

立法會

Legislative Council

LC Paper No. LS99/10-11

Paper for the House Committee Meeting on 7 October 2011

Legal Service Division's Report on Subsidiary Legislation gazetted between 8 July and 9 September 2011

This paper annexes five Legal Service Division's reports covering the two groups of subsidiary legislation as follows:-

- (a) the items gazetted on 8 July 2011 and tabled before the Council on 13 July 2011 (**Annex A**); and
- (b) the items gazetted between 29 July and 9 September 2011 and to be tabled on 12 October 2011 (**Annex B**).

2. In accordance with section 34 of the Interpretation and General Clauses Ordinance (Cap. 1), the Legislative Council may amend the items of subsidiary legislation tabled on 13 July 2011 by **19 October 2011** (or by 9 November 2011 if extended by resolution), and the other items to be tabled on 12 October 2011 by **9 November 2011** (or by 30 November 2011 if extended by resolution) respectively.

3. Four out of the five reports (except the report on subsidiary legislation gazetted on 9 September 2011) have been separately submitted to Members during the summer recess to enable Members to consider the relevant subsidiary legislation as soon as possible. They are submitted again in this bundle to facilitate consideration by the House Committee.

4. Members may wish to have particular attention to the following items of subsidiary legislation:

- (a) Motor Vehicle Idling (Fixed Penalty) Regulation (L.N. 133) and Motor Vehicle Idling (Fixed Penalty) Ordinance (Commencement) Notice (L.N. 134)

The Motor Vehicle Idling (Fixed Penalty) Bill (enacted as the Motor Vehicle Idling (Fixed Penalty) Ordinance (3 of 2011)) was

passed by the Legislative Council on 5 March 2011 and the enacted Ordinance (MVIO) was published in the Gazette on 10 March 2011. L.N. 134 appoints 15 December 2011 as the day on which MVIO comes into operation. L.N. 133 is made by the Secretary for the Environment to prescribe the form of notices or certificates for the purpose of MVIO, specify the manner of payment of fixed penalties, and the information to be supplied by persons paying the fixed penalties and the duties of persons receiving them. L.N. 133 will come into operation on the day on which MVIO comes into operation, i.e. 15 December 2011. L.N. 133 and L.N. 134 are reported at the report dated 16 September 2011 (LC Paper No. LS91/10-11(01)). The Division has identified a drafting issue relating to L.N. 133. Members may refer to paragraphs 6 to 8 of the said report for details.

(b) Securities and Futures (Professional Investor) (Amendment) Rules 2011 (L.N. 135)

L.N. 135 is made by the Securities and Futures Commission to prescribe additional means of ascertaining whether an investor is a professional investor and to modify one current class of professional investor under the Securities and Futures (Professional Investor) Rules (Cap. 571 sub. leg. D). L.N. 135 will come into operation on 16 December 2011. L.N. 135 is reported at the report dated 4 October 2011 which is included in Annex B of this bundle.

5. Members will note that the reports include items of subsidiary legislation to which section 34 of Cap. 1 does not apply. This means that these items are not required to be tabled and not subject to amendment by the Legislative Council. There are three such items, namely, Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Amendment of Schedule 1) Notice 2011 (L.N. 130), Western Harbour Crossing Ordinance (Amendment of Schedule 1) Notice 2011 (L.N. 131), and Volunteer and Naval Volunteer Pensions Ordinance (Amendment of Schedules) Order 2011 (L.N. 132).

6. The Secretariat has circulated to Members the issues of the Gazette which contain the subsidiary legislation covered by the reports in the usual manner. Members may also view the relevant issues of the Gazette at <http://www.gld.gov.hk/egazette/>.

7. Apart from the drafting issue mentioned in the report on L.N. 133, no difficulties relating to the legal and drafting aspects of the items covered by the reports have been identified.

Encl

Prepared by
Legal Service Division
Legislative Council Secretariat
4 October 2011

**Legal Service Division's Report on
Subsidiary Legislation gazetted on 8 July 2011 and
tabled in the Legislative Council on 13 July 2011**

<u>L.N. No</u>	<u>Items</u>
115	Securities and Futures (Levy) (Amendment) Order 2011
116	Securities and Futures (Levy) (Amendment) Rules 2011
117	Securities and Futures (Contracts Limits and Reportable Positions) (Amendment) Rules 2011
118	Mandatory Provident Fund Schemes (Contributions for Casual Employees) (Amendment) Order 2011

**Legal Service Division's Reports on
Subsidiary Legislation gazetted between
29 July 2011 and 9 September 2011
and to be tabled in the Legislative Council on 12 October 2011**

<u>L.N. No</u>	<u>Items</u>
*130	Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Amendment of Schedule 1) Notice 2011
*131	Western Harbour Crossing Ordinance (Amendment of Schedule 1) Notice 2011
*132	Volunteer and Naval Volunteer Pensions Ordinance (Amendment of Schedules) Order 2011
133	Motor Vehicle Idling (Fixed Penalty) Regulation
134	Motor Vehicle Idling (Fixed Penalty) Ordinance (Commencement) Notice
135	Securities and Futures (Professional Investor) (Amendment) Rules 2011

