Hong Kong Institute of
Certified Public Accountants
香港會計師公會

14 November 2005

By hand and by fax (2527 0292)

Our Ref.: C/IPC, M37900

Mr. Alan Lo
Financial Services Branch
Financial Services and the Treasury Bureau
18th Floor, Admiralty Centre Tower 1
18 Harcourt Road
Hong Kong

Dear Alan,

Bankruptcy (Amendment) Ordinance 2005 – subsidiary legislation

With reference to your letter dated 5 October 2005 requesting the Hong Kong Institute of Certified Public Accountants ("the Institute") to provide comments on the proposed subsidiary legislation relating to the Bankruptcy (Amendment) Ordinance, and highlighting certain changes made to earlier drafts, the comments of the Institute are set out below.

Bankruptcy (Amendment) Rules 2005

Rule 12 – Preparation of order

We note from the Bankruptcy (Amendment) Rules 2005 that amendments are proposed to be made to rule 12, including the addition of paragraph (1A) with respect to individual voluntary arrangements. Please clarify the reason for the proposed amendments, in particular, the reason for requiring the nominee to prepare and complete the order under section 20J of the Bankruptcy Ordinance (Cap. 6) ("BO").

Rule 52 – Deposit by petitioner
Section 37(1) – Priority of costs and charges

As highlighted in your letter, the proposed new rule 52 sets out the handling of the deposit made by a petitioner. It provides that the deposit and any further deposit will first be applied "to cover the fees and expenses of the Official Receiver" ("OR") and, in the case of an outsourced debtor-petitioned bankruptcy case, the OR will retain the balance of the deposit, and any further deposit, which will be applied in accordance with the s37(1) of the BO, as amended. Section 37 as amended, on the other hand, provides that "the fees, charges and percentages…payable to the Official Receiver, and costs, charges and expenses incurred or authorised by, the Official Receiver" will enjoy the first priority after the

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"expenses properly incurred in preserving, getting in or realising any of the assets of the bankrupt."

We are concerned that the differences in wording between s37 of the BO and the amended rule 52 may be the cause of confusion and we would suggest that either the relevant wording of s37 is repeated in rule 52 or the cross-referencing between the principal and subsidiary legislation is made clearer.

Rule 79A - OR's costs where proceeds of estate insufficient
Section 85A – Remuneration of provisional trustee and the first trustee constituted under section 112A

According to your letter, the proposed consequential amendments to rule 79A are no longer necessary in view of the new section 85A(3) of the BO. However, the circumstances in which the two provisions would operate seem to be different. Section 85A(3) empowers the court to order the payment out of the bankrupt's estate to reimburse the provisional trustee or first trustee for any necessary disbursements incurred where he "has not received any remuneration". Rule 79A, on the other hand, empowers the court to order payment of costs necessarily incurred by the OR (or, as proposed in the earlier draft amendments, by the trustee) in excess of the deposit made under rule 52, after the making of the bankruptcy order, when "the proceeds of the estate are not sufficient" for the payment of such costs. Therefore, the introduction of section 85A would not serve as a substitute for the originally proposed amendments to rule 79A.

Rule 163A – Trustee to provide information to OR

As explained in your letter, a new rule 163A is added to empower the OR to require a trustee to provide any information or document in connection with the bankruptcy proceedings, with a view to enable the OR to monitor the quality of services provided by private sector insolvency practitioners ("IPs").

While we understand the need for an effective monitoring system and, in principle, do not object the introduction of the proposed rule 163A, the Institute believes that there should be appropriate safeguards in place to ensure that the "specified time" for producing the required information or document should not be unreasonable or impose any undue burden on IPs.

Rule 191 - OR's audit of trustee's accounts

The proposed amendment to rule 191 removes the requirement under rule 191(1) and (2) for the trustee to provide accounts to the OR on a six-monthly basis, or when the estate has been fully realised and distributed. While a new section 93(1A) has been introduced under the Bankruptcy (Amendment) Ordinance 2005 to empower the OR to require the trustee, at any time, to provide him with accounts within the specified time, the Institute believes that it would be preferable to retain a requirement for trustees to furnish accounts to the OR on at

least an annual basis. This will retain a useful discipline and help to ensure that trustees remain conscious of the responsibility to keep proper records.

The wording of the proposed amended rule 191(3), i.e., "An account provided to the Official Receiver by the trustee under section 93(1A) shall be certified and verified by him", creates a potential ambiguity in respect of the party responsible for certifying and verifying the accounts. We would suggest replacing "him" by "the trustee".

Verification by affidavit

Under the Bankruptcy (Forms) Rules (Cap.6B), Form 146 (*Affidavit verifying trustee's account*), which relates to rule 191(3), requires the trustee to verify by affidavit the accounts provided by the trustee to the OR. Under the new section 93(1A), as noted above, the OR may, at any time, require the trustee to provide him with accounts within the specified time. The trustee is also required under various other rules to verify certain accounts by affidavit, e.g., trading accounts (rule 168) and accounts of unclaimed or undistributed funds (rule 199). It seems that no similar requirements apply to court-appointed liquidators. The requirement to verify accounts by affidavit appears to be unnecessarily burdensome on trustees and does not serve a very useful purpose. We suggest that it be removed.

Bankruptcy (Forms) Rules

Form 137 – Statement to accompany application for release

The Institute supports the initiative taken to update Form 137 (*Statement to accompany application for release*) in the Bankruptcy (Forms) Rules, as part of the review of the subsidiary legislation. In this connection, to enhance user-friendliness and clarity, we would suggest changing the form to a vertical format, such that the receipt items are grouped together above the payment items, with the balance shown at the bottom.

We hope that you find our comments above to be constructive. If you have any comments on this submission, please feel free to contact me at peter@hkicpa.org.hk or on 2287 7084.

Yours sincerely,

Peter Tisman
Director, Specialist Practices

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