For information
On 21 May 2004

Bills Committee on
Clearing and Settlement Systems Bill

Updated Summary of Comments Received
and the Administration's Response

As agreed at the last meeting held on 14 May 2004, we have updated the paper on "Summary of Comments Received and the Administration's Response" (LC Paper No. CB(1)1284/03-04(03)) to set out the outcome of our discussions on the Bill with various stakeholders since March 2004. Members will note from the updated summary table at **Annex** that their concerns have been addressed, where appropriate, by the Committee Stage Amendments proposed by the Administration.

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

Annex

Clearing and Settlement Systems Bill

Summary of Comments and Responses

Note: The underlined texts reflect the updated position as at 17 May 2004.

Subject/Clause	Organisation (see *Note*)	Comments	Responses
Definition of "law of insolvency"	HKSA	The Bill refers to a number of terms that are not defined. This leads to some repetition and also perhaps even some inconsistencies as to their scope. It might be useful for the terms "Insolvency", "Insolvency Proceeding" and "Insolvency Office Holder" ("IOH") to be defined. The definition of "law of insolvency" in Clause 13 of the Bill is suggested to be amended. Clause 16 of the Bill refers to "the general law of insolvency" which is not clearly defined law. The "law of insolvency" is in HKSA's view a concept incorporating concepts from many other areas of law, in particular the law relating to the ownership of property and security and other interests.	It was agreed at the meeting between HKSA and the Administration on 4 March 2004 that the suggested definitions would not be required in this Bill. The term "relevant insolvency office holder" has been defined in clause 2. See the response to clauses 16-18. The Administration has proposed Committee Stage Amendments (CSAs) to further clarify the definition of "law of insolvency" in clause 13. There is also a CSA to clause 16 to delete the word "general".
Definition / Clause 2	HKICL	The definition of "relevant insolvency officer" needs to be amended by virtue of the changes proposed to be made to the Bankruptcy Ordinance to include a provisional trustee. The definition of "system" has been deleted. However, the defined term continues to be used and so it seems that it should be reinstated.	We will consider a suitable amendment to this term. The Bankruptcy Ordinance has yet to be amended. The Bill concerns clearing and settlement systems. "Clearing and settlement system" has been defined under clause 2.
Obligations of designated system/ Clause 5	HKICL	As the revised clause no longer requires notifications of persons principally responsible for an aspect of the management or operations of a clearing and settlement system and this being the case, it seems that Clause 5(1)(b) is no longer relevant and should be deleted.	The clause is still relevant as the roles of system operator and settlement institution are distinguished in the Bill.
Obligations of designated	HSBC	The time limit of 3 days for notifying the HKMA of changes to the particulars of a system operator and settlement institution appears to be	A CSA has been proposed to extend the time limit from 3 days to 6 days.

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system / Clause 5(2)		very short.	
Requirements/ Clause 6(1)(c)	HKICL	If the resources available to the system are only advised to HKICL at the point of designation and if at that point HKICL do not have those resources, then HKICL would be in immediate breach of the Ordinance. We think that it would be in the interest of the Monetary Authority ("MA") to inform HKICL in advance of designation of the required resources so that if the resources available presently are not sufficient, then HKICL can make the necessary preparation to obtain those resources so that on designation, HKICL will be in compliance with the Ordinance.	HKICL will be advised in advance of designation.
Requirements/ Clause 6(2)(a)	HKICL	This provision has now been made more general and requires that the operating rules of a clearing and settlement system should impose on participants' requirements which are no less stringent than the requirements imposed on participants under the other provisions of the Ordinance. We wonder whether this is necessary in that the Ordinance will bind participants in any event.	This is an enforcement issue. The policy intention is for a designated system to enforce its own rules to meet at least the necessary standards. The requirements imposed on participants under other provisions of the Bill are basic requirements to ensure that the operations of designated systems are conducted in a safe and efficient manner.
Information requested/ Clauses 5 and 10	PCO	Should ensure that Clauses 5 and 10 of the Bill are in line with the requirements of the Personal Data (Privacy) Ordinance ("PD(P)O") in particular Data Protection Principle ("DPP") 1.	It is envisaged that personal data to be collected will likely relate to the particulars of the directors, shareholders and chief executive (if any) of a corporate system operator or settlement institution, which are necessary for the MA to carry out his functions under the proposed legislation. It is always the MA's intention that personal data collection will comply with the DPPs and we believe that the scope of information prescribed in clause 5 should satisfy the relevance, necessity and non-excessiveness criteria of DPP 1. The power to request information under clause 10 may appear to be broad at first glance, but the clause expressly limits the scope of information to be collected under it to those for the better carrying out of the MA's functions under

