

二零零四年五月三十一日
資料文件

《結算及交收系統條例草案》委員會

行政當局對最近從有關各方收到的意見的最後回應

目的

在二零零四年五月二十一日舉行的會議上，委員獲悉行政當局再收到持續聯繫結算及交收國際銀行(「持續聯繫結算」)、香港會計師公會(「會計師公會」)及香港上海滙豐銀行有限公司(「滙豐銀行」)就草案提交書面意見。本文件列載行政當局對它們的意見的最後回應。

持續聯繫結算及交收國際銀行

2. 持續聯繫結算透過其香港法律顧問在二零零四年五月十九日向香港金融管理局(「金管局」)提出以下意見：
 - (a) 草案第 22 條對類似情況及類似法庭命令的提述應予刪除，以避免出現不必要的法律衝突的問題；及
 - (b) 應澄清第 26(1)(b)(i)及 27(1)(c)(i)條對提交破產或清盤呈請的提述是指在香港提交該等呈請。此舉是避免在香港以外地方委任的有關破產清盤人員試圖根據第 26 及 27 條採取行動，但草案背後的意向並不是要賦予這項訴訟權利。
3. 行政當局與持續聯繫結算及其法律顧問討論後，同意按上文(a)所述就第 22 條提出委員會審議階段修正案(「修正案」)。至於(b)，我們建議提出修正案，修改第 2 條對「有關破產清盤人員」的定義，以澄清有關定義僅限於根據香港法律行事的人士。持續聯繫結算的法律顧問已向我們確認持續聯繫結算對草案再沒有其他意見。

香港會計師公會

4. 行政當局於二零零四年五月二十日收到會計師公會的來信。因應委員的要求，我們已於二零零四年五月二十一日的手法委員會會議上，提供了該信件的副本給委員參閱。會計師公會認為應刪除第 25 條開始時採用的字眼「除在本部明文規定的範圍外」，並要求澄清在何種情況下方才根據第 26(4)及 27(4)條批給豁免。

5. 正如在上次會議上提到，行政當局已研究過，但並不同意會計師公會對第 25 條提出的意見。草案第 3 部現時並不局限、限制或以其他方式影響涉及的交易。然而，我們認為如果沒有上述的字眼，則有人可能辯稱就轉撥指令而引致的權利等，在與第 25(1)(a)條所述的權利等有所重疊的情況下，亦受第 25(1)條保障。換言之，第 25 條開端的字眼，有助表明第 25(1)條對於就涉及的交易而引致的權力的保障，與第 25(2)條就轉撥指令等的規定，並無矛盾。至於根據第 26(4)及 27(4)條批給豁免，我們的政策意向是豁免系統營運者或交收機構(視屬何情況而定)以該身份(而非指定系統的參與者或用家)作為第一參與者(有關係文有所界定)訂立的交易。我們已經向會計師公會闡明以上的觀點和回應。

香港上海匯豐銀行有限公司

6. 金管局在二零零四年五月十九日收到匯豐銀行就草案第 27A、40(1)、46 及 50 條提出的意見(見附件)。匯豐銀行的主要意見是：

- (a) 第 2(1)條對違責處理安排作出的定義非常廣泛，第 27A 條則對擬備及提交違責處理程序報告設定時限，而違反有關規定即屬犯罪，公司的高級人員可能要負上法律責任；及
- (b) 根據第 46 條，公司的高級人員可能要負上個人法律責任，但第 50 條的豁免權的範圍卻並未涵蓋該等高級人員的所有作為。

7. 行政當局理解匯豐銀行的立場，但草案需要載有合理的規定及適當的罰則，才能確保所設立的監察制度能有效運作以及達致其目的。我們已經向匯豐銀行闡明草案的條文及規定是合理的。

