

COMPANIES (AMENDMENT) BILL 2002
COMMENTS BY THE CORPORATE FINANCE DIVISION OF THE SECURITIES AND FUTURES COMMISSION

Section	Amendment	Response
Clause 2	<p>Section 2(1)(b):</p> <p>By adding a definition of “shadow director” in the general interpretation section</p>	<p>One particular class of people likely to fall within the proposed definition and be open to charges that they are acting as shadow directors¹ are bankers. When companies run into financial difficulties but are considered worthy of rescue, it is not uncommon for bankers to send in their representatives to report on the companies’ affairs and operations. Such bank representatives usually make recommendations for improvement of the way the companies should run their business. To retain the support of the bankers, companies would usually accept such recommendations. The bank representatives, by the standard of the proposed definition, would appear to be shadow directors and may not fall within the carve-out for persons giving advice to directors in a professional capacity. The Bills Committee may wish to consider whether this class of persons should be expressly excluded from the definition.</p>
Clause 15	<p>Amend section 47F to replace the references in that section to a statutory declaration by references to a statement in the specified form.</p>	<p>The existing section 47E(6) provides for a majority of the directors of the company proposing to give financial assistance to make a statutory declaration. Section 47F(1), in stipulating the contents of such statutory declaration, also refers to the declaration being made by a majority of the company’s directors. References in section 47E and section 47F to statutory declarations are proposed to be replaced by references to statements in the specified form. However, the proposed amendment to section 47F(1), in clause 15(1)(a) of the Bill, requires the statement to be “signed by the directors” instead of by “a majority of the directors”, which does not appear to reflect the proposed position in section 47E(6) that the statement is to be made by a majority of the directors.</p>

¹ This has been raised in the book, *Public Companies and their Equity Securities, Principles of Regulation under Hong Kong Law*, by Betty M. Ho.

Section	Amendment	Response
		In addition, the consequences of making a false statement are not set out in the Bill. This comment applies to all references to statutory declarations being replaced by statements in the specified form.
Clause 54	Add section 153B which makes clear that an alternate director is the agent of the director who appointed him and provides that a director shall be vicariously liable for torts committed by his alternate.	In the Report of the SCCLR on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance, the Committee recognises that to improve the standard of corporate governance it is desirable that directors should be responsible for the acts and omissions of his alternate. With this objective in mind, we question the value of the proposed amendment: including the wording “ <i>unless the articles contain any provision to the contrary</i> ” seems to defeat the policy objective.
Clause 58	Substituting section 157H – section relates to prohibition of loans etc., to directors and other persons	<p>As is the case under the existing section 157H, the definition of “director” is extended to include spouse, children, step-children, trustee etc of the director only in the context of a listed company or a member of a group of companies of which a listed company is a member.</p> <p>If the intention is to use the extended definition of “director” only in the context of listed companies, it is to be noted that the scope of the definition is not as wide as the extended definition of “connected person” under Rule 14.03(2)(a) of the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Ltd. The Bills Committee may wish to consider extending the definition in the Bill to that in the listing rules.</p> <p>The new section 157H(1)(d) states that subject to section 157HA, a company shall not make a loan etc to another company in which any one or more of the directors of the first mentioned company holds a controlling interest. This provision does not extend to loans made to a company in which directors of the <u>holding</u> company (of the company making the loan etc) have a controlling interest.</p>
Clause 63	Substituting section 161B – section relates to the reporting of loans to officers	In the new subsections (1)(b), (3)(a) and (12)(a), references are made to loans made to or

Section	Amendment	Response
	etc.	<p>credit transactions entered into for a person “<i>connected with a director of the company</i>”. It is not clear as to who will be deemed to be a person connected with a director of a company for the purposes of the section. The expression “<i>a person connected with a director of the company</i>” has not been defined in any of the proposed sections 157H, 157HA or 161B. Is it intended that the extended definition of “director” for the purposes of a listed group in the new section 157H(5) (i.e. the reference to spouse, child etc of a director) has the same ambit as a person “connected with a director” in the new section 161B(1)(b), (3)(a) and (12)(a)?</p> <p>N.B. Note that the existing section 161B expressly states who is regarded as a person “connected” with a director of a company in subsection (7A).</p>