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			the Bill and relating to a designated system. This should be sufficient for the purpose of ensuring that the collection of personal data under Clause 10 will be in line with DPP 1. When the legislation comes into effect, the MA will put in place appropriate administrative arrangements to ensure that the DPPs will be complied with. However, in cases where compliance with DPP 1(3) will be likely to prejudice the discharge of the MA's functions for maintaining or promoting the general stability or effective working of the banking and/or financial systems as referred to in s.58(1)(g) and 58(3)(b) of PD(P)O, the MA is exempt from compliance.
Suspension or revocation of certificate of finality/ Clause 15(1)(b)	HKICL and HSBC	The revised drafting has been widened so that the provisions regarding finality of settlement now cease to apply in relation to a broader range of matters not merely the failure to provide information relating to a default. This clause now enables the MA to suspend the certificate of finality if a broad range of contravention of the Ordinance occur, namely:- • Clause 5(2) – failure to update particulars of a system operator or settlement institution; • Clause 6(3) – failure to obtain approval to a change to the operating rules; • Clause 10 – failure to respond to a request for information; • Clause 11 – failure to comply with directions of the Monetary Authority; • Clause 12 – failure to adopt operating rules requested by the Monetary Authority; • Clause 43 – giving false information; • Clause 52(4) – failure to give information regarding a default. Whilst it is appropriate that all of these contraventions should have their remedies, we wonder whether disrupting the finality of settlement of a designated system is appropriate in that effectively it punishes a broader	The oversight framework is closely related to the finality of the designated system. Contraventions stipulated in this clause will undermine the MA's ability in performing its functions under the ordinance. The concern about losing finality of settlement should be an important incentive for a system to comply with the requirements of the legislation. In exercising its powers, the MA will have regard to the severity of the breach(es) when he considers the appropriateness of suspension or revocation of a certificate of finality.

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		range of parties, the overwhelming majority of whom are not at all involved in the contravention. Perhaps consideration should be given to allowing the person responsible for the contravention to remedy the breach thereby preventing the suspension of the certificate of finality.	
Suspension or revocation of certificate of finality/ Clause 15(1)(b)	HKAB	The Bill should clarify how and when the revocation or suspension of the certificate of finality will be notified to participants of the system concerned.	The MA will ask the system operator / settlement institution to inform the system participants about his intention to suspend or revoke the certificate of finality and the effective date. The MA will publish notice of the suspension and revocation as well as the issuance of a certificate of finality in the Gazette for public information. The effective time and date will be specified in the relevant notices.
Finality of transactions/ Clauses 16 to 18	HKSA	The definition of insolvency has been expanded to include analogous insolvency proceedings in other jurisdictions (Clause 13(c)) and the definition of designated system now includes systems outside Hong Kong if they accept trades denominated in Hong Kong Dollars (Clause 3(2)(b))(an amendment which in itself appears fine). As currently drafted, the Bill now purports to disapply all insolvency laws (i.e. multi-jurisdictional laws) in relation to transfer orders settled through a designated system.	We will review clauses 16 to 18 to see if there is any unintended extra-territorial application. The Administration has proposed CSAs to further clarify the definition of "law of insolvency" in clause 13.
Finality of transactions/ Clause 19(b)	HKSA	HKSA agrees that Clause 19(b) is an essential provision to preserve the integrity of a designated system and the transfer orders settled through it. However, the drafting of Clause 19(b) is considered to be too wide as it validates not only the relevant transfer order but also the underlying transaction (i.e. the disposition of property).	It was agreed at the meeting that the current drafting "disposition of property in pursuance of such [a transfer] order" confined its application to the immediate disposition of property necessitated by the relevant transfer order, not the underlying economic transaction. The Administration has, in its letter of 22 April 2004 to HKSA, further responded regarding this point. HKSA has not raised further comments.
Finality of transactions/	HKSA	Clause 20 purports to remove the powers of the court under sections 49 and 50 of the Bankruptcy Ordinance, section 266 of the Companies	It was agreed at the meeting that reference to "disposition of property" must be read in its context, namely, "disposition of