*Legal Notices not required to be tabled and not subject to amendment

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Legislative Council

LC Paper No. LS88/10-11(01)

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 8 July 2011**

Date of tabling in LegCo : 13 July 2011

Amendment to be made by : 19 October 2011 (or 9 November 2011 if extended by resolution)

Securities and Futures Ordinance (Cap. 571)

Securities and Futures (Levy) (Amendment) Order 2011 (L.N. 115)

Securities and Futures (Levy) (Amendment) Rules 2011 (L.N. 116)

Securities and Futures (Contracts Limits and Reportable Positions) (Amendment) Rules 2011 (L.N. 117)

L.N. 115

Under section 394(1) of the Securities and Futures Ordinance (Cap. 571) (SFO), a levy (if any) at the rate specified by the Chief Executive (CE) in Council by order published in the Gazette shall be payable to the Securities and Futures Commission (SFC) by the person or persons so specified by the CE in Council for-

- (a) every sale and purchase of any securities which is recorded on a recognized stock market or notified to a recognized exchange company under its rules;
- (b) every sale and purchase of any futures contract traded on a recognized futures market; and
- (c) every sale and purchase of any securities or futures contracts traded by means of authorized automated trading services (ATS).

2. The levies specified under section 394(1)(a) and (b) but not (c) of the SFO are set out in the Securities and Futures (Levy) Order (Cap. 571 sub. leg. Z) (the Levy Order).

3. Hong Kong Mercantile Exchange Limited (HKMEx) obtained authorization from the SFC on 26 April 2011 to provide ATS and has commenced trading of gold futures contracts since 18 May 2011. According to paragraph 5 of the LegCo Brief, HKMEx is not the first ATS provider to be authorized by the SFC. Nevertheless, its authorization is unique in that it is the first authorized ATS to-

- (a) offer an exchange-like platform for the trading of futures contracts (i.e. a platform that matches buy and sell orders for futures contracts); and
- (b) be solely or primarily regulated by the SFC.

Its position is similar to that of the Hong Kong Futures Exchange Limited (HKFE), which also operates a futures market in Hong Kong, albeit as a recognized exchange company rather than as an authorized ATS provider.

4. Futures contracts traded by means of authorized ATS provided by HKMEx are not subject to SFC levies. In contrast, futures contracts traded on HKFE are subject to SFC levies under Part 3 of the Levy Order, generally at \$0.60 payable by both the seller and the purchaser. The existing arrangements regarding SFC levies have thus created an unlevel playing field between HKFE and HKMEx.

5. L.N. 115, made by the CE in Council under section 394 of the SFO, amends the Levy Order by adding a new Part 4 to impose, for the purposes of section 394(1)(c) of the SFO, a levy payable to the SFC in respect of a sale and purchase of futures contracts traded by means of authorized ATS. The effect of L.N. 115 is that a levy of \$0.60 on each of the seller and purchaser is payable in respect of a sale and purchase of a futures contract traded by means of authorized ATS provided by HKMEx. However, payment of the levy of \$0.60 is exempted for a period of six months commencing on the first day of trading in the futures contract by means of authorized ATS provided by HKMEx. No levy is payable if the futures contract is traded by means of authorized ATS provided by other operators.

L.N. 116

6. The Securities and Futures (Levy) Rules (Cap. 571 sub. leg. AA) (the Levy Rules) provide for various matters relating to the payment of levies payable to the SFC in respect of the sale and purchase of futures contracts and securities, including the imposition of charges for late payment of such levies and the keeping and inspection of accounts relating to the collection and payment of such levies.

7. L.N. 116, made by the CE in Council under section 394 of the SFO, amends the Levy Rules to extend the application of the Levy Rules to cover levies payable in respect of the sale and purchase of futures contracts traded by means of authorized ATS. This is effected by replacing the definition of "Exchange Company" by the new definition of "Market Operator" which includes the Stock Exchange Company, a recognized exchange company and an authorized ATS provider. Consequential amendments are also made to the relevant sections of the Levy Rules including the addition of a definition of "rules of the Market Operator" in section 3 as the new subsection (2).

8. L.N. 116 also amends section 10(2)(b) of the Levy Rules to include an auditor appointed by a Market Operator otherwise than under the Companies Ordinance (Cap. 32) if it is a non-Hong Kong company registered under Part XI of that Ordinance.

9. Members may refer to the LegCo Brief (File Ref.: SUD/42/11 (2011)) issued by the Financial Service Branch, Financial Services and the Treasury Bureau on 6 July 2011 for background information relating to L.N. 115 and L.N. 116.

10. L.N. 115 and L.N. 116 will come into operation on 18 November 2011.

L.N. 117

11. Under section 35(1) of the SFO, the SFC may prescribe limits on the number of futures contracts and options contracts that may be held or controlled by any person. It may also prescribe the reportable positions in respect of such contracts. "Reportable position" means an open position of such contracts the number of which is in excess of the number specified in the relevant rules. Those limits and reportable positions are established and fixed for the futures contracts and stock options contracts specified respectively in Schedules 1 and 2 to the Securities and Futures (Contracts Limits and Reportable Positions) Rules (Cap. 571 sub. leg. Y) (the principal Rules).

