

民主會計師 Democratic Accountants

11 June 2012

The Hon. Paul M P Chan
Chairman
Bills Committee on Companies Bill
Room 805, Legislative Council Complex
1 Legislative Council Road
Hong Kong

Dear Paul

Clause 399 Companies Bill ("CB") – Offences Relating to Contents of Auditors Report

I write on behalf of a group of accountants who are incumbent members of the Election Committee for the Chief Executive.

We understand that the Administration, in response to various written submissions, has made revision to the draft clause, a copy of which is attached. Despite this revision, we still have strong reservation on the introduction of the clause. The reason being that this provision lacks clear policy objectives.

Policy Objectives

We believe that a provision of such nature will usually serve a number of policy objectives, which may include: (1) to raise the quality of audit and assurance services; (2) to give better protection to the shareholders (especially the minority shareholders); and (3) to impose a sanction on the auditors who fail to behave properly.

Without looking at the liability of auditors and shareholders protection as a comprehensive exercise, the introduction of a single provision in the CB will be unlikely to achieve anything under (1) and (2). The imposition of a statutory penalty of HK\$150,000 with a criminal liability will not be an effective deterrent against the most unscrupulous offenders but will only become a hindrance to the healthy development of the majority of the auditing profession.

As you are aware, the provisions based upon which clause 399 is modelled on is the Companies Act 2006 in the United Kingdom. Such provision in the UK Companies Act was introduced as a balancing act of the liability reform of auditors in the UK and similar provision is not found in the companies law legislation in other jurisdictions, therefore, we would kindly ask the

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Administration to consider seriously the suitability of the introduction of the clause in Hong Kong.

An Alternative Approach

If the Administration still insists to introduce the provision because of political expediency, we are of the view that the concepts of "knowingly" or "recklessly" are not succinct enough to provide a clear guidance to the audit profession.

First, we are not sure whether "knowingly" means the actual knowledge an auditor possesses or that auditor should have possessed given his position, experience and training (i.e., imputed knowledge). If the latter is the legislative intention, then that will be a very embracing concept which may place onerous responsibilities on the profession.

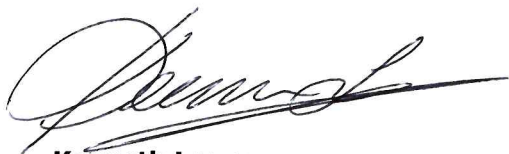
Secondly, we do not believe that "recklessness" is a concept which has been thoroughly discussed and explored despite the judgement of Sir Anthony Mason in the case of *Sin Kam Wah & Another v HKSAR*. The principle of "recklessness" enshrined in that case was related to the discharge of duties of a public officer during a criminal investigation. The test which Sir Anthony discussed involved a lot of judgement value including, for example, what "an ordinary prudent individual should have done in a particular situation. The question is - will a professionally trained auditor be treated as "an ordinary individual", if not, then what is the standard that should apply?

On the other hand, the concept of "fraud" or "fraudulent" is a more established concept and in our view should be the more appropriate threshold based upon which an auditor should be made liable. If this approach is adopted, what need to be changed will be to replace the words "knowingly or recklessly" in Clause 399 (b) by the word "fraudulently".

Conclusion

In short, we believe the introduction of such provision should be deferred and the subject can be revisited again when a more comprehensive review of the legislation for the criminal and civil liability of auditors is conducted.

Yours sincerely,



Kenneth Leung

Convenor

Revised Clause 399 / 經修訂的第 399 條

399. Offences relating to contents of auditor's report

- (1) If a statement required to be contained in an auditor's report under section 398(2)(b) or (3) is omitted from the report, an offence is committed by each individual who—
 - (a) either—
 - (i) signs the auditor's report in accordance with section 400; or
 - (ii) performs managerial functions in relation to the auditing work in respect of the auditor's report under the immediate authority of the person mentioned in subparagraph (i); and
 - (b) knowingly or recklessly causes the statement to be omitted.
- (2) A person who commits an offence under subsection (1) is liable to a fine of \$150,000.