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Clause 20		Ordinance and section 60 of the Conveyancing and Property Ordinance in making any order in respect of any transfer order or any disposition of property "in relation to" any transfer order or disposition of property. The use of the words "in relation to" and inclusion of "or disposition of property" are believed to be sufficiently wide to catch the underlying transaction as well as the transfer order and property disposition effected by a designated system pursuant to the transfer order itself.	property in pursuance of a transfer order", and that these words alone would not extend to include the underlying transaction. However, we will consider whether the wording "in relation to" in the phrase "in relation to a disposition of property in pursuance of a transfer order" could be construed as admitting the application of the provision to the underlying transaction, and if so, consider appropriate wording to ensure that the provision will not cover the underlying economic transaction. Having considered HKSA's suggestion, the Administration has proposed a CSA to amend the expression "in relation to" to "in respect of".
Finality of transactions/ Clause 25	HKSA	Whilst Clause 25 purports to preserve right of the IOH in relation to the underlying economic transactions, Clause 25(1) begins "Except to the extent that it expressly provides, this Part…….". This qualification renders Clause 25 ineffective as, arguably, the provisions of Clauses 19(b) and 20 are worded so that they prevent a claim in relation to the underlying economic transaction as well as the transfer orders.	It was clarified at the meeting that clauses 19(b) and 20 were only intended to cover a transfer order and the immediate "disposition of property" as a result of the transfer order. The right of an IOH in relation to the underlying transactions would not be affected. Nevertheless, we appreciate HKSA's concerns about the wording "Except to the extent that it expressly provides" and will consider a suitable amendment with a specific reference to the relevant clauses instead. The Administration has, in its letter of 22 April 2004 to HKSA, further responded that having reviewed the clause, it is considered that the expression "Except to the extent that it expressly provides" in clause 25(1) is intended to refer to all the provisions of Part 3 that give effect to the finality arrangements. HKSA has not raised further comments.

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Preservation of Rights/ Clause 25	HKICL	Part 3 should be limited to providing that settlement under a designed system is final and should not be unwound but that the rights and obligations between the participant and any other party should not be interfered with.	This is exactly what clause 25 is intended to achieve. While the Bill is drafted to protect settlement finality of a designated system, the effect of clause 25 is to preserve the rights and obligation of the parties concerned in the underlying transaction.
Right of relevant insolvency office holder/ Clause 26(4)	HKICL and HSBC	The clause now enables the MA to disapply this provision insofar as a system operator or settlement institution is concerned so that if the system operator or the settlement institution gains a benefit as a result of a transaction at an undervalue, it is not required to disgorge that benefit in accordance with the section. We would be grateful if the MA would confirm that it will exempt the system operator and settlement institution from the provisions of this clause as clearly it is inappropriate that either of them should be subject to the disgorging of gains made in relation to the operation of a system.	MA is indeed prepared to grant such exceptions under clause 26(4) so long as such transactions entered into by the system operator or settlement institution as first participant are in his capacity as such system operator or settlement institution. Also as currently drafted, the relevant system operator or settlement institution will have to make such request.
Right of relevant insolvency office holder/ Clauses 26 and 27	HKSA	Under Clauses 26(2) and 27(2) of the Bill, the IOH is entitled to recover from the counterparty the gain made by that counterparty, i.e., an immediate debt claim against that counterparty. This is significantly different from the position under the general law: transaction at an undervalue claims and preference claims require an order of the court to create a debt claim. Additionally, the scope of the court order available under the general law is wider than under the Bill in that it can potentially effect parties other than the counterparty. HKSA suggests to consider adopting the UK model as in the UK Statutory Instrument 1999 No.2979 ("UK SI"). The UK SI does not remove existing transaction at an undervalue and preference claims and replace them with alternative claims. Instead, the UK SI restricts the orders available to the court and limits the powers and duties of an IOH in order that the integrity of transfer orders is safeguarded. Such an order would preserve (and not unwind) transfer orders but adjust the underlying transaction by making an order to reverse its economic effect.	The Bill aims to achieve similar results to the UK SI. These two clauses are designed to minimize the impact of the rights and remedies of an IOH taken away by clauses 19 and 20. It was agreed at the meeting that it was a policy decision whether to retain the current approach in the Bill (which followed the approach taken in the Securities and Futures Ordinance ("SFO")), or to adopt that in the UK SI. HKSA suggested that the concept of a "transaction at an undervalue" in Clause 26 be amended by replacing the expression "significantly less" in subclause (3)(b) with the expression "less". HKSA was concerned that the inclusion of the term significantly" would create uncertainty as to whether a right of action under the clause existed, or could be proved in court. The suggested change would bring the concept of "gain" in

