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**Paper for the House Committee meeting
on 17 June 2005**

**Report of the Bills Committee
on Banking (Amendment) Bill 2005**

Purpose

This paper reports on the deliberations of the Bills Committee on Banking (Amendment) Bill 2005 (the Bill).

Background

2. The international standards in banking supervision are set by the Basel Committee on Banking Supervision (BCBS) which was established by the central bank governors of the Group of Ten (G10)¹ countries. In July 1988, BCBS made public the “International Convergence of Capital Measures and Capital Standards”, which set down the agreement among the G10 central banks to apply common minimum capital standards to their banks, to be achieved by the end of 1992. It was known as the “Basel Capital Accord” and is now commonly referred to as “Basel I”. Basel I and its subsequent amendments were adopted in Hong Kong through legislation and are embodied in the Third Schedule to the Banking Ordinance (Cap. 155) (BO).

3. In June 2004, BCBS published a revised international capital adequacy framework commonly known as “Basel II”. Whilst Basel I recommended a minimum capital adequacy ratio (CAR) of 8% to cover credit and market risks, Basel II improves the capital framework’s risk-sensitivity and is more comprehensive.

¹ Comprising Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, United Kingdom and the United States.

4. Basel II has three main components (i.e. 3 Pillars). The first component (Pillar 1) provides a much more comprehensive measurement framework for *credit risk*², maintains basically the same framework for *market risk*³ and introduces a new capital charge for *operational risk*⁴. Although the minimum CAR remains at 8%, the new mechanism has made the basis of calculation more closely aligned to each bank's risk profile. Out of three available approaches to *credit risk*, a bank may choose one that seems most appropriate for the sophistication of its activities and internal controls. Among the three approaches, the *Standardized Approach* would utilize the ratings assigned to the bank by external agencies. The *Internal Ratings Based (IRB) Approach* would use internal rating model to quantify risks. A bank having adopted the IRB Approach could choose between the *Foundation IRB Approach* and *Advanced IRB Approach* depending on the level of sophistication of its rating systems. The second component (Pillar 2) refers to the supervisory review process. Each bank is required to assess the full range of risks and establish internal processes to assess its own capital adequacy on the basis of a thorough evaluation of all risks to which it is exposed. Banks are expected to hold capital above the regulatory minimum and supervisors must intervene at an early stage if capital levels became insufficient. The third component (Pillar 3) aims to bolster market discipline through public disclosure. Each bank would be required to disclose publicly key information on its capital, risk exposures and risk assessment and management.

5. According to the implementation timetable of BCBS, it is intended that Basel II could be implemented globally with effect from 1 January 2007 for the less advanced approaches to capital charge calculation. The most advanced approaches will be implemented from 1 January 2008. The Hong Kong Monetary Authority (HKMA), having consulted the industry and other interested parties, considers it highly desirable to adopt the revised capital adequacy regime and, through legislation, implement Basel II as from 1 January 2007 to tie in with BCBS's implementation timetable.

The Bill

6. The principal object of the Bill is to amend the BO to provide a framework for incorporating the revised capital adequacy framework under Basel II.

² This is the risk of loss to an institution arising from a counterparty's failure to perform on an obligation.

³ This is the risk of loss to an institution resulting from adverse movements in market rates or prices of its investments.

⁴ This is the risk of loss to an institution resulting from inadequate or failed internal processes, people and systems or from external events.

7. The Bill also proposes a number of miscellaneous amendments to the BO, including:

- (a) limiting the liability of managers of companies, for some offences under the BO, to instances that are results of an act or omission on the part of the manager personally or of a person under his control;
- (b) allowing a defence of “reasonable excuse” to some offences under the BO;
- (c) allowing the Monetary Authority (MA), i.e. the statutory office, to publish details of disciplinary decisions in respect of securities business of authorized institutions (i.e. licensed banks, restricted licence banks and deposit-taking companies authorized under the BO) (AIs); and
- (d) allowing the MA to vary the CAR of licensed banks to a maximum of 16%.

The Bills Committee

8. The House Committee agreed at its meeting on 8 April 2005 to form a Bills Committee to study the Bill. Chaired by Hon Jeffrey LAM Kin-fung, the Bills Committee held a total of four meetings to discuss the Bill. The membership list of the Bills Committee is in **Appendix I**.

9. The Bills Committee has invited views from the public. A list of organizations which had given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

10. The Bills Committee notes that one of the major benefits of Basel II is to promote the adoption of stronger risk management practices by the banking industry, which would help enhance the safety and stability of the local banking sector. By enhancing internal risk management, banks will be able to assess their ability to offer to customers more sophisticated products such as derivatives, and assess lendings to sectors such as small and medium enterprises, and allow for better risk-adjusted pricing with lower lending rates for better customers. Therefore, both banks and their customers would benefit from the implementation of Basel II. On the global front, with Basel II representing international best practice in capital adequacy measurement and standards, implementation of Basel II in Hong Kong will also enhance Hong Kong’s reputation as an international financial centre. As such, the Bills Committee supports the implementation of Basel II in Hong Kong.

