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LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (2527 0790)

23 March 2015

Mr Jackie LIU
Principal Assistant Secretary for Financial Services
and the Treasury (Financial Services)
Financial Services and the Treasury Bureau
Financial Services Branch
Financial Services Division
Division 5
24/F, Central Government Offices,
2 Tim Mei Avenue, Tamar, Hong Kong

Dear Mr LIU,

Clearing and Settlement Systems (Amendment) Bill 2015

We are scrutinizing the legal and drafting aspects of the captioned Bill and have the following questions for your clarification-

Interpretation (proposed section 2 and new section 2A)

- (a) Under paragraph (b) of the proposed definition of "system operator", a system operator, in relation to a retail payment system, means a person who, for the purposes of the operating rules of the system, is responsible for the operation of – (i) the transfer, clearing or settlement functions of the system; or (ii) any other related functions. However, the definition of "system operator", in relation to a clearing and settlement system, as proposed in paragraph (a) of the definition does not include a person who is responsible for the operation of any other related functions. Is there any reason for not including such person in the proposed paragraph (a) of the definition?

- (b) "Retail payment system" means a system or arrangement for the transfer, clearing or settlement of payment obligations relating to retail activities, principally by individuals, that involve purchases or payments; and includes related instruments and procedures. Please clarify whether "retail activities" in the proposed definition is confined to retail activities taking place in Hong Kong only or it may include retail activities taking place outside Hong Kong. If it is the former case, for the avoidance of doubt, should it be expressly stated in this meaning?
- (c) In the new section 2A on interpretation of "stored value facility" (SVF), the undertaking given by the issuer of the facility is an undertaking of payment to a third person up to the amount of the stored value that is available for use under the rules of the facility. However, the purpose for making payment to a third person is not stated in the new section 2A. Is it intended that the payment is made for goods or services provided by the third person or for the extinguishment of debts owed by the facility user to the third person? If so, should this be stipulated in the interpretation of "stored value facility"?
- (d) Please clarify if a SVF issuer offers to pay SVF users interest on certain sums of money paid into and remain in the facility for a specified period, whether such kind of offer and arrangement would render the relevant SVF falling outside the scope of the proposed licensing scheme for SVFs. If so, how would such SVF be regulated? For example, would it be subject to regulation and supervision of the Banking Ordinance (Cap. 155).

Amendments relating to the Retail Payment System (Part 2)

- (e) Under the proposed section 4(3) of Clearing and Settlement Systems Ordinance (Cap. 584), a system is regarded as a system whose proper functioning is material to the monetary or financial stability of Hong Kong, if the occurrence of any significant disruption to, or the presence of any significant inefficiency in, the functioning of the system is likely to adversely affect the monetary or financial stability of Hong Kong or the functioning of Hong Kong as an international financial centre. Please clarify what kind of inefficiency would be viewed by the Monetary Authority (MA) as "significant inefficiency" under the section, and if possible, give examples of such kind of inefficiency.

- (f) Under the new section 6A, except with the written consent of the Monetary Authority (MA), it would be an offence for a system operator to carry out through the system concerned an activity that is not one declared by MA by notice published in the Gazette under the new section 4(4B). Please clarify whether an activity carried out through the system which is incidental to the activity so declared (the declared activity) would need MA's written consent. Would MA also set out in the relevant Gazette notice the activities that are incidental to the declared activity and thus may be carried out through the designated system?

Licensing and supervision of Stored Value Facilities (new Part 2A)

- (g) Under the new section 8C, the offences of knowingly promoting or assisting another person in issuing or facilitating the issue of a SVF without a licence include promoting or otherwise assisting by means of providing network or internet portal access or any other technological means. Please clarify if this new section would have the effect of imposing on internet service providers or website operators the duty to verify (a) whether their clients who place SVF promotional materials or advertisements on the relevant websites are SVF licence holders and (b) the accuracy of particulars relating to the SVF licences concerned. If this is the case, please also clarify whether publishers of newspapers (or magazines) and operators of other mass media would be under a similar duty in relation to accepting the advertisements or promotional materials on issuing or facilitating the issue of a SVF.
- (h) Under the new section 8ZA, MA may, by notice in writing to a licensee of SVF, suspend its licence for a period not exceeding six months. It is noted that such notice is not required under the Bill to be published in the Gazette, any local newspapers or mass media. Please clarify how could the suspension of a SVF licence be made known to the members of public if the suspension notice is not required to be published in the Gazette or any mass media? In that regard, we would draw your attention to the notice of revocation (of a SVF licence) given by MA under the new section 8V(7) which is required to be published in one Chinese language newspaper and one English language newspaper circulating in Hong Kong.
- (i) The new section 8ZB(1)(a) to (d) provides for certain prohibited acts during the period when a licence is suspended. While the

new section 8ZB(4) provides for an offence for contravening subsection 1(d), no similar provision is made for contravention of the new section 8ZB(1)(a) to (c). Please clarify what sanctions would be available for contravention of these provisions.

