

LEGISLATIVE COUNCIL BRIEF

Deposit Protection Scheme Bill

INTRODUCTION

At the meeting of the Executive Council on 8 April 2003, the Council **ADVISED** and the Chief Executive **ORDERED** that the Deposit Protection Scheme Bill, at **Annex A**, should be introduced into the Legislative Council.

JUSTIFICATIONS

2. The establishment of a Deposit Protection Scheme (DPS) would enhance deposit protection in Hong Kong and contribute to the stability of the financial system. Although our banking system is sound and supervisory system effective, one cannot rule out the possibility of a sudden and unexpected loss of confidence in our banks owing to circumstances beyond our control. We therefore need to strengthen the resilience of our banking system against external shocks. In its recent Article IV Consultation conducted for Hong Kong, the International Monetary Fund has reiterated the need for Hong Kong to introduce a DPS which would help to underpin the stability of the financial system in Hong Kong.

3. The proposal to introduce a DPS in Hong Kong has also received broad support from the public as reflected in the two rounds of public consultation conducted on this subject in October 2000 and March 2002. The proposed scheme under the Bill has incorporated features designed to minimize the cost of the scheme and potential moral hazard which were the main concerns raised during the two public consultation exercises.

Implementation

4. If the Bill is enacted by the Legislative Council, the project will enter the start-up phase. The Deposit Protection Board (the Board) will be established to oversee the progress of the whole project. The main preparatory work needed during this start-up phase will include the following:-

- (a) development of a set of rules¹ to specify, inter alia, the manner in which compensation is to be paid to depositors;
- (b) specification of the minimum information system requirements for banks to enable the Board to make speedy payment to depositors; and
- (c) establishment of an effective payout system for the scheme.

5. It is expected that the start-up phase would last for about 12-18 months² before the Board is in a position to provide deposit protection. If the DPS Bill could be enacted before the end of 2003, it is expected that the Board could be established in the first half of 2004 and the scheme could commence operation in 2005.

6. We note the banking industry's concern that the DPS should be launched only when the economic environment in Hong Kong has improved. However, it should be noted that the scheme would not be up and running in the near future. As noted above, even if the relevant legislation is passed, the DPS would not be able to commence operation until 2005 at the earliest. Given the amount of preparatory work that needs to be completed before the scheme can be up and running, it is advisable to keep the current momentum going and put in place the necessary framework (including the enabling legislation) step by step. The Government will take into consideration the prevailing economic environment and the views of the industry and other relevant parties in determining the appropriate time to commence the operation of the scheme.

THE BILL

7. The main provisions of this Bill are as follows -

- (a) an independent Hong Kong Deposit Protection Board (the "Board") will be set up to establish and maintain the scheme and to manage and administer the DPS Fund. The Board will only have paybox functions such as assessment and collection of contributions, investment of funds and paying compensation to depositors (see Part 2 and clauses 14(2) and 30 of the Bill);

¹ Most of these rules would be in the form of subsidiary legislation. Sufficient time should be allowed for the law drafting process

² The HKMA commissioned the Canada Deposit Insurance Corporation (CDIC) to help develop a payout system for the scheme in early 2002. Based on the advice of the CDIC, the development of a payout system for the scheme would take about 12-18 months to complete. This would be the most time consuming part of the preparatory work.

- (b) the Board will perform its functions through the HKMA (i.e. the HKMA will carry out the day to day administration of the scheme on behalf of the Board), but the cost incurred by the HKMA will be recoverable from the DPS Fund (see clause 6 of the Bill);
- (c) unless exemption is granted by the Board, every licensed bank will be a member of the DPS (see clauses 11 and 12 of the Bill);
- (d) a DPS Fund - with a target fund size of 0.3% of the total amount of protected deposits maintained with the banks – will be built up by collection of contributions from member banks and other incomes. Contributions are calculated on the basis of individual member banks and a differential rate system based on the supervisory ratings³ of individual banks determined by the HKMA. The rates of contributions from member banks during the Fund build-up period will range from 5 to 14 basis points of the protected deposits of the banks⁴ (see clauses 13 and 14 and Schedule 4 of the Bill);
- (e) the DPS Fund will be invested only in deposits with the Exchange Fund, Exchange Fund bills, US Treasury bills and financial instruments which are necessary for hedging purposes. The Board is required to observe financial provisions in relation to the Fund. The audited statement of accounts of the Fund will have to be laid before the Legislative Council (see clauses 16 to 20 of the Bill);
- (f) compensation from the Fund is payable if a winding up order has been made or the HKMA has made a decision that compensation should be paid. The HKMA's decision is subject to review by the Chief Executive in Council (see clauses 21 and 22);
- (g) the compensation limit for protected deposits with a member bank will be HK\$100,000 per depositor (see clauses 25 and 26 of the Bill);
- (h) there are provisions governing the entitlement to compensation in the case of multi-beneficiary accounts such as joint, trust, agent and client accounts (see clauses 25 to 28 of the Bill and an explanatory note on this at **Annex B**);

³ For this purpose, the HKMA will use the "CAMEL Rating", which is a supervisory rating currently adopted by the HKMA to assess the financial strength and overall soundness of an authorized institution in the areas of Capital, Asset quality, Management, Earning, and Liquidity.

⁴ For the banking sector as a whole, the weighted average rate of contributions will be around 7 basis points of the sector's total protected deposits.

- (i) a depositor's liabilities to the failed member bank will be netted off against his protected deposits in determining his entitlement to compensation under the scheme (see clause 25 of the Bill);
- (j) certain deposits such as inter-bank deposits and connected deposits (e.g. those taken from the directors and managers of the failed member bank) will be excluded from the protection of the scheme (see Schedule 1 of the Bill and an explanatory note on this at **Annex C**);
- (k) where compensation is paid to a depositor, the Board will be subrogated to the rights and remedies of the depositor against the member bank and thus enjoy the priority status afforded to his deposits in the liquidation of the bank (see clause 36 of the Bill); and
- (l) an independent Deposit Protection Appeals Tribunal will be appointed by the Chief Executive to review, at the request of depositors and member banks, the decisions or assessments of the Board or the HKMA made under this Bill (see Part 6 of the Bill).

8. The existing provisions being amended are at **Annex D**.

9. A detailed account of the relevant policy considerations in relation to the above features of the scheme is given in **Annex E**.

LEGISLATIVE TIMETABLE

10. The legislative timetable will be –

Publication in the Gazette	17 April 2003
First Reading and commencement of Second Reading debate	30 April 2003
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

11. The proposal has economic and financial implications as set out at **Annex F**. The proposal is in conformity with the Basic Law, including the provisions

concerning human rights. The Bill does not contain any express binding effect provision. It has no productivity, environmental or civil service implications. The proposal in the Bill has no significant sustainability implications.

PUBLIC CONSULTATION

12. As noted above, we have undertaken two rounds of extensive public consultations on this subject. The results of the first public consultation in late 2000 indicated that there is broad public support for establishing a DPS in Hong Kong. On 13 December 2000, the Legislative Council passed a motion urging the Government to “expeditiously implement a DPS, which is cost effective and easy for depositors to understand, for effectively protecting small depositors, and to formulate appropriate complementary measures aiming at reducing the risk of moral hazard”.

13. The second public consultation conducted in March 2002 focused on the HKMA’s detailed proposals on how the DPS should be structured. A total of 20 written submissions were received from the banking industry, insolvency practitioners, the Consumer Council and other interested parties. Responses received are generally supportive of the HKMA’s proposals, although the Hong Kong Association of Banks (HKAB) has put forward some suggestions aiming at further reducing the cost of the DPS. These include a smaller fund size, a longer fund build-up period and Government’s commitment to make an initial contribution to the Fund and to absorb the administration cost of the scheme. Our responses to these requests have been covered in Annex E of this paper.

14. The Financial Affairs Panel of the Legislative Council was briefed on 6 January 2003 on the proposed major features of the scheme. Members did not raise any particular objection to the proposals. However, a number of questions were raised on specific aspects of the scheme such as the arrangement for exemption from participation in the scheme, the mechanism for appeals, and the arrangement to outsource the day-to-day administration of the scheme to the HKMA.

15. Moreover, the HKMA has consulted the Banking Advisory Committee, the Deposit-taking Companies Advisory Committee, HKAB, the Consumer Council and the Securities and Futures Commission on the draft DPS Bill. Where appropriate, their comments have been incorporated into the Bill.

PUBLICITY

16. We will issue a press release on the Bill. Background briefings for the media may be arranged as necessary. A spokesman will be available to answer media and public enquiries.

OTHERS

17. In case of enquiries about this brief, please contact Mr Edmond Lau, Principal Assistant Secretary for Financial Services and the Treasury, at 2529 0121.

Financial Services Branch
Financial Services and the Treasury Bureau
16 April 2003

DEPOSIT PROTECTION SCHEME BILL

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A BILL

To

Provide for the establishment of a Hong Kong Deposit Protection Board; to provide for the establishment by the Board of a Deposit Protection Scheme for the purpose of providing compensation to depositors under certain circumstances in respect of deposits maintained with banks that are members of the Scheme; to provide for the establishment of a Deposit Protection Scheme Fund from which such compensation is to be paid; to provide for contributions to the Fund and for the entitlement to, and payment of, compensation from the Fund; to make consequential and other amendments to other Ordinances; and to provide for connected purposes.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title and commencement

(1) This Ordinance may be cited as the Deposit Protection Scheme Ordinance.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires -
“applicant” (申請人) means -

- (a) a person who requests the Board under section 39(1) or (2) to refer a decision, or an assessment, of the Board to the Tribunal for review; or

- (b) a person who requests the Monetary Authority under section 39(3) to refer a decision of the Monetary Authority to the Tribunal for review;

“bank” (銀行) means a company that holds a valid banking licence;

“banking licence” (銀行牌照) means a banking licence granted under section 16 of the Banking Ordinance (Cap. 155);

“bare trustee” (被動受託人), in relation to a protected deposit, means a person holding the deposit on trust for a beneficiary where the beneficiary has the exclusive right to direct how the deposit is to be dealt with subject only to the right of the person to resort to the deposit to satisfy any outstanding charge or lien or for the payment of duty, taxes, costs or other outgoings;

“Board” (存保委員會) means the Hong Kong Deposit Protection Board established by section 3;

“chief executive” (行政總裁), in relation to a Scheme member or a bank, means the chief executive appointed under section 74 of the Banking Ordinance (Cap. 155) in respect of the Scheme member or the bank, and includes an alternate chief executive so appointed;

“contribution” (供款) means –

- (a) the build-up levy within the meaning of Schedule 4;
- (b) the expected loss levy within the meaning of Schedule 4;
- or
- (c) the surcharge within the meaning of Schedule 4;

“deposit” (存款) has the meaning assigned to it by section 2(1) of the Banking Ordinance (Cap. 155);

“depositor” (存款人) means a person entitled to repayment of a deposit, whether made by him or not;

“director” (董事), in relation to a Scheme member or a bank, includes any person who occupies the position of director, whatever the title of his office;

“Exchange Fund” (外匯基金) means the Exchange Fund established by the Exchange Fund Ordinance (Cap. 66);

“Exchange Fund Bill” (外匯基金票據) means any instrument described as such which is issued by the Government for the account of the Exchange Fund under the Exchange Fund Ordinance (Cap. 66);

“failed Scheme member” (無力償付成員) means a Scheme member in relation to which a specified event has, for the purposes of Part 5, occurred;

“Fund” (存保基金) means the Deposit Protection Scheme Fund established by section 13;

“HKAB” (香港銀行公會) means The Hong Kong Association of Banks incorporated by section 3 of The Hong Kong Association of Banks Ordinance (Cap. 364);

“late payment fee” (逾期繳付費) means the late payment fee imposed by the Board under section 14(5)(a);

“liquidator” (清盤人) means a liquidator appointed by virtue of or under section 194 of the Companies Ordinance (Cap. 32);

“MA supervisory rating” (專員監管評級), in relation to a Scheme member, means the supervisory rating that –

- (a) is from time to time assigned to the Scheme member by the Monetary Authority; and
- (b) reflects the Monetary Authority’s assessment of the Scheme member’s overall financial condition and of the quality of the Scheme member’s management;

“Monetary Authority” (金融管理專員) means the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap. 66);

“practicable” (可行) means reasonably practicable;

“protected deposit” (受保障存款) has the meaning assigned to it by Schedule 1;

“provisional liquidator” (臨時清盤人) means a provisional liquidator appointed under section 193, or appointed by virtue of section 194, of the Companies Ordinance (Cap. 32);

“related person” (有關連人士), in relation to the Board, means –

- (a) a person employed or authorized by the Board under this Ordinance; or
- (b) a person appointed as an agent or adviser of the Board under this Ordinance;

“Scheme” (存保計劃) means the Deposit Protection Scheme established under section 10;

“Scheme member” (計劃成員) means a bank that is a member of the Scheme;

“Tribunal” (審裁處) means the Deposit Protection Appeals Tribunal established by section 38;

“trustee” (受託人) does not include a bare trustee;

“US Treasury Bill” (美國國庫券) means a security, with an original maturity of not more than 12 months, issued by the Department of Treasury of the United States of America.

(2) For the avoidance of doubt, any reference in this Ordinance to the commission of an offence by every director and every chief executive of a Scheme member or a bank (including any grammatical variations or cognate expressions of such reference) means that one or more than one of any such director and chief executive may be prosecuted for the offence.

PART 2

HONG KONG DEPOSIT PROTECTION BOARD

3. Establishment of Hong Kong Deposit Protection Board

(1) There is established by this section a body corporate with the corporate name of “Hong Kong Deposit Protection Board” in English and “香港存款保障委員會” in Chinese.

(2) The Board -

- (a) has perpetual succession under its corporate name;
- (b) shall provide itself with a common seal; and
- (c) is capable of suing and being sued in its corporate name.

(3) The Board is not a servant or agent of the Government nor does it enjoy any status, immunity or privilege of the Government.

4. Composition of Board

(1) The Board is to consist of –

- (a) the Secretary for Financial Services and the Treasury, or a person appointed by the Secretary, in writing, as his representative, as an ex officio member;
- (b) the Monetary Authority, or a person appointed by the Authority, in writing, as his representative, as an ex officio member; and
- (c) the following members appointed by the Chief Executive –
 - (i) the chief executive officer of the Board as an executive member; and
 - (ii) not fewer than 4 and not more than 7 other members as non-executive members.

(2) A public officer is not eligible for appointment under subsection (1)(c)(ii).

(3) The Chief Executive shall appoint one non-executive member of the Board as Chairman of the Board.

(4) The Chief Executive shall give notice of each appointment under subsection (1)(c) or (3) by notice published in the Gazette.

(5) Schedule 2 has effect with respect to the Board.

5. Functions of Board

The Board has the following functions –

- (a) to establish and maintain the Scheme;
- (b) to manage and administer the Fund;
- (c) to assess and collect contributions and late payment fees;
- (d) to decide the entitlement of depositors and other persons to compensation under Division 2 of Part 5;
- (e) to pay compensation to depositors in accordance with this Ordinance;
- (f) to pay rebates or refunds of contributions to Scheme members in accordance with this Ordinance;
- (g) to recover from the assets of the failed Scheme member concerned any amount of compensation paid to depositors from the Fund, together with any interest accrued thereon in accordance with section 36; and
- (h) such other functions as are imposed on it under this Ordinance.

6. Board to perform functions through Monetary Authority

(1) Unless otherwise directed by the Financial Secretary, the Board shall perform its functions under this Ordinance through the Monetary Authority.

(2) For the purposes of subsection (1), the Monetary Authority shall, under the direction of the Board, do all acts and things necessary for implementing the decisions of the Board.

(3) All costs and expenses incurred by the Monetary Authority for the purposes of subsection (1) shall be charged on the Exchange Fund.

(4) The Financial Secretary may, in relation to the costs and expenses that were charged under subsection (3) during such period as may be determined by him, direct that those costs and expenses, or such portion thereof as may be determined by him –

- (a) shall be recoverable from the Fund; and
- (b) shall, at a time determined by him, be paid to the Exchange Fund by the Board from the Fund.

(5) The Board shall comply with any direction given under subsection (4).

7. Powers of Board

The Board has power to do all such things as are necessary for, or incidental or conducive to, the performance of its functions and in particular, but without prejudice to the foregoing, may –

- (a) borrow money from the Government or any other person for the purpose of performing its functions;
- (b) claim from the liquidator or provisional liquidator of a failed Scheme member payment out of the assets of the failed Scheme member for reimbursement of the amount of compensation paid to the depositors concerned from the Fund, together with any interest accrued thereon in accordance with section 36;
- (c) provide an indemnity to the liquidator or provisional liquidator of a failed Scheme member for the purpose of obtaining an early payment out of the assets of the failed Scheme member;
- (d) make any compromise, agreement or arrangement with the liquidator or provisional liquidator of a failed Scheme

- member, or with any other person, in respect of its claim against the assets of the failed Scheme member;
- (e) with the consent of the Financial Secretary, petition the Court of First Instance for the winding up of a Scheme member;
 - (f) employ persons to assist the Board in the performance of its functions;
 - (g) appoint persons as agents, or authorize persons –
 - (i) to assist the Board in the performance of its functions; or
 - (ii) where the Board is to perform its functions through the Monetary Authority, to assist the Monetary Authority in the performance of such functions;
 - (h) appoint persons as advisers to assist the Board in the performance of its functions;
 - (i) hold, acquire, lease, sell, charge, dispose of or otherwise deal with all kinds of property whether movable or immovable;
 - (j) do all such things as the Board thinks fit in respect of its administration and management; and
 - (k) exercise such other powers as are conferred on the Board under this Ordinance.

8. Directions of Chief Executive in Council

(1) After consultation with the Chairman of the Board, the Chief Executive in Council may, on being satisfied that it is in the public interest to do so, give the Board such written directions as he thinks fit with respect to the performance of any of the Board's functions under this Ordinance.

(2) The Board shall comply with any written direction given under subsection (1).

(3) If a written direction is given under subsection (1), a requirement under an Ordinance that the Board shall, for the purpose of performing any of the functions to which the written direction relates –

- (a) form any opinion;
- (b) be satisfied as to any matter (including existence of particular circumstances); or
- (c) consult any person,

does not apply for any purpose connected with the performance of functions pursuant to, or consequent upon, the written direction.

9. Exemption from taxation

The Board is exempt from taxation under the Inland Revenue Ordinance (Cap. 112).

PART 3

DEPOSIT PROTECTION SCHEME

10. Establishment of Deposit Protection Scheme

The Board shall, for the purposes of this Ordinance, establish and maintain a scheme to be known as the “Deposit Protection Scheme” in English and “存款保障計劃” in Chinese.

11. Membership of Scheme

(1) Subject to section 12, every bank is a member of the Scheme and remains as such during the validity of its banking licence.

(2) In the case of a bank the banking licence of which was granted on or before the commencement of this section, it becomes a member of the Scheme on that commencement.

(3) In the case of a bank the banking licence of which is granted after the commencement of this section, it becomes a member of the Scheme on the date on which its banking licence is granted.

12. Exemption

- (1) A bank may apply to the Board for an exemption from section 11(1).
- (2) An application under subsection (1) for an exemption is –
 - (a) to be made in the manner specified by the Board; and
 - (b) to be accompanied by such information and documents as the Board may reasonably require for the purpose of deciding whether the exemption should be granted.
- (3) The Board may, on receipt of an application under subsection (1) from a bank –
 - (a) exempt the bank from section 11(1); or
 - (b) refuse to so exempt the bank.
- (4) The Board shall not exempt a bank from section 11(1) unless it is satisfied that –
 - (a) the bank is incorporated outside Hong Kong;
 - (b) the deposits taken by the bank at its Hong Kong offices are protected by a deposit protection scheme, or other scheme of a similar nature, established and maintained in the jurisdiction in which the bank is incorporated; and
 - (c) the scope and level of protection available to those deposits under that scheme are not less than those that would be available to those deposits under the Scheme if those deposits were protected by the Scheme.
- (5) If the Board exempts a bank from section 11(1) –
 - (a) it is a condition of the exemption –
 - (i) that the bank shall pay an annual exemption fee of such amount as may be specified by the Board from time to time;
 - (ii) that the bank shall forthwith notify the Board of any change of circumstances which may affect the

exemption and, if so required by the Board, supply further information and documents to assist the Board in deciding whether the exemption should continue to be granted; and

(iii) where the bank is exempted from section 11(1) after having been a member of the Scheme, that the bank shall, in relation to any deposit taken by it before the date specified in the notice referred to in subsection (6) as the date on which the exemption takes effect –

(A) at the written request of the depositor made within 3 months after that date; and

(B) without imposing any fee or penalty on the depositor,

repay the deposit, and pay the interest accrued thereon, prior to maturity; and

(b) the Board may impose such other conditions of the exemption as the Board considers appropriate.

(6) As soon as practicable after having made a decision on an application under subsection (1) from a bank, the Board shall give notice in writing to the bank of its decision and, in the case of a decision to refuse to exempt the bank from section 11(1) or to impose any condition under subsection (5)(b), the reasons for its decision.

(7) An exemption from section 11(1) remains in force until it is revoked by the Board.

(8) The Board may, by notice in writing given to a bank the subject of an exemption from section 11(1) –

(a) impose any further condition of the exemption as the Board considers appropriate;

- (b) vary any condition imposed under paragraph (a) or subsection (5)(b);
- (c) revoke any condition imposed under paragraph (a) or subsection (5)(b); or
- (d) revoke the exemption if any condition of the exemption has not been or is not being complied with,

and shall, in the case of a decision to impose any further condition, vary any condition or to revoke an exemption, state the reasons for its decision in the notice.

