Bills Committee on the Financial Institutions (Resolution) Bill ("the Bill")
Government's responses to clause-specific comments given by deputations

Comments	The Government's response
Clause 5(1)(a): When within scope financial institution ceases to be viable	
One submission expressed concern that the linking of non-viability to licensing conditions might mean that resolution is initiated for minor contraventions of those licensing conditions. *[AIA]*	This is not the intention and clause 5(1)(a)(ii) of the Bill provides that where an authorization criterion has been breached, then that breach must be such as to warrant the withdrawal of the financial institution (FI)'s authorization. Revocation of licence or authorization is a serious step and is not taken lightly by a regulator. As such, the Government considers that the conditions in the Bill are not designed such that minor breaches would be used as grounds to trigger resolution. Furthermore, even where a resolution authority is satisfied that an FI has ceased, or is likely to cease to be viable (clause 25(2), Condition 1), it must also be satisfied that the FI has no reasonable prospect of becoming viable again within a reasonable period (clause 25(3), Condition 2). Taking action to recover from a "minor" breach of an authorization criterion might be expected to be more

	realistically achievable by the FI, meaning that re-establishing compliance within a reasonable period might render Condition 2 unfulfilled. As such, no amendment to clause 5(1)(a)(ii) is considered necessary.
Clause 6(4): Power of Financial Secretary to designate or specify certain matters	
One submission suggested adding a statement into clause 6(4) to the effect that "publication in the Gazette constitutes written notice". *[Dr Ludmilla K Robinson]*	Clause 6(4) empowers the Financial Secretary (FS) to designate a current Financial Stability Board (FSB) list (irrespective of its title) as being a list equivalent to any FSB list covering G-SIBs, G-SIIs and NBNI G-SIFIs[1] for the purpose of identifying the entities that would fall within the relevant definitions under clause 2. The purpose of clause 6(4) is to ensure that if in future the FSB were to (i) re-title; (ii) amalgamate or sub-divide; and/or (iii) restructure in other ways the G-SIFI lists, an entity on any such revised list can still be covered by the definitions of "insurance sector entity" and "securities and futures sector entity" under clause 2, which set the scope of the regime for FIs in those sectors

[1] These are collectively known as global systemically important financial institutions (G-SIFIs), and are global systemically important banks (G-SIBs), global systemically important insurers (G-SIIs) and non-bank non-insurance global systemically important financial institutions (NBNI G-SIFIs) respectively. The G-SIB and G-SII assessment methodologies and lists are already established and updated annually. The FSB, in coordination with the International Organization of Securities Commissions, is working to develop an assessment methodology and, eventually, a corresponding list for NBNI G-SIFIs.

	by reference to the relevant FSB lists. Publication in the Gazette is an established legal mechanism for providing notice of a given action. As far as we are aware, no other laws in Hong Kong contain provisions similar to, or of similar effect, to the suggested provision; hence we do not see any compelling reason to deviate from the established practice. In any event, G-SIFIs, given their systemic nature, will be fully aware of their standing and expect to be subject to resolution regimes. If there is a concern that they will not be aware of the contents of a Gazette notice, little would appear to be gained from deeming the Gazette notice as a written notice. As such, no amendment to clause 6(4) is considered necessary.
Clause 12: Resolvability assessment and clause 13: Resolution planning	
One submission suggests that a change should be made to the Banking Ordinance (Cap. 155) so that employees of service companies who provide services to a bank as "employees" of that bank for the purposes of ensuring that the existing statutory obligations that apply to bank employees also cover employees of those service companies	How a within scope FI structures its employment arrangements, including the employing entity of those staff required to support the provision of critical financial functions and its position within a group, would be considered during the course of resolution planning both for operating FIs as well as service companies within the same