Implementation of Basel II

11. The proposed amendments to the BO for the purpose of implementing Basel II in Hong Kong basically relate to two major areas, namely CAR of AIs (Pillar 1), and enhancement of the existing financial disclosure regime applicable to AIs (Pillar 3). However, the Bill does not contain any substantive rules of Basel II. No specific provisions have been proposed for Pillar 2 as the review process could be covered by the existing powers of the MA provided in the BO.

Proposed rule-making power for MA

12. The current framework for regulating and measuring AIs' CARs is embodied in Part XVII of and the Third Schedule to the BO. These are supplemented by supervisory guidelines and technical notes issued by the MA from time to time. The proposed implementation of Basel II would involve a significantly more sophisticated approach to the calculation of CAR as compared with the present regime in the BO. The HKMA therefore proposes to adopt a rule making approach to save the ongoing need to update the regime in keeping up with industry developments and international practices. To this effect, clause 2 of the Bill provides for the MA to make rules prescribing public disclosure requirements for AIs on their financial affairs including CAR ("Disclosure Rules"); and clause 4 of the Bill provides for the MA to make rules prescribing the manner of calculation of the CAR of AIs ("Capital Rules"). Clause 5 increases to 16% the maximum ratio to which the CAR of a licensed bank may be varied by the MA.

13. Regarding the rationale for empowering the MA to make the Capital Rules and Disclosure Rules instead of amending the current Third Schedule of the BO, the Administration explains that given the fact that the method of calculating CARs under Basel II is considerably more complex than that currently specified in the Third Schedule to the BO, putting the revised regime into legislation through the existing approach, i.e. by incorporating all the detailed calculations in the Third Schedule, is neither practical nor cost-effective. In addition, to keep pace with both developments in the industry which impact on CARs and international practices which will evolve over time, there will be a need on a continuing basis to revise and keep up-to-date the CAR regime in Hong Kong. These necessitate modification of the existing process for putting into legislation the revised capital regime in Hong Kong. It is therefore proposed that a rule-making approach be adopted.

14. The Bills Committee notes that both the Capital Rules and Disclosure Rules to be promulgated are regarded as subsidiary legislation subject to negative vetting by the Legislative Council, although it has not been stated in the Bill. At the same time, the Bills Committee also notes that the Bill also proposes to amend section 7(3) of the BO to allow the MA to issue guidelines indicating

the manner in which he proposes to exercise functions conferred on him under these Rules. Such guidelines are not subsidiary legislation. The relevant extract of the amended section 7 of the BO is enclosed in **Appendix III**.

15. Members of the Bills Committee have questioned whether it is necessary to spell out clearly in the Bill that the Capital Rules and Disclosure Rules are subsidiary legislation. The Administration confirms that it is not necessary to do so as there should not be any doubt as to the status of the rules being subsidiary legislation. As for the guidelines, there is a general understanding that guidelines are not subsidiary legislation. Although there is a requirement for such guidelines to be published by notice in the Gazette, they are not subject to the negative vetting of the Legislative Council.

Public disclosure by AIs

16. The proposed new section 60A (clause 2) would give the MA the power to make rules prescribing public disclosure requirements for AIs on their financial affairs including CAR (i.e. Pillar 3). The power to make rules is subject to the statutory duty to consult the Banking Advisory Committee (BAC), the Deposit-taking Companies Advisory Committee (DTCAC), the Hong Kong Association of Banks (HKAB), the DTC Association (DTCA), and the Financial Secretary (FS).

17. The new section 60A(4) provides that where an AI fails to comply with any requirement applicable to it contained in rules made under the new section 60A(1), every director, every chief executive and every manager of the AI commits an offence and is liable on conviction upon indictment to a fine at tier 7 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.

18. The Bills Committee has examined whether the new section 60A(4) is too stringent as based on the current drafting, even for a minor technical breach by an AI of any requirement applicable to it contained in rules made under the new section 60A(1), every director, every chief executive and every manager of the AI would commit an offence and would thus be subject to criminal prosecution. The Bills Committee has therefore examined the actions the MA would probably take in the case of a breach of the rules made under the new section 60A(1). The Bills Committee has also reviewed the power and actions that could be taken by the MA in respect of non-compliance with the provisions of the BO on the part of AIs.