(9) Before exercising its power under subsection (3)(b), (5)(b) or (8)(a), (b) or (d), the Board shall afford the bank an opportunity, within such period as the Board may specify in writing, being a period reasonable in all the circumstances, of being heard.

(10) A bank exempted from section 11(1) shall inform in writing its depositors, or any person who is not already a depositor of the bank but has informed the bank that he intends to make a deposit with the bank –

- (a) that it is not a member of the Scheme;
- (b) that any deposit, in whole or in part, taken by the bank at any of its Hong Kong offices is not protected by the Scheme, but is protected by a deposit protection scheme, or other scheme of a similar nature, established and maintained in the jurisdiction in which the bank is incorporated; and
- (c) of the following information about the scheme -
 - (i) the name, address, telephone number and website (if any) of the organization operating the scheme;
 - (ii) the scope and level of protection available to the deposits under the scheme;
 - (iii) the type of deposits protected under the scheme;and

- (iv) any other information about the scheme, if any, as specified for this purpose in the conditions of the exemption.

(11) If a bank contravenes subsection (10), every director and every chief executive of the bank commits an offence and is liable –

- (a) on conviction on indictment to a fine of \$400,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

PART 4

DEPOSIT PROTECTION SCHEME FUND

13. Establishment of Deposit Protection Scheme Fund

(1) There is established by this section a fund to be known as the “Deposit Protection Scheme Fund” in English and “存款保障計劃基金” in Chinese.

(2) The Fund is to consist of -

- (a) contributions and late payment fees collected from Scheme members;
- (b) money recovered by the Board from the assets of failed Scheme members;
- (c) returns on investments made under section 20;
- (d) money borrowed by the Board for the purpose of performing its functions; and
- (e) any other money lawfully paid into the Fund.

14. Contributions to Fund

(1) A Scheme member shall pay, within a prescribed period, a contribution payable by it.

(2) The Board shall assess the amount of contribution payable by each Scheme member.

(3) As soon as practicable after having made an assessment under subsection (2), the Board shall notify the Scheme member of the assessment in writing.

(4) All contributions –

- (a) shall be paid into the Fund on being collected; and
- (b) cease to be the property of the Scheme member concerned on being paid into the Fund.

(5) If a Scheme member fails to pay any contribution in contravention of subsection (1) –

- (a) the Board may impose on the Scheme member a late payment fee of \$5,000, or of a sum equivalent to 10% of the amount of the contribution that remains to be paid by the Scheme member, whichever is the greater; and
- (b) the Scheme member shall pay the contribution that remains to be paid by it, and the late payment fee, within a period specified by the Board.

(6) If a Scheme member contravenes subsection (5)(b), every director and every chief executive of the Scheme member commits an offence and is liable –

- (a) on conviction on indictment to a fine of \$400,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(7) Schedule 4 has effect with respect to the contributions payable by a Scheme member and to rebates and refunds of contributions.

15. Payments from Fund

There shall be paid from the Fund, as required under this Ordinance, the following –

- (a) expenses incurred –
 - (i) in investigating or deciding the entitlement of depositors and other persons to compensation under Division 2 of Part 5;
 - (ii) in relation to the Scheme;
 - (iii) in the exercise by the Board of the rights, powers and authorities vested in it by this Ordinance or rules made under section 49;
- (b) expenses incurred in -
 - (i) the establishment and maintenance of the Scheme;
 - (ii) the management and administration of the Fund;
- (c) expenses incurred in obtaining insurance, sureties, guarantees or other security, or in making any financial arrangement, in respect of any compensation paid under this Ordinance;
- (d) repayment of, and interest on, any money borrowed by the Board for the purpose of performing its functions;
- (e) such amounts of compensation as allowed under this Ordinance, and the costs of and incidental to paying the same;
- (f) such amounts of rebates and refunds of contributions as allowed under this Ordinance, and the costs of and incidental to paying the same;
- (g) expenses incurred by the Tribunal;
- (h) any other money payable from the Fund in accordance with this Ordinance.

16. Financial year and estimates

(1) The Board may, with the prior approval of the Financial Secretary, fix a period to be the financial year of the Fund.

(2) In each financial year of the Fund, before a date to be fixed by the Financial Secretary, the Board shall submit to the Financial Secretary, for his approval, estimates of the income and expenditure of the Fund for the next financial year of the Fund.

17. Accounts

(1) The Board shall keep and maintain proper accounts and records of all transactions of the Fund.

(2) After the end of each financial year of the Fund, the Board shall cause to be prepared for the financial year a statement of accounts of the Fund that -

- (a) includes an income and expenditure account and balance sheet; and
- (b) is signed by the Chairman of the Board.

18. Auditors

(1) The Board shall, with the prior approval of the Financial Secretary, appoint an auditor, who may be the Director of Audit.

(2) The auditor is entitled –

- (a) to have access to such books of account and other records of the Fund; and
- (b) to require such information and explanation,

as he considers necessary to perform his functions.

(3) The auditor shall audit the statement of accounts prepared under section 17(2) and make a report to the Board on the audit of that statement.

(4) A report made under subsection (3) shall contain a statement by the auditor as to whether in his opinion the statement of accounts gives a true and fair view of the matters to which the statement of accounts relates.

**19. Statements and reports to be laid before
Legislative Council**

(1) The Board shall, within 4 months after the end of each financial year of the Fund or such further time as the Financial Secretary may for any particular year allow, submit to the Financial Secretary –

- (a) a report on the activities of the Board for that financial year;
- (b) a copy of the f prepared under section 17(2) for that financial year; and
- (c) a copy of the report made under section 18(3) on the audit of that statement.

(2) The Financial Secretary shall cause the reports and statement received by him under subsection (1) to be laid on the table of the Legislative Council.

20. Investment of money

The Board may place, or invest, money of the Fund that is not immediately required by the Board for the performance of its functions in the following –

- (a) deposits with the Monetary Authority for the account of the Exchange Fund;
- (b) Exchange Fund Bills;
- (c) US Treasury Bills;
- (d) exchange rate and interest rate contracts, including derivative products, which are necessary for hedging purposes;
- (e) any other investment approved by the Financial Secretary.

PART 5
COMPENSATION

Division 1 - Preliminary

21. Occurrence of specified event

- (1) In this Part –
- (a) a specified event has occurred in relation to a Scheme member if –
 - (i) a winding-up order has been made by the Court of First Instance in respect of the Scheme member;
 - or
 - (ii) subject to section 22(5), the Monetary Authority has served on the Board a notice of his decision in respect of the Scheme member under subsection (2),whichever is the earlier;
 - (b) a reference to a date of the specified event, in relation to a Scheme member, means –
 - (i) if a specified event has occurred in relation to the Scheme member by virtue of paragraph (a)(i), the date on which the winding-up order in respect of the Scheme member is made;
 - (ii) if a specified event has occurred in relation to the Scheme member by virtue of paragraph (a)(ii), the date on which the notice is served on the Board under subsection (2).
- (2) If –
- (a) a Scheme member in respect of which –

- (i) a Manager within the meaning of section 2(1) of the Banking Ordinance (Cap. 155) has been appointed under section 52 of that Ordinance; or
- (ii) a provisional liquidator has been appointed; and
- (b) the Monetary Authority is of the opinion that the Scheme member –
 - (i) is likely to become unable to meet its obligations;
 - (ii) is about to suspend payment to its depositors; or
 - (iii) is insolvent, has ceased to pay its debts in the ordinary course of business, or cannot pay its debts as they become due,

the Monetary Authority may, after consultation with the Financial Secretary, decide that compensation should be paid from the Fund to the depositors of the Scheme member in accordance with this Ordinance and shall thereupon serve on the Board a written notice of the Monetary Authority's decision.

(3) In the absence of evidence to the contrary, the Monetary Authority is deemed to have served on the Board a notice under subsection (2) if the notice has been left at the Board's address in Hong Kong.

(4) The Monetary Authority shall publish in the Gazette a copy of any notice served on the Board under subsection (2).

(5) If a specified event has occurred in relation to a Scheme member, the Board may exempt in writing the Scheme member, in whole or in part as specified in the exemption, from section 14 and from rules made under section 49.

22. Monetary Authority to report to Chief Executive in Council on occurrence of specified event

(1) Subject to subsection (2), the Monetary Authority shall, as soon as practicable after a specified event has occurred, report the occurrence to the Chief Executive in Council.

(2) If a specified event has occurred in relation to a Scheme member by virtue of section 21(1)(a)(ii), the Monetary Authority shall, before reporting the occurrence –

(a) in the case where the Scheme member is incorporated in Hong Kong –

(i) give the Scheme member not less than 7 days' notice in writing (or such lesser period as is permitted under subsection (3)) informing the Scheme member of –

(A) his decision under section 21(2) that compensation should be paid to the depositors of the Scheme member; and

(B) the reasons for his decision;

(ii) afford the Scheme member an opportunity to submit to him representations in writing on the decision and reasons within the period of the notice; and

(iii) incorporate his decision, the reasons for his decision, and the Scheme member's representations, if any, in his report to the Chief Executive in Council;

(b) in the case where the Scheme member is incorporated outside Hong Kong –

(i) give the Scheme member, at its principal place of business outside Hong Kong, not less than 7 days' notice in writing (or such lesser period as is permitted under subsection (3)) informing the Scheme member of –

- (A) his decision under section 21(2) that compensation should be paid to the depositors of the Scheme member; and
- (B) the reasons for his decision;
- (ii) afford the Scheme member an opportunity to submit to him representations in writing on the decision and reasons within the period of the notice; and
- (iii) incorporate his decision, the reasons for his decision, and the Scheme member's representations, if any, in his report to the Chief Executive in Council.

(3) The Monetary Authority may give a Scheme member less than 7 days' notice in writing referred to in subsection (2) if –

- (a) he has the consent of the Financial Secretary to do so; and
- (b) to do so is reasonable in the circumstances.

(4) If a specified event has occurred in relation to a Scheme member by virtue of section 21(1)(a)(ii), the Chief Executive in Council may, on receipt of the Monetary Authority's report on the occurrence, by notice in writing given to the Monetary Authority confirm or revoke the Monetary Authority's decision under section 21(2) that compensation should be paid to the depositors of the Scheme member.

(5) If the Chief Executive in Council revokes the Monetary Authority's decision under section 21(2) that compensation should be paid to the depositors of the Scheme member –

- (a) subject to paragraph (b), it is deemed, with effect on and after the date specified in the notice of revocation as the date on which the revocation takes effect, that –

- (i) the specified event to which the decision relates never occurred in relation to the Scheme member; and
 - (ii) the Monetary Authority had never served on the Board a notice of the decision;
- (b) paragraph (a) does not operate to prejudice the legality and effect of anything done in accordance with this Ordinance before that date pursuant to that specified event.

23. Quantification date

(1) In this Part, “quantification date” (截算日), in relation to a Scheme member, means -

- (a) in the case where a specification is made under subsection (2) and has not been withdrawn under subsection (3), the date of the specified event in relation to the Scheme member;
- (b) in any other case, the date of appointment of a provisional liquidator in respect of the Scheme member.

(2) If a specified event has occurred in relation to a Scheme member, and the Board -

- (a) has knowledge that a provisional liquidator will not be appointed;
- (b) is of the opinion that it is uncertain whether a provisional liquidator will be appointed; or
- (c) is of the opinion that an appointment of a provisional liquidator will take so long as to unduly delay the payment of compensation to the depositors of the Scheme member by the Board,

the Board may make a specification for the purposes of subsection (1) that the quantification date, in relation to the Scheme member, means the date of the specified event in relation to the Scheme member.

(3) The Board may withdraw a specification made under subsection (2) if a provisional liquidator is appointed in respect of the Scheme member after the specification is made.

24. Protected deposits to include portion thereof

In this Part –

- (a) a reference to a protected deposit includes a portion of the deposit; and
- (b) in the case where a protected deposit means a portion of the deposit, a reference to a portion of a protected deposit means a sub-portion of that portion.

Division 2 - Entitlement to compensation

25. Entitlement to compensation: general

(1) Subject to section 29, a person is entitled, in respect of one or more protected deposits with a failed Scheme member that –

- (a) the person holds in his own right; or
- (b) a depositor holds as a bare trustee or agent, or in a client account, for the person,

to compensation of the specified amount from the Fund under section 26 or 27, but the total amount of compensation to which the person is so entitled in respect of the deposits concerned shall not exceed \$100,000, regardless of the number or amount of deposits.

(2) Subject to section 29, a person is entitled, in respect of one or more protected deposits with a failed Scheme member that the person holds as a trustee under one trust, to compensation of the specified amount from the Fund under section 28, but the total amount of compensation to which the person is so

entitled in respect of the deposits held under that trust shall not exceed \$100,000, regardless of the number or amount of deposits.

(3) In subsections (1) and (2), “specified amount” (指明款額), in relation to compensation to which a person is entitled from the Fund, means the amount by which the aggregate amount, as at the date of the specified event, of the protected deposits in respect of which the person is so entitled exceeds the aggregate amount, as at that date, of the liabilities of the person to the failed Scheme member in respect of which a right of set off would have existed had a winding-up order been made in respect of the failed Scheme member, plus or minus, as the case may be, the interest accrued on the deposits, or the liabilities, calculated up to and including the quantification date.

(4) For the purposes of subsection (3) –

- (a) if any protected deposit or liabilities are not denominated in Hong Kong dollars, the deposit or liabilities shall be converted into Hong Kong dollars at the midpoint between the selling and buying telegraphic transfer rates of exchange quoted by HKAB on the quantification date or, where no such rates are quoted, at an exchange rate determined by the Board; and
- (b) in determining the amount of liabilities of the person to the failed Scheme member, the same rules shall apply with regard to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, as if the failed Scheme member were a person so adjudged.

26. Entitlement to compensation: depositors in their own right

(1) Subject to this Division, if a depositor of a protected deposit with a failed Scheme member holds the deposit in his own right, the depositor is

entitled, in respect of the deposit as at the date of the specified event, to compensation from the Fund.

- (2) If the depositor consists of 2 or more persons –
 - (a) in the case where the persons carry on business in partnership, those persons are, for the purpose of entitlement to compensation from the Fund, a single and continuing body of persons as distinct from the persons who may from time to time be the members of the partnership;
 - (b) in any other case, each of those persons is entitled, in respect of his share in the protected deposit as at the date of the specified event, to compensation from the Fund.

(3) For the purposes of subsection (2)(b), each of the persons is deemed to have an equal share in the protected deposit unless the contrary is proved to the satisfaction of the Board.

27. Entitlement to compensation: bare trusts, agencies and client accounts

(1) Subject to this Division, if a depositor of a protected deposit with a failed Scheme member holds the deposit as a bare trustee under a bare trust, the beneficiary, but not the depositor, is entitled, in respect of the deposit as at the date of the specified event, to compensation from the Fund.

(2) Subject to this Division, if a depositor of a protected deposit with a failed Scheme member holds the deposit as a bare trustee under different bare trusts, the beneficiary of each of those trusts, but not the depositor, is entitled, in respect of the portion of the deposit held under the trust as at the date of the specified event, to compensation from the Fund.

(3) Subject to this Division, if a depositor of a protected deposit with a failed Scheme member holds the deposit as an agent under an agency, the principal, but not the depositor, is entitled, in respect of the deposit as at the date of the specified event, to compensation from the Fund.

(4) Subject to this Division, if a depositor of a protected deposit with a failed Scheme member holds the deposit as an agent under different agencies, the principal of each of those agencies, but not the depositor, is entitled, in respect of the portion of the deposit held under the agency as at the date of the specified event, to compensation from the Fund.

(5) Subject to this Division, if a depositor of a protected deposit with a failed Scheme member holds the deposit in a client account, the client, but not the depositor, is entitled, in respect of the deposit as at the date of the specified event, to compensation from the Fund.

(6) If the beneficiary, principal or client consists of 2 or more persons –

(a) in the case where the persons carry on business in partnership, those persons are, for the purpose of entitlement to compensation from the Fund, a single and continuing body of persons as distinct from the persons who may from time to time be the members of the partnership;

(b) in any other case, each of those persons is entitled, in respect of his share in the protected deposit as at the date of the specified event, to compensation from the Fund.

(7) For the purposes of subsection (6)(b), each of the persons is deemed to have an equal share in the protected deposit unless the contrary is proved to the satisfaction of the Board.

28. Entitlement to compensation: trusts

(1) Subject to this Division, if a depositor of a protected deposit with a failed Scheme member holds the deposit as a trustee under a trust, the depositor is entitled, in respect of the deposit as at the date of the specified event, to compensation from the Fund as such trustee of the trust.

(2) Subject to this Division, if a depositor of a protected deposit with a failed Scheme member holds the deposit as a trustee under different trusts, the

depositor is entitled, in respect of each portion of the deposit held under each of those trusts as at the date of the specified event, to compensation from the Fund as such trustee of the trust.

(3) If the depositor consists of 2 or more persons, those persons are, for the purpose of entitlement to compensation from the Fund, a single and continuing body of persons as distinct from the persons who may from time to time be the trustees.

29. Restrictions on entitlement to compensation

(1) No action to enforce any entitlement to compensation under this Division may be brought in any court unless the action is commenced within 5 years after the date of the specified event concerned.

(2) If a person has, in respect of a protected deposit or portion thereof, received payment that is made out of the Investor Compensation Fund established under section 236 of the Securities and Futures Ordinance (Cap. 571) in respect of a claim for compensation made under rules made under Part XII of that Ordinance, no person is entitled, in respect of the deposit or that portion (as the case may be), to compensation under this Division.

(3) If the Board has paid a depositor of a protected deposit the entire amount of compensation payable to the depositor in accordance with this Ordinance, no other person is entitled, in respect of the deposit, to compensation under this Division.

Division 3 - Payment of compensation and related matters

30. Board's duties and powers on occurrence of specified event

- (1) If a specified event has occurred in relation to a Scheme member -
- (a) the Board shall as soon as practicable after the occurrence inform the depositors of the Scheme member by notice published in any daily newspaper in circulation in Hong

Kong, or by other means the Board considers appropriate, of the occurrence; and

- (b) the Board –
 - (i) may require a depositor, or each depositor of a class of depositors, of the Scheme member to produce to the Board documents in support of the entitlement of the depositor or other persons to compensation under Division 2; and
 - (ii) shall thereupon inform the depositors concerned by notice published in any daily newspaper in circulation in Hong Kong, or by other means the Board considers appropriate, of the requirement.
- (2) If a specified event has occurred in relation to a Scheme member –
 - (a) the Board, or a person appointed as an agent of the Board or authorized by the Board under this Ordinance, may, for the purpose of the performance by the Board of its functions under this Ordinance, have access to the premises and records of the Scheme member; and
 - (b) every director, chief executive, manager, employee or agent of the Scheme member, the liquidator or provisional liquidator of the Scheme member, or any person in possession of the records of the Scheme member, shall, subject to subsection (3) –
 - (i) afford the Board, or a person appointed as an agent of the Board or authorized by the Board under this Ordinance, access to those records; and
 - (ii) provide such assistance to the Board, or such a person so appointed or authorized, as the Board or person may require for the exercise of the power under paragraph (a).

(3) The Board shall not require the disclosure by a solicitor or counsel of any privileged communication, whether oral or written, made to or by him in that capacity.

(4) Any person who, without reasonable excuse, contravenes subsection (2)(b) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 6 months.

(5) If a specified event has occurred in relation to a Scheme member, the Board shall decide in accordance with this Ordinance –

- (a) whether a depositor of the Scheme member or any other person is entitled, in respect of the depositor's protected deposit with the Scheme member, to compensation under Division 2; and
- (b) if he is, the amount of compensation to which he is entitled under Division 2.

(6) In making a decision under subsection (5), the Board may rely on the records obtained from the Scheme member except to the extent of any manifest error that appears on the face of those records.

(7) The Board shall as soon as practicable after a decision has been made under subsection (5) –

- (a) notify the depositor of its decision in writing; and
- (b) if applicable, pay the compensation, subject to section 33, to the depositor from the Fund.

(8) In this section –

“agent” (代理人), in relation to a Scheme member, includes -

- (a) the bankers and solicitors of the Scheme member; and
- (b) any persons, whether officers of the Scheme member or not, who are engaged as the auditors of the Scheme member;

“manager” (經理) has the meaning assigned to it by section 2(1) of the Banking Ordinance (Cap. 155);

“records” (紀錄), in relation to a Scheme member, includes books, accounts, records of transactions and information systems of the Scheme member.

(9) In this section, any reference to a director, chief executive, manager, employee or agent of a Scheme member includes a person who has been but no longer is a director, chief executive, manager, employee or agent of the Scheme member.

31. Board’s powers in relation to arrangements designed to increase amount of compensation

- (1) This section applies if –
- (a) an arrangement has been entered into or carried out on or after the relevant date in relation to a protected deposit with a Scheme member except where the arrangement is one in pursuance of a legally enforceable obligation incurred prior to that date;
 - (b) the arrangement has, or would have had but for this section, the effect of enabling a person to become entitled to an amount of compensation under Division 2, to which the person would otherwise not be entitled; and
 - (c) it would be concluded, having regard to –
 - (i) the manner in which, and the circumstances under which, the arrangement was entered into or carried out;
 - (ii) the form and substance of the arrangement; and
 - (iii) the result in relation to the operation of this Ordinance that, but for this section, would have been achieved by the arrangement,that the arrangement was entered into or carried out for the sole or dominant purpose of enabling the person, either alone or in conjunction with other persons, to

become entitled to an amount of compensation under Division 2, to which the person would otherwise not be entitled.

(2) If subsection (1) applies, the Board shall exercise its power under section 30(5) as if the arrangement or any part thereof had not been entered into or carried out.

