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1 June 2010

Mr Bonny Loo
 Assistant Legal Adviser
 Legislative Council Secretariat (Legal Service Division)
 Legislative Council Building
 8 Jackson Road, Central
 Hong Kong

Dear Mr Loo,

Deposit Protection Scheme (Amendment) Bill 2010

Thank you for your letter of 24 May 2010, requesting us to clarify a few matters regarding the Deposit Protection Scheme (Amendment) Bill 2010 (the "Bill") arising from the discussion at the Bills Committee meeting on 20 May 2010. Please find below our reply which has been prepared in consultation with the Law Drafting Division of the Department of Justice and the Hong Kong Deposit Protection Board ("HKDPB" or "the Board").

Whether decisions or determinations made under the proposed sections 27(4)(c) and (d) and section 36(2) are reviewable

- (a) According to section 41(1) of the Deposit Protection Scheme Ordinance (Cap. 581) ("DPSO"), a person who is aggrieved by a decision of the Board under section 32(5)(b) of the DPSO may apply to the Deposit Protection Appeals Tribunal ("the Tribunal") for a review of the decision. Section 32(5)(b) of the DPSO refers to the amount of compensation to which a depositor is entitled as decided by the Board under Division 2 of Part 5 of the DPSO. Division 2 of Part 5 of the DPSO comprises sections 27, 28, 29, 30 and 31. It

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follows that the amount of compensation to which a depositor is entitled as decided by the Board by applying the proposed section 27(4)(c) or (d) may be subject to the review of the Tribunal. This is consistent with our policy intent.

The Board's decision on making an interim payment under section 36 of the DPSO is not a decision that may be subject to review under section 41(1) of the DPSO. Section 36 does not specify how the Board should arrive at the amount of interim payment payable to a depositor. This is to allow the Board to apply a method that it considers most suitable to the circumstances of the depositor, which probably may involve producing a reasonable estimate of the compensation entitled by the depositor (as the entire amount of compensation must be uncertain or will take a long time to ascertain and will result in delay at the time, which are the two pre-conditions set out in section 36 for triggering an interim payment). We do not have any intention to make such decisions under section 36 of the DPSO reviewable by the Tribunal, including decisions on the method used for producing the reasonable estimate of the compensation entitlement of a depositor at the time of interim payment, which may or not may not be the same as the methods applied in section 27(4)(c) or (d).

- (b) Since the Board's decision on the amount of compensation to which a depositor is entitled by applying the proposed section 27(4)(c) or (d) may be subject to review by the Tribunal, we do not think it necessary to make any changes to the term "the amount of compensation to which he is entitled" in section 32(5)(b) of the DPSO.
- (c) The proposed section 37(5) seeks to clarify for the purposes of section 37(1) of the DPSO, as stated in that proposed section, that the amount of compensation overpaid to a depositor as a result of an estimate made under the proposed section 27(4)(c) or (d) may be recovered by the Board. Hence, it does not affect other provisions of the DPSO and will not exclude from the Tribunal's jurisdiction under section 41(1) of the DPSO a decision of the Board arrived at by

making such estimate. However, we noted the concern of the Bills Committee that the use of the term “the entitled amount” in the proposed section 37(5) may have a potential of casting doubt on whether it has the same meaning as the amount of compensation to which a depositor is entitled as decided by the Board by applying the proposed section 27(4)(c) or (d) so that it will be subject to review by the Tribunal. We agree, therefore, to change the term “the entitled amount” in the proposed section 37(5) to “the reference amount” in order to eliminate any potential for confusion.

Clause 6 – proposed section 36(2)

- (a) The Board is empowered by the existing section 36 of the DPSO to make an interim payment to a depositor (when either one of the conditions set out in that section is met) of an amount that the Board considers appropriate. In other words, the Board can now make different amounts of interim payment to different depositors. The proposed section 36(2) seeks to further provide that the Board is empowered to make interim payments to different depositors, or different classes of depositors, of different amounts as the Board considers appropriate when either of the conditions specified in the proposed section 36(1), i.e. the existing conditions in section 36 of the DPSO, is met. We are of the view that this would reflect the policy intent more clearly.
- (b) We do not seek to change the conditions under which the Board may make an interim payment and the Board’s discretion in determining the amount of interim payment as currently specified in section 36 of the DPSO. However, without limiting the scope of factors that the Board may consider in determining the amount of interim payment to be made to a depositor under section 36 of the DPSO, we are agreeable to highlighting the financial position of the depositor as one of the possible factors to be taken into consideration by making the following changes to the Bill:
 - (i) in the proposed section 36(1), by repealing “of such an amount as the Board considers appropriate”; and