12. L.N. 117, made by the SFC under section 35(1) of the SFO, amends the principal Rules by repealing the existing Schedule 1 and Schedule 2 and substituting each with a new one. However, the net effects are:-

- (a) in relating to Schedule 1,
 - (i) the renumbering of existing items;
 - (ii) the addition of the HSI Dividend Point Index futures contract and the HSCEI Dividend Point Index futures contract as items 10 and 11; and

- (iii) no statutory position limit is set for each new item and the open position reporting level is set for each at 1 000 open contracts for any one contract month;
- (b) in relation to Schedule 2,
- (i) the renumbering of existing items;
 - (ii) the addition of the iShares FTSE A50 China Index ETF stock options contract and the W.I.S.E. - CSI 300 China Tracker stock options contract as items 3 and 4; and
 - (iii) the position limit and open position reporting level for each new item are the same as the existing items, i.e. 50 000 open contracts per option class in any one market direction for all expiry months combined and 1 000 open contracts per option class per expiry month.

13. Members may refer to the LegCo Brief (with no reference number) issued by the SFC on 4 July 2011 for background information. According to the LegCo Brief, the additions to Schedule 1 follow the large open position reporting level and position limits specified in the contract specifications of the HKFE. The additions to Schedule 2 largely follow the position limits and the large open position reporting levels stipulated in the rules for most stock options contracts on shares listed on a stock market operated by the Stock Exchange of Hong Kong Limited.

14. L.N. 117 will come into operation on 25 November 2011.

15. The Panel on Financial Affairs has not been consulted on L.N. 115 to L.N. 117.

**Mandatory Provident Fund Schemes Ordinance (Cap. 485)
Mandatory Provident Fund Schemes (Contributions for Casual Employees)
(Amendment) Order 2011 (L.N. 118)**

16. The Mandatory Provident Fund Schemes Ordinance (Amendment of Schedule 2) Notice 2011 (the Amendment Notice) was approved by the Legislative Council on 30 June 2011. It amends Schedule 2 to the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO) by adjusting the minimum level of relevant income (Min RI) from \$5,000 to \$6,500 per month (and from \$160 to \$250 per day for employees who are members of an industry scheme) for contribution purposes under the MPFSO. The mandatory

contribution to be made in respect of a casual employee of an industry scheme under different income bands is prescribed with reference to the daily Min RI. The Amendment Notice necessitates the amendment to the Mandatory Provident Fund Schemes (Contributions for Casual Employees) Order (Cap. 485 sub. leg. E) (the principal Order).

17. L.N. 118 is made by the Mandatory Provident Fund Schemes Authority under section 7A(6) of the MPFSO. It amends the scales of amounts of contributions prescribed in the Schedule to the principal Order that employers participating in industry schemes need to make as mandatory contributions to the schemes in respect of their casual employees with the effect that the contribution amount for the income band of "\$250.00 or more but less than \$260.00" is \$13 instead of \$7.5.

18. Members may refer to the LegCo Brief (with no reference number) issued by the Mandatory Provident Fund Schemes Authority on 6 July 2011 for background information.

19. L.N. 118 will come into operation on 1 November 2011 which is the same as the commencement date of the Amendment Notice.

20. The Panel on Financial Affairs has not been specifically consulted on the proposed amendments under L.N. 118. However, the Panel has been consulted on a related subject, i.e. the review of the minimum and maximum levels of relevant income for contributions. At the special meeting held on 20 April 2011 to receive views from concerned parties and members of the public, there was a general consensus that the minimum relevant income level for contributions should be revised to about \$6,500. As for the maximum relevant income level, the views were rather diverse regarding the extent of increase. Noting that some low-income workers would become obliged to make contributions after the implementation of the statutory minimum wage on 1 May 2011, Members urged the Administration to expedite the legislative work to revise the minimum and maximum relevant income levels for contributions, and where necessary to take forward the upward revision of the minimum relevant income level in the first place.

21. No difficulties have been identified in the legal and drafting aspects of the above items of subsidiary legislation.

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15 July 2011
LS/S/37/10-11

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Legislative Council

LC Paper No. LS89/10-11(01)

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 29 July 2011**

**LEGAL NOTICES NOT REQUIRED TO BE TABLED AND NOT
SUBJECT TO AMENDMENT**

**Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474)
Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Amendment
of Schedule 1) Notice 2011 (L.N. 130)**

L.N. 130 is made by the Commissioner for Transport (the Commissioner) under section 45(1) of the Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474) to replace Schedule 1 to the Ordinance with a new Schedule 1 to reflect the increase of statutory tolls payable for the use of the Tai Lam Tunnel and Yuen Long Approach Road (Route 3). L.N. 130 came into operation on 1 August 2011.

