

Ref: TL/05094

26 Sep 2005

Clerk to Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Attention: Ms. Connie Szeto

Dear Ms. Szeto,

**Bills Committee on Financial Reporting Council Bill
Invitation for submissions**

On behalf of the Association of International Accountants Hong Kong Branch ("AIA Hong Kong") we wish to thank you for your kind invitation to give our views on the above Bill.

We have studied the Bill, in conjunction with our previous submission dated 11 April 2005, and are very pleased to note that most suggestions in our previous submission have been adopted by the Bills Committee. However, we wish to submit our further comments as follows:

1. The Bill has given inadequate consideration to point No. 1 in our previous submission. We recap this point for your easy information:

Accountability of financial information disclosed by public companies involves two parties, directors (who prepare the financial information) and auditors (who attest the financial information). Therefore, any regulatory regime established should be able to effectively police the works of both the directors and auditors.
2. A public officer is referred to in section 7 (3), and in other parts of the Bill. It may be sensible for certainty to insert a definition of this phrase.
3. Although there are provisions in schedule 2 relating to the removal of members of the Council in certain circumstances, there are no similar considerations in the schedule relating to initial appointment. It may be sensible for certainty to include similar circumstances relating to appointment, perhaps to be determined by the appointer or nominator.

4. In schedule 2, resolutions at Council meetings are passed by majority vote of the members present. However, written resolutions must be passed unanimously by members present in Hong Kong. Is there any reason why a written resolution should not be passed by a majority in number of the Council members present in Hong Kong at the time, with the same proviso as schedule 2, section 6(9)?
5. The Bill authorizes the Audit Investigation Board ("AIB") to require a "relevant undertaking" to produce records and documents (Sections 25 and 26 in Division 2), but not an "associated undertaking". In view of the similarity in meanings of "relevant undertaking" and "associated undertaking", we consider that it is clearer to include "associated undertaking" under the above two Sections.
6. Under Sections 25 and 26, in echoing with our submission, we also consider it is necessary to specifically extend to officers of the listed entity, a relevant undertaking, or an associated undertaking, the statutory obligation to produce records and documents, if required by the investigator.
7. A reference to an authorised officer assisting the investigator appears in section 28 (1) (b) and again in section 28 (6), where the appointment of such a person for the purposes of section 28 (1) (b) is set out. It is not clear from sections 25, 26 and 27 whether an authorised officer can assist the investigator for the purposes of those sections, although section 30 seems to suggest this can be the case in relation to section 27. For clarity, and if this is the intention, perhaps sections 25, 26 and 27 should contain similar references to an authorised officer as are found in section 28.
8. The provisions in section 30 in Part 3, Division 3 suggest that evidence collected from a person in an investigation by the AIB is not admissible in criminal proceedings against that person, with certain exceptions, "despite anything in the Ordinance..". However, section 35 (5) in Division 4 provides that the AIB's report on its findings in the investigation is admissible as evidence of the facts stated in the report in other proceedings. The position is the same in relation to enquiries by the Financial Reporting Review Committee (sections 44 and 47 (5) in Part 4). The Legal Service Division Report highlights the conflict between these sections.

9. Under Section 31 in Part 3, Division 3 which deals with fines for offences relating to requirements under Division 2, we consider that the level of fine under subsection (13) should be raised to give more deterring effect.

The magnitude of fine under subsection (12) and subsection (13) is the same (both being HK\$1,000,000), even though the offences under subsection (13) are of a more serious nature, being "with intent to defraud". For directors or any persons who master-minded or approved misleading financial reporting and obtained substantial benefits by so doing, which in most cases are measured in millions of dollars, the fines must be set at a sufficiently high level to be a true deterrent, unless powers are also given to the Court to demand the directors or any persons committing the offence to disgorge the benefits so obtained.

10. Section 37 in Part 3, Division 4 provides that, following conviction in a prosecution begun as a result of an investigation by the AIB, the person convicted can be ordered to pay a sum to the Council representing its costs and expenses in the investigation. Two issues arise here. Firstly, if the prosecution results in a fine will an award of a sum to meet the costs and expenses of the Council take into account the financial penalty already imposed by the court? If not, the result is effectively two financial penalties being imposed for the same offence. Secondly, is there a danger that this provision may create a conflict of interest in investigations? There are financial benefits to the Council, who appoint the AIB to investigate, if an investigation leads to a report that initiates a successful prosecution. This is of particular concern given that the Bill contains no rights of appeal in relation to reports of the AIB (and the Financial Reporting Review Committee).

We trust that our views are helpful and will ensure that the public interest is protected by more transparent and reliable financial information. Should you need any clarification or additional information, please feel free to contact the undersigned.

Yours sincerely,

Fung Wai Ying FAIA CPA
President

c.c. The Hon. TAM Heung-man, Chairman of the Financial Reporting Council Bill