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Secretary for Financial Services
and the Treasury
Financial Services and the Treasury Bureau
(Attn: Miss Susie HO, DS (FS) 2)
18/F, Tower 1
Admiralty Centre
18 Harcourt Road
Hong Kong

By Fax (2865 6778) and By Post

29 August 2003

Dear Miss HO,

Companies (Amendment) Bill 2003 ("the Bill")
Schedule 4 - Amendments relating to Shareholders Remedies

I am scrutinising the legal and drafting aspects of the Bill and have the following comments:

Inspection

The new section 147

Section 146A of the Companies Ordinance (Cap 32) ("the Ordinance") provides that sections 143 to 149 and section 150 shall apply to all bodies corporate incorporated outside Hong Kong which have a place of business in Hong Kong or have at any time had a place of business therein as if they were companies registered under this Ordinance.

The new section 147(2)(b) proposes to change "body corporate" to "specified corporation".

Under the new section 2, "specified corporation" is defined to mean a company or a non-Hong Kong company (defined in the new section 332 as "a company incorporated outside Hong Kong which, after the commencement of the Bill as enacted, establishes a place of business in Hong Kong and a company incorporated outside Hong Kong which has, before the commencement of the Bill as enacted, established a place of business in Hong Kong and continues to have a place of business in Hong Kong at the commencement of the Bill as enacted").

It appears that under the proposed amendment, the scope of section 147(2)(b) will be restricted. Please clarify whether corresponding amendments should be made to section 146A and other relevant sections.

Inspection of Specified Corporations' Records by Members

The new sections 152FA to 152FE

1. The new section 152FA(1) provides that on application by a member of a specified corporation ("the Applicant"), the court may make an order authorizing the Applicant or a person on behalf of the Applicant ("the Representative") to inspect any records of the specified corporation. Please clarify the following issues:

(a) Share qualification of the Applicant

Whether any share qualification is required for the Applicant?

(b) Scope of the records to be inspected

(i) Can the specified corporation refuse to produce for inspection such records which will incriminate itself, involve a third party or it has undertaken not to reveal?

(ii) The new section 152FE provides that sections 152FA, 152FB and 152FC shall not authorize the collection, retention and use of personal data in contravention of the Personal Data (Privacy) Ordinance (Cap 486). The Personal Data (Privacy) Ordinance only covers data relating to a living individual but not data relating to a legal entity. Please account for the policy intent of the distinction between the data relating to an living individual and the data relating to a legal entity under the new section 152FE.

2. The new section 152FA(2) provides that the court may only make an order if it is satisfied that -

(a) the application is made in good faith; and

(b) the inspection applied for is for a proper purpose having regard to the interests of both the relevant specified corporation and the Applicant.

If the records to be inspected relate to a third party, will the interest of the third party be taken into consideration?

3. The new section 152FA(3) provides that the court may make an order limiting the use of the information or document obtained as a result of the inspection

of the records of a specified corporation ("the Information") by the Applicant and the Representative. As the Representative only inspects the records on behalf of the Applicant, it appears that the Representative should not have an independent right to use the Information and only the Applicant and person(s) using the Information on his/her behalf (whom may not necessarily be the Representative) should be entitled to use the Information.

4. The new section 152FC(1)(a) provides that the Information shall not, without the previous consent in writing of the relevant specified corporation, be disclosed to any other person, unless the disclosure is required for any investigation carried out in Hong Kong in accordance with law ("the Investigation"). Please clarify whether the interests of the relevant specified corporation, the Applicant and other relevant parties will be considered before the Information is disclosed during the Investigation.

Bringing or Intervening in Proceedings on behalf of Specified Corporation
The new sections 168BA to 168BI

1. The new section 168BB(1)(a) provides that a member of a specified corporation may without leave of the court, bring proceedings before the court on behalf of the specified corporation. The new section 168BH provides that proceedings brought by a member of a specified corporation under section 168BB(1) shall not be discontinued or settled without the leave of the court. Please account for the policy intent that such proceedings, which may be brought by the member without leave of the court, can only be discontinued or settled with leave of the court.

2. The new section 168BB(1)(b) provides that a member of a specified corporation may with the leave of the court, intervene in any proceedings before the court to which the specified corporation is a party ("the Proceedings") for the purposes of continuing, discontinuing or defending those proceedings on behalf of the specified corporation.

- (a) Please clarify whether the listed purposes are exhaustive i.e. can a member apply for leave under the new section 168BB(1)(b) to intervene in the Proceedings for a purpose other than those listed in the section e.g. making a counter-claim on behalf of the specified corporation?
- (b) The new section 168BH provides that the Proceedings intervened in by a member of a specified corporation under the new section 168BB(1)(b) shall not be discontinued or settled without the leave of the court. Please clarify the cumulative effect of the new sections 168BB(1)(b) and 168BH:
 - (i) If a member applies under the new section 168BB(1)(b) for leave to intervene in the Proceedings only for the purpose of defending

the Proceedings on behalf of the specified corporation, will he be required to apply for leave under section 168BH if he subsequently wants to discontinue the Proceedings?

- (ii) If the answer for (i) is in the affirmative, can the member, at the time when he makes application for leave of the Court under the new section 168BB(1)(b) for a specified purpose e.g. defending the Proceedings, also apply for the leave of the court for other purposes which he has no intention to pursue at that stage e.g. discontinuing the Proceedings.
- (iii) If the answer for (ii) is in the affirmative, as settlement is not among the purposes set out under the new section 168BB(1)(b), it appears the applicant has to apply for leave under section 168BH if he subsequently wants to settle the Proceedings.

3. The new section 168BB(3) sets out the considerations to be taken into account by the court when granting leave under the new section 166BB(1)(b) for a member of a specified corporation to intervene in the Proceedings; one of which is that the member has served a written notice on the specified corporation in accordance with the new section 168BC at least 14 days before he applies for leave stating his intention to apply for leave to intervene in the Proceedings and the reasons for his intention. It appears that the court is not required to consider the response of the specified corporation to such notice. Should the court take into consideration of the response of the specified corporation?

It is appreciated that your reply in both Chinese and English could reach us by 8 September 2003.

Yours sincerely

(Monna LAI)
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