2. Cap. 474 provides for a toll adjustment mechanism in respect of Route 3. Under section 39(1), Route 3 (CPS) Company Limited (the Franchisee) may, during the franchise period, give effect to an anticipated toll increase on each of three specified dates (i.e. 1 January 2003, 1 January 2010 and 1 January 2017) referred to in Schedule 3. However, under section 40(1), if the Franchisee's Actual Net Revenue (ANR) for any year, which is not a year ending immediately before a specified date, is less than the Minimum Estimated Net Revenue (MENR) for that year as specified in Schedule 4, the Franchisee may apply to the Secretary for Transport and Housing (the Secretary) to give effect to the next anticipated toll increase. Under section 42(1), where the Franchisee has given effect to all the anticipated toll increases pursuant to section 39(1) or 40(1) and its ANR for any year occurring before the expiry of the franchise period is less than its MENR for that year, it may apply to the Secretary for an additional toll increase. Schedule 2 specifies the amounts of toll increase to which the Franchisee may give effect in respect of different categories of vehicles.

3. Under section 45(1), where a toll is increased under the mechanism described in paragraph 2 above, the Commissioner shall by notice published in the Gazette amend Schedule 1 to vary the tolls for different categories of vehicles using Route 3. Section 45(3) provides that section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply in respect of such notice. Accordingly, L.N. 130 is not required to be tabled before, and is not subject to amendment by, the Legislative Council.

4. The amounts of increase of statutory tolls reflected in L.N. 130 are in accordance with the amounts specified in Schedule 2 to Cap. 474. The last statutory toll increase for Route 3 came into effect on 4 September 2010 (L.N. 109 of 2010). According to paragraph 9 of the LegCo Brief issued by the Transport and Housing Bureau (THB) in July 2011 (File Ref: THB(T)CR 19/3/5591/91), the Franchisee will continue to offer concessions to all types of vehicles so that the current concessionary tolls¹ will be maintained notwithstanding the present increase in statutory tolls. Therefore, users of Route 3 will not be affected by any actual increase in tolls.

5. A comparison of the Route 3 statutory tolls before and after the increase, and the applicable concessionary tolls, is at **Annex I**.

6. As stated in paragraph 3 of the LegCo Brief, since the operation of Route 3 in 1998, the Franchisee's actual net revenue has consistently fallen short of the specified levels. The current toll increase is based on the Franchisee's 2006/07 Net Revenue Statement (NRS) which shows that its ANR for 2006/07 was \$460 million, which is lower than the MENR of \$1,236 million for that year specified in Schedule 4 to Cap. 474. According to the LegCo Brief, the Administration has examined the NRS in accordance with the requirement under the toll adjustment mechanism and considers that the current statutory toll increase complies with the relevant provisions of Cap. 474.

Western Harbour Crossing Ordinance (Cap. 436)
Western Harbour Crossing Ordinance (Amendment of Schedule 1) Notice 2011 (L.N. 131)

7. L.N. 131 is made by the Commissioner under section 52(1) of the Western Harbour Crossing Ordinance (Cap. 436) to replace Schedule 1 to the Ordinance with a new Schedule 1 to reflect the increase of statutory tolls payable for the use of the Western Harbour Crossing (WHC). L.N. 131 came into operation on 31 July 2011.

¹ The current concessionary tolls took effect from 1 January 2011.

8. Sections 45 to 52 of Cap. 436 prescribe for WHC a toll adjustment mechanism similar to that of Route 3 described in paragraphs 2 and 3 above:

- (a) Western Harbour Tunnel Company Limited (the Company) may, during the franchise period, give effect to an anticipated toll increase on each of six specified dates (i.e. 1 January 2001, 1 January 2005, 1 January 2009, 1 January 2013, 1 January 2017 and 1 January 2021) referred to in Schedule 4 (section 45(1));
- (b) however, whenever the Company's net revenue in any year, which is not a year ending immediately before a specified date, is less than the MENR for that year as specified in Schedule 5, it may apply to the Secretary to give effect to the next anticipated toll increase (section 46(1));
- (c) where the Company has given effect to all the anticipated toll increases and its net revenue in respect of any year before the expiry of the franchise period is less than the MENR for that year, it may apply to the Secretary to give effect to an additional toll increase (section 48(1));
- (d) the amounts of toll increase to which the Company may give effect for different categories of vehicles on or after 1 January 2011 are specified in Schedule 3 (section 50(1));
- (e) where a toll is increased, the Commissioner shall by notice published in the Gazette amend Schedule 1 to vary the tolls for different categories of vehicles (section 52(1)); and
- (f) section 34 of Cap. 1 does not apply to a notice referred to in (e); accordingly, L.N. 131 is not required to be tabled before, and is not subject to amendment by, the Legislative Council (section 52(3)).

9. The amounts of increase of statutory tolls reflected in L.N. 131 are in accordance with the amounts specified in Schedule 3 to Cap. 436. The last statutory toll increase for WHC came into effect on 31 July 2010 (L.N. 107 of 2010). According to paragraph 9 of the LegCo Brief issued by THB in July 2011 (File Ref: THB(T)CR 1/4651/99), the Company will continue to offer concessions to all types of vehicles so that the current concessionary tolls² will be maintained notwithstanding the present increase in statutory tolls. Therefore, users of WHC will not be affected by any actual increase in tolls.

