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Secretary for Financial Services and the Treasury  
(Attention : Mr. Edmond LAU, PAS(5))  
Financial Services Branch  
Financial Services and the Treasury Bureau  
18/F Tower I, Admiralty Centre  
18 Harcourt Road  
Hong Kong

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**BY FAX**  
Fax No. : 2527 0790  
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Dear Mr. Lau,

### **Clearing and Settlement Systems Bill**

We are scrutinizing the above Bill with a view to advising Members and should be grateful if you would clarify the following matters:

#### Definition of "book-entry securities"

Is there any need to define "securities" referred to in the definition of "book-entry securities"? It is noted that "securities" is defined in the Securities and Futures Ordinance (Cap. 571) ("SFO"). Should the same be done in this Bill?

#### Clause 3

To avoid regulatory overlap with the Securities and Futures Commission ("SFC") under the SFO, it is proposed that the Monetary Authority's power to designate a clearing and settlement system under clause 3(1) will not apply to a clearing and settlement system that is, or is operated by, a company recognized as a clearing house under the SFO. Would the converse be the same, i.e. if the Monetary Authority has designated a clearing and settlement system under this Bill, the SFC would not give recognition to the same system for the purposes of section 37 of the SFO? If this is the case, is it necessary to amend the SFO to avoid the possible regulatory overlap?

#### Part 3 - Finality of Transactions and Proceedings

- (a) After the Monetary Authority has issued a certificate of finality in respect of a designated clearing and settlement system, will the Monetary Authority publish this fact in the Gazette or otherwise? Similarly, will the suspension or revocation of a certificate of finality be published? If not, how will other people know whether a certificate of finality has been issued, suspended or revoked? If it is

considered necessary to publish the relevant facts, should provisions be made to cover this?

- (b) Will the suspension or revocation of a certificate of finality in respect of a designated system affect any transaction effected through the system prior to the suspension or revocation? Is it necessary to make provisions to cover this?
- (c) In clause 16(1), should the reference to "the general law of insolvency" be amended to read "the law of insolvency" to make the reference consistent with the reference used in clause 13?
- (d) Clauses 18 to 20, as drafted, appear to favour heavily the interests of designated clearing and settlement systems as opposed to the interests of the stakeholders, if any, of the insolvent's estate. This appears to be inconsistent with the underlying intentions of the law of insolvency which has been designed to protect the interests of all parties involved in the event of insolvency. To strike a balance between the interests of designated systems and those of other stakeholders involved in transactions effected through the systems, should appropriate measures be put in place in the Bill to ensure that the interests of other stakeholders will not be unduly prejudiced as a result of the operation of these clauses?
- (e) In clause 18(1), apart from making reference to distribution of the assets of a person on bankruptcy or winding up, is it necessary to refer to distribution of the assets of a person on insolvency as well? As you are aware, a similar provision (i.e. section 45) of the SFO refers to "insolvency, bankruptcy or winding up". Moreover, the reference to bankruptcy alone may not cover voluntary arrangements under the Bankruptcy Ordinance (Cap. 6).
- (f) Upon completion of any default proceedings, is the system operator or settlement institution of a designated system required to make a report on such proceedings? Under the SFO, a recognized clearing house is under a duty to make a report on completion of default proceedings. Should similar provisions be provided in respect of designated systems under the Bill?
- (g) It is noted that unlike section 51 of the SFO, the right to recover gain from transaction at undervalue between two participants under clause 26 of the Bill is not exercisable in the event that a winding up statement in respect of the second participant is made by its directors pursuant to section 228A(1) of the Companies Ordinance (Cap. 32)? Is there any reason why different considerations should apply between participants of clearing houses under the SFO and participants of designated clearing and settlement systems under the Bill?
- (h) In the light of (g) above, please also consider whether it is necessary to make the right to recover transfer between two participants giving unfair preference under clause 27 also exercisable in the event that a winding up statement is made in

respect of the second participant by its directors pursuant to section 228A(1) of the Companies Ordinance.

- (i) In clause 28, is it intended that the obligation to notify insolvency should also apply in the event that a participant intends to make a proposal relating to voluntary arrangements under the Bankruptcy Ordinance? Is so, should this scenario be included in clause 28(1)?
- (j) In clause 28(1)(e), please replace "statutory declaration" by "statement in the specified form" to reflect the amendment made to section 228A of the Companies Ordinance in the Companies (Amendment) Ordinance (28 of 2003).

#### Requirement to give information (clauses 10, 51 and 52)

Can a system operator or settlement institution of a designated system refuse to provide information on the ground that it is privileged? If it is intended that privileged information need not be provided, should this be made clear in the Bill?

