

**HONG KONG SPECIAL ADMINISTRATIVE REGION****ORDINANCE NO. 7 OF 2004**L.S.

TUNG Chee-hwa  
Chief Executive  
13 May 2004

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

[ ]

Enacted by the Legislative Council.

**PART 1****PRELIMINARY****1. Short title and commencement**

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

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

**2. Interpretation**

(1) In this Ordinance, unless the context otherwise requires—

- “applicant” (申請人) means a person who applies to the Tribunal under section 41(1), (2) or (3) for a review of—
- (a) a decision, or an assessment, of the Board; or
  - (b) a decision of the Monetary Authority;
- “authorized institution” (認可機構) has the meaning assigned to it by section 2(1) of the Banking Ordinance (Cap. 155);
- “bank” (銀行) means a company—
- (a) that holds a valid banking licence; or
  - (b) the banking licence of which is for the time being suspended under section 24 or 25 of the Banking Ordinance (Cap. 155);
- “banking licence” (銀行牌照) means a banking licence granted under section 16 of the Banking Ordinance (Cap. 155);
- “bare trustee” (被動受託人), in relation to a deposit or portion thereof, means a person holding the deposit or that portion on trust for a beneficiary where the beneficiary has the exclusive right to direct how the deposit or that portion is to be dealt with subject only to the right of the person to resort to the deposit or that portion to satisfy any outstanding charge or lien or for the payment of duty, taxes, costs or other outgoings;
- “Board” (存保委員會) means the Hong Kong Deposit Protection Board established by section 3;
- “chief executive” (行政總裁), in relation to a Scheme member or a bank, means the chief executive appointed under section 74 of the Banking Ordinance (Cap. 155) in respect of the Scheme member or the bank, and includes an alternate chief executive so appointed;
- “client account” (客戶帳戶), in relation to a depositor, means an account maintained by the depositor with a bank for the purpose of holding money held by the depositor for a client of the depositor, whether or not other money may be held in the account;
- “contribution” (供款) means—
- (a) the build-up levy within the meaning of Schedule 4;
  - (b) the expected loss levy within the meaning of Schedule 4; or
  - (c) the surcharge within the meaning of Schedule 4;
- “deposit” (存款) has the meaning assigned to it by section 2(1) of the Banking Ordinance (Cap. 155);
- “depositor” (存款人) means a person entitled to repayment of a deposit, whether made by him or not;
- “director” (董事) includes any person who occupies the position of director, whatever the title of his office;
- “Exchange Fund” (外匯基金) means the Exchange Fund established by the Exchange Fund Ordinance (Cap. 66);
- “Exchange Fund Bill” (外匯基金票據) means any instrument described as such which is issued by the Government for the account of the Exchange Fund under the Exchange Fund Ordinance (Cap. 66);

- “failed Scheme member” (無力償付成員) means a Scheme member in relation to which a specified event has, for the purposes of Part 5, occurred;
- “function” (職能) includes a power and a duty;
- “Fund” (存保基金) means the Deposit Protection Scheme Fund established by section 14;
- “HKAB” (香港銀行公會) means The Hong Kong Association of Banks incorporated by section 3 of The Hong Kong Association of Banks Ordinance (Cap. 364);
- “holding company” (控股公司) means a holding company within the meaning of section 2 of the Companies Ordinance (Cap. 32);
- “information system” (資訊系統) has the meaning assigned to it by section 2(1) of the Electronic Transactions Ordinance (Cap. 553);
- “late payment fee” (逾期繳付費) means the late payment fee imposed by the Board under section 15(4)(a);
- “liquidator” (清盤人) means a liquidator appointed by virtue of or under section 194 of the Companies Ordinance (Cap. 32);
- “MA supervisory rating” (專員監管評級), in relation to a Scheme member, means the supervisory rating that—
- (a) is from time to time assigned to the Scheme member by the Monetary Authority; and
  - (b) reflects the Monetary Authority’s assessment of the Scheme member’s overall financial condition and of the quality of the Scheme member’s management;
- “Monetary Authority” (金融管理專員) means the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap. 66);
- “protected deposit” (受保障存款) means a deposit denominated in any currency and maintained with a Scheme member but does not include those specified in section 1 of Schedule 1;
- “provisional liquidator” (臨時清盤人) means a provisional liquidator appointed under section 193, or appointed by virtue of section 194, of the Companies Ordinance (Cap. 32);
- “related person” (有關連人士), in relation to the Board, means—
- (a) a person employed or authorized by the Board under this Ordinance; or
  - (b) a person appointed as an agent or adviser of the Board under this Ordinance;
- “relevant deposit” (有關存款) means a deposit denominated in any currency and maintained with a Scheme member but does not include those specified in section 2 of Schedule 1;
- “Scheme” (存保計劃) means the Deposit Protection Scheme established under section 11;
- “Scheme member” (計劃成員) means a bank that is a member of the Scheme;