so as to avoid such employees falling into a gap in the legislation (and to remove an issue that is already present for "normal" outsourcings in any event). *[Allen & Overy]*	group. The Bill provides an overarching framework for resolution planning and resolvability assessment and the details of how these processes will work in practice are intended to be set out in further requirements or guidance (for example, the HKMA expects to issue a Supervisory Policy Manual module on resolution planning for industry consultation in H1 2016).
Clause 30: Letters of mindedness	
One submission suggests re-titling the written notification of intention to commence resolution of a within scope FI from "letter of mindedness" to "letter of intent" (or "intention") to convey more forcefully the concept that resolution proceedings will commence. *[Dr Ludmilla K Robinson]*	The term "letter of mindedness" is used only in the heading of clause 30. According to section 18(3) of the Interpretations and General Clauses Ordinance (Cap. 1), any term used in the heading has no bearing on the interpretation. The requirement to issue a letter under clause 30(2) of the Bill is designed to satisfy general principles of fairness by requiring a resolution authority to notify the affected party that the resolution authority is minded to initiate resolution but is not an absolute, definitive indication that resolution proceedings will be commenced. Indeed, clauses 30(2)(e) and (f) provide for the letter to offer the directors of the company on whom the letter is served, the opportunity to make representations in relation to anything stated in the

	letter within a period of time that is reasonable in the circumstances. As such, a letter issued under clause 30(2) does not necessarily lead to initiation of resolution in all cases. As such, no amendment to the title of clause 30(2) is considered necessary.
Clauses 48 and 56: Disposal of proceeds	
One submission seeks clarity as to how any losses incurred as a result of the disposal of a bridge institution or asset management vehicle (AMV) would be allocated where such entities are partially owned by the Government (and as such a non-government entity is also a partial owner). *[Dr Ludmilla K Robinson]*	If a loss were to be crystallized as a result of the operation and eventual disposal of a bridge institution or AMV, then it would be borne, as with any similar transaction outside of resolution, according to the proportion of shares held by the entity's shareholders. In the case that the Government was a shareholder, any loss it suffered could be recovered through a levy under clause 178 of the Bill.
Clause 60: Rules relating to liabilities	
One submission notes that it is unclear whether the rule-making power under clause 60(1) will require FIs to include "contractual recognition provisions" in contracts "*ex post facto*" (i.e. in all relevant contracts existing prior to the enactment of the Bill) or "*ab initio*" (in all contracts entered	Clause 60(1) empowers a resolution authority to make rules requiring FIs to include "contractual recognition provisions" in the terms and conditions of contracts creating liabilities to the effect that parties to the contract agree that the liability is subject to bail-in executed by a resolution authority in Hong Kong. Whilst the rules will, amongst other things, set the

into following enactment of the Bill). *[Dr Ludmilla K Robinson]*	scope of the contracts affected, it is the Government's current intention that the requirements should apply to contracts entered into, or which are subject to material amendment, after the Bill is enacted and comes into force. At this stage, no further amendment to clause 60(1) is considered necessary. It is our intention that the detailed requirements will be set out in rules by way of subsidiary legislation following consultation with relevant stakeholders.
Clause 62: Bail-in instrument may include directions	
One submission notes that while clause 62(1) provides immunity from suit for directors of an FI subject to bail-in, there is no similar protection conferred on directors of the entity (whether a bridge institution or AMV) to which assets or liabilities of an FI in resolution are transferred. *[Dr Ludmilla K Robinson]*	Clause 62(1) provides that a bail-in instrument issued by a resolution authority under Part 5 of the Bill may include directions to one or more directors of the FI in resolution. Clause 62(3) then confers immunity on those directors of the FI who act, or omit to act, in good faith pursuant to a direction given under 62(1). Therefore the immunity under clause 62 is specific to any direction given by the resolution authority in bail-in instrument pursuant to clause 62(1) and protects the relevant directors because they are required to act in a manner mandated by the resolution authority. There are no corresponding direction powers under the Bill that could be exercised in respect of the directors of a bridge

