

whether a particular invitation to the public or representation is or is not an advertisement as such.

However, the distinction between 'advertisements' as such and other invitations is still of relevance in relation to 'advertisements issued by authorised institutions'. Under s 95 below, the Monetary Authority may only exercise control over an authorised institution's 'advertisement' as such.

For ancillary provisions relating to the issue of advertisements, see s 2(2)(b), (c) and (d); Offence to issue advertisements and documents relating to deposits, see s 92 below; False, etc advertisements by authorised institution, see s 95 below; Representations in advertisements that a person is carrying on banking business in Hong Kong, see s 97(1)(b) below.

[2.04] Advisor

For an appointment of Advisor, see s 52(1)(B) below; A person appointed as an Advisor of an authorised institution may hold an appointment under s 5A(3) of the Exchange Fund Ordinance, see s 52(3H) below; Notification of appointment of Auditor, see s 53A below; Duration of appointment of Auditor, see s 53F; Resignation of Auditor, see s 53G(1) below; Revocation of appointment of Auditor, see s 53G(2) below; Appointment of Auditor to fill vacancy, see s 53G(3) below; Advisor may appoint such technical and professional persons, see s 53G(5) below. See s 52 below for appointment of Advisor.

[2.05] Approval

Determination of application for approval to act as a money broker, see s 118C below.

[2.06] Approved currency

The purpose of this subsection is to ensure that the various capital requirements could be met by authorised institutions whose balance sheets are denominated otherwise than in Hong Kong dollars.

Where an authorised institution presents its financial statements in one currency but its share capital is denominated in another currency, it may be that both currencies have to be 'approved currencies'.

Where a company's share capital is denominated in more than one currency (compare *Re Scandinavian Bank Group Plc* [1987] 2 All ER 70), it seems possible to comply with the capital requirements, even if one or more of those currencies is not an approved currency, so long as the Hong Kong dollar equivalent of that part of its share capital denominated in approved currency meets the required minimum under Sch 7 below.

The emphasis is on the free convertibility of the currency of denomination of share capital of the authorised institution, but not on the free convertibility of the assets represented thereby.

In determining the Hong Kong dollar equivalent of share capital in an approval

currency, the currency translation must be made at the relevant time.

For definition of 'Monetary Authority', see s 2(1); Minimum criteria for authorisation, see Sch 7 below.

[2.07] Approved money broker

See ss 118A–118D below for application for approval to act as an approved money broker. For examination and investigation of authorised institutions, see s 55; Communication by auditor with Monetary Authority, see s 61 below; Returns and information to be submitted to the Monetary Authority, see s 63 below; Only approved money brokers may act as money brokers, see s 118A below; Application for approval, see s 118B below; Determination of application for approval, see s 118C below; Revocation of approval, see s 118D below; Procedure on and effect of revocation, see s 118E below; Fees payable by approved money broker, see s 118F below; Official secrecy, see s 120 below; Appeals, see s 132A below; Monetary Authority to consult, etc, before attaching conditions to certificate of approval, see s 134B below.

[2.08] Associate

For definition of majority shareholder controller, see s 2(1); Definition of minority shareholder controller, see s 2(1); Restrictions on and sale of shares, see s 70B below.

[2.09] Auditor

There are various references in this Ordinance to the appointment or approval of an 'auditor'. Under the Companies Ordinance (Cap 622), an appointment in a firm's name is deemed to be an appointment of those persons who from time to time during the currency of the appointment are professional accountants holding practicing certificates (s 399 of the Companies Ordinance (Cap 622)). It is questionable whether a similar rule applies to an appointment of an auditor by the Monetary Authority under s 59(2).

Under s 2(1) of the Professional Accountants Ordinance (Cap 50), a person is 'professional accountant' if he has been registered as such under s 22 of that Ordinance.

A firm may be regarded as a professional account if all the partners are registered as professional accountants and all the partners resident in Hong Kong hold valid practising certificates.

Practising certificates may be issued to a professional accountant under s 30 of the Professional Accountants Ordinance (Cap 50) if he has the requisite experience and can satisfy the Council of Hong Kong Society of Accountants that he is ordinarily resident in Hong Kong and possess such local experience and knowledge of local law and practice as the Council may consider necessary (see s 29A of the Professional Accountants Ordinance (Cap 50)).

For conditions regarding overseas branches and overseas representative offices,

see s 50 below; Audit, see s 59 below; Notification in respect of auditors, see s 59A below; Communication by auditor with Monetary Authority, see s 61 below; Returns and information to be submitted to the Monetary Authority, see s 63 below; Official secrecy, see s 120 below.

[2.10] Authorisation

For application for authorisation, see s 15 below; Grant or refusal of authorisation, see s 16 below; Variation of authorisation, see s 18 below; Revocation of authorisation, see s 22 below; Procedure on and effect of revocation of authorisation, see s 23 below; Transfer of authorisation, see s 28 below. See s 15 below for application for authorisation.

[2.11] Authorised institution

For banking business restricted to licensed banks, see s 11 below; Restriction on business of taking deposits, see s 12 below; Deposit-taking company not to take deposits less than specified sum, see s 14 below; Only authorised institution may issue, etc multi-purpose cards, see s 14A below; Application for authorisation, see s 15 below; Grant or refusal of authorisation, see s 16 below; Variation of authorisation, see s 18; Revocation of authorisation, see s 22 below; Procedure on and effect of revocation of authorisation, see s 23 below; Transfer of authorisation, see s 28 below.

See s 15 below for application for authorisation to carry on banking business or deposit-taking business in Hong Kong.

[2.12] Authorised institution incorporated in Hong Kong

For application for authorisation, see s 15 below; Grant or refusal of authorisation, see s 16 below; Variation of authorisation, see s 18 below; Revocation of authorisation, see s 22 below; Procedure on and effect of revocation of authorisation, see s 23 below; Transfer of authorisation, see s 28 below.

[2.13] Authorised institution incorporated outside Hong Kong

For application for authorisation, see s 15 below; Grant or refusal of authorisation, see s 16 below; Variation of authorisation, see s 18 below; Revocation of authorisation, see s 22 below; Procedure on and effect of revocation of authorisation, see s 23 below; Transfer of authorisation, see s 28 below.

[2.14] Automated teller machine

Automated teller machine is not regarded as local branches.

'Local office' is defined as: a place of business of the institution in Hong Kong from which any business of the institution is promoted or assisted and to which members of the public ordinarily have physical access for the purposes of that business; but does not include:

- (i) the institution's principal place of business in Hong Kong;
- (ii) a local branch established or maintained by the institution;
- (iii) an automated teller machine;
- (iv) a place of business of the institution used solely for the purposes of the administration of the affairs or business of the institution or the processing of transactions; or
- (v) a place of business of the institution, or a place of business of the institution belonging to a class of places of business, declared in a notice under subsection (14)(ca) not to be a place of business, or a class of places of business, as the case may be, for the purposes of this definition;

According to this definition, local offices may include kiosks set up by authorised institutions in outlets, such as supermarkets and that no sales transactions nor deposit will be made at these kiosks. Customers who would like to accept any offer of the services will have to approach a local branch of the authorised institution established under s 44 below where actual transactions will take place.

[2.15] Bank

For application for authorisation, see s 15 below; Grant or refusal of authorisation, see s 16 below; Variation of authorisation, see s 18 below; Revocation of authorisation, see s 22 below; Procedure on and effect of revocation of authorisation, see s 23 below; Transfer of authorisation, see s 28 below.

[2.16] Bank Advisory Committee

For function of Banking Advisory Committee, see s 4 below; Chief Executive in Council to seek advice of Banking Advisory Committee, see s 53(2) below; Monetary Authority to consult Banking Advisory Committee before attaching any condition to authorisation, see s 134A(1) below. See s 4 below for details.

[2.17] Banking business

For definition of local branches, see s 2(1); Definition of overseas branches, see s 2(1). For Banking Advisory Committee to advise the Chief Executive in relation to the carrying on of banking business, see s 4 below; Function of the Monetary Authority to consider and propose reforms of the law relating to banking business, see s 7 below; Banking business restricted to licensed banks, see s 11 below; Application for authorisation to carry on banking business, see s 15 below; Grant or refusal of authorisation to carry on banking business, see s 16 below; Power of the Monetary Authority to impose restriction on banking business, see s 52 below; Authorised institution to notify Monetary Authority when it ceases to carry on banking business, see s 66 below; Restrictions on use of name 'bank', see s 97 below; False statement as to authorised status, see s 97A below; Chief Executive in Council to decide whether or not banking business, see s 119 below.

[2.18] Banking licence

For definition of 'authorisation' and 'bank', see s 2(1). For banking business restricted to licensed banks, see s 11 below; Grant or refusal of authorisation, see s 16 below; Fee payable by authorised institution, see s 19 below; Former banking licence, see s 138 below.

[2.19] Certificate of approval

For definition of 'approval' and 'approved money broker', see s 2(1). For Application for approval, see s 118C(1) below; Conditions attached to certificate of approval, see s 118C(4) below; Contravention of conditions attached to certificate of approval, see s 118C(5) below; Appeal on conditions attached to certificate of approval, see s 132A(1)(b) below; Monetary Authority to consult before attaching conditions to certificate of approval, see s 134B below.

[2.20] Certificate of registration

Section 119 of the Securities and Futures Ordinance (Cap 571) provides that:

The [Securities and Futures Commission] may, upon application by an authorised financial institution in the prescribed manner and payment of the prescribed fee, register the applicant for one or more than one regulated activity (other than Type 3 and Type 8 regulated activities) and shall, upon such registration, grant to the applicant a certificate of registration specifying the regulated activity for which it is registered.

Authorised institutions, upon application under s 119 of the Securities and Futures Ordinance (Cap 571), may be authorised to carry on regulated activities defined under the Securities and Futures Ordinance (Cap 571).

There are a total of 9 types of regulated activities under Part 1 of Sch 5 to the Securities and Futures Ordinance. They are:

- Type 1: dealing in securities;
- Type 2: dealing in futures contracts;
- Type 3: leveraged foreign exchange trading;
- Type 4: advising on securities;
- Type 5: advising on futures contracts;
- Type 6: advising on corporate finance;
- Type 7: providing automated trading services;
- Type 8: securities margin financing;
- Type 9: asset management.

Exemptions are granted to authorised institution to carry on type 3 and type 8 regulated activities, ie leveraged foreign exchange trading and securities margin financing.

Although the application by authorised institutions to carry on regulated activities (other than type 3 and type 8) should be made to the Securities and Futures Commission, under s 119(2) of the Securities and Futures Ordinance, the Commission has to refer the application to the Monetary Authority.

Upon receiving an application for registration for a regulated activity referred, the Monetary Authority shall—

- (a) consider the application;
- (b) consult the Commission upon the merits of the application; and
- (c) advise the Commission whether he is satisfied by the applicant that the applicant is a fit and proper person to be registered for that regulated activity.

See also the Fit and Proper Guidelines issued by the Securities and Futures Commission in September 2006 (<http://www.sfc.hk>).

[2.21] Chief executive

For appointment of chief executive, see s 74 below. It is excluded from the definition of 'manager', see s 2(1).

For liability of the chief executive of a deposit-taking company which takes short-term deposit in Hong Kong or receives money on savings account, see s 12(6) below; Liability of the chief executive of a deposit-taking company or a restricted licensed bank which takes deposit in Hong Kong of a sum less than the amount specified in the First Schedule, see s 14(5) below.

For liability of the chief executive of an authorised institution which contravenes any condition attached to its authorisation, see s 16(8) below; Liability of the chief executive of an authorised institution which fails to submit information reasonably required for the maintenance of the register of the authorised institution, see s 20(7) below.