² The current concessionary tolls took effect from 1 August 2010.

10. A comparison of the WHC statutory tolls before and after the increase, and the applicable concessionary tolls, is at **Annex II**.

11. As stated in paragraph 3 of the LegCo Brief, since the commissioning of WHC in 1997, the Company's net revenue has consistently fallen short of the specified levels. The current toll increase is based on the Company's 2007/08 NRS which shows that its net revenue for 2007/08 was \$760 million, which is lower than the MENR of \$1,623 million for that year specified in Schedule 5 to Cap. 436. According to the LegCo Brief, the Administration has examined the NRS in accordance with the requirement under the toll adjustment mechanism and considers that the current statutory toll increase complies with the relevant provisions of Cap. 436.

12. The Panel on Transport has not been consulted on the new statutory tolls specified in L.N. 130 and L.N. 131.

13. No difficulties have been identified in relation to the legal and drafting aspects of L.N. 130 and L.N. 131.

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9 August 2011

Annex I

Tai Lam Tunnel and Yuen Long Approach Road Tolls

Category	Vehicle	Statutory tolls (\$)		Concessionary tolls (\$)
		before increase	w.e.f. 1 August 2011	
1.	Motorcycles, motor tricycles	50	55	20
2.	Private cars, electrically powered passenger vehicles, taxis	55	60	33
3.	Public and private light buses	150	165	100
4.	(a) Light goods vehicles and special purpose vehicles of a permitted gross vehicle weight not exceeding 5.5 tonnes	150	165	34
	(b) In a vehicle specified in paragraph (a), each additional axle in excess of 2	60	65	0
5.	(a) Medium goods vehicles and special purpose vehicles of a permitted gross vehicle weight exceeding 5.5 tonnes but not exceeding 24 tonnes	160	175	40
	(b) In a vehicle specified in paragraph (a), each additional axle in excess of 2	60	65	0
6.	(a) Heavy goods vehicles and special purpose vehicles of a permitted gross vehicle weight exceeding 24 tonnes	180	195	45
	(b) In a vehicle specified in paragraph (a), each additional axle in excess of 2	60	65	0
7.	Public and private single-decked buses	150	165	115
8.	Public and private double-decked buses	165	180	135

Western Harbour Crossing Tolls

Category	Vehicle	Statutory tolls (\$)		Concessionary tolls (\$)
		before increase	w.e.f. 31 July 2011	
1.	Motorcycles, motor tricycles	60	70	23
2.	Private cars, electrically powered passenger vehicles	120	135	50
	Taxis	120	135	45
3.	Public and private light buses	130	150	60
4.	(a) Light goods vehicles and special purpose vehicles of a permitted gross vehicle weight not exceeding 5.5 tonnes	180	200	60
	(b) In a vehicle specified in paragraph (a), each additional axle in excess of 2	120	135	30
5.	(a) Medium goods vehicles and special purpose vehicles of a permitted gross vehicle weight exceeding 5.5 tonnes but not exceeding 24 tonnes	245	280	85
	(b) In a vehicle specified in paragraph (a), each additional axle in excess of 2	120	135	30
6.	(a) Heavy goods vehicles and special purpose vehicles of a permitted gross vehicle weight exceeding 24 tonnes	365	410	115
	(b) In a vehicle specified in paragraph (a), each additional axle in excess of 2	120	135	30
7.	Public and private single-decked buses	130	150	90
8.	Public and private double-decked buses	190	220	128

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Legislative Council

LC Paper No. LS90/10-11(01)

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 5 August 2011**

**LEGAL NOTICE NOT REQUIRED TO BE TABLED AND NOT
SUBJECT TO AMENDMENT**

**Volunteer and Naval Volunteer Pensions Ordinance (Cap. 202)
Volunteer and Naval Volunteer Pensions Ordinance (Amendment of
Schedules) Order 2011 (L.N. 132)**

The Order is made by the Secretary for Labour and Welfare under section 35(2) of the Volunteer and Naval Volunteer Pensions Ordinance (Cap. 202) (the Ordinance). The Order amends Schedules 3 to 8 to the Ordinance to adjust the amounts for the payment of pensions, gratuities and other allowances under the Ordinance to the officers and volunteers of the Hong Kong Volunteer Defence Corps and members of the Hong Kong Naval Volunteer Force who fought in Hong Kong during the Second World War and their surviving spouses. Under section 35(2) of the Ordinance, the amounts are adjusted in accordance with the percentage of increase declared in a notice made under section 4(1C) of the Pensions (Increase) Ordinance (Cap. 305) (PIO).

2. Section 35(5) provides that section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) does not apply to an order made under section 35(2) of the Ordinance. Accordingly, the Order is not required to be tabled in the Legislative Council and is not subject to amendment.

