

**Bills Committee on
Clearing and Settlement Systems (Amendment) Bill 2015**

**Government's Responses to Questions
Raised by the Assistant Legal Adviser**

This paper sets out the Government's response to questions raised by the Assistant Legal Adviser of the Bills Committee.

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?

2. The revised definition of “system operator”, as proposed in section 2 (Clause 5 of the Clearing and Settlement Systems (Amendment) Bill 2015 (“the Bill”)), concerns a “clearing and settlement system” and a “retail payment system”, and should be read in conjunction with the respective definitions under the same section.

3. It is specified in paragraph (b) of the definition of “retail payment system” that it “includes related instruments and procedures”, examples of which may include the provision of merchant acquiring service and the operation of point-of-sale terminals. We have therefore included “any other related functions” in the definition of “system operator” in relation to a retail payment system.

4. Given that a “clearing and settlement system” is generally established for large value transactions at interbank level, in which case “clearing” and “settlement” are the only two core functions performed by a system operator, the definition of “clearing and settlement system”, as provided in section 2 of the Clearing and Settlement Systems Ordinance (“the Ordinance”), does not include “related instruments and procedures”. As such, the definition of “system operator”, in relation to a “clearing and settlement system”, does not include “any other related functions”.

(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?

5. “Retail activities” in the proposed definition of “retail payment system” under section 2 (Clause 5 of the Bill) are not confined to retail activities taking place in Hong Kong, as the relevant system may involve the clearing, settlement or transfer of cross-border retail payment transactions. Indeed, section 3(a) (Clause 7 of the Bill) provides that the Ordinance applies to and in relation to designation systems (which include “retail payment system”) that are established in a place outside Hong Kong.

(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 of making payment to a third person is not stated in the new section 2A. Is it intended that the payment is made for goods and 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”?

6. The definition of “stored value facility” (“SVF”), as provided in the proposed section 2A (Clause 6 of the Bill), means a facility that may be used as a means of making payments for goods or services, or to another person, under an undertaking given by the issuer. As long as the SVF can be used as a means of making payments to another person (whether it is for goods and services provided by the third person, or for the extinguishment of debts owed by a party to another, or for whatever reason), it will fall within the definition of SVF, hence subject to regulation. We do not consider it necessary to mention the specific purpose of a user making a payment to a third person in the definition of SVF.

(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)?

7. A facility that falls within the definition of SVF under the proposed section 2A (Clause 6 of the Bill), whether or not an SVF issuer offers to pay an interest or other form of incentives, will be subject to regulation under the Bill. The Monetary Authority (“MA”) will take into account the purpose, business model and operational arrangement (including the relevant undertakings or terms and conditions) of the SVF scheme in considering whether the facility is prudent and sound, and whether a licence should be so granted.

8. In the related amendments to section 2 of the Banking Ordinance (“BO”) (Clause 54 of the Bill), the definition of “deposit” does not include any float or SVF deposit as defined under the Bill. Therefore, an SVF will not be subject to regulation and supervision under the BO.

Amendments relating to Retail Payment System (Part 2)

(e) Under the proposed section 4(3) of the 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.

9. As provided in the proposed section 4(3) (Clause 10 of the Bill), if 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, then the system’s proper functioning is regarded as material to the monetary or financial stability of Hong Kong, or material to the functioning of Hong Kong as an international financial centre. The MA may designate the system under section 4(1), having regard to the factors specified in the proposed section 4(4A). If the system inefficiency, in terms of its capacity, design or implementation, etc., affects the process or performance of the system to such an extent that the monetary or financial stability of Hong Kong or the functioning of Hong Kong as an international financial centre is adversely affected, then the MA may consider such inefficiency as “significant”. This will involve a supervisory assessment of the factual circumstances of a particular system.

(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?

10. The proposed section 4(4B) (Clause 10 of the Bill) provides that the MA may, by notice published in the Gazette, declare the activities that are allowed to be carried through the designated retail payment system, having regard to the activities that are carried out through the system before the designation and the operating rules of the system. The proposed section 4(5) provides that, before the MA makes a declaration

under section 4(4B), the system operator or settlement institution of the system will be given a period of not less than 14 days to make representations to the MA as to why the declaration should not be made. After the declaration is made, the proposed section 6A (Clause 13 of the Bill) provides that, unless with the MA's written consent, a system operator or settlement institution of the system must not carry out an activity that is not declared under that section (whether it is incidental to the declared activity). It will be a criminal offence for the system operator or settlement institution who contravenes this requirement. The system operator needs to obtain the MA's written consent before it carries out activities that are not declared or consented by the MA.

