

For discussion
on 21 May 2004

**Bills Committee on
Clearing and Settlement Systems Bill**

**The Administration's Response to Issues
raised at the Meeting held on 14 May 2004**

Purpose

This paper sets out the Administration's response to issues raised at the Bills Committee meeting on 14 May 2004.

The Administration is invited to provide the Bills Committee with its finalized response to the written submission of the Hong Kong Exchanges and Clearing Limited.

2. The Hong Kong Exchanges and Clearing Limited ("HKEx") wrote to the Bills Committee on 6 April 2004 and a Bills Committee Member on 6 May 2004 to express its concerns on potential regulatory overlap between the Securities and Futures Commission and the Hong Kong Monetary Authority (HKMA) in implementing the Securities and Futures Ordinance and the Bill as it comes into effect. Further to our response to the Bills Committee dated 17 April 2004 (see LC Paper No. CB(1)1571/03-04(04)), the Administration has discussed the matter with the HKEx and issued a letter to the HKEx on 13 May 2004 setting out the consensus reached amongst the parties concerned. A copy of the letter is at **Annex** for Members' reference.

The Administration is invited to seek the views of the Continuous Linked Settlement System (CLS) on the draft proposed Committee Stage Amendments (CSAs) to clause 22.

3. Subsequent to the last meeting, the HKMA has consulted the legal adviser of CLS on the CSAs to clause 22. They confirmed that they have no comment on clause 22.

Hong Kong Monetary Authority
Financial Services and the Treasury Bureau
19 May 2004

香港特別行政區政府
財經事務及庫務局
財經事務科
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FINANCIAL SERVICES BRANCH
FINANCIAL SERVICES AND
THE TREASURY BUREAU
GOVERNMENT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION

Annex
附件

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來函檔號 YOUR REF.:

URGENT BY FAX

13 May 2004

Mr Paul Chow
Chief Executive Officer
Hong Kong Exchanges and Clearing Limited
12/F, One International Finance Centre
1 Harbour View Street, Central, Hong Kong
(Fax: 2295 0880)

Dear *Paul*

Clearing and Settlement Systems Bill ("the Bill")

I write to set out our understanding reached on the way forward based on my telephone conversations with you and Stewart this morning, regarding Stewart's letter of 6 May 2004 to the Hon Henry Wu regarding the Bill, which was copied to the Hong Kong Monetary Authority (HKMA) yesterday.

You have clarified with me that the Hong Kong Exchanges and Clearing Limited ("HKEx") is not seeking any amendments to the Bill itself. Rather HKEx seeks to register its concern about any potential regulatory overlap between the Securities and Futures Commission (SFC) and HKMA in implementing the Securities and Futures Ordinance (SFO) and the Bill as it comes into effect. In particular HKEx is concerned about the possibility that the regulatory requirements imposed by SFC on the Hong Kong Securities and Clearing Company Limited (HKSCC) as an authorised clearing house under SFO, and those by HKMA on HKSCC as a member of the Central Moneymarkets Unit (CMU) and any other designated systems under the Bill in future, might be incompatible, and this would put HKSCC in a difficult position. In addition, you have also

assured me that HKEx appreciates the legislative intent of the Bill and has no intention not to comply with relevant requirements legitimately introduced by HKMA in accordance with the Bill.

In fact this subject has been thoroughly discussed at a meeting amongst HKEx, HKMA and the Bureau on 28 April 2004. We believe that the regime proposed under the Bill would not result in regulatory overlap between HKMA and SFC with respect to HKSCC. This is a position confirmed by HKMA and SFC. We also understand that there is no specific example in which such regulatory overlap is currently envisaged.

The above notwithstanding, we appreciate that as our market infrastructure systems evolve, there should be a reliable arrangement amongst the concerned parties to minimise any possible regulatory overlap and avoid the introduction of any incompatible regulatory requirements which make it impossible for the system operators to comply.

As a follow up action to the April meeting, we have already informed HKEx, and allow me to repeat here, that HKMA has assured us that it would stand ready to consult SFC, as appropriate, on rules to be promulgated under the Bill for governing designated clearing and settlement systems in which HKSCC (or CCASS) is also a participant. SFC has also confirmed that it would consult HKMA in similar circumstances arising under SFO. This aims to iron out any possible incompatibility between those rules imposed on clearing houses by SFC under SFO, and those by HKMA on designated systems under the Bill. It helps ensure that HKSCC will not be put in a situation where compliance with one set of rules will result in non-compliance with another. In this regard, we note that the rules under SFO and the Bill seek to achieve different regulatory objectives and thus they may not be entirely the same. HKMA and SFC would be prepared to enter into a memorandum of understanding to set out these consultation procedures.

