

Ms Selene Tsoi
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Financial Services and the Treasury Bureau
15/F, Queensway Government Offices
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20 January 2010

Dear Ms Tsoi

Consultation on “Review of Corporate Rescue Procedure Legislative Proposals”

We refer to your letter dated 29 October 2009 inviting our comments on the above consultation.

ACCA Hong Kong agrees to the proposed provisional supervision as it helps companies with viable long term business prospect but facing short term financial difficulty to turn around. With regards to the 19 questions raised in the consultation paper, we would like to address the following questions in particular.

Question 1

Do you agree with the proposed procedural changes relating to initiation of provisional supervision in paragraphs 2.4 to 2.6 above? If not, please provide reasons and suggest alternatives.

ACCA Hong Kong agrees to the proposed procedural changes with respect to the initiation of provisional supervision set out in the consultation paper. We agree that any court involvement will increase unnecessary costs. As such, we also agree to the proposal that the notice of appointment and documents be filed with only the Registrar of Companies.

Question 2

Do you see any need for other changes to the initiation of provisional supervision, including who may initiate the procedure? If so, please elaborate on the suggested changes and reasons.

We have no objection to exclude creditors from the initiation of provisional supervision as we agree to the justification set out in the consultation paper that creditors, under majority of the circumstances, would not have sufficient knowledge of the financial position of a company to make a judgement as to whether provisional supervision is an appropriate action for the company.

Question 3

Do you agree that the notice of appointment of provisional supervisor should be published in the local newspapers on the same day as the date on which the last document is filed with the Registrar of Companies? If you prefer additional or alternative means of publishing the notice of appointment, please describe and explain.

It is unclear from the consultation paper whether a separate and designated website will be created under the Registrar of Companies which will contain details of companies' appointment of provisional supervisors. We consider this a useful means for all creditors and stakeholders of the company to search for the status of the companies they deal with.

We also consider that the existing approach adopted under liquidation should be followed in the case of provisional supervision, where in all correspondence issued by the concerned company, their status of being under provisional supervision should be stated clearly after their company name. This will alert all the parties involved in their communication with the company under provisional supervision.

On the other hand, we suggest that the provisional supervisor should be imposed of a duty to notify all creditors of the company under provisional supervision by means of registered mail. This practice will ensure all creditors in and outside Hong Kong are being informed of the status of the company.

Question 5

Do you support the proposal to allow for extension of the moratorium up to a maximum period of six months from the commencement of provisional supervision, subject to approval by the creditors at a meeting of creditors? If not, please explain and suggest alternatives.

ACCA Hong Kong agrees that an extension of the moratorium for six months should be approved by the creditors. However, please refer to our comments for Questions 6 for subsequent extension of the moratorium longer than six months.

Question 6

Do you agree with the proposal to allow for extension of the moratorium beyond six months only upon court approval? If not, please explain.

While we share the concern as to limit the length of the overall moratorium to ensure prompt and focused action, we consider that six months could be insufficient for the provisional supervisor to work out an arrangement in some complex situations. Given this case, where an extension can be foreseen as inevitable, the involvement of court in the approval for further extension creates unnecessary time costs as well as actual costs.

We believe that the underlying principle of provisional supervision is to assist a company to turn around in financial difficulties, and we also believe that the creditors will therefore be reluctant to cause undue delay in the process. As such, we consider it an adequate safeguard for creditors to approve further extension of the moratorium. We suggest that creditors can approve a period of up to six months for the moratorium every meeting and there should be no limit for the number of extension.

Question 9

Which of the above three options (namely, the 2003 Proposal, Alternative A or Alternative B) would you prefer? Please explain. If you have any suggestion to refine any of the above three options, please describe and explain. If you prefer another alternative, please describe and explain.

Although we understand that certain administrative issues need to be addressed, we consider Alternative B a preferred option as it is more consistent with the underlying principle of the whole proposal of corporate rescue – helping companies facing short term financial difficulty to turn around, as the company does not need to settle the “employees’ protected debts” before initiating provisional supervision. In addition, employees should not be significantly worse off under this alternative than in the case of insolvent liquidation. With these two fundamental objectives achieved, we consider this alternative a preferred option amongst the three.

Question 10

Independent of which of the above options is adopted, what are your views on the treatment of outstanding employers’ MPF scheme contributions?

We opt for Alternative B as we agree to the argument that outstanding employers’ MPF scheme contributions is of the same nature as other employees’ outstanding entitlements.

Question 11

Do you agree with the proposal that solicitors holding a practising certificate issued under the Legal Practitioners Ordinance (Cap 159) and certified public accountants registered in accordance with the Professional Accountants Ordinance (Cap 50) may take up appointment as provisional supervisors?

Whilst we appreciate the concern of an established investigation and disciplinary mechanism to ensure appropriate regulation of provisional supervisors, we consider that limiting the eligibility of provisional supervisors to solicitors and accountants could leave out a number of experienced individuals who have suitable skills to be provisional supervisors but without the two particular qualifications. Currently, we understand that provisional liquidators are not required to hold any professional qualification.

We consider that the requirement of creditors’ approval together with the imposition of personal liability on the provisional supervisor for any trading or contracts during provisional supervision are adequate measures to ensure that only capable persons will be appointed as provisional supervisors.

We therefore suggest that members of other professional bodies such as that for company secretaries as well as members of professional accountancy bodies other than those registered under the Professional Accountants Ordinance should also be eligible for appointment as provisional supervisor.

Question 12

Do you think that other persons without the above qualifications could also be appointed as provisional supervisors on a case-by-case basis? If so, should such an appointment be made by the OR or the court? Please elaborate, in particular on the appeal channel in case of aggrieved applicants and on the associated investigatory and disciplinary regime in case of complaints against appointed persons.

Please refer to our comments above for Question 11 regarding the eligibility of provisional supervisors.

We also like to point out that it may be impracticable for approval of persons without any prescribed qualifications sought on a case-by-case basis in view of the time to be involved, in particular where the court is involved.

Question 17

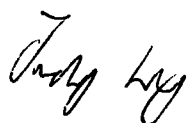
Do you agree with the way that “major secured creditors” was defined in the 2001 Bill? If you think any changes are needed, please elaborate and explain.

We consider a precise definition of “major secured creditors” is required in order to avoid disputes. In this regard, the criterion of “whole or substantially the whole of the company’s property” is too vague in determining whether a secured creditor is a “major secured creditor”.

We recommend that a benchmark or reference such as a particular percentage of total assets or total liabilities should be taken into account in the definition of “major secured creditor”. We also suggest that reference could be made to the statement of affairs prepared by the provisional supervisor for the amount of total assets or total liabilities.

Should you wish to clarify any of the above issues, please do not hesitate to contact us at .

Yours sincerely

A handwritten signature in black ink, appearing to read "Judy Wong", written in a cursive style.

Judy Wong
President