



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
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF :
本函檔號 OUR REF : LS/B/3/17-18
電 話 TELEPHONE : 3919 3508

傳真 FACSIMILE : 2877 5029
電郵 E-MAIL : ykfcheng@legco.gov.hk

By Fax (2527 0790)

20 November 2017

Ms CHEUNG Yi, Eureka
Prin AS (Financial Services and
The Treasury (Financial Services)5)
Financial Services and the Treasury Bureau
Financial Services Division
24/F, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Ms CHEUNG,

Banking (Amendment) Bill 2017

We are scrutinizing the legal and drafting aspects of the captioned Bill and should be grateful if you could clarify the following matters:

Long title

According to the long title of the Bill, the Bill seeks to amend the Banking Ordinance (Cap. 155) to provide for recovery planning by authorized institutions ("AIs"); to change the limitations on AIs' exposures and empower the Monetary Authority ("MA") to make rules for such limitations; and to repeal two items of subsidiary legislation made under Cap. 155. It is noted that a definition of "capital base" is proposed to be added to section 2(1) of the Banking (Capital) Rules (Cap. 155L) (clause 28) following the proposed repeal of the definition of "capital base" in section 2(1) of Cap. 155 (clause 3(2)). It appears that such amendments are relating to and consequential upon the making of the exposure limitation rules. The Bill also contains other minor amendments, including providing for separate definitions of "subsidiary" (currently defined with "holding company" under section 2(1) of Cap. 155) and "holding company" (under clause 3(3) and (5)) (see paragraph 5(d) of the Explanatory Memorandum to the Bill). In this regard, please clarify whether the long title of the Bill, as presently drafted, could reflect the above related and consequential, and other minor amendments.

Clause 3 (section 2 amended (interpretation)) and clause 26 (Fourteenth Schedule amended (affairs or business of authorized institutions specified for purposes of definition of *manager*))

It is noted that "financial exposure mentioned in section 81(2)" has been referred to in the definition of "local branch" in section 2(1) of Cap. 155 and in the definition of "banking or other financial services" in section 1 of the Fourteenth Schedule to Cap. 155. Following the proposed repeal of section 81(2) (see clauses 3(1) and 8), a new definition of "financial exposure" is proposed to be added as new section 2(1A) of Cap. 155 (clause 3(1) and (6)) for the purpose of the definition of "local branch". Under the new section 2(1A), "financial exposure" is proposed to mean any of the following – (a) the extension of credit, for example, advances, loans and other credit facilities (including letters of credit); (b) the holding of shares and debentures; (c) the undertaking of off-balance sheet exposures specified in column 2 of Table 14 in section 118 of Cap. 155L.

For the definition of "banking or other financial services" in section 1 of the Fourteenth Schedule to Cap. 155L, the existing definition is proposed to be repealed (clause 26) and substituted by a new definition which is proposed to include, amongst others, the incurring of exposures in connection with (i) the extension of credit; (ii) the provision of guarantees; or (iii) the undertaking of other off-balance sheet exposures (see paragraph (f) of the new definition of "banking or other financial services").

- (a) It appears that the formulations of "financial exposure" as defined in the new section 2(1A) and that of the exposures as referred to in paragraph (f) of the new definition of "banking or other financial services" in clause 26 are not identical. Please clarify the discrepancy.
- (b) Please also clarify whether the undertaking of other off-balance sheet exposures as referred to in item (iii) under paragraph (f) of the new definition of "banking or other financial services" refers to the undertaking of off-balance sheet exposures specified in column 2 of Table 14 in section 118 of Cap. 155L, and if so, please consider whether the same should be spelt out in the Bill for clarity sake.

Clause 4 – new section 68B (application)

Under the new section 68B(b), the new Part XIIA (in relation to recovery planning) also applies to an AI incorporated outside Hong Kong, which

operates in Hong Kong through a branch. Please clarify whether a "branch" referred to in this section has the same meaning as "local branch" as defined in section 2(1) of Cap. 155, and if so, please consider whether the same should be amended to "local branch".

