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

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, agree. Given the tight timetables for the convening of the first creditors' meeting and for the Provisional Supervisor to decide on employees, the directors should be required to:

- (i) attach to the Statement of Affairs a schedule containing the contact details of all the creditors, including the email address (if any) of a key contact of each creditor; and
- (ii) an up to date schedule of employees, containing critical information regarding their function as well as basic information as to salary etc.

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.

Creditors should also be able to initiate provisional supervision proceedings. This would have to be done by application to the Court. Creditors who are in possession of sufficient information to be able to present a winding up petition will, in our view, be similarly capable of applying to Court for a Provisional Supervisor. Given that the foundation of the proposed legislation is to move away from a liquidation to a rescue culture it seems illogical to leave concerned creditors unable to do anything other than present a winding up petition.

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.

Yes, but within "2 business days" might be more practical.

Additional means of communication should be adopted, including, a posting on the company's website. Consideration should also be given to requiring publication in an internationally circulating media and/or a specific requirement to publish separate notices in newspapers circulating in those countries in which the company has operations, obtain supplies or has customers.

Question 4

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

Yes, agree.

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.

Agree, with an opinion on the company's outlook to be provided by the Provisional Supervisor. To encourage creditor participation in the first and any subsequent meetings, consideration should be given to enabling creditors to attend either physically or by conference call. Given that the first creditors' meeting is to be held within 10 days, it will be very challenging indeed for overseas creditors, in particular, to receive, consider and make arrangements to attend either in person or by proxy. Electronic communication needs to be allowed and encouraged.

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.

Yes, however subject to prior creditors' approval before the application to Court can be made.

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.

Yes, agree.

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.

No comment.

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 with the provision that employees have the option to waive or defer their entitlements. The concern here is what happens if a company implementing a voluntary arrangement is well on the road to recovery but, at the end of 12 months, is not able to pay all remaining employees' debts. It would seem sensible to allow the employees to determine, as it were, their own fate. They would be given the option to consider whether a waiver or deferral of their entitlements is in

their best interests, particularly in regards to preserving their employment.

Question 10

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

MPF scheme contributions should be treated in the same way as employees' arrears of wages.

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?

No, do not agree as this fails to recognize other relevant qualifications from outside Hong Kong and assume, wrongly, that all Hong Kong Certified Practicing Accountants or lawyers have the knowledge and experience to conduct this type of work.

It is clear that a licensing regime must be introduced to balance the need to have suitably experienced professionals doing this work with the ability to hold them accountable for their conduct.

Relying on the disciplinary procedures of the relevant professional bodies also does not provide adequate protection for creditors.

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.

Not without proper licensing and regulation.

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.

Yes, but given the shortness of available time for convening the first meeting, emails and other forms of correspondence should also be acceptable forms of communication to creditors of the upcoming creditors' meeting.

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).

Yes, agree on the basis that this should act as a deterrent for potential abusers.

The Provisional Supervisor should be indemnified out of the assets of the company, however, as should a Provisional Supervisor who is removed at the first creditors' meeting. That said, we do have serious reservations about, in particular, the employment status of those employees who the Provisional Supervisor decides to retain. Are they 'his' personal employees or is the Provisional Supervisor merely confirming their continuing employment by the company?

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, agree.

Question 16

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

Yes, agree.

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.

Agree in principle with the definition of “major secured 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.

The provisional supervisor would serve notice on each major secured creditor (if any) within 5 working days rather than 3 working days.

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?

The “headcount test” should be removed because it could be vulnerable to abuse. Majority in value should (ie. similar to quorum requirements at a first meeting of creditors in a liquidation) be eligible to pass resolutions at a meeting of creditors.

Additional Comment

There is apparently a desire on the part of the Government to introduce some kind of rescue legislation on an urgent basis. If only as a short term measure, whilst provisional supervision makes its way through the legislative process, we recommend that urgent consideration be given to clarifying the existing law to state explicitly that a provisional liquidator can be appointed specifically to explore a rescue.

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