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Letterhead of HONG KONG SOCIETY OF ACCOUNTANTS

BY FAX AND BY POST
(2869 6794)

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7 April 2000

Ms. Leung Siu-kum,
Clerk to Bills Committee on
Companies (Amendment) Bill 2000,
Legislative Council,
Legislative Council Building,
8 Jackson Road,
Contral, Hong Kong.

Dear Ms. Leung,

Companies (Amendment) Bill 2000
Section 228A of the Companies Ordinance

Further to our discussion yesterday and your previous conversation with Winnie Cheung, I attach an extract of the Society's February 1996 submission to the Secretary to the Law Reform Commission's Subcommittee on Insolvency, during the time that the Subcommittee was preparing its consultation paper on the winding-up provisions of the Companies Ordinance.

Although at that juncture, the Society considered that s228A could be repealed upon the introduction of a corporate rescue procedure, I cannot trace the origin of paragraph 22 of that submission which contains this point. This particular suggestion did not appear in earlier drafts of our submission. When we were later approached by the Subcommittee for our views on the specific issue of abuses under s228A, members of our Insolvency Practitioners Committee could not cite any first-hand knowledge of abuses of the provision, and the limited hearsay evidence of which some members were aware pre-dated the amendment which limited the eligibility to be a provisional liquidator under the section.

When the Subcommittee of Insolvency issued its consultation paper in April 1998, we reviewed the subject of s228A and came to the conclusion that it was still a useful provision and should be retained. A relevant extract of our July 1998 submission is also attached for your information.

Although there may be room for improvement in s228A, and we suggested some possible changes in February 1996, it does fulfil a worthwhile function, as we indicated in our submission to the Bills Committee on 24 March 2000. Sometimes shareholders may be constrained from putting a company into liquidation and sometimes shareholders may have disappeared altogether. The argument for retaining it is even stronger in the light of the proposal to introduce insolvent trading provisions which will apply to directors and senior management. In addition, the proposal made in paragraph 21 of our 1996 submission that, if they are able to put together a rescue package, contributories should be able to vote to reverse a decision by directors to wind up the company, would be facilitated by the introduction of a framework for provisional supervision.

I hope that this information is of assistance to the Bills Committee's deliberations.
Please let me know if you have any further questions.

Yours sincerely,

PETER TISMAN
DEPUTY DIRECTOR
(PROFESSIONAL PRACTICES)
HONG KONG SOCIETY OF ACCOUNTANTS

PMT/ay
Encls.

**Extract of HKSA's Submission to the Subcommittee on
Insolvency of the Law Reform Commission, 28 February 1996**

Section 228A liquidations

17. A company may be placed in creditors' voluntary winding up if all or a majority of directors pass the appropriate resolutions and deliver to the Registrar of Companies a statutory declaration made by one of the directors under section 228A(1) of the Ordinance.

18. We note that the equivalent of section 228A is not found in the insolvency laws of other Commonwealth jurisdictions. Consideration should be given to allowing the contributories of a company or the Court to make the final decision as to whether or not a company should be put into liquidation. In compulsory liquidations, contributories and creditors have the opportunity to object before the winding up order is granted by the court. However, in a section 228A liquidation, once the director's statutory declaration is filed, contributories and creditors are presented with a *fait accompli* - the company is placed in liquidation before they meet.

19. It is proposed that section 228A be amended so that the effect of the filing of the director's statutory declaration would be to enable the directors to forthwith appoint a person to be provisional liquidator; however, the company is not in liquidation until a contributories' resolution for winding up the company is passed.

20. If a contributories' resolution for winding-up is subsequently passed, then the commencement date of winding-up should be the date of filing of the director's statutory declaration, so as not to prejudice creditors.

21. If, however, the contributories wish to reverse the directors' decision to wind up the company, they should come up with a rescue package. If this is accepted at the contributories' and creditors' meetings, then the contributories, directors or provisional liquidator should subsequently make a statutory declaration that the company is now solvent.
22. We further propose that once the provisional supervision procedure recommended in the Consultation Paper on Corporate Rescue and Insolvent Trading is accepted, section 228A should be repealed.
23. In addition, we suggest that section 228(1)(d), which refers to all or a majority of the directors making a statutory declaration under section 228A(1), be amended because section 228A(1) [amended 75 of 1993] actually refers to the statutory declaration being made by only one of the directors.
24. In the case of a section 228A liquidation where no one turns up for the meetings of the members and creditors convened by the directors (including the director who was supposed to chair the meeting), it is not clear what the provisional liquidator should do in that situation. We note that under section 228A(3A), the directors would be fined but it is not clear what the provisional liquidator can do, particularly when there are insufficient funds to apply to the court for direction.
25. Consideration could be given to expanding the provisions of section 228A to deal with such practical difficulties that could arise, dealing in particular with situations when there are little or no funds to apply to court for direction, when there is no quorum at the members' meeting and also at the creditors' meeting, and when the director appointed to preside at the meeting of creditors does not turn up at the creditors' meeting.

**Extract of HKSA's Submission to the Subcommittee on
Insolvency of the Law Reform Commission, 31 July 1998**

Chapter 10

Paragraph 10.8 (s228A)

We have re-examined this issue and are now of the view that s228A should be retained. It is a useful provision and since it was tightened up a few years ago, we are not aware of any great abuses in practice, even though, conceptually, it is possible to point to potential pitfalls in the procedure. As regards these, we made various recommendations for further improvements in our submission of 28/2/96 and we would reiterate these now (see Annex A).