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			clause 26 more in line with the concept of gain in the corresponding section of the SFO. HKSA pointed out that the context of section 49 of the Bankruptcy Ordinance, where the expression "significantly less" also appeared, was different from that in Clause 26 of the Bill. We will review the wording of clause 26 in the light of HKSA's comments. In the light of HKSA's concerns, the Administration has proposed CSAs to align the language of these provisions more closely with the language of s.51 of the SFO and to delete the word "significantly" from the phrase "significantly less" in clause 26(3)(b).
Right of relevant insolvency office holder/ Clause 27(4)	HKICL and HSBC	This is a congruent provision to Clause 26(4) and applies in relation to disgorging of an unfair advantage. Again, the same comments arise and please confirm that the MA will be exempting the system operator and settlement institutions from the effect of this clause.	Similar to Clause 26(4).
Obligation of participant/ Clause 28(1)a	HKSA	The Clause 28(1)(a) refers to "any indication in writing by a creditor of the participant of his intention to pass a creditor's voluntary winding-up resolution". This is not technically possible – a creditor's voluntary liquidation is commenced by the passing of a winding up resolution by the members of the company, not by a creditor or creditors of the company.	We will make a suitable amendment to Clause 28(1)(a). We will also revise the reference to "statutory declaration" in Clause 28(1)(e) to take account of recent amendments to the Companies Ordinance. The Administration has proposed appropriate CSAs to clause 28 in the light of HKSA's comments.
Releasing IOH from obligations/ Clause 29	HKSA	The clause proposes that in order to be released from compliance with the duties of his office to the extent that those duties are affected by any action under default arrangements, an IOH must make an application to the court to be released from compliance with such duties or for his duties to be altered. In order to prevent the delay and expense of such applications, it is suggested that the Bill be amended to state that the	It was clarified at the meeting that the approach in the Bill was similar to that under the SFO (section 46(1)) which aimed to provide relief to an IOH. HKSA pointed out that under the common law all IOHs other than a receiver had an inherent right to apply to the court for

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		duties of an IOH will be deemed not to be applicable to the extent that the actions of an IOH otherwise required by such duties would conflict with the Bill. Clause 29 reflects an IOH's common law position and might only be relevant to a receiver as a receiver is not a court-appointed officer so that he does not have the inherent right to go to court for directions when in doubt as to the extent of his duties. It is proposed that Clause 29 might be revised to include a deeming provision that an IOH's duties would be deemed to be modified to the extent affected by the Bill.	directions as to the extent of their duties. HKSA also considered that the section could be read as providing that action taken under the Bill would not have the effect of releasing an IOH from compliance with the functions of his office unless and until an order had been made by a court under the section. We will review the wording of clause 29 in the light of HKSA's suggestion. The Administration has further considered HKSA's comments and concluded that clause 29 already achieves what HKSA suggested. The Administration has, in its letter of 22 April 2004 to HKSA, further responded regarding this point. HKSA has not raised further comments.
Enforcement of judgements/ Clause 30	HKSA	This clause provides that the enforcement of execution/judgment or other legal process over assets provided as collateral security or held by a system operator or settlement institution of a designated system as collateral security is made subject to the consent of the systems operator or settlement institution (although this does not apply to anyone seeking to enforce any existing interest in or security over the property). This provision is not limited in time. HKSA suggests that it may be useful to add an "exit" provision if, following the insolvency of a counterparty, the settlement institution or systems operator does not enforce against the asset within a reasonable timescale (say one year). This is particularly important where the asset may have a value that provides surplus realisations over and above the amounts needed to collateralise the obligations for which it was provided, and that the IOH should have the ability to request that the court order the asset to be sold and the proceeds used first to pay the amount of the collateralised obligation and the surplus paid to the estate of the insolvent counterparty.	It was agreed at the meeting that, in practice, the "exit" provision would not be necessary as the system operator would liquidate the collateral in a short period of time, if not within a day.