“subsidiary” (附屬公司) means a subsidiary within the meaning of section 2 of the Companies Ordinance (Cap. 32);

“Tribunal” (審裁處) means the Deposit Protection Appeals Tribunal established by section 40;

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

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

(2) In this Ordinance, a reference to the performance of a function includes the exercise of a power and the discharge of a duty.

(3) If a deposit, or portion thereof, held by a depositor in a client account for a client is also held by the depositor as a trustee or bare trustee under a trust or bare trust, the deposit or portion is, for the purposes of this Ordinance, taken as being held by the depositor for the client and not as such trustee or bare trustee.

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

## PART 2

### HONG KONG DEPOSIT PROTECTION BOARD

#### **3. Establishment of Hong Kong Deposit Protection Board**

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

(2) The Board—

(a) has perpetual succession under its corporate name;

(b) shall provide itself with a common seal; and

(c) is capable of suing and being sued in its corporate name.

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

#### **4. Composition of Board**

(1) The Board is to consist of—

- (a) the Secretary for Financial Services and the Treasury, or a person appointed by the Secretary, in writing, as his representative, as an ex officio member;
  - (b) the Monetary Authority, or a person appointed by the Authority, in writing, as his representative, as an ex officio member; and
  - (c) not fewer than 4 and not more than 7 other members appointed by the Chief Executive from among persons who, either because of their experience in finance, accounting, banking, law, administration, information technology or consumer affairs, or because of their professional or occupational experience, appear to the Chief Executive to be suitable for the appointment.
- (2) The following are not eligible for appointment under subsection (1)(c)—
- (a) a public officer;
  - (b) a person who is a director, or an employee, of—
    - (i) an authorized institution;
    - (ii) a holding company of an authorized institution;
    - (iii) a subsidiary of such a holding company; or
    - (iv) a subsidiary of an authorized institution.
- (3) The Chief Executive shall appoint one appointed member of the Board as Chairman of the Board.
- (4) The Chief Executive shall give notice of each appointment under subsection (1)(c) or (3) by notice published in the Gazette.
- (5) Schedule 2 has effect with respect to the Board.

## 5. Functions of Board

The Board has the following functions—

- (a) to establish and maintain the Scheme;
- (b) to manage and administer the Fund;
- (c) to assess and collect contributions and late payment fees;
- (d) to decide the entitlement of depositors and other persons to compensation under Division 2 of Part 5;
- (e) to pay compensation to depositors in accordance with this Ordinance;
- (f) to pay rebates or refunds of contributions to Scheme members in accordance with this Ordinance;
- (g) to recover from, or out of the assets of, the Scheme member concerned any amount of compensation paid to depositors from the Fund, together with any interest accrued thereon in accordance with section 38; and
- (h) such other functions as are imposed on it under this Ordinance.

## **6. Board to perform functions through Monetary Authority**

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

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

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

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

(a) shall be recoverable from the Fund; and

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

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

## **7. Powers of Board**

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

(a) borrow money from the Government or any other person for the purpose of performing its functions;

(b) claim from the liquidator or provisional liquidator of a failed Scheme member payment out of the assets of the failed Scheme member for reimbursement of the amount of compensation paid to the depositors concerned from the Fund, together with any interest accrued thereon in accordance with section 38;

(c) provide an indemnity to the liquidator or provisional liquidator of a failed Scheme member for the purpose of obtaining an early payment out of the assets of the failed Scheme member;

(d) make any compromise, agreement or arrangement—

(i) with the liquidator or provisional liquidator of a failed Scheme member, or with any other person, in respect of its claim against the assets of the failed Scheme member; or

(ii) with any person in respect of its claim against a Scheme member, in relation to which it is deemed under section 24 that a specified event never occurred;

