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C2/1/12C(2000)X

23 March 2000

Ms Leung Siu-kum
Clerk to Bills Committee
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong
[Fax : 2869 6794]

Dear Ms Leung,

Companies (Amendment) Bill 2000

I refer to your letter of 8 March 2000. Our response to the concerns raised by Members at the meeting of 7 March 2000 is set out below –

Definition of "general meeting"

There is no specific definition of "general meeting" in the Companies Ordinance (Cap.32). However, sections 111 and 113 of the Ordinance make reference to the holding of

"general meetings" in the context of annual general meeting and extraordinary general meeting. A copy of the two relevant sections is at Annex A.

Clarification on whether only one director or secretary is required to complied with the proposed new section 116BA(1)

The policy intent is that only the director(s) who moves the resolution or the secretary who fails to secure a copy of the proposed resolution be sent to the auditors will be liable to prosecution under new section 116BA(2). We agree that the present provision of new subsection 116BA(1) is not entirely clear on this and subject to Members' agreement, we shall move a Committee Stage Amendment to clarify the position.

Consideration be given on deleting the penalty provision for non-compliance with the proposed new section 116BA(1) so as to bring it at par with the provision with section 141(7)

In addition to the justification put forward in our reply dated 7 March 2000, we wish to add that the new section 116BA is an enabling provision. Members may wish to note that there is no physical meeting taking place under this procedure which is applicable to all types of resolutions, except those relating to removal of auditor and director prior to the expiry of his term of office. Furthermore, this procedure of disposing the need for a physical meeting applies to resolutions to be passed at annual general meetings. These resolutions would be regarded as valid even though no notice was given to the auditors. It is therefore important to ensure that proper notice should be given to auditors. Imposing a penalty on those who fail to comply would have an effective deterrent effect.

Amendment to new section 116BA(4) to clarify that non-

compliance with the proposed section 116BA will not affect the validity of the resolution passed

As per Members' request, we propose to re-cast new subsection 116BA(4) as per the draft Committee Stage Amendment at Annex B.

Statistics on all applications for voluntary windings-up under section 228A since its enactment with the nature and reasons of the applications

A table showing the number of section 228A cases, compulsory winding up cases and creditors voluntary winding up cases in the past five years is at Annex C.

As section 228A is a voluntary winding up procedure initiated by a director's resolution, there is no need to file a winding up petition. The directors are only required to deliver a statutory declaration to the Registrar of Companies recording the resolution that the company cannot by reason of its liabilities continue its business; that they consider it is necessary that the company be wound up; and that there are good and sufficient reasons for the winding up to be commenced under this section.

Given the limited information available, it has not been possible to ascertain why the section 228A route was chosen and whether the reasons for choosing that route were in fact good and sufficient.

We wish to stress that one of the major weaknesses of section 228A is that because the voluntary winding up process is initiated by directors, and third parties are not involved in the initial process, there is no avenue for applying the 'good and sufficient' test. In fact, in an insolvent company's

winding up, the interests of creditors should be given priority. Section 228A does not seem to be able to fulfil that objective and hence we recommend that it be repealed.

Effectiveness of the corporate rescue model implemented in Canada

Further to my letter of 29 February 2000, we have obtained further information on the corporate rescue model implemented in Canada.

In Canada, corporate rescue can be carried out under the frameworks provided under the Bankruptcy and Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA). Proceedings under CCAA are very expensive and are seldom used except in respect of very large companies. The Canadian Office of the Superintendent of Bankruptcy does not collect statistics on the number of corporate restructurings under CCAA, but it estimates that the number of such restructurings would be less than 50 per year over the last two years.

Both legal entities and natural persons can invoke the provisions of BIA. There are two types of proposals under BIA – Division I and Division II. Division I proposals concern legal entities with over C$75,000 in unsecured liabilities while Division II proposals relate to consumer proposals. According to the Canadian Office of the Superintendent of Bankruptcy, there were 741 and 706 Corporate Division I proposals in 1997 and 1998 respectively. The successful rates of Corporate Division I proposals in these two years were 36.6% and 40.9% respectively.

