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**Paper for the House Committee Meeting
of the Legislative Council
on 20 April 2000**

**Legal Service Division Report on
Banking (Amendment) Bill 2001**

Object of the Bill

To improve the operation of the Banking Ordinance (Cap. 155) (BO) by providing for :-

- (a) the control over Authorized Institutions' places of business;
- (b) the regulation of internet advertisements for deposits;
- (c) the maintenance by Authorized Institutions (AIs) of adequate systems of control to ensure the fitness and properness of their "managers";
- (d) the establishment of local representative office by non-deposit-taking banks;
- (e) the rationalization of the availability of the general defence under section 126 of BO;
- (f) the notification by Monetary Authority (MA) of his decision on an application to use the name "bank" and the appeal from MA's decision to the Chief Executive in Council;
- (g) the requirement that the relevant shares of a controller, to whom MA has served a notice of objection, shall be transferred to a nominee of MA; and
- (h) the enactment of a redrafted section 71 of BO relating to the approval of chief executives and directors by MA.

LegCo Brief Reference

2. G4/16/21C dated 23 March 2001 and issued by the Financial Services Bureau.

Date of First Reading

3. 4 April 2001.

Comments

Managers, Chief Executives and Directors

4. The initial proposal requiring the appointment of "managers" by AIs to be approved by MA has been dropped by the Administration. The new proposal is to add a new paragraph 5A in the Seventh Schedule of BO as one of the minimum criteria of authorization under BO (clause 27). The proposed paragraph 5A requires MA to be satisfied that an AI has, and would continue to have, adequate systems of control to ensure that each manager of the institution is a fit and proper person to hold the particular position which he holds or is to hold. MA will in due course issue a guideline on the key elements of the systems of control.

5. To complement the proposed new criterion, the existing definition of "manager" would be repealed. A new definition of "manager" is proposed (Clause 2(a)(vi)). It envisages a manager as any person other than a director or chief executive of an AI being principally responsible, either alone or with others, for the conduct of the affairs or business of the institution specified in the proposed new Fourteenth Schedule. In a management system that the directors and the chief executive are primarily responsible, it seems a little elusive to require identification of some other person each of whom is principally responsible and could at the same time be so responsible jointly with others. An AI would be required to notify MA of the appointment and cessation of each manager, and any change in his responsibility (proposed section 72B - clause 17).

6. The proposed new Fourteenth Schedule identifies seven categories of businesses of an AI: (a) retail banking, (b) private banking, (c) corporate banking, (d) international banking, (e) institutional banking, (f) treasury, and (g) any other business which is material to the institution, and six other internal administrative or supporting functions (clause 29). The categorization, on which the proposed new Fourteenth Schedule is based, is doubtless a prevailing one. However, in the dynamic developing world of banking, such fixed categorization may not fit every AI and could soon be obsolete.

7. The proposed new section 71 (clause 16) makes clear that the conditions attached to a consent of MA under the section must be complied with and no person shall act or continue to act as a chief executive or director of an AI after the consent of MA has been withdrawn. It is also expressly provided that unless MA is satisfied that a person is a fit and proper person to be the chief executive or a director of the AI concerned, no consent should be given. Any consent given could be withdrawn if MA has ceased to be so satisfied. Existing consents and conditions would be deemed to have been given under the proposed new section after its commencement.

Local Branches and Local Offices

8. The existing definition of "local branch" under section 2 of BO does not cover some of the places of business established by AIs in recent years. The Administration categorized these places of business into two main types:

- (a) those through which an AI enters into commitments on the assets side of the balance sheet, such as "lending offices" (Type A places); and
- (b) those through which an AI provides mainly services, such as personal banking centres (Type B places).

Since Type A places could commit an AI to significant financial risks and Type B places would be of comparatively lower risk, it is proposed that the establishment of the former shall require prior approval of MA and that of the latter needs only prior notification to MA.

