

## BANKING ORDINANCE

### Approval and revocation of approval of money brokers A Guideline issued by the Monetary Authority under section 118C(7)

#### Introduction

- 1 This “Guideline on approval and revocation of approval of money brokers” (the Guideline), which is issued under section 118(7) of the Banking Ordinance (the Ordinance) (Cap. 155), describes the authorization regime for money brokers and explains how the Monetary Authority (MA) will interpret the minimum criteria for approval of money brokers as set out in the Eleventh Schedule to the Ordinance and the grounds for revocation of approval of money brokers as set out in the Twelfth Schedule to the Ordinance.
- 2 This Guideline supersedes the previous “Guideline on approval and revocation of approval of money brokers” issued by the MA under section 118(7) of the Ordinance on 4 December 2015.
- 3 Since money brokers operating in Hong Kong mainly act as name-passers and therefore do not pose significant “systemic” risks to the interbank foreign exchange and deposit markets or raise consumer/depositor protection issues, it is not considered necessary to introduce an elaborate regulatory regime similar to that for authorized institutions.
- 4 To enable the MA to apply appropriate regulatory measures to individual brokers and monitor their compliance with the approval criteria and other regulatory standards, the Ordinance empowers the MA to attach conditions to the certificate of approval of money brokers, to vary, add, or delete such conditions, to conduct examinations of approved brokers and to obtain information from them.

#### Legal framework

- 5 Section 118A(1) of the Ordinance provides that no person shall act as a money broker unless that person is approved by the MA as a money broker under section 118C(1)(a).
- 6 Under section 2 of the Ordinance, “money broker” is defined to mean a person who, for reward, carries on the business in or from Hong Kong, or provides to persons in Hong Kong the service, of negotiating, arranging or facilitating, whether by electronic means or otherwise, agreements between other persons -
  - (a) in respect of the making of deposits of any currency; the purchase or sale of any currency; or the purchase or sale of an instrument specified in a notice under section 2(14)(a) by the MA;
  - (b) one of which is an authorized institution; and
  - (c) as agent for, or as the provider of a dealing service (see paragraph 8) to, not less than one of those persons.

- 7 It follows from the above definition that the money broker need not necessarily be resident, or be carrying on a business, in Hong Kong. The requirement to be approved will apply if the money broker is resident abroad but is providing a service to persons in Hong Kong (one of which is an authorized institution).
- 8 “Dealing service”, in the definition of “money broker”, means a service, offered in person or by electronic means or otherwise, whereby the persons to whom the service is provided are given the ability to quote bid or offer prices or rates for the purpose of effecting an agreement of the type described in paragraph 6(a) above. The prices or rates may then be matched pursuant to the service or accepted by any of those other persons to whom the prices or rates are quoted. This means that the legislation covers not only the traditional “voice brokers” but also “electronic brokers”.
- 9 The legislation is not intended to cover persons such as investment advisers, securities dealers, solicitors and professional accountants who may technically act as money brokers (e.g. in arranging to place deposits on behalf of their clients), but in a way which is wholly ancillary or incidental to their main business. This is provided for in Paragraph (b)(i) of the definition of “money broker” in section 2(1) of the Ordinance. However, under section 2(14)(c), the MA may specify a person, or a class of persons, to whom the exemption clause in Paragraph (b)(i) does not apply. This is to enable the MA to block any loopholes which might be created by this exclusion.
- 10 In addition, under section 2(14)(b), the MA may declare a person or a class of persons not to be a money broker, or a class of money brokers, for the purposes of the definition of “money broker”. This power may be used to exempt certain types of persons (which do not fall within the exemption clause in Paragraph b(i) of the definition of “money brokers”) from the approval requirements described above. Any exemption would however be subject to conditions set by the MA.
- 11 Given that “deposit” as currently defined in the Ordinance includes a loan of money and debt securities in respect of which no prospectus has been registered under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), persons who provide the service of negotiating, arranging, or facilitating agreements for syndicated loans or debt securities and thereby receive a fee for such service may inadvertently be caught by the definition of “money broker”. Since the regulatory framework for money broker is not intended to cover the arranging of syndicated loans or the issue of debt securities, the MA issued in December 2001 a notice under section 2(14)(b) which declares that a person is not a money broker by reason only that he negotiates, arrangers or facilitates -
- (a) the syndication of loans under which two or more persons provide credit or lend money to one or more other persons; or
  - (b) the issue of debt securities
- 12 Certain types of over-the-counter derivative products commonly traded in the inter-bank market, such as foreign exchange swaps (FX swaps), non-deliverable forwards (NDF), interest rate swaps (IRS) and cross-currency interest rate swaps (CCIRS), may fall within the scope of the agreements “negotiated, arranged or facilitated” as set out in the definition of “money broker” in the Ordinance. However, since such derivative products may take

