his power under subsection (4) against an executive officer, the Monetary Authority shall inform the officer of his decision to do so by notice in writing served on him, and the notice shall include -

- (a) a statement of the reasons for which the decision is made;
- (b) the time at which the decision is to take effect; and
- (c) in so far as applicable, the duration and terms of the withdrawal or suspension of the consent to be imposed under the decision.²⁴

(4D) Without prejudice to the exercise of any powers by the Securities and Futures Commission under the Securities and Futures Ordinance (of 2001), the Monetary Authority

²² This subsection ensures that the Monetary Authority, in exercising his revocation/suspension power against an executive officer, can rely on information provided by the SFC, e.g. the findings of an SFC investigation.

²³ Procedural requirement : same as that under the new clause 191(1) of the Securities and Futures Bill.

²⁴ Procedural requirement : same as that under the new clause 191(2) of the Securities and Futures Bill.

may make such recommendations to the Securities and Futures Commission concerning any executive officer in respect of the exercise of the power under section 189A or 190 of that Ordinance as he considers appropriate.²⁵

(5) Where the Monetary Authority -

- (a) has decided that he is satisfied that conditions need to be attached to a consent given under subsection (1), or that conditions attached to any such consent need to be amended;
- (b) has given to the executive officer not less than 7 days' advance notice of his decision, specifying his reasons, and accompanied by a copy of this section; and
- (c) has taken into account any written representation received by him from the executive officer,

the Monetary Authority may, by notice in writing served on the executive officer and the institution, attach conditions to the consent, or amend conditions attached to the consent, as the case may be.

²⁵ A new subsection added to enable the Monetary Authority to make recommendations to the SFC in respect of executive officers of exempt AIs. A similar provision has been added to the Securities and Futures Bill (the new clause 189A(7)) to enable the SFC to make recommendations to the Monetary Authority.

(6) Any person who contravenes subsection (1) commits an offence and is liable -

(a) on conviction upon indictment to a fine at tier 7 and to imprisonment for 2 years; or

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

and, in the case of a continuing offence, to a further fine at tier 2 for every day during which the offence continues.

(7) A person shall not be regarded for the purposes of subsection (1) as becoming an executive officer of an exempt authorized institution if he is appointed to serve as an executive officer of it -

(a) immediately on the expiration of a previous term by him as an executive officer; and

(b) in relation to the same regulated activity as he was such executive officer in that previous term.

(8) In this section -

"misconduct" (_____), in relation to an executive officer, means -

(a) a contravention of any of the relevant provisions, within the meaning of Schedule 1 to the Securities and Futures Ordinance (_____ of 2001), which are applicable to the officer;

(b) a contravention of any conditions attached under subsection (2)(b), or attached or amended under subsection (5), to the consent under subsection (1) which relates to the officer; or

(c) an act or omission of the officer relating to the carrying on of any regulated activity -

(i) by the exempt authorized institution in relation to which the officer is an executive officer; and

(ii) which, in the opinion of the Monetary Authority, is or is likely to be prejudicial to the interest of the investing public or to the public interest,

and "guilty of misconduct" () shall be construed accordingly.²⁶

(9) Where any exempt authorized institution is, or was at any time, guilty of misconduct within the meaning of paragraph (a), (b), (c) or (d) of the definition of "misconduct" in section 186(1) of the Securities and Futures Ordinance (of 2001) as a result of the commission of any conduct occurring with the consent or connivance of, or

²⁶ To define misconduct in this context, which is the definition specified in section 186(1) of the Securities and Futures Bill as applied to executive officers of exempt AIs.

attributable to any neglect on the part of, an executive officer of the institution, the conduct shall also be regarded as misconduct on the part of the officer, and "guilty of misconduct" shall also be construed accordingly.²⁷

71D. Appointment of executive officers

(1) Subject to section 71F, every exempt authorized institution shall appoint not less than 2 executive officers -

(a) in the case of an institution -

- (i) incorporated in Hong Kong, to be responsible for directly supervising the conduct of the business conducted by the institution that constitutes a regulated activity;
- (ii) incorporated outside Hong Kong, to be responsible for directly supervising the conduct of the business in Hong Kong conducted by the institution that constitutes a regulated activity; and

²⁷ This subsection effectively applies the revised clause 186(2) of Securities and Futures Bill to executive officers of exempt AIs – to render an executive officer responsible for the misconduct committed by the exempt AIs concerned under certain circumstances.

(b) each of whom shall be an individual.

~~(2) Every director and every manager of an exempt authorized institution which contravenes subsection (1) commits an offence and is liable on conviction upon indictment or on summary conviction to a fine at tier 5 and, in the case of a continuing offence, to a further fine at tier 2 for every day during which the offence continues.²⁸~~

71E. Grant of provisional consent in relation to persons seeking Monetary Authority's consent under section 71C(1) to be executive officers

(1) Where a person seeks the consent under section 71C(1) of the Monetary Authority to be an executive officer of an authorized institution, then the Monetary Authority may, upon the request of the person, and in his absolute discretion but subject to subsection (2), give provisional consent to the person to be such executive officer.