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Offences Part 5	HKAB	Offences are not warranted in cases where no element of mens rea is required, e.g. clause 39(1).	The Administration has responded to HKAB that the offence provisions are necessary for proper enforcement of the obligations under the Bill. There are similar offences under the Banking Ordinance.
Contravention of provision/ Clause 39(1)	HKAB	The severity of the penalty in clause 39(1) appears to be out of proportion to the nature of the offence in clauses 5(1) and (2).	The Administration has responded to HKAB that the availability of information on who is the system operator or settlement institution is important for the functioning of the oversight regime. The penalty level in clause 39(1) is appropriate so as to ensure timely notification by system operator or settlement institution under clauses 5(1) and (2). Such penalty level is also in line with that under the Banking Ordinance.
Contravention of provision/ Clause 39(2)	HKAB	It may be inequitable to impose the same penalty on different offences which vary greatly in the scale of severity.	The Administration has responded to HKAB that the offence provision is related to the contravention of clause 6(1), which focuses on the safety and efficiency of the designated systems. The requirements set out in clause 6(1) are related directly to the effectiveness of the Bill. The offence provision appropriately reflects the seriousness of contravention of these requirements. The Bill only specifies the penalty maxima. It would be up to the Court to calibrate the level of penalty in light of the severity of the breach.
Contravention of provision/ Clause 39(6)	HKAB	The defence, which requires the defendant to prove his innocence, is against the onus of proof under common law. Defence is not available for offences under clause 39(1) and (3).	We have explained to HKAB that the defence provision is not reversing the onus of proof under common law and similar examples can be found in other Hong Kong legislation, c.f.s.126 of the Banking Ordinance and s.292, 293 and 294 of the SFO. Clause 39(1) has included a reasonableness test and therefore defence is not necessary. Clause 39(3) refers to a blatant act i.e. change of operating rules of a designated system without prior written approval of MA and we consider that a defence

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			provision on this clause is not appropriate.
Contravention of provision/ Clause 39(6)	HKICL and HSBC	This clause is now limited to the offences under Clause 39(2), (4) and (5) whereas in the previous draft of the Bill, these defences were available for a broader range of offences (See Clauses 39(2) and (3), 40(2) and (3), 41(2) and (3), 43(2) and (3) and 46(2)). We doubt why the defence provisions now apply to a narrower range of offences.	The defences provided under clause 39(6) are only relevant to clause 39(2), (4) and (5).
Personal liability/ Clause 46	HKAB	It is suggested that only relevant individuals of an appropriate level should be targeted.	The Administration has responded to HKAB that this clause follows the SFO approach (c.f. s.390 of the SFO). The definition of "officer" in the Bill is similar to that of Schedule 1 of the SFO.
Personal liability/ Clause 46	HKICLand HSBC	This clause imposes liabilities on individuals in relation to offences committed by a corporation. A number of changes have been made and our comments are appended below: (i) The range of persons concerned has now been widened considerably to broaden the net of persons who may be potentially criminally liable. We wonder whether it should extend to a manager, secretary or other person involved in management. (ii) The offence is committed by persons who "aided, abetted, counselled, procured or induced" or by persons in respect of offences committed with the "consent of connivance of or attributable to any recklessness on the part of" the relevant persons. It seems that this is too wide and should only cover the concept of aiding and abetting or counseling or procuring. The extension of the offences to inducement consent, connivance or recklessness seem to be far too broad. (iii)The defence which was previously in the earlier version of this clause in favour of a person who took reasonable precautions and exercised due diligence to avoid the commission of the offence has now been deleted. It is not clear that why this is the case. This should be reinstated.	Extension of liabilities to individuals is to ensure the effectiveness of the regime. This is also the approach followed in the SFO. (i) The wording of clause 46(2)(a) is the same as the definition of "officer" in the SFO. If the corporation is a system operator or settlement institution, only the chief executive will be caught. (ii) This is in line with the approach taken in s.390(1) of the SFO. (iii) For offences under clauses 39(2), (4) and (5), a similar due diligence defence is already provided under clause 39(6). For offences under clauses 39(1), 40 and 43, the standard of proof for prosecution has already been made clear in the relevant provisions (e.g. "without reasonable excuse", "comes to his knowledge", "knows or ought to know" etc.) There is thus no need to provide for separate defences. The Administration has proposed appropriate CSAs to clarify