(3) In this section –
“arrangement” (安排) includes an arrangement, transaction, operation or scheme whether or not such arrangement, transaction, operation or scheme is enforceable, or intended to be enforceable, by legal proceedings;

“relevant date” (有關日期), in relation to a Scheme member, means –

- (a) the date on which a Manager within the meaning of section 2(1) of the Banking Ordinance (Cap. 155) has been appointed in respect of the Scheme member under section 52 of that Ordinance; or
- (b) the date on which a petition for the winding up of the Scheme member has been presented,

whichever is the earlier.

32. Compensation in Hong Kong dollars

Compensation payable in accordance with this Ordinance shall be paid in Hong Kong dollars regardless of the currency in which the protected deposit concerned is denominated.

33. Limits to amount of compensation

The amount of compensation payable to a depositor of a failed Scheme member in accordance with this Ordinance shall not exceed the amount in respect of which the depositor would, on the winding up of the failed Scheme member, be entitled to priority under section 265(1)(db) of the Companies Ordinance (Cap. 32).

34. Interim payment

If a specified event has occurred in relation to a Scheme member, and the Board considers that, in relation to a depositor of the Scheme member –

- (a) there is uncertainty as to the entire amount of compensation payable to the depositor in accordance with this Ordinance;
- (b) the time required to ascertain the entire amount of compensation payable to the depositor in accordance with this Ordinance would be so long as to unduly delay the payment of compensation to the depositor by the Board;
- (c) the entire amount of compensation payable to the depositor in accordance with this Ordinance is likely to exceed the amount in respect of which the depositor would, on the winding up of the Scheme member, be entitled to priority under section 265(1)(db) of the Companies Ordinance (Cap. 32),

the Board may make an interim payment of compensation to the depositor of such an amount as the Board considers appropriate.

35. Recovery of payment by Board

(1) If the amount of compensation paid, whether or not as an interim payment under section 34, to a depositor from the Fund is later found to be greater than the amount of compensation payable to the depositor in accordance with this Ordinance, the depositor shall repay the excess to the Board within a period specified by the Board.

(2) If a depositor contravenes subsection (1) –

- (a) the Board may impose on the depositor a late repayment fee of a sum not exceeding 5% of the amount of the excess that remains to be repaid by the depositor; and
- (b) the depositor shall pay the late repayment fee within a period specified by the Board.

(3) Such excess or late repayment fee as a depositor is required to repay or pay under this section is recoverable by the Board from the depositor as a debt due to the Board. The Board may, in relation to the excess or late repayment fee –

- (a) determine, if it considers uneconomical to do so, not to recover the same from the depositor; or
- (b) take such steps as it considers appropriate to recover the same from the depositor.

(4) Such excess or late repayment fee shall be paid into the Fund on being collected.

36. Subrogation

(1) If the Board makes a payment of compensation to a depositor from the Fund –

- (a) subject to subsection (2), the Board is, notwithstanding any rule of law, subrogated, to the full extent of that payment and, where the amount of that payment is calculated on the basis of a quantification date within the meaning of section 23(1)(a), any interest, calculated in accordance with subsection (5), accrued on that payment, to all the rights and remedies of the depositor in relation to all his deposits, whether or not protected deposits, with the failed Scheme member, in priority over –
 - (i) the rights and remedies of the depositor in relation to those deposits; and
 - (ii) the rights and remedies of any person who is subrogated, whether or not before the Board's subrogation, to the rights and remedies of the depositor in relation to those deposits; and
- (b) until the Board has been reimbursed the full amount of that payment and any interest accrued on that payment in

accordance with this section, the depositor, or any person who is subrogated, whether or not before the Board's subrogation, to the rights and remedies of the depositor in relation to those deposits, has no right in bankruptcy or winding up or by legal proceedings or otherwise to receive in respect of those deposits any amount out of the assets of the failed Scheme member.

(2) The Board is not subrogated to any rights and remedies of the depositor in respect of compensation payable out of the Investor Compensation Fund established under section 236 of the Securities and Futures Ordinance (Cap. 571).

(3) The Board may maintain an action in respect of the rights and remedies of a depositor to which it is subrogated in the name of the depositor or in its own name.

(4) For the avoidance of doubt, the rights and remedies of a depositor to which the Board is subrogated include the rights and remedies of the depositor in respect of so much of his deposits as the depositor would, on the winding up of the failed Scheme member, be entitled to priority under section 265(1)(db) of the Companies Ordinance (Cap. 32).

(5) For the purposes of subsection (1)(a), a payment of compensation to a depositor accrues interest, at the rate set out in subsection (6), for the period beginning with the date of the payment and ending with –

- (a) in the case where the Court of First Instance has made a regulating order in respect of the failed Scheme member under section 227A of the Companies Ordinance (Cap. 32) and the Official Receiver or the liquidator has not required the depositor to make a formal proof of debt under section 227E of that Ordinance, the date of appointment of a provisional liquidator, or if no such appointment is made,

- the date of the winding-up order made by the Court of First Instance;
- (b) in the case where no regulating order has been made or where a regulating order has been made but the Official Receiver or the liquidator has required the depositor to make a formal proof of debt, the date of the commencement of the winding up of the failed Scheme member;
 - (c) in any other case, the date on which the Board receives full reimbursement in respect of that payment and the interest accrued on that payment in accordance with this section.
- (6) The interest rate referred to in subsection (5) is –
- (a) the rate at which interest is for the time being payable in respect of a Hong Kong dollar savings account with deposit amount of \$100,000, quoted by the note-issuing banks within the meaning of section 2 of the Legal Tender Notes Issue Ordinance (Cap. 65); or
 - (b) if different rates are quoted by different note-issuing banks, the rate determined by the Board as the average of those rates.

37. Reimbursement from provisional liquidator

The provisional liquidator of a failed Scheme member may, subject to the approval of the Court of First Instance, reimburse the Board out of the assets of the failed Scheme member for any amount of compensation paid to a depositor of the failed Scheme member from the Fund, together with any interest accrued thereon in accordance with section 36.

PART 6
REVIEW BY DEPOSIT PROTECTION APPEALS
TRIBUNAL

38. Establishment of Deposit Protection Appeals Tribunal

(1) There is established by this section a tribunal to be known as the “Deposit Protection Appeals Tribunal” in English and “存款保障上訴審裁處” in Chinese.

(2) The Tribunal is to consist of –

- (a) the Chairman of the Tribunal; and
- (b) such number of persons, not being fewer than 2, from the panel referred to in subsection (4) as the Chairman may appoint to be members of the Tribunal to review a decision or assessment of the Board or a decision of the Monetary Authority.

(3) The Chief Executive shall, on the recommendation of the Chief Justice, appoint a judge to be the Chairman of the Tribunal.

(4) The Chief Executive shall appoint a panel of persons, not being public officers, whom he considers suitable for appointment under subsection (2)(b) to be members of the Tribunal.

(5) The Chief Executive shall give notice of each appointment under subsections (3) and (4) by notice published in the Gazette.

(6) The Chairman (except where the Chairman is a judge, or a deputy judge, of the Court of First Instance), or members, of the Tribunal may be paid, as a fee for their services, such amount as the Chief Executive considers appropriate. Those amounts payable to the Chairman shall be a charge on the general revenue, and those amounts payable to the members shall be a charge on the Fund.

(7) Schedule 3 has effect with respect to the Tribunal.

(8) Subject to this section and Schedule 3 and to rules made under section 50, the Chairman of the Tribunal may determine the procedures and practice of the Tribunal.

(9) In this section, “judge” (法官) means –

- (a) a judge, or a deputy judge, of the Court of First Instance;
- (b) a former Justice of Appeal of the Court of Appeal; or
- (c) a former judge, or a former deputy judge, of the Court of First Instance.

39. Review of decisions or assessments by Tribunal

(1) Any person who is aggrieved by a decision of the Board under section 12(3)(b), (5)(b) or (8)(a), (b) or (d) or 30(5)(a) or (b) may request the Board to refer the decision to the Tribunal for review.

(2) If a Scheme member is dissatisfied with the Board’s assessment under section 14(2) of the amount of contribution payable by the Scheme member, the Scheme member may request the Board to refer the assessment to the Tribunal for review, but nothing in this subsection empowers a Scheme member to request a review of the MA supervisory rating of the Scheme member.

(3) Any person who is aggrieved by a decision specified in rules made under section 51 as a decision to which this section applies may request the Monetary Authority to refer the decision to the Tribunal for review.

(4) A request under subsection (1) or (2) is –

- (a) to be made in writing by the applicant to the Board –
 - (i) if the request relates to a decision of the Board under section 12(3)(b) or (5)(b), within 30 days after receiving the notice of decision of the Board given under section 12(6);

- (ii) if the request relates to a decision of the Board under section 12(8)(a), (b) or (d), within 30 days after receiving the notice of the Board given under section 12(8);
- (iii) if the request relates to a decision of the Board under section 30(5)(a) or (b), within 30 days after receiving the notice of decision of the Board given under section 30(7)(a);
- (iv) if the request relates to the Board's assessment under section 14(2), within 30 days after receiving the notice of the assessment given under section 14(3),

or within a further time that the Board may, in the circumstances of any particular case, think fit; and

- (b) to state the grounds for the review.

(5) A request under subsection (3) is –

- (a) to be made in writing by the applicant to the Monetary Authority within the time specified in rules made under section 51 as the time within which such a request is to be made; and
- (b) to state the grounds for the review.

(6) A request under subsection (1), (2) or (3) does not suspend the decision or assessment to which the request relates.

(7) As soon as practicable after receipt of a request under subsection (1), (2) or (3), the Board or the Monetary Authority shall forward a copy of the decision or assessment together with all other relevant papers to the Tribunal for review.

(8) On receipt of the copy of the decision or assessment, and of the papers, forwarded under subsection (7), the Tribunal shall review the decision or

assessment in question and, after taking into account the stated grounds for the review, may make its determination to –

- (a) confirm, vary or set aside the decision or assessment; or
- (b) remit the matter to the Board or the Monetary Authority with any direction that it considers appropriate.

(9) If the Tribunal sets aside a decision of the Board under section 12(3)(b) or (8)(d), the Tribunal may make such directions as it considers appropriate concerning the refund of the contribution that has been paid by the applicant.

(10) In reviewing a decision or assessment of the Board or a decision of the Monetary Authority, the Tribunal –

- (a) shall afford the applicant, and the Board or the Monetary Authority, an opportunity of being heard; and
- (b) may determine that any matter of fact has been established if it has been established on the basis of standard of proof applicable to civil proceedings in a court of law.

(11) As soon as practicable after completing the review, the Tribunal shall deliver its determination under subsection (8)(a) or (b), with the reasons for its determination.

(12) A determination made by the Tribunal shall be recorded in writing and signed by the Chairman of the Tribunal. The determination shall be registered in the Court of First Instance and shall be deemed to be an order of the Court upon registration.

(13) The determination of the Tribunal is final and is not subject to appeal except on a point of law.

(14) A document purporting to be a determination of the Tribunal that is signed by the Chairman of the Tribunal shall, in the absence of proof to the contrary, be regarded as a determination of the Tribunal duly made, without proof of its making, or proof of signature, or proof that the person signing the determination was in fact the Chairman of the Tribunal.

40. Powers of Tribunal

(1) In relation to a review of a decision or assessment of the Board or a decision of the Monetary Authority, the Tribunal may –

- (a) receive and consider any material by way of oral evidence, written statements or documents, whether or not the material would be admissible in a court of law;
- (b) determine the manner in which any such material is received;
- (c) by notice in writing signed by the Chairman of the Tribunal, require a person to attend before it and, subject to subsection (2), to give evidence and produce any article, record or document in his possession or control relating to the subject matter of the review;
- (d) administer oaths;
- (e) examine or cause to be examined on oath or otherwise a person attending before it and require the person to answer truthfully any question which the Tribunal considers appropriate for the purpose of the review;
- (f) order a witness to provide evidence for the purpose of the review by affidavit;
- (g) order a person not to publish or otherwise disclose any material produced to the Tribunal;
- (h) prohibit the publication or disclosure of any material the Tribunal receives at any sitting, or any part of a sitting, that is held in camera;
- (i) stay any of the proceedings in the review on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice;
- (j) determine the procedure to be followed in connection with the review;

- (k) order that costs be paid to any party to the review or any person who is required to attend before it for the purpose of the review;
 - (l) hear an application for stay of proceedings for a review by the applicant at any time before its determination is made; and
 - (m) exercise such other powers or make such other orders as may be necessary for or ancillary to the conduct of the review or the performance of its functions.
- (2) Subsection (1)(c) does not empower the Tribunal to require –
- (a) the banker or financial adviser of an applicant to disclose any information relating to the affairs of any person other than the applicant; or
 - (b) a solicitor or counsel to disclose any privileged communication, whether oral or written, made to or by him in that capacity.
- (3) A person commits an offence if he, without reasonable excuse –
- (a) fails to comply with an order, notice, prohibition or requirement of the Tribunal made or given under or pursuant to subsection (1);
 - (b) disrupts any sitting of the Tribunal or otherwise misbehaves during any such sitting;
 - (c) having been required by the Tribunal under subsection (1) to attend before the Tribunal, leaves the place where his attendance is so required without the permission of the Tribunal;
 - (d) hinders or deters any person from attending before the Tribunal, giving evidence or producing any article, record or document, for the purpose of a review;

- (e) threatens, insults or causes any loss to be suffered by any person who has attended before the Tribunal, on account of such attendance; or
 - (f) threatens, insults or causes any loss to be suffered by the Chairman, or any member, of the Tribunal at any time on account of the performance of his functions in that capacity.
- (4) A person who commits an offence under subsection (3) is liable –
- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
 - (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(5) A person is not excused from complying with an order, notice, prohibition or requirement of the Tribunal made or given under or pursuant to subsection (1) only on the ground that to do so might tend to incriminate the person.

41. Use of incriminating evidence required by Tribunal

Notwithstanding any other provisions of this Ordinance, where the Tribunal –

- (a) requires a person to give evidence under section 40(1)(c);
- (b) requires a person to answer any question under section 40(1)(e);
- (c) orders a person to provide evidence under section 40(1)(f);
or
- (d) otherwise requires or orders a person to provide any information under section 40(1)(m),

and the evidence, answer or information might tend to incriminate the person, then the requirement or order as well as the evidence, the question and answer, or the information shall not be admissible in evidence against the person in

criminal proceedings in a court of law other than those in which the person is charged with an offence under section 40(3)(a), or under Part V of the Crimes Ordinance (Cap. 200), or for perjury, in respect of the evidence, answer or information.

42. Contempt dealt with by Tribunal

(1) The Tribunal has the same powers as the Court of First Instance to punish for contempt.

(2) Without limiting the generality of the powers of the Tribunal under subsection (1), the Tribunal has the same powers as the Court of First Instance to punish for contempt, as if it were contempt of court, a person who, without reasonable excuse, commits any conduct falling within section 40(3).

(3) The Tribunal shall, in the exercise of its powers to punish for contempt under this section, adopt the same standard of proof as the Court of First Instance in the exercise of the same powers to punish for contempt.

(4) Notwithstanding anything in this section or any other provisions of this Ordinance –

(a) no power may be exercised under or pursuant to this section to determine whether to punish any person for contempt in respect of any conduct if –

(i) criminal proceedings have previously been instituted against the person under section 40(3) in respect of the same conduct; and

(ii) (A) those criminal proceedings remain pending; or

(B) by reason of the previous institution of those criminal proceedings, no criminal proceedings may again be lawfully instituted against that person under that section in respect of the same conduct;

- (b) no criminal proceedings may be instituted against any person under section 40(3) in respect of any conduct if –
 - (i) any power has previously been exercised under or pursuant to this section to determine whether to punish the person for contempt in respect of the same conduct; and
 - (ii) (A) proceedings arising from the exercise of such power remain pending; or
 - (B) by reason of the previous exercise of such power, no power may again be lawfully exercised under or pursuant to this section to determine whether to punish the person for contempt in respect of the same conduct.

43. Appeal to Court of Appeal

(1) Where the Tribunal has delivered its determination under section 39(8)(a) or (b) on a review of –

- (a) a decision or assessment of the Board; or
- (b) a decision of the Monetary Authority,

the applicant, or the Board or the Monetary Authority (as the case may be), if dissatisfied with the determination, may appeal to the Court of Appeal against the determination on a point of law.

(2) The Court of Appeal may affirm, reverse or vary the determination appealed against.

(3) The Rules of the High Court (Cap. 4 sub. leg. A) apply in relation to such an appeal to the extent that those Rules are not inconsistent with this Ordinance.

(4) In an appeal under this section, the Court of Appeal may make such order for payment of costs as it considers appropriate.

PART 7

MISCELLANEOUS

44. Confidentiality

(1) Except so far as it is necessary for the performance of any function under this Ordinance or for carrying into effect the provisions of this Ordinance, every person to whom this subsection applies –

- (a) shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that come to his knowledge in the performance of any function under this Ordinance;
- (b) shall not communicate any such matter to any person other than the person to whom such matter relates; and
- (c) shall not suffer or permit any person to have access to any records in his possession, custody or control.

(2) Subsection (1) applies to –

- (a) any person who –
 - (i) is or has been –
 - (A) a member of the Board;
 - (B) a related person of the Board; or
 - (C) a person employed by or assisting a related person of the Board; and
 - (ii) performs or has performed any function under this Ordinance; and
- (b) the Monetary Authority, or a person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap. 66) to assist the Monetary Authority.

(3) Subsection (1) does not apply –

- (a) to the disclosure of information in summary form that is so framed as to prevent particulars relating to the business of any particular Scheme member being ascertained from it;
- (b) to the disclosure of information with a view to the institution of, or otherwise for the purpose of, any criminal proceedings, whether under this Ordinance or otherwise;
- (c) in connection with any other legal proceedings arising out of this Ordinance;
- (d) to the disclosure of information to the police or the Independent Commission Against Corruption, at the request of the Secretary for Justice, relevant to the proper investigation of any criminal complaint;
- (e) to the disclosure of information with a view to the institution of, or otherwise for the purpose of, any disciplinary proceedings relating to the discharge of his professional duties by an auditor, or a former auditor, of a Scheme member or former Scheme member, whether or not the auditor or former auditor, as the case may be, was appointed for the purposes of section 46(3) or (4);
- (f) to the disclosure of information to the Chief Executive, the Financial Secretary, the Monetary Authority, the Securities and Futures Commission, an investor compensation company recognized by the Commission under section 79 of the Securities and Futures Ordinance (Cap. 571) or any public officer authorized by the Financial Secretary for the purpose of enabling or assisting the Board to perform its functions under this Ordinance;
- (g) to the disclosure of information to an auditor, or a former auditor, of a Scheme member or former Scheme member

for the purpose of enabling or assisting the Board to perform its functions under this Ordinance;

- (h) to the disclosure of information with the consent of –
 - (i) the person from whom the information was obtained or received; and
 - (ii) where the information does not relate to such person, the person to whom it relates;
- (i) to the disclosure of information which has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purpose for which, disclosure is not precluded by this section; or
- (j) to the disclosure of information required by law.

(4) No person shall, without the written consent of the Monetary Authority given generally or in any particular case or class of cases, disclose to any person other than the Board –

- (a) any information regarding a Scheme member's MA supervisory rating or the amount of a Scheme member's contribution; or
- (b) any other information that would, by itself or together with other information, enable a Scheme member's MA supervisory rating or the amount of a Scheme member's contribution to be ascertained or inferred.

(5) Any person who contravenes subsection (1) commits an offence and is liable –

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(6) If a person contravenes subsection (4), the person or, where the person is a Scheme member, every director and every chief executive of the person, commits an offence and is liable –

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

45. Immunity

(1) The Board, or a person who is, or is acting as, a member, or a related person, of the Board, is not liable for anything done, or omitted to be done, in good faith in the performance, or purported performance, of the functions of the Board.

(2) The Monetary Authority, or a person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap. 66) to assist the Monetary Authority, is not liable for anything done, or omitted to be done, in good faith in the performance, or purported performance, of the functions imposed on the Authority by or under this Ordinance.

46. Power of Board to obtain information

(1) The Board may require a Scheme member to submit (including periodically submit) such information as it may require for the performance of its functions, and such information shall be submitted within such period and in such manner as the Board may specify.

(2) Without prejudice to the generality of subsection (1), the Board may require a Scheme member to submit, within such period and in such manner as the Board may require, returns showing the amount of the protected deposits maintained with the Scheme member and the breakdown of those protected deposits.

(3) The Board may require a Scheme member to submit a report prepared by an auditor appointed by the Scheme member and approved by the

Board as to whether or not, in the opinion of the auditor, information submitted pursuant to subsection (1) or a return submitted pursuant to subsection (2), is correctly compiled in all material respects.

(4) The Board may require a Scheme member to submit a report prepared by an auditor appointed by the Scheme member and approved by the Board as to whether or not, in the opinion of the auditor, the Scheme member has in place systems of control that are adequate to enable the Board to perform its functions.

(5) Nothing in this section empowers the Board to require a Scheme member to submit any information or report relating to any person who is –

- (a) a beneficiary for whom a deposit maintained with the Scheme member is held by a depositor as a trustee or bare trustee;
- (b) a principal for whom a deposit maintained with the Scheme member is held by a depositor as an agent; or
- (c) a client for whom a deposit maintained with the Scheme member is held by a depositor in a client account.

(6) If a Scheme member, without reasonable excuse, fails to submit any information or return as required under subsection (1) or (2), every director and every chief executive of the Scheme member commits an offence and is liable –

- (a) on conviction on indictment to a fine of \$400,000 and to imprisonment for 2 years and to a further fine of \$20,000 for each day on which the failure continues; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months and to a further fine of \$10,000 for each day on which the failure continues.

