

Sunny Cheung

Chief Executive Officer

Direct Tel (852) 2266 2288
 Direct Fax (852) 2266 2277
 sunnycheung@octopus.com.hk



Our ref: CEO-LECO-LE-C-2015003

20 April 2015

(By post and by e-mail: bc_03_14@legco.gov.hk)

Bills Committee on Clearing and Settlement Systems (Amendment) Bill 2015
 Legislative Council,
 Legislative Council Complex
 1 Legislative Council Road
 Central
 Hong Kong

Dear Sirs,

Clearing and Settlement Systems (Amendment) Bill 2015

Further to my oral presentation on 23 March 2015 of Octopus' views to the Bills Committee on the Clearing and Settlement Systems (Amendment) Bill 2015 (the "Bill"), we now set out our suggested amends to the Bill.

C79 Part 2 Clause 6 Section 2A Interpretation: stored value facility

(3) The undertaking for subsection (1)(b)(ii) is an undertaking that, if the facility is used as a means of making payments to another person (recipient) (other than payments mentioned in subsection (1)(b)(i), the issuer, or a person procured by the issuer to make such payments, will make payments to the recipient up to the amount of the stored value that is available for use under the rules of the facility.

(Comment: We like to clarify whether the definition of SVF precludes negative balances. Currently, Octopus offers a negative provision of up to HK\$35 on the device (i.e. card)).

C87 Clause 10 Section 4 amended (Monetary Authority may designated clearing and settlement systems)

(4) Section 4(2)—

Repeal everything from paragraph (b) onwards

Substitute

"(b) it meets either of the following descriptions—

- (i) for a clearing and settlement system, it accepts for clearing or settlement transfer orders denominated in Hong Kong dollars;

- (ii) for a retail payment system, it accepts for transfer, clearing or settlement transfer orders denominated in any currency or declared medium of exchange,

and is not –

- (iii) a system that is, or is operated by, a company recognized as a clearing house under section 37(1) of the Securities and Futures Ordinance (Cap. 571)
- (iv) a system that is operated by a licensee predominantly for the purposes of supporting the operation of a stored value facility for which it is authorized under 8F or 8G."

(Comment: The exclusion from "Designated RPS" of clearing and settlement system run by a SVF licensee to support its own SVF scheme is not clearly set out in the Bill).

C119 Division 2

8B. Restriction relating to issue, etc. of stored value facilities

- (1) A person must not issue a stored value facility in or into Hong Kong unless the issue of the facility is authorized by a licence held by the person.
- (2) A person must not facilitate the issue of a stored value facility in or into Hong Kong unless the facilitation of the issue of the facility is authorized by a licence held by the person.

(Comment: The most effective way of achieving a level playing field would be to prohibit the issuance of SVF "in or into" Hong Kong unless authorised: "into" would cover an offshore SVF operator issuing into HK on a cross-border basis.)

C127 Subdivision 2 – Conditions of Licence

Conditions of Licence

Specification of grounds for attaching conditions:

Insert new subsection (2) and (3) at section 8I 'Monetary Authority may attach conditions of licence' and renumber accordingly:

- (2) The Monetary Authority may exercise its power under 8I if -
 - (a) the licensee is unable to meet its obligations or suspends payment;
or
 - (b) the Monetary Authority is of the opinion that -
 - (i) the licensee is carrying on its business in a manner detrimental to the interests of the user or potential user of

- any stored value facility issued, or the issue of which is facilitated, under its licence;
- (ii) the licensee is carrying on its business in a manner detrimental to the interests of its creditors;
 - (iii) the licensee is likely to become unable to meet its obligation or, is insolvent or is about to suspend payment;
 - (iv) the licensee has contravened a provision of this Ordinance or a condition attached to its licence under section 8I; or
 - (v) a ground for revoking a licence specified in Part 2 or 3 of Schedule 5 exists.
- (2) Without limiting any other meaning which insolvent may have, a licensee is regarded to be insolvent if -
- (a) it has ceased to pay its debt in the ordinary course of business; or
 - (b) it cannot pay its debt when it becomes due.

C177 8ZH. Power to give direction for licensee's affairs, etc. to be managed by Manager

Amend section 8ZH as follows and renumber accordingly:

- (1) The Monetary Authority may -
 - (a) by notice in writing to a licensee, direct that the licensee's affairs, business or property specified in the terms of the direction is to be managed by a Manager appointed by the Monetary Authority while the direction is in force; and
 - (b) appoint a person to be a Manager for paragraph (a).
- (2) For the purposes of 1(a) above, 'property' includes any account and the funds or assets held therein set up in accordance with the criteria set out in paragraph 7(1)(c)(ii) in Part 2 of Schedule 3 for the holding of the relevant funds.