different forms, including complex synthetic structures, each product must be considered on a case by case basis. Intermediaries who wish to act as agent or provide a dealing service in respect of such products where at least one of the parties is an authorized institution should therefore seek their own legal advice and, where appropriate, apply to the MA for approval to act as money broker under section 118B of the Ordinance.

### **Approval criteria**

- 13 Under section 118C(1) of the Ordinance, the MA has a general discretion to approve or refuse an application for approval as a money broker. Under section 118C(2), the MA is required to refuse to approve if any one or more of the criteria specified in the Eleventh Schedule (“the Schedule”) are not fulfilled with respect to the applicant.
- 14 Normally, the MA will not refuse to approve an applicant if he forms the opinion that all the criteria in the Schedule are satisfied with respect to it. As noted above, however, the MA does have a discretionary power to refuse to grant approval (though he has to give reasons for doing so and give the applicant the opportunity to be heard). This power may be exercised where the application in question gives rise to prudential concerns which are not covered in the existing criteria in the Schedule.
- 15 The approval criteria for money brokers and the authorization criteria for authorized institutions share a number of general characteristics, e.g. in respect of the continuing and forward looking nature of the criteria as well as the applicability of the criteria to the institution as a whole including its operations beyond Hong Kong.
- 16 Under Paragraph 1(4) of the Schedule, in relation to a company incorporated outside Hong Kong, the MA may regard himself as satisfied with respect to any matter relating to the approval criteria where the relevant money broker supervisory authority informs the MA that it is satisfied in relation to that matter, provided that the MA is satisfied as to the scope and nature of the supervision exercised by that authority.
- 17 In satisfying himself regarding any matter relating to the approval criteria, the MA is not bound to continue to hold that opinion after the company concerned is approved. Nor is the MA bound to hold a similar opinion in respect of any similar matter which relates to another company seeking approval as a money broker. In other words, each decision is taken on a case-by-case basis having regard to the merits of the particular case.
- 18 A description of each of the criteria in the Schedule and the MA’s interpretation of them is set out below. The paragraph references relate to those in the Schedule.

### **Paragraph 2 - identity of controllers**

- 19 Paragraph 2 provides that the MA must be satisfied that he knows the identity of each controller of the company. If necessary, the MA will seek the assistance of the home supervisor of a company incorporated outside Hong Kong in order to obtain this information. “Controller” is as defined in section 2 of the Ordinance and includes minority shareholder controller.

### **Paragraphs 3 & 4 - fitness and propriety of directors, controllers and chief executives**

20 These Paragraphs provide that the MA must be satisfied that each person who is, or is to be, a chief executive, director or controller of an applicant company is a fit and proper person to hold that particular position. In the case of a company which is incorporated outside Hong Kong, this requirement applies to the chief executive of the business in Hong Kong as well as to the chief executive of the company as a whole. In relation to companies incorporated outside Hong Kong, the MA will rely heavily on the views of the home supervisor, but will also reserve the right to take into account any other information which may be available to him.

#### Directors and chief executives

21 With regard to a person who is, or is to be, a director or chief executive, the MA will take into account the following factors -

- (a) the person's reputation and character, in particular as these relate to probity;
- (b) the person's knowledge and experience, competence, soundness of judgement and diligence;
- (c) the person's record of regulatory compliance;
- (d) the person's previous connections with companies which have been wound up by the courts on the application of creditors or which have been the subject of an official investigation; and
- (e) the person's business record and other business interests.

22 Consideration of such factors aims to ensure that the business of the money broker will be conducted in a prudent, professional and arm's length manner which avoids conflicts of interest.

23 Once a company is approved, the MA has continuing regard to the performance of the person in the exercise of his duties. Failure by a company to conduct its business with integrity, prudence and professional competence will reflect adversely on the probity and/or competence and/or soundness of judgment of those responsible.

