

立法會
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**Paper for the House Committee Meeting
on 4 November 2011**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 21 October 2011**

Date of tabling in LegCo : 26 October 2011

Amendment to be made by : 23 November 2011 (or 14 December 2011 if extended by resolution)

PART I BANKING ORDINANCE

Banking Ordinance (Cap. 155)

Banking (Capital) (Amendment) Rules 2011 (L.N. 137)

Banking (Disclosure) (Amendment) Rules 2011 (L.N. 138)

The Banking (Capital) (Amendment) Rules 2011 and the Banking (Disclosure) (Amendment) Rules 2011 are made by the Monetary Authority under sections 98A and 60A of the Banking Ordinance (Cap. 155) respectively to implement a package of enhancements to the Basel II regulatory capital framework (Basel II Enhancements) issued by the Basel Committee on Banking Supervision (BCBS)¹ in July 2009. Both Amendment Rules shall come into operation on 1 January 2012.

Background

2. The Banking (Capital) Rules (Cap. 155 sub. leg. L) and the Banking (Disclosure) Rules (Cap. 155 sub. leg. M) were made in 2006 and came into force on 1 January 2007 to implement the Basel II regulatory capital framework introduced by the BCBS in 2006.

3. Basel II regulatory capital framework comprises the following three "pillars" -

¹ The BCBS is a standard-setting body which promotes sound standards of banking supervision globally.

- (a) minimum capital adequacy ratio for a bank's credit, market and operational risks and its calculation (Pillar 1);
- (b) supervisory review process to evaluate and monitor the bank's capital adequacy in relation to its overall risk profile (Pillar 2); and
- (c) disclosure requirements to allow market participants to access key pieces of information on the capital adequacy of banks (Pillar 3).

4. In response to the global financial crisis in 2008, BCBS introduced Basel II Enhancements² to address inadequacies identified in the Basel II framework. "Revisions to the Basel II market risk framework" (Pillar 1), supported by "Guidelines for computing capital for incremental risk in the trading book", address those weaknesses relating to the trading book³ and the fair valuation of exposures, especially illiquid exposures. "Enhancements to the Basel II framework" (Pillars 1, 2 and 3) address the additional risk identified in respect of re-securitization exposures in the banking book⁴ (Pillar 1); prescribe supplemental Pillar 2 guidance for improving the banks' governance and risk management practices; and require additional disclosure of banks' exposures to market risk and securitization activities and the related capital requirements (Pillar 3).

5. BCBS has intended the Pillar 2 supplemental guidance to be implemented immediately and the Pillar 1 and 3 enhancements to be implemented by 31 December 2011. The Hong Kong Monetary Authority (HKMA) has considered that the Basel II enhancements should be implemented in Hong Kong. Pillar 2 enhancements have already been implemented by the issuance of a revised module CA-G-5 in HKMA's supervisory policy manual in June 2010. L.N. 137 and L.N. 138 are made to implement the enhancements to Pillar 1 and Pillar 3.

The Banking (Capital) (Amendment) Rules 2011 (L.N. 137)

6. The Banking (Capital) Rules prescribe how the capital adequacy ratios of locally-incorporated authorized institutions⁵ (AIs) are to be calculated. L.N. 137 introduces technical amendments including –

² Basel II Enhancements are set out in the papers entitled "Revisions to the Basel II market risk framework" (<http://www.bis.org/publ/bcbs158.htm>), "Guidelines for computing capital for incremental risk in the trading book" (<http://www.bis.org/publ/bcbs159.htm>) and "Enhancements to the Basel II framework" (<http://www.bis.org/publ/bcbs157.htm>).

³ "Trading books" means an AI's exposures in financial instruments and commodities which are held with the intention of trading or for the purpose of hedging one or more of the exposures in other financial instruments and commodities which are held with the intention of trading (section 2 of Cap. 155 sub. leg. L).

⁴ "Banking book" means all AI's on-balance sheet exposures and off-balance sheet exposures except such exposures which fall within the definition of "trading book" (section 2 of Cap. 155 sub. leg. L), including mainly loans.

⁵ "Authorized Institution" means a bank, a restricted licence bank, or a deposit-taking company (section 2 of Cap. 155).