(ii) by recasting the proposed section 36(2) as follows:

“(2) The Board –

- (a) is to determine the amount of interim payment to be made to a depositor under subsection (1); and
- (b) may make interim payments of different amounts to different depositors or different classes of depositors under subsection (1),

that the Board considers appropriate having regard to the matters that the Board thinks relevant in the circumstances, which may include the financial position of the depositor or depositors concerned.”.

Clause 13 – proposed section 1(2) of Schedule 4

The proposed definition of “amount of relevant deposits” in section 1(1) of Schedule 4 to the DPSO (“the proposed definition”) and the proposed section 1(2) of that Schedule are meant to set out how members of the Deposit Protection Scheme (“the Scheme”) should report the amount of protected deposits (defined as “amount of relevant deposits”) held with them to the Board annually for contribution assessment purposes, as required by the Board in exercise of its power under section 48(2) of the DPSO. On the other hand, section 29 of the DPSO specifies how the Board will determine the amount of compensation to which a depositor is entitled when compensation under the Scheme is triggered. As section 29(3) of the DPSO provides that compensation is payable to a client under a client account, section 29(4) and (5) of the DPSO is therefore required to deal with the entitlement to compensation where the client consists of 2 or more persons.

However, for contribution assessment purposes, a Scheme member is required to report the amount of relevant deposits held in client accounts under the proposed paragraph (c) of the proposed definition, which is equivalent to paragraph (a)(iii) of the existing

definition of "amount of relevant deposits" in section 1(1) of Schedule 4 to the DPSO, on an account basis. The rationale behind for reporting on an account basis is that it was considered too onerous and may not be practically feasible to require Scheme members to investigate and find out the clients of client accounts (so that it mirrors the compensation determination basis) when reporting their amounts of relevant deposits for contribution assessment purposes. It is stated expressly in section 48(5) of the DPSO that the Board may not obtain information from Scheme members relating to the clients of client accounts. This reporting basis was set after thorough consultation before the Scheme was launched and Scheme members have been reporting on that basis since 2006. We have no intention of changing such reporting basis.

As regards the proposed section 1(2)(b) and (c) of Schedule 4 to the DPSO, which are identical to the existing section 1(2)(b) and (c) of that Schedule, they are meant to specify the treatments for deposits held by any depositor consisting of two or more persons under different accounts in the different capacities, i.e. in one's own right and as a trustee or bare trustee. However, it is not necessary to make similar specifications for deposits held in a client account because, as explained above, deposits in client accounts are to be reported on an account basis. It does not involve a decision as to whom the deposits in a client account are to be allocated if the depositor consists of two or more persons, as an amount up to the protection limit can be reported for each client account. Besides, a client account is clearly distinct from any other accounts in which deposits are held by a depositor in his own right, it is therefore not necessary to make provision to distinguish the different capacities of the depositor. Scheme members fully understand the relevant requirements and have been reporting on that basis since the Scheme commenced operation in 2006. The auditors responsible for auditing the reports made by Scheme members had no difficulties in understanding the relevant requirements. Scheme members and the auditors also reported no difficulties in understanding the proposed section 1(2) of Schedule 4 during the consultation. We therefore do not see it necessary to change the relevant provisions.

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Please feel free to contact me at 2529-0121 or Mr Adrian Lam at 2528-9050 should you have any further questions on the above.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'N. Li', with a small 'pp.' written to the right of the signature.

(Miss Natalie Li)

for Secretary for Financial Services and the Treasury

c.c.

Law Drafting Division/DoJ (Attn: Ms Phyllis Ko, SALD)

(Attn: Miss Mandy Ng, GC)

HKDPB

(Attn: Mr Colin Pou)