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

31 March 2010

By email < co_rewrite@fstb.gov.hk > and by hand

Our Ref.: C/RIFEC, M69667

Companies Bill Team
Financial Services and the Treasury Bureau
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Dear Sirs,

Re: Consultation Paper on Draft Companies Bill – First Phase Consultation

--- Please find attached the comments of the Hong Kong Institute of Certified Public Accountants on the proposals set out in the above-referenced consultation paper.

If you have any questions on our submission or wish to discuss it further, please contact me at the Institute on 2287 7084.

Yours faithfully,

Peter Tisman
Director, Specialist Practices

PMT/ML/ay
Encl.

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Reply Form for the Draft Companies Bill – First Phase Consultation

1. The purpose of this reply form is to facilitate providing views and comments on the Consultation Paper entitled Draft Companies Bill – First Phase Consultation ("Consultation Paper") published by the Financial Services and the Treasury Bureau ("FSTB") on 17 December 2009.

2. The Consultation Paper can be downloaded from the FSTB's website at http://www.fstb.gov.hk/fsb.

3. If you have any views or comments on the Consultation Paper, you are welcome to complete this reply form and return it to us on or before **16 March 2010** by one of the following means:

By mail or hand delivery to:	Companies Bill Team Financial Services and the Treasury Bureau 15/F, Queensway Government Offices 66 Queensway Hong Kong Re: **Consultation Paper on Draft Companies Bill – First Phase Consultation**
By fax to:	(852) 2869 4195
By e-mail to:	co_rewrite@fstb.gov.hk

4. Any questions about this reply form may be addressed to Miss Sandy CHAN, Executive Assistant (Companies Bill Team), who can be reached at (852) 2867 5844 (phone), (852) 2869 4195 (fax) or co_rewrite@fstb.gov.hk (email).

5. Submissions will be received on the basis that we may freely reproduce and publish them, in whole or in part, in any form, and use, adapt or develop any proposal put forward without seeking permission or providing acknowledgment of the party making the proposal.

6. Please note that names of respondents, their affiliation(s) and comments may be posted on the FSTB's website or referred to in other documents we publish. If you do not wish your name and/or affiliation to be disclosed, please state so when making your submission. Any personal data submitted will only be used for purposes which are directly related to consultation purposes under this consultation paper. Such data may be transferred to other Government departments/agencies for the same purposes. For access to or correction of personal data contained in your submission, please contact Mr Arsene YIU, Assistant Secretary for Financial Services and the Treasury (Financial Services), who can be reached at (852) 2528 9077 (phone), (852) 2869 4195 (fax), or arseneyiu@fstb.gov.hk (email).

PART A: GENERAL INFORMATION OF THE RESPONDENT

Name/Name of Organisation	: Hong Kong Institute of Certified Public Accountants
If organisation, name and title of Contact Person	: Peter Tisman, Director, Specialist Practices
	(Please fill in if the respondent is a company or organization)
Phone Number	: (852) 2287 7084
E-mail Address	: peter@hkicpa.org.hk

If you do not wish to disclose your affiliation or name to the public, please check the box here:

☐ Our organisation does not wish to disclose our name.

☐ I do not wish to disclose my name.

PART B: DETAILED QUESTIONS FOR RESPONSE

You may provide your views or comments on all or any of the questions. If the provided space is insufficient, please attach additional pages.

Question 1

In respect of members' schemes of listed companies, which of the following options do you prefer? Please explain the reasons.

Option 1: retain the headcount test; *[Please proceed to Question 4]*

Option 2: retain the headcount test but give the court a discretion to dispense with the test; or *[Please proceed to Question 3]*

Option 3: abolish the headcount test. *[Please proceed to Question 2]*

In respect of members' schemes of listed companies, option 3 is preferred, i.e. to abolish the headcount test.

We consider that the additional requirements in the Code on Takeovers and Mergers ("Takeovers Code") issued by the Securities and Futures Commission ("SFC") under the Securities and Futures Ordinance (Cap. 571), namely Rules 2 and 2.10, provide sufficient safeguards for the interests of minority shareholders of listed companies; in particular Rule 2.10, which is not commonly found in other comparable jurisdictions and stipulates that votes cast against the resolution should not be more than 10% of the voting rights attached to all disinterested shares, offers useful protection. If any additional safeguard is considered necessary for minority shareholders of listed companies, we believe that it should be dealt with separately by the SFC through Takeovers Code amendments. Furthermore, schemes of arrangement still ultimately require the sanction of the court and if the court considers that a particular scheme prejudices the interests of minority shareholders, it can decline to sanction the scheme. In this regard, consideration could also be given to adding a general provision into the Companies Ordinance ("CO") giving aggrieved parties a right to apply to the court where they believe a scheme is prejudicial to the interests of the members generally or some part of the members.

