

立法會

*Legislative Council*

LC Paper No. LS17/06-07

**Paper for the House Committee Meeting  
on 1 December 2006**

**Further Report by Legal Service Division on  
Deposit Protection Scheme (Asset Maintenance) Rules (L.N. 247)  
gazetted on 10 November 2006**

Members may recall that the Deposit Protection Scheme (Asset Maintenance) Rules (L.N. 247) ("the Rules") was gazetted on 10 November 2006. The purpose of the Rules is to empower the Monetary Authority to require a member of the Deposit Protection Scheme to maintain sufficient assets in Hong Kong under certain circumstances prescribed in the Rules.

2. Since reporting on the Rules to the House Committee meeting on 17 November 2006 (LC Paper No. LS9/06-07), we have asked the Monetary Authority to clarify sections 3, 5, 8 and 9 of the Rules. The correspondence with the Monetary Authority is attached for Members' reference.

3. We do not have any further clarification to make on our queries and are satisfied that there is no difficulty in the legal and drafting aspects of the Rules.

Encl

Prepared by

LEE Ka-yun, Kelvin  
Assistant Legal Adviser  
Legislative Council Secretariat  
30 November 2006

LS/S/6/06-07

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Hong Kong Monetary Authority  
(Attn. : Mr Raymond TSAI  
Manager / Deposit Protection Scheme)  
55th Floor  
Two International Finance Centre  
8 Finance Street  
Central  
Hong Kong

18 November 2006

**BY FAX**  
Fax No. : 2878 2486

Dear Mr TSAI,

**Deposit Protection Scheme (Asset Maintenance) Rules  
(L.N. 247 of 2006)**

I am scrutinising the legal and drafting aspects of the above Rules. I would be most grateful if you may clarify the follow points-

Section 3 Assets in Hong Kong

1. Section 3(3) provides that-

“On the written application by a Scheme member, the Monetary Authority may designate that a company is not a related company of the Scheme member for the purposes of subsection (1)(d)”.

Please clarify the circumstances and the policy under which the Monetary Authority ("MA") will invoke such power to design a company.

2. It is noted that under certain circumstances, the Deposit Protection Appeals Tribunal may review the decision of MA. It appears that the refusal by MA to designate a company under subsection (3) is not reviewable. Please confirm whether this is the position.

### Section 5 Issuance of Asset Maintenance Requirement

3. Section 5(1) of the Rules provides that under certain circumstances, MA may-

"... by notice in writing served on the Scheme member, require the Scheme member to maintain, during the period specified in the requirement, assets in Hong Kong of the amount specified in the requirement."

4. Section 5(2) of the Rules further provides that-

"The period so specified may begin on a date specified in the requirement and continues to run whilst the requirement is in effect."

5. Reading subsection (1) alone, it seems plain that-

(a) the requirement to maintain assets begins on the date specified in the requirement in subsection (1); and

(b) the requirement is effective and continues to run during the period specified in the written requirement in subsection (1).

6. Subsection (2) appears to be not necessary and may lead to confusion in interpreting subsection (1). Please clarify the purpose of subsection (2).

7. In section 5(4), I understand that MA will issue a preliminary notice to a Scheme member before issuing a requirement under section 5(1) and afford the Scheme member an opportunity to submit to MA written representation within 7 days of the service of the preliminary notice. In the absence of any representation by a Scheme member, MA will issue a requirement under subsection (1). This procedure is not clearly set out in subsection (4). It may be desirable if this procedure (i.e. issue of the formal requirement at the expiry of 7 days) is clearly set out in subsection (4).

### Section 8 Offences and Section 9 Defences

8. It is noted that section 8 of the Rules makes it an offence if a Scheme member fails to comply with the requirement in section 5(1). The offence

can be disposed of summarily or by indictment with a fine and a daily fine in the case of a continuing offence and imprisonment up to 2 years.

9. Section 9 provides that it is a defence for the person charged to prove that he took reasonable precautions and exercised due diligence to avoid the commission of the offence by himself or any person under his control. Please clarify the policy of MA as to whether it is intended to be an offence if a Scheme member failed to comply with the requirement owing to, for example, genuine financial difficulty. Please also clarify what conduct is intended to be caught by section 8.