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 including promoting or otherwise assisting by means of providing network or internal 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 SVF.

11. The proposed section 8C (Clause 7 of the Bill) provides that a person must not knowingly promote or otherwise assist another person in issuing, or facilitating the issue of, an unlicensed SVF, including by means of providing network or internet portal access or any other technological means. It will be a criminal offence for the person who contravenes this requirement without a reasonable excuse. The provision does not impose a duty on the part of any person (including internet service providers or website operators) to verify the contents and accuracy of the promotional or advertisement materials provided by an SVF issuer.

(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 newspaper or mass media. Please clarify how could the suspension of a SVF licence be made known to the member 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 the 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.

12. As provided in the proposed section 8ZZZF (Clause 17 of the Bill), the MA must establish and keep a register of licensees. It is provided in subsection (5) that, if a licence is suspended under the proposed section 8ZA, the MA must, as soon as practicable after the suspension, make a notation that the licence has been so suspended in the register against the name of the licensee concerned and ensure that the notation remains on the register until the suspension ceases to have effect. Subsection (6) provides that the register should be kept at the MA's office or any other place notified by the MA in the Gazette. Subsection (7) provides that the MA must make the register available for inspection by the public in the form of an online record. We believe the above arrangements are appropriate to keep the public informed of the suspension of an SVF licence. The MA will issue a press release to keep the public informed as necessary.

(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.

13. The proposed section 33Q (Clause 29 of the Bill) provides that the MA may, by notice in writing, impose one or more of the sanctions specified in subsection (2) against a regulated person, which includes a licensee or an officer of a licensee, if the MA is satisfied that the person has contravened a provision of this Ordinance, having regard to the

matters specified in subsection (3).

(j) Both the new sections 8ZZI(7) and 8ZZJ(7) provide that the 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?

14. The Government has no intention to exempt the MA from the compliance with the requirement under section 18 of the Personal Data (Privacy) Ordinance ("PDPO"). The proposed sections 8ZZI(7) and 8ZZJ(7) provide that the MA is not obliged to disclose to any person matters which the MA has considered in giving a notice of objection under the proposed sections 8ZZF(2)(a) or 8ZZG(3)(b). If an individual (or a relevant person on behalf of an individual) makes a valid request under the PDPO to the MA to enquire whether the MA holds a personal data of which the individual is the data subject and, if so, whether the individual can be supplied with a copy of the data, the MA will, in accordance with the relevant provisions of PDPO, deal with the request.

(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?

15. A manager is considered to be appointed on a temporary basis if the appointment period is less than 14 days, because the proposed section 8ZZY(2) (Clause 17 of the Bill) provides that a licensee must within 14 days, after the date on which a person becomes a manager of a licensee, give a written notice to the MA. It will be a criminal offence for the licensee who contravenes this requirement. We believe the provisions under the proposed section 8ZZY have set out the requirement clearly,

and note that this arrangement is in line with the existing practice under section 72B of the BO.

(l) The new section 8ZZZJ provides for the requirements on the publication of advertisement relating to SVFs, please consider if it is necessary to give a definition for “advertisement” in that section for the purpose of clarity.

16. Absent any stated definition in the Bill, the word “advertisement” can be construed based on its ordinary and customary meaning. Nevertheless, we are reviewing the need for adding a definition of “advertisement” in the context of the Bill. If so, we will propose a committee stage amendment.

Matters 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?

17. The proposed amendments to section 12 (Clause 21 of the Bill) provides the MA with a power to request information from a system operators or settlement institution of a designated system and an SVF licensee for the better performance of the MA’s functions under this Ordinance. This section does not have the effect of overriding any privilege which may be claimed by a system operator or settlement institution of a designated system and an SVF licensee. In other words, a person may refuse to provide privileged documents or information to the MA. Absent any contrary intent, we do not consider it necessary to add a provision.

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 explanation are protected by privileged (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?

18. The requirements imposed on the person under the proposed section 33C(2), (3) or (4), or section 33D(1) or (2) do not have the effect of overriding any privilege which may be claimed by a person in relation to investigation. As such, the privilege claim may constitute a reasonable excuse for the purpose of the proposed 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?

19. Legal professional privilege is a fundamental right enshrined in the Basic Law. Nothing in the Bill will erode or override a claim in relation to the legal professional privilege. A valid claim for the legal professional privilege may be raised by a person under investigation.

(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?

20. If a sanction has been imposed on a regulated person under the proposed section 33Q(1), the MA may consider issuing a press release, and publishing the information on the MA's website to disclose to the public the details of the sanction imposed, the reasons for imposing the sanction, and the relevant material facts, in accordance with the proposed section 33U. We do not consider it necessary to make provisions to prescribe the manner of such disclosure, as the MA may take into account the circumstances of a case before deciding the most appropriate and effective means to disclose the information to the public.