#### Time when decisions of Monetary Authority take effect

If the Monetary Authority decides to revoke a designation under clause 4 or a certificate of finality under clause 15, when will such decision take effect? Since there may be some time gap between the making of the decision by the Monetary Authority and the receipt of the notice of decision by the relevant designated clearing and settlement system, please consider the need to provide expressly the time when the revocation will take effect.

#### Review of decisions made by the Monetary Authority

To assist a person aggrieved by a decision of the Monetary Authority under clauses 3(1), 4(1), 14(1) or 15(1) to apply for a review of the decision by the Clearing and Settlement Systems Appeals Tribunal, should provisions be made in the Bill to require the Monetary Authority to give reasons for his decision, in particular, if he decides not to designate a clearing and settlement system or to revoke a designation.

#### Part 4 - Appeals Tribunal

##### (a) Clause 33

- (i) In clause 33(8), apart from delivering its determination made under clause 33(6), is the Appeals Tribunal required to deliver any costs order made under clause 34(1)(k)? If so, should this be stipulated in the relevant provision?
- (ii) In the event that part of the determination relates to material received by the Tribunal at any sitting, or any part of a sitting, that is held in camera, is the Tribunal obliged to deliver that part of the determination under clause 33(8)? Should provisions be made to allow the Tribunal to prohibit the publication or disclosure of any determination, or any part thereof, in such

circumstances? You may wish to refer to a similar provision (i.e. section 224) applicable to the Securities and Futures Appeals Tribunal under the SFO.

- (iii) In clause 33(9), what is the procedure for registering a determination made by the Tribunal in the Court of First Instance? Should provisions be made to cover this?
- (b) How and from whom are the costs awarded under clause 34(1)(k) recoverable? Should provisions be made to cover this?
- (c) Clause 37
  - (i) Does the lodging of an appeal to the Court of Appeal under clause 37 operate as a stay of execution of a determination of the Tribunal? Should provisions be made to cover this?
  - (ii) In clause 37(2), instead of using "reverse", would it be more appropriate to use "set aside" to make the reference consistent with clause 33(6)(a)?
  - (iii) Can the Court of Appeal remit the matter in question to the Tribunal? Should a provision similar to clause 33(6)(b) be provided in clause 37?
- (d) In clause 38, is it necessary to confer on the Chief Justice the power to make rules providing for the award of costs under clause 34(1)(k) and the taxation of those costs?

#### Clause 49

Is there any reason why disclosure of information to the Clearing and Settlement Systems Appeals Tribunal is not allowed under clause 49?

#### Clause 50

- (a) Clause 50(1) and (2), as drafted, appears to be wide enough to cover immunity from criminal liability. Does this reflect the Administration's intent? Please refer to section 380 of the SFO which grants immunity from civil liability only.
- (b) What is the rationale for exempting the system operator or settlement institution of a clearing and settlement system from liabilities for tortious acts or other wrongful act of his employees?
- (c) Is it intended that the scope of immunity under clause 50(2) should be confined to the relevant persons of a *designated* clearing and settlement system instead of *any* clearing and settlement system? Is so, should the references to "clearing and settlement system" be replaced by "designated clearing and settlement system"?

- (d) Who is an "officer" referred to in clause 50(2)(b)? Is it necessary to define the term? Please also consider the need to define "officer" as used in clause 55(1)(a).

Clause 54 and Schedule 2

Clause 54(3) would have the effect of exempting a clearing and settlement system specified in Schedule 2 from the obligations of a designated system and from the oversight of the Monetary Authority as provided in Part 2 of the Bill. This appears to be inconsistent with the object of the Bill which is to establish a regulatory regime for important clearing and settlement systems. What is the rationale for granting the exemption? How can the Monetary Authority ensure that the systems specified in Schedule 2 will be operated in a safe and efficient manner?

References to "by notice published in the Gazette"

References to "by notice published in the Gazette" can be found in various provisions of the Bill, for example, clauses 3(1), 4(1) and (2), 12(5) and 26(4). Please confirm whether notices made under those provisions are all subsidiary legislation subject to the negative vetting of the Legislative Council. In the event that some of these notices are not intended to be subsidiary legislation, instead of using the reference "by notice published in the Gazette", would it be more appropriate to adopt the reference used in clause 3(5)(a) instead?

Chinese text

We are still scrutinizing the Chinese text and will write to you separately, if necessary.

We would appreciate it if you could let us have the Administration's reply in both languages as soon as possible, preferably before the first Bills Committee meeting scheduled for 18 March 2004.

Yours sincerely,

(Connie Fung)  
Assistant Legal Adviser

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