

立法會
Legislative Council

LC Paper No. LS31/14-15

**Paper for the House Committee Meeting
on 23 January 2015**

**Further Report by Legal Service Division on
Banking (Disclosure) (Amendment) Rules 2014 (L.N. 160)
Gazetted on 24 December 2014**

Members may recall that at the House Committee meeting on 9 January 2015, the Legal Service Division (LSD) reported that a further report would be made, if necessary, after we had received and considered the Administration's reply on the legal and drafting issues in relation to L.N. 160, which amends the Banking (Disclosure) Rules (Cap. 155M) to prescribe the new and additional information to be disclosed by an authorized institution.

2. Under section 60A(1) of the Banking Ordinance (Cap. 155) (the empowering provision), the Monetary Authority (MA) may, after consultation with the Financial Secretary (FS) and other specified persons, make rules prescribing the information to be disclosed to the general public by authorized institutions relating to their states of affairs etc.

3. It is noted that L.N. 160 was made not by MA himself, but by another person as Acting MA. LSD has made enquiries with the Administration on the legal basis for making L.N. 160 by Acting MA in view of the following points which may give rise to the argument that FS does not have the power to appoint a person as Acting MA –

- (a) section 5A(1) of Cap. 66 provides that FS shall appoint a person to be MA on such terms and conditions as he thinks fit;
- (b) section 5A(3) of Cap. 66 empowers FS to appoint persons to assist MA in the performance of the functions of MA specified in section 5A(2)¹;
- (c) there is no express provision in Cap. 66 or any other ordinance authorizing FS to appoint Acting MA to discharge MA's functions specified in section 5A(2) which includes the power to make subsidiary legislation; and

¹ Section 5A(2) of the Exchange Fund Ordinance (Cap. 66) provides that –

"The Monetary Authority shall –

- (a) assist the Financial Secretary in the performance of his functions under this Ordinance;
- (b) perform such functions as the Financial Secretary may direct; and
- (c) perform functions imposed on or assigned to the Monetary Authority by any other Ordinance."

- (d) there is an argument that MA and his staff are not "public officer" as defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) as "MA appointed under section 5A of [Cap 66] and any person appointed under section 5A(3) of [Cap. 66]" are listed out separately from "any person holding an office of emolument, whether permanent or temporary, under the Government" (i.e. "public officer" as defined in Cap. 1) under the definition of "prescribed officer" in section 2 of both the Prevention of Bribery Ordinance (Cap. 201) and the Independent Commission Against Corruption Ordinance (Cap. 204)². That argument was discussed at the meetings of the Bills Committee on Adaptation of Laws Bill 2001.³

4. In response, the Administration has explained that MA is appointed by FS under section 5A(1) of the Exchange Fund Ordinance (Cap. 66); and in the absence of MA, FS may appoint a person to act as MA. According to the Administration, as Mr Peter PANG was appointed by FS to act as MA on 19 December 2014 (i.e. the date on which L.N. 160 was made), Mr PANG was entitled to exercise MA's power to make L.N. 160 under the empowering provision. The Administration is of the view that sections 39(2)⁴ and 54⁵ of Cap. 1 provide the relevant legal basis for Mr PANG, as duly appointed by FS, to make L.N. 160 under the empowering provision.

5. LSD has made further enquiries with the Administration on the legal basis –

- (a) for the view that FS may appoint a person to act as MA (i.e. Acting MA) to make subsidiary legislation; and

² Under section 2 of both the Prevention of Bribery Ordinance (Cap. 201) and the Independent Commission Against Corruption Ordinance (Cap. 204), "prescribed officer" is defined as –

- "(a) any person holding an office of emolument, whether permanent or temporary, under the Government; and
(b) the following persons (to the extent that they are not persons included in paragraph (a)) –
(i) any principal official of the Government appointed in accordance with the Basic Law;
(ii) the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap 66) and any person appointed under section 5A(3) of that Ordinance;
(iii) Chairman of the Public Service Commission;
(iv) any member of the staff of the [Independent Commission Against Corruption];
(v) any judicial officer holding a judicial office specified in Schedule 1 to the Judicial Officers Recommendation Commission Ordinance (Cap 92) and any judicial officer appointed by the Chief Justice, and any member of the staff of the Judiciary".

³ See the Report of the Bills Committee on Adaptation of Laws Bill 2001 to Council Meeting on 22 January 2003 (LC Paper No. CB(2)883/02-03) and the Report of the Bills Committee on Adaptation of Laws Bill 2002 to the House Committee on 12 January 2002 (LC Paper No. CB(2)624/02-03).

