

**Bills Committee on
Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015**

Response to Matters Raised by Members at the Meeting on 16 February 2016

This paper sets out the Government's response to the matters, as listed in the letter from the Clerk to the Bills Committee dated 18 February 2016, raised by Members in relation to the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015 ("the Bill") at the meeting on 16 February 2016.

Clauses 98 and 106 – sections 278A and 297B on exemption from liability in offering inducement to affect appointment as a provisional liquidator or liquidator and the receiver or manager of the property of a wound-up company respectively

2. As explained in our earlier response to matters raised by Members at the meeting on 25 January 2016 in the Paper No. CB(1)552/15-16(02), in the public consultation exercise in 2013, we noted the accounting profession's views that their operational arrangements as described in section 500.65 of the Code of Ethics for Professional Accountants ("the Code") issued by the Hong Kong Institute of Certified Public Accountants might be caught by the amended section 278A (and also the new section 297B) (Clause 98 and 106 of the Bill respectively). Having considered their views, we stated in the consultation conclusions issued in May 2014 that the Government would "provide for exceptions to the prohibition in the draft legislation in respect of the situations as set out in section 500.65 of the Code". In order not to affect the existing operation of the accounting profession, carve-out provisions similar to section 500.65 of the Code are added to the amended section 278A(2) and the new section 297B(2) which provide for exemptions for the two situations as explained below.

3. Under the amended section 278A(2)(a) and the new section 297B(2)(a), if a practice unit and an employee of the practice unit are under an arrangement where the employee's remuneration is based in whole or in part on introductions obtained for the practice unit through the employee's efforts, the practice unit would not commit an offence under the amended section 278A(1) or the new section 297B(1) by paying remuneration to the employee under that arrangement which results in the appointment or nomination of a person (e.g. an insolvency practitioner employed by the practice unit) as the provisional liquidator or liquidator of a company or the receiver or manager of the property of a company.

4. The amended section 278A(2)(b) and the new section 297B(2)(b) also provide that the offence provisions do not apply to the situation where the appointment or nomination of a person as the provisional liquidator or liquidator of a company or the receiver or manager of the property of a company is the result of a transfer or sale of the

business, or a part of the business, of a practice unit, or a change in composition of a practice unit within the meaning of section 32I(1) of the Professional Accountants Ordinance (Chapter 50)¹ (“PAO”). For example, if a practice unit (“the seller”) sells its insolvency practice² to another practice unit (“the buyer”) resulting in a change of the liquidator of a company (e.g. from an insolvency practitioner employed by the seller to another insolvency practitioner employed by the buyer), the buyer may be regarded as a person giving valuable consideration (i.e. the price for acquisition of the insolvency practice) securing the appointment of the liquidator and hence be caught by the amended section 278A(1). The amended section 278A(2)(b) (and similarly, the new section 297B(2)(b) for the appointment of receivers or managers) provides for an exemption for such situation.

Clause 129 – rule 39 on preparation of statement of affairs and affidavit of concurrence

5. Taking into account the comments from Members at the Bills Committee meeting on 16 February 2016, we have reviewed the provisions in the new rule 39(6)(c) (Clause 129 of the Bill) and agree that since persons such as a director, company secretary, officer (e.g. a person holding important role in the management titled financial controller or chief financial officer) etc. of a company are already covered by the new rule 39(6)(c), it would not be necessary to expressly mention directors, company secretaries, financial controllers and / or chief financial officers in other parts of the new rule 39(6). Therefore we will consider introducing a Committee Stage Amendment to simplify the drafting of the new rule 39(6) by removing the new rule 39(6)(a) and 39(6)(b) (Clause 129 of the Bill).

6. On the other hand, whilst the new rule 39(6) does not apply to an auditor of a company because this provision relates specifically to the preparation of statement of affairs and affidavit of concurrence in respect of the company which does not involve the company’s auditor who is not in employment or involved in the business operation of the company, there is another provision in the Bill (viz. the new section 286B (Clause 101 of the Bill), which is derived from the existing section 221 of Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32) (“CWUMPO”)) which

¹ Section 32I(1) of the PAO provides that a reference to a change in composition of a practice unit means –

- (a) in relation to a firm of certified public accountants (practising), a change in the persons who comprise the partners of the firm, if at least one of the partners of the firm before the change is a partner of the firm after the change;
- (b) in relation to a corporate practice, a change in the persons who comprise the directors of the corporate practice;
- (c) in relation to a certified public accountant (practising) practising on his own account, the admission by him of any partner to his practice; and
- (d) in relation to any practice unit, a change in the name of the practice unit, whether or not following or in consequence of an event described in paragraph (a), (b) or (c).

² Insolvency practice generally covers businesses in relation to the practice of a provisional liquidator, liquidator, receiver or manager.

empowers the Official Receiver, provisional liquidator or liquidator to apply to the court for an order requiring the auditor to attend before the court and be examined as to relevant matters concerning the company.

7. As regards the situation where a relevant person fails to attend an interview, we wish to point out that the new rule 39(6) and (7) is derived from the existing rule 39(2) of the Companies (Winding-up) Rules (Chapter 32H) (“CWUR”). Same as at present, although there is no offence provision for non-compliance with the new rule 39(6), if a person fails to attend the interview as required under the new rule 39(6), the Official Receiver, provisional liquidator or liquidator may invoke the examination procedure mentioned in paragraph 6 above. The existing section 221(4) of CWUMPO and the new section 286B(5) empower the court to cause a person who fails to attend the examination to be apprehended and brought before the court for examination. A person who fails to cooperate under such circumstances may be liable for contempt of court.

Protection for holders of the convertible securities of a wound-up company

8. As we explained at the Bills Committee meeting on 16 February 2016, exercising the right to convert convertible securities into shares of a company is essentially a commercial decision made by the relevant holders at their own discretion. In the extreme circumstances where a creditor who was holding convertible securities considers that he has been deceived by the company in making the conversion, or if he believes that there has been an element of fraud, the creditor may report the matter to the relevant authorities for investigation to ascertain whether a criminal offence has been committed.

9. The holder may also seek civil remedies from the court as appropriate. For example, there are common law principles which enable a person who has entered into a transaction on the basis of fraudulent misrepresentations to apply to the court for an order for the transaction to be set aside.

Drafting issues

Clause 169 – the amended rule 179(2)

10. We will consider introducing a Committee Stage Amendment to change the phrase to “*准許*” (“allowed” in the English text) to make the provisions more concise.

Clause 173 – forms in Appendix of CWUR

11. Section 37(1) of the Interpretation and General Clauses Ordinance (Chapter 1) specifically provides to the effect that a form prescribed by or under an Ordinance

remains valid notwithstanding there are deviations from the form that do not affect its substance. Such provision obviates the need to amend a form solely on the ground of textual or technical deviations that do not affect its substance. It is on this basis that in the present as well as relevant past bills to amend CWUMPO, no technical amendments have been proposed to those forms prescribed by or made under CWUMPO purely for the purpose of updating the year references in the forms.

Financial Services and the Treasury Bureau
Official Receiver's Office
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