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By email (cb1@legco.gov.hk) and by hand

Your Ref.: CB1/SS/12/12
Our Ref.: RIFEC, M90966

Hon Wong Ting-kwong, SBS, JP
Chairman, Subcommittee on Proposed Resolutions under
the Bankruptcy Ordinance and the Companies Ordinance
Room 601, Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr. Wong,

Proposed Resolutions under the Bankruptcy and Companies Ordinance

The Hong Kong Institute of CPAs ("Institute") would like to thank the Subcommittee on Proposed Resolutions under the Bankruptcy and Companies Ordinance for the opportunity to submit views on the proposed resolutions relating to fees, deposits and charges in respect of bankruptcy and winding-up proceedings.

Petitioner's deposit in bankruptcy and winding up cases

The Official Receiver's Office ("ORO") has previously consulted the Institute on petitioners' deposits under the Companies and Bankruptcy Ordinances. This matter was considered by the Institute's Restructuring and Insolvency Faculty executive committee (RIFEC), comprising insolvency practitioners and other professionals working in the insolvency field. RIFEC members noted that, given Hong Kong's economic growth and cumulative inflation over the past 16 years since the deposit was last reviewed, its relative value has diminished. Seen in this light, the current level of the petitioners' deposits does not appear to be too high or, in general, likely to be discouraging people from seeking recourse to winding up or bankruptcy proceedings.

As regards company windings up, most petitions are creditors' petitions and, in those cases where companies may petition for their own winding up, such as when they are initiating a scheme of arrangement, the amount of the deposit would generally not be a matter of concern.

In the case of bankruptcy proceedings, RIFEC noted that during the economic downturn in the early 2000s, following the Asian financial crisis, the number of petitions reached a high of around 2,500 per month or 25,000-30,000 annually, which was around ten times the number of petitions in 1999. Again, this suggests that the amount of the deposit has not generally been a barrier to initiating

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bankruptcy proceedings. Furthermore, bankruptcy is intended to provide a last resort resolution for financially distressed individuals. Reducing the deposit could convey an ambiguous message to the community that the government is smoothing the path to bankruptcy, rather than encouraging greater financial prudence, or encouraging those facing financial difficulties to take earlier action by, for example, considering the option of an individual voluntary arrangement.

We appreciate, nevertheless, that there may be some cases of specific hardship, but, in these cases, reducing the deposit from HK8,600 to HK$8,000, or to an even lower level, may not offer a solution, as this may still be beyond the means of the potential bankrupts. We would suggest that more detailed consideration be given to other options, such as providing for applications to be made, via an appropriate agency (e.g., social welfare department or community agency) to waive the deposit altogether in circumstances of particular hardship, or for a fund to be set up that could be administered by such an agency and which could pay the deposit on behalf of the bankrupts.

Companies (Fees and Percentages) Order –Table A Item 10: Fee for proof of debt

With reference to the proposed reduction from HK$40 to HK$35 in the fee payable by creditors for filing proofs of debts above HK$250, we are of the view that consideration should be given to abolishing this fee completely. It is already a relatively small amount, which can be administratively burdensome to handle, and reducing it further would simply exacerbate the situation.

It is quite common for creditors of Hong Kong liquidations to be situated in foreign jurisdictions. For a foreign creditor to pay the HK$40 filing fee is both expensive, in that it may cost more to obtain a bank draft than the value of the draft itself, and it is also time consuming.

The abolition of the fee would simplify the administration of liquidations from the perspective of both private sector insolvency practitioners and the ORO.

From the perspective of private sector practitioners, the abolition of the fee would reduce the administrative time spent dealing with cheques when they are sent to the liquidator. Currently, the liquidator needs to forward the cheques to the OR together with copies of the proofs of debt to which they relate. If the fee were abolished it would be necessary to file the proofs only. The cost savings, which in the case of liquidations with a large number of creditors, could be significant, could then be passed on to creditors in the form of a higher dividend.

It would also relieve the ORO of the administrative burden associated with handling and accounting for numerous small value cheques.

Companies (Fees and Percentages) Order –Table B Item I: "Ad valorem fee"

We note that the Administration proposes to reduce the “realisation fees” in company windings up, in certain circumstances. In particular, it is proposed to

amend the realisation fee, under the Companies (Fees and Percentages) Order, Table B Item IV, from 10% to a fixed fee of HK$170 on each payment. However, we believe that this change will not have a significant impact, as the OR now only rarely acts as provisional liquidator or liquidator. Generally, in compulsory liquidations, either private sector practitioners are directly appointed or the ORO contracts out insolvency work to private practitioners, through various administrative schemes. In this regard, the “realisation fee” or "ad valorem fee", under Table B, Item I, is more significant, both to creditors and to the ORO.

Although the ORO’s modus operandi has changed over the past 20 years, it is clear that the relevant fees generated from windings up have not changed to take account of this. Over this period, the role and work of the ORO have changed from being based, primarily, on case administration to a role that is more supervisory and regulatory in nature. As a result, the ORO now performs less and less day-to-day liquidation work.

However, the fees deducted from the estates of companies being wound up continue to reflect the intention to remunerate the ORO properly for the work the department would, in the past, have carried out as the liquidator.

This ad valorem fee is relevant in the funding the ORO, and for the great majority of cases, the graduated levels of charges, under Item I of Table B, may not be excessive and may represent a fair consideration for the work that the ORO still does in ordinary compulsory winding up cases, including work done in a supervisory capacity.

In the case of large-scale corporate insolvencies, however, which are regular, albeit not frequent, occurrences, the ad valorem fee can result in windfall amounts being collected by the ORO, at the expense of the general body of creditors, which bear little relationship to the work performed by the ORO. Examples of past insolvencies of this kind would include the Carrian, BCC Hong Kong and Peregrine cases. While specific applications may be made by the liquidators to have fees reduced or waived in such cases, these applications are not always successful.

We note that the equivalent ad valorem fees in the United Kingdom are capped at a maximum overall amount under the law and we would suggest that a similar approach be considered in Hong Kong.

<u>Companies Ordinance, section 295</u>

While not part of the subsidiary legislation currently under discussion, we should also like to draw the subcommittee's attention to section 295 of the Companies Ordinance. Under this section, monies which, under section 202 of the Ordinance, private sector liquidators must pay into the Companies Liquidation Account, may be invested, at the request of the committee of inspection or the liquidator, on fixed deposit or deposit at call. Under section 295(4), out of the interest paid, 1.5% per annum of the money invested must be paid to the ORO.

In the low interest environment that has prevailed over the past several years, this provision effectively means that little or no interest on the sums invested is paid to the credit of the general body of creditors.

We would suggest, therefore, that when the opportunity to review this provision arises, it should be amended so that the interest paid to the credit of the ORO is expressed as a certain fraction of the interest paid on the investment, rather as a return on the total monies invested.

Should you have any questions on this submission, please contact the director, specialist practices at the Institute, on 2287 7084 or at peter@hkicpa.org.hk.

Yours sincerely,

Peter Tisman
Director, Specialist Practices

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c.c. Financial Services and the Treasury Bureau (Attn: Mr. Maurice Loo)
Official Receiver's Office (Attn: Ms. Teresa Wong)