

## Bills Committee on Companies Bill

### Clause 399 – Offences relating to Contents of Auditor’s Report

#### Purpose

In the context of dealing with the Committee Stage Amendments (CSAs) in relation to clause 399, it came to our attention that the original clause 399 does not fully reflect the legislative intent and may give rise to implementation problem. This paper brings this to Members’ attention.

#### Original Clause 399

2. Under the original clause 399 the persons potentially caught by the offence are –

- (a) if the auditor is a natural person – the auditor, every employee and agent of the auditor who is *eligible for appointment* as auditor;
- (b) if the auditor is a firm – every partner, employee and agent of the auditor who is *eligible for appointment* as auditor;
- (c) if the auditor is a body corporate, every officer, member, employee and agent of the auditor who is *eligible for appointment* as auditor.

3. Clause 384 provides that only a *practice unit* is eligible for appointment as auditor. “Practice unit” has the meaning given by section 2(1) of the Professional Accountants Ordinance, Cap 50 (“PAO”), which defines the term as –

- (a) a firm of certified public accountants (practising);
- (b) a certified public accountant (practising) practising on his own account;
- (c) a corporate practice.

4. “Certified public accountant (practising)” is defined in PAO as a certified public accountant holding a practising certificate. (To state the obvious, only a natural person may be qualified as a certified public accountant (section 24)). Under section 28A(5) and section 28D(2), a firm of certified public accountants (practising) or a corporate practice shall not be qualified to be registered as such under the PAO unless at least such proportion as the Council of the Hong Kong Institute of Certified Public Accountants may from time to time prescribe (currently not less than two-thirds) of its partners or members are certified public accountants (practising).

5. Given the definition of “practice unit”, we are advised that under the original clause 399, the offence only applies to persons who would be qualified to be appointed as auditor in his capacity as a certified public accountant (practising) practising on his own account. The original clause 399(2)(a)(ii), (2)(b) and (2)(c) as drafted would appear to be redundant as only the firm, the sole practitioner, or the corporate practice would be a practice unit. Hence, the references to employee, partner, officer and member would be redundant. It is also inconceivable for the audit work to involve another sole practitioner (who would be covered by the section as drafted) as the agent of the auditor. In other words, the offence would not apply to a firm or corporate practice, and only an auditor who is a certified public accountant (practising) practicing on his own will be subject to the offence.

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6. Copy of the original clauses 398 and 399 is at **Annex**.

7. The above problem could be addressed by the Administration’s CSAs which will revise clause 399 so that only the person who signs the auditor’s report and the persons who perform managerial functions in relation to the audit under the immediate authority of the person who signs the auditor’s report will be liable.

**Auditor's Liability – Clauses 398 and 399**

**398. Auditor's opinion on other matters**

- (1) In preparing an auditor's report, the auditor must carry out an investigation that will enable the auditor to form an opinion as to—
  - (a) whether adequate accounting records have been kept by the company; and
  - (b) whether the financial statements are in agreement with the accounting records.
- (2) A company's auditor must state the auditor's opinion in the auditor's report if the auditor is of the opinion that—
  - (a) adequate accounting records have not been kept by the company; or
  - (b) the financial statements are not in agreement with the accounting records in any material respect.
- (3) If a company's auditor fails to obtain all the information or explanations that, to the best of the auditor's knowledge and belief, are necessary and material for the purpose of the audit, the auditor must state that fact in the auditor's report.
- (4) If the financial statements do not comply with section 378(1), the auditor must include in the auditor's report, so far as the auditor is reasonably able to do so, a statement giving the particulars that are required to be, but have not been, contained in the financial statements.

**399. Offences relating to contents of auditor's report**

- (1) Every person specified in subsection (2) commits an offence if the person knowingly or recklessly causes a statement required to be contained in an auditor's report under section 398(2)(b) or (3) to be omitted from the report.
- (2) The persons are—
  - (a) if the auditor who prepares the auditor's report is a natural person—
    - (i) the auditor; and
    - (ii) every employee and agent of the auditor who is eligible for appointment as auditor of the company;
  - (b) if the auditor who prepares the auditor's report is a firm, every partner, employee and agent of the auditor who is eligible for appointment as auditor of the company; or
  - (c) if the auditor who prepares the auditor's report is a body corporate, every officer, member, employee and agent of the auditor who is eligible for appointment as auditor of the company.
- (3) A person who commits an offence under subsection (1) is liable to a fine of \$150,000.