Question 2

(a) If your answer to Question 1 is Option 3, do you think that the headcount test should also be abolished in respect of members' schemes of non-listed companies?

We consider that the headcount test should also be abolished in respect of members' schemes of non-listed companies.

(b) If your answer to (a) is yes, do you think that some form of additional protection should be provided for small shareholders? If so, what should such protection be?

See our response to question 1 above. Consideration should be given to adding a general provision into the CO to provide a channel for aggrieved parties to apply to the court. This together with the court's discretionary power, under section 166 of the CO, to reject a scheme that prejudices the interests of small shareholders should be sufficient, without the need to introduce other specific safeguards in place of the headcount test.

Question 3

If your answer to Question 1 is Option 2 or Option 3, do you think that the same approach should apply to creditors' scheme?

A different approach is needed for creditor schemes which would not benefit from the safeguards under the Takeovers Code, and given that smaller creditors do not have other protections available to minority shareholders. We are of the view that the headcount test should be retained in respect of creditors' schemes as protection for smaller creditors and a means to ensure that the voices of smaller creditors are heard. Although smaller creditors can file objections to a scheme with the court, the cost and other practical considerations may discourage them from taking such action.

Question 4

(a) Do you agree that directors' residential address should continue be made available for inspection on the public register?

We are not aware that the issues raised in the United Kingdom and Australia regarding threats to directors' safety from the inclusion of their residential addresses on the public register are of immediate practical concern in Hong Kong. For the time being, therefore, we do not see any strong grounds for making changes to the current disclosure regime in respect of directors' residential addresses.

So long as the requirement remains there may be a need to look at enforcement of the existing requirement, as there are apparently cases where directors' residential addresses do not appear on the public register.

As directors owe fiduciary duties to the company and are personally subject to legislation relating to disqualification, fraudulent trading and other enforcement and regulatory actions, and may not be always contactable through the registered office of the company, in particular when the company is being wound up and dissolved, it is in the public interest that regulatory and enforcement agencies, and also other relevant stakeholders, such as liquidators, and even creditors, are able to contact or locate the directors of a company, particularly in cases where service of documents and legal proceedings are involved.

(b) If your answer to (a) is in the negative, do you think that either:

(i) the Australian approach (paragraphs 7.8 and 7.9); or

(ii) the UKCA 2006 approach (paragraph 7.10(b)) should be adopted?

If, in the future, circumstances are such that there are good grounds for no longer making available directors' residential addresses on the public register, we would suggest adopting the UKCA 2006 approach set out in paragraph 7.10(b) of the consultation paper, i.e., every director should be given the option of providing a service address for the public record, with their residential addresses being kept on a separate record to

which access is restricted to specified parties. In this respect, there should be a statutory right of access for liquidators, among other specified parties.

If directors are given the option to provide a service address, it is suggested that they be required to give an express authority for such a service address to be used for service of documents and legal proceedings, which is not easily revocable by third parties. As such, relevant documents and legal proceedings would be deemed to be properly served on a director when they have been delivered to his/her service address appearing on the public register. This would prevent the situation where a service provider claims to have no further contact with a particular director, or to be no longer engaged by him/her, and is unwilling to accept service on his/her behalf.

(c) If you consider that either the Australian or the UKCA 2006 approaches should be adopted, do you have any suggestions on how to tackle the practical problems highlighted in paragraph 7.13(c) to (e) above?

We would suggest that the Companies Registry discuss with other jurisdictions how they have handled the practical issues involved in making available a register on the basis of restricted access. With improvements in technology, we would envisage that the practical problems may diminish over time. As regards existing data, we would suggest that the UK practice should be followed, i.e., removing the data in the existing records only upon application by directors or, alternatively, applying the new regime only to new notifications of addresses/changes of address.

Question 5

(a) Do you think that there is a need to mask certain digits from the identification numbers of new records of directors and company secretaries on the public register?

We do not have any strong view on whether or not to mask certain digits from the identification numbers of new records of company secretaries on the public register.

As regards directors, unless misuse of personal identification number is a significant problem, we do not see the need to change the current disclosure regime in relation to personal identification numbers for directors, as these provide a means of uniquely identifying an individual, particularly in cases where legal proceedings or enforcement actions are involved.