⁴ Section 39(2) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that –
"Where any Ordinance confers any power or imposes any duty on the holder of any public office as such, then the power may be exercised and the duty shall be performed by the holder for the time being of that public office."

⁵ Section 54 of the Interpretation and General Clauses Ordinance (Cap. 1) provides that –
"In any Ordinance, instrument, warrant or process of any kind, any reference to a public officer, or to a person holding a public office by a term designating his office, shall include a reference to any person for the time being lawfully discharging the functions of that office, or any part of such functions, and any person appointed to act in or perform the duties of such office, or any part of such duties, for the time being."

- (b) for invoking sections 39(2) and 54 of Cap. 1 which applies to "public officer" as defined in section 3 of Cap. 1 only (i.e. any person holding an office of emolument, whether permanent or temporary, under the Government).

6. In response, the Administration has repeated that it relied on sections 39(2) and 54 of Cap. 1 and section 5A(1) of Cap. 66. Also, the Administration has relied on section 56⁶ of Cap. 1 which provides for appointment of officers by name or office. The Administration has also explained that Hong Kong Monetary Authority is an integral part of the Government and that the Exchange Fund is managed and controlled by the Government.

7. Having taken into account the Administration's explanations as summarized in paragraphs 4 and 6 above, we are satisfied that MA is arguably a "public officer" as defined in section 3 of Cap. 1, and sections 39(2) and 54 of Cap. 1 are applicable under the circumstances. We have also considered the Administration's response to the drafting issues raised by us. Subject to Members' views, we have no further comments relating to the legal and drafting aspects of L.N. 160. The correspondence between the Legal Service Division and the Administration over the legal and drafting issues is at Annex.

8. Members may wish to note that the scrutiny period for amending L.N. 160 under section 34(2) of Cap. 1 will expire at the Council meeting of 4 February 2015 (or that of 25 February 2015 if extended by resolution). Should Members consider it appropriate, a motion may be moved at the Council meeting of 4 February 2015 to extend the scrutiny period of L.N. 160 to the Council meeting of 25 February 2015 so that Members would have more time to consider the subsidiary legislation. The deadline for giving notice of a motion to extend the scrutiny period of L.N. 160 is 30 January 2015.

Prepared by

Carrie WONG
Assistant Legal Adviser
Legislative Council Secretariat
22 January 2015

Encl.

⁶ Section 56 of the Interpretation and General Clauses Ordinance (Cap.1) provides that –

"Where any Ordinance confers power upon any person to appoint or name a person to have and exercise any powers or perform any duties, the person so empowered may either appoint a person by name or direct the person for the time being holding any office designated by him to have and exercise such powers or perform such duties; and thereupon, or from the date specified by the person so empowered, the person appointed by name or the person holding the office aforesaid shall have and may exercise such powers or perform such duties accordingly until such appointment be revoked or otherwise determined."

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By Fax (2527 0790)
30 December 2014

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Financial Services Branch
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Hong Kong

Dear Mr LIU,

Banking (Disclosure) (Amendment) Rules 2014 (L.N. 160 of 2014)

Under section 60A(1) of the Banking Ordinance (Cap. 155), the Monetary Authority (the MA) may, after consultation with the Financial Secretary and other specified persons, make rules prescribing the information to be disclosed to the general public by authorized institutions relating to their states of affairs etc. Under section 5A of the Exchange Fund Ordinance (Cap. 66), the MA is a person appointed by the Financial Secretary. It is noted that the captioned Rules were made not by the MA himself, but by another person as Acting MA. Please enlighten us on the legal basis for making these Rules by a person other than the MA himself as required under the Banking Ordinance.

It is also noted that following a similar enquiry made in August 2004 in relation to the Banking (Specification of Public Sector Entities In Hong Kong) (Amendment) Notice 2004 (L.N. 119 of 2004) where the relevant Notice was not made by the MA himself, the MA eventually agreed that he would sign the Notice personally, and make the necessary arrangements to replace it by another Notice. Consequently, L.N. 119 of 2004 was repealed by L.N. 148 of 2004, and the MA made L.N. 149 of 2004 to replace L.N. 119 of 2004.

As the House Committee meeting will be held on 9 January 2015 to decide whether a subcommittee will be formed to study these Rules in detail, please let us have your reply in both English and Chinese preferably by 5 January 2015.

Yours sincerely,

(Miss Carrie WONG)
Assistant Legal Adviser

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By Fax (2527 0790)
5 January 2015

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Hong Kong

Dear Mr LIU,

Banking (Disclosure) (Amendment) Rules 2014 (L.N. 160 of 2014)

To assist our scrutiny of the Banking (Disclosure) (Amendment) Rules 2014 (the Amendment Rules), we should be grateful for your clarifications on the following legal and drafting issues.