19. According to the HKMA, in the BO, apart from criminal prosecution, there are a full range of alternative actions that the MA could take in respect of a contravention of a provision of the BO on the part of an AI. As the primary regulatory objective of the MA is to ensure stability of the banking system, the

primary concern of the MA is to address the relevant problem arisen in the first place. To this end, the MA would probably use moral persuasion in the first instance and this could be reinforced by exercising the powers given to it under section 52 of the BO. The new section 60A(4) imposes a strict liability on certain personnel of AIs and there are other similar provisions existed in the BO. Depending on the circumstances of the case, criminal prosecution against the personnel of the AI concerned might not be initiated, but this is a matter for the Department of Justice to decide, not the MA.

Definition of CAR and related terms

20. Clause 4 of the Bill adds new section 98A to the BO to provide for the MA, after consultation with the BAC, DTCAC, HKAB, DTCA, and the FS, to make rules prescribing the individual components of the capital base, and the manner in which credit, market and operational risks are to be taken into account in calculating the CARs of AIs (i.e. Pillar 1).

21. The Bills Committee notes that the term “capital adequacy ratio” is defined in the Schedule to the Bill as the ratio of an AI’s capital base to a value representing the degree of credit risk, market risk and operational risk to which the institution is for the time being exposed. The Bills Committee has examined whether there is a need to refine the definition of the term to ensure clarity. The Bills Committee notes the respective definitions of “credit risk”, “market risk”, “operational risk” and “capital base” as defined in section 1 of the Schedule to the Bill. However, it is not certain how “value” in the phrase “... means the ratio of the institution’s capital base to a value representing” is arrived at.

22. The HKMA points out that the term “value” is an amount to be calculated on the basis of different types of assets or exposures of an AI, the assigned risk weights to the type of assets/exposures and the calculation methodologies under each of the approaches of Pillar 1. The proposed definition of “capital adequacy ratio” is arrived at after a lot of deliberation within the Administration. The MA would make rules to prescribe clearly the manner in which the CAR of AIs shall be calculated.

Appeals mechanism

23. On check and balance measures, the Bills Committee agrees that provisions on the mechanism for appeals and other procedural safeguards should be incorporated into the BO with regard to the decisions of the MA made under the Capital Rules. To this end, the Administration proposes a two-tier appeals mechanism. At the first tier, under the new section 98A(3), the rules made under section 98A(1) may provide for the MA, on application made to him by any person aggrieved by a decision made by the MA under those rules, to review his decision. At the second tier, an AI aggrieved by a decision made by the MA under those rules can also appeal to the Chief Executive in Council for a review

under the existing BO.

24. On the first-tier appeals mechanism, the Bills Committee notes that the Administration's intention is to establish an internal procedure for handling requests for review of the MA's decisions. Before invoking the formal appeal procedure, an aggrieved person may apply to the MA to review a decision made by the MA under the Capital Rules. On receipt of such a request, a review committee constituted by officials in the HKMA who are not directly involved in making the decision in question would be formed to review the decision. This procedure is in line with the normal approach adopted currently by the MA for resolving matters with the banking industry. Hence, proposed section 98A(3) would formalize the existing informal procedure. To reflect the policy intention, the Administration also proposes to move a Committee Stage amendment (CSA) to clause 4 to make it clear that an AI, instead of "any person", aggrieved by a decision of the MA made in relation to it under the Capital Rules could make an application for review of MA's decision.

25. The Bills Committee considers that the second-tier mechanism with the Chief Executive in Council being the appellate body, is not suitable for present-day circumstances. Since the Executive Council (ExCo) is primarily a body to assist the Chief Executive in policy making and that the ExCo may lack the time and expertise required to deal with such appeal cases, the Administration should consider establishing a specific appeal body for handling appeal cases relating to the decisions of the MA made under the BO, as in the case of the Securities and Futures Ordinance (Cap. 571), where a Securities and Futures Appeals Tribunal had been established to handle appeals against the decisions of the Securities and Futures Commission (SFC).

26. The Administration points out that the existing appeals mechanism in the BO, i.e. the Chief Executive in Council being the appellate body, has been in place for a long time and its appropriateness has not been questioned by the banking industry. During the public consultation on the Bill, the banking industry has expressed no objection to maintaining the existing mechanism.

27. Nevertheless, the Administration sees merit in members' proposal, given the technical nature of appeals under the Capital Rules, and agrees to move CSAs to the Bill to provide for the establishment of a tribunal that would review certain decisions of the MA made under the Capital Rules.

28. The Bills Committee has also examined the extent to which the decisions of the MA in relation to the Capital Rules would be appealable under the proposed amendments in the Bill. The Administration points out that the right of appeal will only lie in respect of the fundamental decision as to which approach to capital adequacy calculation an AI may adopt, which may have a material impact on the AI's capital requirement. The detailed calculation technicalities, which are to be prescribed in accordance with the international

standards of Basel II, would not be subject to appeal. The Capital Rules would be made after thorough industry consultation as proposed in clause 4 of the Bill. The Capital Rules would also specify which decisions of the MA made in the exercise of the power conferred on it by the Capital Rules would be subject to appeal.