(e) with the consent of the Financial Secretary, petition the Court of First Instance for the winding up of a Scheme member;

- (f) employ persons to assist the Board in the performance of its functions;
- (g) appoint persons as agents, or authorize persons—
  - (i) to assist the Board in the performance of its functions; or
  - (ii) where the Board is to perform its functions through the Monetary Authority, to assist the Monetary Authority in the performance of such functions;
- (h) appoint persons as advisers to assist the Board in the performance of its functions;
- (i) hold, acquire, lease, sell, charge, dispose of or otherwise deal with all kinds of property whether movable or immovable;
- (j) do all such things as the Board thinks fit in respect of its administration and management; and
- (k) exercise such other powers as are conferred on the Board under this Ordinance.

## **8. Board may issue guidelines**

(1) The Board may issue, for the guidance of banks or depositors, guidelines not inconsistent with this Ordinance, indicating the manner in which it proposes to perform its functions under this Ordinance.

(2) The Board shall publish a guideline issued under this section in the Gazette.

(3) The Board may amend or revoke a guideline issued under this section. Subsection (2) applies to the amendment or revocation of a guideline in the same way as it applies to the issue of a guideline.

(4) A person does not incur a civil or criminal liability only because the person has contravened a guideline issued under this section. If in any legal proceedings the court is satisfied that such a guideline is relevant to determining a matter that is in issue in the proceedings—

- (a) the guideline is admissible in evidence in the proceedings; and
- (b) proof that the person contravened or did not contravene the guideline may be relied on by any party to the proceedings as tending to establish or negate the matter.

(5) A guideline issued under this section is not subsidiary legislation.

(6) In this section, “court” (法院) includes a magistrate and the Tribunal.

## **9. Directions of Chief Executive in Council**

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

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

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

(a) form any opinion;

(b) be satisfied as to any matter (including existence of particular circumstances); or

(c) consult any person,

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

## **10. Exemption from taxation**

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

## **PART 3**

### **DEPOSIT PROTECTION SCHEME**

## **11. Establishment of Deposit Protection Scheme**

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

## **12. Membership of Scheme**

(1) Subject to section 13, every bank is a member of the Scheme and remains as such until—

(a) the company ceases to be a bank by virtue of section 18(3) of the Banking Ordinance (Cap. 155); or

(b) its banking licence is revoked under that Ordinance.

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

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



### 13. Exemption

- (1) A bank may apply to the Board for an exemption from section 12(1).
- (2) An application under subsection (1) for an exemption is—
  - (a) to be made in the manner specified by the Board; and
  - (b) to be accompanied by such information and documents as the Board may reasonably require for the purpose of deciding whether the exemption should be granted.
- (3) The Board may, on receipt of an application under subsection (1) from a bank—
  - (a) exempt the bank from section 12(1); or
  - (b) refuse to so exempt the bank.
- (4) The Board shall not exempt a bank from section 12(1) unless it is satisfied that—
  - (a) the bank is incorporated outside Hong Kong;
  - (b) the deposits taken by the bank at its Hong Kong offices are protected by a deposit protection scheme, or other scheme of a similar nature, established and maintained in the jurisdiction in which the bank is incorporated; and
  - (c) the scope and level of protection available to those deposits under that scheme are not in all material respects narrower, and lower, than those that would be available to those deposits under the Scheme if the bank were not exempted.
- (5) If the Board exempts a bank from section 12(1)—
  - (a) it is a condition of the exemption—
    - (i) that the bank shall pay an annual exemption fee of such amount as may be specified by the Board from time to time;
    - (ii) that the bank shall forthwith notify the Board of any change of circumstances which may affect the exemption and, if so required by the Board, supply further information and documents to assist the Board in deciding whether the exemption should continue to be granted; and
    - (iii) where the bank is exempted from section 12(1) after having been a member of the Scheme, that the bank shall, in relation to any deposit taken by it before the date specified in the notice referred to in subsection (6) as the date on which the exemption takes effect—
      - (A) at the written request of the depositor made within 3 months after that date; and
      - (B) without imposing any fee or penalty on the depositor, repay the deposit, and pay the interest accrued thereon, prior to maturity; and

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

(6) As soon as practicable after having made a decision on an application under subsection (1) from a bank, the Board shall give notice in writing to the bank of its decision and, in the case of a decision to refuse to exempt the bank from section 12(1) or to impose any condition under subsection (5)(b), the reasons for its decision.