#### Controllers

24 As controllers may exert significant influence on the business decisions of the company, the fit and proper criteria are also applicable to them. A key consideration is that the MA must be satisfied that the controllers of the company are fit and proper and will not prejudice the prudent and professional management of the company. This is viewed in the context of the circumstances of the individual case. The general presumption is that the greater the influence on the company, the higher the standard will be expected of the controller to fulfill the criterion.

- 25 Similar to directors and chief executives, in considering whether controllers of companies incorporated outside Hong Kong are fit and proper, the MA will rely heavily on the views of the home supervisor, but will also reserve the right to take into account any other information that may be available to him.
- 26 In satisfying himself with respect to a controller, the MA will first consider what influence the person has or is likely to have on the conduct of the affairs of the institution. If the person does, or is likely to, exercise a close control over the business, the MA would look for evidence that he has the knowledge and experience, competence, soundness of judgement and diligence for running a money broker. The MA would look therefore for the same range of qualities and experience that he would expect of the executive directors of a money broker. On the other hand, if the controller does not, and is not likely to, influence the directors and management of the money broker in relation to the day to day conduct of the business, it would not be necessary to require such a level of relevant qualities and experience.
- 27 The MA will also consider the probity of the person as he would in the case of directors and chief executives. The MA also has regard in this context to whether there could be conflicts of interest arising from the influence of the controller on the money broker.

#### **Paragraph 5 - adequate financial resources**

- 28 Paragraph 5 provides that the MA must be satisfied that the company presently has, and will, if it is approved, continue to have adequate financial resources (whether actual or contingent) for the nature and scale of its operations and, without prejudice to the generality of the foregoing, the aggregate amount of its paid-up share capital and the balance of its share premium account is not less than HK\$5 million or an equivalent amount in any other approved currency.

#### **Paragraph 6 - requirement to maintain adequate accounting systems and adequate systems of control**

- 29 Paragraph 6 provides that the MA must be satisfied that the company presently has, and will, if it is approved, continue to maintain adequate accounting systems and adequate systems of control. These are necessary to ensure that the business of money brokers is conducted in a professional and ethical manner and that errors, misunderstandings and breaches of confidentiality in the dealing activities of brokers are minimised. Money brokers also need to have adequate accounting systems and controls to ensure that proper records are maintained and accurate supervisory information is provided to the MA.
- 30 In considering whether a company's records and systems are adequate, the MA has regard, among other considerations, to the size, nature and complexity of its transactions, and the volume of transactions undertaken.
- 31 In assessing the overall adequacy of the accounting records and control systems of a money broker which is incorporated outside Hong Kong (other than in respect of its business in Hong Kong), the MA will have regard to the views of the home supervisor and will also take account of any other information which may be available to him.

- 32 Approved money brokers are generally required to maintain comprehensive records of the transactions undertaken; a list of names of their counterparties; and copies of all customer complaints and of their response to such complaints. Records should be kept for at least three years to enable effective audit trails to be carried out if necessary.

#### **Paragraph 7 – business to be conducted with integrity, prudence and competence**

- 33 Paragraph 7 provides that the MA must be satisfied that the business of the company is presently, and will, if it is approved, continue to be conducted with integrity, prudence and the appropriate degree of professional competence.

- 34 In considering whether this criterion is satisfied with respect to a money broker, the MA will have regard to its compliance with relevant codes or guidelines which are applicable to its particular activities. These include in particular the codes of conducts issued, adopted or endorsed by the Treasury Markets Association (as amended from time to time). In the case of companies incorporated outside Hong Kong, the MA will also have regard to the extent to which they comply with codes and guidelines issued by their home supervisors to the extent to which these apply to their operations as a whole (including those conducted in Hong Kong or with persons in Hong Kong).

- 35 The MA will also take account of the company's compliance with other prudential requirements set out in other parts of this Guideline and of its general reputation and standing in the market, both in Hong Kong and, where appropriate, in its international operations. The MA may require further information and may take confidential soundings in the market from established market practitioners to satisfy himself about a company's good standing.

- 36 Integrity is concerned with the manner in which the business of the company is carried on and is distinct from the question of whether its directors, controllers and chief executives are fit and proper persons. The company must observe high ethical standards in carrying on its business. Criminal offences or other breaches of law will obviously call into question the fulfillment of this criterion, as will breaches of relevant codes or guidelines. Of particular relevance in this context are the provisions of such codes and guidelines which deal with excessive gifts and entertainment as an inducement to conduct business. In considering what action to take in respect of a breach of statute or relevant codes or guidelines, the MA would have regard to the seriousness of the breach, whether the breach was deliberate or an unintentional or unusual occurrence, and whether it could be detrimental to the interbank foreign exchange and deposit markets.