- (a) amendments to align the capital treatment for securitization (including re-securitization) exposures in the trading book with the higher capital requirements applicable to banking book securitization exposures (e.g. sections 128 and 140);
- (b) amendments imposing on banks that use the value at risk models more stringent requirements such as more frequent updating of data and more use of stress-testing (e.g. section 146(2) and (5)) and additional market risk capital charges (e.g. sections 139 and 146(10));
- (c) amendments relating to the valuation of fair-valued exposures held in both the trading book and the banking book to ensure that the valuation is prudent and reliable (e.g. sections 4 and 27);
- (d) amendments to impose higher risk-weights for re-securitization exposures to address the additional risk observed with respect to such exposures (e.g. sections 97 and 111);
- (e) amendments to increase the capital requirements of liquidity facilities provided to securitization transactions (e.g. sections 99 and 120);
- (f) provisions of the recognition of the following four credit rating agencies -
 - (i) Japan Credit Rating Agency, Ltd. (incorporated in Japan);
 - (ii) ICRA Limited (incorporated in India);
 - (iii) Credit Analysis and Research Limited (incorporated in India);
and
 - (iv) CRISIL Limited (incorporated in India);
- (g) amendments to limit banks' ability to rely on credit ratings where the ratings are based on guarantees provided by the banks themselves (e.g. section 95), and to require banks to conduct adequate credit analysis for securitization exposures (e.g. sections 94, 96 and 104); and
- (h) textual amendments to rectify ambiguities identified in the implementation of the principal Rules and to achieve consistency between its Chinese and English texts (e.g. sections 20, 23 to 26, 37 to 40(3)).

The Banking (Disclosure) (Amendment) Rules 2011 (L.N. 138)

7. The Banking (Disclosure) Rules prescribes the information to be disclosed to the general public by AIs relating to their state of affairs, profits and loss, and the capital adequacy ratio. L.N. 138 introduces requirements including -

- (a) the requirement that an AI's disclosure policy should set out the approach used by it to ensure that the information it discloses is relevant and adequate to convey an accurate impression of its actual risk profile to market participants (section 4);
- (b) requirements to make additional disclosure of a bank's securitization exposure and to align the disclosure requirements in respect of securitization exposures in the trading book with that in the banking book, and requirements for disclosure of exposures in the trading book separately from those in banking book (sections 6, 8 and 12);
- (c) disclosure of the nature of risks, other than credit risk, inherent in a bank's securitized assets and the bank's role in the securitization process; disclosure of a bank's risk management of securitization exposures, including its policy governing the use of credit risk mitigation to mitigate the risks of retained exposures; and further disclosure for information regarding the valuation of securitization exposures including the methods and key assumptions applied in valuation (sections 6, 8 and 12); and
- (d) in respect of market risk, additional disclosure requirements regarding capital requirements for banks' trading book positions in interest rate exposures (particularly their securitization and re-securitization exposures and credit-sensitive trading products) and the approach and methodologies used for computing the new market risk capital charges (sections 7, 9 and 13).

8. Members may refer to LegCo Brief (File Reference: B9/1/1/1C) issued by the Financial Services and the Treasury Bureau on 19 October 2011 for details of the two Amendment Rules and other information.

Consultation

9. According to the LegCo Brief, the Financial Secretary, the Banking Advisory Committee, the Deposit-taking Companies Advisory Committee, The Hong Kong Association of Banks and The DTC Association were consulted on the Amendment Rules in August 2011 in accordance with sections 60A and 98A of the Banking Ordinance. All of them supported the objectives of the proposed

amendments. The comments received from the statutory consultation, which were mostly requests for clarification on some technical points, have been addressed in finalising the Amendment Rules. Members may refer to the Annex 3 to the LegCo Brief for details of the comments and the responses from HKMA.

10. At its meeting on 9 June 2011, the Panel on Financial Affairs was briefed on the implementation of Basel II Enhancements in Hong Kong. Members expressed concerns on the possible impacts of the implementation of Basel II Enhancements on the business development and competitiveness of the banking industry and their customers, particularly the small and medium sized enterprises. The Administration explained that while the more stringent capital and liquidity requirements would inevitably increase the operating costs of the banks, the new measures would ensure that the capital framework for the banks in Hong Kong is consistent with international standards and that the banks would be more resilient in the face of any future financial crisis.