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			the application of clause 46 and defined the term "officer" in clause 2.
Confidentiality/ Clause 49	PCO	Should consider adding an exception to Clause 49 of the Bill to cater for the data subjects' statutory right of information access provided in s.18 of PD(P)O.	Clause 49(1)(b) of the Bill does not prohibit the MA from communicating matters to the person to whom such matters relate. In addition, clause 49(3)(f) allows the MA to disclose information of a data subject with his/her consent. We believe that these provisions will be able to achieve similar results as those of s.18 of PD(P)O and since Clause 49 is not inconsistent with s.18 of PD(P)O, a data subject should be able to rely on s.18 of PD(P)O to request access to his personal relevant personal data that is in the MA's possession under the CSS legislation. In cases where a data access request will be likely to prejudice the discharge of the MA's functions or directly or indirectly identify the person who is the source of the data, the MA is exempt from compliance with DPP 6 and s.18(1)(b) of the PD(P)O pursuant to s.58(1)(g) of PD(P)O.
Confidentiality/ Clause 49(3)	HKICL	The carve out of the confidentiality provision in relation to disclosure of information required by law has been deleted (Clause 49(3)(h)). We view that this is not appropriate and should be reinstated.	This is in line with the confidentiality provision in the Banking Ordinance. It is believed that the MA being the regulatory authority may have sensitive information about an system operator/settlement institution/participant that he should not be forced to disclosure the same simply on account of a subpoena or a legal requirement. It is to be noted that there are various disclosure gateways that are believed to be sufficient. Thus , we consider clause 49(3) is sufficient without the previous clause 49(3)(h).
Immunity/ Clause 50	HKICL	We recommend to include the following statement as a "for the avoidance of doubt" provision: "nothing in Part 2 imposes any civil obligation on a system operator towards any participant or other persons"	The requirements in Part 2 are statutory requirements on designated systems. They, of course, do not impose civil obligation on any system operator. It would not be necessary to include a provision for the avoidance of doubt. As statutory requirements would override civil or contractual

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		Also, as the immunity does not cover a chief executive, director, manager or employee in respect of any act or omission in good faith which is not for the purpose of carrying out or purporting to carry out any directions given to him by the MA, we wonder whether this immunity should be extended to cover a chief executive, director, manager or employee in respect of any acts or omissions for the purpose of complying or purporting to comply with any obligations under the Ordinance.	obligations, we consider it unnecessary to extend the scope of immunity as suggested by HKICL. The Administration has proposed appropriate CSAs to clarify the application of clause 50.
Immunity/ Clause 50	HKICL/ HSBC	HKICL suggested that the civil immunity in clause 50 should be similar to section 39 of the SFO, which applies to recognised clearing houses, such that the immunity can be extended to cover system operators and settlement institutions.	It is not an appropriate comparison in view of the different regimes under the SFO and under the Bill. An institution cannot provide services of a recognised clearing house without the recognition of the Securities and Futures Commission (SFC). Besides the general duties, a recognised clearing house shall act in the interest of the public and ensure that the interest of the public prevails where it conflicts with the interest of the recognised clearing house. In addition, all the rules of the recognised clearing house have to be approved by the SFC. Clause 50 of the Bill has provided the civil immunity to system operators and settlement institutions if they are acting in good faith in carrying out the MA's directions. Our policy intent is not to expand the immunity to cover all the other activities of the system operators and settlement institutions because doing so would negate partly the purpose of the oversight regime. The participants in the HKICL as a designated system would likely object as well to such immunity sought by the HKICL. The Administration has explained the above to HKICL and HSBC. They have not raised further comments.