C305 Division 9 - Miscellaneous

Publication of conditions attached to licence:

8ZZZF. Monetary Authority to keep register of licensees

- (1) The Monetary Authority must establish and keep a register of licensees in the form the Monetary Authority thinks fit.
- (2) The register must contain in respect of each licensee—
 - (a) the name of the licensee;

- (b) the address of the principal place of business in Hong Kong of the licensee; and
- (c) the licence number of the licence held by the licensee; and
- (d) any conditions that are currently attached to the licence and any additional criteria imposed by the Monetary Authority in addition to those set out in Part 2 of Schedule 3, in each case which affect the user's rights as against the applicable company.

C319 Part 2 B Matters Pertaining to Functions and Powers of Monetary Authority

HKMA to provide additional rules and guidance:

Add a new section 9(4) and 9(5) to Part 2B Matters Pertaining to Functions and Powers of Monetary Authority:

9. Functions of Monetary Authority

- (4) The Monetary Authority may give guidance consisting of such information and advice as it considers appropriate with respect to –
 - (a) the operation of this Ordinance, including the interpretation and implementation of the minimum criteria applicable in relation to licensees (i.e. a corresponding guide for the SVF Bill as the HKMA's Guide to Authorization with respect to the Banking Ordinance);
 - (b) any matters relating to the functions of the Monetary Authority under this Ordinance; and
 - (c) any other matters about which it appears to the Monetary Authority to be desirable to give information or advice in connection with this Ordinance.

The Monetary Authority may –

- (i) publish its guidance;
 - (ii) offer copies of its published guidance for sale at a reasonable price;
 - (iii) if it gives guidance in response to a request made by any person, make a reasonable charge for the guidance.
- (5) The Monetary Authority may on the application or with the consent of an applicable person direct that any or all criteria, conditions or regulations to which it is subject are not to apply to it or are to apply to it with such modifications as may be specified in the direction, but shall not do so unless it is satisfied that compliance by such person would be unduly burdensome and would not adversely affect any of the Monetary Authority's regulatory objectives, provided always that it must publish any such modification or

waiver and entertain applications for similar directions from any persons which are similarly affected.

(Comment on C127, C177, C305, C319: The most effective way of achieving a level playing field and transparency would be to empower the HKMA to make rules supplementing the Bill's provisions, adopt published guidance as to its approach to the regulation and supervision of SVFs and publish conditions attached to each authorized SVF issuer and waivers of any rules, guidance, etc.)

C393 Section 35 amended (review of decisions by Tribunal)

Add clause 32 (4)

(4) Section 35(3) -35 (6)

Repeal these sections in their entirety and substitute:

- (3) The Tribunal shall, within [● business days] deliver to the Monetary Authority a copy of any reference under subsection (1) that it has received.
- (4) A reference under subsection (1) does not suspend the decision to which the reference relates.
- (5) As soon as practicable, and in any event no more than [● weeks], after receipt of a copy of a reference delivered under subsection (3), the Monetary Authority shall forward a copy of the decision to which the reference relates together with all other relevant papers in his possession to the Tribunal.
- (6) On receipt of the copy of the decision, and of the papers, forwarded under subsection (5), the Tribunal shall as soon as is practicable and in any event no more than [● weeks] from receipt of the copy decision, review the decision in question and, after taking into account the stated grounds for the review, may make its determination to -
 - (a) confirm, vary or set aside the decision; or
 - (b) remit the matter to the Monetary Authority with any direction that it considers appropriate.

(Comment: We note that a reference to the Tribunal does not suspend the decision to which the reference relates. While an applicant must apply to the Tribunal within 30 day deadline, the Tribunal itself does not appear to be obliged to deal with the referral within any specific timescale. There is a risk that the appeal process could be drawn out, a period during which the applicant will still have to abide by whatever consents or directions the HKMA has determined.)

C399 Section 49 amended (power of Monetary Authority to make regulations)

(1) Section 49—

Repeal subsection (1) Substitute

"(1) The Monetary Authority may make regulations for the better carrying out of the purposes of this Ordinance after consulting -

(a) in so far as the regulations relate to designated systems -

(i) the Financial Secretary; and

(ii) the system operators and settlement institutions of designated systems;

(b) in so far as the regulations relate to stored value facilities,

(i) the Financial Secretary; and

(ii) the operators of such stored value facilities."

(Comment: The operators of stored value facilities should also be consulted.)