(7) If a Scheme member fails to submit an auditor's report as required under subsection (3) or (4), every director and every chief executive of the

Scheme member commits an offence and is liable on conviction to a fine at level 6 and to a further fine of \$10,000 for each day on which the failure continues.

(8) Any person who signs any document to which subsection (1), (2), (3) or (4) relates and which he knows or reasonably ought to know to be false in a material particular commits an offence and is liable –

(a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or

(b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(9) In this section –

“adequate” (足夠), in relation to systems of control, includes operating effectively;

“systems of control” (管控制度) includes procedures.

47. False statements regarding Scheme membership and protected deposits

(1) No person shall, with intent to deceive, make any false, misleading or deceptive statement or representation as to whether or not –

(a) a person is a Scheme member; or

(b) a deposit, or any other financial product, is a protected deposit.

(2) Any person who contravenes subsection (1) commits an offence and is liable –

(a) on conviction on indictment to a fine of \$400,000 and to imprisonment for 2 years; or

(b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

48. Defences

In any proceedings for an offence under section 12(11), 14(6), 44(6) or 46(6) or (7), it is a defence for the person charged to prove that he took

reasonable precautions and exercised due diligence to avoid the commission of the offence by himself or any person under his control.

49. Power of Board to make rules

(1) The Board may, after consultation with the Financial Secretary and HKAB, make rules –

- (a) specifying the requirements of the information systems to be maintained by Scheme members so as to facilitate payment of compensation to depositors in accordance with this Ordinance;
- (b) specifying the manner in which compensation is to be paid to depositors from the Fund;
- (c) specifying the manner in which contributions and late payment fees are to be paid by Scheme members;
- (d) specifying the information and documents that the Board may require for the purpose of deciding the entitlement of a depositor or any other person to compensation under Division 2 of Part 5;
- (e) requiring a Scheme member to make known to the public under specified circumstances –
 - (i) whether or not it is a member of the Scheme; or
 - (ii) whether or not a deposit, or any other financial product offered by the Scheme member, is a protected deposit,and specifying the manner in which the requirement is to be complied with;
- (f) prescribing anything required to be prescribed under this Ordinance other than Part 6 and section 5 of Schedule 3; and
- (g) generally providing for the better performance of the functions of the Board.

- (2) Rules made under this section may -
- (a) provide that a contravention of a specified provision of the rules is an offence punishable -
 - (i) on conviction on indictment by a fine at level 6 and imprisonment for 2 years; or
 - (ii) on summary conviction by a fine at level 3 and imprisonment for 6 months; and
 - (b) provide for any specified defence to be available in proceedings for such an offence.

(3) Rules made under this section shall not require a Scheme member to maintain any information system that contains information or documents, or to submit any information or document, relating to any person who is –

- (a) a beneficiary for whom a deposit maintained with the Scheme member is held by a depositor as a trustee or bare trustee;
- (b) a principal for whom a deposit maintained with the Scheme member is held by a depositor as an agent; or
- (c) a client for whom a deposit maintained with the Scheme member is held by a depositor in a client account.

50. Power of Chief Justice to make rules

The Chief Justice may make rules -

- (a) providing for matters of procedure, or other matters, relating to requests for review, or reviews, under Part 6, which are not provided for in that Part or section 5 of Schedule 3;
- (b) providing for the issue or service of any document (however described) for the purposes of Part 6 or section 5 of Schedule 3; or
- (c) prescribing anything required to be prescribed under Part 6 or section 5 of Schedule 3.

51. Power of Monetary Authority to make rules

(1) The Monetary Authority may, after consultation with HKAB, make rules for the purpose of enabling a Scheme member, or each Scheme member of a class of Scheme members, to be required to maintain, in respect of the protected deposits maintained with the Scheme member, assets in Hong Kong.

(2) Rules made under this section may –

- (a) empower the Monetary Authority to require a Scheme member, or each Scheme member of a class of Scheme members, to maintain, in respect of the protected deposits maintained with the Scheme member, assets in Hong Kong in accordance with any requirement specified in the rules for the purpose;
- (b) empower the Monetary Authority to specify, for the purpose of an asset maintenance requirement, the amount of assets to be maintained in Hong Kong by the Scheme member, or each of the Scheme members, subject to the requirement;
- (c) specify the circumstances under which, and the manner in which, the Monetary Authority may issue an asset maintenance requirement;
- (d) specify –
 - (i) the assets that are to be regarded as assets in Hong Kong;
 - (ii) the extent to which, and the manner in which, certain assets are to be taken into account; and
 - (iii) other matters to be taken into account, for the purpose of determining whether an asset maintenance requirement has been complied with;

- (e) require that the Monetary Authority shall, before issuing an asset maintenance requirement, afford the Scheme member an opportunity of being heard;
- (f) specify the time within which, and the manner in which, a Scheme member is to be heard before an asset maintenance requirement is issued;
- (g) enable any person aggrieved by an asset maintenance requirement to request the Monetary Authority to refer the decision to the Tribunal for review;
- (h) specify the time within which, and the manner in which, such a request is to be made;
- (i) provide that every director and every chief executive of a Scheme member that contravenes an asset maintenance requirement commits an offence and is liable –
 - (i) on conviction on indictment to a fine of \$400,000 and to imprisonment for 2 years and, in the case of a continuing offence, to a further fine of \$20,000 for each day during which the offence continues; or
 - (ii) on summary conviction to a fine at level 6 and to imprisonment for 6 months and, in the case of a continuing offence, to a further fine of \$10,000 for each day during which the offence continues;
- (j) provide for any specified defence to be available in proceedings for such an offence; and
- (k) provide for any other matter relating to the asset maintenance requirement.

(3) In this section, “asset maintenance requirement” (維持資產規定) means the requirement, referred to in subsection (2)(a), by the Monetary

Authority of a Scheme member, or each Scheme member of a class of Scheme members, to maintain assets in Hong Kong.

52. Amendment of Schedules

(1) The Chief Executive in Council may, by notice published in the Gazette, amend Schedule 1, 2, 3 or 4.

(2) In amending Schedule 4, the Chief Executive in Council shall ensure that the Fund should, so far as practicable, be made up of money derived from the banking industry.

53. Consequential and other amendments

The enactments specified in Schedule 5 are amended as set out in that Schedule.

SCHEDULE 1 [ss. 2 & 52 & Sch. 4]

DEFINITION OF “PROTECTED DEPOSIT”

1. In this Ordinance, unless the context otherwise requires, “protected deposit” (受保障存款) means a deposit denominated in any currency and maintained with a Scheme member but –

- (a) does not include –
 - (i) a term deposit where the current term agreed to by the depositor at the most recent time it was negotiated exceeds 5 years;
 - (ii) a deposit the repayment of which is secured either in whole or in part on the assets of the Scheme member;
 - (iii) a bearer instrument;
 - (iv) a deposit taken by the Scheme member at any of its offices outside Hong Kong; or

- (v) a deposit held for the account of the Exchange Fund;
- (b) does not –
 - (i) except in relation to Part 5 of this Ordinance, include a deposit held by an excluded person in his own right, or, in the case of a deposit held by an excluded person and a non-excluded person in their own right (except where those persons carry on business in partnership), the portion of the deposit attributable to the excluded person's share in the deposit;
 - (ii) except in relation to section 14 and Part 5 of this Ordinance and Schedule 4, include –
 - (A) a deposit held by a depositor as a bare trustee or agent, or in a client account, for an excluded person, or, in the case of a deposit so held for an excluded person and a non-excluded person (except where those persons carry on business in partnership), the portion of the deposit attributable to the excluded person's share in the deposit; or
 - (B) a deposit held by a depositor as a trustee for an excluded person only; and
- (c) does not, in relation to Part 5 of this Ordinance, include –
 - (i) a deposit held by an excluded person in his own right, or, in the case of a deposit held by an excluded person and a non-excluded person in their own right (except where those persons carry on business in partnership), the portion of the

deposit attributable to the excluded person's share in the deposit;

- (ii) a deposit held by a depositor as a bare trustee or agent, or in a client account, for an excluded person, or, in the case of a deposit so held for an excluded person and a non-excluded person (except where those persons carry on business in partnership), the portion of the deposit attributable to the excluded person's share in the deposit; or
- (iii) a deposit held by a depositor as a trustee for an excluded person only.

2. In this Schedule –

“authorized institution” (認可機構) has the meaning assigned to it by section 2(1) of the Banking Ordinance (Cap. 155);

“excluded person” (豁除人士), in relation to a deposit maintained with a Scheme member, means –

- (a) a related company of the Scheme member;
- (b) a multilateral development bank as defined in paragraph 1 of the Third Schedule to the Banking Ordinance (Cap. 155);
- (c) an authorized institution;
- (d) a foreign bank; or
- (e) in relation to –
 - (i) section 1(b), an officer of the Scheme member or its related company;
 - (ii) section 1(c), an officer of the Scheme member or its related company on –
 - (A) the date immediately preceding the date on which a Manager within the meaning of

section 2(1) of the Banking Ordinance (Cap. 155) has been appointed in respect of the Scheme member under section 52 of that Ordinance; or

- (B) the date on which a petition for the winding up of the Scheme member has been presented,

whichever is the earlier;

“foreign bank” (外地銀行) means a company that –

- (a) is incorporated outside Hong Kong;
- (b) is not an authorized institution; and
- (c) may, in or outside the place where it is incorporated, lawfully take deposits from the general public (whether or not on current account), or is authorized or recognized as a bank in that place;

“holding company” (控股公司) means a holding company within the meaning of section 2 of the Companies Ordinance (Cap. 32);

“non-excluded person” (非豁免人士) means –

- (a) in relation to paragraph (b) of section 1, a person who is not an excluded person within the meaning of that paragraph;
- (b) in relation to paragraph (c) of section 1, a person who is not an excluded person within the meaning of that paragraph;

“officer” (人員) –

- (a) in relation to a Scheme member or its related company that is an authorized institution, means –
 - (i) a director of the Scheme member or the company;
 - (ii) a chief executive of the Scheme member or the company;

- (iii) a controller, within the meaning of section 2(1) of the Banking Ordinance (Cap. 155), of the Scheme member or the company; or
 - (iv) a manager, within the meaning of that section, of the Scheme member or the company;
- (b) in relation to a Scheme member's related company that is not an authorized institution, has the meaning assigned to it by section 2(1) of the Companies Ordinance (Cap. 32);
- “related company” (關連公司), in relation to a Scheme member, means –
- (a) a holding company of the Scheme member;
 - (b) a subsidiary of the holding company; or
 - (c) a subsidiary of the Scheme member;
- “subsidiary” (附屬公司) means a subsidiary within the meaning of section 2 of the Companies Ordinance (Cap. 32).

3. For the purposes of section 1(b)(i) and (ii)(A) and (c)(i) and (ii), if a deposit is held by more than one person in their own right or held for more than one person, each of those persons is deemed to have an equal share in the deposit unless the contrary is proved to the satisfaction of the Board.

SCHEDULE 2

[ss. 4 & 52]

PROVISIONS RELATING TO BOARD

1. Seal

(1) The affixing of the common seal of the Board shall be authenticated by the signature of any 2 members of the Board.

(2) Any document purporting to be a document duly executed under the seal of the Board shall be received in evidence and is, unless the contrary is proved, to be deemed to be a document so executed.

2. **Tenure of non-executive members**

(1) A non-executive member of the Board shall be appointed for a term not exceeding 3 years.

(2) On the expiry of his period of appointment or reappointment, a non-executive member of the Board is eligible for reappointment for such further term as the Chief Executive may specify.

(3) A non-executive member of the Board may resign from office by giving notice in writing to the Chief Executive. A notice of resignation takes effect on the date specified in the notice or, if no date is specified, on the date of receipt by the Chief Executive of the notice.

(4) If any non-executive member of the Board, including the Chairman, is absent from Hong Kong or is for any other reason unable to exercise the powers or discharge the duties of his office as member or Chairman, as the case may be, the Chief Executive may appoint another person to be a temporary member or Chairman, as the case may be, in his place during his absence or incapacity.

3. **Terms and conditions of appointment of members**

All matters relating to the terms and conditions of the appointment of the members (other than ex officio members) of the Board are to be determined by the Chief Executive.

4. **Removal of appointed members**

If the Chief Executive is satisfied that an appointed member of the Board –

- (a) has become bankrupt, is incapacitated by physical or mental illness, or is otherwise unable or unfit to perform the functions of a member of the Board; or
- (b) in the case where the member is a non-executive member, has become a public officer,

the Chief Executive may declare his office as member of the Board to be vacant, and shall notify the fact in such manner as the Chief Executive thinks fit; and upon such declaration the office becomes vacant.

5. Meetings and proceedings of Board

(1) Meetings of the Board are to be held at such times and places as the Chairman of the Board, or the person acting as the Chairman, may decide.

(2) The quorum for meetings of the Board is 5.

(3) Subject to the provisions of this Schedule, the Board may determine its own procedures.

(4) At any meeting of the Board, the Chairman of the Board, or the person acting as the Chairman, has a vote on all matters coming before the Board; and in the case of an equality of votes, he also has a casting vote.

6. Transaction of business by circulation of papers

The Board may transact any of its business by circulation of papers, and a resolution in writing which is approved by a majority of the members of the Board is as valid and effectual as if it had been duly passed at a meeting of the Board by the votes of the members of the Board so approving the resolution.

7. Committees

The Board may appoint committees for any general or special purposes as it thinks fit and, in relation to such a committee –

- (a) the chairman shall be appointed by the Board; and
- (b) the chairman and at least two-third of the other members are to be members of the Board.

8. Conflict of interests

(1) A member of the Board who is in any way directly or indirectly interested in a contract made or proposed to be made by the Board, shall disclose the nature of his interest at a meeting of the Board. The disclosure shall be

recorded in the minutes of the Board, and the member may not without the permission of the Chairman of the Board take any part in any deliberation of the Board with respect to that contract and may not in any event vote on any question concerning it.

(2) For the purposes of subsection (1), a general notice given at a meeting of the Board by a member of the Board to the effect that he is a member of a specified company or firm and is to be regarded as interested in any contract that may, after the date of the notice, be made with the company or firm is regarded as a sufficient disclosure of his interest in relation to any contract so made or proposed to be so made.

(3) A member of the Board need not attend in person at a meeting of the Board in order to make a disclosure which he is required to make under subsection (1) if he takes reasonable steps to secure that the disclosure is made by a notice which is brought up and read at the meeting.

SCHEDULE 3

[ss. 38, 49, 50 & 52]

PROVISIONS RELATING TO TRIBUNAL

1. Interpretation

In this Schedule –

“panel member” (小組成員) means a member of the panel referred to in section 38(4) of this Ordinance;

“parties” (各方) –

(a) in relation to a review of a decision or assessment of the Board, means the applicant or the Board;

(b) in relation to a review of a decision of the Monetary Authority, means the applicant or the Monetary Authority;

“Tribunal member” (審裁處成員) means a member of the Tribunal appointed under section 38(2)(b) of this Ordinance.

2. **Tenure of Chairman**

(1) The Chairman of the Tribunal shall be appointed for a term not exceeding 3 years.

(2) On the expiry of his period of appointment or reappointment, the Chairman of the Tribunal is eligible for reappointment for such further term as the Chief Executive may specify.

(3) The Chairman of the Tribunal may resign from office by giving notice in writing to the Chief Executive. A notice of resignation takes effect on the date specified in the notice or, if no date is specified, on the date of receipt by the Chief Executive of the notice.

(4) If the Chief Executive is satisfied that the Chairman of the Tribunal –

- (a) has become bankrupt;
- (b) is incapacitated by physical or mental illness; or
- (c) is otherwise unable or unfit to perform the functions of the Chairman of the Tribunal,

the Chief Executive may, after consultation with the Chief Justice, declare his office as Chairman of the Tribunal to be vacant, and shall notify the fact in such manner as the Chief Executive thinks fit; and upon such declaration the office becomes vacant.

(5) If a review has been commenced by the Tribunal but not completed before the expiry of the term of office of the Chairman of the Tribunal, the Chief Executive may authorize the Chairman to continue to act as the Chairman for the purpose of completing the review.

3. **Tenure of panel members**

(1) A panel member shall be appointed for a term not exceeding 3 years.

(2) On the expiry of his period of appointment or reappointment, a panel member is eligible for reappointment for such further term as the Chief Executive may specify.

(3) A panel member may resign from office by giving notice in writing to the Chief Executive. A notice of resignation takes effect on the date specified in the notice or, if no date is specified, on the date of receipt by the Chief Executive of the notice.

- (4) If the Chief Executive is satisfied that a panel member –
- (a) has become bankrupt;
 - (b) is incapacitated by physical or mental illness;
 - (c) is otherwise unable or unfit to perform the functions of a Tribunal member; or
 - (d) has become a public officer,

the Chief Executive may declare his office as panel member to be vacant, and shall notify the fact in such manner as the Chief Executive thinks fit; and upon such declaration the office becomes vacant.

4. Tenure of Tribunal members

(1) A Tribunal member may resign from office by giving notice in writing to the Chairman of the Tribunal. A notice of resignation takes effect on the date specified in the notice or, if no date is specified, on the date of receipt by the Chairman of the notice.

(2) If a Tribunal member ceases to be a panel member, he ceases to be such Tribunal member.

5. Sittings

(1) The Chairman of the Tribunal shall convene such sittings of the Tribunal as are necessary to determine a review.

(2) Before convening a sitting under subsection (1) in respect of a review, the Chairman of the Tribunal may give directions to the parties to the review concerning –

- (a) procedural matters to be complied with by the parties; and
- (b) the time within which the parties are required to comply with such matters.

- (3) At a sitting of the Tribunal –
- (a) the Chairman of the Tribunal shall preside;
 - (b) not fewer than 2 Tribunal members shall also be present;
and
 - (c) every question before the Tribunal shall be determined by the opinion of the majority of those referred to in paragraphs (a) and (b) except a question of law which shall be determined by the Chairman of the Tribunal alone.

(4) Every sitting of the Tribunal shall be held in public unless the Tribunal, on its own motion or on the application of any of the parties to the review, determines that in the interests of justice a sitting, or any part of a sitting, shall not be held in public in which case it may hold the sitting, or the relevant part of the sitting, as the case may be, in camera.

(5) If an application is made pursuant to subsection (4) for a determination that a sitting, or any part of a sitting, shall not be held in public, a hearing of the application shall be held in camera.

(6) The parties to a review shall, at any sitting of the Tribunal relating to the review, be entitled to be heard –

- (a) in person, or –
 - (i) in the case of the Board or a corporation, through its officer or its employee;
 - (ii) in the case of the Monetary Authority, through a person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap. 66) to assist the Monetary Authority; and
- (b) through counsel or a solicitor or, with the leave of the Tribunal, through any other person.

(7) The Chairman of the Tribunal shall prepare or cause to be prepared a record of the proceedings at any sitting of the Tribunal, which shall contain such particulars relating to the proceedings as he considers appropriate.

6. **Miscellaneous**

Except as otherwise provided in this Ordinance, the Tribunal, its Chairman and its members, and the parties to, and any witness, counsel, solicitor, or any other person involved in, a review, shall have the same privileges and immunities in respect of the review as they would have if the review were civil proceedings before the Court of First Instance.

SCHEDULE 4 [ss. 2, 14 & 52 & Sch. 1]

CONTRIBUTIONS TO FUND

1. **Interpretation**

- (1) In this Schedule, unless the context otherwise requires –
- “balance of protected deposits” (受保障存款結餘), in relation to a Scheme member, means, subject to subsection (2), the amount of the protected deposits maintained with the Scheme member in respect of which compensation would, if a specified event has, for the purposes of Part 5 of this Ordinance, occurred in relation to the Scheme member, be payable in accordance with this Ordinance;
- “build-up levy” (建立期徵費) means the build-up levy payable by a Scheme member under section 3(4);
- “expected loss levy” (預期損失徵費) means the expected loss levy payable by a Scheme member under section 4(2);
- “surcharge” (附加費) means the surcharge payable by a Scheme member under section 5(2);
- “target fund size” (基金目標金額), in relation to a year, means the size of the Fund that the Board seeks to achieve and maintain for that year.

(2) In calculating, for the purposes of the definition of “balance of protected deposits” in subsection (1), the amount of the protected deposits

maintained with a Scheme member in respect of which compensation would be payable in accordance with this Ordinance –

- (a) any amount of liabilities of any depositor to the Scheme member shall be disregarded;
- (b) interest accrued on protected deposits shall not be included;
- (c) a depositor of a protected deposit, or portion thereof, with the Scheme member who holds the deposit or that portion as a bare trustee or agent, or in a client account, is taken as being entitled, in respect of the deposit or that portion, to compensation under Division 2 of Part 5 of this Ordinance as if he held the deposit as a trustee;
- (d) a deposit held by a depositor as a bare trustee or agent, or in a client account, for –
 - (i) an excluded person within the meaning of paragraph (a), (b), (c), (d) or (e)(i) of the definition of "excluded person" in section 2 of Schedule 1; or
 - (ii) such an excluded person and a person who is not such an excluded person,
 is taken as a deposit so held for a person who is not such an excluded person; and
- (e) a deposit held by a depositor as a trustee for such an excluded person only is taken as a deposit so held for a person who is not such an excluded person.

(3) For the purposes of this Schedule, the target fund size is reached in a particular year if the sum of –

- (a) the aggregate amount of contributions payable by all Scheme members for that particular year; and
- (b) the balance of the Fund as at 20 October of the immediately preceding year,

is equal to or greater than the target fund size for that particular year.