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Information requested/ Clauses 10, 51 and 52	PCO	In the absence of the "reasonable man test", it is uncertain whether Clauses 10, 51 and 52 of the CSS Bill would satisfy the requirements on necessity and non-excessiveness of data collection in DPP 1.	We believe that clauses 10, 51 and 52 of the Bill, as they now stand, already provide for "objective standards" that would facilitate the satisfaction of the necessity and non-excessiveness requirements under DPP 1(1): - (a) the scope of information collected under clause 10 will be limited to those for the better carrying out of the MA's functions under the legislation and relating to a designated system; (b) information collected pursuant to clause 51 will be subject to the following conditions: (i) collection is allowed only where there are reasonable grounds for believing that a clearing and settlement system exists, but the MA is unable on the basis of information before him to determine whether the system is eligible to be designated, or if eligible to be, should be designated under the Bill; (ii) the information must be those which may assist the MA in making the determination mentioned in (i); and (iii) it ought to be relating to the relevant system; and (c) information collected pursuant to clause 52 will be subject to the following conditions: (i) the information may only be requested by the nominated official specified by the MA; (ii) it must be related to the default of a participant in the system or to any matter arising out of or connected with such default; and (iii) the collection may be subject to the exemption under clause 9. Furthermore, the information sought will be required by the MA to determine whether a system should be designated or to ascertain whether a designated system is or has been in

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			compliance with the provisions of the legislation. It is therefore essential that the MA has the discretion to request such information he considers necessary to make those decisions. We believe that there is already an implied requirement of reasonableness in the exercise of the MA's discretionary power in collection of personal data.
Information requirement/ Clause 52(1)	HKICL	Although the drafting has now been improved to require directions to be made to specific persons, there is no limitation to the direction to the effect that the information must be within the possession or knowledge of the relevant person.	We believe that there is already an implied requirement of reasonableness in the exercise of the MA's discretionary power in collecting information. If the system operator or settlement institution does not have the information, the MA would not make that requirement.
General – possible regulatory overlap	HKEx	Concerns on potential regulatory overlap between the SFC and the HKMA in implementing the SFO and the Bill as it comes into effect	The Administration has explained to the HKEx that the oversight regime proposed under the Bill would not result in regulatory overlap between the HKMA and the SFC. This notwithstanding, the HKMA would consult the SFC as appropriate, or vice versa, to iron out any possible incompatible regulatory requirements as the market infrastructure evolves. There is also the Risk Management Committee of the HKEx which serves as an appropriate forum to discuss any matter arising from this. Consensus on this has been reached amongst the Administration and the HKEx. The HKMA and the SFC have also pledged to set out the consultation arrangements in a memorandum of understanding.
General – law of insolvency	HKSA	HKSA agrees that the Bill should preserve the integrity of the transfer orders and not subject the settlements thereof to challenge both under the general law and/or on the insolvency of a counterparty. However, it believes that the rights of an IOH under the general law to challenge the underlying economic transaction being effected by the transfer order should remain, albeit with modifications to ensure that any action taken by the IOH does not interfere with or challenge the integrity of transfer	HKSA's understanding of the policy intentions of the Bill is correct. It is the policy stance that the Bill is to preserve the integrity of the transfer orders from the law of insolvency but with minimal disruption to the law of insolvency as far as possible so modification to such law is only made to that extent necessary. The Bill does not intend to create a further and separate insolvency regime.

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		orders effected by a designated system, which HKSA believes is also the intended effect of the Bill.	The Administration has, in its letter of 22 April 2004 to HKSA, further responded regarding this point. HKSA has not raised further comments.

Note: Submissions from:

(a) the Hong Kong Interbank Clearing Ltd ("HKICL") dated 10 January 2004, 20 & 22 March 2004 and 28 April 2004
(b) the Office of the Privacy Commissioner for Personal Data ("PCO") dated 21 January 2004
(c) the Hong Kong Society of Accountants ("HKSA") dated 6 February 2004 and 1 April 2004
(d) HSBC dated 9 February 2004, 16 March 2004, 25 March 2004 and 3 May 2004
(e) the Hong Kong Exchanges and Clearing Limited ("HKEx") dated 22 April 2004 and 6 May 2004
(f) the Hong Kong Association of Banks ("HKAB") dated 29 March 2004 and 11 May 2004

Ends

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