9. Accordingly, it is proposed to amend the definition of "local branch" to cover Type A places by extending it to include any places of business at which an AI carries on any other business whereby it may incur financial exposure as described in section 81(2) of BO. Section 44 of BO is consequentially amended by adding a proposed subsection (3A) to cover local branches established before the commencement of the amended definition (clause 5).

10. A new definition of "local office" is introduced to cover Type B places. The obligation to notify MA of the commencement of business of a local office is imposed by the proposed new section 45A (clause 7). The new definition of "local office" refers to local office as a place of business from which any business of an AI is promoted and assisted. Since sales transactions do take place in many personal banking centres, it is unclear whether the fact that doing any sales transactions, e.g. insurance contracts, would take the place of business outside the ambit of "local office".

Advertisement for Deposits

11. The existing section 92 would be replaced by a new section (Clause 19), which would make explicit that the general prohibition of advertising for deposits

extends to acts done at places outside Hong Kong. The existing exception granted to persons carrying on the business of issuing advertisements would be restricted to situations where the content of the advertisement was wholly devised by a customer or his agent. New exceptions are created in favour of broadcasters and internet services providers. The new section would also stipulate that MA may from time to time publish guidelines specifying the factors that MA takes into account when determining whether or not the section applies to an advertisement. Complementarily, the definitions of "advertisement", "document" and "issue" in section 2 Of BO would also be amended. A new definition of "invitation" would be added to include advertisement issued through new technological means.

Availability of Defence

12. Section 126(1) of BO affords a defence to a person who has taken all reasonable precautions and exercised all due diligence to avoid the commission of an offence under BO by himself or any person under his control. Section 126(2) specified the provisions of BO to which the section would not apply. The Bill proposes to repeal the existing section 126(2) and substitute a new subsection. The net effect of the proposed amendment would be that the defence would not apply to sections 18(11), 22(12), 24(12), 25(10), 53C(14), 53H, 63(7), 93(1), 120(6) and 125(4) and would apply to sections 46(8) and 47(2) of BO. The amendment is an effort to rationalize the application of the section because the offences under those sections, to which the defence would not apply, are either by nature inconsistent with the defence or requiring the proof of specific intent.

Local Representative Office

13. The definition of "bank" in section 46(9) of BO is amended to include an institution which is authorized or recognized as bank at the place where it is incorporated (clause 9). This would allow banks, which are policy banks not engaged in deposit-taking business, to establish representative offices in Hong Kong.

Restriction on Use of Name "Bank"

14. The Bill proposes (clause 20) to add a new subsection (1AA) to the existing section 97 explicitly requiring MA to give notice in writing to the applicant of his consent or refusal to the use of the name "bank" and to specify his reasons in the notice of the refusal.

15. Section 132A(1) of BO is proposed to be amended by substituting the existing paragraph (f) with a new paragraph and the addition of a new paragraph (fb) (clause 22). The effect is to allow appeal to the CE in Council against the decision of MA in refusing to give consent, in imposing conditions attached to a consent, in withdrawing a consent and any amendment of any such attached conditions.

Transfer of controller's shares to MA

16. Section 70B(10) would be amended to include an order that the holder of the shares under restriction shall cause the shares to be transferred to a nominee of MA (clause 14).

Public Consultation

17. According to the LegCo Brief, the Banking Advisory Committee, the Deposit-taking Companies Advisory Committee, the Hong Kong Association of Banks (HKAB), the DTC Association and the Hong Kong Internet Service Providers Association have been consulted. The Administration states that HKAB has confirmed that it has no objection to the new proposal in relation to the managers. The banking industry has no objection to other major proposals of the Bill.

Consultation with LegCo Panel

18. The Panel for Financial Affairs has been briefed of the legislative proposal at its meeting held on 4 December 2000.

Recommendation

19. The Bill comprises a number of specific amendments. Some are significant and some merely technical. Taken together they could have a discernible impact on the current banking practice and the future development of the banking sector. It is therefore recommended that a Bills Committee be set up to study the Bill in detail. The Legal Service Division is seeking clarification from the Administration on certain legal and drafting matters and will issue a further report if necessary.

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