#### **Conditions on approval**

- 37 Under section 118C(1)(a)(ii) of the Ordinance, the MA may attach such conditions as he may think proper to the approval of a particular application. It is the MA's intention that it should be conditions of the approval of money brokers that they comply with the codes of conduct issued or adopted or endorsed by the Treasury Markets Association (as amended from time to time) as applicable to them and any other codes to which they may be subject, and that they give prior written notice to the MA of any change(s) in their controllers, directors or chief executive.

- 38 Section 134B(1) provides that before attaching any condition to the certificate of approval of any money broker, the MA shall -
- (a) where the condition is attached to the certificate of approval of each money broker which is a member of Hong Kong Inter-Dealer Brokers Association, consult with the Association;
  - (b) where the condition is attached to the certificate of approval of a particular money broker, give that money broker an opportunity of being heard within a reasonable period.

### **Revocation of approval**

- 39 Under section 118D the MA may revoke the approval of an approved money broker on any one or more of the grounds specified in the Twelfth Schedule.
- 40 There are a number of steps which must be gone through before a revocation takes effect. Under section 118D(1), the MA may, after consultation with the Financial Secretary, propose to revoke an approval by serving notice in writing to that effect on the money broker concerned. Before proposing to revoke an approval (except where the revocation is requested by the money broker concerned), the MA must, under section 118E(1), have informed the company of the grounds for the proposed revocation and have given it an opportunity of being heard.
- 41 Only when the appeal procedures (see paragraphs 56 to 57) are exhausted or the company has waived its right of appeal would the MA specify by notice in writing to the money broker the date on which the proposed revocation shall take effect. From that date, the money broker must cease to act as a money broker.
- 42 The MA's powers of revocation under section 118D are discretionary. Even if the powers to revoke become exercisable, the MA may choose not to exercise them if he considers that remedial action can be speedily taken by the company concerned which would resolve the problem in a satisfactory manner. However, where such remedial action is not forthcoming, revocation of the company's approval may follow.
- 43 A description of each of the grounds for revocation in the Twelfth Schedule and the MA's interpretation of them is set out below. The paragraph references are to those in the Twelfth Schedule.

### **Paragraph 1 -criteria for approval specified in the Eleventh Schedule no longer satisfied**

- 44 As noted in paragraph 15 above, the criteria for approval set out in the Eleventh Schedule are continuing requirements which apply after a money broker has been approved. Accordingly, Paragraph 1 provides that it is a ground for revocation if the MA is satisfied that if the money broker concerned were not presently approved and were to make an application for approval, section 118C(2) would prohibit him from approving it. This is because the company concerned no longer satisfies one or more of the criteria set out in the Eleventh Schedule.

**Paragraph 2 - failure by the approved money broker to provide the MA with information of a material nature**

**Paragraph 3 - provision of information by the approved money broker to the MA which is materially false, misleading or inaccurate**

- 45 Paragraph 2 provides that the MA's powers to revoke become exercisable if he is satisfied that the money broker has not provided him, before or after approval, with information of a material nature relating to it as is required under the Ordinance. Paragraph 3 refers to a situation where the MA is satisfied that the company has provided him, before or after approval, with information which is, to a material extent, false, misleading or inaccurate. This applies whether or not the information was provided pursuant to a requirement under the Ordinance.
- 46 Failure to provide the MA with material information as required under the Ordinance could indicate weaknesses in the management and/or internal controls of the money broker. It may cast doubts on whether the company is being prudently managed and on the attitude of its management towards regulatory compliance. In determining whether or not to exercise his power of revocation on this ground, the MA would have regard to such factors as the nature of the information concerned, the frequency of the failure to provide information, whether effective measures had been implemented to rectify the situation, and whether there were other mitigating factors in the circumstances.
- 47 The MA considers that the provision of false, misleading or inaccurate information of a material nature by a money broker would be a serious matter as it would raise significant doubt not only on the effectiveness of the company's internal control systems but also perhaps on the basic integrity of its management and the general attitude of the management towards regulatory compliance. The MA would not however contemplate exercising his powers in the case of a minor inaccuracy. Rather, he would take account of such factors as the materiality of the information and of the inaccuracy, the frequency with which such inaccuracies occurred, whether there was a deliberate intent to deceive the MA, whether effective measures had been implemented to rectify the situation and whether there were other mitigating factors in the circumstances.