3. By the Declaration of Increase in Pensions Notice 2011 (L.N. 105 of 2011) (the DIP Notice) gazetted on 17 June 2011 made under PIO, an increase of 3.2% is declared in respect of a basic pension with effect from 1 April 2011 in accordance with the percentage of increase in the average monthly Consumer Price Index (A) (the Average Index) of the 12 months ending on 31 March 2011 over the Average Index of the immediately preceding 12 months. Accordingly, pursuant to the Order, the amounts set out in Schedules 3 to 8 to the Ordinance are adjusted in accordance with the percentage of increase (3.2%) in respect of a basic pension declared in the DIP Notice. The relevant amounts were last revised in April 2010 (L.N. 106 of 2010).

4. Section 35(4) of the Ordinance provides that an order made under section 35(2) shall take effect on the same date as specified in the relevant notice made under PIO. As mentioned in paragraph 3 above, the DIP Notice came into effect on 1 April 2011. Accordingly, the Order is deemed to have come into operation on 1 April 2011.
5. The Panel on Welfare Services has not been consulted on the Order.
6. No difficulties have been identified in the legal or drafting aspects of the above item of subsidiary legislation.

Prepared by

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19 August 2011

立法會
Legislative Council

LC Paper No. LS91/10-11(01)

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 26 August 2011**

Date of tabling in LegCo : 12 October 2011

Amendment to be made by : 9 November 2011 (or 30 November 2011 if extended by resolution)

Motor Vehicle Idling (Fixed Penalty) Ordinance (Cap. 611)
Motor Vehicle Idling (Fixed Penalty) Regulation (L.N. 133)

Motor Vehicle Idling (Fixed Penalty) Ordinance (Cap. 611)
Motor Vehicle Idling (Fixed Penalty) Ordinance (Commencement) Notice (L.N. 134)

The Motor Vehicle Idling (Fixed Penalty) Bill (enacted as the Motor Vehicle Idling (Fixed Penalty) Ordinance (3 of 2011)) was passed by the Legislative Council on 5 March 2011 and the enacted Ordinance (the Ordinance) was published in the Gazette on 10 March 2011. The Ordinance prohibits the idling of motor vehicles and provides for, inter alia, a fixed penalty for contravention of the prohibition and recovery of the fixed penalty.

2. L.N. 134 appoints 15 December 2011 as the day on which the Ordinance comes into operation.

3. Under section 31 of the Ordinance, the Secretary for the Environment may make regulations prescribing any notice or certificate for the purposes of the Ordinance, specifying how fixed penalties and other amounts payable under the Ordinance may be paid, the information to be supplied by persons paying them and the duties of persons receiving them.

4. L.N. 133 is made by the Secretary for the Environment under section 31 of the Ordinance to prescribe -

- (a) the form of the notice of particulars of alleged fixed penalty motor vehicle idling contravention under section 8(1) of the Ordinance (Fixed Penalty Notice) (Form 1);
- (b) the form of the notice demanding payment of fixed penalty under section 11(2) of the Ordinance (Demand Notice) (Form 2);
- (c) the form of the certificate of posting of demand notice under section 11(5) of the Ordinance (Form 3); and
- (d) the form of evidentiary certificate under section 24(1) of the Ordinance as a proof of certain matters in proceedings for recovery of fixed penalties.

5. Section 5 of L.N. 133 provides for the manner of payment of fixed penalties. Under section 5(5), if a payment of fixed penalty is made otherwise than in accordance with L.N. 133, the fixed penalty is treated as unpaid and the Director of Accounting Services may return the amount of the payment to the payer.

6. Under section 11 of the Ordinance, a Demand Notice will be issued to a person if he fails to pay the fixed penalty within 21 days after being given a Fixed Penalty Notice or if he refuses to accept a Fixed Penalty Notice intended to be given to him. Paragraph 3 of the Notes to the Fixed Penalty Notice provides that "[a] demand notice will be issued in due course" and paragraph 4 provides that "[i]f you fail to pay in accordance with the Demand Notes or to notify the Authority that you wish to dispute liability for the contravention, an additional penalty may be imposed". As drafted, paragraph 3 appears to suggest that a Demand Notice will be issued in any event irrespective of whether the fixed penalty is paid. The Legal Service Division has written to the Administration to seek clarifications on the drafting of paragraph 3 of the Notes. In its reply, the Administration confirms that a Demand Notice will be served only if the fixed penalty is not paid within 21 days after the Fixed Penalty Notice is issued and says that the wording of paragraph 3 of the Notes is modelled on paragraph B of the Notes to Form 1 of the Fixed Penalty (Traffic Contraventions) Regulations (Cap. 237A). A copy of the Administration's reply is annexed for members' reference (Annex).

7. It is noted that the Notes to Form 1 of Cap. 237A does not make reference to the requirement for payment in accordance with the demand note issued under Cap. 237A and the drafting approach of paragraphs 3 and 4 of the Notes to the Fixed Penalty Notice appears to be different from that of Cap. 237A. The drafting of the Notes to the Fixed Penalty Notice also appears to be inconsistent with the approach adopted in the more recently enacted subsidiary legislation such as the Notes to Form 1 in the Fixed Penalty (Smoking Offences) Regulation (Cap. 600A) and the Notes to Form 1 in the Fixed Penalty (Public Cleanliness Offences) Regulation (Cap. 570A), both of which do not make reference to the requirement for payment in accordance with demand notice.

