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OF SINGAPORE

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Your Ref: To be advised

11 January 2013

General Counsel's Office
The Monetary Authority of Singapore
10 Shenton Way
MAS Building
Singapore 079117

BY POST & EMAIL
(Email: gco@mas.gov.sg)

Attn: Mr Ng Heng Fatt

Dear Sirs

CONSULTATION PAPER ON PROPOSED AMENDMENTS TO THE MONETARY AUTHORITY OF SINGAPORE ACT

We refer to your email dated 26 December 2012 inviting the Law Society to provide its feedback on the Consultation paper on Proposed Amendments to the Monetary Authority of Singapore Act ("MAS Act").

We note that we had earlier requested (via an email dated 27 December 2012 from the Secretariat of Law Society) for an extension of time until 25 January 2013 for submission of our feedback on this consultation in view that the relevant practice committees for 2013 are in the process of being constituted and many of our members were then currently on leave during the festive season. However, we understand that MAS was not able to grant us an extension of time to submit our feedback as MAS has a deadline to meet, but nevertheless hoped that Law Society would still be able to provide our feedback on the consultation by 12 January 2013.

Notwithstanding the above, the proposed amendments to the MAS Act were referred to the relevant practice committees of the Law Society, namely the Corporate Practice Committee and the Insolvency Practice Committee for their urgent views. In light of the short time frame provided for response, many of the members of the Corporate Practice Committee and the Insolvency Practice Committee did not have sufficient time to provide their considered views on the said consultation. As such, the Committees regret that they were not able to provide their consolidated considered views on the proposed amendments at such short notice.

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The Law Society of Singapore

Be that as it may, a member of the Corporate Practice Committee and a member of the Insolvency Practice Committee have provided us their individual feedback on certain proposals outlined in the consultation from. Their views are respectively set out in Annex A and Annex B herein, for your consideration.

We look forward to receiving your reply after MAS has considered the feedback provided.

Thank you for giving the Law Society the opportunity to provide its views in this matter, albeit within a short consultation period. Please re-consider giving Law Society more time in order for our members to carefully review these detailed proposals.

Yours faithfully



Jasmine Foong
Assistant Director, Representation & Law Reform Department

ANNEX A

Feedback provided by a member of the Corporate Practice Committee

In general, the member agrees with the policy of rationalising and consolidating the resolution powers of the MAS. The member's comments on specific sections of the consultation paper are set out below:

A. Section 2.1: Resolution Powers currently in the Bankruptcy Act ("BA") and Insurance Act ("IA")

The member is of the view that the resolution regime in the BA and IA can certainly be used as a model, however, considering that the legal changes will involve repealing the existing provisions in the BA, this is an opportune time to further fine-tune the existing BA and IA provisions. The member observes that the Consultation Paper makes no reference to similar regimes in other countries. Thus it is the member's opinion that MAS could consider studying other jurisdictions when considering if further refinements are necessary.

B. Section 2.2: Enhanced Direction-Making Powers

The member agrees in general with the policy principle expressed in this section, however, the member is of the view that the introduction of additional defined expressions such as 'covered financial institutions' and 'excluded financial institutions' does not serve any useful purpose. These terms do not intuitively suggest to the reader what they encompass and thus necessitate reference to the definition. The member is of the opinion that this style of drafting makes the statute very difficult to read and the reader would constantly have to refer to the substantive provision and the definition provision for clarification.

Further, the member notes that the amendment proposed in paragraph 2.1.1 is not reflected in Annex B thus the member is unclear as to how the proposed amendment is to be implemented within the MAS Act. The member is also of the view that the amendment ought to appear in section 27 of the MAS Act.

C. Section 2.3: Key Attributes of Effective Resolution Regimes for Financial Institution ("KA") Powers

While the member agrees with the policy principle of extending legal reach to non-regulated entities that are part of a financial institution group, the member questions the mode of empowerment set out in paragraph 2.3.3. Directions issued by MAS only bind the addressee and may not be binding on third parties who for instance might have contractual relationships with the non-regulated entity that is part of the financial institution group. It is unclear whether the directions issued by MAS, while binding on the entity to which it is issued, has any effect on enforceability of transactions entered into by the entity. The member suggests that MAS be empowered to make subsidiary legislation to carry this policy into effect as subsidiary legislation has the advantage of enabling MAS to affect third party rights effectively, if necessary.

With respect to on-disclosure restrictions (paragraph 2.3.8), the member appreciates that the policy principle discussed is based on existing statutory provisions. However, the member is of the opinion that this policy position may not adequately take into account the effects of foreign law, which cannot be readily anticipated. For instance,

MAS is proposing that it be empowered to permit the foreign financial regulator to on-disclose information shared by MAS to another government agency in a foreign jurisdiction. This seems to assume that MAS is able to control the use of information once it is being disseminated to the foreign financial regulator. There may also be unanticipated situations, such as where there is a change in the laws such that the foreign financial regulator is compelled to share information to authorities or other entities.