(7) An exemption from section 12(1) remains in force until it is revoked by the Board.

(8) The Board may, by notice in writing given to a bank the subject of an exemption from section 12(1)—

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

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

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

(10) A bank exempted from section 12(1) shall, as soon as practicable after the relevant time, inform in writing its depositors, or any person who is not already a depositor of the bank but has informed the bank that he intends to make a deposit with the bank—

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

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

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

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

(12) In subsection (10), “relevant time” (有關時間)—

- (a) in relation to the bank’s depositors, means the time when the bank receives the notice of decision of the Board given under subsection (6);
- (b) in relation to a person who is not already a depositor of the bank but has informed the bank that he intends to make a deposit with the bank, means the time when the person so informs the bank.

## PART 4

### DEPOSIT PROTECTION SCHEME FUND

#### **14. Establishment of Deposit Protection Scheme Fund**

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

(2) The Fund is to consist of—

- (a) contributions and late payment fees collected from Scheme members;
- (b) money recovered by the Board from, or out of the assets of, Scheme members;
- (c) returns on investments made under section 21;
- (d) money borrowed by the Board for the purpose of performing its functions; and
- (e) any other money lawfully paid into the Fund.

#### **15. Contributions to Fund**

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

(2) As soon as practicable after having made an assessment under subsection (1), the Board shall notify the Scheme member of the assessment in writing.

(3) A Scheme member shall pay to the Board, in the prescribed manner and within the prescribed period, the amount of contribution assessed by the Board.

(4) If a Scheme member fails to pay any contribution in contravention of subsection (3)—

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

(b) the Scheme member shall pay to the Board the contribution that remains to be paid by it, and the late payment fee, in the prescribed manner and within a period specified by the Board.

(5) The Board shall, on collecting any contribution or late payment fee from a Scheme member, pay it into the Fund.

(6) If a Scheme member contravenes subsection (4)(b), every director and every chief executive of the Scheme member commits an offence and is liable—

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

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

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

## **16. Payments from Fund**

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

(a) expenses incurred—

(i) in investigating or deciding the entitlement of depositors and other persons to compensation under Division 2 of Part 5;

(ii) in relation to the Scheme;

(iii) in the exercise by the Board of the rights, powers and authorities vested in it by this Ordinance or rules made under section 51;

(b) expenses incurred in—

(i) the establishment and maintenance of the Scheme;

(ii) the management and administration of the Fund;

(c) expenses incurred in obtaining insurance, sureties, guarantees or other security, or in making any financial arrangement, in respect of any compensation paid under this Ordinance;

- (d) repayment of, and interest on, any money borrowed by the Board for the purpose of performing its functions;
- (e) such amounts of compensation as allowed under this Ordinance, and the costs of and incidental to paying the same;
- (f) such amounts of rebates and refunds of contributions as allowed under this Ordinance, and the costs of and incidental to paying the same;
- (g) expenses incurred by or in relation to the Tribunal;
- (h) any other money payable from the Fund in accordance with this Ordinance.

### **17. Financial year and estimates**

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

(2) As soon as practicable after the commencement of this section, the Board shall submit to the Financial Secretary, for his approval, estimates of the income and expenditure of the Fund for the first financial year of the Fund.

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

### **18. Accounts**

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

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

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

### **19. Auditors**

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

(2) The auditor is entitled—

- (a) to have access to such books of account and other records of the Fund; and

(b) to require such information and explanation, as he considers necessary to perform his functions.

(3) The auditor shall audit the statement of accounts prepared under section 18(2) and make a report to the Board on the audit of that statement.

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

## **20. Statements and reports to be laid before Legislative Council**

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

(a) a report on the activities of the Board for that financial year;

(b) a copy of the statement of accounts prepared under section 18(2) for that financial year; and

(c) a copy of the report made under section 19(3) on the audit of that statement.

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

## **21. Investment of money**

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

(a) deposits with the Monetary Authority for the account of the Exchange Fund;

(b) Exchange Fund Bills;

(c) US Treasury Bills;

(d) subject to subsection (2), exchange rate contracts or interest rate contracts, including derivative products;

(e) any other investment approved by the Financial Secretary.

(2) The Board shall not place, or invest, money of the Fund in exchange rate contracts or interest rate contracts except for hedging purposes.

