Bills Committee on Banking (Amendment) Bill 2005

Proposed Amendments Relating to Liability of Managers of Authorized Institutions

Purpose

At the meeting of the Bills Committee held on 27 April 2005, Members requested the Administration to consider whether the interests of bank customers would be affected by the proposed amendments relating to the liability of managers of authorized institutions (AIs) under the Banking Ordinance (BO). This paper sets out the assessment of the Administration in this regard.

The Proposed Amendments

2. Under the existing BO, if an AI breaches certain requirements in the BO, every director, every chief executive and every manager of the AI commits an offence and is liable to be prosecuted. The terms "director" and "chief executive" are self-explanatory. The term "manager" refers to a senior executive of an AI who is principally responsible for one or more of the important affairs or key business of the AI specified in the Fourteenth Schedule to the BO.

3. The Hong Kong Association of Banks (HKAB) has previously expressed a concern that, since a manager is normally responsible for only one business area of an AI, it is unreasonable that he or she may be prosecuted for a contravention committed outside his or her area of responsibility. The Administration considers that the concern of the banking industry is not invalid. It therefore proposes adding a new section 2(18) to the BO so as to limit the liability of managers for certain contraventions to the case where the contravention is caused or contributed to by an act or omission on the part of the manager himself or a person under his control.

Implications on Bank Customers' Interest

4. The Administration is of the view that the proposed amendments are unlikely to have any material impact on the interests of bank customers. There are several reasons for this.

5. First of all, the proposed amendments concern only the liability of the managers of an AI. They do not in any way limit or reduce the liability of

the directors and chief executives, who are the directing minds of the institution. Every director and every chief executive of the AI may still be held personally liable for a contravention committed by the institution.

6. Secondly, the proposed amendments only seek to avoid the situation whereby a manager is prosecuted for a contravention committed outside his or her area of responsibility. Each manager is still expected to manage his or her department properly so as to prevent a contravention of the BO from happening in the department. If a manager fails to do so, he or she will be liable to be prosecuted.

7. Finally, it is a continuing authorization criterion for an AI to maintain adequate systems of control for its business, which should include appropriate safeguards to ensure compliance with the BO. As part of its supervision of AIs, the Hong Kong Monetary Authority (HKMA) will ensure that this authorization criterion is being complied with by AIs. If the HKMA is of the view that an AI has not put in place proper systems of control to ensure compliance with the BO, it will require the AI to take appropriate remedial action. If the AI fails to do so, the HKMA will have to consider the need for taking more stringent supervisory actions, including suspending or revoking the authorization of the institution in accordance with the BO.

8. In summary, the Administration believes that, notwithstanding the proposed amendments to limit the liability of managers of AIs under the BO, there are sufficient incentives under the current regulatory regime for AIs to ensure compliance with the BO and the proper conduct of their business. It is unlikely that the proposed amendments would have any material impact on the interests of bank customers.

9. Incidentally, Members may wish to note that the HKMA has consulted the Consumer Council and HKAB on the subject Bill. Insofar as the proposed amendments relating to the liability of managers are concerned, the Consumer Council did not have any comments. HKAB, on the other hand, has put forward some suggestions, including replacing the strict liability offences by mens rea offences. These suggested changes have the effect of further reducing the liability of the managers of AIs in the event of a contravention of the BO. The HKMA does not consider it appropriate to incorporate these suggested changes into the Bill without first conducting a detailed analysis. In order not to delay the passage of the Bill, which is important to the implementation of Basel II in Hong Kong, the HKMA will review this matter in the next amendment exercise of the BO.

Hong Kong Monetary Authority
Financial Services and the Treasury Bureau
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