I shall be grateful if you could let me have your response in both Chinese and English on the above queries at your earliest convenience.

Yours sincerely,

(Kelvin LEE Ka-yun)  
Assistant Legal Adviser

c.c. LA  
SALA2



(By Fax 2877 5029 and By Post)

Our Ref: B9/62/2C

28 November 2006

Mr Kelvin Lee  
Assistant Legal Adviser  
Legal Service Division  
Legislative Council Secretariat  
Legislative Council Building  
8 Jackson Road  
Central  
Hong Kong

Dear Mr Lee,

**Deposit Protection Scheme (Asset Maintenance) Rules**  
**(L.N. 247 of 2006)**

In reply to your letter of 18 November 2006, I enclose our response in both Chinese and English to the queries raised in relation to the Deposit Protection Scheme (Asset Maintenance) Rules.

If you have any questions, please feel free to contact Ms Tess Leung at 2878 8280 or Mr Raymond Tsai at 2878 1060.

Yours sincerely,

(Colin Pou)  
Acting Division Head  
Banking Development Department

Encl.

cc. SFST (Attn: Mr Clement Chan)  
DOJ (Attn: Ms Carmen Chu and Ms Elen Lau)

## **Deposit Protection Scheme (Asset Maintenance) Rules**

### *Section 3 Assets in Hong Kong*

Under subsection (1)(d), an asset maintained in Hong Kong by a Scheme member does not include a claim on, or a share of, a related company of the Scheme member. This is because the value of such assets could be substantially diminished should the bank run into problems. However, it is envisaged that there may be exceptional cases where, for example, a Scheme member holds its bank premises through a subsidiary established specifically for the purpose. In order to cater for such situations, the Rules provide the Monetary Authority (MA) with a discretionary power under subsection (3) to designate such a company not to be a related company of the Scheme member for the purposes of subsection (1)(d). This will enable the Scheme member to include any claim on the subsidiary of the Scheme member holding the bank premises as an asset in Hong Kong.

The MA's discretion in designating a company not to be a related company of the Scheme member for the purposes of subsection (1)(d) will only be applicable to where the company is established solely for the purpose of holding readily marketable assets in Hong Kong which will not be affected by the problems of the bank itself. Since the discretion exercised by the MA under subsection (3) is in favour of the Scheme member (making the asset maintenance requirement easier to complying with), it is considered not necessary for the decision of the MA to be subject to the review of the Deposit Protection Appeals Tribunal. The industry did not raise any objection during the consultation.

### *Section 5 Issuance of Asset Maintenance Requirement*

The asset maintenance requirement is intended to be imposed on a Scheme member on each and every day starting from the commencement date specified in the written notice until the MA withdraws the requirement pursuant to section 6(1). Subsection (2) is added to put it beyond doubt that the asset maintenance requirement will be a continuous requirement.

The existing formulation of subsection (4) has stated the pre-conditions for the MA to issue a requirement under subsection (1). These include serving on the Scheme member a preliminary notice in writing, allowing the Scheme member a 7-day period to make written representation and requiring the MA to consider any representation so submitted by the Scheme member. The formulation that "consider *any* representation so submitted by the Scheme member" has already implied that there may or *may not* be any representation submitted by the Scheme member. Accordingly, if a Scheme member does not make any representation to the MA within 7 days after receiving the preliminary notice, the MA can proceed to exercise his power under subsection (1). In the light of the above, it seems

unnecessary to further elaborate the procedures in subsection (4) for issuing a requirement under subsection (1).

#### Section 8 Offences and Section 9 Defences

The MA will take into account the matters stated in section 5(1)(a) to (c) of the Rules as well as representations submitted by a Scheme member before imposing an asset maintenance requirement on the Scheme member. If the Scheme member is unable to comply with the requirement, every director and chief executive of the Scheme member commits an offence under section 8. However, if the person charged has taken reasonable precautions and exercised due diligence to avoid the commission of the offence by himself or any person under his control, but the Scheme member still fails to comply with the requirement (e.g. the failure is caused by a sudden market value depreciation of bank assets), the director or the chief executive concerned should be able to rely on the defence as provided in section 9. This is the policy intention of the MA and is consistent with the framework delineated in section 53 of the Deposit Protection Scheme Ordinance (Cap.581).