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28 January 2010

By Fax (2869 4195) & By Mail

Division 4, Financial Services Branch
Financial Services and the Treasury Bureau
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Dear Sirs

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

Thank you for your letter of 29 October 2009 addressed to Mr. Kwa Chong Seng, Chairman of DBS Bank (Hong Kong) Limited.

We are pleased to provide herewith our comments to the questions for consultation on the conceptual framework and key issues relating to corporate rescue.

If you have any queries, please contact the undersigned.

Yours faithfully



Doris Wong
Company Secretary
phone no: (852)
e-mail address:

Encls.

LIST OF QUESTIONS FOR CONSULTATION

Chapter 2: Initiation of provisional supervision

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.**

We agree in principle to the proposed procedural changes relating to initiation of provisional supervision under paragraphs 2.4 to 2.6 of the Consultation Paper and would like to provide our views as follows:-

2.4 The abolishment of the need to file the notice and documents with the Official Receiver or the High Court would be more efficient and cost effective.

2.5 To protect the interests of the employees, the company should confirm before the commencement of provisional supervision that it has in place a valid insurance policy to cover its employee compensation liabilities, including liabilities in respect of any work accidents that happened before the commencement of provisional supervision. We suggest that the policy should be valid for at least 6 months from the date of commencement of provisional supervision.

2.6 Suggest that the Statement of affairs should be certified by the company's director. Also, the preparation of state of affairs must be confined to the actual controllers of the company in conjunction with the top official who handles financial affairs. And, if there are issues regarding accuracy of information (discovered by stakeholders at a later stage), the providers should be legally liable. By so doing, the chance of abusing the arrangement (to solicit further supports from creditors/banks or delaying liquidation) can be minimized.

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.**

We agree that provisional supervision should be initiated by a company or its directors or provisional liquidators or liquidators, who would have sufficient knowledge of the financial position of a company to determine if provisional supervision would be beneficial and may assist the company to turn around and continue to operate as a going concern.

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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.**

We agree that the notice of appointment of provisional supervisor should be published in at least one Chinese and one English local newspapers (suggest include a list of newspapers that would be recognized for this purpose in the Gazette) on the same day as the date on which the last document is filed with the Registrar of Companies.

We also suggest that on commencement of provisional supervision, the webpage and letterheads of the company bearing its name should indicate in a prominent place that the company has commenced provisional supervision and the commencement date.

Chapter 3: Moratorium

Question 4 **Do you support an initial moratorium period of 45 days? If not, please suggest alternatives and explain.**

We support an initial moratorium period of 45 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 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 creditors' meeting.

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.**

In order to allow sufficient time for a provisional supervisor to deal with the affair's of a large company, we think it would be reasonable to allow for extension of the moratorium beyond six months upon court approval.

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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.**

We agree that any court extension should not exceed a maximum of 12 months from the commencement of provisional supervision.

Question 8 **Does the list of contracts and agreements which should be exempted from the moratorium, as set out as Appendix, need to be revised? If so, please suggest and explain.**

The list of contracts and agreements which should be exempted from the moratorium (as set out at Appendix of the consultation paper) need to be updated in view of the development of the financial market since 2001. Please consider if other agreements involving derivatives should be included in the exemption. Moreover, in Chapter 3 under 3.2, it is highlighted that “there would be a stay of all civil proceedings against the company during the moratorium”. Please clarify whether the “civil proceedings” include the enforcement of rights to sell assets surrendered by the company / security provider.

Chapter 4: Employees’ outstanding entitlements

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 think the September 2003 Proposal which allows companies a 60-day grace period to give each employee up to HK\$36,000 in unpaid wages and a year from the approval plan to pay any outstanding amount would be fair since it would strike a balance between the interest of employees and other creditors, based on the principle that employees would not be treated less favourably than in winding up.

Question 10 **Independent of which of the above options is adopted, what are your views on the treatment of outstanding employers’ MPF scheme contributions?**

We think outstanding employers’ MPF scheme contributions should be treated in the same way as employees’ arrears of wages and other outstanding entitlements.

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Chapter 5: Provisional supervisor

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?

We agree with the proposal that solicitors holding a practicing 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. We also suggest that such qualified person should make a declaration prior to his appointment as provisional supervisor that he is independent from the company.

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 do not agree that other persons without the above qualifications should be appointed as provisional supervisors for the following reasons (as stated in 5.10)

- Difficult to ensure that persons without the necessary professional qualifications can be effectively regulated since they do not belong to any statutory professional body and are not subject to any code of conduct and disciplinary action.
- A provisional supervisor can engage the service of persons who possess the relevant expertise and skills suitable to the type of business and the special needs of the company in question.

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.

We agree that creditors should be given the choice to replace the provisional supervisor appointed by the relevant parties 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. In practice, the company may wish to get the blessings of the major creditors on the choice of provisional supervisor and his remuneration prior to commencement of provisional supervision.

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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).

We agree in principle with the imposition of personal liability on the provisional supervisors regarding contracts entered into by him in the performance of his functions, which is in line with the personal liability imposed on a receiver under the Companies Ordinance and the practice in other jurisdictions. However, in view of the concern that imposing personal liability may deter experienced professional from taking up such appointments, the provisional supervisor should take professional indemnity insurance coverage and the indemnity insurance cost should be borne by the professional firm (where the provisional supervisor is a staff / partner of such firm).

Chapter 6: Insolvent trading

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.

We support the introduction of insolvent trading provisions which would encourage a company to initiate provisional supervision in a timely manner and to prevent further erosion of the distressed company's assets to the detriment of creditors.

Question 16 Do you agree with the proposed revised formulation of "insolvent trading"? If not, please suggest alternatives.

We agree to the proposed revised formulation of "insolvent trading" as follows:-

- (a) excluding senior management from being liable under insolvent trading and
- (b) dropping ground (1)(b) under paragraph 6.1.

Chapter 7: Secured creditors

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.

We agree to the definition of "major secured creditors" as stated in the Companies (Corporate Rescue) Bill 2001. Please consider the situation where there is no single major secured creditor but there are two or more secured creditors holding charges on more or less equal shares of the company's property.

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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 support the proposal to largely follow the 2001 Bill approach with respect to protection of “major secured creditors” and other secured creditors’ rights. We refer to clause 19(4) and suggest to change the time frame from “12” months to “6” months:-

“Any charge on the undertaking or property of the company created at any time within the period of 6 months immediately preceding the relevant date shall unless it is proved that the company was solvent immediately after the creation of the charge, be invalid for the purposes of this Ordinance except for”.

We also believe that the authority granted to the “major secured creditors” to veto the PS process is too high. Usually secured creditors tend to realize the tangible assets as soon as possible.

Besides, it would too tight for the major secured creditor to decide and / or obtain internal approval within 3 working days whether to participate the PS. We would suggest to allow 5 working days.

Chapter 8: Voting at meeting of 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?

We support the removal of the “headcount test” in the voting and resolutions to be passed at meetings of creditors so that the voluntary arrangement proposal would not be blocked by small creditors for reasons which may not be related to the best interests of the company and its creditors.

Other input: Even after the voluntary arrangement (proposed by PS after the formal moratorium) has been agreed and being implemented, stakeholders (all creditors) should have the right to re-address such arrangement. This is to protect stakeholders who may offer haircut or allow a long repayment period in the original proposal but ultimately, due to changes in operating environment, the business in question is more profitable than expected.