中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : B&M/2/1/27C
本函檔號 OUR REF : LS/B/6/15-16
電 話 TELEPHONE : 3919 3511

傳真 FAX : 2877 5029
電郵 E-MAIL : wkyick@legco.gov.hk

By Fax (2856 0922)

4 January 2016

Miss Angora NGAI
AS for Financial Services & the Treasury (Financial Services) International and Mainland Affairs
Financial Services and the Treasury Bureau
Financial Services Branch
Financial Services Division
International and Mainland Affairs Division
24/F, Central Government Offices,
2 Tim Mei Avenue, Tamar, Hong Kong

Dear Miss NGAI,

Financial Institutions (Resolution) Bill

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

Basic Law issues

Article 110 of the Basic Law provides that the Government of the Hong Kong Special Administrative Region shall, on it own, formulate monetary and financial policies, safeguard the free operation of financial business and financial markets, and regulate and supervise them in accordance with law. It appears that the proposed regime under the Bill would allow extensive intervention in the operation, appointment of senior executives and structure of the within scope financial institutions (FIs) by the relevant resolution authorities (before or after the taking place of resolution of such FIs). Please clarify whether the proposed regime as a whole would be consistent with the free operation of financial business in Hong Kong which is enshrined in Article 110

of the Basic Law and whether there are sufficient grounds to justify the extensive restrictions on the free operation of financial business imposed by the proposed regime.

Under Article 105 of the Basic Law, the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property shall be protected in accordance with law. It is noted that certain resolution measures and instruments proposed in the Bill would have the effect of derogating or even depriving of private properties in or relating to the within scope FIs (e.g. clawback of remuneration of certain senior executives of the FIs concerned, bail-in instruments, temporary public ownership, mandatory reduction of capital instruments, transfer instruments and suspension of payment obligations of a FI to its creditor, etc). In the light of the protection of private property under Article 105 of the Basic Law, please clarify whether there are sufficient grounds to justify the proposed measures and instruments respectively in view of their impacts on the private property right of the shareholders, creditors and senior executives of the within scope FIs.

Mandatory Provident Fund (MPF) Schemes issues

It is noted that certain banks and insurance companies in Hong Kong (i.e. systematically important banks and insurers) are also approved trustees of registered MPF Schemes. Please clarify the following matters:-

(a) The reasons why the Bill does not provide for (i) the arrangements or transfer of the registered MPF Schemes managed by the FIs which move into resolution and (ii) the protection of accrued benefits in such Schemes in the relevant resolution process; and the reasons why there are no corresponding or consequential amendments to the Mandatory Provident Fund Schemes Ordinance (Cap. 485).

(b) As the registered MPF Schemes are not within the protective schemes under Schedule 1 to the Bill, it appears that the accrued benefits in those Schemes would not be excluded from the resolution actions under the Bill. Would those registered MPF Schemes and the accrued benefits administrated by the FIs concerned be made subject to the stabilization options or resolution instruments proposed in the Bill?

(c) Will the MPF Authority play a role in the resolution of a within scope FI which is also an approved MPF Schemes trustee under

Cap. 485? Why the Bill does not provide for the functions and roles of the MPF Authority in the resolution of such FIs? Will the MPF Authority be consulted by the relevant resolution authorities in the resolution actions?

Protection of employees' interests in resolution of FIs

It is noted that there are no provisions in the Bill which are specifically made for protecting the interests of the pre-resolution employees of FIs which move into resolution. In this connection, please clarify the following matters:-

(a) Since the FIs that move into resolution under Part 4 of the Bill will not be subject to a winding-up petition, payments from the Protection of Wages on Insolvency Fund under section 16 of the Protection of Wages on Insolvency Ordinance (Cap. 380) will not be available to the pre-resolution employees of such FIs. Please explain why there is no provision in the Bill to ensure that the treatment of pre-resolution employees of such FIs would not be worse off than those in the winding-up scenario under Cap. 380.

(b) What measures (legislative or administrative) will be taken by the Administration and the relevant resolution authorities to protect the interests of the pre-resolution employees of such FIs?

(c) Will the requirements in the Employment Ordinance (Cap. 57) be binding on the resolution authorities, the section 10 entities and the bridge institutions/asset management vehicles/temporary public ownership companies in respect of the pre-resolution employees of the FIs?

(d) Will the resolution authorities, the section 10 entities and the bridge institutions/asset management vehicles/temporary public ownership companies, subject to the relevant provisions in the Bill, be bound by the terms of the relevant pre-resolution employment/service agreements of the FIs in resolution?

Part 1 (Preliminary)

Please clarify if the definition of "assets" under clause 2(1) would include goodwill, copyright and registered patent of the entities concerned.

Under clause 2(1), "chief executive officer" (CEO) means a person who is responsible (alone or jointly with others) under the immediate authority

of the directors for the management of the **whole** of the business of the entity (emphasis added). Please clarify if this definition of CEO can cover the scenario that part of the business of an entity is not under the management of a CEO but is directly managed by the board of directors (or by another person appointed by the board) and thus the relevant CEO does not actually manage the whole of the business of the entity.

