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A BILL

To

Amend the Banking Ordinance.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title and commencement

(1) This Ordinance may be cited as the Banking (Amendment) Ordinance 2005.

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

PART 2

AMENDMENTS RELATING TO PUBLIC DISCLOSURE OF INFORMATION AND TO CAPITAL ADEQUACY RATIO

2. Section substituted

Section 60A of the Banking Ordinance (Cap. 155) (as inserted by section 6 of the Banking (Amendment) Ordinance 1999 (42 of 1999) and further amended by section 24(4) of the Banking (Amendment) Ordinance 2001 (32 of 2001)) is repealed and the following substituted—

“60A. Disclosure to the general public of information relating to financial affairs

(1) The Monetary Authority may, after consultation with the Financial Secretary and the persons specified in subsection (2), make rules prescribing the information to be disclosed to the general public by authorized institutions relating to their state of affairs, profit and loss or capital adequacy ratio and prescribing the manner in which, times at which and periods during which such information shall be so disclosed.

(2) The persons specified for the purposes of subsection (1) are—

- (a) the Banking Advisory Committee;
- (b) the Deposit-taking Companies Advisory Committee;
- (c) The Hong Kong Association of Banks; and
- (d) The DTC Association.

(3) Rules made under subsection (1) may make different provision for authorized institutions belonging to different classes of authorized institution.

(4) Where an authorized institution fails to comply with any requirement applicable to it contained in rules made under subsection (1), every director, every chief executive and every manager of the authorized institution commits an offence and is liable—

- (a) on conviction upon indictment to a fine at tier 7; or
- (b) 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.

(5) For the avoidance of doubt, it is hereby declared that any requirement under subsection (1) for the Monetary Authority to consult with any person shall not operate to prevent the Monetary Authority from consulting with such other person as the Monetary Authority thinks fit.”.

3. Capital adequacy ratio

Section 98(1) is amended by repealing everything after “with” and substituting “subsection (2) and rules made under section 98A(1).”.

4. Section added

The following is added—

“98A. Calculation of capital adequacy ratio

(1) The Monetary Authority may, after consultation with the Financial Secretary and the persons specified in subsection (2), make rules prescribing the manner in which the capital adequacy ratio of authorized institutions shall be calculated.

(2) The persons specified for the purposes of subsection (1) are—

- (a) the Banking Advisory Committee;
- (b) the Deposit-taking Companies Advisory Committee;
- (c) The Hong Kong Association of Banks; and
- (d) The DTC Association.

(3) Rules made under subsection (1) may provide for the Monetary Authority, on application made to him by any person aggrieved by a decision made by the Monetary Authority under those rules, to review his decision.

(4) For the avoidance of doubt, it is hereby declared that any requirement under subsection (1) for the Monetary Authority to consult with any person shall not operate to prevent the Monetary Authority from consulting with such other person as the Monetary Authority thinks fit.”.

5. Monetary Authority may increase capital adequacy ratio for particular authorized institutions

Section 101(1) is repealed and the following substituted—

“(1) The Monetary Authority may, after consultation with an authorized institution, by notice in writing served on it vary the capital adequacy ratio specified in section 98(1) in relation to that institution by increasing the ratio to not more than 16 per cent and, where the ratio is so varied, the other provisions of this Part shall, in relation to that institution, apply as if the ratio specified in section 98(1) were the ratio as so varied.”.

6. Amendments consequential to sections 2 to 5

The amendments set out in the Schedule shall have effect.

PART 3

OTHER AMENDMENTS

7. Interpretation

(1) Section 2(8) is amended by adding “, other than section 14,” after “Ordinance”.

(2) Section 2 is amended by adding—

“(18) Any provision of this Ordinance that purports to impose criminal liability on every manager of an authorized institution or other company in the event of a contravention of this Ordinance shall be construed as imposing criminal liability on a manager of an authorized institution or other company only to the extent that the contravention was caused or contributed to by an act or omission on the part of the manager himself or a person under his control.”.

8. Revocation of authorization

(1) Section 22(1) is amended by repealing “subsection (3)” and substituting “subsections (1A) and (3)”.

(2) Section 22 is amended by adding—

“(1A) The requirement in subsection (1) to consult the Financial Secretary before proposing to revoke the authorization of an authorized institution shall not apply where the ground for the revocation of the authorization of the authorized institution is a request in writing by the institution to the Monetary Authority to revoke its authorization.”.

9. Disciplinary action in respect of relevant individuals

Section 58A is amended by adding—

“(4A) Where the Monetary Authority has exercised his power under subsection (1) against a relevant individual, the Monetary Authority may disclose to the public details of the decision he has made under that subsection, the reasons for which the decision was made, and any material facts relating to the case.”.

