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## Reply Form for the Consultation on Review of Corporate Rescue Procedure Legislative Proposals

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1. The purpose of this reply form is to facilitate providing views and comments on the Consultation Paper entitled Review of Corporate Rescue Procedure Legislative Proposals ( “Consultation Paper” ) published by the Financial Services and the Treasury Bureau ( “FSTB” ) on 29 October 2009.
2. The Consultation Paper can be downloaded from the FSTB’s website at <http://www.fstb.gov.hk/fsb>
3. If you have any views or comments on the Consultation Paper, you are welcome to complete this reply form and return it to us on or before **28 January 2010** by one of the following means:

By mail or  
hand delivery to: Division 4, Financial Services Branch  
Financial Services and the Treasury Bureau  
15/F, Queensway Government Offices  
66 Queensway  
Hong Kong

Re: **Consultation Paper on  
Review of Corporate Rescue Procedure  
Legislative Proposals**

By fax to: (852) 2869 4195

By e-mail to: corporate\_rescue@fstb.gov.hk

4. Any questions about this reply form may be addressed to Miss Sandy CHAN of FSTB, who can be reached at (852) 2867 5844 (phone), (852) 2869 4195 (fax) or corporate\_rescue@fstb.gov.hk (email).
5. Submissions will be received on the basis that we may freely reproduce and publish them, in whole or in part, in any form, and use, adapt or develop any proposal put forward without seeking permission or providing acknowledgment of the party making the proposal.

6. Please note that names of respondents, their affiliation(s) and comments may be posted on the FSTB's website or referred to in other documents we publish. If you do not wish your name and/or affiliation to be disclosed, please state so when making your submission. Any personal data submitted will only be used for purposes which are directly related to consultation purposes under this consultation paper. Such data may be transferred to other Government departments/agencies for the same purposes. For access to or correction of personal data contained in your submission, please contact Mr WONG Wing-hang, Assistant Secretary for Financial Services and the Treasury (Financial Services), who can be reached at (852) 2867 5465 (phone), (852) 2869 4195 (fax), or whwong@fstb.gov.hk (email).

**PART A: GENERAL INFORMATION OF THE RESPONDENT**

Name/Name of Organisation	:	_____
If organisation, name and title of Contact Person	:	_____
		<i>(Please fill in if the respondent is a company or organization)</i>
Phone Number	:	_____
E-mail Address	:	_____

If you do not wish to disclose your affiliation or name to the public, please check the box here:

Our organisation does not wish to disclose our name.

I do not wish to disclose my name.

## **PART B: DETAILED QUESTIONS FOR RESPONSE**

You may provide your views or comments on all or any of the questions. If the provided space is insufficient, please attach additional pages.

### **Question 1**

Do you agree with the proposed procedural changes relating to initiation of provisional supervision in paragraphs 2.4 to 2.6 above? If not, please provide reasons and suggest alternatives.

Yes.

### **Question 2**

Do you see any need for other changes to the initiation of provisional supervision, including who may initiate the procedure? If so, please elaborate on the suggested changes and reasons.

No.

### **Question 3**

Do you agree that the notice of appointment of provisional supervisor should be published in the local newspapers on the same day as the date on which the last document is filed with the Registrar of Companies? If you prefer additional or alternative means of publishing the notice of appointment, please describe and explain.

In addition, also In the companies' website and emails or fax to creditors on the date when the notice of appointment is published.

### **Question 4**

Do you support an initial moratorium period of 45 days? If not, please suggest alternatives and explain.

We believe 60 days reasonable and pragmatic as we are talking about calendar days but not banking days.

### **Question 5**

Do you support the proposal to allow for extension of the moratorium up to a maximum period of six months from the commencement of provisional supervision, subject to approval by the creditors at a meeting of creditors? If not, please explain and suggest alternatives.

We believe the total length of moratorium of 6 months is sufficient ie including the initial moratorium. Assuming the initial moratorium of 60 days, it is thus extendable to a max. length of 4 months. Given the tight schedule and heavy works conducted by the provisional supervisor during the moratorium period, to

hold another creditors' meetings to determine the extension may be time consuming. Given the provisional supervisors are professional and independent from the companies in trouble, it is acceptable that the provisional supervisors can act at their discretion to extend the moratorium further provided that total length of the moratorium will not exceed 6 months and prompt notice with explanation to substantiate such extension decision to be announced within 3 working days.

**Question 6**

Do you agree with the proposal to allow for extension of the moratorium beyond six months only upon court approval? If not, please explain.

To save costs, it is fine to secure creditors' consent at this juncture instead of court orders. Also, max. length of the extension should not exceed 6 months. When such extension is necessary, prior notice to the creditors to be given at least 1 month before due date together with reasons of extension.

**Question 7**

If your answer to Q6 is yes, do you agree that any court extension should not exceed a maximum of 12 months from the commencement of provisional supervision? If not, please explain and suggest alternatives.

NA

### **Question 8**

Does the list of contracts and agreements which should be exempted from the moratorium, as set out at Appendix, need to be revised? If so, please suggest and explain.

Subject to the then market condition, the continuity or cessation of certain financial contracts may have different impact to the companies in trouble. We believe the decision should be made by the provisional supervisor. If in his/her opinion, to continue the contracts will bring bigger loss to the companies, to close the contracts in order to crystallise the loss may be desirable. Alternatively, if the companies are regarded as viable and it is necessary to maintain the contracts to ensure the continuous running of the companies, to keep the contracts may then be necessary. Thus, it is not necessary to exempt these financial contracts automatically but subject to the opinion of the provisional supervisor. Besides, if these contracts are exempted from moratorium, it may imply that creditors relevant to these contracts could take action against the company under these contracts and it would affect the stability of the provisional supervision.