8. Based on the Administration's reply, it would perhaps be clearer if paragraph 3 of the Notes to the Fixed Penalty Notice specifies that a Demand Notice will be issued if payment is not made in accordance with the Fixed Penalty Notice within 21 days.

9. A paper providing an update on the making of subsidiary legislation under the Ordinance was provided by the Administration to the Panel on Environmental Affairs (the Panel) (LC Paper No. CB(1)2739/10-11(03)) in July 2011. At the meeting held on 20 July 2011, the Panel was briefed on the Motor Vehicle Idling (Fixed Penalty) Regulation. Some members questioned the rationale behind the delay in introducing the subsidiary legislation, which should have been introduced in August 2011 as pledged by the Administration in the course of examination of the Motor Vehicle Idling (Fixed Penalty) Bill. Some other members were dissatisfied that the Administration had neither provided the draft Fixed Penalty and Demand Notices, nor an update on the progress of preparatory work for implementation of the prohibition against idling engines; and without such information, they might not have the confidence that the prohibition could be implemented by mid-December 2011.

10. Members may refer to the LegCo Brief (no reference number provided) issued by the Environmental Protection Department in August 2011 for background information.

11. Under section 1 of L.N. 133, L.N. 133 comes into operation on the day on which the Ordinance comes into operation, i.e. 15 December 2011.

12. In view of the concerns expressed by members at the Panel meeting, members may wish to consider whether a subcommittee should be formed to study L.N. 133 and L.N. 134 in detail.

13. Apart from the drafting issue described in paragraphs 6 to 8 above, the Legal Service Division has not identified any difficulties in the legal or drafting aspects of L.N. 133 and L.N. 134.

Encl

Prepared by

Kitty CHENG
Assistant Legal Adviser
Legislative Council Secretariat
16 September 2011



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



立法會秘書處 法律事務部
LEGISLATIVE COUNCIL SECRETARIAT
LEGAL SERVICE DIVISION

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By Fax (2572 0306)

12 September 2011

Mr Mok Wai Chuen
Assistant Director (Air Policy)
Environmental Protection Department
46/F, Revenue Tower
5 Gloucester Road
Wan Chai
Hong Kong

Dear Mr Mok,

**Motor Vehicle Idling (Fixed Penalty) Regulation
- L.N. 133 of 2011**

I refer to Form 1 (Notice of Particulars of Alleged Fixed Penalty Motor Vehicle Idling Contravention) of the Motor Vehicle Idling (Fixed Penalty) Regulation (L.N. 133 of 2011).

Under section 11 of the Motor Vehicle Idling (Fixed Penalty) Ordinance (Cap. 611), a Demand Notice will be issued to a person if he fails to pay the fixed penalty within 21 days after being given a Form 1 or if he refuses to accept a Form 1 intended to be given to him. It seems that a Demand Notice would not be issued to a person who has paid the fixed penalty in accordance with Form 1.

Paragraph 3 of the Notes to Form 1, however, provides the following -

"A Demand Notice will be issued in due course. You may ignore the Demand Notice only if you have made prior payment on this Notice."

Please explain the reason for including paragraph 3 in the Notes to Form 1.

I would be most grateful if you could let me have your reply in bilingual form before 14 September 2011.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Kitty Cheng', written in a cursive style.

(Kitty Cheng)
Assistant Legal Adviser

c.c. LA
ASG2

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環境保護署總部
香港灣仔
告士打道五號
稅務大樓四十六樓

15 September 2011

Miss Kitty Cheng
Assistant Legal Advisor
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Dear Ms Cheng,

Motor Vehicle Idling (Fixed Penalty) Regulation

Thank you for your letter dated 12 September 2011 concerning paragraph 3 of the Notes to Form 1 of the Motor Vehicle Idling (Fixed Penalty) Regulation (“the Regulation”).

We would like to clarify that a Demand Notice will be served under section 11(2) of the Motor Vehicle Idling (Fixed Penalty) Ordinance (Cap. 611) only if the fixed penalty is not paid within 21 days after Form 1 is issued. This is in line with the corresponding arrangement under section 15(3) of the Fixed Penalty (Traffic Contraventions) Ordinance (Cap. 237). Paragraph 3 of the Notes to Form 1 of the Regulation serves to introduce the Demand Notice mentioned in paragraph 4. Its wording is modeled on paragraph B of the Notes to Form 1 of the Fixed Penalty (Traffic Contraventions) Regulations (Cap. 237A).