Clause 4 – new section 68C (requirements to prepare, maintain and submit recovery plan)

Under the new section 68C(1), MA may, by notice in writing served on an AI, require the AI to prepare, maintain and submit (including periodically submit) to MA a plan setting out the measures that the AI can take to stabilize and restore its financial resources and viability when the institution comes under severe stress. The term "financial resources" has also been referred to in the new sections 68C(3)(b), 68D(3) and 68F(1)(c)(i). The term "severe stress" has also been referred to in the new section 68D(3) which provides that MA must not impose the requirements under subsection (1) unless MA considers the imposition necessary or expedient to ensure that the AI's recovery plan is fit for the purpose of stabilizing and restoring its financial resources and viability when the institution comes under severe stress.

- (a) Please clarify the meaning of "financial resources". Does "financial resources" of an AI include capital and liquidity resources and actual or contingent financial resources?
- (b) Please clarify the circumstances under which an AI would be considered as "under severe stress". What kinds of assessment would be conducted for determining whether an AI comes "under severe stress"?
- (c) What would usually be the frequency of submission of the recovery plan to MA for the periodic submission as provided for in the new section 68C(1)(b)?
- (d) Could a foreign incorporated AI with branch operations in Hong Kong rely on its group recovery plan instead of preparing a local recovery plan and if not, whether it can do so if the branch has limited operations in Hong Kong?

Clause 4 – new section 68D (general power to impose requirements)

Under the new section 68D(1), MA may impose requirements on the AI in relation to the recovery plan. Such requirements may relate to the information to be maintained by the AI, and the management information

systems required, for the purposes of recovery planning (new section 68D(2)(b)).

- (a) Please clarify whether it will suffice for a foreign incorporated AI with operations in Hong Kong to maintain such information relating to activities and operations within Hong Kong only.
- (b) Please consider whether the term "management information systems" as referred to in the new section 68D(2)(b) should be defined.

Clause 4 – new section 68E (requirement to revise recovery plan)

- (a) Under the new section 68E(2)(b), MA may, by notice in writing served on the AI, require the AI to submit a revised recovery plan within the period specified in the notice demonstrating how the deficiency or impediment in the recovery plan specified by MA has been addressed. Please consider whether it is necessary to provide, from a procedural fairness perspective, that the AI should be afforded an opportunity to state its opinion on that requirement before the AI is required to revise its recovery plan. Reference can be made to article 6(5) in Chapter I of the EU Bank Recovery and Resolution Directive (2014/59/EU).
- (b) Under the new section 68E(3), if an AI fails to comply with the requirement imposed in the notice under subsection (2); or MA considers that the deficiency or impediment has not been adequately addressed by the revised recovery plan submitted by the AI, MA may, by notice in writing served on the AI, require it to make specific revisions to the plan within the period specified in the notice. Would the seriousness of the deficiencies and impediments and the effect of the revised measures on the AI's business be taken into account in determining the types of specific revisions required to be made by the AI?

Clause 4 – new section 68G (requirement to notify)

The new section 68G seeks to provide for the notification requirements whereby an AI must, as soon as practicable, notify MA of the occurrence (or likely occurrence) of an event that requires the AI to implement a measure in its recovery plan or the decision of the AI to implement a measure in its recovery plan, and provide MA with any particulars of the matter required by MA. Similar notification requirements are proposed to be imposed on a holding company of the AI under new section 68H(3) and (4).

What would usually constitute such triggering events in relation to the above notification requirements? Would an AI incorporated overseas which operates a branch in Hong Kong need to notify MA if an event does not relate to or pose any risks to its Hong Kong's operations?

Clause 4 – new section 68H (holding company of authorized institution)

Under the new section 68H, MA may impose similar requirements under sections 68C, 68D, 68E and 68F in relation to the recovery plan on an AI's holding company which is incorporated in Hong Kong by or under the Companies Ordinance (Cap. 622), a former Companies Ordinance as defined by section 2(1) of Cap. 622 or any other Ordinance for the purpose of promoting the financial soundness and viability of the AI or the general stability and effective working of the financial system in Hong Kong.

- (a) What factors would be taken into account in determining whether recovery planning requirements should be imposed on the holding company of the AI rather than the AI itself?
- (b) What is the rationale for not extending the recovery planning requirements to an AI's holding company which is incorporated overseas?

