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創於1913年  
Founded in 1913

# 香港華人會計師公會 The Society of Chinese Accountants & Auditors

(在香港註冊成立之有限公司)  
(Incorporated in Hong Kong as a company limited by guarantee)

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BY FAX: 2528 3345  
AND BY POST

Dear Ms Lam,

**Re: Consultation Paper on Statutory Derivative Action  
in the Companies (Amendment) Bill 2003**

On behalf of the Society of Chinese Accountants & Auditors, I thank you for your letter of 22 April 2004 inviting our comments on the captioned subject viz. (i) the Committee Stage Amendments ("CSAs") to the proposed sections 168BA to 168BI in the Companies (Amendment) Bill 2003 and (ii) the issues arising from the discussion by the Bills Committee on the operation of statutory derivative action ("SDA").

**I. Committee Stage Amendments**

- (a) We support the CSAs to the Bill and believe that the proposed statutory leave requirement of section 168BB subsection (1) will tighten the judicial control of the new statutory procedure. Indeed, uncontrolled access to the remedy could not only burden the company with the costs of bringing *the* action, at the behest of someone with a relatively minor investment in the company, it could also result in potential directors feeling so vulnerable to be sued that they decline such position.

**Hon. Auditor 義務核數師**

Yu Yu Kin MSCA, CPA 余汝健



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- (b) We also support the new conditions in the proposed section 168BB(3) as we consider the legislation should provide more guidance to courts as to the appropriate criteria for granting leave, otherwise a hearing to determine whether there was a prima facie case would be almost as long as a full trial.

## II. Issues On The Operation Of Statutory Derivative Action

- (a) In regards to the issue of the co-existence the common law derivative action and the statutory derivative action taken by the same shareholder, we feel that the term "same shareholder" in paragraph 12(a) and (b) of the consultation paper should be defined more clearly and concisely for this purpose, particularly when there is no provision made for a parent company to bring a derivation action on behalf of a subsidiary or associate within the group.
- (b) In connection with the conduct of proceedings, section 168BF gives the court wide power to make whatever orders it thinks fit regarding the conduct of the proceedings, including matters such as the provision of information and assistance to the applicant by the company or its directors. Our only comment here is to hope the court will exercise such powers prudently to avoid the decision being overturned on appeal.
- (c) We do not have any comments on the issue of the scope of proceedings.

I appreciate the efforts of the Bill Committee and the opportunity to express our views and would be pleased to discuss further our comments or answer any questions that you may have. Please do not hesitate to contact our Research and Current Issues Chairman, Mr. Edward Lau at 2581 2036 or the undersigned at 2544 8093 regarding our submission.

I apologise for the late submission of this letter.

Yours sincerely,

Albert Chan  
President

The Society of Chinese Accountants & Auditors