11. The Legal Service Division has sought clarification from the Administration on certain drafting points. The Administration's response is being studied by the Legal Service Division.

PART II CIVIL AVIATION

Civil Aviation Ordinance (Cap. 448)

Air Navigation (Hong Kong) Order 1995 (Amendment) Order 2011 (L.N. 139)

12. This Amendment Order is made under sections 2A(2) and 12(2) of the Civil Aviation Ordinance (Cap. 448) (the Ordinance) by the Chief Executive in Council to amend Article 97 under the Air Navigation (Hong Kong) Order 1995 (the Principal Order). The Article provides that the Chief Executive may make regulations for prescribing the fees to be charged.

13. According to the LegCo Brief, the Amendment Order is needed to expand the power to charge fees under Article 97. After the Amendment Order is made, it is intended that the Hong Kong Air Navigation (Fees) (Amendment) Regulation 2011 be made to implement the fee proposals annexed to the LegCo Brief, which includes new fee items and a consolidation of certain fees. The fee proposals are aimed to achieve full cost recovery for services provided by the Government.

14. It is unclear from the LegCo Brief on how or why the existing Article 97 is inadequate to enable the said fee proposals to be introduced. Further, the Amendment Order appears to include some other amendments such as the delegation of power from the Chief Executive to the Director-General of Civil Aviation (the DGCA). A letter has been issued to the Administration seeking clarification and also to inquire about the provision of an authenticated Chinese text for the Principal Order. The Administration has responded that the proposed amendments are introduced to better reflect the procedures for levying the fees and charges in respect of the air navigation related matters and to put beyond doubt the Chief Executive's power to undergo those procedures so as to prescribe the fees to be levied. Further, this amendment is also taken as an opportunity to tidy up the relevant provisions relating to the fees and charges mechanism. As for the provision of a Chinese authenticated version of the Principal Order, the Administration has indicated that preparatory work in that regard has already started. The Administration's response is attached for Members' reference.

15. No difficulties with the legal and drafting aspects of the Amendment Order has been detected. However, in view of the re-formulation of the Administration's intention, it is necessary to study afresh the effect of the amendments with respect to the legislative intent as now detailed in the Administration's response. A further report will be made if necessary.

16. The Panel on Economic Development has not been consulted on the Amendment Order although general support on the fee proposals has been expressed when the Panel was consulted on 27 June 2011.

17. The Amendment Order will come into operation on 16 December 2011.

18. Members may refer to LegCo Brief (File Ref: THB(T)A 26/15/6) issued by Transport and Housing Bureau and dated 19 October 2011 for further information.

Civil Aviation Ordinance (Cap. 448)

Air Navigation (Hong Kong) Order 1995 (Amendment of Schedule 16) Order 2011 (L.N. 140)

Dangerous Goods (Consignment by Air) (Safety) Ordinance (Cap. 384)

Dangerous Goods (Consignment by Air) (Safety) (Amendment) Regulation 2011 (L.N. 141)

19. The International Civil Aviation Organisation (ICAO) promulgates under the Convention on International Civil Aviation (the Chicago Convention) a set

of requirements for carriage of dangerous goods by air. These requirements regulate matters including the classification, packaging, marking, labeling and loading of dangerous goods on board aircraft as well as training requirements for airlines, air cargo and security personnel. Under the Chicago Convention, such requirements are set out in the Technical Instructions for the Safe Transport of Dangerous Goods by Air (TIs). The TIs are given effect locally through two pieces of local subsidiary legislation made by the Chief Executive in Council -

- (a) Air Navigation (Dangerous Goods) Regulations (the AN Regulations), as Schedule 16 to the Air Navigation (Hong Kong) Order 1995 (the Order); and
- (b) Dangerous Goods (Consignment by Air) (Safety) Regulations (the DG Regulations).

20. The AN Regulations regulate the dangerous goods operations of airlines and airport authorities whereas the DG Regulations regulate the shippers and freight forwarders in the proper handling of dangerous goods before offering them for air transport.

