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27 October 2003

The Hon. Audrey Eu Yuet-mee
Chairman,
Bills Committee on Companies (Amendment) Bill 2003,
Legislative Council Secretariat
Legislative Council Building,
8 Jackson Road, Central, Hong Kong.

Dear Ms. Eu,

Companies (Amendment) Bill 2003

Thank you for inviting the Society to submit comments on the Companies (Amendment) Bill 2003. The Society's views on the Bill are set out in the paragraphs below.

Definition of "subsidiary" for the purposes of group accounts

1. The Society supports the proposed amendment to the "subsidiary" definition in the Companies Ordinance (Cap. 32) ("CO"), which was initiated by the Society and has been developed in close consultation with the Society.

Schedule 3 - Enhancing the registration system for overseas companies, etc.

Sections 333-333B Provisions relating to authorised representatives

2. The Society notes that under section 333 of the CO, a body corporate, other than a solicitor corporation or a corporate practice under the Professional Accountants Ordinance (Cap. 50), may not be authorised to accept, on behalf of any overseas company, service of process or any notices required to be served on the company. We believe that this requirement is intended to ensure that companies which, for example, are not subject to regulatory oversight by professional bodies would not be eligible to accept services of process, etc. on behalf of an overseas company. However, we consider that the existing provision is unduly restrictive given that it is common for accounting or legal firms to set up separate company secretarial companies to conduct this kind of service. We would suggest, therefore, that, in keeping with our understanding of the spirit of the provision, a body corporate that is controlled by a firm of certified public accountants or solicitors should also be allowed to act as an authorised representative of an overseas company in Hong Kong.
3. Under the existing s333A of the CO, where an authorised representative of an overseas company registered under Part XI ceases to be able to act on behalf of the company by reason of death or incapacity or other unforeseen circumstances, the company is required, within 6 weeks from that time, to file with the Registrar of Companies a

notice of appointment of a new authorised representative, in order to be regarded as complying with the continuing obligation in respect of the registration of an authorised representative.

4. The proposed new s333A, however, does not contain a similar requirement to appoint a replacement within a reasonable period of time to accept service of process, etc. In addition, although the proposed s333B provides for the termination of the authorisation an authorised representative at the instigation of the person or the company, there is no concurrent obligation to appoint a replacement within a certain timeframe. It would appear, therefore, that although it will remain a continuing obligation under the new s333A to maintain an authorised representative, a non-Hong Kong company registered under the CO could easily find itself technically in breach of this obligation, unless a statutory grace period is provided for, as it is now under the existing s333A. The Society therefore proposes retaining the requirement, under s333A, to file the notice of appointment of a new authorised representative, except that the notice should be filed within 14 days after the date of the termination of authorisation in respect of the former incumbent, or within 28 days after the date on which the notice of termination is filed, whichever is the later.

Section 337A Provisions relating to notice of liquidation proceedings re. non-Hong Kong companies

5. We note the proposal to require notification to be given to the Registrar of the commencement of any proceedings for the liquidation of a non-Hong Kong company, wherever the proceedings may take place, rather than merely proceedings occurring in the jurisdiction of incorporation of the company, as at present. However, we do not agree with the proposal to remove the obligation upon the officers of the company, in addition to the company itself, to deliver such notice to the Registrar. Whilst a non-Hong Kong company undergoing liquidation proceedings overseas may not have any incentive to comply with Hong Kong filing requirements, its locally based officers may be more inclined to do so. In addition, “officers” should be extended to include provisional liquidators and liquidators for the purposes of this provision.
6. Where no (provisional) liquidator has been appointed, we would suggest that the information required to be filed should also include the date of hearing of the petition filed and the identity of the petitioner.
7. We would also suggest that a standard form should be specified for such filing.

Schedule 4 - Enhancing shareholder remedies

Section 152FA-152FC Order for inspection of a corporation's records by its members

8. We note that the amendments proposed to enhance shareholder remedies relating to orders for inspection of corporate records, unfair prejudice remedies, statutory derivative actions and injunctions against breaches were contained in the Consultation Paper on Proposals made in Phase I of the Corporate Governance Review, issued by the Standing Committee on Company Law Reform (SCCLR).

9. The proposed s152FA empowers the court to make an order for inspection of a corporation's records by shareholders, if it is satisfied that the application is made in good faith and the inspection applied for is for a proper purpose. Under the proposed s152FA(3), where the court makes such an order, it is required to consider whether it is necessary to also make an order limiting the use that may be made of any information obtained from the inspection and, in addition, s152FC specifies certain limitations on the disclosure of information so obtained. Notwithstanding these safeguards, the Society believes that, to ensure that any such information, which may, for example, be commercially sensitive, would not subsequently be subject to improper use or disclosure, it would be preferable if the Bill were to state explicitly that such information should be used or disclosed only in relation to the purpose for which it was sought, unless the court orders otherwise.
10. In order to ensure consistency with the proposed s152FA, and for the avoidance of doubt, the reference to "any records" in the proposed s152FB relating to ancillary orders should be amended to "any records of the corporation".
11. In our submission of November 2001 on the SCCLR's Phase I consultation paper, we proposed that safeguards should be prescribed to prevent access on the basis of frivolous or vexatious applications and that, in addition, it might be desirable to consider specifying a minimum shareholding requirement. Whilst the requirement under the proposed s152FA, that the court needs to be satisfied that the application is made in good faith and for a proper purpose, should help to deter abuses, we believe that specifying a minimum shareholding requirement would provide a further safeguard against any misuse of the provisions. We would reiterate, therefore, that consideration be given to introduction of such a requirement.

Statutory derivative actions and injunctions

12. In our November 2001 submission on the SCCLR's Phase I consultation paper, we noted the practical difficulties with the common law derivative action, referred to in the consultation paper, such as the inability of shareholders to gain access to information in order to establish a case for commencing an action, and the fact the shareholder initiating the action would be liable for the costs of the action without having a right to share in the potential damages.
13. We support the provisions contained in the Bill that seek to address some of these practical difficulties, including:
 - The proposed section 152FA, referred to above, which empowers the court to make an order for inspection of a corporation's records.
 - The proposed section 168BG, which seeks to empower the court to grant orders as to the costs incurred by a member taking a derivative action, provided that there is no evidence of bad faith on the part of the member and there are reasonable grounds on which to commence the action.
14. We also reiterate our support for the introduction of a power on the part of the court

to grant injunctions against contraventions of the CO, breaches of fiduciary duties, etc., as incorporated in the proposed new s350B.

We trust that you find the above comments to be constructive. If you have any questions, please feel free to contact Mr. Peter Tisman, the Society's Deputy Director (Business & Practice).

Yours sincerely,

WINNIE C.W. CHEUNG
SENIOR DIRECTOR
PROFESSIONAL & TECHNICAL DEVELOPMENT
HONG KONG SOCIETY OF ACCOUNTANTS

WCC/PMT/ay