2. **Calculation of target fund size and balance of Fund**

(1) For the purposes of this Schedule, the target fund size for any particular year is the specified percentage of the aggregate of the balance of protected deposits maintained with each of the Scheme members as at 20 October of the immediately preceding year.

(2) For the purposes of this Schedule, the balance of the Fund as at 20 October of any year is the amount by which the total assets of the Fund exceed its total liabilities as shown in a balance sheet of the Fund, as at that date, prepared by the Board.

(3) In this section, “specified percentage” (指明百分比) means 0.3%.

3. **Build-up levy**

(1) This section applies to any year up to and including the year in which the target fund size has been reached for the first time after the commencement of this Schedule.

(2) If, after the year in which the target fund size has been reached for the first time after the commencement of this Schedule, the target fund size for a particular year becomes, as a result of a specified amendment, greater than the balance of the Fund as at 20 October of the immediately preceding year, this section also applies to –

- (a) that particular year; and
- (b) any subsequent year up to and including the year in which the target fund size is reached for the first time after the commencement of that specified amendment.

(3) If, after the year in which the target fund size has been reached for the first time after the commencement of a specified amendment, the target fund size for a particular year becomes, as a result of another specified amendment, greater than the balance of the Fund as at 20 October of the immediately preceding year, this section also applies to –

- (a) that particular year; and
- (b) any subsequent year up to and including the year in which the target fund size is reached for the first time after the commencement of that other specified amendment.

(4) A build-up levy is payable by a Scheme member for any year to which this section applies.

(5) Subject to subsections (6) and (7) and section 6, the amount of build-up levy payable by a Scheme member for any year is the sum calculated by multiplying the balance of protected deposits maintained with the Scheme member as at 20 October of the immediately preceding year by the percentage specified in column 2 of the following Table opposite the MA supervisory rating of the Scheme member specified in column 1 of that Table.

TABLE

Column 1	Column 2
MA supervisory rating	Percentage
1	0.05%
2	0.08%
3	0.11%
4 or 5	0.14%

(6) If the amount by which the target fund size for a particular year exceeds the balance of the Fund as at 20 October of the immediately preceding year is smaller than the aggregate amount of build-up levies that would, but for this subsection, have been payable by all Scheme members for that particular year in accordance with subsection (5), the amount of build-up levy payable by a Scheme member for that particular year is the amount of build-up levy that would have been payable by the Scheme member for that year in accordance with subsection (5), reduced proportionately in the ratio of that amount of excess to that aggregate amount.

(7) If the target fund size for a particular year does not exceed the balance of the Fund as at 20 October of the immediately preceding year, no build-up levy is payable for that particular year.

(8) For the avoidance of doubt, the percentage specified in column 2 of the Table in subsection (5) may be revised by way of an amendment to this section before, during or after the year in which the target fund size is reached for the first time after the commencement of this Schedule.

(9) In this section, “specified amendment” (指明的修訂) means an amendment to the definition of “specified percentage” in section 2(3).

4. **Expected loss levy**

(1) This section applies to any year after the year in which the target fund size has been reached for the first time after the commencement of this Schedule, except a year to which section 3 applies by virtue of subsection (2) or (3) of that section.

(2) An expected loss levy is payable by a Scheme member for any year to which this section applies.

(3) Subject to section 6, the amount of expected loss levy payable by a Scheme member for any year is the sum calculated by multiplying the balance of protected deposits maintained with the Scheme member as at 20 October of the immediately preceding year by the percentage specified in column 2 of the following Table opposite the MA supervisory rating of the Scheme member specified in column 1 of that Table.

TABLE

Column 1	Column 2
MA supervisory rating	Percentage
1	0.0075%
2	0.01%
3	0.015%

4 or 5

0.02%

(4) For the avoidance of doubt, the percentage specified in column 2 of the Table in subsection (3) may be revised by way of an amendment to this section before, during or after the year in which the target fund size is reached for the first time after the commencement of this Schedule.

5. Surcharge

(1) This section applies to any year –

- (a) to which section 4 applies; and
- (b) 70% of the target fund size for which is greater than the balance of the Fund as at 20 October of the immediately preceding year.

(2) A surcharge is payable by a Scheme member for any year to which this section applies.

(3) Subject to section 6, the amount of surcharge payable by a Scheme member for any year is the amount of build-up levy that would have been payable by the Scheme member for that year in accordance with section 3(5) as if section 3 applied to that year, adjusted proportionately in the ratio of –

- (a) the aggregate amount of surcharges payable by all Scheme members for that year, calculated in accordance with subsection (4); to
- (b) the aggregate amount of build-up levies that would have been payable by all Scheme members for that year, calculated in accordance with subsection (4)(a)(i).

(4) The aggregate amount of surcharges payable by all Scheme members for any year is –

- (a) the difference between –
 - (i) the aggregate amount of build-up levies that would have been payable by all Scheme members for that year in accordance with section 3(5) as if section 3 applied to that year; and

- (ii) the aggregate amount of expected loss levies payable by all Scheme members for that year in accordance with section 4(3); or
- (b) 30% of the amount by which the target fund size for that year exceeds the balance of the Fund as at 20 October of the immediately preceding year,

whichever is the lower.

6. Calculation of contribution for new Scheme members

(1) The amount of contribution payable by a Scheme member for the year in which it becomes a member of the Scheme by virtue of section 11(3) of this Ordinance –

- (a) shall be calculated on the basis of the balance of protected deposits maintained with the Scheme member as at the date it becomes a member of the Scheme but not 20 October of the immediately preceding year; and
- (b) is that proportion of the amount of projected full-year contribution for that year that the number of days during which the Scheme member is a member of the Scheme in that year bears to 365.

(2) If a Scheme member becomes a member of the Scheme by virtue of section 11(3) of this Ordinance after 20 October in any particular year, the amount of contribution payable for the subsequent year shall be calculated on the basis of the balance of protected deposits maintained with the Scheme member as at the date it becomes a member of the Scheme but not 20 October of that particular year.

(3) In this section, “projected full-year contribution” (預計全年供款), in relation to a year in which a Scheme member becomes a member of the Scheme by virtue of section 11(3) of this Ordinance, means the amount of contribution that would have been payable by the Scheme member if that

Scheme member had been a member of the Scheme during the whole of that year.

7. Minimum amount of contribution

Notwithstanding anything in this Schedule, if the amount of contribution payable by a Scheme member for any year is less than \$50,000, a minimum contribution equal in amount to that proportion of \$50,000 that the number of days during which the Scheme member is a member of the Scheme in that year bears to 365 is payable by the Scheme member for that year .

8. Rebate

(1) A rebate shall be made by the Board in any year if 115% of the target fund size for that year is smaller than the balance of the Fund as at 20 October of the immediately preceding year.

(2) For any year in which a rebate is required to be made by the Board, the amount of rebate payable to a Scheme member is the aggregate amount of rebates payable to all Scheme members in that year, calculated in accordance with subsection (3), adjusted proportionately in the ratio of –

- (a) the amount of net contribution by the Scheme member during the immediately preceding 10 years or the period since the commencement of this Schedule, whichever is the shorter; to
- (b) the aggregate of the amount of net contribution by each of the Scheme members during the same period.

(3) The aggregate amount of rebates payable to all Scheme members in any particular year is 30% of the amount by which the balance of the Fund as at 20 October of the immediately preceding year exceeds the target fund size for that particular year.

(4) In this section, “the amount of net contribution” (供款淨額), in relation to a Scheme member during a period, means the amount of contribution

paid by the Scheme member during the period less the amount of rebate received by the Scheme member during that period.

9. Refund of contribution

(1) A proportion of the contribution paid by a Scheme member for the year in which it ceases to be a member of the Scheme shall be refunded to that Scheme member.

(2) The amount to be refunded is that proportion of the contribution that the number of days during which the Scheme member is not a member of the Scheme in that year bears to 365.

SCHEDULE 5

[s. 53]

CONSEQUENTIAL AND OTHER AMENDMENTS

Companies Ordinance

1. Preferential payments

Section 265 of the Companies Ordinance (Cap. 32) is amended –

(a) in subsection (1)(db), by repealing everything after “, held” and substituting –

“deposits, to each depositor –

(i) in respect of the deposits, or portion thereof, that the depositor holds in his own right, the aggregate amount so held on deposit, up to \$100,000, regardless of the number of deposits;

(ii) in respect of the deposits, or portion thereof, that the depositor holds as a bare trustee for each of the beneficiaries, the aggregate amount so held on deposit, up to,

- subject to subsection (5I), \$100,000, regardless of the number of deposits so held for the beneficiary;
- (iii) in respect of the deposits, or portion thereof, that the depositor holds as an agent for each of the principals, the aggregate amount so held on deposit, up to, subject to subsection (5I), \$100,000, regardless of the number of deposits so held for the principal;
- (iv) in respect of the deposits, or portion thereof, that the depositor holds in a client account for each of the clients, the aggregate amount so held on deposit, up to, subject to subsection (5I), \$100,000, regardless of the number of deposits so held for the client; and
- (v) in respect of the deposits, or portion thereof, that the depositor holds as a trustee (but not a bare trustee) under each of the trusts, the aggregate amount so held on deposit, up to \$100,000, regardless of the number of deposits so held under the trust;”;
- (b) in subsection (5D)(a), by repealing “戶” and substituting “款人”;
- (c) by repealing subsections (5E) and (5F) and substituting –
- “(5E) If –
- (a) an arrangement has been entered into or carried out on or after the

specified date in relation to a deposit with the company except where the arrangement is one in pursuance of a legally enforceable obligation incurred prior to that date;

- (b) the arrangement has, or would have had but for this subsection, the effect of enabling a person to become entitled to priority under subsection (1)(db), to which the person would otherwise not be entitled; and
- (c) it would be concluded, having regard to –
 - (i) the manner in which, and the circumstances under which, the arrangement was entered into or carried out;
 - (ii) the form and substance of the arrangement; and
 - (iii) the result in relation to the operation of this Ordinance that, but for this subsection, would have been achieved by the arrangement,that the arrangement was entered into or carried out for

the sole or dominant purpose of enabling the person, either alone or in conjunction with other persons, to become entitled to priority under subsection (1)(db), to which the person would otherwise not be entitled,

the priority given under subsection (1)(db) shall apply as if the arrangement or any part thereof had not been entered into or carried out.

(5F) Deposits given priority under subsection (1)(db) do not include –

- (a) a deposit held for the account of the Exchange Fund established by the Exchange Fund Ordinance (Cap. 66);
- (b) a deposit held by an excluded person in his own right, or, in the case of a deposit held by an excluded person and a non-excluded person in their own right (except where those persons carry on business in partnership), the portion of the deposit attributable to the excluded person's share in the deposit;
- (c) a deposit held by a depositor as a bare trustee or agent, or in a client account, for an excluded

person, or, in the case of a deposit so held for an excluded person and a non-excluded person (except where those persons carry on business in partnership), the portion of the deposit attributable to the excluded person's share in the deposit; and

- (d) a deposit held by a depositor as a trustee (but not a bare trustee) for an excluded person only.

(5G) For the purposes of subsection (5F)(b) and (c), if a deposit is held by more than one person in their own right or held for more than one person, each of those persons is deemed to have an equal share in the deposit unless the contrary is proved to the satisfaction of the liquidator or provisional liquidator.

(5H) For the purposes of paragraph (db) of subsection (1) –

- (a) if the depositor referred to in subparagraph (i) of that paragraph consists of 2 or more persons –
 - (i) in the case where the persons carry on business in partnership, those persons are, for the purpose of priority given

- under that paragraph, a single and continuing body of persons as distinct from the persons who may from time to time be the members of the partnership;
- (ii) in any other case, each of those persons is deemed to have an equal share in the deposit, or the relevant portion thereof, unless the contrary is proved to the satisfaction of the liquidator or provisional liquidator;
- (b) if the beneficiary, principal or client referred to in subparagraph (ii), (iii) or (iv) of that paragraph consists of 2 or more persons –
- (i) in the case where the persons carry on business in partnership, those persons are, for the purpose of priority given under that paragraph, a single and continuing body of persons as distinct from the persons

who may from time to time be the members of the partnership;

- (ii) in any other case, each of those persons is deemed to have an equal share in the deposit, or the relevant portion thereof, unless the contrary is proved to the satisfaction of the liquidator or provisional liquidator; and

- (c) if the depositor referred to in subparagraph (v) of that paragraph consists of 2 or more persons, those persons are, for the purpose of priority given under that paragraph, a single and continuing body of persons as distinct from the persons who may from time to time be the trustees.

(5I) If –

- (a) a person has more than one of the following capacities –
 - (i) a depositor holding one or more deposits, or portion thereof, in his own right;

- (ii) a beneficiary for whom one or more deposits, or portion thereof, is or are held by a depositor as a bare trustee;
 - (iii) a principal for whom one or more deposits, or portion thereof, is or are held by a depositor as an agent;
 - (iv) a client for whom one or more deposits, or portion thereof, is or are held by a depositor in a client account; and
- (b) the aggregate of the amount that shall be paid in priority under subsection (1)(db)(i), (ii), (iii) or (iv) in respect of the relevant deposits or portions would, but for this subsection, have exceeded \$100,000, the amount that shall be paid in priority under subsection (1)(db)(ii), (iii) or (iv) shall abate in equal proportions among themselves so that the aggregate referred to in paragraph (b) shall be \$100,000.”;
- (d) in subsection (6) –
 - (i) in the definition of “controller” –
 - (A) by repealing “總監” and substituting “控權人”;

- (B) in the Chinese text, by repealing the full stop at the end and substituting a semicolon;
- (ii) in the definition of “deposit” and “depositor”, by repealing “戶” and substituting “款人”;
- (iii) by adding –
- ““arrangement” (安排) includes an arrangement, transaction, operation or scheme whether or not such arrangement, transaction, operation or scheme is enforceable, or intended to be enforceable, by legal proceedings;
- “bare trustee” (被動受託人) has the same meaning as in the Deposit Protection Scheme Ordinance (of 2003);
- “chief executive” (行政總裁) has the same meaning as in the Banking Ordinance (Cap. 155);
- “excluded person” (豁除人士), in relation to a deposit maintained with the company being wound up, means –
- (a) a related company of the company;
- (b) an officer of the company or its related company on –
- (i) the date immediately preceding the date on which a Manager within

the meaning of section 2(1) of the Banking Ordinance (Cap. 155) has been appointed in respect of the company being wound up under section 52 of that Ordinance; or

(ii) the date on which a petition for the winding up of the company being wound up has been presented,

whichever is the earlier;

(c) a multilateral development bank as defined in paragraph 1 of the Third Schedule to the Banking Ordinance (Cap. 155);

(d) an authorized financial institution; or

(e) a foreign bank;

“foreign bank” (外地銀行) means a company

that –

(a) is incorporated outside

Hong Kong;

- (b) is not an authorized financial institution; and
- (c) may, in or outside the place where it is incorporated, lawfully take deposits from the general public (whether or not on current account), or is authorized or recognized as a bank in that place;

“non-excluded person” (非豁免人士) means a person who is not an excluded person;

“officer” (人員), in relation to a company that is an authorized financial institution, means –

- (a) a director of the company;
- (b) a chief executive of the company;
- (c) a controller of the company; or
- (d) a manager of the company;

“related company” (關連公司), in relation to a company, means –

- (a) a subsidiary of the company;
- (b) a holding company of the company; or

- (c) a subsidiary of the holding company;

“specified date” (指明日期), in relation to a company, means –

- (a) the date on which a Manager within the meaning of section 2(1) of the Banking Ordinance (Cap. 155) has been appointed in respect of the company under section 52 of that Ordinance; or
- (b) the date on which a petition for the winding up of the company has been presented,

whichever is the earlier;”.

Banking Ordinance

2. Official secrecy

Section 120(5) of the Banking Ordinance (Cap. 155) is amended by adding after paragraph (g) –

- “(gaa) to the disclosure of information by the Monetary Authority to the Hong Kong Deposit Protection Board established by section 3 of the Deposit Protection Scheme Ordinance (of 2003) for the purpose of enabling or assisting the Board to exercise its functions under that Ordinance;”.

3. Grounds for revocation of authorization

The Eighth Schedule is amended by adding –

“21. The authorized institution has failed to comply with any requirement under the Deposit Protection Scheme Ordinance (of 2003) applicable to the institution.”.

Securities and Futures Ordinance

4. Subrogation of recognized investor compensation company to rights, etc. of claimant on payment from compensation fund

Section 87 of the Securities and Futures Ordinance (Cap. 571) is amended –

(a) in subsection (1)(a), by adding “subject to subsection (1A),” before “the company”;

(b) by adding –

“(1A) The company is not subrogated to any rights and remedies of the claimant in respect of compensation from the Deposit Protection Scheme Fund established by section 13 of the Deposit Protection Scheme Ordinance (of 2003).”.

5. Subrogation of the Commission to rights, etc. of claimant on payment from compensation fund

Section 243 is amended –

(a) in subsection (1)(a), by adding “subject to subsection (1A),” before “the Commission”;

(b) by adding –

“(1A) The Commission is not subrogated to any rights and remedies of the claimant in respect of compensation from the Deposit Protection Scheme

Fund established by section 13 of the Deposit Protection Scheme Ordinance (of 2003).”.

6. Preservation of secrecy, etc.

Section 378(2) is amended by adding –

- “(ea) the disclosure of information to the Hong Kong Deposit Protection Board established by section 3 of the Deposit Protection Scheme Ordinance (of 2003) for the purpose of enabling or assisting the Board to perform its functions under that Ordinance;”.

Securities and Futures (Investor Compensation - Claims) Rules

7. Making a claim for compensation

Section 4 of the Securities and Futures (Investor Compensation – Claims) Rules (L.N. 215 of 2002) is amended –

- (a) in subsection (1), by repealing “Where” and substituting “Subject to subsection (1A), where”;
- (b) by adding –

“(1A) A qualifying client of a specified person shall not claim compensation from the compensation fund in respect of any loss in respect of which he has received payment that is made out of the Deposit Protection Scheme Fund established by section 13 of the Deposit Protection Scheme Ordinance (of 2003).”.

Explanatory Memorandum

The principal object of this Bill is to provide for –

- (a) the establishment of a Hong Kong Deposit Protection Board;

- (b) the establishment by the Board of a Deposit Protection Scheme for the purpose of providing compensation to depositors under certain circumstances in respect of deposits maintained with banks that are members of the Scheme;
- (c) the establishment of a Deposit Protection Scheme Fund from which such compensation is to be paid; and
- (d) contributions to the Fund, and the entitlement to, and payment of, compensation from the Fund.

2. Part 1 contains preliminary provisions. Clause 2 defines the terms used in the Bill. In particular, the term “protected deposit” is defined by reference to Schedule 1.

3. Part 2 deals with the establishment of the Hong Kong Deposit Protection Board (the “Board”). In particular –

- (a) clause 3 establishes the Board;
- (b) clause 4 sets out the composition and membership of the Board;
- (c) clause 5 sets out the functions of the Board;
- (d) clause 6 requires the Board to perform its functions through the Monetary Authority;
- (e) clause 7 sets out the powers of the Board; and
- (f) clause 8 empowers the Chief Executive in Council to give the Board written directions with respect to the performance of the Board’s functions.

4. Part 3 deals with the establishment of the Deposit Protection Scheme (the “Scheme”). In particular –

- (a) clause 10 requires the Board to establish and maintain the Scheme;
- (b) clause 11 provides that every bank is a member of the Scheme; and

- (c) clause 12 empowers the Board to exempt a bank from being a member of the Scheme under certain circumstances.

5. Part 4 deals with the establishment of the Deposit Protection Scheme Fund (the “Fund”). In particular –

- (a) clause 13 establishes the Fund and sets out what constitutes the Fund;
- (b) clause 14 provides for the contributions to the Fund;
- (c) clause 15 sets out what may be paid from the Fund;
- (d) clauses 16 to 19 deal with the financial provisions in relation to the Fund; and
- (e) clause 20 empowers the Board to place or invest money of the Fund in certain investments.

6. Part 5 deals with compensation from the Fund. Division 1 (clauses 21 to 24) contains preliminary provisions, which include definitions of the terms used in that Part. Division 2 (clauses 25 to 29) deals with the entitlement to such compensation. Division 3 (clauses 30 to 37) deals with the payment of such compensation. In particular –

- (a) clause 21 sets out when a specified event has occurred in relation to a bank that is a member of the Scheme;
- (b) clause 25 sets out the compensation to which a person is entitled under clauses 26, 27 and 28 when a specified event has occurred;
- (c) clause 26 deals with the entitlement to compensation of a depositor of a protected deposit who holds the deposit in his own right;
- (d) clause 27 deals with the entitlement to compensation of a person who is a beneficiary, principal or client for whom a protected deposit is held by a depositor as bare trustee or agent, or in a client account, respectively;

- (e) clause 28 deals with the entitlement to compensation of a depositor of a protected deposit who holds the deposit as a trustee;
- (f) clause 30 sets out the Board's duties and powers in relation to payment of compensation when a specified event has occurred;
- (g) clause 33 limits the amount of compensation payable to a depositor;
- (h) clause 34 empowers the Board to make interim payment of compensation under certain circumstances; and
- (i) clause 36 provides for the subrogation of the Board to the rights and remedies of the depositor to whom the Board has made a payment of compensation, in relation to his deposits maintained with the bank.

7. Part 6 deals with review of certain decisions or assessments of the Board or Monetary Authority by the Deposit Protection Appeals Tribunal (the "Tribunal").

In particular –

- (a) clause 38 establishes the Tribunal and sets out its composition and membership;
- (b) clause 39 provides for the review of –
 - (i) certain decisions of the Board or Monetary Authority; and
 - (ii) assessments of the Board of the amount of contribution to the Fund, and for procedural and other matters relating to the review;
- (c) clause 40 sets out the powers of the Tribunal;
- (d) clauses 41 and 42 provide for other matters relating to the Tribunal; and
- (e) clause 43 provides for appeals to the Court of Appeal against determinations of the Tribunal on a point of law.