C437 Schedule 3 Minimum Criteria

Part 1 Preliminary

Amend paragraph 2

2. Application of criteria

(a) Unless otherwise provided in Part 2 of this Schedule, the criteria set out in that Part apply in relation to all applicable companies.

(b) Where the applicable company which issues a stored value facility is a bank or an authorised deposit-taking company, the criteria set out in Part 2 of this Schedule shall apply to it with regard to the operation of the stored value facility to the exclusion of any and all conditions or requirements which would otherwise apply to it as a bank or an authorised deposit-taking company (including under any existing memorandum of understanding)

Part 2 Criteria

Amend criteria 1 of Schedule 3 Part 2 as follows:

1. Principal business

(1) The principal business of the applicable company must be -

(a) the issue of stored value facilities under a licence; or

- (b) the facilitation of the issue of stored value facilities under a licence.

(2) Any business activities other than the principal business or the provision of operational and closely related ancillary services carried on by the applicable company must be approved by the Monetary Authority.

- (3) This section does not apply in relation to an applicable company that is a bank.

(Comment: To ensure level playing field, any bank which operates SVF should do so under the requirements which apply to non-bank SVF operators generally and to the exclusion of any requirements which would otherwise apply to it as a bank.)

C445 Schedule 3 Part 2 'Criteria'

Amend paragraphs 7 and 8 as follows:

7. Management of float and SVF deposit

(1) If the applicable company holds the float or SVF deposit of a stored value facility to which its SVF scheme relates, the applicable company must -

- (a) have in place adequate risk management policies and procedures for managing the float or deposit to ensure that there will always be sufficient funds for the redemption of the stored value that remains on the facility;
- (b) implement those policies and procedures; and
- (c) ensure that at all times all (or such lower percentage thereof as the Monetary Authority may approve) of the float or deposit (the "relevant funds")—
 - (i) is kept separate from any other funds paid to or maintained or received by the applicable company;
 - (ii) is placed in a separate account that it holds in Hong Kong with a bank licensed by the Monetary Authority which is designated in such a way as to show that it is an account which is held for the purpose of safeguarding relevant funds and which is only used for holding those funds; and
 - (iii) is not subject to any interest in or right over it by any person other than the applicable company.

- (2) The applicable company may, instead of placing the relevant funds in a bank account and subject to any conditions the Monetary Authority may impose, invest some or all of the relevant funds provided the maturity profile of such assets corresponds with the expected redemption profile of the float or SVF deposit to which the relevant funds relate. Such assets are to be held in a separate account with an authorised custodian which is designated appropriately and only used for holding those assets and to not be subject to any interest in or right over them by any person (including such custodian).
- (3) In either case, the applicable company must ensure that it receives an acknowledgment in writing from the relevant third party bank or custodian confirming the separate designation, the absence of interest in or right over the relevant funds or assets and the absence of any rights of set-off or consolidation of the relevant account with any other account held with it by the applicable company and that such acknowledgement is renewed on a regular basis, no less than annually.
- (4) The applicable company may retain for its own benefit and use any interest or income earned on the relevant funds or investments made using them.

(Comment: Safeguarding requirements to protect customers' funds should be reasonable. Measures to protect the funds should be simple and not too costly.)

C445 8. Redemption of outstanding stored value

If the applicable company holds the float or SVF deposit of a stored value facility to which its SVF scheme relates, the applicable company must -

- (a) 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
- (b) in the contract between the applicable company and the user state clearly and prominently the conditions relating to redemption including -
 - (i) any fee to be charged for the redemption; and
 - (ii) any deadline for using or redeeming the stored value that remains on the facility;
 - (iii) any conditions to be fulfilled for the user to effect redemption; and
 - (iv) the manner in which redemption will be effected.

Insert new paragraphs 9, 10 and 11 (and renumber accordingly):

C447 9. Termination

The contract between the applicable company and the user may provide for termination of the right to use the stored value.

10. Issuance not at a discount

An applicable company must, on receipt of funds, issue without delay the SVF deposit or stored value at par value.

11. Prohibition of interest

An applicable company must not award –

- (a) interest in respect of the holding of the SVF deposit or stored value;
or
- (b) any other benefit related to the length of time during which a user holds the SVF deposit or stored value.

(Comment on C445, 447: The SVF issuer should have the sole discretion to set the redemption period and time bar. The new regulatory regime aims to provide a level playing field to existing issuers as well as new entrants, hence, the level of fees and charges and the redemption conditions should be driven by market force and not subject to consultation with the HKMA. Furthermore, SVF is a payment product, which should not be issued at a discount and/or an interest bearing product.)

Yours sincerely,



Sunny Cheung
Chief Executive Officer
Octopus Cards Limited