

7 September 2001

Clerk to Bills Committee on Companies (Corporate Rescue) Bill
Legislative Council Secretariat
3rd Floor, Citibank Tower
3 Garden Road
Central
Hong Kong

Dear Sir,

Bills Committee on Companies (Corporate Rescue) Bill

We refer to your letter of 13 July 2001.

As mentioned in our previous letter to you dated 5 April 2000, we are in support of the corporate rescue procedure as it provides a mechanism whereby arrangements could be made to assist business to survive, in whole or in part, as a going concern than simply for it to be wound-up. We note that you have also accepted our comment that the corporate rescue procedures should not apply to Hong Kong Exchanges and Clearing Limited (HKEx) by including in clause 3(1)(b)(iv) that the “Ordinance shall not apply to a company which is a recognized exchange controller within the meaning of section 2(1) of the Exchanges and Clearing Houses (Merger) Ordinance (Cap. 555)”.

We do not have any further comments on the Companies (Corporate Rescue) Bill insofar as our cash and derivatives market operations are concerned since the corporate rescue procedure does not apply to participants of the Stock Exchange of Hong Kong (SEHK) or the Hong Kong Futures Exchange, all of which are persons registered with the Securities and Futures Commission (SFC). We do, however, wish to draw your attention to the following concerns that we have in view of the impact that the corporate rescue procedure may have on our regulatory function over the listed companies and our clearing operations:

1. The Bill provides in clause 14(1) that during the moratorium, “a director of the company shall not discharge a duty or exercise a power imposed or conferred on him in his capacity as such a director” and that “the provisional supervisor of the company shall discharge such a duty and may exercise such a power”.

Clerk to Bills Committee on Companies (Corporate Rescue) Bill
Legislative Council Secretariat

By virtue of clause 14(1), it appears that SEHK will no longer be able to rely on the undertakings given by a director of a company listed on SEHK to, among other things, comply with, and use his best endeavours to procure the listed company to comply with, the Listing Rules and other applicable Ordinances such as the Securities (Disclosure of Interests) Ordinance. At the same time, as there is no contractual relationship between SEHK and the provisional supervisor, it is doubtful whether SEHK would be able to effectively apply the Listing Rules on the listed company. Under such circumstances, upon the appointment of a provisional supervisor, trading of the listed company's securities on SEHK should be suspended. We would therefore like to take this opportunity to emphasize that the right of SEHK to suspend the trading of a listed company's securities on SEHK should not in any way be curtailed by the corporate rescue procedure.

2. Schedule 5 of the Bill sets forth those contracts or other agreements to which section 11(2) shall not apply. These contracts comprise financial contracts such as currency or interest rate swap agreements or agreements to buy or sell securities. As mentioned in paragraph 10 of the Legislative Council Brief, the reason for the exclusion of these contracts from the application of the corporate rescue procedure is because to "impose a moratorium on such contracts could involve unravelling innumerable other contracts which would cause chaos in the market concerned".

HKEx is in support of the exclusion of these contracts and agreements from the application of the corporate rescue procedure. Nevertheless, (i) in view of the fact that the corporate investor participants of Hong Kong Securities Clearing Company Limited (HKSCC) are not persons registered with the SFC and are therefore subject to the corporate rescue procedure; and (ii) in order that HKSCC may be able to enforce any security provided by such investor participants for the buying or selling of securities so as to avoid the situation referred to in the immediately preceding paragraph in the event of default, we propose that the list of contracts and agreements set forth in Schedule 5 be extended to include any security provided to secure the liabilities of the company under an agreement or contract referred to in any of items 1 to 11 of Schedule 5.

If you wish to discuss this matter further with us, please do not hesitate to let us know.

Yours faithfully,
For and on behalf of
Hong Kong Exchanges and Clearing Limited

Lawrence Fok
Deputy Chief Operating Officer