10. Audit

Section 59(5) is amended by repealing “or (2)” and substituting “, and every director, every chief executive and every manager of an authorized institution which, without reasonable excuse, contravenes subsection (2)”.

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

Section 63(5) is amended by repealing “contravenes subsection (1), or fails to comply with any requirement under subsection (3) or (3A),” and substituting “, without reasonable excuse, contravenes subsection (1) or fails to comply with any requirement under subsection (3) or (3A)”.

12. Punishment for attempted evasion of restrictions

Section 70D(2) is amended by repealing “every director, every chief executive and every manager” and substituting “any director, chief executive or manager”.

13. Executive officers of registered institutions require Monetary Authority’s consent

Section 71C is amended by adding—

“(7A) Where the Monetary Authority has exercised his power under subsection (4) against an executive officer, the Monetary Authority may disclose to the public details of the decision he has made under that subsection, the reasons for which the decision was made, and any material facts relating to the case.”.

14. Revocation of approval

(1) Section 118D(1) is amended by repealing “subsection (2)” and substituting “subsections (1A) and (2)”.

(2) Section 118D is amended by adding—

“(1A) The requirement in subsection (1) to consult the Financial Secretary before proposing to revoke the approval of an approved money broker shall not apply where the ground for the revocation of the approval of an approved money broker is a request in writing by the money broker to the Monetary Authority to revoke its approval.”.

SCHEDULE

[s. 6]

AMENDMENTS CONSEQUENTIAL TO SECTIONS 2 TO 5
OF THIS ORDINANCE

PART 1

AMENDMENTS TO THE BANKING ORDINANCE AND
ITS SUBSIDIARY LEGISLATION**Banking Ordinance****1. Interpretation**

(1) The Banking Ordinance (Cap. 155) is amended, in section 2(1), by repealing the definition of “capital adequacy ratio” and substituting—

““capital adequacy ratio” (資本充足比率), in relation to an authorized institution, means the ratio of the institution’s capital base to a value representing the degree of risk of the following kinds to which the institution is exposed—

- (a) credit risk, that is to say, the risk of loss from—
 - (i) default by counterparties in on-balance sheet and off-balance sheet items of the institution; or
 - (ii) diminution in the value of such on-balance sheet items of the institution as may for the purposes of this paragraph be prescribed by the Monetary Authority in rules made under section 98A(1);
- (b) market risk, that is to say, the potential losses arising from fluctuations in the value of positions held by the institution—
 - (i) for trading purposes in debt securities, interest rate-related contracts, equities and equity-related contracts; and
 - (ii) in foreign exchange, exchange rate-related contracts, commodities and commodity-related contracts; and
- (c) operational risk, that is to say, the risk of direct or indirect losses resulting from—
 - (i) inadequacies or failings in the processes or systems, or of personnel, of the institution; or
 - (ii) external events;”.

(2) Section 2(1) is amended by adding—

““capital base” (資本基礎), in relation to an institution, means the sum of—

(a) the following amounts, but in each case only to the extent prescribed by the Monetary Authority in rules made under section 98A(1), namely—

(i) the paid-up capital of the institution;

(ii) the amount standing to the credit of the share premium account of the institution;

(iii) the audited retained earnings of the institution; and

(iv) the published reserves of the institution; and

(b) the amounts of such other resources of the institution as may for the purposes of this paragraph be prescribed by the Monetary Authority in rules made under section 98A(1);

“multilateral development bank” (多邊發展銀行) means any bank or lending or development body specified by the Monetary Authority under subsection (19);

“share premium account” (股份溢價帳)—

(a) in relation to a company incorporated in Hong Kong, means a share premium account referred to in section 48B(1) of the Companies Ordinance (Cap. 32) maintained in respect of the company;

(b) in relation to a company incorporated outside Hong Kong, means an account having the same characteristics as a share premium account referred to in section 48B(1) of the Companies Ordinance (Cap. 32) irrespective of its name;

“The DTC Association” (DTC 公會) means The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies incorporated under the Companies Ordinance (Cap. 32);

“The Hong Kong Association of Banks” (香港銀行公會) means the body corporate of that name incorporated by section 3 of The Hong Kong Association of Banks Ordinance (Cap. 364);

“Tier 1 country” (第 1 級國家) means Hong Kong and any country or place other than Hong Kong which—

(a) is a member of the Organization for Economic Co-operation and Development; or

(b) has concluded a special lending arrangement with the International Monetary Fund associated with the International Monetary Fund’s General Arrangements to Borrow,

but excludes any such country or place which—

- (c) has rescheduled its external sovereign debt, whether to central government or non-central government creditors, within the previous 5 years; or
- (d) is specified by the Monetary Authority by notice published in the Gazette as being a country or place that is not to be regarded as a Tier 1 country for the purposes of this definition;”.