8. Part 7 deals with miscellaneous matters. In particular –
- (a) clauses 44 and 45 contain confidentiality and immunity provisions;
 - (b) clause 46 empowers the Board to require a bank that is a member of the Scheme to submit certain information and report;
 - (c) clause 48 provides for a defence for certain offences under the Bill;
 - (d) clause 49 empowers the Board to make rules after consultation with the Financial Secretary and The Hong Kong Association of Banks;
 - (e) clause 50 empowers the Chief Justice to make rules for the purpose of requests for review, or reviews, under Part 6;
 - (f) clause 51 empowers the Monetary Authority to make rules, after consultation with The Hong Kong Association of Banks, for the purpose of enabling a bank that is a member of the Scheme to be required to maintain, in respect of the protected deposits maintained with the bank, assets in Hong Kong; and
 - (g) clause 52 empowers the Chief Executive in Council to amend Schedule 1, 2, 3 or 4.
9. Schedule 2 contains the provisions relating to the Board. Those provisions deal with the tenure of certain members, procedures of proceedings and other related matters.
10. Schedule 3 contains the provisions relating to the Tribunal. Those provisions deal with the tenure of the Chairman and members, procedures of sittings and other related matters.
11. Schedule 4 contains the provisions on the contributions to the Fund payable by a bank that is a member of the Scheme and on the rebate and refund of such contributions.

12. Schedule 5 contains consequential and other amendments to several Ordinances.

Treatment of Multi-beneficiary Accounts

Providing cover on a per-depositor basis requires consideration of how the limit should be applied to multi-beneficiary accounts such as joint, trust, agent and client accounts. The crux of the issue lies in how to balance equitable treatment of depositors against the practical considerations of maintaining a simple and effective scheme.

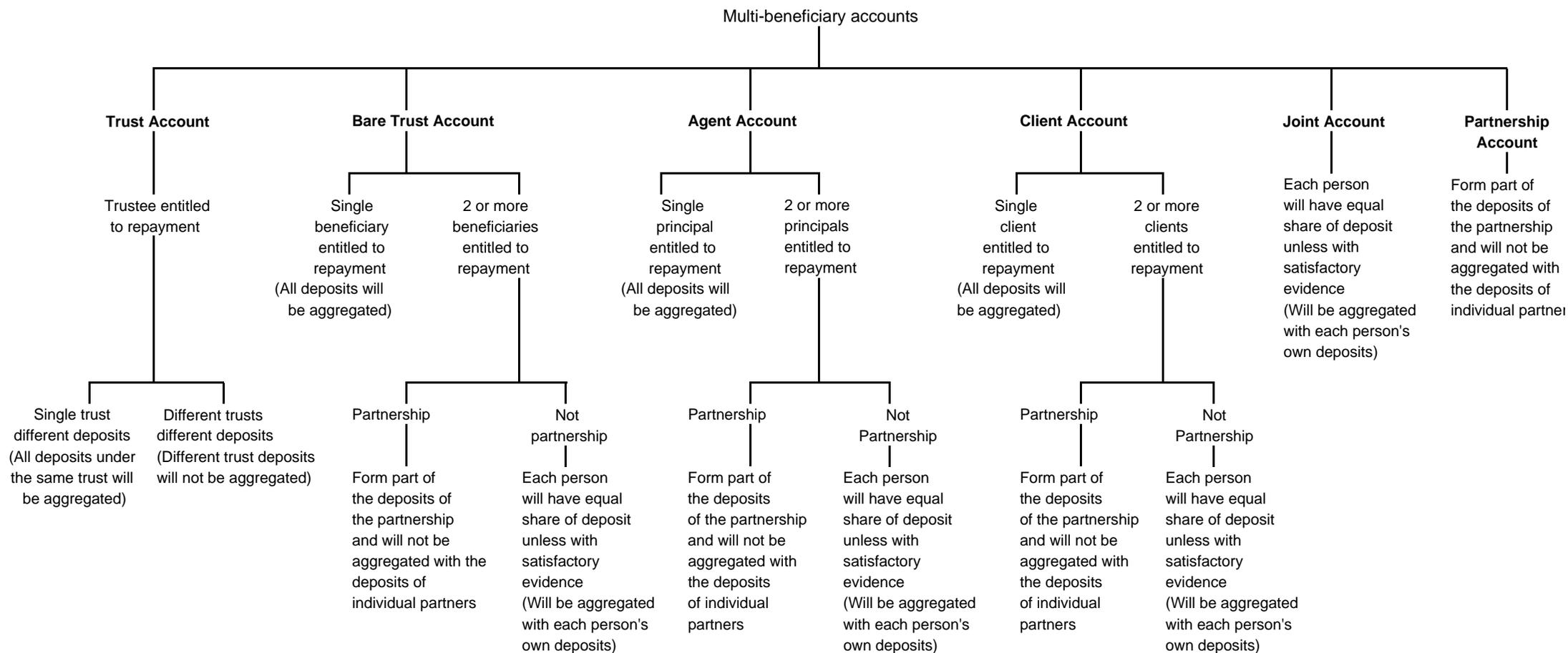
2. A brief description of the proposed treatment of each type of the multi-beneficiary accounts is set out below:-

- (i) Trust accounts – For active trusts, the trustee would be treated as a separate depositor and thus is entitled to compensation in his own right. For bare trusts (i.e. where a trustee holds property for a beneficiary who is absolutely and solely entitled to that property), each beneficiary would be allowed to claim compensation according to his entitlement to the account, but such claim would be aggregated with the balances in the beneficiary’s other accounts with the failed bank in determining whether the coverage limit has been reached;
- (ii) Agent accounts – The underlying principals, rather than the agent in whose name the account is held, would be regarded as being entitled to compensation in respect of the balance in the agent account. The entitlement of each principal in the account would then be aggregated with the balances in the principal’s other accounts with the failed bank in determining whether the coverage limit has been reached;
- (iii) Client accounts – The clients, rather than the account-holder in whose name the account is held, would be regarded as being entitled to compensation in respect of the balance in the client account. The entitlement of each client in the account would then be aggregated with the balances in the client’s other accounts with the failed bank in determining whether the coverage limit has been reached;
- (iv) Joint accounts – The balance in a joint account would be deemed to be equally held by all the account-holders unless there is satisfactory evidence as to their otherwise respective shares. The deemed share of each of the account-holders would then be aggregated with their respective other entitlements in determining whether the coverage limit has been reached; and

- (v) Partnership accounts – These accounts would be treated as a joint beneficial claim separate from those of the individual partners.

3. A schematic representation of the proposed treatment of multi-beneficiary is shown in the attachment.

A Schematic Representation of the Proposed Treatment of Multi-beneficiary Accounts



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Deposits Excluded From Protection

The following types of deposits would not be covered by the Deposit Protection Scheme:-

- (i) a term deposit where the current term agreed to by the depositor at the most recent time it was negotiated exceeds 5 years;
- (ii) a deposit the repayment of which is secured either in whole or in part on the assets of the bank;
- (iii) a bearer instrument;
- (iv) a deposit taken by an office of the bank outside Hong Kong;
- (v) a deposit held for the account of the Exchange Fund;
- (vi) a deposit held by an excluded person in his own right (in the case where the deposit is held by an excluded person and a non-excluded person in their own right (except where those persons carry on business in partnership), the portion of the deposit attributable to the excluded person's share in the deposit would be excluded);
- (vii) a deposit held by a person as trustee on an active trust for the benefit of an excluded person only¹; and
- (viii) a deposit held by a person as a bare trustee on a bare trust or as an agent on an agency, or in a client account, for an excluded person (in the case where the deposit is so held for an excluded person and a non-excluded person (except where those persons carry on business in partnership), the portion of the deposit attributable to the excluded person's share in the deposit would be excluded)¹.

2. For the purposes of paragraph (vi) – (viii) above, “excluded person” means:-

- (i) a holding company of the bank, a subsidiary of the bank or a subsidiary of the holding company;

¹ The exclusions under (vii) and (viii) do not apply in relation to assessment of contributions payable by individual banks. This arrangement will obviate the need for banks to look beyond the trustee, agent or client account holder to ascertain whether the underlying beneficiary, principal or client is an excluded person. The ultimate objective is to minimise the reporting burden on banks during normal times.

- (ii) a director, controller, chief executive or manager of the bank, a subsidiary of the bank, a holding company of the bank or a subsidiary of the holding company;
- (iii) a multilateral development bank as defined in paragraph 1 of the Third Schedule to the Banking Ordinance (e.g. the International Bank for Reconstruction and Development, the Asian Development Bank, etc);
- (iv) an authorized institution; and
- (v) an overseas bank which is not an authorized institution in Hong Kong.

3. The above exclusions are largely based on the exclusions under the priority claim provisions in the Companies Ordinance.

Annex D

Chapter:	32	Title:	COMPANIES ORDINANCE	Gazette Number:	L.N. 119 of 2000
Section:	265	Heading:	Preferential payments	Version Date:	01/12/2000

- (1) In a winding up there shall be paid in priority to all other debts-
- (a) (Repealed 6 of 1984 s. 181)
 - (b) any-
 - (i) payment from the Protection of Wages on Insolvency Fund under section 18 of the Protection of Wages on Insolvency Ordinance (Cap 380) to any clerk or servant in respect of wages or salary or both in respect of services rendered to the company if such payment was made during a period of 4 months before the commencement of the winding up; and (Amended 48 of 1987 s. 8)
 - (ii) wages and salary (including commission provided that the amount thereof is fixed or ascertainable at the relevant date) of any clerk or servant in respect of services rendered to the company during the relevant period not exceeding, together with any payment under sub-paragraph (i), \$3000; (Replaced 12 of 1985 s. 29)
 - (c) any-
 - (i) payment from the Protection of Wages on Insolvency Fund under section 18 of the Protection of Wages on Insolvency Ordinance (Cap 380) to any labourer or workman in respect of wages, whether payable for time or for piece work, in respect of services rendered to the company if such payment was made during a period of 4 months before the commencement of the winding up; and (Amended 48 of 1987 s. 8)
 - (ii) wages of any labourer or workman, whether payable for time or for piece work, in respect of services rendered to the company during the relevant period not exceeding, together with any payment under sub-paragraph (i), \$3000; (Replaced 12 of 1985 s. 29)
 - (ca) any severance payment payable to an employee under the Employment Ordinance (Cap 57), not exceeding in respect of each employee \$6000; (Added 55 of 1974 s. 2)
 - (caa) any long service payment payable to an employee under the Employment Ordinance (Cap 57), not exceeding in respect of each employee \$8000; (Added 77 of 1985 s. 2)
 - (cb) any amount due in respect of compensation or liability for compensation under the Employees' Compensation Ordinance (Cap 282) accrued before the relevant date and, where the compensation is a periodical payment, the amount due in respect thereof shall be taken to be the amount of the lump sum for which the periodical payment could, if redeemable, be redeemed on an application being made for that purpose under the Employees' Compensation Ordinance (Cap 282), but this paragraph shall not apply to any amount due in respect of compensation or liability for compensation where the company has entered into a contract with a person carrying on accident insurance business in Hong Kong in respect of its liability under the Employees' Compensation Ordinance (Cap 282) for personal injury by accident to the employee to whom the compensation or liability for compensation is due or where the company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company; (Added 4 of 1977 s. 2. Amended 6 of 1984 s. 259)
 - (cc) any wages in lieu of notice payable to an employee under the Employment Ordinance

- (Cap 57), not exceeding in respect of each employee one month's wages or \$2000 whichever is the lesser; (Added 4 of 1977 s. 2)
- (cd) all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his right) on the termination of his employment before or by the effect of the winding-up order or resolution; (Added 6 of 1984 s. 181)
- (ce) any payment from the Employees Compensation Assistance Fund under Part IV of the Employees Compensation Assistance Ordinance (Cap 365) representing an amount due by the company in respect of compensation or liability for compensation under the Employees' Compensation Ordinance (Cap 282) accrued before the relevant date; (Added 54 of 1991 s. 47)
- (cf) any amount of unpaid contribution or any amount deemed to be unpaid contribution calculated in accordance with rules made under section 73(1)(n) of the Occupational Retirement Schemes Ordinance (Cap 426) which should have been paid by the company being wound up in accordance with the terms of an occupational retirement scheme within the meaning of that Ordinance before the commencement of the winding up:
 Provided that where such amount exceeds \$50000 in respect of an employee, 50% of such part of the amount that exceeds \$50000 shall not be paid in priority to all other debts under this subsection; (Added 88 of 1992 s. 84)
- (cg) (without prejudice to any right or liability under a trust) any amount of salaries deducted by the company being wound up from its employees' salaries for the purpose of making contributions in respect of such employees to the funds of an occupational retirement scheme within the meaning of the Occupational Retirement Schemes Ordinance (Cap 426) which have not been paid into such funds; (Added 88 of 1992 s. 84)
- (ch) any amount of unpaid contribution under, or any amount of unpaid contribution calculated in accordance with, the Mandatory Provident Fund Schemes Ordinance (Cap 485) which should have been paid by the company being wound up in accordance with the provisions of that Ordinance before the commencement of the winding up:
 Provided that where such amount exceeds \$50000 in respect of an employee, 50% of such part of the amount that exceeds \$50000 shall not be paid in priority to all other debts under this subsection; (Added 80 of 1995 s. 49)
- (ci) any amount deducted by the company being wound up from the relevant income of its relevant employees for the purpose of making contributions in respect of such relevant employees to the approved trustee of a registered scheme within the meaning of the Mandatory Provident Fund Schemes Ordinance (Cap 485) which have not been paid to that approved trustee; (Added 80 of 1995 s. 49)
- (cj) any sum and interest thereon payable to the Mandatory Provident Fund Schemes Authority under section 17(7) of the Mandatory Provident Fund Schemes Ordinance (Cap 485); (Added 80 of 1995 s. 49)
- (d) all statutory debts due from the company to the Government at the relevant date and which became due and payable within 12 months next before that date. (Replaced 6 of 1984 s. 181. Amended 23 of 1999 s. 3)
- (da) (Repealed 30 of 1999 s. 18)⁺⁺
- (db) where the company being wound up is or was a bank and, at the commencement of the winding up, held deposits, the aggregate amount held on deposit, up to a maximum of \$100000, to each depositor, regardless of the number of his deposits; (Added 83 of 1995 s. 16)
- (e) where the company being wound up is an insurer, any sum payable to a person in respect of any claim (other than a claim for a refund of premium) made under or in accordance with a contract of insurance (but not a contract of reinsurance) effected by the insurer as

part of its general business carried on in or from Hong Kong, unless-

- (i) such sum is, under the contract or in the ordinary course of business, payable in a place outside Hong Kong where assets of the company are maintained and under the law of that place the claim in respect of which the sum is payable is, in the event of a winding up, accorded priority with respect to those assets over claims which under the contract or in the ordinary course of business are payable at any other place; or
 - (ii) the person to whom the sum is payable is entitled with respect to the claim to claim compensation under any scheme designed to secure compensation to persons in circumstances where the insurer becomes insolvent; (Added 79 of 1988 s. 8)
- (ea) where the company being wound up is an insurer, any payment from the Employees Compensation Assistance Fund under Part IV of the Employees Compensation Assistance Ordinance (Cap 365) representing a sum payable by the company to a person in respect of any claim (other than a claim for refund of premium) made under or in accordance with a contract of insurance issued for the purposes of Part IV of the Employees' Compensation Ordinance (Cap 282) effected by the insurer as part of its general business carried on in or from Hong Kong; unless such sum is, under the contract or in the ordinary course of business, payable in a place outside Hong Kong where assets of the company are maintained and under the law of that place the claim in respect of which the sum is payable is, in the event of a winding up, accorded priority with respect to those assets over claims which under the contract or in the ordinary course of business are payable at any other place; (Added 54 of 1991 s. 47)
- (f) where the company being wound up is an insurer, any sum payable (after offsetting the amount of any sums owing from the claimant) to a person in respect of any claim (other than a claim for a refund of premium) made under or in accordance with a contract of reinsurance effected by the insurer, as reinsurer, as part of its general business carried on in or from Hong Kong, unless such sum is, under the contract or in the ordinary course of business, payable in a place outside Hong Kong where assets of the company are maintained and under the law of that place the claim in respect of which the sum is payable is, in the event of a winding up, accorded priority with respect to those assets over claims which under the contract or in the ordinary course of business are payable at any other place. (Added 79 of 1988 s. 8)

(1A) Where the relevant date is on or after 1 June 1970 but before 1 April 1977, the sum of \$6000 shall be deemed to be substituted in each case for the sums of \$3000 referred to in paragraphs (b) and (c) respectively of subsection (1). (Added 41 of 1970 s. 2. Amended 4 of 1977 s. 2)

(1B) Where the relevant date is on or after 1 April 1977, the sum of \$8000 shall be deemed to be substituted in each case for the sums of \$3000 referred to in paragraphs (b) and (c) respectively, and for the sum of \$6000 referred to in paragraph (ca), of subsection (1). (Added 4 of 1977 s. 2)

(2) Subject to subsection (1)(b) and (c), where any payment on account of wages or salary, or severance payment, or long service payment or wages in lieu of notice payable under the Employment Ordinance (Cap 57), or accrued holiday remuneration, has been made to any clerk, servant, workman or labourer in the employment of a company out of money advanced by some person for that purpose, that person shall in a winding up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which that clerk, servant, workman or labourer would have been entitled to priority in the winding up has been diminished by reason of the payment having been made. (Amended 6 of 1984 s. 181; 12 of 1985 s. 29(3); 77 of 1985 s. 2)

(3) The debts specified in subsection (1)(b), (c), (ca), (caa), (cb), (cc), (cd), (ce), (cf), (cg), (ch), (ci) and (cj)- (Amended 55 of 1974 s. 2; 4 of 1977 s. 2; 6 of 1984 s. 181; 77 of 1985 s. 2; 54 of 1991 s. 47; 88 of 1992 s. 84; 80 of 1995 s. 49)

- (a) shall have priority over the debts specified in subsection (1)(d);
- (b) shall rank equally among themselves; and
- (c) shall be paid in full unless the assets are insufficient to meet them, in which case they

shall abate in equal proportions among themselves. (Replaced 41 of 1970 s. 2)

(3A) The debts specified in subsection (1)(d) shall have priority over the debts specified in subsection (1)(da), (db), (e), (ea) and (f). (Added 79 of 1988 s. 8. Amended 54 of 1991 s. 47; 10 of 1993 s. 2; 83 of 1995 s. 16)

(3AAA) The debts specified in subsection (1)(da) shall have priority over the debts specified in subsection (1)(db), (e), (ea) and (f). (Added 10 of 1993 s. 2. Amended 83 of 1995 s. 16)

(3AAAA) The debts specified in subsection (1)(db)-

(a) shall have priority over the debts in subsection (1)(e), (ea) and (f);

(b) shall rank equally among themselves; and

(c) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions among themselves. (Added 83 of 1995 s. 16)

(3AA) The debts specified in subsection (1)(e) and (ea)-

(a) shall have priority over the debts specified in subsection (1)(f);

(b) shall rank equally among themselves; and

(c) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions among themselves. (Added 79 of 1988 s. 8. Amended 54 of 1991 s. 47)

(3AB) The debts specified in subsection (1)(f)-

(a) shall rank equally among themselves; and

(b) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions among themselves. (Added 79 of 1988 s. 8)

(3B) The debts specified in subsection (1) shall, so far as the assets of the company available for payment of general creditors are insufficient to meet those debts, have priority over the claims of holders of debentures under any charge created as a floating charge by the company, and shall be paid accordingly out of any property comprised in or subject to the charge. (Added 41 of 1970 s. 2. Amended 10 of 1987 s. 9)

(4) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(5) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within 3 months next before the date of a winding-up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof. (Amended 41 of 1970 s. 2)

(5A) Any money paid under a charge under subsection (5) shall be a debt due from the company to the landlord or other person having distrained, and such debt shall be discharged so far as the assets are sufficient to meet it after payment of the debts specified in subsection (1) but before payment of the other debts proved in the winding up. (Added 41 of 1970 s. 2)

(5B) Where in any winding up assets have been recovered under an indemnity for costs of litigation given by certain creditors, or have been protected or preserved by the payment of moneys or the giving of indemnity by creditors, or where expenses in relation to which a creditor has indemnified a liquidator have been recovered, the court may, on the application of the Official Receiver or the liquidator or any such creditor, make such order as it deems just with respect to the distribution of those assets and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk run by them in so doing. (Added 6 of 1984 s. 181)

(5C) Any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period. (Added 6 of 1984 s. 181)

(5D) The deposits given priority under subsection (1)(db) do not include the following-

(a) terms deposits where the current term agreed to by the depositor at the most recent time it was negotiated exceeds 5 years;

(b) deposits made after the date of publication of a notice in the Gazette under section 28(2)(b)

of the Banking Ordinance (Cap 155) that the company has been removed from the register and has ceased to be a bank. (Added 83 of 1995 s. 16)

(5E) The priority given under subsection (1)(db) does not apply to money held on deposit where a depositor, after a bank ceases carrying on banking business and whether or not winding up proceedings have commenced at that time, assigns to another person his rights to a portion of the money on deposit in the depositor's name, if the effect of such an assignment is to increase the amount of money that will be eligible for priority under subsection (1)(db). (Added 83 of 1995 s. 16)

(5F) Deposits given priority under subsection (1)(db) do not include deposits made in the name of-