For liability of the chief executive of an authorised institution which establishes or maintains any local branch without the approval of the Monetary Authority, see s 44(8) below; Liability of the chief executive of an authorised institution which fails to give notice to the Monetary Authority within 7 days after establishment of a local office, see s 45A(3) below; Liability of the chief executive of a bank which produces false information of its local representative office to the Monetary Authority, see s 47(4) below; Liability of the chief executive of an authorised institution which establishes or maintains any overseas branch or overseas representative office without the approval of the Monetary Authority, see s 49(8) below; Liability of the chief executive of an authorised institution which fails to submit required information relating to its overseas branches and overseas representative offices to the Monetary Authority, see s 50(4) below; Liability of the chief executive of an authorised institution which produces false information of its overseas branches or overseas representative offices to the Monetary Authority, see s 50(5) below; Liability of the chief executive of an authorised institution which establishes an overseas banking corporation without the approval of the Monetary Authority, see s 51A(8) below; Liability of the chief executive of an authorised institution which fails to comply with any requirement of the Monetary Authority under s 52(1)(A), see s 52(4) below.

Power of a chief executive ceased once a Manager is appointed under s 52(1)(C), see ss 53B(1) and 53C(7) below; Duty of chief executive to submit information required to the Manager appointed under s 52(1)(C), see s 53C(2) below.

For liability of the chief executive of an authorised institution which submits false information to the Monetary Authority for the purpose of examination under s 55, see s 56(3) below; Liability of the chief executive of an authorised institution which fails to comply with the Companies Ordinance (Cap 622) with respect to the audit of a company's account, see s 59(5) below; Liability of the chief executive of an authorised institution which fails to submit the report required under s 59(2) to the Monetary Authority, see s 59(5) below; Liability of the chief executive of an authorised institution which fails to give notice to the Monetary Authority upon a removal of its auditor, see s 59A(3) below; Liability of the chief executive of an authorised institution which fails to publish its audited balance sheet under s 60, see s 60(9) below; Liability of the chief executive of an authorised institution which fails to submit required information under s 63 to the Monetary Authority, see s 63(5) below; Liability of the chief executive of an authorised institution which fails to submit information on shareholding under s 64 to the Monetary Authority, see s 64(5) below; Liability of the chief executive of an authorised institution which fails to inform the Monetary Authority about its alteration of constitution, see s 65(2); Liability of the chief executive of an authorised institution which fails to inform the Monetary Authority about its cessation of taking deposits, see s 66(2) below; Liability of the chief executive of an authorised institution which fails to inform the Monetary Authority about its inability to meet obligations, see s 67(2) below; Liability of the chief executive of an authorised institution which enter into any agreement for the sale of its banking business without the approval of the Monetary Authority, see s 69(4) below; Liability of the chief executive of an authorised institution which issues shares in contravention of restrictions under s 70B(3), see s 70D(2) below.

Chief executives require Monetary Authority's approval, see s 71 below; Monetary Authority may require chief executive to submit information, see s 72A below; Liability of the chief executive of an authorised institution which fails to inform the Monetary Authority about the appointment of a manager, see s 72B(4) below; Liability of the chief executive of an authorised institution which allows prohibited persons from acting as employees of the authorised institution without the consent of the Monetary Authority, see s 73 below.

For liability of the chief executive of an authorised institution which grants advances against security of own shares without the approval of the Monetary Authority, see s 80(3) below; Liability of the chief executive of an authorised institution which contravenes the limitation on advances under s 81, see s 81(9) below; Liability of the chief executive of an authorised institution which contravenes the limitation on advances to directors under s 83, see s 83(7); Liability of the chief executive of an authorised institution which contravenes the limitation on advances to employees under s 85, see s 85(3) below.

For liability of the chief executive of an authorised institution which places money with foreign bank without the approval of the Monetary Authority, see s 86(5) below; Liability of the chief executive of an authorised institution which holds share capital of any other company in excess of 25 per cent of the capital base of the authorised institution without the approval of the Monetary Authority, see s 87(3) below; Liability of the chief executive of an authorised institution which holds share capital of a company in excess of 5% of the capital base of the authorised institution without the approval of the Monetary Authority, see s 87A(7) below; Liability of the chief executive of an authorised institution which holds

any interest in land in excess of 25% of the capital base of the authorised institution without the approval of the Monetary Authority, see s 88(6) below; Liability of the chief executive of an authorised institution which contravenes the limitation on aggregate holdings under ss 83, 87 and 88, see s 90(3) below; Liability of the chief executive of an authorised institution which fails to produce evidence required to prove compliance of ss 83, 87 or 88, see s 91(3) below.

For liability of the chief executive of an authorised institution which issues false advertisement, see s 95(3) below; Liability of the chief executive of an authorised institution which issues prohibited representations under s 96, see s 96(3) below.

For liability of the chief executive of an authorised institution which fails to inform the Monetary Authority about its failure to keep to capital adequacy, see s 99(3) below; Liability of the chief executive of an authorised institution which fails to take remedial action required by the Monetary Authority under s 100, see s 100(5) below; Liability of the chief executive of an authorised institution which fails to inform the Monetary Authority about its failure to keep to liquidity ratio, see s 103(3) below; Liability of the chief executive of an authorised institution which fails to take remedial action required by the Monetary Authority under s 104, see s 104(5) below; Liability of the chief executive of an authorised institution which creates charges without the approval of the Monetary Authority or fails to notify the Monetary Authority of certain civil proceedings, see s 106(4) below; Liability of the chief executive of an authorised institution who wilfully makes a false entry in any book of record of the authorised institution, see s 123(1) below; Liability of the chief executive of an authorised institution which fails to keep all its entries in books in the Chinese or English language and the Arabic system of numerals, see s 132(3) below.

[2.22] Company: Incorporated by any other Ordinance

This would cover bodies corporate such as The Hong Kong and Shanghai Banking Corporation Limited, the Mass Transit Railway Corporation and the Kowloon-Canton Railway Corporation, which are incorporated under The Hong Kong and Shanghai Banking Corporation Limited Ordinance (Cap 70), the Mass Transit Railway Corporation Ordinance (Cap 556) and the Kowloon-Canton Railway Corporation Ordinance (Cap 372) respectively.

It may not cover bodies corporate incorporation of bodies of persons (see for example the Credit Unions Ordinance (Cap 119) and the Building Management Ordinance (Cap 344).

[2.23] Controller

For definitions of 'indirect controller', 'majority shareholder controller', and 'minority shareholder controller', see s 2(1); 'relevant person' under s 52, see s 52(5) below; Information on shareholder, see s 64(1) below; Provisions applicable to persons proposing to become controllers, and to certain existing controllers, of authorised institutions incorporated in Hong Kong, see s 70 below; Objection to existing controllers, see s 70A below; Restrictions on and sale of shares, see s 70B below; Prohibition on certain persons acting as indirect controllers, see s 70C below; Limitation on advances by authorised institutions, see s 81 below;

Limitations on advances to directors, etc of bank, see s 83 below; Liability in tort for inducing persons to make a deposit in certain cases, see s 94 below.

[2.24] Controller: any person

The controller of a company may be an individual as well as a body corporate. A company may have more than one 'controller'.

[2.25] Currency

For definitions of 'approved currency', and 'money broker', see s 2(1) below. Power of the Monetary Authority to declare whether a medium of exchange is a currency, see s 2(5); A deposit-taking company is not allowed to take deposit of a sum less than the amount specified in item 2 of the First Schedule in any currency, see s 14(1)(a) and First Schedule below; A restricted licensed bank is not allowed to take deposit of a sum less than the amount specified in item 3 of the First Schedule in any currency, see s 14(1)(b) and First Schedule below.

[2.26] Dealing service

For definition of 'money broker', see s 2(1).

[2.27] Deposit

For definitions of 'banking business', 'deposit-taking company', 'local branch' and 'short-term deposit', see s 2(1). Part III does not apply to certain deposits, see ss 3(1) and 3(2) below. No person other than an authorised institution may carry on a business of taking deposits in Hong Kong, see s 12(1) below; Restrictions on the taking of certain deposits by deposit-taking companies, see ss 12(2), 12(3), 12(4), 12(5) and 14 below; Ceasing to carry on a business of taking deposits a ground for revocation of authorisation, see s 22 below. An authorised institution must notify the Monetary Authority if it ceases to carry on a business of taking deposits, see s 66 below; Disposal of business of taking deposits, see s 69 below; Loans to foreign banks include 'deposit', see s 86(1)(a) below; Offence to issue advertisements and documents relating to deposits, see s 92 below; Fraudulent inducement to make a deposit, see s 93 below; Liability in tort for inducing persons to make a deposit in certain cases, see s 94 below.

[2.28] Deposit: a loan of money

A contract of loan of money has been defined as one under which a person lends or agrees to lend money to another, in consideration of a promise, express or implied, to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest (*Chitty on Contracts* (25th Ed) para 3157). However, it is clear that not every form of indebtedness amounts to a loan (*Chitty on Contracts* (25th Ed) para 3159 and see also B Allcock, 'The Money Lenders Ordinance' (1981) 11 HKLJ 293 at 295-98). In this regard, it seems that the form of the transaction, rather than the fact that its object is the raising of money, is decisive unless the form of the

transaction is a sham (*Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209 at 216-217 per Lord Devlin). Thus, the purchase of bills of exchange or book debts at a discount does not involve a loan even where the sale is made with recourse to the seller (*Olds Discount Co Ltd v John Playfair Ltd* [1938] 2 All ER 275, *Chow Yoong Hong v Choong Fah Rubber Manufactory* supra) but difficult questions sometimes arise where money is paid to a third party at the request of the alleged 'borrower' (see *Chitty on Contracts* (25th Ed) para 3158 and for a recent case, see *Champagne Perrier-Jouet SA v HH Finch Ltd* [1982] 3 All ER 713). For the use of margin stock trading facilities, see *Harvester Stock Investment Co v Kwan Siu-May* [1987] 1 HKC 271.

However, if the transaction is held to involve a loan of money, the fact that the loan is repayable only after a term of years or that it is evidenced by the issue of promissory notes, bills of exchange, debentures or other securities will not (unless one of the exceptions applies) mean that there is no 'deposit', even though the loan would not be called a 'deposit' in the ordinary sense of that word. (Compare the somewhat wider working used to define 'deposit' in s 1(4) of the UK Banking Act 1987 which dispenses with the need to show the existence of a loan by referring to a sum of money paid on terms under which it will be repaid, with or without interest). The width of the definition can be appreciated by substituting the words 'loan' or 'borrowing' for the various reference to 'deposit' in the Ordinance (see for example notes on s 12(1) below).

[2.29] Deposit: at interest, at no interest or negative interest

Non-interest-bearing deposits are also treated as 'deposit' for the purposes of this Ordinance, so that, for example, a deposit-taking company could not hold a non-interest-bearing balance from an associated company if that balance were less than the specified sum prescribed by s 14 below.

[2.30] Deposit: repayable at a premium or repayable with any consideration

Although the expression 'or' is normally to be read disjunctively (see s 3 of the Interpretation and General Clauses Ordinance (Cap 1)), it would appear that there is an overlap between sub-para (i) and (ii) of para (a) as a loan may be at interest and repayable at premium or with some other consideration, form which it would seem that a loan may still be a 'deposit' even if it falls within both sub-para.

[2.31] Deposit: upon terms involving the issue

A subscription for debenture or other debt securities may not involve a 'deposit' where the subscription is other than for cash (compare *Commissioners of Inland Revenue v Port of London Authority* [1923] AC 507) as such a subscription may not constitute a loan of money.

[2.32] Deposit: debenture

Under s 2(1) of the Companies Ordinance (Cap 622), 'debenture' is defined to include debenture stock, bonds and any other securities of a company whether

Subsection (15)(b) was amended pursuant to s 27 of the Banking (Amendment) Ordinance 1997 (4 of 1997), commencing on 15 May 1997.

[53C.02] General note

For powers of Monetary Authority, see s 52 above; Effect of direction under s 52(1)(C), see s 53B above; Powers of Manager, see s 53C; Duration of direction under s 52(1)(C), see s 53F below; Chief executives and directors require Monetary Authority's approval, see s 71 below; Monetary Authority may require specified persons to submit information, see s 72A below; Defence where director or manager prosecuted, see s 126 below; Consent of Secretary for Justice to prosecution, see s 136 below.