(3) Section 2 is amended by adding—

“(19) The Monetary Authority may by notice published in the Gazette specify to be a multilateral development bank for the purposes of this Ordinance any bank or lending or development body established by agreement between, or guaranteed by, 2 or more countries, territories or international organizations other than for purely commercial purposes.”.

2. **Functions of the Monetary Authority**

Section 7(3) is amended by repealing everything after “Gazette” and substituting “guidelines indicating the manner in which he proposes to exercise functions conferred or imposed by or under this Ordinance upon him.”.

3. **Interpretation and application**

Section 79(2) is amended by repealing everything after “with” and substituting “rules made under section 98A(1).”.

4. **Limitations on advances by authorized institutions**

(1) Section 81(2)(c) is repealed and the following substituted—

“(c) the product of—

- (i) the principal amount of any item that, in relation to the institution, is an off-balance sheet item for the purpose of rules made under section 98A(1); and
- (ii) the factor specified by the Monetary Authority pursuant to subsection (3) for that item,

where, in respect of that institution, the other party is,”.

(2) Section 81(6)(b)(i)(D) is amended by repealing “within the meaning of the Third Schedule”.

(3) Section 81(8)(b) is repealed and the following substituted—

“(b) the expression “debt securities” (債務證券) shall mean any securities other than shares, stocks or import or export trade bills;”.

5. Appeals

- (1) Section 132A(1) is amended by adding—
“(f*c*) a decision of the Monetary Authority, made in the exercise of a power conferred by rules made under section 98A(1), that is a decision to which this paragraph applies by virtue of a declaration made in accordance with subsection (1A);”.
- (2) Section 132A is amended by adding—
“(1A) Rules made under section 98A(1) conferring on the Monetary Authority power to make any decision may declare decisions made in the exercise of that power to be decisions to which subsection (1)(f*c*) applies.”.

6. Power to amend Schedules

Section 135(3) is amended by repealing “Third,”.

7. Capital adequacy ratio

The Third Schedule is repealed.

8. Liquidity ratio

- (1) The Fourth Schedule is amended, in paragraph 1, by repealing the definition of “multilateral development bank”.
- (2) The Fourth Schedule is amended, in paragraph 1, by repealing the definition of “public sector entity in Hong Kong” and substituting—
“ “public sector entity in Hong Kong” (香港公營單位) means any entity specified by the Monetary Authority under paragraph 1A;”.
- (3) The Fourth Schedule is amended by adding—
“1A. The Monetary Authority may by notice published in the Gazette specify to be a public sector entity in Hong Kong for the purposes of this Schedule any entity established by or on behalf of the Government.”.

9. Minimum criteria for authorization

- (1) The Seventh Schedule is amended, in paragraph 1(1), by repealing the definition of “share premium account”.
- (2) The Seventh Schedule is amended, in paragraph 6(*d*), by repealing the semicolon and substituting a full stop.
- (3) The Seventh Schedule is amended by repealing paragraph 6(*e*).

(4) The Seventh Schedule is amended, in paragraph 11(*a*), by repealing “and its profit and loss” and substituting “, its profit and loss and its capital adequacy ratio”.

10. **Minimum criteria for approval as money broker**

The Eleventh Schedule is amended, in paragraph 1(1), by repealing the definition of “share premium account”.

Specification of Factors (Financial Exposure of Authorized Institution) Notice

11. **Repeal**

The Specification of Factors (Financial Exposure of Authorized Institution) Notice (Cap. 155 sub. leg. C) is repealed.

Banking (Specification of Public Sector Entities in Hong Kong) Notice

12. **Repeal**

The Banking (Specification of Public Sector Entities in Hong Kong) Notice (Cap. 155 sub. leg. E) is repealed.

PART 2

AMENDMENTS TO OTHER ORDINANCES

Companies Ordinance

1. **Preferential payments**

Section 265(6) of the Companies Ordinance (Cap. 32) (as amended by the Deposit Protection Scheme Ordinance (Cap. 581)) is amended, in the definition of “excluded person”, in paragraph (*c*), by repealing “paragraph 1 of the Third Schedule to” and substituting “section 2(1) of”.

Deposit Protection Scheme Ordinance

2. Deposits specified for purposes of definitions of “protected deposit” and “relevant deposit” in section 2(1) of this Ordinance

Schedule 1 to the Deposit Protection Scheme Ordinance (Cap. 581) is amended, in section 3, in paragraph (b) of the definition of “excluded person”, by repealing “paragraph 1 of the Third Schedule to” and substituting “section 2(1) of”.