Clause 9 – new section 81B (remedial action)

Under the new section 81B, MA may by notice in writing served on an AI require it to take the remedial action specified in the notice, if the AI fails to comply with the exposure limitation rules made under new section 81A, after holding discussions with the AI for determining what remedial action should be taken. If an AI fails to comply with such remedial action requirement imposed in a notice served under the new section 81B(2), the AI would commit an offence and be liable (a) on conviction on indictment – to a fine at tier 8 (i.e. \$1,000,000) and, in the case of a continuing offence, to a further daily fine at tier 3 (i.e. \$20,000); or (b) on summary conviction – to a fine at tier 5 (i.e. \$100,000) and, in the case of a continuing offence, to a further daily fine at tier 2 (i.e. \$10,000) (new section 81C(2)).

- (a) Please provide examples of the remedial action that MA may require the AI to take.
- (b) Please consider whether it is necessary to provide for a review mechanism under which an AI which is aggrieved by the decision of

MA in relation to the requirement to take remedial action in a notice served under the new section 81B(2) could apply to the Banking Review Tribunal for a review of MA's decision under section 101B(1) of Cap. 155. It is noted that a similar review mechanism is available to an AI which is aggrieved by the decision of MA requiring the AI to take remedial action in relation to capital requirements under section 97E(3) and liquidity requirements under section 97J(3) of Cap. 155.

Clause 9 – new section 81C (offence of failing to comply with prescribed notification or remedial action requirements)

Under the new section 81C, if an AI fails to comply with a notification requirement prescribed in the rules to be made under the new section 81A(1) to the effect that an AI must in respect of a matter prescribed in the rules immediately notify MA or a requirement imposed in a notice in relation to remedial action served by MA under the new section 81B(2), the AI would commit an offence and be liable (a) on conviction on indictment – to a fine at tier 8 (i.e. \$1,000,000) and, in the case of a continuing offence, to a further daily fine at tier 3 (i.e. \$20,000); or (b) on summary conviction – to a fine at tier 5 (i.e. \$100,000) and, in the case of a continuing offence, to a further daily fine at tier 2 (i.e. \$10,000). Every director, chief executive and manager of the AI would also commit an offence and be liable to the above levels of fine and imprisonment for five years on conviction on indictment and imprisonment for two years on summary conviction.

It is noted that an AI has to comply with similar notification requirements and remedial action requirements in relation to capital requirements under sections 97D and 97E of Cap. 155 and in relation to liquidity requirements under sections 97I and 97J of Cap. 155. Every director, chief executive and manager of the AI who fails to comply with the prescribed notification requirements and remedial action requirements in relation to capital and liquidity requirements would commit an offence and be liable on conviction on indictment to a fine at tier 8 and to imprisonment for five years, and in the case of a continuing offence, to a further daily fine at tier 3.

- (a) Please provide justifications for imposing liability and penalties against both the AI and every director, chief executive and manager of the AI for contravention of the requirements under the new section 81C which is different from the existing approach in relation to capital and liquidity requirements that liability and penalties are only imposed against every director, chief executive and manager of the AI for their non-compliance of similar requirements imposed by MA.

- (b) Please consider whether it is necessary to provide for a defence of reasonable excuse in the new section 81C(2).
- (c) Please consider whether a defence, which is similar to the one under section 126(1) of Cap. 155 (that in proceedings for an offence under Cap. 155 it shall be a defence for the person charged to prove that he took reasonable precautions and exercised due diligence to avoid the commission of such offence by himself or any person under his control) should be provided for in the offence provision under the new section 81C.

We would be grateful if your reply in both English and Chinese could reach us as soon as practicable.

Yours sincerely,



(Vanessa CHENG)
Assistant Legal Adviser

c.c. HKMA (Attn: Mr Eamonn White (Head (Resolution Office))
(By Fax: 2878 1899)
Ms Gillian HUI (Head (Banking Policy)A)
(By Fax: 2878 1886))
DoJ (Attn: Mr Michael LAM (Sr Asst Law Draftsman)
(By Fax: 3918 4613)
Mr Jonathan LUK (GC) (By Fax: 3918 4613))
Legal Adviser
Senior Assistant Legal Adviser 1
Clerk to the Bills Committee