[53C.03] Subsection (1)(a): All the powers specified in the Ninth Schedule

Under the Ninth Schedule, a Manager appointed under s 52(1)(C) above may exercise the following powers:

- (1) Power to take possession of the property of the institution;
- (2) Power to purchase property for the institution;
- (3) Power to sell the business or property of the institution;
- (4) Power to borrow money or grant security;
- (5) Power to appoint a professionally qualified person to act for the institution;
- (6) Power to exercise any voting rights;
- (7) Power to bring or defend any legal action on behalf of the institution;
- (8) Power to give guarantees on behalf of the institution;
- (9) Power to refer to arbitration;
- (10) Power to effect and maintain insurances in respect of the business or property of the institution;
- (11) Power to use the institution's seal;
- (12) Power to enter into any contract on behalf of the institution;
- (13) Power to draw, accept, make and endorse any bill of exchange on behalf of the institution;
- (14) Power to appoint any agent;
- (15) Power to do all such thing as may be necessary for the realisation of the property of the institution;
- (16) Power to make any payment;
- (17) Power to carry on the business of the institution;
- (18) Power to grant or surrender of a lease;
- (19) Power to make any arrangement or compromise on behalf of the institution;
- (20) Power to rank and claim in the bankruptcy or insolvency;
- (21) Power to change the situation of the institution's business office.
- (22) Power to do all things incidental to the exercise of the above powers.

[53C.04] Subsection (3)(a)(ii): The Manager ... may ... at any meeting of the members of the institution, move any resolution which is seconded by a member or which has the approval of the Monetary Authority

Under this subsection, a Manager may move any resolution at a meeting of members of the authorised institution if it is seconded by a member or an approval of the Monetary Authority is obtained. However, subsection (4) of this section requires the Manager to obtain approval of the Monetary Authority if he would like to exercise his power under this subsection. It seems that even if a member seconds the Manager's proposed resolution, he still needs to obtain an approval of the Monetary Authority. The words 'is seconded by a member' seem to be redundant as, in any case, an approval of the Monetary Authority is required.

[53C.05] Subsection (3)(a)(iii): The Manager ... may ... at any meeting of the directors of the institution, move any resolution which is seconded by a director or which has the approval of the Monetary Authority

Under this subsection, a Manager may move any resolution at a meeting of directors of the authorised institution if a director seconds it or an approval of the Monetary Authority is obtained. However, subsection (4) of this section requires the Manager to obtain approval of the Monetary Authority if he would like to exercise his power under this subsection. It seems that even if a director seconds the Manager's proposed resolution, he still needs to obtain an approval of the Monetary Authority. The words 'is seconded by a director' seem to be redundant as, in any case, an approval of the Monetary Authority is required.

[53C.06] Subsection (5): Section 71(1) shall not apply

Under s 71(1) below, written consent of the Monetary Authority is required to appoint any person as the chief executive of an authorised institution, or director of an authorised institution incorporated in Hong Kong. This subsection exempts this requirement of written consent of the Monetary Authority for any appointment of chief executive or director under subsection (3)(a)(i) or (b).

[53C.07] Subsection (6): Not required to give any notice to the Monetary Authority pursuant to section 72A(2A)

Under s 72A(2A) below, where an authorised institution becomes aware of the fact that any person has become or has ceased to be a chief executive or a director of the institution, the institution has to serve a written notice to the Monetary Authority not less than 14 days after becoming aware of that fact. This subsection exempts this requirement of written notice to the Monetary Authority.

[53C.08] Subsection (13): Any person who fails without reasonable excuse to comply with any requirement under subsection (2) ... is liable

Persons being charged under this subsection may have a defence under s 126 below if he can prove that he has taken reasonable precautions and has exercised due diligence to avoid the commission of this offence by himself or any person under his control.

[53C.09] Subsection (14): Signs any document ... knows or reasonably ought to know to be false

The defence under s 126 below is not applicable to this subsection.

[53C.10] Subsection (15): Any person who produces any book, account, document ... which is false ... is liable

Persons being charged under this subsection may have a defence under s 126 below if he can prove that he has taken reasonable precautions and has exercised due diligence to avoid the commission of this offence by himself or any person under his control.

53D. Court of First Instance may approve certain resolutions

Remarks: Adaptation amendments retroactively made by s 25 of 1998 s 2

- (1) During the period for which a direction given under section 52(1)(C) is in force in respect of an authorized institution incorporated in Hong Kong, the Court of First Instance may, on the application of-
- (a) the Manager of the institution; or
 - (b) not less than 100 members of, or members holding not less than one-tenth of the total number of issued shares in, the institution,
- approve or refuse to approve any resolution which-
- (i) where paragraph (a) is applicable, was proposed to be moved at a general meeting of the members of the institution but which was not so moved because a quorum for the meeting was not obtained;
 - (ii) where paragraph (a) or (b) is applicable, has been properly moved at a general meeting of the members of the institution but which has not, for whatever reason, been passed.
- (2) During the period for which a direction given under

section 52(1)(C) is in force in respect of an authorized institution incorporated outside Hong Kong, the Court of First Instance may, on the application of the institution, approve or refuse to approve any resolution-

- (a) which has been passed, or which purports to have been passed, at a meeting within the meaning of section 53B(10);
- (b) which is invalid by reason of section 53B(8)(a)(iii); and
- (c) a copy of which has been provided, in the form in which it was passed, or purports to have been passed, as the case may be, to the Manager by the institution not later than 14 days after the day on which it was passed, or purports to have been passed, as the case may be.

(3) On the hearing of an application under subsection (1)-

- (a) the Manager and any member of the authorized institution concerned; and
 - (b) the Monetary Authority,
- shall be entitled to be heard on the application and to call, examine and cross-examine any witness and, if he so thinks fit, support or oppose the making of the application.

(4) On the hearing of an application under subsection (2)-

- (a) the Manager, any chief executive (other than a chief executive who either holds his appointment by virtue of the operation of section 53B(2) or is appointed under section 53C(3)(b)) and a director of the authorized institution concerned, and any relevant office-holder within the meaning of section 53C(16); and
- (b) the Monetary Authority,

shall be entitled to be heard on the application and to call, examine and cross-examine any witness and, if he so thinks fit, support or oppose the making of the application.

(5) Where the Court of First Instance approves a resolution referred to in subsection (1) or (2), then

the resolution shall be deemed to have been passed upon, and shall take effect on and after, that approval or such later time as the Court of First Instance thinks fit.

- (6) For the avoidance of doubt, it is hereby declared that where the Court of First Instance approves a resolution referred to in subsection (1) (where paragraph (ii) of that subsection is applicable) or (2), then section 53B(5) or (8), as the case may be, shall cease to apply to or in relation to the resolution on and after that approval takes effect.

(Added 49 of 1995 s 15. Amended 25 of 1998 s 2)

[53D.01] Enactment history

This section was added pursuant to s 15 of the Banking (Amendment) Ordinance 1995 (49 of 1995), commencing on 15 November 1995 and further amended pursuant to s 2 of the Banking (Amendment) Ordinance 1998 (25 of 1998) commencing on 1 July 1997.

[53D.02] General note

For powers of Monetary Authority, see s 52 above; Effect of direction under s 52(1)(C), see s 53B above; Powers of Managers, see s 53C above.

[53D.03] Subsection (2)(a): At a meeting within the meaning of section 53B(10)

Under s 53B(10) above, a meeting is defined as:

- (1) general meeting of the members of an authorised institution;
- (2) meeting of directors of an authorised institution; and
- (3) meeting of the creditor of an authorised institution, if the authorised institution is incorporated outside Hong Kong.

[53D.04] Subsection (2)(b): Invalid by reason of section 53B(8)(a)(iii)

Under s 53B(8)(a)(iii) above, a Manager of an authorised institution incorporated outside Hong Kong may make an objection to invalidate a resolution passed or purported to be passed by the institution, to the extent that the resolution relates to any of the affairs, business and property of the institution.

[53D.05] Subsection (4): Any chief executive (other than ... by virtue of the operation of section 53B(2) or is appointed under section 53C(3)(b))

Under s 53B(1) above, immediately upon a direction given under s 52C(1) above coming into force, ie a Manager is appointed to an authorised institution,

- (1) appointments of all existing chief executives of an authorised institution incorporated in Hong Kong; and
- (2) appointments of chief executive, in so far such appointment relates to the business in Hong Kong of the authorised institution, of an authorised institution incorporated outside Hong Kong are revoked.

The Monetary Authority has discretion under s 53B(2) above not to revoke any appointment revoked under s 53(1) above and the Manager appointed under s 51C(1) above is empowered to appoint any chief executive to fill the vacancy arising from the operation of s 53B(1) above.

The words 'any chief executive' under this subsection mean chief executive of an authorised institution incorporated outside Hong Kong and their appointment does not relate to the business in Hong Kong of the authorised institution. Only these chief executives are entitled to be heard under this subsection.

[53D.06] Subsection (5): The resolution ... shall take effect on and after, that approval or such later time as the Court of First Instance thinks fit

Although an authorised institution may apply to the Court of First Instance to validate a resolution passed, which is invalidated by reason of s 53B(8)(a)(iii) above, ie objected by the Manager appointed, the resolution approved by the Court of First Instance under this section will only take effect on or after the Court of First Instance's approval but not before the approval is granted.

[53D.07] Subsection (6): Section 53B(5) or (8) ... cease to apply

Section 53B(5) above provides that, while a direction given under s 52C(1) above is in force, ie a Manager is appointed, any resolution passed or any thing done in reliance on any such resolution without the consent of the Manager appointed is invalid.

Section 53B(8) above provides that, while a direction given under s 52C(1) above is in force, ie a Manager is appointed, any resolution passed or anything done in reliance on any such resolution without satisfying the procedural requirements under that section is invalid.

This subsection provides these two sections cease to apply if the Court of Appeal approves a resolution under subsection (1) or (2) of this section.

53E. Court of First Instance may make certain orders

Remarks: Adaptation amendments retroactively made - see 25 of 1998 s 2

(1) Where, on the application of the Manager of an authorized institution at any time during the period for which a direction given under section 52(1)(C) is in force in respect of the institution, it appears to the Court of First Instance that—

- (a) any person is about to do an act which, if done, might adversely affect or conflict with, or
- (b) any person has done an act which adversely affects or conflicts with,

the discharge of the Manager's duties or the exercise of the Manager's powers in respect of any of the affairs, business or property of the institution, then, subject to subsection (4), the Court of First Instance may, without prejudice to the operation of any of the other provisions of this Part or to any order the Court of First Instance would be entitled to make otherwise than by or by virtue of this section, make one or more of the following orders—

- (i) if paragraph (a) is applicable, an order restraining the person referred to in that paragraph from doing the act referred to in that paragraph;
- (ii) if paragraph (b) is applicable—
 - (A) an order declaring the act referred to in that paragraph to be invalid with effect on and after the date on which the order is made (but without prejudice to the validity of such act, or any thing done in reliance on such act, before that date);
 - (B) an order declaring any thing done in reliance on such act to be invalid with effect on and after the date on which the order is made (but without prejudice to the validity of such act, or any thing done in reliance on such act, before that date);

- (iii) for the purpose of securing compliance with any other order under this section, an order directing a person to do or refrain from doing a specified act;
 - (iv) any ancillary order which the Court of First Instance considers necessary in consequence of the making of any other order under this section.
- (2) The Court of First Instance may, before making an order under subsection (1), direct that notice of the application under that subsection be given to such persons as it thinks fit or direct that notice of the application be published in such manner as it thinks fit, or both.
- (3) Subject to subsection (4), the Court of First Instance may, of its own volition or on an application made to it for that purpose, by order reverse, vary or discharge an order made under subsection (1) or suspend the operation of such an order.
- (4) The Court of First Instance shall, before making an order under subsection (1) or (3), satisfy itself, so far as it can reasonably do so, that the order would not unfairly prejudice any person.