## PART 5

## COMPENSATION

## Division 1—Preliminary

**22. Occurrence of specified event**

(1) In this Part—

(a) subject to section 24, a specified event has occurred in relation to a Scheme member if—

(i) a winding-up order has been made by the Court of First Instance in respect of the Scheme member; or

(ii) the Monetary Authority has served on the Board a notice of his decision in respect of the Scheme member under subsection (2),

whichever is the earlier;

(b) a reference to a date of the specified event, in relation to a Scheme member, means—

(i) if a specified event has occurred in relation to the Scheme member by virtue of paragraph (a)(i), the date on which the winding-up order in respect of the Scheme member is made;

(ii) if a specified event has occurred in relation to the Scheme member by virtue of paragraph (a)(ii), the date on which the notice is served on the Board under subsection (2).

(2) If—

(a) in respect of a Scheme member—

(i) a Manager within the meaning of section 2(1) of the Banking Ordinance (Cap. 155) has been appointed under section 52 of that Ordinance; or

(ii) a provisional liquidator has been appointed; and

(b) the Monetary Authority is of the opinion that the Scheme member—

(i) is likely to become unable to meet its obligations;

(ii) is about to suspend payment to its depositors; or

(iii) is insolvent, has ceased to pay its debts in the ordinary course of business, or cannot pay its debts as they become due,

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

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

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

(5) If a specified event has occurred in relation to a Scheme member, the Board may exempt in writing the Scheme member, in whole or in part as specified in the exemption, from section 15 and from rules made under section 51.

(6) If a specified event has occurred in relation to a Scheme member by virtue of subsection (1)(a)(ii), the fact that—

(a) in the case where subsection (2)(a)(i) applies in relation to the occurrence, the appointment of the Manager is reversed by the Chief Executive in Council under section 53(1)(i) of the Banking Ordinance (Cap. 155) or is set aside by a court; or

(b) in the case where subsection (2)(a)(ii) applies in relation to the occurrence, the order appointing the provisional liquidator is discharged,

does not affect the operation of subsection (1)(a)(ii) in relation to the Scheme member.

### **23. Monetary Authority to report to Chief Executive in Council on occurrence of specified event**

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

(2) If a specified event has occurred in relation to a Scheme member by virtue of section 22(1)(a)(ii), the Monetary Authority shall, before reporting the occurrence—

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

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

(A) his decision under section 22(2) that compensation should be paid to the depositors of the Scheme member; and

(B) the reasons for his decision;

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



- (iii) incorporate his decision, the reasons for his decision, and the Scheme member's representations, if any, in his report to the Chief Executive in Council;
- (b) in the case where the Scheme member is incorporated outside Hong Kong—
  - (i) give the Scheme member, at its principal place of business outside Hong Kong, not less than 7 days' notice in writing (or such lesser period as is permitted under subsection (3)) informing the Scheme member of—
    - (A) his decision under section 22(2) that compensation should be paid to the depositors of the Scheme member; and
    - (B) the reasons for his decision;
  - (ii) afford the Scheme member an opportunity to submit to him representations in writing on the decision and reasons within the period of the notice; and
  - (iii) incorporate his decision, the reasons for his decision, and the Scheme member's representations, if any, in his report to the Chief Executive in Council.
- (3) The Monetary Authority may give a Scheme member less than 7 days' notice in writing referred to in subsection (2) if—
  - (a) he has the consent of the Financial Secretary to do so; and
  - (b) to do so is reasonable in the circumstances.
- (4) If a specified event has occurred in relation to a Scheme member by virtue of section 22(1)(a)(ii), the Chief Executive in Council shall, as soon as practicable after receipt of the Monetary Authority's report on the occurrence, by notice in writing given to the Monetary Authority confirm or revoke the Monetary Authority's decision under section 22(2) that compensation should be paid to the depositors of the Scheme member.
- (5) In determining whether to confirm or revoke under subsection (4) the Monetary Authority's decision, the Chief Executive in Council shall have regard to—
  - (a) the interests of the depositors of the Scheme member;
  - (b) the general stability and effective working of the banking system in Hong Kong; and
  - (c) such other factors as the Chief Executive in Council considers appropriate in the public interest.