Please confirm if the notices to be published by the Financial Secretary (FS) under clause 6(5) (i.e. notices for specifying the control functions of an entity) are subsidiary legislation subject to amendment by the Legislative Council (LegCo) under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1).

Please consider if FS should be empowered by the Bill to give directions to the resolution authorities, section 10 entities and the appointing persons (appointed under clause 95) that he thinks fit with respect to the exercise of their respective functions under the resolution regime either generally or in any particular case so that FS can oversee the overall resolution process after its initiation and ensure that public interest is always safeguarded in such process.

Part 3 (Powers related to Resolution)

Please give examples or illustrations on what would be regarded by the resolution authorities under clause 12 as impediments to the orderly resolution of the within scope FIs in the banking, the insurance and the securities and futures sectors.

Under clause 14, a resolution authority may serve a written notice on a holding company of a within scope FI to direct it to take measures to remove or mitigate the effect of impediments to the orderly resolution of the within scope FI. In case the holding company is incorporated and situated in a non-Hong Kong jurisdiction, how can the relevant resolution authority implement or enforce the notice issued under clause 14?

Please clarify if the relevant resolution authority has discretion, on reasonable grounds, to extend the period specified in the notice served under clause 14(2) (whether on it's own motion or on the application of the FI concerned). For the avoidance of doubt, please consider if such discretion (if any) should be expressly provided in the Bill.

Under clause 16(3)(b), an officer of a within scope FI or holding company commits an offence (i.e. not complying with the notice of a resolution

authority) if he was knowingly concerned in any way (whether by act or omission) in the commission of the offence under that section by the FI or holding company. Please clarify what elements would need to be proved for an offence under clause 16(3)(b). Would a senior executive of the FI be criminally liable under clause 16(3)(b) merely by knowing the facts about the commission of the offence by the FI under clause 16(1) and occupying certain senior position in the FI even if he did not assist or take part in the act (or omission) of committing such an offence by the FI?

Please clarify whether the rules prescribing the "loss-absorbing capacity requirements" for within scope FIs to be made under clause 19 are subsidiary legislation subject to amendment by LegCo under section 34 of Cap. 1.

Please clarify whether a resolution authority has power under clauses 23 and 24 to revoke the appointment of an authorized representative of a non-Hong Kong FI appointed under section 786 of the Companies Ordinance (Cap. 622). If so, please consider if such power should be expressly provided in Part 3 of the Bill or Part 16 of Cap. 622.

Please clarify whether the revocation of appointment as a director, CEO or deputy CEO of a within scope FI under clause 24 would be made known to the public by the relevant resolution authority. If so, how?

Part 4 (Moving to Resolution)

Please elaborate what would be regarded by a resolution authority as non-viability of a within scope FI under conditions 1, 2 and 3 in clause 25 of the Bill. Should the criteria for non-viability of within scope FIs be expressly provided in the Bill?

How would a resolution authority exercise its powers or enforce its decisions made under clauses 28(1) and 29(1) if the relevant holding company or affiliated operational entity of a within scope FI is incorporated in a foreign jurisdiction and its major operation or assets are situated outside Hong Kong?

Please clarify the reasons why there are no appeal mechanisms for the decisions on (a) initiation of resolution of a FI and (b) making of a capital reduction instrument in respect of an authorized institution (i.e. a bank) under Part 4 of the Bill.

Part 5 (Stabilization Options)

What is/are the reason(s) for excluding all Part 5 instruments as subsidiary legislation (under clause 199(c) of the Bill)?

Under clause 37(1), a section 10 entity may assist a resolution authority in the making of a valuation of a FI in resolution and the appointment of such entity must satisfy the criteria set out in clause 37(2). Would the valuation of a FI by a section 10 entity be invalidated if it is subsequently discovered that a defect in the appointment of such entity has arisen due to the fact that the criteria of appointment specified in clause 37(2) were not met?

Would the resolution authority (or the section 10 entity) be liable to the possible loss or damages suffered by the pre-resolution shareholders or pre-resolution creditors, if any, arising from the defect in the appointment of the entity mentioned in the previous paragraph?

Under clauses 43 and 51, a bridge institution or an asset management vehicle is wholly **or partially** owned by the Government (emphasis added). Do these clauses mean that the private sector entities may partially own the bridge institution or an asset management vehicle together with the Government? If so, why is that? And how could the Government ensure that the private sector owners' decisions or actions taken for the bridge institution or an asset management vehicle would be consistent with the resolution objectives set out in clause 8?

Under clause 79(3), the relevant resolution authority may direct a FI under resolution to continue to provide, on reasonable commercial terms to another entity services that are essential to the continued performance of critical financial functions in Hong Kong. Please clarify which party (the Government, the relevant resolution authority or otherwise) would pay for the above-mentioned essential services provided by such FI on reasonable commercial terms.