	institution or AMV. The Government's assessment is that as a shareholder of a bridge institution or AMV, the Government would control the appointment of its directors and so powers to issue directions to those directors are not necessary in order to enable the Government to exercise control. In the absence of such directions, it is unnecessary to provide similar immunity protection in the case of a bridge institution or AMV.
Clause 83: Suspension of obligations	
One submission notes that it is unclear whether the suspension of the commencement or continuation of any action or proceeding against a within scope FI under clause 83(5) could be effective in respect of the obligations of an FI which are wholly or partly international in nature. *[Dr Ludmilla K Robinson]*	Where a resolution authority elects to use the power under clause 83(5), the Government recognises that, as in other cases such as bail-in (clause 60) and the temporary stay on termination rights (clause 92), there are limits to what can be achieved when seeking to apply resolution powers in respect of contracts and/or liabilities that are governed by the law of a jurisdiction other than Hong Kong. Whether such a suspension would be effective in respect of such obligations will be dependent to a degree upon the resolution framework in the relevant overseas jurisdiction. Where that jurisdiction has an effective mechanism permitting the recognition of foreign resolution actions, then it would be expected that the provisions could have effect irrespective of

	the governing law of the contract creating the obligation/liability in respect of which the suspension has been imposed under clause 83(1). The Government does not believe that any provision can be made in the Bill to further enhance the efficacy of such powers, but would expect the issue to be considered during the course, given that much depends on recognition overseas, of resolution planning and in the assessment of impediments to an FI's resolvability.
Part 5, Division 4, Clauses 86-92: Default event provisions	
One submission considers it unclear whether the default event provisions which are subject to a suspension order are those which operate against the FI or those which may be invoked by an FI to protect its interests. *[Dr Ludmilla K Robinson]*	Clause 89 provides that resolution action does not, of itself, constitute an event of default. Clause 90 provides that where, in resolution, termination rights otherwise arise, the resolution authority may stay those temporarily (for a maximum of 2 days) to prevent the disorderly close out of contracts which could serve to undermine a resolution authority's stabilization actions. The powers available under these clauses are designed to reduce the risk of the FI's counterparties triggering contractual acceleration and early close out rights, resulting in the abrupt termination of large volumes of financial

	contracts which could disrupt continuity of the critical financial services provided by the FI thereby undermining an orderly resolution. The termination rights in question are intended to be those which may by invoked by counterparties of the FI to close out positions against it because of the state of the FI's health. The power to impose the stay is at the discretion of the resolution authority. In the perhaps unlikely event that a counterparty of the FI in resolution were to default under a contract with the FI, triggering an early termination right in favour of the FI whilst the FI continued to perform all substantive obligations under the contract (which is a pre-requisite for any stay (clause 88)), it is unlikely that the resolution authority would elect to impose a stay in respect of any such contract. As such, no amendment is considered necessary in this regard.
Clause 98: revocation of appointment of independent valuer	
One submission notes that Schedule 2(4) addresses the issue of conflict of interest in relation to the appointment of an independent valuer, but suggests making a further reference	Clause 98(1) already sets out the circumstances in which the revocation of an appointment of an independent valuer may take place. These circumstances include, under clause

in clause 98 dealing with the circumstances for revoking the appointment of an independent valuer. *[Dr Ludmilla K Robinson]*	98(1)(d), that the person no longer satisfies the criteria for appointment under Schedule 2 (which would include the criterion in respect of conflict of interest under section 4 of Schedule 2). As such, no amendment to clause 98 is considered necessary in this regard.
Clause 103: What independent valuer must assess	
One submission suggests amending the term "immediately before" in clause 103, which provides for the independent valuer to assess the treatment a pre-resolution shareholder or pre-resolution creditor would have received if a winding up of the entity in resolution had commenced "immediately before" its resolution was initiated. The submission considers the term "immediately before" to be vague and open to interpretation, whereas a more specific value, e.g. "on the date and at the precise time at which the resolution process is activated" would enhance certainty and reduce risk of legal challenge to the valuation. *[Dr Ludmilla K Robinson]*	The Government is satisfied that the current reference to "immediately before" provides sufficient certainty for the reference point for conducting the valuation required under clause 101. The phrase "immediately before" is used frequently in Hong Kong legislation. It is noted that a similar approach to providing a reference point for similar valuations is used in other jurisdictions' resolution regimes (see, for example, the UK Banking Act 2009 (UKBA) section 60B(1)). As such, no amendment is considered necessary in respect of clause 103.