Clause 3 – Proposed section 2

1. It is noted that –

- (a) ***applicable JCCyB ratio*** and ***G-SIB*** are defined in the proposed section 2(1) of the Amendment Rules by reference to their respective meanings given by the Banking (Capital) Rules (Cap. 155L); and
- (b) ***LCR***, ***LMR*** and ***HQLA*** which are used extensively in the Amendment Rules are only defined in section 2 of the Banking (Liquidity) Rules (Cap. 155Q), but not in the Banking Ordinance (Cap. 155) or the Banking (Disclosure) Rules (Cap. 155M).

Please consider whether ***LCR***, ***LMR*** and ***HQLA*** should be defined in the proposed section 2 of the Amendment Rules by reference to their respective meanings given by Cap. 155Q, as in the case of ***applicable JCCyB ratio*** and ***G-SIB***.

Clause 8 – Proposed section 25

2. (a) Under subsection (1)(b), "public sector entities" is to be amended to "official sector". Please clarify whether there is any difference in the meaning between these two terms, and the reason(s) for introducing the change. In particular, please clarify whether "official sector" includes public statutory bodies as well.
- (b) Under the proposed section 25, "institution" and "sector" are both rendered as "機構" in the Chinese text. Please consider whether two different Chinese terms should be adopted instead.

Clause 11 – Proposed section 30A

3. Under subsection (1)(a), "an interim reporting date" is rendered as "在中期報告期的報告日". The meaning of "reporting period" is missing in the English text. Similar comment applies to the proposed sections 51A(1)(a), 103A(1)(a)(i) and 103A(1)(b)(i) where "reporting date" is used in a similar context.
4. Under subsection (2), "to the extent that the template covers the relevant required disclosure items" is rendered as "而使用範圍以該模版涵蓋有關所需的披露項目為限". As "required" is used in the English text, please clarify whether the requirement is a mandatory one. If so, amendments may need to be made in the corresponding Chinese text. The same comment applies to the proposed sections 51A(2) and 103A(2) as well.
5. Under subsection (6)(e), "the potential for the institution to be required to post collateral under the terms of the contracts" is rendered as "根據該等合約的條款，該機構被要求提供抵押品的可能". As "required" is used in the English text, please clarify whether the requirement is a mandatory one. If so, amendments may need to be made in the corresponding Chinese text.
6. Under subsection (6)(h)(ii), "that the institution considers to be relevant for understanding its liquidity profile" is rendered as "有關機構認為，它們攸關對該機構的流動性狀況的了解". The meaning of "它們" is missing in the English text. Please consider whether, for consistency with the drafting of subsection 6(h)(i), the relevant Chinese text should be replaced by "有關機構認為，攸關對該機構的流動性狀況的了解者".

Please let us have your reply in both English and Chinese by 7 January 2015.

Yours sincerely,

(Miss Carrie WONG)
Assistant Legal Adviser

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6 January 2015

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Dear Miss Wong,

**Banking (Disclosure) (Amendment) Rules 2014
(LN 160 of 2014)**

Thank you for your letter of 30 December 2014 enquiring about the legal basis for the Acting Monetary Authority to make the subject Rules.

The Monetary Authority is appointed by the Financial Secretary under section 5A(1) of the Exchange Fund Ordinance (Cap. 66). In the absence of the Monetary Authority, the Financial Secretary may appoint a person to act as the Monetary Authority. Mr. Peter Pang was appointed by the Financial Secretary to act as the Monetary Authority on 19 December 2014, the date on which the subject Rules were made. Accordingly, he, as the then Acting Monetary Authority, was entitled to exercise the Monetary Authority's power to make the subject Rules under section 60A of the Banking Ordinance (Cap. 155).

Section 39(2) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that –

“Where any Ordinance confers any power or imposes any duty on the holder of any public office as such, then the power may be exercised and the duty shall be performed by the holder for the time being of that public office.”

Section 54 of the Interpretation and General Clauses Ordinance provides that –

“In any Ordinance, instrument, warrant or process of any kind, any reference to a public officer, or to a person holding a public office by a term designating his office, shall include a reference to any person for the time being lawfully discharging the functions of that office, or any part of such functions, and any person appointed to act in or perform the duties of such office, or any part of such duties, for the time being.”

The Administration is of the view that the above-cited provisions provide the relevant legal basis for the then Acting Monetary Authority, as duly appointed by the Financial Secretary, to make the subject Rules under section 60A of the Banking Ordinance.