D. Part IVA: Control over Financial Institutions (Annex B of Consultation Paper)

It is not clear why there is a need for a separate Part IVA and Part IVB to the MAS Act, given that both parts are largely aimed at broadening MAS powers when a financial institution is in a distressed situation. The situation is further complicated by the fact that Part IVA uses the concept of a relevant financial institution, while Part IVB uses the concept of a covered financial institution and an excluded financial institution. The member is of the opinion that this only adds to the complex structure of the Act.

(i) Section 30AAB(1)

Section 30AAB(1) defines the trigger for the exercise of MAS powers under subsection (2). However, the member highlights that subsection (1) does not explain how these triggers are activated when the relevant financial institution is a foreign branch, rather than locally incorporated. The member observes that the distinction between locally incorporated financial institutions and branches of foreign financial institutions is recognised in subsection (3) but not in subsection (1). The member is of the view that clarification should be given as to how one would determine if a foreign financial institution is insolvent for the purposes of subsection (1)(a).

(ii) Section 30AAC

Section 30AAC is unclear as to whether the financial institution's constitution is superseded upon an assumption of control. The drafting suggests that the constitution is superseded in part. However, conceptually, the constitution should remain effective and binding on MAS and the statutory manager in full, or to the extent that some provisions are overridden, the statute should then clearly state that which provisions are overridden. In this regard, subsection (3)(b) suggests that the provisions on the constitution requiring the calling of meetings are overridden, but the member notes that the words used are 'nothing in this paragraph shall require the Authority...' rather than 'nothing in the constitution shall require the Authority...'

(iii) Section 30AAC subsection 1(c)

As mentioned above (see: comments on section 2.3), the member is of the view that such an undertaking needs further consideration given the possibility of unanticipated changes to foreign law which overrides the undertaking of the foreign authority.

(iv) Section 30AAAI

As mentioned above (see: comments on section 2.3), MAS may wish to consider effecting this policy through subsidiary legislation rather than directions.

(v) Section 30AAK

The member reiterates the comments made on section 2.2, regarding the style of drafting and usage of expressions such as 'covered financial institution' and 'excluded financial institution'.

ANNEX B

Feedback provided by a member of the Insolvency Practice Committee

A. Proposal 1: Subject to the same grounds and pre-conditions as those set out in the Banking Act where relevant, MAS is to be given the powers to:

- (i) take control of a covered financial institution;

The member is of the view that consideration should be given to adopting the extended definition of 'insolvent' that appears in the current section 2(2) of the Banking Act.

- (ii) make a determination for the sale or transfer of the assets and liabilities of a failing covered financial institution without the prior consent of the prescribed persons, subject to the Minister's approval;

The member is of the view that the provisions and powers of MAS should be allowed, where appropriate, to relate, ring-fenced and/or calibrated to specific areas, for example, to specific trusts rather than the entire financial institution. For instance, the power to intervene could be exercised in respect of specific trusts and not the entire entity. This allows for greater flexibility and ensures that trusts which are in a good position and do not require intervention are not affected.

B. Proposal 4: For MAS to consider the following proposed criteria in determining whether to exercise the resolution powers outlined in subparagraph (b) and (c) of Proposal 1:

- (i) whether it is in the public interest to do so; and (ii) any other matter that the Authority considered relevant

The member is of the opinion that consideration should be given as to whether the first criterion of 'public interest' is sufficiently broad in itself, without the need to include the second criterion of 'any other matter that the Authority considered relevant'. Otherwise, it is suggested that more specific criteria could be included other than the widely drafted provision of 'any other matter that the Authority considered relevant'. In this regard, this member observes that in the case of judicial management, the relevant provision stipulates specific key criterion in addition to the wider criterion of 'public interest'. As the powers to be introduced are wide powers, consideration should be given as to whether a more specific criterion could be designed.

C. Proposal 5: For the proposed resolution regime to run in parallel with the judicial management regime under the Companies Act.

The member agrees with this proposal in general. However, the member wishes to point out that paragraph 2.1.6 of the Consultation Paper may not be entirely accurate as judicial management is available to banks and insurance companies (see: s277b (10) of the Companies Act, taking into account that s227B(7) is subject to s227B (10)). The member notes that with the resolution mechanism being extended to other financial institutions, consideration should be given as to whether the same standards for entry into judicial management should apply to all such financial institutions. Consideration should be given to each type of financial institution that the resolution provisions are to be extended to, to determine the standards to be applied

for entry into judicial management, and in particular, whether the public interest criteria should apply.

The member was also of the view that provision should be made in the case of a conflict between judicial management and the resolution procedure, the latter should prevail.

D. Proposal 6: There will be a provision in the MAS Act to exclude the application of any claw-back mechanism in the CA to transfers of assets to another insurer that have been directed or approved by MAS, to prevent the unwinding of any prior transfers undertaken.

The member is of the view that the clawback provisions to be excluded should extend beyond the Companies Act and be considered for other legislation such as the Bankruptcy Act and section 73B of the Conveyancing and Law of Property Act.