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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                         | : CIMA (Chartered Institute of Management Accountants)                      |
| If organisation, name and title of Contact Person | :<br><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 principle, we broadly agree with the proposal. We also feel that the use of electronic means such as email may be particularly useful in ensuring that overseas creditors can be speedily informed.

### **Question 4**

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

Yes

### **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.

Yes, as a provisional supervisor would need sufficient time to implement a plan of restructuring.

**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

**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

**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.

**We feel that the case for special treatment for a particular class of creditors has not been made. Such treatment could be unfair to other creditors and not necessarily be required to avoid a knock-on domino effect in the financial markets. If all derivatives transactions, regardless of whether they are entered into for hedging or speculative purpose, are closed out, it could ruin the**

**long term viability of the company in question. We suggest that it be left to the provisional supervisor's own discretion to determine to what extent such contracts be closed out or maintained.**

### **Question 9**

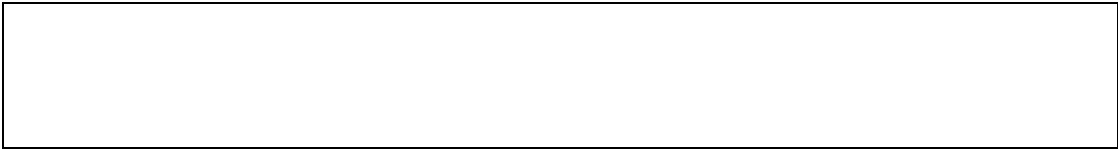
Which of the above three options (namely, the 2003 Proposal, Alternative A or Alternative B) would you prefer? Please explain. If you have any suggestion to refine any of the above three options, please describe and explain. If you prefer another alternative, please describe and explain.

We prefer Alternative A. It would then fall to the provisional supervisor to convince employees that accepting his or her plan was in their and the company's best interests. Presumably staff kept on would continue to receive a salary and that the accrued liabilities could be paid in due course contingent on the success of the plan of reorganisation. This should provide a positive incentive to support the reorganisation. Should employees not be convinced, they would be free to petition the courts to wind up the company and take their chances as creditors.

### **Question 10**

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

As per question 9 - Alternative A.



**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?

Yes, but not exclusively so.

**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.

We feel that it is critical that only properly qualified insolvency experts be chosen to take up appointment to act as a provisional supervisor. This would require at the very least the skills of an experienced liquidator. In addition, however, due to the emphasis on redeeming the company rather than winding it up, a far broader range of skills would be required for success, such as entrepreneurial and managerial ability.

As the average corporate lawyer or CPA is not necessarily equipped with such skills we feel that the proposal to limit appointees to be drawn only from the two named Hong Kong sources is not satisfactory. Such a decision would very likely exclude other qualified candidates. Our proposal is that appointees be drawn from a broader franchise such as recognised insolvency experts, professionally & internationally qualified accountants without limitation and qualified lawyers, and only to the extent that they can prove possession of the requisite skills. As an example, members of the Chartered Institute of Management Accountants are



internationally recognised professional accountants who possess in-depth knowledge and experience in financial management and strategic management issues.

As persons drawn from this wider franchise would be members of their respective internationally recognised institutes and law societies in their countries of origin, the issue of control and regulation can be dealt with through existing channels. In addition, the fact that the provisional supervisor would be subject to personal liability (albeit with some form of company indemnity) should provide a further effective control mechanism. We also agree that appointments may be made on a case-by-case by the OR.

### **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

### **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

**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. Presumably the provisional supervisor and company directors would not be subject to a charge of insolvent trading whilst carrying out their respective duties during the implementation phase of the voluntary arrangement as approved by the required parties prior to the restoration of the company's solvency.

**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.

Yes. Notwithstanding the fact that the wording "substantially" is rather vague and

could lead to an element of disagreement we feel that it is still better than using an arbitrary percentage. To be successful the provisional supervisor would need to have the power to make a binding decision.

**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.

Yes, we do not believe that security should be arbitrarily taken away from secured creditors.

**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?

Yes prefer the removal of the headcount test.

- End -