The subsidiary legislation quoted in your letter, i.e. the Banking (Specification of Public Sector Entities in Hong Kong) (Amendment) Notice 2004 (LN 119 of 2004), is not relevant to the present question, as Mr. William Ryback was not formally appointed to act as the Monetary Authority when the relevant Notice was made.

Yours sincerely,



(Jackie Liu)
for Secretary for Financial Services and the Treasury

c.c.

Department of Justice

(Attn: Ms. Agatha Ding)

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Dear Mr LIU,

Banking (Disclosure) (Amendment) Rules 2014 (L.N. 160 of 2014)

Thank you for your reply of 6 January 2015. We would like to seek further clarifications as set out in the following paragraphs.

We note that while section 5A(3) of the Exchange Fund Ordinance (Cap. 66) empowers Financial Secretary (FS) to appoint, on such terms and conditions as he thinks fit, persons to assist the Monetary Authority (MA) in the performance of the functions of MA specified in section 5A(2), there is no express provision in Cap. 66 or elsewhere authorizing FS to appoint persons to act as MA to discharge MA's functions specified in section 5A(2) which includes the power to make subsidiary legislation. In this connection, please clarify the legal basis for the view that FS may appoint a person to act as MA (i.e. Acting MA) to make subsidiary legislation.

Section 5A(4) of Cap. 66 provides that MA and persons appointed to assist him under subsection (3) shall be regarded for all purposes, as employed in connection with the purposes of the Exchange Fund. Section 6 of Cap. 66 provides that the emoluments payable to MA are charged to the Exchange Fund established under section 3 of Cap. 66. In the light of these sections, please clarify the legal basis for invoking sections 39(2) and 54 of the Interpretation and General Clauses Ordinance (Cap. 1) which applies to "public officer" only.

In this connection, please note the definition of "public officer" in section 3 of Cap. 1 as follows –

"*public officer*" (公職人員) means any person holding an office of emolument under the Government, whether such office be permanent or temporary.

Yours sincerely,

(Miss Carrie WONG)
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8 January 2015

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Dear Miss Wong,

**Banking (Disclosure) (Amendment) Rules 2014
(LN 160 of 2014)**

Thank you for your letter of 5 January 2015. The Administration's reply to the issues you raised is set out below.

Clause 3 – Proposed section 2

The proposed sections 30(7), 51(7) and 103(5), to be added to the Banking (Disclosure) Rules (Cap. 155M), will assist in the interpretation of relevant terms (including *LCR*, *LMR* and *HQLA*), with reference to the same definitions contained in Rule 2 of the Banking (Liquidity) Rules (Cap. 155Q). In this case, a separate definition for such terms in section 2 of the Banking (Disclosure) Rules is considered not necessary.

Clause 8 – Proposed section 25

At present, section 25(1)(b) of the Banking (Disclosure) Rules requires an authorized institution to disclose a breakdown of its cross-border claims by major countries or geographical segments in accordance with the types of counterparty, broken down into “banks”, “public sector entities” and “others”. The requirement was designed to reflect the breakdown of cross-border claims used in the international banking statistics reported by regulatory authorities (on the basis of information provided by banks) to the Bank for International Settlements (“BIS”)¹ and periodically published by the BIS. This had the advantage that banks would already have compiled information in this form and that banking analysts and other persons using the information disclosed by banks would be familiar with the information in this format. In the latest requirements of the BIS for its statistical compilations, “public sector entities” is no longer included, but two new categories of breakdown, namely, “official sector” and “non-bank private sector”, have been adopted to refine the categories of disclosed items. The former “public sector entities” included central, local and state governments of a country, as well as enterprises and agencies which are owned or controlled by these governments. The new “official sector” category includes “general government sector”, “central bank sector” and “international organizations” (including “multilateral development banks”) only, and public statutory bodies should generally be included in either the “non-bank private sector” or the “others” category. Authorized institutions have been reporting on this basis since last year and hence the Monetary Authority does not expect that they will have difficulty in making disclosures on the same basis. The industry associations have been consulted on the Banking (Disclosure) (Amendment) Rules 2014 and have raised no objection to the adoption of the revised BIS categorisation for cross border claims.

In addition, we believe that the wording “機構” in the Chinese text is appropriate to reflect the intent embodied in the corresponding expressions, i.e. “institution” and “sector”, in the English text.

¹ The BIS has a number of standing committees to support central banks, and authorities in charge of financial stability more generally, by providing background analysis and policy recommendations. One of the standing committees is the Basel Committee on Banking Supervision, which promulgates the Basel III requirements.