L.N. 140

21. The Amendment Order (L.N. 140) is made under section 2A of the Civil Aviation Ordinance (Cap. 448) (the Ordinance) by the Chief Executive in Council to amend Schedule 16 to the Order to -

- (a) provide that, subject to any accident or incident report involving dangerous goods carried on board the aircraft is required to be made to the DGCA, the latest edition of TIs does not apply to dangerous goods contained within items of excess baggage being sent as cargo; and
- (b) require the operator of an aircraft to ensure that-
 - (i) information regarding which categories of dangerous goods are not to be taken on board the aircraft or carried by passengers be made available to the passengers in a specified manner; and
 - (ii) specified information in respect of dangerous goods is also provided to both cargo and passengers reservations and sales staff.

22. L.N. 140 will come into operation on 1 January 2012 except for section 3(7), which will come into operation on 1 January 2013.

L.N. 141

23. The Amendment Regulation (L.N. 141) is made under section 3 of the Dangerous Goods (Consignment by Air) (Safety) Ordinance (Cap. 384) by the Chief Executive in Council to amend the DG Regulations.

24. The Amendment Regulation seeks to remove "stores" from the definition of cargo under regulation 2 in order to bring the meaning of such definition into line with the same definition under the latest edition of TIs. The "declaration" prescribed under regulations 6 and 7 are sought to be substituted by "certification" to clarify that a statutory declaration is NOT intended to be contained in a dangerous goods transport document under those regulations. Further, the schedule to the Regulation is also proposed to be amended to refer to the latest edition of TIs regarding the requirements of dangerous goods to be consigned for carriage by air.

25. L.N. 141 will come into operation on 1 January 2012.

26. On 23 May 2011, the Administration consulted the Panel on Economic Development on the amendments proposed under L.N. 140 and 141. Members in general raised no concern about the proposed amendments except that a member enquired about the current measures for detection and identification of undeclared dangerous goods intended to be carried on board the aircraft by passengers and the consequences if those dangerous goods passed the X-ray screening without being detected. The Panel generally supported the proposed amendments.

27. Members may refer to LegCo Brief (File Ref: THB CR 1/15/951/49) issued by Transport and Housing Bureau and dated 19 October 2011 for further information.

PART III MISCELLANEOUS

Legislative Council Ordinance (Cap. 542)

Declaration of Geographical Constituencies (Legislative Council) Order 2011 (L.N. 142)

28. This Order is made under sections 18 and 19 of the Legislative Council Ordinance (Cap. 542) (the Ordinance) by the Chief Executive in Council to declare areas of Hong Kong to be geographical constituencies (GCs) for the purpose of electing Members for the fifth term of office of the Legislative Council, give names to those constituencies and specify the number of Legislative Council Members to be returned for each of those constituencies.

29. The Order declares that the number of seats to be allocated to the 5 GCs are as follows:

- (a) Hong Kong Island 7 seats (increased by 1 seat)⁶;
- (b) Kowloon West 5 seats (unchanged);
- (c) Kowloon East 5 seats (increased by 1 seat);
- (d) New Territories West 9 seats (increased by 1 seat); and
- (e) New Territories East 9 seats (increased by 2 seats).

30. On 18 July 2011, the Administration consulted the LegCo Panel on Constitutional Affairs. At the meeting, the Panel received a briefing on the provisional recommendations of the Electoral Affairs Commission on the delineation and the names of geographical constituencies ("GCs") for the 2012 Legislative Council Election. Members reiterated their concern about the population disparity among the five existing GCs. Some members suggested that the New Territories East GC and the New Territories West GC should be merged and divided into three GCs, bringing the total number of GCs to six. The Administration maintained the view that the number of GCs should remain to be five as that would allow the candidates to continually benefit from the close contact and network that they have been established with and in their constituencies.

31. The Amendment Order will come into operation on 1 January 2012.

32. Members may refer to LegCo Brief (File Ref: CMAB C1/30/8) issued by Constitutional and Mainland Affairs Bureau and dated 19 October 2011 for further information.

Companies Ordinance (Cap. 32)

Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) (Amendment) Notice 2011 (L.N. 143)

33. This Amendment Notice is made by the Securities and Futures Commission (the Commission) under sections 38A and 342A of the Companies Ordinance (Cap. 32) (the Ordinance) to amend section 6 of the Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice.