29. In the course of deliberation, views have been expressed that the Administration should consider whether the existing appeals mechanism under the BO should also be revamped. The Administration's view is that for the moment, it does not see the need to change the appeals mechanism which has been working well and is accepted by the banking industry. It however agrees that this matter could be reviewed in future where necessary.

Power of MA to vary the capital adequacy ratio (clause 5)

30. The MA is empowered under section 101 of the BO to vary, after consultation with FS, the CAR of licensed banks to a maximum of 12% and that of deposit-taking companies and restricted licence banks to 16%. Clause 5 recasts section 101(1) to empower MA to vary the CAR of all AIs to a maximum of 16%. According to the Administration, such amendment is necessary to enable the MA to set a higher CAR if the circumstances so require, e.g. a significant increase in risks to which an individual bank or the industry as a whole is exposed.

Criminal liability of managers (clause 7)

31. 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.

32. The Bills Committee notes that 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 (clause 7) 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.

33. The Administration assures members 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.

34. In this respect, the Bills Committee notes that the HKMA has also consulted the Consumer Council and HKAB on the 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 undertakes to review this matter in the next amendment exercise of the BO.

Disciplinary action in respect of relevant individuals and executive officers (clauses 9 and 13)

35. The MA has been empowered under the Banking (Amendment) Ordinance 2002 to use the same standards and approaches adopted by the SFC in the MA's front-line supervision of AIs' securities business. Currently, the SFC publishes its disciplinary action as well as the relevant facts and findings surrounding the case. Although the MA has been given similar powers under sections 58A and 71C of the BO, there is doubt as to whether the MA can publish his disciplinary actions in view of the confidentiality obligations imposed on him by section 120 of the BO. To maintain a level playing field between AIs and SFC regulated persons, the Bill provides new sections 58A(4A) and 71C(7A) in the BO to put it beyond doubt that the MA may publish his disciplinary decisions in a manner similar to that followed by the SFC.

Defence of "reasonable excuse" (clauses 10 and 11)

36. Clauses 10 and 11 introduce a defence of "reasonable excuse" to an offence for contravening section 59(2) (report on matters as MA may reasonably require for the exercise of his functions under the BO) or section 63(1) (submission of monthly and quarterly return), or failing to comply with any requirement under section 63(3) or (3A) (submission of an auditor's report as specifically required by MA before a specified date) of the BO. The amendments would mitigate the harsh effect of the relevant provisions.

Committee Stage amendments

37. The Administration has accepted the Bills Committee's suggestion to move CSAs to the Bill to provide for the establishment of a tribunal that would review certain decisions of the MA made under the Capital Rules. The Administration has also accepted members' suggestion to refine the CSAs to allow the tribunal to publish its determination and the reasons for the determination under certain circumstances (e.g. if the publication would be a useful reference for the banking industry). A full set of the Administration's proposed CSAs is in **Appendix IV**. The Bills Committee will not propose any CSAs.

Recommendation

38. The Bills Committee supports the Bill and recommends the resumption of the Second Reading debate on the Bill on 6 July 2005.

Advice sought

39. Members are requested to support the recommendation of the Bills Committee at paragraph 38.

Council Business Division 1
Legislative Council Secretariat
16 June 2005

Bills Committee on Banking (Amendment) Bill 2005

Membership list

Chairman	Hon Jeffrey LAM Kin-fung, SBS, JP
Deputy Chairman	Hon Bernard CHAN, JP
Members	Dr Hon David LI Kwok-po, GBS, JP Hon CHAN Kam-lam, JP Hon SIN Chung-kai, JP Hon Andrew LEUNG Kwan-yuen, SBS, JP Hon Ronny TONG Ka-wah, SC (Total : 7 Members)
Clerk	Mr Andy LAU
Legal Adviser	Mr KAU Kin-wah
Date	27 April 2005

Appendix II

Bills Committee on Banking (Amendment) Bill 2005

List of organizations which have given views on the Bill

1. Hong Kong Institute of Certified Public Accountants
2. Office of the Privacy Commissioner for Personal Data, Hong Kong
3. Securities and Futures Commission

Council Business Division 1
Legislative Council Secretariat
16 June 2005

7. Functions of Monetary Authority

(1) The principal function of the Monetary Authority under this Ordinance shall be to promote the general stability and effective working of the banking system. (*Amended 82 of 1992 s. 15*)

(2) Without limiting the generality of subsection (1), the Monetary Authority shall— (*Amended 82 of 1992 s. 25*)