#### **24. Specified event deemed never occurred under certain circumstances**

- (1) Subject to subsection (3), if—

- (a) a specified event has occurred in relation to a Scheme member by virtue of section 22(1)(a)(i); and
- (b) the winding-up order in respect of the Scheme member is set aside by a court,

it is deemed, with effect on and after the date on which the setting aside takes effect, that the specified event never occurred.

(2) Subject to subsection (3), if—

- (a) a specified event has occurred in relation to a Scheme member by virtue of section 22(1)(a)(ii); and
- (b) the Monetary Authority's decision under section 22(2) that compensation should be paid to the depositors of the Scheme member—
  - (i) is revoked by the Chief Executive in Council under section 23(4); or
  - (ii) is set aside by a court,

it is deemed, with effect on and after the date specified in the notice of revocation as the date on which the revocation takes effect, or the date on which the setting aside takes effect, that the specified event never occurred and that the Monetary Authority had never served on the Board a notice of that decision.

(3) Subsection (1) or (2) does not operate to prejudice the legality and effect of anything done in accordance with this Ordinance pursuant to the specified event before the effective date referred to in that subsection.

## 25. Quantification date

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

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

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

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

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

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

## **26. Protected deposits to include portion thereof**

In this Part—

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

### **Division 2—Entitlement to compensation**

## **27. Entitlement to compensation: general**

(1) Subject to section 31, a person is entitled, in respect of one or more protected deposits with a failed Scheme member that—

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

to compensation of the specified amount from the Fund under section 28 or 29, but the total amount of compensation to which the person is so entitled in respect of the deposits concerned shall not exceed \$100,000, regardless of the number or amount of deposits.

(2) Subject to section 31, a person is entitled, in respect of one or more protected deposits with a failed Scheme member that the person holds as a trustee under one trust, to compensation of the specified amount from the Fund under section 30, but the total amount of compensation to which the person is so entitled in respect of the deposits held under that trust shall not exceed \$100,000, regardless of the number or amount of deposits.

(3) In subsections (1) and (2), “specified amount” (指明款額), in relation to compensation to which a person is entitled from the Fund, means the amount by which the aggregate amount, as at the date of the specified event, of the protected deposits in respect of which the person is so entitled exceeds the aggregate amount, as at that date, of the liabilities of the person to the failed Scheme member in respect of which—

- (a) in the case of the date of the specified event within the meaning of section 22(1)(b)(i), a right of set off exists in the winding up of the failed Scheme member;
  - (b) in the case of the date of the specified event within the meaning of section 22(1)(b)(ii), a right of set off would have existed in the winding up of the failed Scheme member had a winding-up order been made in respect of it on that date,
- plus or minus, as the case may be, the interest accrued on the deposits, or the liabilities, calculated up to and including the quantification date.
- (4) For the purposes of subsection (3)—
    - (a) if any protected deposit or liabilities are not denominated in Hong Kong dollars, the deposit or liabilities shall be converted into Hong Kong dollars at the midpoint between the selling and buying telegraphic transfer rates of exchange quoted by HKAB on the quantification date or, where no such rates are quoted, at an exchange rate determined by the Board; and
    - (b) in determining the amount of liabilities of the person to the failed Scheme member, the same rules shall apply with regard to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, as if the failed Scheme member were a person so adjudged.

## **28. Entitlement to compensation: depositors in their own right**

- (1) Subject to this Division, if a depositor of a protected deposit with a failed Scheme member holds the deposit in his own right, the depositor is entitled, in respect of the deposit as at the date of the specified event, to compensation from the Fund.
- (2) If the depositor consists of 2 or more persons—
  - (a) in the case where the persons carry on business in partnership, those persons are, for the purpose of entitlement to compensation from the Fund, a single and continuing body of persons as distinct from the persons who may from time to time be the members of the partnership;
  - (b) in any other case, each of those persons is entitled, in respect of his share in the protected deposit as at the date of the specified event, to compensation from the Fund.
- (3) For the purposes of subsection (2)(b), each of the persons is deemed to have an equal share in the protected deposit unless the contrary is proved to the satisfaction of the Board.

### **29. Entitlement to compensation: bare trusts and client accounts**

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

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

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

(4) If the beneficiary or client consists of 2 or more persons—

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

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

(5) For the purposes of subsection (4)(b), each of the persons is deemed to have an equal share in the protected deposit unless the contrary is proved to the satisfaction of the Board.