(Added 49 of 1995 s 15. Amended 25 of 1998 s 2)

[53E.01] Enactment history

This section was added pursuant to s 15 of the Banking (Amendment) Ordinance 1995 (49 of 1995), commencing on 15 November 1995 and further amended pursuant to s 2 of the Banking (Amendment) Ordinance 1998 (25 of 1998), commencing on 1 July 1997.

[53E.02] General note

For powers of Monetary Authority, see s 52 above; Effect of direction under s 52(1)(C), see s 53B above; Powers of Managers, see s 53C above; Court of First Instance may approve certain resolutions, see s 53D above.

53F. Duration of direction under section 52(1)(B) or (C)

Remarks: Adaptation amendments retroactively made - see 68 of 1999 s 3

- (1) The Monetary Authority shall revoke a direction given under section 52(1)(B) or (C) if—
- (a) after consultation with the Financial Secretary, it appears to the Monetary Authority that it is no longer necessary for the direction to remain in force; or
 - (b) it is necessary to do so to give effect to—
 - (i) a decision of the Chief Executive in Council under section 53(1)(i); or
 - (ii) an order of the Chief Executive in Council under subsection (2). (Amended 68 of 1999 s 3)
- (2) The Chief Executive in Council, upon the application of—
- (a) in the case of an authorized institution the subject of a direction given under section 52(1)(B), the institution;
 - (b) in the case of an authorized institution incorporated in Hong Kong the subject of a direction given under section 52(1)(C), not less than 100 members of, or members holding not less than one-tenth of the total number of issued shares in, the institution;
 - (c) in the case of an authorized institution incorporated outside Hong Kong the subject of a direction given under section 52(1)(C), any chief executive (other than a chief executive who either holds his appointment by virtue of the operation of section 53B(2) or is appointed under section 53C(3)(b)) or director of the institution, or any relevant office-holder within the meaning of section 53C(16),
- may, if he is satisfied that it is no longer necessary for the direction to remain in force, order the Monetary Authority to revoke that direction.
- (3) The revocation under subsection (1) of a direction given under section 52(1)(B) or (C) shall—
- (a) be in writing;
 - (b) be served on—
 - (i) the authorized institution specified in the direction at its principal place of business in Hong Kong except that, in

- the case of a direction given under section 52(1)(C) in respect of an authorized institution incorporated outside Hong Kong, it shall be served on the institution's principal place of business outside Hong Kong; and
- (ii) the Advisor or Manager, as the case may be, of that institution; and
- (c) take effect immediately it is so served unless otherwise specified in the revocation.
- (4) Notice of a revocation under this section of a direction given under section 52(1)(C) shall be published by the Monetary Authority in the Gazette and in such other ways as appear to him expedient for notifying the public.
- (5) A revocation in writing under subsection (1) of a direction given under section 52(1)(B) or (C) includes a copy of the revocation.
- (6) For the avoidance of doubt, it is hereby declared that the revocation under subsection (1) of a direction given under section 52(1)(C) shall not revive any appointment deemed to be revoked as a consequence of the operation of section 53B(1).
- (Added 49 of 1995 s 15)

[53F.01] Enactment history

This section was added pursuant to s 15 of the Banking (Amendment) Ordinance 1995 (49 of 1995), commencing on 15 November 1995.

[53F.02] General note

For powers of Monetary Authority, see s 52 above; Notification of direction under s 52(1)(C), see s 53A above; Effect of direction under s 52(1)(C), see s 53B above; Powers of Manager, see s 53C above; Court of First Instance may make certain orders, see s 53E above.

53G. Advisors, Managers and assistants

- (1) An Advisor or Manager may at any time by notice in writing to the Monetary Authority resign his office, but any such resignation shall not take effect

- unless and until it is accepted by the Monetary Authority.
- (2) The Monetary Authority may at any time revoke the appointment of an Advisor or Manager.
- (3) Where the office of an Advisor or Manager becomes vacant pursuant to subsection (1) or (2), or due to the death of the holder of that office, the Monetary Authority shall forthwith—
- (a) appoint a person to fill the vacancy; and
 - (b) serve a notice in writing, specifying the name and address of the person so appointed, on the authorized institution concerned at its principal place of business in Hong Kong except that, in the case of an authorized institution incorporated outside Hong Kong the subject of a direction given under section 52(1)(C), it shall be served on the institution's principal place of business outside Hong Kong.
- (4) The appointment of an Advisor or Manager shall be deemed to be revoked immediately upon the revocation under section 53F(1) of the direction given under section 52(1)(B) or (C) by virtue of which he holds his office.
- (5) Subject to subsection (6), an Advisor or Manager may appoint such technical and professional persons (including any person who has been appointed under section 5A(3) of the Exchange Fund Ordinance (Cap 66)) as he thinks fit to assist him in the discharge of his duties and exercise of his powers in respect of any of the affairs, business or property of the authorized institution concerned.
- (6) An Advisor or Manager shall not exercise his power under subsection (5)—
- (a) unless he has the approval in writing of the Monetary Authority to do so; and
 - (b) except in accordance with the conditions, if any, specified in the approval.
- (7) The Monetary Authority, after consultation with the Financial Secretary, may at any time determine the remuneration and expenses to be paid by an authorized institution to—

- (a) the Advisor of the institution or any person appointed under subsection (5) by the Advisor;
 - (b) the Manager of the institution or any person appointed under that subsection by the Manager,
- and any such determination may be made whether or not—
- (i) the appointment of the Advisor or Manager or any such person has been revoked or has otherwise terminated;
 - (ii) the direction concerned given under section 52(1)(B) or (C) has been revoked.
- (8) Where the Monetary Authority has made a determination under subsection (7), he shall—
- (a) if the determination relates to an Advisor of an authorized institution or to any person appointed under subsection (5) by the Advisor, serve a copy of the determination on the institution at its principal place of business in Hong Kong;
 - (b) if the determination relates to the Manager of an authorized institution or to any person appointed under subsection (5) by the Manager—
 - (i) as soon as is reasonably practicable, publish a notice in the Gazette stating—
 - (A) that the determination has been made; and
 - (B) the name of that institution;
 - (ii) if the institution is incorporated in Hong Kong, provide a copy of the determination to any member of the institution who so requests;
 - (iii) if the institution is incorporated outside Hong Kong, serve a copy of the determination on the institution at its principal place of business outside Hong Kong and provide a copy of the determination to the chief executive (other than a chief executive who either holds his appointment by virtue of the operation of section 53B(2) or is

(Amended L.N. 362 of 1997; 68 of 1999 s 3)

[131.01] Enactment history

This section was enacted pursuant to the Banking Ordinance 1986 (27 of 1986), commencing on 1 September 1986 and was further amended pursuant to s 3 of the Banking (Amendment) Ordinance 1999 (68 of 1999), commencing on 1 July 1999.

Subsection (1)(a) was replaced pursuant to s 42 of the Banking (Amendment) Ordinance 1995 (49 of 1995), commencing on 15 November 1995, and was further amended pursuant to s 19 of the Banking (Amendment) Ordinance 1997 (4 of 1997), commencing on 15 May 1997.

Subsection (1)(b) was replaced pursuant to s 42 of the Banking (Amendment) Ordinance 1995 (49 of 1995), commencing on 15 November 1995.

Subsection (1)(c) was repealed pursuant to s 42 of the Banking (Amendment) Ordinance 1995 (49 of 1995), commencing on 15 November 1995.

Subsection (1)(d) was amended pursuant to s 10 of the Banking (Amendment) Ordinance 1992 (67 of 1992), commencing on 1 September 1992.

Subsection (1)(e) was repealed pursuant to s 10 of the Banking (Amendment) Ordinance 1992 (67 of 1992), commencing on 1 September 1992.

Subsection (3) was replaced pursuant to s 42 of the Banking (Amendment) Ordinance 1995 (49 of 1995), commencing on 15 November 1995.

Subsection (4) was added pursuant to s 21 of the Banking (Amendment) Ordinance 1992 (82 of 1992), commencing on 10 December 1992.

Subsection (5) was added pursuant to s 42 of the Banking (Amendment) Ordinance 1995 (49 of 1995), commencing on 15 November 1995, and was further amended pursuant to s 2 of the Banking (Amendment) Ordinance 1998 (25 of 1998), commencing on 1 July 1997.

[131.02] General note

For fee payable by authorised institution, see s 19 above; Fees in respect of local branches, see s 45 above; Fees in respect of local representative offices, see s 48 above; Fees in respect of overseas branches and overseas representative offices, see s 51 above; Advisors, Managers and assistants, see s 53G above; Fees payable by approved money brokers, see s 118F above; Preferential payments, see s 265 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

[131.03] Subsection (1)

There are no provisions relating to the payment of the remuneration and allowance of an inspector appointed under Part XX (see s 117(4) above).

[131.04] Subsection (2)

The applicant cannot be made liable if the authorised institution fails to pay the portion of the expenses fixed by the Monetary Authority.

[131.05] Subsection (3)

Both s 265(1)(d) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) and s 38(1)(d) of the Bankruptcy Ordinance give a preferential status to the Government debts in a winding up, receivership or bankruptcy proceeding. Only statutory debts due to the Government, which became due and payable within 12 months before the commencement of winding up, will have preferential status under s 265(1)(d) of that Ordinance.

[131.06] Subsection (5)

Rule 19(1) of the Companies (Winding-up) Rules (Cap 32H) provides that the assets of a company in a winding up by the court, remaining after payment of the costs and expenses properly incurred in preserving, realising or getting in the assets, shall be made in the following order of priority, namely:

- (1) The fees, percentages and charges payable to, or costs, charges and expenses incurred by or authorised by, the Official Receiver, whether acting as Official Receiver or liquidator, including the costs of any person properly employed by him;
- (2) The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the court but excluding the interest on such costs;
- (3) The remuneration of and any fees, disbursements and expenses properly incurred by the special manager (if any);
- (4) The costs and expenses of any person who makes or concurs in making, the company's statement of affairs;
- (5) The taxed charges of any shorthand writer appointed to take an examination;
- (6) The necessary disbursements of any liquidator, other than the Official Receiver, appointed in the winding up by the court or under the Ordinance, other than expenses properly incurred in preserving, realising or getting in the assets heretofore provided for;
- (7) The costs of any person properly employed by any liquidator, other than the Official Receiver, appointed in the winding up by the court or under the Ordinance;
- (8) The remuneration of any liquidator, other than the Official Receiver, appointed in the winding up by the court or under the Ordinance;
- (9) The actual out-of-pocket expenses necessarily incurred by the committee of inspection, subject to the approval of the Official Receiver.

131A. Cost related fees to be paid into Exchange Fund

Any part of monies paid to the Director of Accounting Services under sections 19, 45, 48, 51, 118F or 131(4), which relates to the administrative or other costs incurred or likely to be incurred by the Exchange Fund in connection with or otherwise in relation to the performance of any function under this Ordinance, shall be paid by him into the Exchange Fund.

(Added 82 of 1992 s 22. Amended 49 of 1995 s 43; 4 of 1997 s 20)

[131A.01] Enactment history

This section was added pursuant to s 22 of the Banking (Amendment) Ordinance 1992 (82 of 1992), commencing on 10 December 1992, and was amended pursuant to s 43 of the Banking (Amendment) Ordinance 1995 (49 of 1995), commencing on 15 November 1995, and was further amended pursuant to s 20 of the Banking (Amendment) Ordinance 1997 (4 of 1997), commencing on 15 May 1997.

[131A.02] General note

For fee payable by authorised institution, see s 19 above; Fees in respect of local branches, see s 45 above; Fees in respect of local representative offices, see s 48 above; Fees in respect of overseas branches and overseas representative offices, see s 51 above; Fees payable by approved money brokers, see s 118F above; Recovery of fees, expenses, see s 130 above.