Yours sincerely,

(L W TING)
for Secretary for Financial Service

Annex C

	Section 228A cases	Compulsory winding-up orders	Creditors' voluntary winding-up cases
1995	44	481	182
1996	32 (-27%)	557 (+16%)	174 (-4%)
1997	30 (-6%)	502 (-10%)	107 (-38%)
1998	114 (+280%)	723 (+43%)	211 (+97%)
1999	173 (+52%)	803 (+11%)	357 (+50%)
Percentage increase since 1995	+293%	+67%	+96%

Note : Figures in bracket devote percentage changes over the previous periods.

Source : Official Receiver's Office

Annex B

Companies (Amendment) Bill 2000

Proposed Committee Stage Amendment

Clause	Amendment proposed
14	By deleting the proposed section 116BA(4) and substituting – "(4) A failure to comply with subsection (1) shall not affect the validity of any resolution.".

every officer of the company who is in default shall be liable to a fine and, for continued default, to a daily default fine. *(Amended 7 of 1990 s. 2)*

(Replaced 6 of 1984 s. 73)

[cf. 1948 c. 38 s. 131 U.K.]

112. *(Repealed 6 of 1984 s. 74)*

113. Convening of extraordinary general meeting on requisition

(1) The directors of a company, notwithstanding anything in its articles shall, on the requisition of members of the company holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company, or, in the case of a company not having a share capital, members of the company representing not less than one-tenth of the total voting rights of all the members having at the said date a right to vote at general meetings of the company, forthwith proceed duly to convene an extraordinary general meeting of the company.

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not within 21 days from the date of the deposit of the requisition proceed duly to convene a meeting for a day not more than 28 days after the date on which the notice convening the meeting is given, the requisitionists, or any of them representing more than one-half of the total voting rights of all of them, may themselves convene a meeting, but any meeting so convened shall not be held after the expiration of 3 months from the said date. *(Amended 6 of 1984 s. 75)*

(4) A meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors.

(5) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were in default.

(6) For the purposes of this section, the directors shall, in the case of a meeting at which a resolution is to be proposed as a special resolution, be deemed not to have duly convened the meeting if they do not give such notice thereof as is required by section 116.

[cf. 1929 c. 23 s. 114 U.K.]

Published by the Government Printer, Hong Kong

遵從第(4)款的規定而構成失責，公司及其每名失責高級人員均可處罰款，如持續失責，則可處按日計算的失責罰款。 *(由1990年第7號第2條修訂)*

(由1984年第6號第73條代替)

〔比照1948 c. 38 s. 131 U.K.〕

112. *(由1984年第6號第74條廢除)*

113. 應請求書召開特別大會

(1) 即使公司的章程細則有任何規定，公司的董事應公司成員請求書的請求，須立即妥為安排召開公司特別大會，而該等公司成員在存放該請求書當日須持有不少於十分之一的公司已繳足資本，而且該資本在該請求書存放當日附有在公司大會上表決的權利；如屬無股本的公司，則該等成員須佔在上述日期有權在公司大會上表決的全體成員不少於十分之一的總表決權。

(2) 請求書必須述明會議的目的，並由請求人簽署及存放於公司的註冊辦事處；請求書可包含數份同樣格式的文件，而每份文件均由1名或多於1名請求人簽署。

(3) 如董事在該請求書存放日期起計21天內，未有妥為安排一次在召開會議通知書發出日期後28天內召開的會議，則該等請求人或佔全體請求人一半以上總表決權的請求人，可自行召開會議，但如此召開的會議不得在上述日期起計3個月屆滿後舉行。 *(由1984年第6號第75條修訂)*

(4) 由請求人根據本條召開的會議，須盡可能以接近董事召開會議的方式召開。

(5) 請求人因董事沒有妥為召開會議而招致的任何合理費用，須由公司償還請求人，而任何如此償還的款項，須由公司從到期或即將到期就失責董事的服務而應向其支付的費用或酬金中保留。

(6) 就本條而言，如某項決議擬在某次會議上以特別決議的形式提出，而董事沒有發出第116條所規定的會議通知書，則董事須當作並未妥為召開會議。

〔比照1929 c. 23 s. 114 U.K.〕

由香港政府印務局局長印刷及發行

Annex A