- (a) be responsible for supervising compliance with the provisions of this Ordinance;
- (b) take all reasonable steps to ensure that the principal places of business, local branches, local offices, overseas branches and overseas representative offices of all authorized institutions and local representative offices are operated in a responsible, honest and business-like manner; (*Amended 32 of 2001 s. 3*)
- (c) promote and encourage proper standards of conduct and sound and prudent business practices amongst authorized institutions and money brokers; (*Amended 4 of 1997 s. 4*)
- (d) suppress or aid in suppressing illegal, dishonourable or improper practices in relation to the business practices of authorized institutions;
- (e) co-operate with and assist recognized financial services supervisory authorities of Hong Kong or of any place outside Hong Kong, whenever appropriate, to the extent permitted by this or any other Ordinance; (*Amended 95 of 1991 s. 4; 6 of 2002 s. 3*)
- (f) consider and propose reforms of the law relating to banking business and the business of taking deposits; and (*Amended 6 of 2002 s. 3*)
- (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. (*Added 6 of 2002 s. 3*)

(3) The Monetary Authority may from time to time cause to be prepared and published by notice in the Gazette, ~~for the guidance of authorized institutions, guidelines not inconsistent with this Ordinance, indicating the manner in which he proposes to exercise functions conferred or imposed by this Ordinance upon him.~~ (*Amended 82 of 1992 s. 25*)



guidelines indicating the manner in which he proposes to exercise functions conferred or imposed by or under this Ordinance upon him.

Banking (Amendment) Bill 2005

09 Jun 05

Draft

Committee Stage Amendments

BANKING (AMENDMENT) BILL 2005

COMMITTEE STAGE

Amendments to be moved by the Secretary for Financial Services
and the TreasuryClauseAmendment Proposed

4

In the proposed section 98A –

- (a) in subsection (3), by deleting "any person aggrieved by a decision made by the Monetary Authority under those rules" and substituting "an authorized institution aggrieved by a decision of the Monetary Authority made in relation to it under those rules";

- (b) by adding –

"(3A) Rules made under subsection (1) may provide that a decision made by the Monetary Authority under those rules is a decision to which section 101B(1) applies."

New

By adding –

"5A. Part XVIIIA added

The following is added immediately after section 101 –

"PART XVIIA
CAPITAL ADEQUACY REVIEW TRIBUNAL

**101A. Establishment of Capital
Adequacy Review
Tribunal**

(1) There is established a tribunal to be known as the "Capital Adequacy Review Tribunal" in English and "[資本充足事宜覆核審裁處]" in Chinese, comprising a chairman and such number of members as may be appointed under subsection (3).

(2) The Chief Executive shall, by notice published in the Gazette, appoint to be the Chairman of the Review Tribunal a person who is qualified for appointment as a judge of the High Court under section 9 of the High Court Ordinance (Cap. 4).

(3) The Chief Executive shall, by notice published in the Gazette, appoint as members of the Review Tribunal persons, not being public officers, whom he considers suitable for that appointment, and the number of persons so appointed shall at any one time be not less than 2.

(4) The Chairman and members of the Review Tribunal shall be paid, as a fee for their services, such amounts as the Chief Executive considers appropriate; and of those amounts the amounts payable to the Chairman shall be a charge on the general revenue, and the amounts payable to members shall be a charge on the Exchange Fund established under section 3 of the Exchange Fund

Ordinance (Cap. 66).

(5) The Fifteenth Schedule has effect with respect to the Review Tribunal.

(6) Subject to this Part and the Fifteenth Schedule and to rules made under section 101I, the Chairman of the Review Tribunal may determine the procedures and practice of the Review Tribunal.

101B. Application to Review Tribunal

(1) An authorized institution that is aggrieved by a decision of the Monetary Authority made in relation to it, being a decision to which this section applies by virtue of section 98A(3A), may, at any time within the period specified in subsection (3), apply to the Review Tribunal for a review of the decision.

(2) An application for review shall be in writing and shall state the grounds for the application for a review.

(3) The period specified for the purposes of subsection (1) is the period ending 30 days after the receipt by the authorized institution of notice in writing given by the Monetary Authority informing it of the decision, or such later date as the Review Tribunal may, in the circumstances of the particular case, allow.

(4) The making of an application to the Review Tribunal for a review of a decision does not operate to suspend the decision.

101C. Determination of review by Review Tribunal

(1) The Review Tribunal shall deliver to the

Monetary Authority a copy of any application for a review of a decision under section 101B(1) that it has received.

(2) As soon as practicable after receipt of that copy, the Monetary Authority shall forward to the Review Tribunal a copy of the decision together with all other relevant papers in his possession.

(3) In reviewing a decision of the Monetary Authority, the Review Tribunal shall afford both the applicant and the Monetary Authority a reasonable opportunity of being heard.

(4) For the purpose of proceedings before the Review Tribunal, matters of fact are established if they are established on the balance of probabilities.

(5) In determining a review of a decision, the Review Tribunal may –

- (a) affirm, vary or set aside the decision; or
- (b) remit the matter to the Monetary Authority with any direction that it considers appropriate.