8. 首先，就第 27A 條而言，六個工作日被認為是足夠擬備一份違責個案報告。再者，回應匯豐銀行的提議，金管局同意就違責處理安排應如何作出報告，向指定系統提供指引。第二，要注意在第 46 條下，有關公司的高級人員除非符合第 46(a)或(b)條，否則不會負上法律責任。草案第 2 條已對「高級人員」作出恰當的定義，而該定義是根據現行法例的相關條文作出的。在豁免權方面，我們對匯豐銀行的回應中闡明，草案第 50 條向真誠地執行金融管理專員的指示的系統營運者及交收機構(包括其僱員及高級人員)給予民事豁免權。我們的政策意向並不是將豁免權擴大至包括系統營運者及交收機構所進行的所有其他活動，否則會損害與該等系統營運者及交收機構簽訂合約的參與者的權益。匯豐銀行獲悉我們的回應，且並沒有再提出任何其他意見。

前瞻

9. 除上述提及的意見外，自上次就本年五月二十一日的會議向議員發出《行政當局就條例草案接獲的意見及回應摘要(更新)》(立法會 CB(1)1870/03-04(02)號文件)後，我們並沒有再收到有關草案的任何其他意見。我們亦曾向另外兩個相關機構，即香港銀行公會及香港銀行同業結算有限公司查詢，它們都表示再沒有其他意見。

10. 行政當局已詳細考慮有關各方提出的意見，並適當地因應這些意見提出對草案的修正案。我們相信有關意見已獲得恰當的處理。所有修正案已載於最新的草案已標示修正版本(二零零零年五月二十七日發出)。

香港金融管理局
財經事務及庫務局
二零零零年五月二十七日

Annex
附件

To: Stanley TK CHAN/HKMA/HK@HKMA
cc: suannehou@hsbc.com.hk
fungyee.cheung@hsbc.com.hk
tonyyu@hsbc.com.hk

bcc:

From: susan.w.c.s.ng@hsbc.com.hk
Date: 19/05/2004 06:27 PM

Subject: Clearing and Settlement Systems Bill - Latest Draft

Stanley

We refer to the latest draft Bill that is posted on the LECO's website under LC Paper No. CB(1) 1795/03-04(04), and advise our further comments as follow:-

Clause 27A - Duty to report on completion of default proceedings

This new clause imposes duty on SI and SO to report on completion of "any action taken under default arrangements" within 6 (working) days.

For the "Default arrangements", we find that it is defined very broadly in Clause 2(1), and the wording of 27A will oblige a report even if one of the less serious "default" actions is taken, which may not involve any netting at all (as is contemplated in Clause 27A(a)).

With reference to the corresponding section of the SFO (47), "default proceedings" is defined more restrictively to effectively refer to the taking of proceedings or similar action (section 40(2)(a)) and closing out actions (Part 5 of Schedule 3).

We would be grateful if MA could consider to narrow down the wording of 27A to refer specifically only to the taking of netting or closing out actions under the default arrangements and not "any action".

For the time limit of 6 (working) days, it appears to be rather short for preparing the report. In comparison to S47 of the SFO, there is no time limit imposed.

We would be grateful if MA could consider to lengthen the time limit (if not removed altogether).

Clause 40 (1) - Contravention of provision of Part 3

This new section makes the failure to comply with 27A an offence and, under 46, company officers may be held personally liable for the offence.

While it is understandable to impose a penalty for contravention of 27A, it does not seem reasonable to impose personal liability on officers on a matter that does not appear to have that much significance.

Please consider that 40(1) should only apply if a person contravenes 27A "without reasonable excuse".

Clause 46 - Liability of company officers

We note that the new definition of "officer" covers exactly the same range of persons in the original wording of 46. Also, the "senior" officers that is stated in the existing draft version in Chinese appears only in the heading of the Clause and not the text, and in any event, does not in any way thereby restrict the definition of "officer".

Despite that both USD SI and HKICL have reiterated our points several times, we are disappointed to find that the latest version of this clause still has not addressed our concern.

We also refer to the "Comments from HKICL of 28 April 2004 and the Administration's Responses" on 7 May with regard to the following:

Clause 50 - Immunity

Our view will largely be the same as for Clause 46.

Summary of Conclusion

We would like to confirm our understanding from the discussion among the HKMA, HKICL and USD SI at the meetings as follows:

- the current arrangements are considered to be adequate,
- should any changes be required in the future, HKMA will consult with HKICL and HSBC before requiring those changes to be implemented,

- a reasonable time-frame will be allowed for implementing the changes.

Please would you advise if otherwise.

Thanks and regards,
Susan

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