

Bills Committee on Financial Institutions (Resolution) Bill

**List of follow-up actions arising from the discussion
at the meeting on 3 May 2016**

Clauses 142 to 145 – Clawback of Remuneration

1. Clauses 142 and 143 provide that a resolution authority ("RA") may, at any time after it has initiated the resolution of a within scope financial institution ("FI"), apply to the Court for a clawback order against an officer or former officer of that institution. The controlled period for a clawback is three years immediately preceding the date on which the resolution of FI was initiated, or a further three years extended by the Court. Members have expressed grave concern about the duration of the controlled period. There are also enquiries about the operation of the controlled period with the relevant provisions in the Limitation Ordinance (Cap. 347), the operation of the clawback provisions with the relevant provisions in the Employment Ordinance (Cap. 57), and the factors the Court would take into account in making the clawback order. The Administration is requested to:

- (a) explain the rationale for setting the initial controlled period at three years, and the considerations of not providing a longer period (e.g. five years);
- (b) clarify the time limit, if any, for an RA to apply for a clawback order, including whether the RA would be subject to the Limitation Ordinance in exercising its power in this regard;
- (c) clarify whether in making a clawback order, the Court is only required to be satisfied that the acts or omission of acts of the officer concerned were made intentionally, recklessly or negligently, and had materially contributed to the ceasing of the FI or its non-viability under clause 143(2), or the Court is also required to consider the negligence and fault (including concealed fault) of the officer concerned under the Common Law;
- (d) explain whether the clawback provisions would be in conflict with the provisions in the Employment Ordinance, especially if a clawback order would override the provisions relating to the officer's entitlement to fixed remuneration (e.g. wages); and

- (e) consider some members' suggestion of empowering the RA to retain the remuneration or part of the remuneration of the officer or former officer of the FI concerned, including the retention period, the kinds of remuneration to be retained, the matters the RA should consider for the retention, etc.

2. Clause 143(3)(b) stipulates that the Court "must" take into account the financial circumstances of the officer in determining the extent to which the officer's remuneration would be covered by the clawback order. Members are concerned that the officer may conceal his/her financial circumstances through transferring his/her remuneration to a third party/outside Hong Kong. There is also concern as how the RA would recover the remuneration subject to the clawback order under clause 145. The Administration is requested to:

- (a) review the relevant provisions to address members' concerns;
- (b) provide details on the financial circumstances that the Court would take into account under clause 143(3)(b); and
- (c) consider some members' views to delete clause 143(3)(b) and 143(4) from the Bill, and the views of the legal adviser to the Bills Committee to replace the word "must" by "may" in clause 143(3) so that the Court would have discretion on whether to consider the financial circumstances of the officer.

3. Clause 144(2) provides that the making of a clawback order against an officer does not affect any criminal or civil liability incurred by the officer in relation to the FI under resolution. The Administration is requested to explain the purpose for including the provisions in the Bill, and clarify the possible impact of the clawback order on the criminal or civil liability incurred by the officer.

Clauses 171 – Official secrecy

4. Clause 171 imposes secrecy requirements to any person who holds or has held an office, appointment, employment or other role under the Bill. Certain disclosure gateways are provided in clause 171(3). The Administration is requested to consider a member's suggestion to exempt parties, such as representatives of the RA and Government officials (e.g. the Financial Secretary and Secretary for Financial Services and Treasury), from the secrecy requirements so that they may make public statements or answer enquiries regarding possible resolution of a distressed FI. The exemption may be necessary to prevent panic arising from rumors about the distressed FIs.

5. In the light of comments by the legal adviser to the Bills Committee, the Administration is requested to consider the need to set out clearly in clause 171(2) that the members, employees or agents of, or the consultants or advisors to, a section 10 entity or an independent valuer are also covered by the secrecy requirements.

Drafting issue

6. In the light of a member's comment, the Administration has agreed to review the Chinese rendition "幕後董事" for the term "shadow director" in clause 142 making reference to the Chinese rendition adopted in the Companies Ordinance (Cap. 622).

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