### **Question 9**

Which of the above three options (namely, the 2003 Proposal, Alternative A or Alternative B) would you prefer? Please explain. If you have any suggestion to refine any of the above three options, please describe and explain. If you prefer another alternative, please describe and explain.

Alternative B is preferable considering the company is in financial distress. While the "employees' protected debts" should be paid by the company before or by the time the voluntary arrangement comes into effect, we suggest that a certain percentage, say 50%, of the remaining employees' debts should be paid within 6 months from the start of the voluntary arrangement and the rest within 12 months. We also suggest that unpaid wages of directors should only be paid after 12 months from the start of the voluntary arrangement.

**Question 10**

Independent of which of the above options is adopted, what are your views on the treatment of outstanding employers' MPF scheme contributions?

No comment.

**Question 11**

Do you agree with the proposal that solicitors holding a practising certificate issued under the Legal Practitioners Ordinance (Cap 159) and certified public accountants registered in accordance with the Professional Accountants Ordinance (Cap 50) may take up appointment as provisional supervisors?

As per our workout experience before, the most appropriate persons to take over the provisional supervision roles are certified public accountants. It is because the accounting/financial knowledge and corporate rescue experience are the most important inputs the companies in trouble are in need of and what the provisional supervisors have to exercise or bring in to assess the viability of the company. Besides, the accounting firms have sufficient manpower to support the whole project. Legal advisors play a supportive role and usually be brought in for legal advice for the due implementation of provisional supervision.



**Question 12**

Do you think that other persons without the above qualifications could also be appointed as provisional supervisors on a case-by-case basis? If so, should such an appointment be made by the OR or the court? Please elaborate, in particular on the appeal channel in case of aggrieved applicants and on the associated investigatory and disciplinary regime in case of complaints against appointed persons.

No comment.

**Question 13**

Do you agree with giving creditors the choice to replace the provisional supervisor appointed by the company or its directors or the provisional liquidators or liquidators of the company and approve the remuneration of the provisional supervisor at the first meeting of creditors to be held within 10 working days from the commencement of provisional supervision? If not, please elaborate on the reasons and suggest alternatives.

Agreed.

**Question 14**

Do you support imposing personal liability on provisional supervisors as proposed in paragraphs 5.14 to 5.17 above? If not, please suggest alternatives which would effectively address the issues set out under paragraphs 5.16(a) to (c).

Agreed.

**Question 15**

Do you support the introduction of insolvent trading provisions? In case you do not, please explain and suggest alternatives to (a) encourage timely initiation of provisional supervision; and (b) deter irresponsible depletion of the company's assets.

Yes.

**Question 16**

Do you agree with the proposed revised formulation of "insolvent trading"? If not, please suggest alternatives.

Yes.

**Question 17**

Do you agree with the way that "major secured creditors" was defined in the 2001 Bill? If you think any changes are needed, please elaborate and explain.

The definition should be more specific. As per definition, "property" means most, if not all, assets of the companies. However, it is necessary to ascertain the amount of "secured indebtedness" and compare it with the amount of other unsecured indebtedness. Thus, "major secured creditors" should be defined to refer to a meaningful portion of the total debts they are owed versus unsecured debts, say over 50%. Also, the "major secured creditors" have to be referred to those located in Hong Kong as those locating outside Hong Kong ie PRC may not observe

HK regulations and laws. Similarly, if the "secured assets" are located outside HK, the different jurisdictions and legal systems may affect the implementation of provision supervision and if it is the case, we have to exclude these secured creditors. Also, even though the secured creditors are secured by "property", if in the reasonable opinion of the provisional supervisor, the disposal of "property" would not substantially affect the operation of the companies ie instead of owning the office premise, the company could lease one; instead of owning the factory premises, the company could change manufacturing mode by subcontractings etc, the creditors secured by such "property" could be excluded as well. The fundamentals of provisional supervision are to assess objectively, within the limited period of time, the survival prospect of the companies and also strike a balance of interest among different classes of creditors.

#### **Question 18**

Do you support the proposal to largely follow the 2001 Bill approach with respect to protection of “major secured creditors” and other secured creditors’ rights? If you think any changes are needed, please elaborate and explain.

We opine that the 2001 Bill put a rather unnecessary and unfair favour to secured creditors. In particular, the 3-day allowance and the discretion of the 'major secured creditors' to determine the fate of the company and the recovery prospect of unsecured creditors. When a company is under financial stress, all creditors are in the same boat and thus, the moratorium should apply to all classes of creditors. In fact, the position of secured creditors are generally superior given their secured exposure. Normally, if the company could be run stably under provisional supervision, the value of the secured assets could be preserved or stabilized. If the major secured creditors take such hostile action to enforce securities, the secured assets under distressed or liquidation situation will usually end up with a disposal price with big haircut. It would either reduce or affect the recovery prospect of the secured indebtedness or eliminate the possible residual values which may be shared among unsecured creditors. Nevertheless, as a compromise, in order to protect the major secured creditors against any possible rapid depreciation of the security value or the loss of potential buyers, it is acceptable to set up a mechanism

under which the major secured creditors could enforce the secured assets during the moratorium ie the evidence to the satisfaction of the provisional supervisor regarding the availability of indicative bids with reasonable offer price or possible substantial loss to the secured creditors if the enforcement to be delayed etc.

**Question 19**

What are your views on retaining or removing the “headcount test” in the voting at meetings of creditors (i.e. requirement (a) stated in paragraphs 8.1 and 8.2 above) for resolutions to be passed at meetings of creditors?

We wish to follow the similar voting mechanism under the scheme of arrangement ie the consent to be subject to support by 75% of creditors in value and 50% in numbers.

- End -