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.

21. We will give this suggestion further thought, and may propose committee stage amendments to enhance the arrangement if necessary.

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?

22. Section 35(1) provides that any person who is aggrieved by the relevant decisions of the MA may refer the decision to the Payment Systems and Stored Value Facilities Appeals Tribunal ("the Tribunal"). The proposed Part 2 of Schedule 1 (Clause 52 of the Bill) specifies a list of reviewable decisions which may be referred to the Tribunal for review under section 35(1). All decisions of the MA which may adversely

affect a regulatee have been included in the list. Part 2 of Schedule 1 does not include the relevant decisions¹ in relation to which an SVF licensee is unlikely to be aggrieved.

Minimum Criteria for SVF licensees (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?

23. The proposed section 1 of Part 2 of Schedule 3 (Clause 53 of the Bill) provides that the principal business of an SVF licensee (not being a bank) must be the issue or facilitation of the issue of SVF. In other words, a licensee should not carry out any other businesses unrelated to its principal business. The proposed section 8Q (Clause 17 of the Bill) provides that a licensee must ensure that all the minimum criteria applicable to the licensee are fulfilled. The proposed section 8O (Clause 17 of the Bill) provides that a licensee must ensure that the operation of any SVF issued or the issue of which is facilitated, under its licence is conducted in a safe and efficient manner calculated to minimize the likelihood of any disruption to the functioning of the facility.

¹ The relevant decisions of the MA that are not subject to review by the Tribunal under section 35 include—

- (a) section 8A(2): The MA may declare a person or a class of persons not to be regarded as a manager (meaning an individual appointed by the licensee to be principally responsible for the conduct of one or more of the licensee's affairs or business specified in Schedule 6);
- (b) section 8L: The MA may at any time cancel a condition attached to an SVF licence;
- (c) section 8ZU: If it appears to the MA that it is no longer necessary for a direction for a licensee to seek advice on management of its affairs (section 8ZG) or licensee's affairs to be managed by Manager (section 8ZH) to remain in force, the MA must, after consulting the Financial Secretary, revoke the direction;
- (d) section 8ZV: The MA may at any time revoke the appointment of an Advisor or a Manager made under section 8ZG(1)(b) or 8ZH(1)(b);
- (e) section 8ZZZD(1): the MA may exempt an SVF from the regulation under certain divisions of Part 2A of the Ordinance; and
- (f) section 11(2): the MA may exempt a person, in relation to a designated system established outside Hong Kong from any or all of the obligations imposed on the person under the relevant provisions of the Ordinance.

24. The Bill contains amendments or new provisions to empower the MA to request information or documents (proposed amendments to section 12 under Clause 21 of the Bill); examine books, accounts and transactions (proposed section 12A under Clause 22 of the Bill); give directions (proposed amendments to section 13 under Clause 23 of the Bill); and issue guidelines (proposed amendments to section 54 under Clause 45 of the Bill). These provisions will empower the MA to conduct on-site and off-site examinations, and to exercise appropriate supervisory powers on the licensed facilities in future (including ensuring that the licensee is carrying out its principal business) properly.

(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?

25. As provided in the proposed section 8 of Part 2 to Schedule 3 (Clause 53 of the Bill), the applicable company must redeem in full the total of the stored value that remains on the facility as soon as practicable after requested by the user to do so, as long as the applicable company holds the float or SVF deposit. It is a separate requirement under the same section that the applicable company must state clearly and prominently the conditions relating to redemption in the contract.

26. Furthermore, the proposed section 9 of Part 2 of the same Schedule provides that the operating rules of the SVF scheme must be prudent and sound, having regard to the purposes of the scheme and how the scheme is operated and governed. If a contract between a licensee and its users contains unreasonable restrictions on redemption, the

licensee may be regarded as not meeting the requirement as specified in that section. After the passage of the Bill, the MA may consider issuing guidelines under the proposed amendments to section 54 (Clause 54 of the Bill) to facilitate the compliance with the Ordinance.

(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.

27. The service contracts to be made between the SVF licensees and the potential SVF users are subject to other laws and regulations, where applicable.

28. Under the proposed section 8Q (Clause 17 of the Bill), an SVF licensee must ensure that all the minimum criteria applicable in relation to the licensee are fulfilled. While the MA may review the operating rules of an SVF scheme (including any contractual arrangements between a licensee and its users) in reviewing an application for licence and in on-going supervision, the terms and conditions of such contracts are not required to be approved by the MA.

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