### **30. Entitlement to compensation: trusts**

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

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

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

### **31. Restrictions on entitlement to compensation**

(1) If a depositor of a Scheme member or any other person is entitled, in respect of the depositor's protected deposit with the Scheme member, to compensation under this Division, any such compensation shall be paid to the depositor, but not any other person, in accordance with this Ordinance.

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

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

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

### **Division 3—Payment of compensation and related matters**

### **32. Board's duties and powers on occurrence of specified event**

- (1) If a specified event has occurred in relation to a Scheme member—
  - (a) the Board shall as soon as practicable after the occurrence inform the depositors of the Scheme member by notice published in any daily newspaper in circulation in Hong Kong, or by other means the Board considers appropriate, of the occurrence; and
  - (b) the Board—
    - (i) may, for the purpose of performing its functions, require a depositor, or each depositor of a class of depositors, of the Scheme member to supply the Board with information and documents in support of the entitlement of the depositor or other persons to compensation under Division 2; and

- (ii) shall thereupon inform the depositors concerned by notice published in any daily newspaper in circulation in Hong Kong, or by other means the Board considers appropriate, of the requirement.
- (2) If a specified event has occurred in relation to a Scheme member—
  - (a) the Board, or a person appointed as an agent of the Board or authorized by the Board under this Ordinance, may, for the purpose of the performance by the Board of its functions under this Ordinance, have access to the premises and records of the Scheme member; and
  - (b) every director, chief executive, manager, employee or agent of the Scheme member, the liquidator or provisional liquidator of the Scheme member, or any person in possession of the records of the Scheme member, shall, subject to subsection (3)—
    - (i) afford the Board, or a person appointed as an agent of the Board or authorized by the Board under this Ordinance, access to those records; and
    - (ii) provide such assistance to the Board, or such a person so appointed or authorized, as the Board or person may require for the exercise of the power under paragraph (a).
- (3) The Board shall not require the disclosure by a solicitor or counsel of any privileged communication, whether oral or written, made to or by him in that capacity.
- (4) Any person who, without reasonable excuse, contravenes subsection (2)(b) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 6 months.
- (5) If a specified event has occurred in relation to a Scheme member, the Board shall decide in accordance with this Ordinance—
  - (a) whether a depositor of the Scheme member or any other person is entitled, in respect of the depositor's protected deposit with the Scheme member, to compensation under Division 2; and
  - (b) if he is, the amount of compensation to which he is entitled under Division 2.
- (6) In making a decision under subsection (5), the Board may rely on the records obtained from the Scheme member except to the extent of any manifest error that appears on the face of those records.
- (7) The Board shall as soon as practicable after a decision has been made under subsection (5)—
  - (a) notify the depositor of its decision in writing; and
  - (b) if applicable, pay the compensation, subject to section 35, to the depositor from the Fund.
- (8) In this section—  
“agent” (代理人), in relation to a Scheme member, includes—

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

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

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

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

### **33. Board’s powers in relation to arrangements designed to increase amount of compensation**

(1) Subsection (2) applies if—

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

that the arrangement was entered into or carried out for the sole or dominant purpose of enabling the person, either alone or in conjunction with other persons, to become entitled to an amount of compensation under Division 2, to which the person would otherwise not be entitled.

(2) The Board shall exercise its power under section 32(5)—

- (a) as if the arrangement or any part thereof had not been entered into or carried out; or
- (b) in such other manner as the Board considers appropriate to counteract the effect of the arrangement.



- (3) In this section—
- “arrangement” (安排) includes an arrangement, transaction, operation or scheme whether or not such arrangement, transaction, operation or scheme is enforceable, or intended to be enforceable, by legal proceedings;
- “relevant date” (有關日期), in relation to a Scheme member, means—
- (a) the date on which a Manager within the meaning of section 2(1) of the Banking Ordinance (Cap. 155) is appointed in respect of the Scheme member under section 52 of that Ordinance; or
  - (b) the date on which the petition for the winding up of the Scheme member is presented,
- whichever is the earlier.

### **34. Compensation in Hong Kong dollars**

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

### **35. Limits to amount of compensation**

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

### **36. Interim payment**

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

- (a) there is uncertainty as to the entire amount of compensation payable to the depositor in accordance with this Ordinance; or
- (b) the time required to ascertain the entire amount of compensation payable to the depositor in accordance with this Ordinance would be so long as to unduly delay the payment of compensation to the depositor by the Board,

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