(6) As soon as practicable after completing the review, the Review Tribunal shall deliver its determination and the reasons for that determination.

101D. Registration of determination made by Review Tribunal

(1) A determination made by the Review Tribunal shall be recorded in writing and signed by the Chairman of the Tribunal.

(2) The Court of First Instance may, on notice in writing given by the Review Tribunal in the manner

prescribed by rules made by the Chief Justice under section 101I, register a determination of the Review Tribunal in the Court of First Instance; and a determination so registered shall for all purposes be regarded as an order of the Court of First Instance made within the jurisdiction of the Court of First Instance.

(3) The determination of the Review Tribunal is final and, except as provided in section 101H, is not subject to appeal.

(4) For the purposes of any proceedings in a court of law, a document purporting to be a record of a determination of the Review Tribunal signed by the Chairman of the Review Tribunal shall, in the absence of evidence to the contrary, be regarded as a determination of the Review Tribunal duly made and signed, without proof of its making, or proof of signature, or proof that the person signing the determination was in fact the Chairman of the Review Tribunal.

101E. Powers of Review Tribunal

(1) For the purposes of any review, the Review Tribunal may –

- (a) receive and consider any material by way of oral evidence, written statements or documents, whether or not the material would be admissible in a court of law;
- (b) determine the manner in which any such material is received;
- (c) by notice in writing signed by the

Chairman of the Tribunal, require a person to attend before it and, subject to subsection (2), to give evidence and produce any article, record or document in his possession or control relating to the subject matter of the review;

- (d) administer oaths;
- (e) examine or cause to be examined on oath or otherwise a person attending before it and require the person to answer truthfully any question which the Tribunal considers appropriate for the purpose of the review;
- (f) order a witness to provide evidence for the purpose of the review by affidavit;
- (g) stay any of the proceedings in the review on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice;
- (h) order that costs be paid to any party to the review or any person who is required to attend before it for the purpose of the review;
- (i) hear an application for stay of proceedings for a review at any time before its determination is made; and
- (j) exercise such other powers or make such other orders as may be necessary for or ancillary to the conduct of the

review or the performance of its functions.

(2) Nothing in subsection (1) empowers the Review Tribunal to require –

- (a) the technical consultant or adviser of an applicant to disclose any information relating to the affairs of any person other than the applicant; or
- (b) a solicitor or counsel to disclose any privileged communication, whether oral or written, made to or by him in that capacity.

(3) For the avoidance of doubt, the rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to proceedings of the Review Tribunal as they apply in relation to civil proceedings in a court and, accordingly, a person may not under subsection (1) be required to give, produce or provide any evidence or document if he could not be required to do so if the proceedings of the Review Tribunal were civil proceedings in a court.

(4) No person shall –

- (a) fail to comply with an order, notice, prohibition or requirement of the Review Tribunal made or given under or pursuant to subsection (1) or the Fifteenth Schedule;
- (b) disrupt any sitting of the Review Tribunal or otherwise misbehave during

any such sitting;

- (c) having been required by the Review Tribunal under subsection (1) to attend before the Tribunal, leave the place where his attendance is so required without the permission of the Tribunal;
- (d) hinder or deter any person from attending before the Review Tribunal, giving evidence or producing any article, record or document, for the purpose of a review;
- (e) threaten, insult or cause any loss to be suffered by any person who has attended before the Review Tribunal, on account of such attendance; or
- (f) threaten, insult or cause any loss to be suffered by the Chairman, or any member, of the Review Tribunal at any time on account of the performance of his functions in that capacity.

(5) A person who, without reasonable excuse, contravenes subsection (4) commits an offence and is liable –

- (a) on conviction upon indictment to a fine at tier 8 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at tier 5 and to imprisonment for 6 months.

(6) A person is not excused from complying with an order, notice, prohibition or requirement of the Review

Tribunal made or given under or pursuant to subsection (1) only on the ground that to do so might tend to incriminate the person.

**101F. Sittings of Review Tribunal
to be held in private**

(1) The sittings of the Review Tribunal shall be held in private.

(2) A participant in proceedings for a review shall not, at the time of the proceedings or at any other time, publish or otherwise disclose to any person any information about the review or any information that comes to his knowledge in the course of the review.

(3) Subsection (2) does not apply to a disclosure, by a participant in proceedings for a review –

- (a) made to another participant in the same proceedings, where the disclosure is necessary for the proper carrying out of the first-mentioned participant's functions in relation to the review; or
- (b) necessarily made for the purpose of an appeal to the Court of Appeal under section 101H in relation to the review.

(4) Subsection (2) does not apply to publication by the Review Tribunal under subsection (6) of the reasons for its determination in any proceedings.