In addition, section 65 of SFO has established a Risk Management Committee for HKEx, chaired by the HKEx Chairman and served by HKEx, to consider inter alia matters relating to the clearing and settlement systems operated by HKEx. The Financial Secretary has appointed a

senior executive member each from SFC and HKMA to sit on this Committee. We believe that this would be an appropriate forum for HKEx, SFC and HKMA to bring up any matters of concern as and when the regulators propose new rules governing these HKEx systems under their regulatory remit.

We trust that the above arrangements would have addressed your concern. As discussed over the phone, we are happy to consider referring to these arrangements in SFST's speech in resuming the Second Reading Debate of the Bill in the legislature.

We once again thank HKEx for bringing your concern to us, and we look forward to your support for the enactment of the Bill in this legislative session which is important in further enhancing our financial market infrastructure.

Yours sincerely,



(Miss Au King-chi)

for Secretary for Financial Services and the Treasury

c.c.

Hon Henry Wu (*Fax: 2526 8095*)

Hon C K Sin (*Fax: 2509 9688*)

Chairman, Bills Committee on the Clearing and Settlement Systems Bill

- with a copy of HKEx's letter of 6 May 2004

HKEx (Attn: Mr Patrick Conroy) (*Fax: 2868 1308*)
Mr. Steward Shing) (*Fax: 2541 8485*)

HKMA (Attn: Mr Norman Chan (*Fax: 2878 8129*)
Mr James Lau) (*Fax: 2878 8167*)

SFC (Attn: Mr Andrew Sheng) (*Fax: 2845 9553*)
-with a copy of HKEX's letter of 6 May 2004

HKE

香港交易所

6 May 2004

Hon. Henry K. C. Wu, BBS
Councillor
Legislative Council
HKSAR of the People's Republic of China
Room 420, West Wing
Central Government Offices
Hong Kong

Dear *Henry*,**Re : Clearing and Settlement Systems Bill**

Further to the letter of 7 April 2004 from our Ms. Mary Kao responding to your letter of 26 March 2004 to Mr. Paul Chow on the captioned subject, I would like to bring to your attention our concern on the draft Clearing and Settlement Systems Bill.

Hong Kong Exchanges and Clearing Limited (HKEx) has, since our written submission to the Bills Committee on 6 April 2004, provided further comments to the Hong Kong Monetary Authority (HKMA) in relation to the Bill. A summary of our comments and the Administration's responses is enclosed for your reference.

We have also held a meeting with HKMA and the Financial Services and Treasury Bureau (FSTB) to discuss our comments and the Administration's responses. As reflected in the enclosed summary, our major concern is on the issue of regulatory overlap. Both HKMA and the Securities and Futures Commission consider that Hong Kong Securities Clearing Company Limited (HKSCC), being a participant to the Central Moneymarkets Unit (CMU), will be subject to the Bill and hence the regulatory oversight of HKMA but this should not result in any regulatory overlap. HKEx has also been re-assured by FSTB on this view.

HKSCC, in carrying out its duties as a recognized clearing house under the Securities and Futures Ordinance (SFO), will in effect be subject to two sets of regulations, namely the SFO and the Bill. The issue of regulatory overlap may not be apparent today given our limited scope of CMU related operations. However, HKSCC or its Central Clearing and Settlement System, CCASS, may be linked or connected with other designated systems in future. It is possible that conflict or inconsistency may arise whether as a result of regulatory overlap or otherwise. We believe clear arrangement should be put in place to deal with this issue so as to enable HKSCC to discharge its duties properly.

While we trust that HKMA will keep the Bills Committee informed of our discussions, we would like to bring our concern to your kind attention to see if the Bills Committee could help address it in a better way at the time of passing the legislation.

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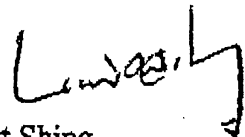
HKEx 香港交易所

6 May 2004
Hon. Henry K. C. Wu, BBS
Councillor
Legislative Council

Please feel free to contact me at 2840 3228 should you require further information or clarification.

We thank you for your kind assistance.