- (a) the Exchange Fund established under the Exchange Fund Ordinance (Cap 66);
- (b) a multilateral development bank as defined in paragraph 1 of the Third Schedule to the Banking Ordinance (Cap 155);
- (c) a holding company that holds all of the shares of the company being wound up, a subsidiary of the company being wound up or a subsidiary of the holding company;
- (d) a person who, at the commencement of the winding up, was a director, controller or manager of-
 - (i) the company being wound up;
 - (ii) a subsidiary of the company being wound up;
 - (iii) a holding company that holds all of the shares of the company being wound up or a subsidiary of the holding company;
- (e) an authorized institution as defined in the Banking Ordinance (Cap 155). (Added 83 of 1995 s. 16)

(6) In this section-

"accrued holiday remuneration" (累算的假日薪酬) includes, in relation to any person, all sums which, by virtue either of his contract of employment or of any enactment (including any order made or direction given under any Ordinance), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday had his employment with the company continued until he became entitled to be allowed the holiday;

"bank" (銀行) has the same meaning as in the Banking Ordinance (Cap 155); (Added 83 of 1995 s. 16)

"controller" (總監) has the same meaning as in the Banking Ordinance (Cap 155); (Added 83 of 1995 s. 16)

"deposit" (存款) and "depositor" (存戶) have the same meaning as in the Banking Ordinance (Cap 155); (Added 83 of 1995 s. 16)

"Employees Compensation Assistance Fund" (僱員補償援助基金) means the fund established by section 7 of the Employees Compensation Assistance Ordinance (Cap 365); (Added 54 of 1991 s. 47)

"general business" (一般業務) means insurance business not being long term business as defined in section 2(1) of the Insurance Companies Ordinance (Cap 41); (Added 79 of 1988 s. 8)

"insurer" (保險人) means a person carrying on insurance business; (Added 79 of 1988 s. 8)

"manager" (經理) has the same meaning as in the Banking Ordinance (Cap 155); (Added 83 of 1995 s. 16)

"Protection of Wages on Insolvency Fund" (破產欠薪保障基金) means the fund deemed to be established and continued in existence under section 6 of the Protection of Wages on Insolvency Ordinance (Cap 380); (Added 12 of 1985 s. 29(3))

"the relevant date" (有關日期) means-

- (a) in the case of a company ordered to be wound up compulsorily, the date of the appointment (or first appointment) of a provisional liquidator or, if no such appointment was made, the date of the winding-up order, unless in either case the company had commenced to be wound up voluntarily before that date; and

(b) in any case where paragraph (a) does not apply, the date of the commencement of the winding up;

"the relevant period" (有關期間) means-

(a) in a case where a company is being wound up by the court and the relevant date in the case of that company is a date other than the date of the commencement of the winding up, the period-

(i) beginning 4 months next before the commencement of the winding up and ending on the relevant date; or

(ii) beginning 4 months next before the last day of service within the meaning of section 16(4) of the Protection of Wages on Insolvency Ordinance (Cap 380) of any clerk or servant or labourer or workman, as the case may be, who has made an application for an ex gratia payment under section 15(1) of that Ordinance, and ending on that last day of service, (Replaced 68 of 1996 s. 5)

whichever is the earlier;

(b) in any case where paragraph (a) does not apply, the period-

(i) of 4 months next before the relevant date; or

(ii) beginning 4 months next before the last day of service within the meaning of section 16(4) of the Protection of Wages on Insolvency Ordinance (Cap 380) of any clerk or servant or labourer or workman, as the case may be, who has made an application for an ex gratia payment under section 15(1) of that Ordinance, and ending on that last day of service, (Replaced 68 of 1996 s. 5)

whichever is the earlier; (Replaced 48 of 1987 s. 8)

"statutory debt" (法定債項) means a debt the liability for which and the amount of which are determined by or under any provision in any Ordinance; (Amended 23 of 1999 s. 3)

"wages" (工資) includes, in relation to any person, any sum which, by virtue of his contract of employment, is payable to him as a Lunar New Year bonus, but does not include any accrued holiday remuneration. (Replaced 6 of 1984 s. 181)

(7) The Companies (Amendment) Ordinance 1984 (6 of 1984) shall not apply in the case of a winding up where the relevant date occurred before the commencement* of that Ordinance, and, in such a case, the provisions relating to preferential payments which would have applied if that Ordinance had not been enacted shall be deemed to remain in full force. (Added 6 of 1984 s. 181)

(8) The Fourth Schedule to the Protection of Wages on Insolvency Ordinance 1985 (12 of 1985) shall not apply in the case of a winding up where the date of the commencement of the winding up occurred before the commencement+ of that Ordinance, and, in such case, the provisions relating to preferential payments which would have applied if that Ordinance had not been enacted shall be deemed to remain in full force (Added 12 of 1985 s. 29(3))

(9) The Companies (Amendment) (No. 3) Ordinance 1988 (79 of 1988) shall not apply in the case of a winding up where the date of the commencement of the winding up occurred before the commencement of that Ordinance, and, in such a case, the provisions relating to preferential payments which would have applied if that Ordinance had not been enacted shall be deemed to remain in full force. (Added 79 of 1988 s. 8)

(10) Section 5(a) of the Protection of Wages on Insolvency (Amendment) Ordinance 1996 (68 of 1996) ("the amending Ordinance") shall not apply in the case of a winding up to which an application under section 15(1) of the Protection of Wages on Insolvency Ordinance (Cap 380) relates where such application is made before the commencement** of the amending Ordinance, and in such a case, the provisions relating to preferential payments which would have applied if the amending Ordinance had not been enacted shall be deemed to remain in full force. (Added 68 of 1996 s. 5)

[cf. 1929 c. 23 s. 264 U.K.]

* **Commencement date: 31 August 1984.**

- + Commencement date: 19 April 1985.
- ** Commencement date: 6 December 1996.
- ++ Note: Sections 265(1)(da) was repealed by the Companies (Amendment) Ordinance 1999 (30 of 1999). Section 43 of that Ordinance provides as follows-

"43. Savings

Despite the repeal of sections 265(1)(da), 290A, 290B and 290E of the principal Ordinance, those sections are to continue to have effect in relation to a company that has been struck off under section 290A of the principal Ordinance as if those sections had not been repealed."

Chapter:	155	Title:	BANKING ORDINANCE	Gazette Number:	L.N. 16 of 2003
Section:	120	Heading:	Official secrecy	Version Date:	01/04/2003

(1) Except as may be necessary for the exercise of any function under this Ordinance or for carrying into effect the provisions of this Ordinance, every person to whom this subsection applies- (Amended 64 of 1987 s. 26)

- (a) shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that may come to his knowledge in the exercise of any function under this Ordinance;
 - (b) shall not communicate any such matter to any person other than the person to whom such matter relates; and
 - (c) shall not suffer or permit any person to have access to any records in the possession, custody or control of any person to whom this subsection applies.
- (2) Subsection (1) shall apply to any person who is or has been-
- (a) a public officer;
 - (b) a person authorized by the Monetary Authority;
 - (c) the Advisor of an authorized institution; (Replaced 49 of 1995 s. 36)
 - (d) the Manager of an authorized institution; (Replaced 49 of 1995 s. 36)
 - (da) a person appointed under section 53G(5); (Added 49 of 1995 s. 36)
 - (e) a person appointed under section 117(2); and
 - (f) a person employed by or assisting a person to whom this subsection applies by virtue of paragraph (b), (c), (d), or (e),

who exercises or has exercised any function under this Ordinance.

(3) Subsection (1) shall not apply if the Manager of an authorized institution is required to comply with a notice to furnish returns and information under section 51 of the Inland Revenue Ordinance (Cap 112). (Replaced 49 of 1995 s. 36)

(4) No person who exercises any function in the course of an examination or investigation under section 47, 50, 55 or 117 or who receives reports, returns or information submitted under section 47, 50, 55, 56, 59, 63 or 64 shall be required to produce in any court any book, account or other document whatsoever or to divulge or communicate to any court any matter or thing coming under his notice in the exercise of his functions under this Ordinance, except as may be necessary in the course of a prosecution for any offence or of a winding-up by the Court of First Instance under section 122. (Amended 67 of

1992 s. 9; 25 of 1998 s. 2)

(5) Subsection (1) shall not apply-

- (a) to the disclosure of information in the form of a summary of similar information provided by a number of authorized institutions if the summary is so framed as to prevent particulars relating to the business of any particular authorized institution being ascertained from it;
- (b) to the disclosure of information with a view to the institution of, or otherwise for the purposes of, any criminal proceedings, whether under this Ordinance or otherwise;
- (c) in connection with any other legal proceedings arising out of this Ordinance;
- (d) to the disclosure of information to the police or the Independent Commission Against Corruption, at the request of the Secretary for Justice, relevant to the proper investigation of any criminal complaint; (Amended L.N. 362 of 1997)
- (e) to the disclosure of information by the Monetary Authority with a view to the institution of, or otherwise for the purposes of, any disciplinary proceedings relating to the exercise of his professional duties by an auditor or former auditor of an authorized institution or former authorized institution, whether or not the auditor or former auditor, as the case may be, was appointed under section 50, 59 or 63; (Replaced 43 of 1990 s. 9. Amended 67 of 1992 s. 9)
- (f) to the disclosure of information by the Monetary Authority to the Chief Executive, the Financial Secretary, an inspector appointed by the Financial Secretary to investigate the affairs of a company, a person holding an authorized statutory office or any public officer authorized by the Financial Secretary for the purposes of this paragraph where, in the opinion of the Monetary Authority- (Amended L.N. 96 of 1993; 68 of 1999 s. 3; L.N. 106 of 2002)
 - (i) it is desirable or expedient that information should be so disclosed in the interests of depositors or potential depositors or the public interest; or
 - (ii) such disclosure will enable or assist the recipient of the information to exercise his functions and it is not contrary to the interests of depositors or potential depositors or the public interest that the information should be so disclosed; (Replaced 95 of 1991 s. 40)
- (fa) to the disclosure of information by the Monetary Authority to the Securities and Futures Commission relating to-
 - (i) the carrying on of a regulated activity by a registered institution; or
 - (ii) the carrying on by an authorized institution of the business of receiving or holding client assets, within the meaning of Schedule 1 to the Securities and Futures Ordinance (Cap 571), of intermediaries, within the meaning of Schedule 1 to that Ordinance, of which the institution is an associated entity within the meaning of Schedule 1 to that Ordinance; (Added 6 of 2002 s. 12)
- (g) to the disclosure of information by the Monetary Authority to an auditor of an authorized institution or former authorized institution, or to a former auditor, for the purpose of enabling or assisting the Monetary Authority to discharge his functions under this Ordinance; (Replaced 43 of 1990 s. 9. Amended L.N. 276 of 1990; 95 of 1991 s. 40)
- (ga) to the disclosure of information-
 - (i) to any person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap 66); and
 - (ii) where such disclosure will enable or assist such person to assist the Monetary Authority in the performance of any of the functions referred to in that section; (Added 49 of 1995 s. 36)
- (h) subject to subsection (5D), to the disclosure of information by the Monetary Authority with the consent of-
 - (i) the person from whom the information was obtained or received; and

- (ii) where the information does not relate to such person, the person to whom it relates; or (Added 95 of 1991 s. 40)
- (i) to the disclosure of information which has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purpose for which, disclosure is not precluded by this section or section 121. (Added 95 of 1991 s. 40)
- (5A) For the purposes of subsection (5)(f), "authorized statutory office" (認可法定職位) means-
 - (a) the Insurance Authority under the Insurance Companies Ordinance (Cap 41); (Amended 10 of 1989 s. 65)
 - (b) the Securities and Futures Commission; or (Replaced 10 of 1989 s. 65)
 - (c) the Mandatory Provident Fund Schemes Authority established by section 6 of the Mandatory Provident Fund Schemes Ordinance (Cap 485). (Added 4 of 1998 s. 7)
 - (d) (Repealed 10 of 1989 s. 65)

(Added 68 of 1988 s. 2. Amended 4 of 1998 s. 7)
- (5B) The Legislative Council may, by resolution, amend subsection (5A). (Added 68 of 1988 s. 2)
- (5C) The Monetary Authority may attach a condition to any disclosure of information made pursuant to subsection (5)(b), (c), (d), (e), (f), (fa) or (ga) and shall attach a condition to any disclosure of information made pursuant to subsection (5)(g), that neither- (Amended 49 of 1995 s. 36; 6 of 2002 s. 12)
 - (a) the person to whom the information has been disclosed; nor
 - (b) any person obtaining or receiving the information (whether directly or indirectly) from the person referred to in paragraph (a),
 shall disclose that information to any other person without the consent of the Monetary Authority. (Added 95 of 1991 s. 40)
 - (5D) Subsection (5)(h) shall not operate to require the Monetary Authority to disclose in or in relation to any civil proceedings any information which he may disclose, or has disclosed, pursuant to that subsection. (Added 95 of 1991 s. 40. Amended 94 of 1993 s. 28)
 - (6) Any person who-
 - (a) contravenes subsection (1);
 - (b) aids, abets, counsels or procures any person to contravene subsection (1); or
 - (c) knowing that the condition referred to in subsection (5C) has been attached to a disclosure of information made pursuant to subsection (5), contravenes, or aids, abets, counsels or procures any person to contravene, that condition, (Added 95 of 1991 s. 40)
 commits an offence and is liable-
 - (i) on conviction upon indictment to a fine at tier 8 and to imprisonment for 2 years; or
 - (ii) on summary conviction to a fine at tier 5 and to imprisonment for 6 months. (Amended 4 of 1997 s. 27)
 - (7) Subsection (5)(a), (e) and (g) shall apply to and in relation to approved money brokers and former approved money brokers as it applies to and in relation to authorized institutions and former authorized institutions respectively, and the other provisions of this Ordinance shall be construed accordingly. (Added 4 of 1997 s. 17)

(Amended 3 of 1990 s. 46; 82 of 1992 s. 20)

Chapter:	155	Title:	BANKING ORDINANCE	Gazette Number:	L.N. 16 of 2003
Schedule:	8	Heading:	GROUNDS FOR REVOCATION OF AUTHORIZATION	Version Date:	01/04/2003

[sections 22(1) & 135(1)]

1. In this Schedule, "controller" (控權人) includes a minority shareholder controller.

*2. The Monetary Authority is satisfied that, if the authorized institution were not authorized and were to make an application under section 15 for authorization in respect of the business referred to in that section presently being carried on by it, section 16(2) would prohibit him from so authorizing it (but excluding the criteria specified in paragraphs 2(b) and 13 of the Seventh Schedule).

3. The Monetary Authority is satisfied that the authorized institution proposes to make, or has made, any composition or arrangement with its creditors or is insolvent or is being or has been wound up or is otherwise dissolved.

4. The authorized institution has made a report to the Monetary Authority under section 67 that it is likely to become unable to meet its obligations or is about to suspend payment or the Monetary Authority is satisfied that the institution is so unable or has suspended payment.

5. The Monetary Authority is satisfied that the authorized institution has not provided him, whether before or after being authorized, with such information of a material nature relating to it, and to any circumstances likely to affect its method of business, as is required under this Ordinance.

6. The Monetary Authority is satisfied that the authorized institution has provided him, whether before or after being authorized, with information which is, to a material extent, false, misleading or inaccurate, and whether or not such information was so provided pursuant to a requirement under this Ordinance.

7. The Monetary Authority is satisfied that the authorized institution has contravened any condition attached under section 16 of this Ordinance to its authorization.

8. The Monetary Authority is satisfied that the authorized institution has-

- (a) in the case of a bank, ceased to carry on banking business;
- (b) in any other case, ceased to carry on a business of taking deposits.

9. The objects of the authorized institution as stated in its memorandum and articles of association or other document constituting the company no longer include the object of-

- (a) in the case of a bank, carrying on banking business;
- (b) in any other case, carrying on a business of taking deposits.

10. The authorized institution has failed to pay any fee required by section 19 to be paid by it after being advised in writing by the Monetary Authority that it is contravening that section.

11. The authorized institution has failed to comply with any requirement under section 60 applicable to it after being advised in writing by the Monetary Authority that it is contravening that section.

12. In the case of an authorized institution which is a deposit-taking company or restricted licence bank, the institution has contravened section 14(1) or (3).
13. A person has become a controller of the authorized institution after having been served with a notice of objection, within the meaning of section 70, objecting to his becoming such a controller.
14. A person continues to be a controller of the authorized institution after having been served with a notice of objection, within the meaning of section 70 or 70A, objecting to his being such a controller.
15. A person has become or continues to be a chief executive or director of the authorized institution in contravention of section 71.
- 15A. A person has become or continues to be an executive officer of the authorized institution in contravention of section 71C. (Added 6 of 2003 s. 15)
16. The authorized institution is in contravention of section 74.
17. The authorized institution engages in business practices specified in a notice under section 82(1).
18. The Monetary Authority is satisfied that the interests of depositors or potential depositors of the authorized institution are in any other manner threatened by the institution continuing to be authorized.
19. The authorized institution requests in writing the Monetary Authority to revoke its authorization and the Monetary Authority is satisfied that the interests of depositors of the institution are or will be adequately safeguarded if he complies with that request.
20. The Monetary Authority is satisfied that the authorized institution engages in business practices which would be likely to prejudice the interests of Hong Kong as an international financial centre.
(Eighth Schedule added 49 of 1995 s. 52)

* **The operation of this paragraph is affected by the Banking Ordinance (Amendment of Seventh Schedule) Notice 2002 (L.N. 63 of 2002). See the transitional provision in section 2 of that Notice.**

Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	87	Heading:	Subrogation of recognized investor compensation company to rights, etc. of claimant on payment from compensation fund	Version Date:	01/04/2003

(1) Where a recognized investor compensation company makes any payment out of the

compensation fund in respect of any claim made under rules made under Part XII-

- (a) the company shall be subrogated, to the extent which that payment bears to the loss sustained (without taking into account any compensation paid or payable out of the compensation fund for the loss) by the claimant by reason of the default on which the claim was based, to all the rights and remedies of the claimant in relation to the loss; and
- (b) the respective rights of the claimant and the company in bankruptcy or winding up or by legal proceedings or otherwise to receive in respect of the loss-
 - (i) any sum out of the assets of the person concerned who is in default; or
 - (ii) any property held on trust by that person for the claimant, shall rank equally.

(2) All assets (whether in cash or otherwise) recovered by the recognized investor compensation company under subsection (1) shall be dealt with in such manner as the Commission may direct and shall become part of the compensation fund.

Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	243	Heading:	Subrogation of the Commission to rights, etc. of claimant on payment from compensation fund	Version Date:	01/04/2003

(1) Where the Commission makes any payment out of the compensation fund in respect of any claim for compensation made under rules made under this Part-

- (a) the Commission shall be subrogated, to the extent which that payment bears to the loss sustained (without taking into account any compensation paid or payable out of the compensation fund for the loss) by the claimant by reason of the default on which the claim was based, to all the rights and remedies of the claimant in relation to the loss; and
- (b) the respective rights of the claimant and the Commission in bankruptcy or winding up or by legal proceedings or otherwise to receive in respect of the loss-
 - (i) any sum out of the assets of the person concerned who is in default; or
 - (ii) any property held on trust by that person for the claimant, shall rank equally.

(2) All assets (whether in cash or otherwise) recovered by the Commission under subsection (1) shall become part of the compensation fund.

Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	378	Heading:	Preservation of secrecy, etc.	Version Date:	01/04/2003

PART XVI

MISCELLANEOUS

Division 1-Secrecy, conflict of interests, and immunity

- (1) Except in the performance of a function under, or for the purpose of carrying into effect or doing anything required or authorized under, any of the relevant provisions, a specified person-
 - (a) shall preserve and aid in preserving secrecy with regard to any matter coming to his knowledge by virtue of his appointment under any of the relevant provisions, or in the performance of any function under or in carrying into effect any of the relevant provisions, or in the course of assisting any other person in the performance of any function under or in carrying into effect any of the relevant provisions;
 - (b) shall not communicate any such matter to any other person; and
 - (c) shall not suffer or permit any other person to have access to any record or document which is in his possession by virtue of the appointment, or the performance of any such function under or the carrying into effect of any such provisions, or the assistance to the other person in the performance of any such function under or in carrying into effect any such provisions.
- (2) Nothing in subsection (1) applies to-
 - (a) the disclosure of information which has already been made available to the public;
 - (b) the disclosure of information with a view to the institution of, or otherwise for the purposes of, any criminal proceedings, or any investigation carried out under the laws of Hong Kong, in Hong Kong;
 - (c) the disclosure of information for the purpose of seeking advice from, or giving advice by, counsel or a solicitor or other professional adviser acting or proposing to act in a professional capacity in connection with any matter arising under any of the relevant provisions;
 - (d) the disclosure of information by a person in connection with any judicial or other proceedings to which the person is a party;
 - (e) the disclosure of information in accordance with an order of a court, or in accordance with a law or a requirement made under a law;
 - (f) the communication of any information or opinion to which section 381(1) applies (whether with or without reference to section 381(2))-
 - (i) to the Commission in the manner described in section 381(1);
 - (ii) where section 381(4) applies, to the Insurance Authority or the Monetary Authority (as the case may be) in the manner described in section 381(4).
- (3) Notwithstanding subsection (1), the Commission may disclose information-
 - (a) in the form of a summary compiled from any information in the possession of the Commission, including information provided by persons under any of the relevant provisions, if the summary is so compiled as to prevent particulars relating to the business or identity, or the trading particulars, of any person from being ascertained from it;
 - (b) to a person who is a liquidator appointed under the Companies Ordinance (Cap 32);
 - (c) to the Market Misconduct Tribunal;
 - (d) to the Securities and Futures Appeals Tribunal;
 - (e) to the Monetary Authority, if-
 - (i) the information relates to-
 - (A) any business of a registered institution which constitutes a regulated activity for which the registered institution is registered; or

- (B) any business of an associated entity that is an authorized financial institution, which is that of receiving or holding client assets of the intermediary of which the associated entity is an associated entity; or
 - (ii) in the opinion of the Commission the condition specified in subsection (5) is satisfied;
 - (f) if in the opinion of the Commission the condition specified in subsection (5) is satisfied, to-
 - (i) the Chief Executive;
 - (ii) the Financial Secretary;
 - (iii) the Secretary for Justice;
 - (iv) (Repealed L.N. 106 of 2002);
 - (v) the Insurance Authority;
 - (vi) the Registrar of Companies;
 - (vii) the Official Receiver;
 - (viii) the Mandatory Provident Fund Schemes Authority;
 - (ix) the Privacy Commissioner for Personal Data;
 - (x) the Ombudsman;
 - (xi) a public officer authorized by the Financial Secretary under subsection (12);
 - (xii) an inspector appointed by the Financial Secretary to investigate the affairs of a corporation;
 - (xiii) a recognized exchange company;
 - (xiv) a recognized clearing house;
 - (xv) a recognized exchange controller;
 - (xvi) a recognized investor compensation company;
 - (xvii) a person authorized to provide authorized automated trading services under section 95(2);
 - (g) if in the opinion of the Commission the condition specified in subsection (5) is satisfied-
 - (i) to an authority or regulatory organization outside Hong Kong which, or to a companies inspector outside Hong Kong who, in the opinion of the Commission satisfies the requirements referred to in subsection (6)(a) and (b);
 - (ii) to-
 - (A) the Hong Kong Society of Accountants;
 - (B) any other body prescribed by rules made under section 397 for the purposes of this subparagraph,
 - with a view to its taking of, or otherwise for the purposes of, any disciplinary action against any of its members;
 - (h) to a person who is or was an auditor appointed under any provision of this Ordinance, for the purpose of enabling or assisting the Commission to perform its functions under any of the relevant provisions;
 - (i) where the information is obtained by an investigator under section 183, to-
 - (i) the Financial Secretary;
 - (ii) the Secretary for Justice;
 - (iii) the Commissioner of Police;
 - (iv) the Commissioner of the Independent Commission Against Corruption;
 - (v) the Market Misconduct Tribunal;
 - (vi) the Securities and Futures Appeals Tribunal;
 - (j) for the purpose of, or otherwise in connection with, an audit required by section 16;
 - (k) with the consent of the person from whom the information was obtained or received and, if the information relates to a different person, also with the consent of the person to whom the information relates.
- (4) Notwithstanding subsection (1), a person who is or was an auditor appointed in relation to a

licensed corporation or an associated entity of a licensed corporation under section 159 or 160, and a person who is or was an employee or agent of such auditor, may disclose information obtained or received by him in the course of performing his duties as such auditor or as an employee or agent of such auditor (as the case may be)-

- (a) for the purposes of any judicial or other proceedings arising out of the performance of his duties as such auditor or as an employee or agent of such auditor (as the case may be);
 - (b) in the case of a person who is or was an employee or agent of an auditor, to the auditor.
- (5) The condition referred to in subsection (3)(e), (f) and (g) is that-
- (a) it is desirable or expedient that the information should be disclosed pursuant to subsection (3)(e), (f) or (g) (as the case may be) in the interest of the investing public or in the public interest; or
 - (b) the disclosure will enable or assist the recipient of the information to perform its or his functions and it is not contrary to the interest of the investing public or to the public interest that the information should be so disclosed.
- (6) Where the Commission is satisfied, for the purposes of subsection (3)(g)(i), that an authority, regulatory organization or companies inspector outside Hong Kong-
- (a) performs any function similar to a function of the Commission or the Registrar of Companies, or regulates, supervises or investigates banking, insurance or other financial services or the affairs of corporations; and
 - (b) is subject to adequate secrecy provisions,

the Commission shall as soon as reasonably practicable thereafter cause the name of the authority, regulatory organization or companies inspector (as the case may be) to be published in the Gazette.

(7) Where information is disclosed pursuant to subsection (1), or in any of the circumstances described in subsection (2), (3) or (4) (other than subsections (2)(a), (3)(a), (g)(i) and (k) and (4)(b))-

- (a) the person to whom that information is so disclosed; or
- (b) any other person obtaining or receiving the information, whether directly or indirectly, from the person referred to in paragraph (a),

shall not disclose the information, or any part thereof, to any other person, unless-

- (i) the Commission consents to the disclosure;
- (ii) the information or the part thereof (as the case may be) has already been made available to the public;
- (iii) the disclosure is for the purpose of seeking advice from, or giving advice by, counsel or a solicitor or other professional adviser acting or proposing to act in a professional capacity in connection with any matter arising under any of the relevant provisions;
- (iv) the disclosure is in connection with any judicial or other proceedings to which the person or the other person referred to in paragraph (a) or (b) (as the case may be) is a party; or
- (v) the disclosure is in accordance with an order of a court, or in accordance with a law or a requirement made under a law.

(8) Where information is disclosed to an auditor in the circumstances described in subsection (4)(b)-

- (a) the auditor; or
- (b) any other person obtaining or receiving the information, whether directly or indirectly, from the auditor,

shall not disclose the information, or any part thereof, to any other person, unless-

- (i) in the case of the auditor, the disclosure is for the purpose described in subsection (4)(a);
- (ii) the Commission consents to the disclosure;
- (iii) the information or the part thereof (as the case may be) has already been made available to the public;
- (iv) the disclosure is for the purpose of seeking advice from, or giving advice by, counsel or a solicitor or other professional adviser acting or proposing to act in a professional capacity in connection with any matter arising under any of the relevant provisions;

- (v) the disclosure is in connection with any judicial or other proceedings to which the auditor or the other person referred to in paragraph (a) or (b) (as the case may be) is a party; or
- (vi) the disclosure is in accordance with an order of a court, or in accordance with a law or a requirement made under a law.

(9) The Commission, in disclosing any information in any of the circumstances described in subsection (3) or in granting any consent pursuant to subsection (7)(i) or (8)(ii), may impose such conditions as it considers appropriate.

(10) A person who contravenes subsection (1) commits an offence and is liable-

- (a) on conviction on indictment to a fine of \$1000000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(11) Where a person discloses any information in contravention of subsection (7) or (8) and, at the time of the disclosure-

- (a) in the case of a contravention of subsection (7), he-
 - (i) knew or ought reasonably to have known that the information was previously disclosed to him or any other person (as the case may be) pursuant to subsection (1), or in any of the circumstances described in subsection (2), (3) or (4) (other than subsections (2)(a), (3)(a), (g)(i) and (k) and (4)(b)); and
 - (ii) had no reasonable grounds to believe that subsection (7)(i), (ii), (iii), (iv) or (v) applies to the disclosure of the information by him; or
- (b) in the case of a contravention of subsection (8), he-
 - (i) knew or ought reasonably to have known that the information was previously disclosed to him or an auditor (as the case may be) in the circumstances described in subsection (4)(b); and
 - (ii) had no reasonable grounds to believe that subsection (8)(i), (ii), (iii), (iv), (v) or (vi) applies to the disclosure of the information by him,

he commits an offence and is liable-

- (i) on conviction on indictment to a fine of \$1000000 and to imprisonment for 2 years; or
- (ii) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(12) The Financial Secretary may authorize any public officer as a person to whom information may be disclosed under subsection (3)(f)(xi).

(13) Any matter published under subsection (6) is not subsidiary legislation.

(14) For the avoidance of doubt, it is hereby declared that subsection (1) does not preclude the disclosure of information under a reprimand under section 194(1)(iii) or 196(1)(ii).

(15) In this section-

"companies inspector" (公司審查員), in relation to a place outside Hong Kong, means a person whose functions under the laws of that place include the investigation of the affairs of a corporation carrying on business in that place;

"specified person" (指明人士) means-

- (a) the Commission;
- (b) any person who is or was a member, an employee, or a consultant, agent or adviser, of the Commission; or
- (c) any person who is or was-
 - (i) a person appointed under any of the relevant provisions;
 - (ii) a person performing any function under or carrying into effect any of the relevant provisions; or
 - (iii) a person assisting any other person in the performance of any function under or in carrying into effect any of the relevant provisions.

Chapter:	571T	Title:	SECURITIES AND FUTURES (INVESTOR COMPENSATION- CLAIMS) RULES	Gazette Number:	L.N. 215 of 2002; L.N. 12 of 2003
Section:	4	Heading:	Making a claim for compensation	Version Date:	01/04/2003

- (1) Where a qualifying client of a specified person sustains a loss-
 - (a) as a result of a default committed on or after the appointed day by-
 - (i) the specified person; or
 - (ii) an associated person of the specified person;
 - (b) in relation to-
 - (i) specified securities or futures contracts; or
 - (ii) related assets,

the qualifying client may claim compensation from the compensation fund in respect of such loss.

(2) A claim under subsection (1) may include a claim for the costs reasonably incurred in and incidental to the making and proving of the claim.

(3) A claim under subsection (1) shall be lodged with the Commission-

- (a) if a notice under section 3(1) has been published, on or before the date specified in the notice; or
- (b) if no such notice has been published, within 6 months after the day the claimant first became aware of the default giving rise to the claim.

(4) A claim which is not lodged within the time limit provided in subsection (3) is barred, unless the Commission determines otherwise.

Detailed account of the proposed major features of the Scheme

(A) Establishment of the Deposit Protection Board

- (a) The majority of the opinions received from the consultation exercise supported the idea that the DPS in Hong Kong should confine its role to that of a “pay box” to reduce the cost of deposit protection and to avoid duplication of functions with the HKMA as the banking regulator. There was also support for the establishment of a separate legal entity to oversee the operations of the scheme in order to offer greater accountability and transparency to the public.
- (b) In view of this, it is proposed that a Deposit Protection Board should be established by legislation to administer the DPS in Hong Kong. Consistent with the majority views expressed in the public consultation, its functions would be confined to collection of contributions, managing the funds of the DPS, assessing claims made against the fund, making payments to depositors and recovering the payments from the assets of the failed bank.
- (c) It is proposed that the Board would consist of 7 to 10 members appointed by the Chief Executive, comprising 4 to 7 unofficial members and three ex-officio members, namely the Secretary for Financial Services and the Treasury (or his representative), the Monetary Authority (or his representative) and the Chief Executive Officer of the Board. The unofficial members would thus be in majority. The Chairman of the Board would also be appointed by the Chief Executive from the unofficial members. This would enhance the independence of the Board.

(B) Governance and accountability arrangements

- (a) The Board would observe high standards of corporate governance.

Its books and accounts would be subject to regular audits. Its annual budget would need to be approved by the Financial Secretary. The Board would also be required to prepare an annual report and statement of accounts and lay them before the Legislative Council every year.

(C) The Board to perform its functions through the HKMA

- (a) There would be provisions under the DPS legislation that require the Board to perform its functions through the HKMA. This is to achieve cost saving as the Board could leverage on the existing IT, staffing and office administration resources of the HKMA. It would also alleviate the Board of the need to maintain a staff level that is required to handle the workload in the event of a bank failure but otherwise not needed in normal times. Under this arrangement, the HKMA would essentially be acting as an agent of the Board in administering the scheme and would, in this respect, be subject to the oversight of the Board.
- (b) In keeping with the user-pays principle, the Financial Secretary would be given the power to direct that the costs incurred by the HKMA in administering the scheme should be recovered from the funds of the DPS (DPS Fund) at a rate determined by him. A similar arrangement is also found in the Protection of Wages on Insolvency Fund Scheme.
- (c) This arrangement has the support of the Hong Kong Association of Banks, the Consumer Council and is approved by the Exchange Fund Advisory Committee.

(D) Membership of the DPS

- (a) Participation by licensed banks in the DPS would be mandatory. This is an essential design feature to ensure the viability of the

scheme and to avoid the problem of adverse selection whereby only riskier banks would choose to join the scheme.

- (b) The HKMA has assessed the DTC Association's suggestion that restricted licence banks (RLBs) and deposit-taking companies (DTCs) should not be excluded from the scheme but should have the option to decide whether to join. Given that RLBs and DTCs are not allowed to take small deposits under the three-tier authorization system, it is considered that there is not a strong case for including these two tiers of institutions in a scheme designed to protect only small depositors. In any case, the entry criteria for a banking licence have recently been relaxed. An RLB or DTC which wishes to take deposits protected under the DPS may seek to upgrade to licensed bank status. For these reasons, the HKMA remains convinced that membership of the DPS should be confined to licensed banks.

- (c) An overseas incorporated bank may apply for exemption from participating in the scheme if the deposits taken by the bank's Hong Kong offices are protected by a scheme in the bank's home jurisdiction and the scope and level of protection afforded by that scheme are not less than those afforded to such deposits by the DPS in Hong Kong. However, an exempted bank is required to inform its depositors or prospective depositors that it is not a member of the scheme and therefore any deposits with it are not protected by the DPS in Hong Kong. The bank should also provide details of the protection offered by its home jurisdiction scheme including the level of protection and the types of deposits protected. In the case where an existing member of the scheme is subsequently granted exemption from participation, it should allow its depositors to uplift their deposits without being subject to any early withdrawal penalty. The latter requirement is introduced in response to a comment of the Consumer Council.

(E) Funding

- (a) The DPS would be funded by contributions levied on the banks. A DPS Fund would be established for this purpose. The target fund size is proposed to be set at 0.3% of the banking sector's total amount of protected deposits, which is equivalent to approximately \$1.6 billion based on the level of protected deposits as at August 2002. In considering the appropriate size of the fund, the aim is to cover potential losses that might be suffered by the scheme¹, not the liquidity required for making payouts to depositors. The latter would be met by borrowings from the Exchange Fund (see point (d) below) or the market.
- (b) Faced with increasing pressure on bank profitability, HKAB has queried whether there is scope for the target fund size to be reduced. The HKMA has considered HKAB's comment and decided to maintain the target fund size. The reason is that according to HKMA's estimate, the proposed target fund size is consistent with international standards on the adequacy of deposit protection funds. Any significant reduction of the target fund size might undermine the credibility of the scheme.
- (c) The range of the target fund would be set at +15% and – 30% of the target fund size. Where the balance of the DPS Fund is outside the target fund range, a rebate or surcharge would be triggered in order to bring the fund back within the target range.
- (d) The Exchange Fund would provide back-up funding to enable the Board to make prompt payment to depositors. The funding provided by the Exchange Fund would represent a loan which would be repaid by the Board and would carry a rate of interest to be determined by the FS.
- (e) The target fund would be built up in approximately 5 years. The

¹ Losses will mainly come from two sources: (i) recovery shortfall, i.e. inability to recover amounts paid to depositors from the assets of the failed bank; and (ii) finance cost on the borrowing the DPS has undertaken to finance the payout for the period until the funds are recovered from the failed bank's assets.

HKMA has considered HKAB's suggestion to extend the proposed fund build-up period of 5 years. Assuming that the Bill is enacted before the end of 2003, it is expected that the Board could be established in the first half of 2004 and the scheme could commence operations in 2005. Based on this projection, the proposed target fund size would only be reached in 2009/10. This seems to be a sufficiently lengthy period for the DPS Fund to build up. We therefore do not recommend lengthening the fund build-up period.

(F) Assessment of contributions

- (a) There was support from the public consultation for the adoption of a differential system for assessment of contributions so that banks would be rewarded for having strong management and good asset quality, thus helping to address the potential moral hazard associated with a DPS. In view of this, it is proposed that a differential system based on "CAMEL rating²" would be used to assess the amount of contributions payable by individual banks. The rates of contribution payable by banks before and after the first year in which the target fund size has been reached would be as follows:-

Banks with CAMEL Rating	Rate of contribution payable (as percentage of the balance of protected deposits)	
	Until the 1st year in which the target fund size is reached	After the 1 st year in which the target fund size is reached
1	0.05%	0.0075%
2	0.08%	0.01%
3	0.11%	0.015%
4 & 5	0.14%	0.02%

² The "CAMEL Rating" is a supervisory rating currently adopted by the HKMA to assess the financial strength and overall soundness of an authorized institution in the areas of Capital, Asset quality, Management, Earning, and Liquidity.

- (b) We have considered HKAB's suggestion that the Government should provide an initial contribution to the DPS Fund and absorb the administration cost of the scheme. In keeping with the user-pays principle, we still consider it inappropriate for the Government to provide any form of direct subsidies to the scheme. This is consistent with the approach adopted by other leading schemes such as the Canada Deposit Insurance Corporation, where government support for the deposit protection scheme is confined mainly to the provision of back-up liquidity in the event of a bank failure. Nevertheless, in view of the industry's concern about cost, we have already taken on board HKAB's suggestion that the DPS should outsource the day-to-day administration of the scheme to the HKMA as a means of cost saving (see section C above).

(G) Investment of the Fund

- (a) In keeping with the need for capital preservation and liquidity, the DPS Fund would be allowed to invest only in (a) deposits with the Exchange Fund; (b) Exchange Fund bills; (c) US Treasury bills; and (d) exchange rate and interest rate contracts, including derivative products, which are necessary for hedging purposes.

(H) Scope and level of compensation

- (a) Both Hong Kong dollar and foreign currency deposits would be protected by the scheme. If a person is entitled to compensation under the scheme in respect of protected deposits that he holds in his own right or that is held for him by a depositor as a bare trustee or agent, or in a client account, the maximum amount of compensation to which he is entitled would be \$100,000. If a person is entitled to compensation under the scheme in respect of protected deposits that he holds as a trustee under one trust, the maximum amount of compensation to which he is so entitled would be \$100,000. This would cover the principal amount of a

protected deposit and the interest accrued on that deposit, normally up to the date of appointment of a provisional liquidator for the failed bank³. The coverage limit would be reviewed and adjusted as appropriate in the future. There was support from the public consultation (e.g. the banks and the Consumer Council) for the coverage limit to be initially set at HK\$100,000. It is estimated that 84% of the depositors in Hong Kong would have their total deposits fully protected under the scheme.

(I) Netting and payout to depositors

- (a) In determining the amount of deposit protection payouts, it is proposed that a depositor's liabilities to the failed bank would be netted off against his protected deposits in determining his entitlement to compensation under the scheme. This is consistent with the current insolvency law and would reduce the risk that the DPS would pay out more to depositors than it could recover in a liquidation (owing to potential differences in its netting approach from that of the liquidator). The netting approach is supported by the Standing Committee on Company Law Reform, the Department of Justice, the Official Receiver and major insolvency practitioners.

- (b) From the perspective of restoring depositor's confidence in the banking system and averting a banking crisis at an early stage, it is proposed that the Board would be given the power to make interim payments to depositors where there is uncertainty as to the exact amount of compensation payable to a depositor or where the time required to ascertain such amount would be so long as to unduly delay the payment to the depositor.

³ However, there may be situation where this may not be appropriate, e.g. where the Court has decided not to appoint a provisional liquidator, or when the Board is uncertain whether a provisional liquidator will be appointed, or where to wait for such appointment would unduly delay payment by the DPS. In such circumstances, the interest would be accrued up to the date on which payout by the DPS is triggered.

- (c) The DPS would be entitled to recover the amount paid to the depositor of a failed bank out of the depositor's ultimate claim on the assets of the bank in a liquidation. The DPS would have the benefit of the priority status afforded in the liquidation to the deposits in respect of which it had made a payment.

(J) Establishment of a Deposit Protection Appeals Tribunal

- (a) The decisions and assessments of the Board, particularly those relating to the determination of compensation payments, would be subject to the review of an independent tribunal to be known as the "Deposit Protection Appeals Tribunal". The Tribunal would be chaired by a judge or a retired judge. All members of the Tribunal would be appointed by the Chief Executive. The decisions of the Tribunal would be final except on a point of law.

Economic and Financial Implications

Economic Implications

The establishment of a DPS will involve additional cost, both for according the protection cover and for administering the scheme. Yet for that cost, depositors will enjoy a better measure of explicit protection on all or part of their bank deposit funds. The extent to which the additional cost, which will be met with a levy on the protected deposits with individual member banks, is to be shifted to the depositors or else absorbed by the banks themselves is yet to be seen. Setting a ceiling at \$100,000 will enable the DPS to lay the focus on protecting primarily the smaller depositors, to contain the overall cost of the system, and to limit the moral hazard of extending the protection too widely.

2. Corresponding to the cost of implementing the DPS, resources will be entailed, stemming from which certain job opportunities will be generated. There will be compliance efforts for the member banks, which can be expected to settle when the system has bedded down.

3. In general, as the DPS will help enhance the stability of the local banking system against a fluid and sometimes rather volatile external financial and economic environment, it will be beneficial to the well being of the Hong Kong economy. Also, with the growing international trend in favour of an explicit DPS, it will help uphold Hong Kong's status as an international financial centre.

Financial and Civil Service Implications

4. The HKMA will administer the DPS on behalf of the Board and recover any administration expenses incurred from the DPS Fund. The Exchange Fund will also provide back-up credit facilities to the DPS for liquidity purposes to enable the Board to make prompt payment to depositors. Such facilities will be charged at an interest rate to be determined by the Financial Secretary as the Controller of the Exchange Fund.

5. As regards the setting up of the Deposit Protection Appeals Tribunal, the operating cost for which will also be recovered from DPS Fund except the service fee for the Chairman of the Tribunal which should be absorbed by the

Government. In normal times, we expect the workload of the Tribunal to be minimal. As such, unless in the event of bank failures, we do not consider it necessary to engage the Chairman on a full-time basis. Any financial resources required in relation to the service provided by the Chairman will be met from the existing resources of the Financial Services and the Treasury Bureau.