(5) A person who contravenes subsection (2) commits an offence and is liable –

- (a) on conviction upon indictment to a fine at tier 8 and to imprisonment for 2

years; or

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

(6) The Review Tribunal may, with the consent of the applicant and the Monetary Authority, for the information of authorized institutions generally, publish the reasons for its determination in any proceedings, or a summary of any part of those reasons, but without disclosing or containing information leading to the disclosure of –

- (a) the identity of the applicant or any witness in the proceedings;
- (b) any commercially sensitive information relating to the applicant; or
- (c) any confidential information obtained from the Monetary Authority.

(7) In this section, "participant" (參與者), in relation to any proceedings for a review, means the Chairman and members of the Review Tribunal, the applicant in the proceedings, and any witness, counsel, solicitor or other person involved in the review but, without prejudice to section 120(1), does not include the Monetary Authority.

101G. Use of incriminating evidence given under compulsion

(1) This section applies to any evidence, answer or information given or provided by a person pursuant to an order or requirement of the Review Tribunal made under section 101E(1)(c), (e), (f) or (j).

(2) Notwithstanding any other provision of this Ordinance, neither the evidence, answer, or information given or provided by the person nor the requirement or order made by the Review Tribunal shall be admissible in evidence against the person in criminal proceedings in a court of law, other than proceedings in which the person is charged with an offence under section 101E(4)(a), or with an offence under Part V of the Crimes Ordinance (Cap. 200), or with perjury, in respect of the evidence, answer or information.

101H. Appeal to Court of Appeal

(1) A party to proceedings for a review before the Review Tribunal may, if dissatisfied with a determination in the proceedings, appeal to the Court of Appeal against the determination on a point of law.

(2) Where an appeal has been lodged under subsection (1) the Court of Appeal may, on application made to it by any party to the review proceedings, order a stay of the proceedings, or of execution of the determination, of the Review Tribunal, subject to such conditions as to costs, payment of money into the Tribunal or otherwise as the Court of Appeal considers appropriate; but the lodging of an appeal under subsection (1) does not of itself operate as a stay of the proceedings, or of execution of the determination, of the Tribunal.

(3) The Court of Appeal may affirm, vary or set aside the determination appealed against, or may remit the matter in question to the Review Tribunal, or to the Monetary Authority, with such directions as it considers

appropriate.

(4) The Rules of the High Court (Cap. 4 sub. leg. A) apply in relation to such an appeal to the extent that those Rules are not inconsistent with this Ordinance.

(5) In an appeal under this section, the Court of Appeal may make such order for payment of costs as it considers appropriate.

101I. Power of Chief Justice to make rules

The Chief Justice may make rules –

- (a) providing for matters of procedure, or other matters, relating to applications for a review, or reviews, under this Part, which are not provided for in this Part or section 5 of the Fifteenth Schedule;
- (b) providing for the issue or service of any document (however described) for the purposes of this Part or section 5 of the Fifteenth Schedule;
- (c) providing for matters relating to the registration in the Court of First Instance pursuant to section 101D(2) of a determination of the Review Tribunal;
- (d) regulating the procedure for the hearing of appeals under section 101H; or
- (e) prescribing anything required to be prescribed under this Part or section 5 of the Fifteenth Schedule."

- 6 In the heading, by deleting "5" and substituting "5A".
- Schedule In the heading, by deleting "5" and substituting "5A".
- Schedule, Part 1 In section 1(2), by adding –
 ""Review Tribunal" (覆核審裁處) means the Capital Adequacy
 Review Tribunal established under section 101A".
- Schedule, Part 1 By adding –
 "4A. **Official secrecy**
 Section 120(5) is amended by adding –
 "(da) to the disclosure of information to the Review
 Tribunal;".
- Schedule, Part 1 By deleting section 5.
- Schedule, Part 1 In section 6 –
 (a) by renumbering it as section 6(2);
 (b) by adding –
 "(1) Section 135(1) is amended by repealing
 "Seventh or Eighth" and substituting "Seventh,
 Eighth or Fifteenth".
- Schedule, Part 1 By adding immediately after section 10 –

"10A. Fifteenth Schedule added

The following is added –

"FIFTEENTH SCHEDULE [ss. 101A, 101E,
101I & 135]

PROVISIONS RELATING TO
CAPITAL ADEQUACY
REVIEW TRIBUNAL

1. Interpretation

In this Schedule –

"Chairman" (主席) means Chairman of the Review
Tribunal;

"member" (成員) means a member of the Review Tribunal;

"parties" (雙方), in relation to an application to the Review
Tribunal for a review of a decision of the Monetary
Authority, means the person making the application
and the Monetary Authority.

2. Tenure of Chairman

(1) The term of appointment of a person as
Chairman shall not exceed 3 years.

(2) A person whose term of appointment or
reappointment as Chairman has expired is eligible for
reappointment.