(2) The Monetary Authority shall refuse to give provisional consent under subsection (1) to a person unless the person satisfies the Monetary Authority that the giving of the consent will not prejudice the interests of -

(a) depositors or potential depositors of the exempt authorized institution concerned; and

²⁸ This subsection is deleted since it creates a double penalty for the same offence : the penalty for this offence is already provided for under clause 124(3) of the Securities and Futures Bill.

(b) the investing public.

(3) The Monetary Authority may give provisional consent under subsection (1) to a person subject to such conditions as the Monetary Authority thinks proper to attach thereto, and the Monetary Authority may at any time, by notice in writing served on the person and the exempt authorized institution concerned, attach conditions to the consent or amend conditions attached to the consent, as the case may be.

(3A) The attachment or amendment under subsection (3) of conditions shall take effect at the time of -

(a) giving the provisional consent; or

(b) service of the notice concerned under that subsection or at the time specified in the notice, whichever is the later,

as the case may be.²⁹

(4) A provisional consent given under subsection (1) to a person shall be deemed to be revoked when the person and the exempt authorized institution concerned are given notice under section 71C(3) of the Monetary Authority's decision to give, or refuse to give, consent under section 71C(1) for the person to be an executive officer of the institution.

²⁹ New subsection added to specify that the attachment of conditions to provisional consent and amendment of such conditions will take effect without following the usual procedure of waiting for appeal channels to be exhausted. This is identical to the arrangement for attachment of conditions and amendment of such conditions to the provisional approval of licensed representatives under clause 119(8) of the Securities and Futures Bill.

(5) The Monetary Authority may, having regard to the interests of the depositors or potential depositors of the exempt authorized institution concerned or of the investing public, and in his absolute discretion, withdraw provisional consent given under subsection (1) ~~to a person by giving notice in writing to the person and the institution withdrawing the consent to a person -~~

(a) by giving notice in writing to the person and the institution withdrawing the consent;

(b) with effect on such date as is specified in the notice, being a date not earlier than 7 days after the notice is so given³⁰.

71F. Transitional provisions in relation to sections 71C and 71D in the case of certain exempt authorized institutions

Neither section 71C nor section 71D shall apply to or in relation to an exempt authorized institution during the period within which the institution falls within paragraph (a) of the definition of "exempt authorized institution".

³⁰ The original clause provides that the withdrawal of provisional consent given to an executive officer takes immediate effect. The Hong Kong Association of Banks has pointed out that this would result in practical problems since an exempt AI will be regarded as having contravened the requirement of having at least two executive officers appointed at all times once the provisional consent of one of its executive officers is withdrawn. It is considered reasonable to provide a grace period of 7 days in such cases so that the exempt AI in question can seek a replacement executive officer for appointment.

10. Monetary Authority may require specified persons to submit information

Section 72A(1) is amended -

(a) in paragraph (b), by adding "or an executive officer of an exempt authorized institution" after "institution";

(aa) any person who is a relevant individual within the meaning of section 20(10)³¹;

(b) in paragraph (d), by adding "or 71C(1)" after "71(1)".

11. Official secrecy

Section 120 is amended -

(a) in subsection (5), by adding -

"(fa) to the disclosure of information by the Monetary Authority to the Securities and Futures Commission relating to -

(i) the carrying on of a regulated activity by an exempt

³¹ Section 72A(1) of the Banking Ordinance empowers the Monetary Authority to require specified persons to submit information. It is necessary to include in this section the front-line securities staff of exempt AIs whose names appear in the register to be maintained pursuant to section 20(1)(ea) so that the Monetary Authority can require such persons to submit information when necessary to facilitate the supervisory process over such persons.

authorized institution; or
(ii) the carrying on by an authorized institution of the business of receiving or holding client assets, within the meaning of Schedule 1 to the Securities and Futures Ordinance (of 2000), of intermediaries, within the meaning of Schedule 1 to that Ordinance, of which the institution is an associated entity within the meaning of Schedule 1 to that Ordinance;"

(b) in subsection (5A)(b), by repealing "

" and substituting " ";

(c) in subsection (5C), by adding ", (fa)" after "(f)";

~~(d) by adding —~~

~~— "(8) For the avoidance of doubt, it is hereby declared that subsection (1) does not apply to a reprimand under section 58A.".~~³²

³² This subsection is deleted since the power of reprimand will be vested with the Securities and Futures Commission under the new clause 189A of the Securities and Futures Bill.