Under clause 83(5), a creditor of a within scope FI may not, without the written consent of the resolution authority concerned, commence or continue any action to attach any assets of, or obtain the payment of money or delivery of any other property by, such FI. Please clarify if such restriction would be applicable to a scenario that a "writ of execution" (e.g. a writ of fieri facias, a writ of delivery, a writ of possession or a writ of sequestration) against the FI's assets has already issued and sealed by the relevant court under Order 46 of the Rules of the High Court (Cap. 4A) or the Rules of the District Court (Cap. 336H) but the actual delivery or possession of the assets concerned has

not yet taken place. If this is the case, please consider if it is necessary to expressly provide for such scenario under clause 83.

Part 6 (Compensation)

Please clarify whether the notice of appointment of an appointing person published by FS under clause 95 is subsidiary legislation.

Under clause 104(3), an independent valuer appointed under Part 6 may, at any time before a decision under that section takes effect, correct a clerical mistake in the decision or an error in it arising from any accidental slip or omission. Please clarify if a miscalculation of the amount of compensation in question could be viewed as a clerical mistake or an error arising from accidental slip or omission which the independent valuer may correct or change unilaterally under the clause.

Part 7 (Tribunals)

Under clause 113(6), when publishing the reasons for its determination in any proceeding before the Resolvability Review Tribunal, the Tribunal should not disclose any commercially sensitive information relating to an applicant in the relevant proceeding. Please clarify what would be regarded as "commercially sensitive information" in the proceeding under Part 7. For the avoidance of doubt, please consider if it would be helpful to provide the relevant criteria in the Bill in respect of "commercially sensitive information" relating to the applicants in the proceeding under Part 7.

Part 8 (Clawback of Remuneration)

If an officer of a within scope FI is ordered by the court to repay all or a specified part of the remuneration received from the FI under clause 144, please clarify whether the salaries tax paid by the officer for such remuneration can be deducted from the amount of repayment. If not, why not?

Part 10 (Information Gathering, Inspection and Investigation Powers)

Under clause 158(4)(a), an authorized person may at any reasonable time enter the business premises of a controlled entity to do the acts set out in the clause. Please clarify if it would be an offence if a controlled entity refuses an authorized person to enter its business premises but is able to provide the authorized person with the relevant documents, records and information under clause 158(4)(b) and (c). Please also clarify why entering the business premises of a controlled entity by an authorized person (without a court's warrant) is necessary for the purposes of clause 158.

Please explain why the defence of "reasonable excuse" is not provided for the offence under clause 168 (destruction of documents, etc.).

Part 13 (Non-Hong Kong Resolution Actions)

What is/are the reason(s) for excluding the instruments for recognition of non-Hong Kong resolution actions as subsidiary legislation (under clause 199(e) of the Bill)?

Why do conditions 1, 2 and 3 under clause 25 not apply to the making of a recognition instrument under Part 13?

Under clause 186, the non-Hong Kong resolution action produces substantially the same legal effect in Hong Kong that it would have produced had it been made under the laws of Hong Kong. Please clarify the meaning of "the laws of Hong Kong" in the clause. Does it only refer to the provisions in the Bill or does it also refer to other legislation (or common law principles) of Hong Kong?

Would resolution authorities in Hong Kong need to assist in the non-Hong Kong resolution action after a recognition instrument is made? In this regard, are the resolution authorities entitled under clause 189 to exercise all the powers under the Bill (on behalf of the non-Hong Kong resolution authority) against a non-Hong Kong FI as if it were a within scope FI in Hong Kong? And if so, how would the Hong Kong resolution authorities safeguard the interest of Hong Kong creditors and shareholders? Please also clarify which party will bear the costs and expenses incurred by the Hong Kong resolution authorities in the non-Hong Kong resolution action(s).

For the compensation arrangements under clause 187, please clarify whether before the relevant decisions on compensation to Hong Kong creditors or shareholders are made by the non-Hong Kong resolution authority, any valuation and assessment of the non-Hong Kong FI would be conducted as in the case of a within scope Hong Kong FI.

Schedule 3 (Securities Transfer Instruments)

When the appointment of a director, CEO or deputy CEO of a prescribed entity is revoked by a securities transfer instrument under section 7 of Schedule 3, would the validity of the commercial agreements entered into by such director, CEO or deputy CEO (on behalf of the prescribed entity) be affected by the relevant revocation?

Schedules 8 and 9 (Resolvability Review Tribunal and Resolution Compensation Tribunal)

Please clarify the reason(s) why there are no provisions in Schedules 8 and 9 (a) to require the chairpersons and ordinary members of the Resolvability Review Tribunal and the Resolution Compensation Tribunal to declare and register their interests which relate to the functions or purviews of the Tribunals upon their appointments and at reasonable intervals thereafter and (b) to provide for prevention of any conflict of interests in the hearings or proceedings conducted by the chairpersons and ordinary members of the Tribunals.

It is appreciated that your reply in both English and Chinese could reach us within January 2016.

Yours sincerely,

(YICK Wing-kin)
Assistant Legal Adviser

c.c. DoJ (Attn: Mr Lawrence PENG, Dep Law Draftsman (Legislation) (Acting) (By Fax: 3918 4613)
Mr Manuel NG, Sr Govt Counsel (By Fax: 3918 4613))
Legal Adviser
Senior Assistant Legal Adviser 1
Clerk to the Bills Committee