- (j) Both the new sections 8ZZI(7) and 8ZZJ(7) provide that MA is not obliged to disclose to any person the particulars of a matter that MA has considered in giving an objection notice (relating to becoming a controller of a SVF licensee). Since the particulars (or part of them) under both sections could be personal data of the potential or existing controller of a SVF, please clarify if it is the Administration's intention to exempt MA from the compliance of the requirement under section 18 (i.e. personal data access request) of the Personal Data (Privacy) Ordinance (Cap. 486). If so, will the Administration consider providing for such exemption in the new Part 2A?
- (k) The new section 8ZZY(3) provides that the requirements in subsection (2) do not apply if the manager is appointed on a **temporary basis**. Under what circumstances a manager would be considered to be appointed on a temporary basis? Will the Administration set out those circumstances in the new section 8ZZY for the purpose of clarity?
- (l) The new section 8ZZZJ provides for the requirements on the publication of advertisement relating to SFVs, please consider if it is necessary to give a definition for "advertisement" in that section for the purpose of clarity.

Matter pertaining to Functions and Powers of MA (new Part 2B)

- (m) Under the proposed section 12, MA may request information or documents relating to a SVF or designated system from a SVF licensee or a system operator (or settlement institution) of a designated system. If the requested documents or information are privileged, is a SVF licensee or a system operator (or a settlement institution) entitled to refuse to provide such documents or information. If so, should provision be added to cover this scenario?

Investigation by MA (new Part 3A)

- (n) Under the new section 33F, it would be an offence if a person without reasonable excuse fails to comply with a requirement (e.g. production of records/documents, answering questions or giving explanation as required by the investigators) imposed on the person under section 33C(2),(3) or (4) or 33D(1) or (2). Please clarify whether the person concerned would be excused from complying with the requirements, if the records/documents, answer or explanations are protected by privilege (e.g. legal professional privilege). If not, would the fact that the information is privileged constitute a reasonable excuse for the purposes of the new section 33F?
- (o) It is noted that the new Part 3A of Cap. 584 (i.e. new section 33H) specifically provides for limitation on the use of self-incriminating evidence. However, this Part does not provide for the protection of the materials subject to the legal professional privilege (LPP) which is enshrined in Article 35 of the Basic Law. Please clarify why no provisions have been made to protect the LPP materials under the new Part 3A. How would MA or investigators appointed by MA handle the LPP claims made by the persons subject to the investigations under the new Part 3A?
- (p) Regarding the public notice of imposition of sanction given by MA under the new section 33U, how would MA make members of public known of such notices? Would it be done by a gazette notice or publication on the MA's website? Is it necessary to make provision on this in the new section 33U?

Regulations made by MA (Part 6)

- (q) Under the proposed section 49(1)(a), MA may make regulations relating to designated payment systems after consulting the Financial Secretary (FS) and the system operators and settlement institutions of designated systems. However, under the proposed section 49(1)(b), when making regulations relating to SVFs, MA would only need to consult FS without the need to consult the potential or existing SVF licensees (or other stakeholders). Please explain the difference in the consultation arrangements.

Review of MA's decisions (Schedule 1 to Cap. 584)

- (r) Please confirm whether all decisions of MA made under Cap. 584 (including those made by him or persons appointed or authorized by him under the Bill) are listed in Part 2 (Reviewable Decisions) of Schedule 1 to Cap. 584. If not, what are the reasons for not subjecting the relevant decisions to review by the proposed Payment Systems and Stored Value Facilities Appeals Tribunal?

Minimum Criteria for SVF licences (new Schedule 3 to Cap. 584)

- (s) Section 1(1) of Part 2 of the new Schedule 3 to Cap. 584 sets out the principal business of a SVF licence. Please clarify whether a SVF licensee would be allowed to engage in any other businesses that are unrelated to and separate from the principal business and whether a SVF licensee would need to obtain consent from MA for engaging in those other businesses. How would MA ensure that the other businesses of a licensee would not affect its principal business in issuing and operating a SVF?
- (t) Under section 8 of Part 2 of the new Schedule 3, the applicable company must redeem in full the total of the stored value that remains on the facility as soon as practicable after being requested by the user to do so and must state clearly and prominently in the contract made between the applicable company and the user concerned the conditions relating to redemption, including the deadline for redemption. Does this mean that the obligation of the applicable company to redeem only arises where there is such a contract with such conditions? In cases where the redemption deadline stipulated in the contract has expired, may the applicable company refuse to redeem the outstanding stored value? Since the interests of SVF users are involved, would the Administration consider revising section 8 of Part 2 of the new Schedule 3 to enhance protection to SVF users?
- (u) Concerning the service contracts to be made between the SVF licensees and the potential SVF users, please advise whether such contracts would be subject to the regulation and control under the Unconscionable Contracts Ordinance (Cap. 458) and the Control of Exemption Clauses Ordinance (Cap. 71) and whether terms and conditions of such contracts would be required to be approved by MA beforehand.

It is appreciated that your reply in both languages could reach us as soon as possible, preferably by 13 April 2015.

Yours sincerely,



(YICK Wing-kin)
Assistant Legal Adviser

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