12. Appeals

Section 132A is amended -

(a) in subsection (1) -

(i) in paragraph (d), by adding ", 59B(3)"
after "51A(2)";

(ii) by adding -

"(ea) any conditions to which an
approval under section 59B(3)
is made subject by the
Monetary Authority under that
section;"

~~(iii) by adding -~~

~~"(fa) a refusal to grant consent
under section 71C(1),
conditions attached under
section 71C(2)(b) to such
consent, the withdrawal under
section 71C(4) of such consent,
conditions attached under
section 71C(5) to such consent
or the amendment of any such
conditions under section
71C(5);";³³~~

³³ This subsection is no longer necessary since appeals against refusal to grant consent to executive officers and the attachment/amendment of conditions to such consent, etc will now be handled by the Securities and Futures Appeals Tribunal established under Part XI of the Securities and Futures Bill instead of the Chief

~~(b) by adding~~

~~“(2A) Any exempt authorized institution aggrieved by a decision in a notice under section 58A(3) served on it may appeal to the Chief Executive in Council against the decision.”³⁴~~

(b) by adding -

“(6) A person aggrieved by a specified decision of the Monetary Authority made in respect of the person may, by notice in writing served on the Securities and Futures Appeals Tribunal established by section 210 of the Securities and Futures Ordinance (of 2001), apply to the Tribunal for a review of the decision.”³⁵

(7) The provisions of Part XI of the Securities and Futures Ordinance (of 2001) shall apply to and in relation to a notice under subsection (6) as they apply to and in

Executive in Council.

³⁴ This subsection is also deleted since the power under section 58A which deals with reprimand of an exempt AI will be transferred to the Securities and Futures Bill. Appeals against such decisions will also be handled by the Securities and Futures Appeals Tribunal instead of the Chief Executive in Council.

³⁵ To add a new subsection under section 132A to provide that appeals against specified decisions (to be defined later in the section) should be made to the Securities and Futures Appeals Tribunal established under the Securities and Futures Bill.

relation to a notice under section 211(1) of that Ordinance.³⁶

(8) A specified decision, other than a specified decision mentioned in paragraph (c) of the definition of "specified decision", shall take effect³⁷ -

(a) where, prior to the expiration of the time specified in section 211(3) of the Securities and Futures Ordinance (of 2001) as that within which an application for review of the decision shall be made, the person to whom the decision relates notifies the Monetary Authority that he will not make the application, at the time when he so notifies the

³⁶ To apply the provisions concerning appeals under the Securities and Futures Bill to specified decisions under the Banking Ordinance.

³⁷ This subsection has the same legislative effect as clause 224(2) of the Securities and Futures Bill. It spells out the interaction between the effective date of specified decisions and the appeal process under the Securities and Futures Appeals Tribunal. The only exception in this context is the attachment/amendment of conditions to provisional consent granted to executive officers under section 71E(3), which will take effect without waiting for the appeal process to be exhausted (see Footnote 29).

Monetary Authority;

(b) subject to paragraph (a), where
the person does not make an
application for review of the
decision within the time
specified in section 211(3) of
the Securities and Futures
Ordinance (_____ of 2001) as
that within which the
application shall be made, at
the time when the time so
specified expires; or

(c) where the person makes an
application for review of the
decision within the time
specified in section 211(3) of
the Securities and Futures
Ordinance (_____ of 2001) as
that within which the
application shall be made -

(i) where the decision is
confirmed by the
Securities and Futures
Appeals Tribunal
established by section

210 of that Ordinance,
at the time when the
decision is so confirmed;

(ii) where the decision is
varied, or substituted
by another decision, by
that Tribunal, at the
time when the decision
is so varied or
substituted, subject
however to the terms of
the variation or
substitution; or

(iii) where the application is
withdrawn, at the time
when it is so withdrawn.

(9) Notwithstanding subsection (8) and
any other provisions of this or any other
Ordinance, the Monetary Authority may, in
respect of a specified decision, where he
considers it appropriate in the interest of
the investing public or in the public interest
to do so, specify in a notice served on the
person to whom the decision relates any time,
other than that at which the decision is apart
from this subsection to take effect, as the

time at which the decision is to take effect,
in which case the decision takes effect at the
time so specified.³⁸

(10) In this section -

"specified decision" (_____) means a
decision of the Monetary Authority -

(a) in a notice under section 58A(4)
served on the person concerned;

(b) to refuse to grant consent
under section 71C(2)(a), to
attach pursuant to section
71C(2)(b) conditions to such
consent, to withdraw or suspend
under section 71C(4) such
consent, to attach pursuant to
section 71C(5) conditions to
such consent or to amend
pursuant to section 71C(5) any
such conditions; or

(c) to attach pursuant to section
71E(3) conditions to
provisional consent given under
section 71E(1) or to amend
pursuant to section 71E(3) any

³⁸ This new subsection has the same legislative effect as clause 224(3) of the Securities and Futures Bill.

such conditions.³⁹".

13. Minimum criteria for authorization

The Seventh Schedule is amended -

- (a) in paragraph 4, by repealing "or chief executive" and substituting ", chief executive or executive officer";
- (b) in paragraph 5(a), by adding ", or executive officer," after "chief executive";
- (c) in paragraph 12, by adding "(including any business which is not banking business or the business of taking deposits)" after "business".

14. Grounds for revocation of authorization

The Eighth Schedule is amended by adding -

"15A. A person has become or continues to be an executive officer of the authorized institution in contravention of section 71C."

³⁹ New subsection to define specified decision in the context of the Banking Ordinance. Appeals against such specified decisions should be made to the Securities and Futures Appeals Tribunal instead of the Chief Executive in Council.