132. Use of language

- (1) All entries in books and accounts kept by authorized institutions shall be recorded in the Chinese or English language and the Arabic system of numerals shall be employed. (Amended 49 of 1995 s 44)
- (2) All forms and information required to be sent and all returns required to be made to the Monetary Authority pursuant to any of the provisions of this Ordinance shall be compiled in the Chinese or English language and the Arabic system of numerals and, if any such form, information or return is a translation, be certified to the satisfaction of the Monetary Authority as a true and correct translation. (Amended 82 of 1992 s 25; 49 of 1995 s 44)
- (3) Every director, every chief executive and every

manager of an authorized institution which contravenes subsection (1) or (2) commits an offence and is liable on conviction upon indictment or on summary conviction to a fine at tier 5 and, in the case of a continuing offence, to a further fine at tier 2 for every day during which the offence continues. (Amended 4 of 1997 s 27; 32 of 2001 s 24)

[132.01] Enactment history

This section was enacted pursuant to the Banking Ordinance 1986 (27 of 1986), commencing on 1 September 1986.

Subsection (1) was amended pursuant to s 44 of the Banking (Amendment) Ordinance 1995 (49 of 1995), commencing on 15 November 1995.

Subsection (2) was amended pursuant to s 25 of the Banking (Amendment) Ordinance 1992 (82 of 1992), commencing on 10 December 1992, and was further amended pursuant to s 44 of the Banking (Amendment) Ordinance 1995 (49 of 1995), commencing on 15 November 1995.

Subsection (3) was amended pursuant to s 27 of the Banking (Amendment) Ordinance 1997 (4 of 1997), commencing on 15 May 1997, and was further amended pursuant to s 24 of the Banking (Amendment) Ordinance 2001 (32 of 2001), commencing on 24 May 2002.

[132.02] General note

For defence where director or manager is prosecuted, see s 126 above; Consent of Secretary for Justice to prosecution, see s 136 below.

[132.03] Subsection (1)

Under normal principle of statutory interpretation, this section should be construed so as only to apply to entries made in books or accounts kept in Hong Kong.

[132.04] Subsection (3): Every director, every chief executive and every manager ... which contravenes subsection (1) or (2) ... is liable

It seems that this subsection creates a strict liability offence. However, person being charged under this subsection may have a defence under s 126 above if he can prove that he has taken reasonable precautions and has exercised due diligence to avoid the commission of this offence by himself or any person under his control.

132A Appeals

- (1) Any person (howsoever described) aggrieved by—

- (a) a decision of the Monetary Authority under section 16(1)(b) or (3A)(b), 25(1) or (2), 44(5), 46(5), 49(5), 51A(5), 52(1)(A), (B) or (C) or (3A), 53G(7), 87A(5) or 118C(1)(b);
- (b) the attachment by the Monetary Authority of any conditions to the person's authorisation under section 16(1)(a), (3A)(a) or (5) or to the person's certificate of approval under section 118C(1)(a) or (4);
- (c) any conditions referred to in section 18(4)(c) or (5), 22(4)(c) or (5), 24(5)(c) or (6) or 25(3)(c) or (4) attached to a consent given to the person pursuant to section 18(4), 22(4), 24(5) or 25(3), as the case may be;
- (d) the refusal by the Monetary Authority to grant approval under section 44(1), 46(1), 49(1), 51A(2), 59B(3), 69(1) or 87A(2)(a); (Amended 42 of 1999 s 14; 6 of 2002 s 13)
- (e) any conditions to which an approval under section 44(1), 46(1), 49(1), 51A(2) or 87A(2)(a) is made subject by the Monetary Authority under section 44(4), 46(4), 49(4), 51A(4) or 87A(4), as the case may be; (Amended 42 of 1999 s 14)
- (ea) any conditions to which an approval under section 59B(3) is made subject by the Monetary Authority under that section; (Added 6 of 2002 s 13)
- (f) a refusal to give consent under section 71(1) or 73(1) or (1A), conditions attached under section 71(2)(b) to a consent under section 71(1), the withdrawal under section 71(4) of a consent under section 71(1), conditions attached under section 71(5) to a consent under section 71(1) or the amendment under section 71(5) of any such conditions, by the Monetary Authority; (Replaced 32 of 2001 s 22)
- (fb) refusal by the Monetary Authority to give consent under section 97(1), (Added 32 of 2001 s 22. Amended 3 of 2012 s 15)
- (g) **(Repealed)**
- (h) **(Repealed)**

- may appeal to the Chief Executive in Council against the decision, conditions, refusal, withdrawal, requirement or variation, but that decision or those conditions, or that refusal, withdrawal, requirement or variation, as the case may be, shall take effect immediately, notwithstanding that an appeal has been or may be made under this subsection.
- (2) Any authorised institution aggrieved by the proposed revocation of its authorisation under section 22(1) may appeal to the Chief Executive in Council against the proposed revocation.
- (3) Any person aggrieved by a decision of the Monetary Authority to serve—
- a conditional notice of consent or notice of objection (within the meaning of section 70) on him;
 - a notice of objection (within the meaning of section 70A) on him,
- may appeal to the Chief Executive in Council against the decision, but that decision shall take effect immediately, notwithstanding that an appeal has been or may be made under this subsection.
- (4) Any authorised institution aggrieved by a requirement in a notice under section 95(1) may appeal to the Financial Secretary against the requirement, but that requirement shall take effect immediately, notwithstanding that an appeal has been or may be made under this subsection.
- (5) Any approved money broker aggrieved by the proposed revocation of its approval under section 118D(1) may appeal to the Chief Executive in Council against the proposed revocation.
- (6) A person aggrieved by a specified decision of the Monetary Authority made in respect of the person may, by notice in writing given to the Securities and Futures Appeals Tribunal established by section 216 of the Securities and Futures Ordinance (Cap 571), apply to the Tribunal for a review of the decision. (Added 6 of 2002 s 13)
- (7) The provisions of Part XI of the Securities and Futures Ordinance (Cap 571) shall apply to and in relation to a notice under subsection (6) as they apply

to and in relation to a notice under section 217(1) of that Ordinance.

- (8) A specified decision, other than a specified decision mentioned in paragraph (c) of the definition of *specified decision* in subsection (10), shall take effect—
- (a) where, prior to the expiration of the period of 21 days specified in section 217(3) of the Securities and Futures Ordinance (Cap 571) as that within which an application for review of the decision shall be made, the person to whom the decision relates notifies the Monetary Authority that he will not make the application, at the time when he so notifies the Monetary Authority;
- (b) subject to paragraph (a), where the person does not make an application for review of the decision within the period of 21 days specified in section 217(3) of the Securities and Futures Ordinance (Cap 571) as that within which the application shall be made, at the time when the period so specified expires; or
- (c) where the person makes an application for review of the decision within the period of 21 days specified in section 217(3) of the Securities and Futures Ordinance (Cap 571) as that within which the application shall be made—
- (i) where the decision is confirmed by the Securities and Futures Appeals Tribunal established by section 216 of that Ordinance, at the time when the decision is so confirmed;
- (ii) where the decision is varied, or substituted by another decision, by that Tribunal, at the time when the decision is so varied or substituted, subject however to the terms of the variation or substitution; or
- (iii) where the application is withdrawn, at the time when it is so withdrawn.

(Added 6 of 2002 s 13)

- (9) Notwithstanding subsection (8) and any other provisions of this or any other Ordinance, the Monetary Authority may, in respect of a specified decision, where he considers it appropriate in the interest of the investing public or in the public interest to do so, specify in a notice served on the person to whom the decision relates any time, other than that at which the decision is apart from this subsection to take effect, as the time at which the decision is to take effect, in which case the decision takes effect at the time so specified.

(Added 6 of 2002 s 13)

(10) In this section—

specified decision

(指明決定) means a decision of the Monetary Authority—

- (a) in a notice under section 58A(4) served on the person concerned;
- (b) to refuse to grant consent under section 71C(1), to attach pursuant to section 71C(2)(b) conditions to such consent, to withdraw or suspend under section 71C(4) such consent, to attach pursuant to section 71C(9) conditions to such consent or to amend pursuant to section 71C(9) any such conditions; or
- (c) to attach pursuant to section 71E(3) conditions to provisional consent given under section 71E(1) or to amend pursuant to section 71E(3) any such conditions. (Added 6 of 2002 s 13)

(Added 4 of 1997 s 21. Amended 68 of 1999 s 3)

[132A.01] Enactment history

This section was added pursuant to s 21 of the Banking (Amendment) Ordinance 1997 (4 of 1997), commencing on 15 May 1997.

Subsection (1)(a) was amended pursuant to s 14 of the Banking (Amendment) Ordinance 1999 (42 of 1999), commencing on 19 November 1999.

Subsection (1)(d) was amended pursuant to s 14 of the Banking (Amendment) Ordinance 1999 (42 of 1999), commencing on 19 November 1999.

Subsection (1)(e) was amended pursuant to s 14 of the Banking (Amendment) Ordinance 1999 (42 of 1999), commencing on 19 November 1999.

Subsection (1)(f) was replaced pursuant to s 22 of the Banking (Amendment) Ordinance 2001 (32 of 2001), commencing on 24 May 2002.

Subsection (1)(fb) was added pursuant to s 22 of the Banking (Amendment) Ordinance 2001 (32 of 2001), commencing on 24 May 2002.

Subsection (1)(g) (except in so far as it relates to section 104(2) of the Banking Ordinance (Cap 155)) has been repealed by s 15 of the Banking (Amendment) Ordinance 2012, since 1 January 2013. The original text is reproduced as follows for reference:

‘(g) a requirement in a notice under section 100(2) or 104(2) served on the person;’

Subsection (1)(h) (except in so far as it relates to liquidity ratio and section 105(1) of the Banking Ordinance (Cap 155)) has been repealed by s 15 of the Banking (Amendment) Ordinance 2012, since 1 January 2013. The original text is reproduced as follows for reference:

‘(h) a variation of the capital adequacy ratio or liquidity ratio contained in a notice under section 101(1) or 105(1), as the case may be, served on the person;’

Subsection (6) was added pursuant to s 13 of the Banking (Amendment) Ordinance 2002 (6 of 2002), commencing on 1 April 2003.

Subsection (7) was added pursuant to s 13 of the Banking (Amendment) Ordinance 2002 (6 of 2002), commencing on 1 April 2003.

Subsection (8) was added pursuant to s 13 of the Banking (Amendment) Ordinance 2002 (6 of 2002), commencing on 1 April 2003.

Subsection (9) was added pursuant to s 13 of the Banking (Amendment) Ordinance 2002 (6 of 2002), commencing on 1 April 2003.

Subsection (10) was added pursuant to s 13 of the Banking (Amendment) Ordinance 2002 (6 of 2002), commencing on 1 April 2003.

[132A.02] General note

For grant or refusal of authorisation, see s 16 above; Variation of authorisation, see s 18 above; Revocation of authorisation, see s 22 above; Temporary suspensions, see s 24 above; Suspensions, see s 25 above; Control of establishment of local branches, see s 44 above; Control of establishment of local representative offices, see s 46 above; Control of establishment of overseas branches and overseas representative offices, see s 49 above; Control of establishment of overseas banking corporations, see s 51A above; Powers of Monetary Authority, see s 52 above; Advisors, Managers and assistant, see s 53G above; Amalgamation requires approval, see s 69 above; Chief executives and directors require Monetary Authority's approval, see s 71 above; Certain persons prohibited from acting as employees of authorised institutions except with consent of Monetary Authority, see s 73 above; Acquisition by authorised institutions incorporated in Hong Kong of share, see s 87A above; False advertisements by authorised institution, see s 95

above; Remedial action for failure to keep to capital adequacy ratio, see s 100 above; Monetary Authority may increase capital adequacy ratio for particular authorised institution, see s 101 above; Remedial action for failure to keep to liquidity ratio, see s 104 above; Monetary Authority may vary liquidity ratio, see s 105 above; Determination of application for approval to act as money brokers, see s 118C above; Revocation of approval to act as money brokers, see s 118D above.

Persons aggrieved by the decision of the Monetary Authority have a general right to appeal against the decision of the Monetary Authority. The right of appeal under this section is not restricted to the authorised institution or directors, chief executives or managers of the authorised institution.