**Paragraph 4 – contravention of any condition attached to an approval**

- 48 As noted in paragraph 37, the MA has the power under section 118C(1) to attach conditions to the certificate of approval of a money broker. Paragraph 4 provides that the MA may exercise his powers of revocation where he is satisfied that the money broker has breached such a condition. In considering whether to exercise his powers, the MA would take account of the particular circumstances of the breach (including how serious it was, whether it was deliberate and how often it had been repeated) and any remedial action which had been taken to prevent a recurrence.

**Paragraph 5 -cessation to act as a money broker**

- 49 Under Paragraph 5, the MA may revoke the approval of a money broker if the company concerned is no longer acting as a money broker. If a company has ceased to act as a money broker, it should notify the MA in writing of that fact. In considering whether to exercise his



power of revocation under Paragraph 5, the MA would take account of the particular circumstances of the cessation (including whether it was temporary or permanent) and whether there were any reasons why the approval should be retained.

#### **Paragraph 6 -failure to pay fees**

- 50 Under section 118F, money brokers are required to pay the various fees specified in the Second Schedule. Under Paragraph 6, the MA may revoke the approval of a money broker if he is satisfied that the company concerned has failed to pay any such fee after being advised in writing by the MA that it is contravening section 118F. In considering whether to exercise his powers of revocation, the MA would take account of the particular circumstances of the failure to pay and any remedial action which had been taken to prevent a recurrence.

#### **Paragraph 7 -voluntary revocation by the approved money broker**

- 51 Paragraph 7 provides that an approved money broker may request in writing the MA to revoke its approval.

#### **Paragraph 8 – threat to the interests of Hong Kong as an international financial centre**

- 52 Under Paragraph 8, the MA may revoke the approval of a money broker if he is satisfied that the money broker engages in business practices which would be likely to prejudice the interests of Hong Kong as an international financial centre. This would apply to such practices as involvement in money laundering.

#### **Application procedures**

- 53 Only a body corporate is eligible to apply for approval under the Ordinance to be a money broker. Although it is not a statutory requirement, applicant companies are advised to discuss their plans with the Licensing Team of the HKMA before submitting a formal application. The consultation process will help to clarify issues, improve mutual understanding and expedite the processing of the formal application.

- 54 The MA may consult the relevant overseas supervisor in the case of a company incorporated outside Hong Kong regarding -

- the financial soundness of the company;
- the fitness and propriety of its directors, controllers and the chief executive;
- the company's record in compliance with statutory provisions or non-statutory codes and guidelines; and
- any other information deemed relevant.

- 55 The following information or documents should be submitted together with an application -

- financial statements for the past three years;
- if the applicant company intends to establish an operation in Hong Kong, a business plan for the first three years of operations in Hong Kong setting out the intended nature and scale of the business and business strategies. If the applicant company is resident abroad but is to provide a service to persons in Hong Kong (one of which is an authorized

institution), the intended scope, scale, and nature of the money broking services to be provided to persons in Hong Kong for the first three years;

- a description of the applicant's organization and staff resources;
- documents on the company's constitution;
- details of direct and indirect ownership, including the names of all controllers and the amount of their shareholdings;
- questionnaire on the background, experience, and qualifications of directors;
- details of accounting systems and systems of internal control;
- a statement by the applicant as to whether its operations are already supervised and by whom.

## **Appeals**

56 Under section 132A, any company aggrieved by the refusal of the MA to approve its application to be a money broker, or by the attachment or subsequent variation by the MA of any conditions to its certificate of approval, or by the MA's proposal to revoke its approval, may appeal to the Chief Executive in Council against the refusal or the attachment of conditions (though this does not prevent either of the MA's decisions from taking immediate effect), or the proposal for revocation.

57 The procedures for an appeal to the Chief Executive in Council are prescribed in the Administrative Appeals Rules of the Interpretation and General Clauses Ordinance (Cap. 1). Under the Rules, an appellant shall submit an appeal for the consideration of the Chief Executive in Council within thirty days after the date the appellant is notified of the decision against which the appellant wishes to appeal. The appellant will normally be notified of the decision of the appeal in writing within fourteen days after the determination of the appeal.