Issued on: 14 March 2012

CO Rewrite –Bills Committee on Companies Bill
seeking views on the retention of the headcount test (clause 664)

This is in reply to the letter dated 14 February 2012 inviting HKIoD to give views on Clause 664 of the Companies Bill. Let it be known that we are delighted to have the opportunity to assist the Bills Committee on Companies Bill.

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HKIoD previously commented on the issue of whether to retain the headcount test for members' schemes and for creditors' schemes, in our 26 March 2010 submission (the "March 2010 submission") in connection with the Draft Companies Bill First Phase Consultation, and in our 9 April 2011 submission (the "April 2011 submission") in connection with Companies Bill.

As to members' schemes

The Companies Bill will retain the headcount test for members' scheme while giving the court discretion to dispense with the test so as to tackle the problem of share splitting by parties opposing a scheme.

In the March 2010 submission, we argued a preference for the abolishment of the headcount test for members' scheme whether for listed or non-listed companies. A "majority in number" requirement embodied in the headcount test encourages manipulation by majority as well as minority shareholders. Many Hong Kong investors hold only beneficial interests in shares of listed companies within CCASS. With many shares in listed companies being held by nominees and custodians, a headcount test is not necessarily indicative of the decisions of the beneficial owners of the shares. Minority shareholders of listed companies are already afforded substantial protection under the Takeovers Code. A court still has discretion not to sanction members' scheme even without a headcount test requirement. On this basis, we think the removal of the headcount test requirement is appropriate.

We stand by the views we presented. There being sufficient means to protect minority shareholders has always been a key part in our considerations.

Nevertheless, as we indicated in the April 2011 submission, the Bills Committee may want to condition the retention of the headcount test (as to listed companies) on timely introduction and implementation of a scripless market in Hong Kong.

As to creditors' schemes

The Companies Bill will retain the headcount test for creditors' schemes, but will not extend court discretion to dispense with the test.

As we indicated in the March 2010 submission, we continue to believe voting by value of debt and not by headcount will result in outcomes that are fairer.

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