132B. Level of fines for offences under this Ordinance

Where this Ordinance provides for a fine for an offence (including a continuing offence) by reference to a tier, the fine applicable for the offence is the amount shown for that tier in the Thirteenth Schedule.

(Added 4 of 1997 s 21)

[132B.01] Enactment history

This section was added pursuant to s 21 of the Banking (Amendment) Ordinance 1997 (4 of 1997), commencing on 15 May 1997.

[132B.02] General note

For power to amend Schedules, see s 135 below.

133. Power of Monetary Authority to specify forms

- (1) Subject to subsection (2), the Monetary Authority may specify the form of any document required under this Ordinance to be in the specified form and the form of such other documents required for the purposes of this Ordinance as he thinks fit.
- (2) The Monetary Authority's power under subsection (1), shall be subject to any express requirement under this Ordinance for a form, whether specified or otherwise, to comply with that requirement, but that requirement shall not restrict the exercise of that power in respect of that form to the extent that, in the opinion of the Monetary Authority, his exercise

subsequently, be reclassified under that subsection, the institution shall so reclassify the exposure unless-

- (a) in the case of an exposure denominated in a currency other than Hong Kong dollars, the exposure's falling within, or failure to remain within, the value threshold or exposure limit specified in that section arises solely as a result of short-term exchange rate fluctuations; or
- (b) the outstanding balance of the exposure falls within the value threshold or exposure limit specified in that section primarily because of-
 - (i) repayments made by the obligor in respect of the exposure; or
 - (ii) write-offs made by the institution in respect of the outstanding balance of the exposure.

143. Corporate exposures

- (1) For the purposes of section 142(1) as read with Table 16-
 - (a) an authorized institution's specialized lending shall fall within project finance if the institution lends primarily to the revenue generated by a single project funded by the lending, both as the source of repayment of, and as collateral for, the lending;
 - (b) an authorized institution's specialized lending shall fall within object finance if the lending funds the acquisition of physical assets and the repayment of the lending is dependent on the cash flows generated by the assets which have been financed and pledged or assigned to the institution;
 - (c) an authorized institution's specialized lending shall fall within commodities finance if the lending is structured short-term lending to finance reserves, inventories, or receivables of exchange-traded commodities (including gold), and-
 - (i) the repayment of the lending will be from the proceeds of the sale of the commodities (including gold); and
 - (ii) the obligor in respect of the exposure has no independent capacity to repay the lending;
 - (d) an authorized institution's specialized lending shall fall within income-producing real estate if the lending funds the acquisition of real estate and the prospects for repayment and recovery of the lending

depend primarily on the cash flows generated by the real estate acquired.

- (2) Where an authorized institution is not able to estimate the credit risk components as required in this Part for corporate exposures in respect of the institution's specialized lending, the institution shall use the supervisory slotting criteria approach to calculate the risk-weighted amount of such specialized lending in accordance with section 158(2).
- (3) Subject to subsection (4), for the purposes of section 142(1) as read with Table 16, an authorized institution may only classify an exposure to a corporate as a corporate exposure which falls within the IRB subclass of small-and-medium sized corporates if-
 - (a) subject to paragraphs (b) and (c), the corporate concerned has a reported total annual revenue, in its latest annual financial statements, of less than \$500 million;
 - (b) subject to paragraph (c), in any case where the corporate concerned is a member of a group of companies, the group of companies has a consolidated reported total annual revenue, in the group's latest consolidated annual financial statements, of less than \$500 million;
 - (c) in any case where the corporate concerned is consolidated with other corporates by the institution for risk management purposes, the aggregate of the reported total annual revenue, in the latest annual financial statements of the corporate concerned and the other corporates, is less than \$500 million.
- (4) Where an authorized institution demonstrates to the satisfaction of the Monetary Authority, in respect of a corporate to which the institution has an exposure, that the corporate's scale of business is not accurately reflected in the corporate's total annual revenue, the institution may, with the prior consent of the Monetary Authority, substitute the corporate's total assets for total annual revenue in determining whether the exposure falls within subsection (3) in respect of that corporate.
- (5) For the purposes of section 142(1) as read with Table 16, an authorized institution shall classify all of its exposures to corporates which do not fall within-
 - (a) the IRB subclass of specialized lending under

- supervisory slotting criteria approach pursuant to subsection (2);
- (b) the IRB subclass of small-and-medium sized corporates pursuant to subsection (3);
- (c) the IRB subclass of small business retail exposures pursuant to section 144(2); or
- (d) the IRB subclass of residential mortgages to property-holding shell companies pursuant to section 144(3)(b), as exposures which fall within the IRB subclass of other corporates.

144. Retail exposures

- (1) For the purposes of section 142(1) as read with Table 16, an authorized institution may only classify an exposure as a retail exposure which falls within the IRB subclass of small business retail exposures, residential mortgages to individuals, residential mortgages to property-holding shell companies, qualifying revolving retail exposures, or other retail exposures to individuals, as the case may be, if the exposure is included in a pool of exposures managed by the institution on a pooled or portfolio basis.
- (2) Subject to subsection (1), for the purposes of section 142(1) as read with Table 16, an authorized institution may only classify an exposure to a corporate as a retail exposure which falls within the IRB subclass of small business retail exposures if the total exposure of the institution or its consolidation group to-
 - (a) subject to paragraph (b), the corporate;
 - (b) if applicable-
 - (i) a group of companies of which the corporate is a member; or
 - (ii) the corporate and other persons (including individuals) which are consolidated by the institution with the corporate for risk management purposes, is less than \$10 million.
- (3) Subject to subsection (1), for the purposes of section 142(1) as read with Table 16-
 - (a) an authorized institution shall classify a residential mortgage loan to one or more than one individual as a retail exposure which falls within the IRB

- subclass of residential mortgages to individuals where the property securing the residential mortgage loan concerned is used, or intended for use, as the residence of the borrower or as the residence of a tenant, or a licensee, of the borrower;
- (b) an authorized institution shall classify a residential mortgage loan to a property-holding shell company as a retail exposure which falls within the IRB subclass of residential mortgages to property-holding shell companies where-
 - (i) the property securing the residential mortgage loan concerned is used, or intended for use, as the residence of one or more than one director or shareholder of the property-holding shell company or as the residence of a tenant, or a licensee, of the property-holding shell company;
 - (ii) all of the borrowed-monies obligations of the property-holding shell company arising under the residential mortgage loan concerned are the subject of a personal guarantee-
 - (A) which is entered into by one or more than one director or shareholder of the property-holding shell company (referred to in this paragraph as 'guarantor'); and
 - (B) which fully and effectively covers those obligations;
 - (iii) the institution, having due regard to the guarantor's financial obligations (including, in particular, all the guarantor's borrowed-monies obligations and obligations of suretyship), is satisfied that the guarantor is able to perform all the guarantor's obligations under the guarantee; and
 - (iv) the residential mortgage loan concerned made available to the property-holding shell company has been assessed by reference to substantially similar credit underwriting standards (including loan purpose, and loan-to-value and debt-service ratios) as would normally be applied by the institution to an individual.

- (4) Subject to subsection (1), for the purposes of section 142(1) as read with Table 16, an authorized institution shall classify an exposure as a retail exposure which falls within the IRB subclass of qualifying revolving retail exposures if-
- (a) the exposure is revolving, unsecured, and unconditionally cancellable (both contractually and in practice) by the institution;
 - (b) the exposure is to one or more than one individual and not explicitly for business purposes;
 - (c) the exposure is not more than \$1 million;
 - (d) the exposure belongs to a pool of exposures which have exhibited, in comparison with other IRB subclasses of retail exposures, low loss rate volatility, relative to the institution's average level of loss rates for retail exposures, especially within the pools to which low estimates of PD are attributed;
 - (e) data on loss rates for qualifying revolving retail exposures are retained by the institution in order to allow analysis of the volatility of loss rates; and
 - (f) treatment of the exposure as falling within the IRB subclass of qualifying revolving retail exposures is consistent with the underlying risk characteristics of the exposure.
- (5) Subject to subsections (1) and (6), for the purposes of section 142(1) as read with Table 16, an authorized institution shall classify all of its exposures to individuals which do not fall within-
- (a) the IRB subclass of residential mortgages to individuals; or
 - (b) the IRB subclass of qualifying revolving retail exposures, as exposures which fall within the IRB subclass of other retail exposures to individuals.
- (6) An authorized institution shall treat any of its exposures to individuals which are not managed by the institution on a pooled or portfolio basis in accordance with subsection (1) as corporate exposures.

145. Equity exposures

- (1) For the purposes of section 142(1) as read with Table 16-
- (a) subject to paragraphs (b) and (c) and subsection (2), an authorized institution shall classify under the IRB

- class of equity exposures all of its direct and indirect equity interests (whether voting or non-voting) in a corporate where those interests are not consolidated or deducted for the purposes of determining the institution's capital base in accordance with Part 3;
- (b) an authorized institution shall classify under the IRB class of equity exposures-
 - (i) holdings of any share issued by a corporate;
 - (ii) holdings of any equity contract;
 - (iii) holdings in any collective investment scheme which is engaged principally in the business of investing in equity interests;
 - (iv) holdings of any instrument which would satisfy the requirements set out in section 38 for inclusion in the institution's core capital if the instrument were issued by the institution;
 - (v) holdings of any instrument-
 - (A) which is irredeemable;
 - (B) which does not embody an obligation on the part of the issuer except an obligation which falls within subparagraph (vi); and
 - (C) which conveys a residual claim on the assets or income of the issuer;
 - (vi) holdings of any instrument which embodies an obligation on the part of the issuer and in respect of which-
 - (A) the issuer may indefinitely defer the settlement of the obligation;
 - (B) the obligation requires (or permits at the issuer's discretion) settlement by the issuance of a fixed number of the issuer's equity shares;
 - (C) the obligation requires (or permits at the issuer's discretion) settlement by the issuance of a variable number of the issuer's equity shares and, other things being equal, any change in the value of the obligation is attributable to, comparable to, and in the same direction as, the change in the value of a fixed number of the issuer's equity shares; or
 - (D) the institution has the option to require

that the obligation be settled in equity shares unless the institution demonstrates to the satisfaction of the Monetary Authority that—

- (I) in the case of a traded instrument, the instrument trades more like debt of the issuer than equity; or
 - (II) in the case of a non-traded instrument, the instrument should be treated as a debt holding;
- (vii) holdings of any debt obligation, share, derivative contract, investment scheme or instrument, which is structured with the intent of conveying the economic substance of equity interests; and
 - (viii) any of the institution's liabilities on which the return is linked to that of equity interests; and
- (c) an authorized institution shall not classify under the IRB class of equity exposures any equity holding which is structured with the intent of conveying the economic substance of debt holding or securitization exposures.
- (2) The Monetary Authority may, by notice in writing given to an authorized institution, require the institution to treat a debt holding of the institution as an equity exposure for the purposes of calculating the institution's credit risk if the Monetary Authority is satisfied that the nature and economic substance of the debt holding are such that the debt holding should more realistically be characterized as an equity exposure than as a debt holding.
 - (3) An authorized institution shall comply with the requirements of a notice given to it under subsection (2).

146. Other exposures

- (1) Subject to subsection (2), for the purposes of section 142(1) as read with Table 16, an authorized institution shall classify under the IRB class of other exposures any of the institution's exposures which do not fall within the IRB class of corporate, sovereign, bank, retail or equity exposures.
(L.N. 137 of 2011)
- (2) For the purposes of section 142(1) as read with Table 16, an authorized institution must classify under the IRB subclass of other items—

- (a) any of the institution's other exposures that do not fall within the IRB subclass of cash items; and
- (b) any of the institution's exposures that—
 - (i) fall within the definition of other regulatory capital instrument in section 35; and
 - (ii) are not subject to deduction from the institution's core capital and supplementary capital under section 48(2).

(L.N. 137 of 2011)

Division 3

IRB calculation approaches

IRB calculation approaches

Subject to subsections (2) and (3), an authorized institution shall, for the purposes of calculating the risk-weighted amount of its exposures, select IRB calculation approaches from the range of IRB calculation approaches set out in Table 17 available for each of the 6 IRB classes.