Explanatory Memorandum

The main purpose of this Bill is to amend the Banking Ordinance (Cap. 155) (“the Banking Ordinance”) to provide for the introduction of revised banking supervision standards following the publication in June 2004 of the report entitled “International Convergence of Capital Measurement and Capital Standards: a Revised Framework” by the Basel Committee on Banking Supervision (a committee, established by the central bank governors of the Group of Ten countries, which formulates broad supervisory standards, provides guidance and recommends best practice in the area of banking supervision). The framework contained in this report is commonly referred to as “Basel II”.

2. The Bill also makes miscellaneous other amendments to the Banking Ordinance, including—
- (a) limiting the liability of managers of companies, for certain offences under that Ordinance, to cases where the contravention results from an act or omission on the part of the manager himself or of a person under his control;
 - (b) introducing a defence of “reasonable excuse” for certain offence provisions under that Ordinance.

Preliminary (Part 1)

3. Clause 1 contains the short title and a commencement provision.

**Amendments relating to public disclosure of information
and to capital adequacy ratio (Part 2)**

4. Clause 2 amends section 60A of the Banking Ordinance (this section was inserted by an amendment to the Banking Ordinance in 1999 but has not yet been brought in operation). The amendment expands the scope of the power conferred on the Monetary Authority to require the public disclosure by authorized institutions of information relating to their financial affairs, to include information relating to their capital adequacy ratio. The amendment also provides for the power conferred under that section to be exercised by means of rules made under that Ordinance instead of by notice published in the Gazette.
5. Clause 3 amends section 98(1) of the Banking Ordinance to provide that the capital adequacy ratio of authorized institutions shall be calculated in accordance with rules made under new section 98A of that Ordinance, instead of in accordance with the Third Schedule to that Ordinance.
6. Clause 4 adds new section 98A to the Banking Ordinance to provide for the Monetary Authority to make rules prescribing the manner of calculation of the capital adequacy ratio of authorized institutions.
7. Clause 5 amends section 101(1) of the Banking Ordinance to increase to 16 per cent the maximum ratio to which the capital adequacy ratio of an authorized institution may be varied by the Monetary Authority under that subsection.
8. Clause 6 provides for the consequential amendments set out in the Schedule to have effect.

Other amendments (Part 3)

9. Clause 7(1) disapplies section 2(8) of the Banking Ordinance to section 14 of that Ordinance, to avoid the unintended consequence of a restricted licence bank or deposit-taking company becoming liable for holding a deposit of less than the minimum size allowed under section 14 of that Ordinance by reason only of fluctuation in foreign currency exchange rates.
10. Clause 7(2) adds new section 2(18) to the Banking Ordinance so as to limit the liability of the managers of an authorized institution for certain contraventions under that Ordinance 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.

11. Clause 8 amends section 22 of the Banking Ordinance to remove the existing requirement for the Monetary Authority to consult the Financial Secretary before revoking the authorization of an authorized institution in cases where such revocation has been requested by the authorized institution itself.
12. Clause 9 amends section 58A of the Banking Ordinance to provide that the Monetary Authority may disclose to the public certain details of disciplinary action taken under that section.
13. Clause 10 amends section 59(5) of the Banking Ordinance so that a contravention of section 59(2) of that Ordinance is an offence only in the absence of reasonable excuse.
14. Clause 11 amends section 63(5) of the Banking Ordinance so that a contravention of section 63(1), or a failure to comply with a requirement under section 63(3) or (3A), of that Ordinance is an offence only in the absence of reasonable excuse.
15. Clause 12 amends section 70D(2) of the Banking Ordinance to remove it from the ambit of new section 2(18) of that Ordinance.
16. Clause 13 amends section 71C of the Banking Ordinance to provide that the Monetary Authority may disclose to the public certain details of disciplinary action taken under that section.
17. Clause 14 amends section 118D of the Banking Ordinance to remove the existing requirement for the Monetary Authority to consult the Financial Secretary before revoking the approval of an approved money broker in cases where such revocation has been requested by the money broker itself.

**Amendments consequential to sections 2 to 5
of this Ordinance (Schedule)**

18. The Schedule sets out the amendments that are consequential to the amendments effected by clauses 2 to 5 of the Bill. Part 1 of the Schedule contains amendments to the Banking Ordinance, including—
 - (a) the addition of new definitions in section 2(1) of that Ordinance consequent on the repeal of the Third Schedule to that Ordinance;
 - (b) the amendment of section 7(3) of that Ordinance to provide that guidelines may be issued by the Monetary Authority in relation to the exercise of powers conferred by subsidiary legislation under the Ordinance.

Part 2 of the Schedule contains consequential amendments to other Ordinances.