Yours sincerely,

(W C MOK)

for Director of Environmental Protection

立法會
Legislative Council

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 9 September 2011**

Date of tabling in LegCo : 12 October 2011

Amendment to be made by : 9 November 2011 (or 30 November 2011 if extended by resolution)

**Securities and Futures Ordinance (Cap. 571)
Securities and Futures (Professional Investor) Rules (Cap. 571 sub. leg. D)
Securities and Futures (Professional Investor) (Amendment) Rules 2011
(L.N. 135)**

The Securities and Futures Ordinance (Cap. 571) (Ordinance) contains certain investor protection provisions which will not apply when the relevant regulated acts are targeted at professional investors¹.

2. "Professional investor" is defined in section 1 of Part 1 of Schedule 1 to the Ordinance to mean any of the specified entities as stated in paragraphs (a) to (i) of the definition (such as banks and insurance companies) and such additional classes of persons as prescribed under the Securities and Futures (Professional Investor) Rules (Cap. 571 sub. leg. D) (Rules) pursuant to paragraph (j) of the definition.

3. The additional classes of persons prescribed under the Rules as professional investors are: -

- (a) a trust corporation having been entrusted under the trust or trusts of which it acts as a trustee with total assets of not less than \$40 million (or the equivalent in foreign currency)²;
- (b) an individual, either alone or with his associates on a joint account, having a portfolio of not less than \$8 million (or the equivalent in foreign currency)³;

¹ For example, section 175 of the Ordinance which generally prohibits an offer of securities to a person by an intermediary unless the offer is accompanied by an offering document with the detailed information required.

² Section 3(a) of the Rules.

³ Section 3(b) of the Rules.

- (c) a corporation or partnership having either a portfolio of not less than \$8 million (or the equivalent in foreign currency) or total assets of not less than \$40 million (or the equivalent in foreign currency)⁴; and
- (d) a corporation the sole business of which is to hold investments and which is wholly owned by an individual (either alone or with his associates on a joint account) having a portfolio of not less than \$8 million (or the equivalent in foreign currency) (i.e. an individual who falls within the description in sub-paragraph (b) above)⁵.

4. The Rules also sets out specific methods (evidential requirements) to ascertain whether an investor has the required assets or portfolio. Depending on whether the investor in question is a trust corporation⁶, an individual⁷, a corporation⁸ or partnership⁹, the value of the assets or portfolio is ascertained, as the case may be, by: -

- (a) what is stated in the most recent audited financial statement or statements prepared within 16 months before the relevant date¹⁰;
- (b) referring to the custodian statement or statements issued within 12 months before the relevant date; or
- (c) what is stated in a certificate issued by an auditor or a certified public accountant within 12 months before the relevant date.

5. According to paragraph 5 of the LegCo Brief, market participants have expressed that the evidential requirements under the Rules are very specific and provide little flexibility. The Securities and Futures Commission (SFC) therefore made L.N. 135 pursuant to section 397(1) of the Ordinance to prescribe additional means of ascertaining whether an investor is a professional investor under section 3(a), (b) and (c) of the Rules, whilst preserving the existing methods of evidencing the required assets or portfolio. L.N. 135 extends section 3(a), (b) and (c) of the Rules to prescribe that a trust

⁴ Section 3(c) of the Rules.

⁵ Section 3(d) of the Rules.

⁶ Section 3(a) of the Rules.

⁷ Section 3(b) of the Rules.

⁸ Section 3(c) of the Rules.

⁹ Section 3(c) of the Rules.

¹⁰ Relevant date is defined in section 2 of the Rules to mean different dates with respect to different regulated acts or obligations in question. Generally speaking, relevant date refers to the date on which the regulated act or obligation in question is done or required to be done. For example, section 175 of the Ordinance generally prohibits an offer of securities to a person by an intermediary unless the offer is accompanied by an offering document with the detailed information required and such prohibition does not apply where the person is a professional investor. In such a case, relevant date means the date on which the offer is made.

corporation, an individual (either alone or with his associates on a joint account), a corporation or partnership is a professional investor if they have the required assets or portfolio at the relevant date. Accordingly, market participants will be allowed to use other methods to ascertain whether an investor has the required assets or portfolio in addition to the existing methods.

6. L.N. 135 also modifies section 3(d) of the Rules to prescribe as a professional investor any corporation the sole business of which at the relevant date is to hold investments and which at the relevant date is wholly owned by one or more trust corporations, individuals (either alone or with their associates on joint accounts), corporations or partnerships where they are prescribed as professional investors within the scope of section 3(a), (b) or (c) of the Rules.

7. L.N. 135 comes into operation on 16 December 2011.

8. Members may refer to the LegCo Brief (no reference number provided) issued by SFC dated 14 September 2011 for further information.

9. SFC issued a consultation paper in relation to the evidential requirements under the Rules in October 2010 and published the consultation conclusions in February 2011. According to SFC, most respondents supported, in principle, the proposed amendments to the Rules, subject to comments on specific proposals.

10. The Panel on Financial Affairs has not been consulted on L.N. 135.

11. The Legal Service Division has sought clarification from SFC regarding the drafting aspects of L.N. 135 and has no further enquiries to make in view of SFC's responses. No difficulties have been identified in the legal aspects of L.N. 135.

Prepared by

KAN Wan-ye, Wendy
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Legislative Council Secretariat
4 October 2011