TABLE 17
IRB CALCULATION APPROACHES

Item	IRB class	IRB calculation approach
1.	Corporate exposures	(a) Foundation IRB approach (b) Advanced IRB approach (c) Supervisory slotting criteria approach
2.	Sovereign exposures	(a) Foundation IRB approach (b) Advanced IRB approach
3.	Bank exposures	(a) Foundation IRB approach (b) Advanced IRB approach
4.	Retail exposures	Retail IRB approach
5.	Equity exposures	(a) Market-based approach: simple risk-weight method (b) Market-based approach: internal models method (c) PD/LGD approach
6.	Other exposures	Specific risk-weight approach

- (2) An authorized institution shall not select an IRB calculation approach set out in Table 17 unless the institution satisfies the requirements specified in this Part applicable to or in relation to that IRB calculation approach.
- (3) Where, under these Rules, an authorized institution may use more than one IRB calculation approach set out in Table 17 to calculate its credit risk for exposures which fall within an

IRB class, the institution shall not, except with the prior consent of the Monetary Authority-

- (a) use more than one such IRB calculation approach to calculate its credit risk for exposures which fall within that IRB class; or
 - (b) discontinue using one such IRB calculation approach, and commence using another such IRB calculation approach, to calculate its credit risk for exposures which fall within that IRB class.
- (4) An authorized institution shall-
- (a) subject to paragraphs (b) and (c), only use more than one rating system for exposures which fall within an IRB class if the institution demonstrates to the satisfaction of the Monetary Authority that the rating systems concerned are necessary having regard to the characteristics and complexity of those exposures;
 - (b) only assign an exposure to a rating system referred to in paragraph (a) if that rating system accurately reflects the level of credit risk of the exposure; and
 - (c) document the reason for assigning an exposure to a particular rating system.
- Division 4-Risk-weighting framework under IRB approach

Division 4

Risk-weighting framework under IRB approach

148. General requirements for estimation of probability of default, loss given default and exposure at default

An authorized institution shall, for the purposes of making estimates of PD and, where relevant, LGD and EAD (collectively referred to in this Division as 'estimates')—

- (a) conduct periodic assessments of its risk quantification process and update the process as necessary to ensure that new data and analytical techniques and evolving industry practices are incorporated into the process;
- (b) update the institution's estimates produced by the institution's risk quantification process not less than once in every 12 months;

- (c) base the institution's estimates on historical experience and empirical evidence and not only on subjective or judgmental considerations, take into account all relevant data and information available and use appropriate methods;
- (d) demonstrate to the satisfaction of the Monetary Authority that the data the institution uses in its estimates (whether internal data or external data, or both)—
 - (i) are representative of its long run default experience and long run loss experience (covering a period which captures a reasonable mix of high-default and low-default years of at least one economic cycle); and
 - (ii) are based on economic or market conditions which are relevant to current and foreseeable economic or market conditions;
- (e) ensure that adjustments to the estimates, based on data which fall within paragraph (d)—
 - (i) are only made or approved by officers of the institution with the necessary experience and expertise to make or approve such adjustments and who have been authorized by the institution to make or approve such adjustments; and
 - (ii) form part of the institution's risk quantification process and are based on the exercise in good faith of judgment by officers who fall within subparagraph (i) and are not biased towards reducing the institution's regulatory capital for credit risk; and
- (f) demonstrate to the satisfaction of the Monetary Authority that the institution has-
 - (i) a set of procedures to evaluate the appropriateness of the method or data used in making the estimates; and
 - (ii) a mechanism for increasing the estimates when the evaluation referred to in subparagraph (i) indicates that the estimates

- (c) subject to Division 7, in relation to those positions arising from foreign currency option contracts, apply paragraphs (a) and (b) to each currency to which the option contracts relate.
- (2) An authorized institution shall, for the purposes of calculating the market risk capital charge for its positions in foreign exchange (including gold) and exchange rate-related derivative contracts, not exclude any of its structural positions from such calculation except after consultation with the Monetary Authority.
- (3) In subsection (2)—
- ‘structural position’ (結構性持倉), in relation to an authorized institution, means a position in foreign exchange held by the institution with the intention of hedging any adverse effect of exchange rate movements on its capital adequacy ratio.
- (L.N. 267 of 2006)

296. Calculation of market risk capital charge

- (1) Subject to subsection (2) and section 295, an authorized institution shall calculate the market risk capital charge for the institution’s positions in foreign exchange (including gold) as 8% of its total net open position derived by aggregating—
- (a) the sum of the institution’s net long or short positions less its United States dollars position against its Hong Kong dollars position; and
- (b) the institution’s net position in gold (whether long or short).
- (2) For the purposes of subsection (1)(a)—
- (a) the sum of an authorized institution’s net long or short positions is the sum of—
- (i) its total net long or short position in each foreign currency (including gold and, if applicable, the net delta-weighted position of option contracts in each such currency); and
- (ii) its Hong Kong dollars position;
- (L.N. 267 of 2006)
- (b) the United States dollars position against the Hong Kong dollars position in respect of an authorized institution is—
- (i) zero if the institution’s net open positions in United States dollars and Hong Kong dollars are both long or both short;

- (ii) the smaller of the 2 positions (expressed as the absolute value) if the institution’s net open positions in United States dollars and Hong Kong dollars are opposite positions.
- Division 6—Calculation of market risk capital charge for commodity exposures

Division 6

Calculation of market risk capital charge for commodity exposures

297. Preliminary steps to calculating market risk capital charge

- (1) An authorized institution shall, for the purposes of calculating the market risk capital charge for its positions in commodities and commodity related derivative contracts—
- (a) convert its gross (long plus short) position in each commodity to which those positions relate (measured in barrels, kilograms or grams or such other standard unit of measurement as is applicable to the commodity concerned) into monetary terms at the current market price of the commodity;
- (b) subject to Division 7, treat positions arising from commodity option contracts as commodity exposures;
- (c) value a futures contract or forward contract relating to a commodity by reference to the notional amount of the standard unit of measurement of the commodity converted into monetary terms at current market price and apply the maturity method to any interest rate exposure arising out of that contract;
- (d) in the case of a commodity swap contract under which one leg of the swap contract relates to a position or series of positions referenced to a fixed price and the other leg of the swap contract relates to a position or series of positions referenced to the current market price of a reference commodity or commodities—
- (i) for each payment under the swap contract, value each of the positions at the notional amount of the swap contract;
- (ii) treat each such position—

- (A) as long if the institution is paying at a fixed price and receiving at a floating market price; and
 - (B) as short if the institution is receiving at a fixed price and paying at a floating market price; and
 - (iii) treat any such leg which involves receiving or paying at a fixed or floating interest rate as an interest rate exposure to which the maturity method applies.
- (2) An authorized institution-
- (a) subject to paragraph (b), may, for the purposes referred to in subsection (1), offset long and short positions in the same commodity when calculating its open positions;
 - (b) shall not so offset its positions in different types of commodities.
- (3) In this section—
- ‘current market price’ (現行市場價格) means the current market price as determined in accordance with section 4 as if measured at fair value.

(L.N. 137 of 2011)

298. Calculation of market risk capital charge

An authorized institution shall calculate the market risk capital charge for its commodity exposures as the sum of-

- (a) 15% of the institution’s net position in each commodity; and
- (b) 3% of the institution’s gross (long plus short) position in each commodity.

Division 7

Calculation of market risk capital charge for option exposures:
general

299. Approaches which authorized institution may use to calculate market risk capital charge for option exposures

An authorized institution shall, for the purposes of calculating the market risk capital charge for its option exposures to debt securities, interest rates, equities, foreign exchange (including gold) and commodities-

- (a) subject to paragraph (c) and section 300, use the simplified approach;
- (b) subject to paragraph (c) and section 302, use the delta-plus approach; or
- (c) with the prior consent of the Monetary Authority, use another approach.

Division 8

Calculation of market risk capital charge for option exposures:
simplified approach

300. Application of Division 8

(1) An authorized institution shall not use the simplified approach to calculate the market risk capital charge for its option exposures unless the institution-

- (a) purchases option contracts but does not write option contracts; or
- (b) purchases option contracts and only writes option contracts which are fully hedged by matched long positions in the same option contracts.

(2) An authorized institution which uses the simplified approach to calculate the market risk capital charge for its option exposures shall-

- (a) exclude from that calculation-
 - (i) option contracts written by it; and
 - (ii) the corresponding purchased option contracts which fully hedge the option contracts referred to in subparagraph (i); and
- (b) only use its outstanding purchased option contracts for that calculation.

301. Calculation of market risk capital charge for outstanding purchased option contracts

(1) Subject to subsection (3), an authorized institution shall, for the purposes of calculating the market risk capital charge for its outstanding purchased option contracts (with or without related positions in the underlying exposures of those option contracts)—

- (a) where the institution has-

- (i) a long position in a put option contract and a long position in the underlying exposure of the put option contract; or
 - (ii) a long position in a call option contract and a short position in the underlying exposure of the call option contract,
- multiply the fair value of the position in the underlying exposure of the option contract by the sum of the market risk capital charge factors for general market risk and specific risk for the position in the underlying exposure of such option contract as set out in Table 31 less the amount by which the option contract is in-the-money (if any);
- (b) where the institution has a long position in a put option contract or a long position in a call option contract, use the lesser of-
 - (i) the fair value of the underlying exposure of the option contract multiplied by the sum of the market risk capital charge factors for general market risk and specific risk for the underlying exposure of such option contract as set out in Table 31; or
 - (ii) the fair value of the option contract; and
 - (c) calculate in a way such that-
 - (i) the market risk capital charge is calculated separately for individual option contracts but together with the related position in the underlying exposure of such option contracts;
 - (ii) the institution uses the sum of the market risk capital charge for individual option contracts to calculate the total market risk capital charge for its portfolio of option exposures.

TABLE 31

MARKET RISK CAPITAL CHARGE FACTOR FOR EACH RISK CATEGORY

Risk category	Market risk capital charge factor for specific risk	Market risk capital charge factor for general market risk
interest rate	as per the market risk capital charge factors for specific risk set out in Table 28 according to the class, credit quality grade and residual maturity	as per the risk-weights set out in Table 30 according to the residual maturity for fixed rate exposures or residual term to next interest fixing date for floating rate exposures and coupon rate
equity	8.00%	8.00%

foreign exchange	0.00%	8.00%
commodity	0.00%	15.00%

- (2) For the purposes of subsection (1)(a), where the amount derived from the calculation under that subsection is negative, an authorized institution shall treat the market risk capital charge for the relevant outstanding purchased option contract and the position in the underlying exposure of such option contract as zero.
 - (3) Where it is unclear to an authorized institution which side of an option contract purchased by it constitutes the underlying exposure for the purposes of the simplified approach, the institution shall take the exposure which would be received by it if the option under the contract were exercised to be the underlying exposure for this purpose.
 - (4) An authorized institution shall, for the purposes of calculating the market risk capital charge for an option contract purchased by it which has a residual maturity of more than 6 months-
 - (a) subject to paragraph (b), compare the strike price of the option contract with the forward price of the underlying exposure of the option contract;
 - (b) if it is not practicable for the institution to comply with paragraph (a), take the amount by which the option contract is considered to be in-the-money as zero.
 - (5) An authorized institution shall add the market risk capital charge calculated under this Division to the market risk capital charge calculated for the risk category concerned.
- Division 9-Calculation of market risk capital charge for option exposures: delta-plus approach

Division 9

Calculation of market risk capital charge for option exposures: delta-plus approach

302. Application of Division 9

- An authorized institution which writes option contracts (other than such an authorized institution which, by virtue of section 300(1)(b), uses the simplified approach) shall-
- (a) incorporate the delta-weighted positions of its

- outstanding option contracts into their respective risk categories; and Market risk capital Market risk capital charge factor for charge factor for Risk category specific risk general market risk
- (b) calculate and provide the following market risk capital charges against those positions-
- (i) the market risk capital charge for general market risk and specific risk for delta risk;
 - (ii) the market risk capital charge for gamma risk; and
 - (iii) the market risk capital charge for vega risk.
- 303. Delta risk**
- An authorized institution shall, for the purposes of calculating its delta risk-
- (a) slot its delta-weighted positions which have debt securities or interest rates as the underlying exposures of the relevant option contracts into the time bands set out in Table 30;
 - (b) treat its interest rate option contracts as having long and short positions such that-
 - (i) one position is referenced to the time the option contract concerned takes effect; and
 - (ii) the other position is referenced to the time the option contract concerned matures;
 - (c) subject to paragraph (d), calculate the market risk capital charge for its option contracts with equities or equity indices as the underlying exposure by applying the calculation treatment under Division 4 to the delta-weighted positions of those option contracts;
 - (d) for the purposes of paragraph (c), treat equities or equity indices on each exchange as a separate underlying exposure;
 - (e) calculate the market risk capital charge for its option contracts with foreign exchange or gold as the underlying exposure by applying the calculation treatment under Division 5 to the net delta-weighted positions (being the difference between the institution's total delta-weighted long positions and its total delta-weighted short positions) of those option contracts; and
 - (f) calculate the market risk capital charge for its option

contracts with commodities as the underlying exposure by applying the calculation treatment under Division 6 to the delta-weighted positions of those option contracts.