(3) A person appointed as Chairman may resign
his office by giving notice in writing to the Chief Executive,
and the notice shall take effect on the date specified in the
notice or, if no such date is specified, on the date of receipt
of the notice by the Chief Executive.

(4) If the Chief Executive is satisfied that the person appointed as Chairman –

- (a) has become bankrupt;
- (b) is incapacitated by physical or mental illness; or
- (c) is otherwise unable or unfit to perform the functions of Chairman,

the Chief Executive may, by notice published in the Gazette, revoke the person's appointment as Chairman; and upon such revocation the office becomes vacant.

(5) If the hearing of a review by the Review Tribunal has been commenced but is not completed before the expiry of a person's appointment as Chairman, the Chief Executive may extend the person's appointment as Chairman until the determination of the review.

3. Tenure of members

(1) The term of appointment of a member shall not exceed 3 years.

(2) A member whose term of appointment or reappointment has expired is eligible for reappointment.

(3) A member may resign by giving notice in writing to the Chief Executive, and the notice shall take effect on the date specified in the notice or, if no such date is specified, on the date of receipt of the notice by the Chief Executive.

(4) If the Chief Executive is satisfied that a member –

- (a) has become bankrupt;
- (b) is incapacitated by physical or mental

illness;

(c) is otherwise unable or unfit to perform the functions of a member; or

(d) has become a public officer,

the Chief Executive may, by notice published in the Gazette, revoke the member's appointment.

4. **Further provisions relating to Chairman and members**

(1) If the Chairman appointed under section 101A of this Ordinance ("substantive Chairman") is precluded by illness, absence from Hong Kong or any other cause from exercising his functions, the Chief Executive may appoint a person who is qualified for appointment as a judge of the High Court under section 9 of the High Court Ordinance (Cap. 4) to act as Chairman, and as such to exercise and perform all the functions of Chairman, for the period during which the substantive Chairman is so precluded from exercising his functions.

(2) If a member appointed under section 101A of this Ordinance ("substantive member") is precluded by illness, absence from Hong Kong or any other cause from taking part in proceedings of the Review Tribunal, the Chief Executive may appoint a person, not being a public officer, to act as a member and as such to take part in proceedings of the Review Tribunal, for the period during which the substantive member is so precluded from taking part in proceedings.

(3) For the purpose of any proceedings that at the end of the period mentioned in subsection (1) or (2) have

begun but have not been disposed of, the person appointed to act as Chairman or as a member may, until the disposal of the proceedings, continue to act as Chairman or as a member.

(4) If during the hearing of a review there is any change in the person who is or is acting as Chairman or in the persons who are or are acting as members, then –

- (a) if the parties to the review so consent, the hearing may continue notwithstanding that change;
- (b) in the absence of such consent the hearing shall not continue but may begin anew.

5. Procedure

(1) The Review Tribunal shall convene on such occasions as the Chairman considers necessary to determine a review.

(2) The Chairman may, at any time after an application for a review of a decision has been made, give directions to the parties to the review concerning –

- (a) procedural matters to be complied with by any of the parties; and
- (b) the time within which such procedural matters are to be complied with.

(3) The quorum for any sitting of the Review Tribunal shall be the Chairman and 2 members.

(4) At a sitting of the Review Tribunal –

- (a) the Chairman shall preside; and
- (b) every question before the Review

Tribunal shall be determined by the majority of the votes cast by the Chairman and members present, except that a question of law shall be determined by the Chairman alone.

(5) The right to be heard conferred by section 101C(3) of this Ordinance may be exercised in person or –

- (a) in the case of a corporation, may be exercised through its officer or employee;
- (b) in the case of the Monetary Authority, may be exercised through a person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap. 66) to assist the Monetary Authority; or
- (c) may be exercised through counsel or a solicitor or, with the leave of the Review Tribunal, through any other person.

(6) The Chairman shall prepare or cause to be prepared a record of the proceedings at any sitting of the Review Tribunal, which shall contain such particulars relating to the proceedings as he considers appropriate.

6. **Privileges and immunities**

Except as otherwise provided in this Ordinance –

- (a) the Review Tribunal, its Chairman and its members; and
- (b) the parties to, and any witness, counsel, solicitor or other person involved in, a

review,
 shall have the same privileges and immunities in respect of
 the review as they would have if the review were civil
 proceedings before the Court of First Instance."."

Schedule, Part 2 By adding immediately after section 1 –

"Electronic Transactions Ordinance

1A. Proceedings in relation to which sections 5, 5A, 6, 7 and 8 of this Ordinance do not apply under section 13(1) of this Ordinance

Schedule 2 to the Electronic Transactions Ordinance

(Cap. 553) is amended –

- (a) in paragraph (zp), by repealing the full stop and substituting a semicolon;
- (b) by adding –
 - "(zq) the Capital Adequacy Review Tribunal established under the Banking Ordinance (Cap. 155)."."