

Bills Committee on Insurance Companies (Amendment) Bill 2014

The Administration's Response to Questions Raised by the Assistant Legal Adviser

Purpose

This paper sets out the Administration's response to questions raised by the Assistant Legal Adviser of the Bills Committee in her letter dated 31 March 2015 (vide LC Paper No.: CB(1)729/14-15(01)).

General – The form of expression

It is noted that many of the provisions in the Bill which appear to provide for obligations are negatively expressed, for example, the new section 64N (clause 71 of the Bill) provides that “An authorized insurer must not enter into a contract of insurance through another person in Hong Kong unless – (a) that person is a licensed insurance intermediary; or (b) that person’s duties only involve clerical or administrative duties.”. Please explain the reason for choosing this form of expression.

2. The form of expression under new section 64N (added by Clause 71) follows that of the corresponding provision (section 65(13)) under the existing Insurance Companies Ordinance (“ICO”) (Cap. 41). As a general rule for the drafting of the Bill, “must” is used for a statutory obligation the contravention of which attracts a statutory sanction; while “must not” is used for a statutory prohibition the contravention of which attracts a statutory sanction. For example, new section 13A(1) (Clause 23 of the Bill) imposes a statutory prohibition that the authorized insurer “must not” appoint a controller without the approval of the independent Insurance Authority (“IA”). On the other hand, new section 13A(8) imposes a statutory obligation on the insurer that it “must” terminate the appointment of the controller after receiving IA’s notice.

3. It is very common that an offence provision imposes a statutory prohibition and there are numerous offence provisions in Hong Kong legislation using the structure “must not... unless”. Some recent examples include section 600(1) of the Companies Ordinance (Cap. 622), section 42(1) of the Lifts and Escalators Ordinance (Cap. 618), section 39(1) of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (“AMLO”) (Cap. 615) and section 7(2)

of the Genetically Modified Organisms (Control of Release) Ordinance (Cap. 607).

Clause 84 – new section 80(2)(d) in new Part XI

The proposed new section 80(2)(d) refers to “controllers”. It is noted that the definition of “controller” in section 2(1) of the ICO is proposed to be amended so that it does not apply to the proposed new Parts X and XI. In the new Part X, “controller” (控權人) is specifically defined in the new section 64F. However, “controller” is not defined in the new Part XI. Please clarify and confirm the meaning of “controller” under the new Part XI.

4. The term “controller” is defined in new section 64F in new Part X which provides for the licensing regime for insurance intermediaries. The same definition is applicable to the term appearing in new section 80(2)(d) in new Part XI which is related to disciplinary actions and conduct requirements for licensed insurance intermediaries. For the sake of clarity, we will propose Committee Stage Amendments (“CSAs”) to transpose the definition of “controller” from new section 64F to section 2(1) and make it clear that the definition applies to both Parts X and XI.

Clause 84 – new section 81(1)

The proposed new section 81(1) provides that “the Authority must not exercise a power under section 80 without first giving the person in respect of whom the power is to be exercised a reasonable opportunity of being heard.” Please clarify whether the information or evidence obtained from that person can be used in other proceedings, by reference to, for example, section 307L of the Securities and Futures Ordinance (“SFO”) (Cap. 571).

5. There is no provision in the Bill to restrict the use of evidence received by IIA under new section 81(1) in other civil or criminal proceedings.

Clause 84 – new section 83(1)

The proposed new section 83(1) provides that “At any time when the Authority is contemplating exercising a power under section 80, it may, if it considers it appropriate to do so in the interests of policy holders or potential policy holders or the public interest, by agreement with the

person concerned – (a) exercise a power that the Authority may exercise in respect of the person under this Part [Part XI]; and (b) take an additional action that the Authority considers appropriate in the circumstances of the case.”.

Please clarify –

(a) under the new section 83(1)(a), apart from the powers under the new section 80, what other power(s) may IIA exercise in respect of the person under Part XI?

(b) what “additional action” can IIA take under the new section 83(1)(b)?

6. New section 83 enables IIA to resolve disciplinary cases by agreement with a regulated person when it considers it appropriate to do so in the interests of policy holders or potential policy holders or the public interest. We will amend the new section 83(1)(a) to clarify that it refers to “a power that the Authority may exercise in respect of the person under section 80”. New section 83(1)(b) provides flexibility for IIA to agree with a regulated person on additional actions to rectify a situation. An example of “additional action” would be requiring a concerned licensed insurance agency or licensed insurance broker company to commission an independent review on its internal control system within a specified period with a view to avoiding recurrence of similar misconduct incidents in the future.

Clause 84 – new sections 92 and 127

Please clarify whether the rules made under the proposed new section 92 and 127 are subsidiary legislation.

7. Pursuant to sections 3 and 34 of the Interpretation and General Clauses Ordinance (Cap. 1), rules made under new sections 92 and 127 (both added by Clause 84) are subsidiary legislation subject to negative vetting by the Legislative Council.

Clause 84 – new section 89(b)

The proposed new section 89(b) provides that “When carrying on a regulated activity, a licensed insurance intermediary must exercise a level of care, skill and diligence that may reasonably be expected of a prudent person who is carry on the regulated activity”. Please

consider whether the standard of the “level of care, skill and diligence” which a licensed insurance intermediary must exercise should further be elaborated by reference to, for example, section 465 of the Companies Ordinance (Cap. 622).

8. New section 89 sets out the broad principles of conduct requirements on the part of a licensed insurance intermediary when carrying on a regulated activity. We envisage that IIA will, pursuant to new section 93(1), publish codes of conduct to elaborate on the principles under new section 89, with a view to facilitating licensees’ compliance with the conduct requirements. IIA may also make rules, which will be subsidiary legislation, to require licensed insurance intermediaries to take specific steps to comply with conduct requirements under new section 89 (see new section 92(g) added by Clause 84 of the Bill).

Clause 84 – new section 104

The proposed new section 104 provides for costs to be awarded by the Insurance Appeals Tribunal (“IAT”). It makes no provision as how such costs are to be paid. It is noted that section 260(2) of Cap. 571, which is similar to the new section 104, provides that “Any costs awarded under this section are a charge on the general revenue.” Please consider whether a provision such as that in section 260(2) of Cap. 571 should be added to the new section 104.

9. Our response can be found on the paper titled “The Administration’s Response to Follow-up Actions Arising from the Discussion at the Meetings on 10 April and 14 April 2015” (LC Paper No.: CB(1)824/14-15(04)), that is, the costs are paid by a party to the review as determined by IAT.

**Financial Services and the Treasury Bureau
May 2015**