Yours sincerely,



Stewart Shing
Head, Clearing Business Unit

Encls

cc: Mr. Paul Chow – CEO, HKEx
Mr. Patrick Conroy – COO, HKEx

bcc: Ms. Mary Kao
~~Mr. Derrick Fung~~

Clearing and Settlement Systems Bill

Comments from Hong Kong Exchanges and Clearing Limited ("HKEx") and the Administration's Responses

Bill Clause / Subject	Comments	Responses
3(2)	"For the purposes of section 37" in section 3(2) of the Bill should be amended to "under section 37(1)" to be in line with the wording in the SFO ¹ .	After careful consideration, it is believed that the proposed amendment is not necessary.
Use of the term "clearing and settlement system"	The definition of "clearing and settlement system" includes CCASS and the references to clearing and settlement system, system, system operator and settlement institution in some of the sections of the Bill would include HKSCC ² /CCASS ³ e.g. sections 8(2)(d), 46(2)(b), 48(2)(b), 50(2)(a) and 51. As we understand that the Bill is not intended to apply to clearing and settlement system operated by a recognized clearing house, please ensure that such references are made expressly in relation to a "designated system" or alternatively consider excluding CCASS from the definition of the "clearing and settlement system".	Clauses 8(2)(d) and 51 are not necessarily confined to designated system whereas we agree that clauses 46(2)(b), 48(2)(b) and 50(2)(a) can be amended to refer to designated system only. After such amendments, we don't think that it is needed to exclude CCASS from the definition of the "clearing and settlement system".
Definition of "Participant"	The definition of the term "participant" in the Bill seems to be referring to a person who establishes the system by way of an arrangement with other party or parties. Our understanding of the term from the other provisions in the Bill and in particular Part 3 is that it means a person who participates in the system, i.e. a person who effects transfer of payments or securities through the designated system. The precise meaning of the term seems not clear.	The definition of "participant" includes the system operator, settlement institution and those who make use of the designated system for funds and securities transfers. The current definition is clear to cover all these parties, as a clearing and settlement system is a contractual arrangement and participants are "parties to the arrangement".

¹ Securities and Futures Ordinance

² Hong Kong Securities Clearing Company Limited

³ Central Clearing and Settlement System

Clearing and Settlement Systems Bill

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<u>Bill Clause/ Subject</u>	<u>Comments</u>	<u>Responses</u>
Oversight of HKSCC	HKSCC, including its CCASS operations, is subject to the regulation of SFC ⁴ under the SFO in discharging its statutory duties under the SFO as a recognized clearing house. In order to facilitate orderly, fair and expeditious clearing and settlement of transactions involving CMU ⁵ Instruments, HKSCC becomes a participant of CMU. As a result, HKSCC would be subject to the oversight of the MA directly under the statutory provisions applicable to participants of a designated system and indirectly through the operating rules and default arrangements in relation to CMU.	HKSCC would be subject to the oversight of the MA as a participant, i.e. user of the CMU.
48	MA has power to make regulations for the better carrying out of the purposes of the Ordinance under section 48 of the Bill and to impose amendments to the operating rules of a designated system under section 12 of the Bill. It appears that HKSCC will be subject to both SFC statutory regulation under the SFO and MA statutory regulation under the Bill which appears to be a statutory regulatory overlap.	HKSCC would not be regulated in the same capacity under the two legislation: under the SFO, HKSCC acts as an operator; under the Bill: HKSCC acts as a participant. There should be no regulatory overlap.
26 and 27	Sections 26 and 27 of the Bill could be applied to HKSCC as "first participant" of a designated system such as CMU. Since HKSCC is acting on behalf of our CCASS participants, we have no proprietary interest in the underlying transactions. We consider	It may be that HKSCC has no proprietary interest in the transactions, but all are novated when input into the system to make HKSCC a counterparty to each party of the transactions novated. If HKSCC is acting solely as

⁴ Securities and Futures Commission

⁵ Central Moneymarkets Unit

Clearing and Settlement Systems Bill

Comments from Hong Kong Exchanges and Clearing Limited ("HKEx") and the Administration's Responses

<u>Bill Clause / Subject</u>	<u>Comments</u>	<u>Responses</u>
	that HKSCC, although as a participant to CMU, should be exempted from these two sections while conducting CMU operations in the capacity of a recognized clearing house.	the conduit of the transaction, clauses 26 and 27 are not applicable to them.
General	HKSCC, in becoming a participant to a designated system like CMU, is in a way discharging its statutory duties as a recognized clearing house. We would like to confirm that any liability arising from the performance of obligations as a participant in good faith should be covered by the immunity provided in section 39 of SFO.	