THE ASSOCIATION OF INTERNATIONAL ACCOUNTANTS
HONG KONG BRANCH
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26 November 2004

The Hon. Audrey Eu Yuet-mee, SC, JP
Chairman of the Bill Committee
Legislative Council
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Miss Eu,

Companies (Amendment) Bill 2004

Thank you for your letter dated 10 November 2004 inviting the Association of International Accountants Hong Kong Branch to submit its views on the Companies (Amendment) Bill 2004.

We have studied and reviewed the Companies (Amendment) Bill 2004 and agree in principle that the amendments to the Companies Ordinance serve to make the financial statements prepared in accordance with the Companies Ordinance (CO) more comparable to those prepared in accordance with International Accounting Standards (IAS). Particularly as the majority of companies listed on the Hong Kong Stock Exchange are incorporated outside Hong Kong although some of the intermediate holding companies and subsidiaries within the listed group are incorporated in Hong Kong. This results in two sets of standards in the treatment of subsidiaries, depending upon their place of incorporation. In order to enhance the reputation of Hong Kong as a major international financial centre and attract more international investors, financial statements presented by companies listed in Hong Kong, including its sub-group, and other Hong Kong incorporated companies on the bases and principles accepted by the international financial community is certainly an important cornerstone.

The AIA is a great supporter of the concept of International Accounting Standards and we are pleased to see Hong Kong related laws and regulations moving towards them. We also agree that having “true and fair override” provisions will help avoid the possibility of including vehicles such as special purpose entities and other off-balance sheet non-subsidiaries into the group accounts.

We do not see the need of introducing a new term of “undertaking” in the new Twenty-third Schedule. The term “undertaking” is said to include body corporates, partnerships and other unincorporated associations. These are not separate and distinct legal entities and, if a company becomes a member or a partner in such undertakings in its own name, the undertakings are legally parts of the company. If a company is involved in such undertakings through a nominee, the legal status is the same unless the beneficial interest of the company is deliberately concealed with fraudulent intentions. Therefore, the proposed amendment remains ineffective if an undisclosed nominee or trustee is imposed between the company and the undertaking, similar to undisclosed nominee or trustee of shares in another company.

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The Association would also like to draw your attention to our concern over certain potential loopholes pursuant to Section 266 of the CO and Section 50 of the Bankruptcy Ordinance (BO), which are also related to the holding company and subsidiary. Section 266B in effect applies to the relevant sections of the BO to the winding up of companies. The key provision is BO Section 51B, which defines an “associate”, in the case of a company, as “that debtor (who) has control of it”. The anomalies may be noted in cases where a subsidiary of the debtor company is an associate by virtue of Section 51B of the BO since the debtor is in control of it, but a holding or parent company is not an associate, as the debtor company is not the one in control. This provides an opportunity to hive off funds of a financially distressed company prior to the actual commencement of a formal insolvency administration. Although the above concern might not directly affect the currently proposed amendments, we would appreciate if you could kindly take it into account in any future proposed amendments.

On behalf of the Association, we would like to express our sincere gratitude for being invited to present our comments and views.

Yours sincerely,

Kenny N.S. Chan FAIA
Chairman
Accounting & Tax Sub-Committee