If misuse of date becomes more prevalent and there is a good case for masking certain digits in the identification numbers of directors on the public register, a separate record containing full identification numbers should be kept. There should be a statutory provision allowing, among other specified parties, liquidators to gain access to the record of directors' full identification numbers.

(b) If your answer to (a) is yes, do you have any views on how to deal with personal identification numbers on existing records?

If it is deemed necessary in the future to mask certain digits of personal identification numbers, as suggested in the consultation paper, the existing records could be masked in a phased approach if this cannot be accomplished at one go. Unlike residential addresses, which may change from time to time (and so the existing date may naturally tend to become obsolete), personal identification numbers, particularly Hong Kong identity card numbers, may be more permanent, so applying the new regime only to new notifications would not be very effective in this case. Consideration could also be given to masking existing data only upon application by affected directors or company secretaries.

Question 6

On the assumption that a new disinterested members' approval exception to prohibitions on loan and similar transactions in favour of directors and their connected persons will be introduced in respect of public companies, which of the following options do you prefer?

Option 1: "relevant private companies" as defined in section 157H(10) of the CO should continue to be subject to more stringent regulations similar to public companies (including restrictions relating to quasi-loans and credit transactions, restrictions relating to connected persons and disinterested members' approval requirement);

Option 2: extending the concept of "relevant private company" to cover companies associated with non-listed public companies;

Option 3: modifying the concept of "relevant private company" by disapplying it to private companies having a common holding company with a listed/public company;

Option 4: modifying the concept of "relevant private company" to cover only private companies which are subsidiaries of a listed/public company; or

Option 5: abolishing the concept of "relevant private companies", i.e. all private companies should be subject to the same treatment.

Any other option (please elaborate)?

On the assumption that a new disinterested members' approval exception to prohibitions on loans and similar transactions in favour of directors and their connected persons will be introduced in respect of public companies, "relevant private companies" should continue to be subject to more stringent regulation (option 1). Consideration should also be given to implementing option 2, i.e., extending the concept of "relevant private company" to cover companies associated with non-listed public companies. This would extend to shareholders of non-listed public companies the extra protection given to shareholders of listed companies.

Question 7

Do you consider that the common law derivative action currently preserved in section 168BC(4) of the CO should be abolished in the CB?

We agree with the arguments in the consultation paper in favour of preserving the common law derivative action ("CDA"). We note that the CDA and the statutory derivative action ("SDA") procedures have co-existed for over four years without giving rise to any major legal problems, and that the safeguards in the CO to prevent duplicative CDAs and SDAs will be preserved in the Companies Bill. Therefore, we do not support abolition of the CDA at this time.

Comment on Draft Clauses

Clause No.	Comment
Part 15 Clause 15.24	**Streamlining the procedures for restoration of dissolved companies by court order** It is noted that where a company has been struck off the register by the Registrar of Companies, or deregistered upon its own application, and thereby dissolved, any director or member or creditor of the company or any interested person, including the government, may make an application to the court for restoration of the company. However, it is being proposed that the period for applying for restoration or reinstatement be shortened generally from 20 years after the company's dissolution to six years following dissolution of the company. However, our members working in the insolvency field point out that, in practice, cases arise where it is necessary to restore a company after a longer period than six years following the dissolution of the company. We are not aware that the existing 20-year period during which an application can be made to restore or reinstate a company to the register has created any major legal or administrative problems. Under the circumstances, we would suggest maintaining the status quo.

Clause No.	Comment
Part 10 Clause 10.13	**Codifying directors' duty of care, skill and diligence** It is noted that clause 10.13(1) and (2) of the draft bill defines the standard of care, skill and diligence as the standard that would be exercised by a reasonably diligent person with: (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and (b) the general knowledge, skill and experience that the director has. Paragraph (a) above aims to adopt an objective test as the minimum standard, while paragraph (b), adds a subjective test, which looks at the personal attributes of a particular person that may raise the standard expected of that person above the minimum objective standard. We have some concern that the present wording in paragraph (a), which supposedly reflects "a minimum objective standard of care expected of all directors" (see consultation paper, part 10, paragraph 12), may actually go somewhat further than this when it refers to "the functions carried out by the director" (underlining added). This arguably seems to require an examination of the specific circumstances applying in the particular company in question. The point needs to be clarified. In endeavouring to codify the common law standard of care, skill and diligence, it is important that the statute does not at the outset, inadvertently, go beyond the existing common law standard or create ambiguity.

- End -