Clause 11 – Proposed section 30A

Regarding subsection (1)(a), the term “interim reporting date” in the English text should be construed to mean the reporting date of an interim reporting period. The meaning is accurately reflected by the term “在中期報告期的報告日” in the Chinese text. The same applies to relevant references in the proposed sections 51A(1) and 103A(1). Both the English and Chinese texts correspond with each other.

Regarding subsection (2), we believe that it is appropriate to use the term “所需的披露項目” in the Chinese text to reflect the disclosure items that are required to be covered in the disclosure template. The same applies to the relevant references in the proposed sections 51A(2) and 103A(2). We do not see the need to revise the Chinese text further in this regard.

Regarding subsection 6(e), the disclosure concerns the potential for an institution to be required to post collateral under the terms of the contracts. We believe the expression “根據該等合約的條款，該機構被要求提供抵押品的可能” in the Chinese text reflects properly how the institution is required to post collateral under such contract terms. We do not see the need to amend the Chinese text further.

Regarding subsection (6)(h), we consider that the meaning reflected by the bilingual texts are consistent. The relevant references to “者” (in subsection (6)(h)(i)) and “它們” (in subsection (6)(h)(ii)) in the Chinese text are appropriate for the sake of drafting clarity with the use of the connective “但”.

Yours sincerely,



(Jackie Liu)
for Secretary for Financial Services and the Treasury

c.c.

Department of Justice

(Attn: Ms. Agatha Ding)

(Attn: Mr. Alan Chong)

(Attn: Ms. Mandy Ng)

Chief Executive, Hong Kong Monetary Authority

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By Fax and Email
15 January 2015

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Dear Miss Wong,

**Banking (Disclosure) (Amendment) Rules 2014
(LN 160 of 2014)**

Thank you for your letter of 7 January 2015 seeking further clarifications on the legal basis for the Acting Monetary Authority to make the subject Rules pursuant to section 60A of the Banking Ordinance (Cap. 155).

Section 5A(1) of the Exchange Fund Ordinance (Cap. 66) provides that –

“The Financial Secretary shall appoint a person to be the Monetary Authority on such terms and conditions as he thinks fit.”

Section 56 of the Interpretation and General Clauses Ordinance (Cap. 1) also provides that –

“Where any Ordinance confers power upon any person to appoint or name a person to have and exercise any powers or perform any duties, the person so empowered may either appoint a person by name or direct the person for the time being holding any office designated by him to have and exercise such powers or perform such duties; and thereupon, or from the date specified by the person so empowered, the person appointed by name or the person holding the office aforesaid shall have and may exercise such powers or perform such duties accordingly until such appointment be revoked or otherwise determined.”

Pursuant to both of the above-cited provisions, the Financial Secretary is empowered to appoint the Acting Monetary Authority to hold the office of the Monetary Authority and to have and exercise all the powers or perform all the functions, statutory or otherwise, vested in the Monetary Authority, during the period when the Monetary Authority is absent from office. Such relevant functions include the exercise of rule-making power for the subject Rules under section 60A of the Banking Ordinance during the period of the acting appointment.

Furthermore, as cited in the Administration’s letter of 6 January 2015, section 39(2) of the Interpretation and General Clauses Ordinance provides that –

“Where any Ordinance confers any power or imposes any duty on the holder of any public office as such, then the power may be exercised and the duty shall be performed by the holder for the time being of that public office.”

Section 54 of the same Ordinance further provides that –

“In any Ordinance, instrument, warrant or process of any kind, any reference to a public officer, or to a person holding a public office by a term designating his office, shall include a reference to any person for the time being lawfully discharging the functions of that office, or any part of such functions, and any person appointed to act in or perform the duties of such office, or any part of such duties, for the time being.”

These two provisions read together are consistent with the Administration's view that the Acting Monetary Authority, as duly appointed by the Financial Secretary to hold the office of the Monetary Authority, is empowered to make the subject Rules. In this connection, the Monetary Authority is a "public officer" within section 3 of the Interpretation and General Clauses Ordinance, given that (a) the Hong Kong Monetary Authority is an integral part of the Government, and that (b) the emoluments payable to the Monetary Authority are charged to the Exchange Fund which is managed and controlled by the Government by virtue of Article 113 of the Basic Law, and is under the control of the Financial Secretary by virtue of section 3(1) of the Exchange Fund Ordinance.

Yours sincerely,



(Jackie Liu)

for Secretary for Financial Services and the Treasury

c.c.

Department of Justice

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(Attn: Ms. Mandy Ng)

Chief Executive, Hong Kong Monetary Authority

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