304. Gamma risk

- (1) An authorized institution shall calculate the gamma impact of each of its option contracts by the use of Formula 28.

FORMULA 28
CALCULATION OF GAMMA IMPACT OF OPTION CONTRACTS

$$\text{Gamma impact} = 1/2 \times \text{Gamma} \times \text{VU2}$$

where—

VU = variation of the underlying exposure of the option contract calculated as—

- (a) for option contracts relating to debt securities, debt security indices and interest rates, the fair value of that underlying exposure multiplied by the risk-weight for the appropriate time band set out in Table 30;
 - (b) for option contracts relating to equities and equity indices, the fair value of that underlying exposure multiplied by 8%;
 - (c) for option contracts relating to foreign exchange (including gold), the fair value of that underlying exposure multiplied by 8%; and
 - (d) for option contracts relating to commodities, the fair value of that underlying exposure multiplied by 15%.
- (2) For the purposes of subsection (1), an authorized institution shall treat the following positions as the same underlying exposure-
- (a) for interest rate exposures, positions within each time band set out in Table 30;
 - (b) for equities and equity indices exposures, positions on each exchange;
 - (c) for foreign exchange and gold exposures, positions in each currency pair and gold; and
 - (d) for commodity exposures, positions in each commodity.
- (3) An authorized institution shall-
- (a) offset the positive and negative gamma impacts for

- each option contract on the same underlying exposure to produce a positive or negative net gamma impact for that exposure; and
- (b) only use negative net gamma impacts to calculate the market risk capital charge for gamma risk.
- (4) An authorized institution shall calculate the total market risk capital charge for gamma risk as the sum of the absolute value of the negative net gamma impacts.

305. Vega risk

- (1) An authorized institution shall calculate the market risk capital charge for vega risk by multiplying the sum of the vegas for all its option contracts on the same underlying exposure, applying section 304(2) by a positive or negative change of 25% in the volatility of the value of the underlying exposures of those option contracts.
- (L.N. 267 of 2006)
- (2) An authorized institution shall calculate the total market risk capital charge for vega risk as the sum of the absolute value of the individual market risk capital charges for vega risk calculated under subsection (1).

Division 10—Calculation of market risk capital charge for credit derivative contracts booked in authorized institutions' trading book

Division 10

Calculation of market risk capital charge for credit derivative contracts booked in authorized institutions' trading book

306. Application of Division 10

- (1) This Division applies to credit derivative contracts booked in an authorized institution's trading book.
- (2) An authorized institution shall use the notional amount of the credit derivative contract to calculate the market risk capital charge for its credit derivative contracts except for section 312(6) and (7) where the fair value of the credit-linked note shall be used.

307. Specific risk

- (1) Where an authorized institution has entered into a total return swap or credit default swap as the protection seller, the

- institution shall record a long position in the reference obligation specified in the swap contract.
- (2) Where an authorized institution has entered into a total return swap or credit default swap as the protection buyer, the institution shall record a short position in the reference obligation specified in the swap contract.
- (3) Where an authorized institution has purchased a credit-linked note, the institution shall record a long position in—
- (a) the reference obligation specified in the note; and
- (b) the note issuer.
- (4) Where an authorized institution has issued a credit-linked note, the institution shall record a short position in the reference obligation specified in the note.
- (5) Subject to subsection (6), an authorized institution must, for the purposes of calculating the market risk capital charge for specific risk for nth-to-default credit derivative contracts that fall within section 286(a)(iv)—
- (a) subject to paragraph (b), apply section 287 and Division 10; and
- (b) if the nth-to-default credit derivative contract has an ECAI issue specific rating, in respect of positions in which the institution is the protection seller, assign a market risk capital charge factor to the position in accordance with section 287A(3A), (6) or (8) (as the case requires), as determined by the operation of section 15 as if that contract were a securitization exposure. (L.N. 137 of 2011; L.N. 156 of 2012)
- (L.N. 137 of 2011)
- (6) Subject to subsection (7), for the purposes of subsection (5)—
- (a) subject to paragraph (b), where an authorized institution has a position in one of the reference obligations underlying a first-to-default credit derivative contract and the contract hedges that position, the institution may offset with respect to the hedged amount—
- (i) the market risk capital charge for specific risk for its position in the reference obligation; and
- (ii) that part of the market risk capital charge for specific risk for the credit derivative contract that relates to the reference obligation in which the institution has that position; and

- (b) where an authorized institution has multiple positions in the reference obligations underlying a first-to-default credit derivative contract, the offsetting of market risk capital charge otherwise allowed under paragraph (a) is allowed only for its positions in the underlying reference obligation having the lowest market risk capital charge for specific risk.
(L.N. 137 of 2011)
- (7) For the purposes of subsection (6), an authorized institution—
- (a) must offset the long and short positions in identical first-to-default credit derivative contracts before applying that subsection; and
- (b) must not offset the market risk capital charge for specific risk for its position in any *n*-th-to-default credit derivative contract, where *n* is greater than 1, with the market risk capital charge for its position in any underlying reference obligation.
(L.N. 137 of 2011)
- (8) (Repealed L.N. 137 of 2011)
- (9) Where an authorized institution enters into a credit default swap, total return swap or credit-linked note which provides for payment to be made proportionately in respect of the reference obligations in the basket of reference obligations specified in the swap contract or note, as the case may be, the institution shall record its positions in the reference obligations according to their respective proportions specified in the swap contract or note, as the case may be.
- (10) Where an authorized institution has purchased or issued a creditlinked note which is referenced to multiple reference obligations and satisfies the conditions for a qualifying debt security or debt-related derivative contract set out in section 287(4), the institution may—
- (a) if it has purchased the note, record the specific risk arising from its long positions in the multiple reference obligations specified in the note as a single long position in the note;
- (b) if it has issued the note, record the specific risk arising from its short positions in the multiple reference obligations specified in the note as a single short position in the note.

308. Use of credit derivative contracts to offset specific risk

- (1) Subject to subsection (2) and section 307(6), an authorized institution may use a credit derivative contract booked in the institution's trading book to offset the market risk capital charge for specific risk calculated for the institution's trading book position in the underlying exposure which is identical to the reference obligation specified in the credit derivative contract, or in another credit derivative contract, in accordance with section 309, 310 or 311.
(L.N. 137 of 2011)
- (1A) Subject to subsection (2), an authorized institution may use a credit derivative contract booked in the institution's trading book to offset the market risk capital charge for specific risk calculated for the institution's trading book position in another credit derivative contract in accordance with—
- (a) section 309 (excluding section 309(1)(b)) with all necessary modifications;
- (b) section 310 with all necessary modifications; or
- (c) section 311 (excluding section 311(1)(a)) with all necessary modifications. (L.N. 51 of 2013)
- (2) Where section 309, 310 or 311 does not permit an authorized institution to use a credit derivative contract booked in the institution's trading book to offset the market risk capital charge for specific risk calculated for the institution's trading book position in the underlying exposure which is identical to the reference obligation specified in the credit derivative contract, or in another credit derivative contract, the institution shall calculate and provide the market risk capital charge against both trading book positions.
(L.N. 51 of 2013)
- 309. Offsetting in full**
- (1) For the purposes of section 308(1), an authorized institution may offset 100% of the market risk capital charge for specific risk for its position in a credit derivative contract against that for a position in the underlying exposure which is identical to the reference obligation specified in the contract where the values of the 2 positions, being the long or short position in the contract, and the short or long position respectively in the underlying exposure which is identical to the reference obligation specified in the contract, always move in the opposite direction and broadly to the same extent due to—
(L.N. 51 of 2013)
- (a) the 2 positions consisting of identical exposures; or

- (b) a long or short position in the underlying exposure being hedged by a total return swap and there being a match between the reference obligation specified in the total return swap and the position in the underlying exposure in every respect, and notwithstanding that the maturity of the total return swap may be different from that of the position in the underlying exposure.
- (2) Where an authorized institution offsets the market risk capital charge for specific risk for its positions pursuant to subsection (1), no market risk capital charge for specific risk is required to be calculated in respect of those positions. (L.N. 51 of 2013)
- 310. Offsetting by 80%**
- (1) For the purposes of section 308(1), an authorized institution may offset 80% of the market risk capital charge for specific risk for its position in a credit derivative contract against that for a position in the underlying exposure which is identical to the reference obligation specified in the contract where (L.N. 137 of 2011; L.N. 51 of 2013)
- (a) the values of the 2 positions, being the long or short position in the contract, and the short or long position respectively in the underlying exposure which is identical to the reference obligation specified in the contract, always move in the opposite direction but not broadly to the same extent as set out in section 309(1); and
- (b) the institution demonstrates to the satisfaction of the Monetary Authority that the contract can mitigate the credit risk of the institution's position in the underlying exposure effectively.
- (2) For the purposes of the demonstration referred to in subsection (1)(b), an authorized institution falls within that subsection in any case where-
- (a) subject to paragraphs (b), (c) and (d), the institution's long or short position in the underlying exposure referred to in that subsection is effectively hedged by a credit default swap or credit-linked note;
- (b) there is a match between-

- (i) the reference obligation specified in the credit default swap or credit-linked note referred to in paragraph (a) and the position in the underlying exposure;
- (ii) the maturity of the reference obligation specified in the credit default swap or credit-linked note referred to in paragraph (a) and of the position in the underlying exposure; and
- (iii) the currency in which the credit default swap or credit-linked note referred to in paragraph (a) and the position in the underlying exposure are denominated; (L.N. 51 of 2013)
- (c) the credit event definitions and settlement mechanisms and other key factors of the credit default swap or credit-linked note referred to in paragraph (a) do not cause the price movement of the swap contract or note, as the case may be, to materially deviate from the price movement of the position in the underlying exposure; and
- (d) the credit default swap or credit-linked note referred to in paragraph (a) transfers risk effectively taking account of any restrictive payout provisions (including fixed payouts and materiality thresholds).
- (3) Where an authorized institution offsets the market risk capital charge for specific risk for its positions pursuant to subsection (1)— (L.N. 51 of 2013)
- (a) only 20% of the market risk capital charge for specific risk is required to be calculated for the position with the higher market risk capital charge for specific risk; and
- (b) the market risk capital charge for specific risk to be calculated for the other position shall be zero.

311. Other offsetting

- (1) For the purposes of section 308(1), an authorized institution may offset partially the market risk capital charge for specific risk for its position in a credit derivative contract against that for a position in the underlying exposure where the values of the 2 positions, being the long or short position in the contract, and the short or long position respectively in the underlying exposure, usually move in the opposite direction in any case where — (L.N. 137 of 2011; L.N. 51 of 2013)