34. A prospectus issued by or on behalf of a company offering shares in or debentures of a company to the public (the prospectus) must comply with the

⁶ Information in brackets reflects the changes when compared to the 2008 LegCo general election

requirements prescribed under sections 38 (for local companies) or 342 (for companies incorporated outside Hong Kong) of the Ordinance. The prospectus must set out the reports specified in Part II of the Third Schedule to the Ordinance and it is unlawful to issue the prospectus without such compliance.

35. Paragraph 34 under Part II of the Third Schedule to the Ordinance requires a valuation report to be set out in a prospectus to contain specified particulars with respect to all interests in land or buildings of a company and its subsidiaries (the group) if the property interests have a value exceeding 10% of the group's asset or have a value not less than HK\$3,000,000 as disclosed in the group's last accounts. According to the LegCo Brief, such a requirement in certain cases may be too burdensome to comply with and the information may be of little use to the investors. Under sections 38A(2) (on local companies) and 342A(2) (on companies incorporated outside Hong Kong) of the Ordinance, the Commission may, by notice published in the Gazette, exempt such a requirement.

36. The Amendment Notice seeks to implement the above exemption to allow different valuation and disclosure requirements to be applied to different property interests, depending on whether the interest is a "property activities interest" or not. A company will be required to obtain a valuation report as to the value of each property interest which is not-

- (a) a non-property activities interest which –
 - (i) has a carrying amount of less than 15% of the group's total asset;
or
 - (ii) is a mining property interest with a carrying amount of 15% or more of the group's total assets AND the prospectus contains a valuation report of such mining property interest together with its associated minerals or petroleum resources or assets (the exempted property interest); OR
- (b) a property activities interest which has a carrying amount of less than 1% of the group's total assets, provided that the carrying amounts of all such property activities interest when added together do not exceed 10% of the group's total asset.

37. Further, except where summary disclosure is allowed, the full text of the valuation report with respect to each non-exempted property interest is required to be disclosed in the prospectus and an overview with respect to all exempted property interests not covered by the valuation report is required to be included in the prospectus.

38. The Panel on Financial Affairs has not been consulted on the Notice.

39. The Amendment Notice will come into operation on 1 January 2012.

40. Members may refer to LegCo Brief (without file reference) issued by The Securities and Futures Commission and dated 18 October 2011 for further information.

Concluding Observation

41. Subject to further study of the Administration's response on L.N. 137 to L.N. 139 of 2011, no difficulties have been identified in the legal or drafting aspects of the above subsidiary legislation.

Prepared by

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3 November 2011

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2 November 2011

Assistant Legal Advisor
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Dear Miss LEE,

Civil Aviation Ordinance (Cap 448)
Air Navigation (Hong Kong) Order 1995 (Amendment) Order 2011
(L.N. 139 of 2011)

I refer to your letter of 28 October 2011 on the captioned. The requested information is set out in the ensuing paragraphs.

The proposed amendments to the existing enabling provisions are introduced to better reflect the procedures for levying the fees and charges in respect of the air navigation related matters. As an example, it is necessary to undergo examination, test, inspection, as well as calculation, for the purpose of ascertaining the level of fees to be levied. The proposed amendments aim to put beyond doubt the powers for the Chief Executive to undergo these procedures so as to prescribe the fees to be charged under the Order. Article 97(3) of the Amendment Order sets out in greater detail the powers for the Chief Executive to prescribe by regulations the fees to be paid in respect of the

air navigation related matters set out in the Article, while Article 97(4) of the Amendment Order provides specifically the powers for the Director-General of Civil Aviation to specify the amounts and timing of payment of deposits chargeable by him, and the making of refunds. Opportunity is also taken to tidy up the relevant provisions relating to the fees and charges mechanism.

Due to the length of the Air Navigation (Hong Kong) Order (Cap 448C) and the numerous technical terms involved, the introduction of the Chinese text will require careful drafting and consultation with the stakeholders. We have already started the preparatory work in this respect. In the meantime, the Adaptation of Laws (Military References) Bill being scrutinized by the Bills Committee has included amendments to the military references in the Civil Aviation Ordinance and its subsidiary legislation. We will keep in view the progress of the Bill and consider introducing the Chinese text for the remaining monolingual English versions of the legislation in due course so as to facilitate the public in accessing the legislation in both versions of the official languages.

Yours sincerely,



(Miss Monica Chen)

for Secretary for Transport and Housing

cc Security Bureau (Attn : Miss Janet Ho)