Schedule 3: Securities Transfer Instruments; Schedule 4: Property Transfer Instruments and Schedule 6: Bail-in Instruments	
One submission notes that the notification procedures upon the commencement of resolution provided for in Schedules 3, 4 and 6 should extend to requiring a resolution authority to provide advance notice of the resolution of an FMI participant to the relevant FMI in order to maximize the likelihood of continued participation by the entity in resolution in the FMI. *[Undisclosed recipient]*	As noted in item 6 in the Government's response to submissions and comments given by deputations on the meeting held on 19 January 2016 (Policy Issues) (LC Paper No. CB(1)545/15-16(02)), the Government will continue to monitor the ongoing work at the international level in respect of securing continuity of access to FMIs for participants in resolution (or their successor entities e.g. a bridge institution). At this stage, and pending the outcome of the international work, the Government would be reluctant to include a specific provision in the Bill requiring advance notice to be given to affected FMIs in all cases as there may be circumstances where particular sensitivities or time pressures render this not desirable or possible. Recognising these potential sensitivities or time pressures, the Key Attributes of Effective Resolution Regimes for Financial Institutions (Key Attributes) also stipulate that advance notification may not be practical in all circumstances: paragraph 5.1 of II-Annex 1 II of the Key Attributes states that "[r]esolution authorities should inform FMIs as soon as possible of the resolution of a participant, and ***if possible*** in

	advance of the firm's entry into resolution…" (emphasis added). That said, the Government fully recognises the need to develop prompt notification and coordination mechanisms with FMIs in order to devise effective resolution plans for FIs that are FMI participants, particularly given that continued access to FMIs will likely be critical for preserving the continuity of critical financial functions. As such, there will be little incentive for a resolution authority to delay informing an FMI of a participant entering resolution when it is safe and appropriate to do so. As such, no amendment is considered necessary in this regard.
Schedule 4, Part 1, section 4(4), (5) and (6): Effect of property transfer instrument	
One submission noted with regard to Schedule 4, Part 1, section 4 that there is a possibility that actions performed by a resolution authority may be declared void or voidable (section 4(6)(c)) after the fact (where a condition imposed on the transfer (section 4(4)) has been breached (section 4(5)) and this may give rise to legal uncertainty, so potentially jeopardizing continued compliance by designated systems	The Bill provides a framework which is intended to cover a range of eventualities as it is not possible to predict in advance the circumstances which may be faced by a resolution authority in any given resolution case. As such, the inclusion of the ability to make a transfer conditional does not connote that a transfer necessarily will be conditional. Indeed, the importance of certainty and

with Principle 1 of the Principles for Financial Market Infrastructure (PFMI).[2] *[Undisclosed recipient]*	continuity in resolution is fully recognised and the resolution authority would therefore strive to make any transfer under the Bill non-conditional unless it proves to be necessary at the time given the circumstances of the case. It is noted that the UKBA makes similar provision to that under the Bill, e.g. under section 34(5) of the UKBA. In determining whether to impose conditionality on a transfer, the resolution authority will consider carefully the potential ramifications of doing so and how to alleviate any concerns. As such, no amendment is considered necessary in this regard.
Schedule 8: Resolvability Review Tribunal; and Schedule 9: Resolution Compensation Tribunal	
One submission suggests that ordinary/panel members of the Resolvability Review Tribunal (RRT) and the Resolution Compensation Tribunal (RCT) should include representatives from the relevant industry/people who have profound knowledge of the relevant industry. *[Hong Kong Federation of Insurers]*	The Government is of the view that the provisions of both Schedules 8 and 9, in respect of the RRT and RCT respectively, already cater for this. Section 3(1) in both Schedules 8 and 9 requires that the Chief Executive must appoint "qualified persons" to a panel and such persons must have as per section 3(2)(a)(i) in both Schedules 8 and 9,

[2] Principle 1 of the PFMI, issued by the Basel Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions in April 2012, states that: "[a]n FMI should have a well-founded, clear, transparent, and enforceable legal basis for each material aspect of its activities in all relevant jurisdictions".

	amongst other things, “relevant expertise”. As such, no amendment is considered necessary in this regard.

Financial Services and the Treasury Bureau (Financial Services Branch)
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