



創於 1913 年  
Founded in 1913

# 香港華人會計師公會

## The Society of Chinese Accountants & Auditors

(在香港註冊成立之有限公司)

(Incorporated in Hong Kong as a company limited by guarantee)

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### Hon. Legal Advisor 義務法律顧問

Paul K. C. Chan, 陳錦程

### Hon. Auditor 義務核數師

Yu Yu Kin 余汝健

18 February 2010

Division 4, Financial Services Branch  
Financial Services and the Treasury Bureau  
15/F, Queensway Government Offices  
66 Queensway  
Hong Kong

Dear Sirs,

### Consultation Paper on Review of Corporate Rescue Procedure

In response to your Consultation Paper on Review of Corporate Rescue Procedure (“Consultation Paper”) issued in October 2009, we would like to submit our comments on the Consultation Paper.

The Society of Chinese Accountants and Auditors (“SCAA”) is an incorporated body of professional accountants in Hong Kong established since 1913. Our members are practising accountants and representing a significant number of practising firms of accountants in Hong Kong. Our primary objectives include:

- to provide a professional development channel for all practising accountants in Hong Kong,
- to assist members to maintain high standards of professional conduct, and
- to provide services to its members and their members’ staff, and to advance the theory and practice of accountancy.

On 25 January 2010, we held a members’ forum to seek our members’ views on your Consultation Paper. The key comments from our Council and members are summarised as attached.

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Tang Kwok Bun, Benjamin 鄧國斌

We would be glad to discuss with you our comments in further details if so required.  
Please contact the undersigned at our email address at [info@scaacpa.org.hk](mailto:info@scaacpa.org.hk),  
facsimile no. (852) 2526 6434 or telephone no. (852) 2869 6680 or our Mr. Kenny  
Tam, Chairman of Insolvency Management Committee at his email address at  
, facsimile no. or telephone no.

**President 會長**  
Chan Mei Bo, Mabel 陳美寶

Yours sincerely

**Vice President 副會長**  
Ng Wing Fai, Simon 吳榮輝

**Hon. Secretary 秘書長**  
Lam Chi Yuen, Nelson 林智遠

Mabel Chan

President, The Society of Chinese Accountants and Auditors

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## LIST OF QUESTIONS FOR CONSULTATION

### 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.*

Yes, we do.

### 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.*

No, we do not.

### 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.*

Yes, we do. However, we suggest FSTB to consider whether it is practical for a provisional supervisor to publish his/her notice of appointment in the local newspapers on the same day as the date of filing the same notice with the Companies Registry while he/she is appointed urgently without giving sufficient time for him/her to place the advertisement in advance. In this regard, the date of filing such notice will be one day delay, at least, in order to coincide with the date of publishing the same.

### Question 4

*Do you support an initial moratorium period of 45 days? If not, please suggest alternatives and explain.*

No, we do not. We suggest FSTB to consider an initial moratorium period of at least 60 days to increase the flexibility. Since the passing of “The proposed introduction of a mechanism of a first meeting of creditors for creditors to consider replacing the provisional supervisor if necessary within 10 working days from the commencement of provisional supervision.” will only leave around 30 days, when there is a change of provisional supervisor, for the subsequently appointed provisional supervisor to act if the initial moratorium period is 45 days.

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.*

Yes, we do.

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.*

Yes, we do.

Question 7

*If your answer to Q6 is yes, do you agree that any court extension should not exceed a maximum of 12 months from the commencement of provisional supervision? If not, please explain and suggest alternatives.*

No, we do not. We suggest FSTB to consider not to impose any time limit for any court extension of the moratorium period with reference to the provisions in Singapore and the United Kingdom to increase the flexibility since such limitation will force the ceasing of the provisional supervision when the provisional supervisor is still under negotiation for possible rescue deals which may go beyond 12 months of the moratorium period.

Question 8

*Does the list of contracts and agreements which should be exempted from the moratorium, as set out at Appendix, need to be revised? If so, please suggest and explain.*

No comments.

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.*

We would not prefer the 2003 Proposal and Alternative A. However, for Alternative B, we suggest FSTB to consider not to impose personal liability on provisional supervisor for the

settlement of employees' claims.

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 are of the view that MPF contributions shall not be considered as equal priority as settlement of employee's other preferred entitlements. In this regard, we suggest FSTB to consider any outstanding amounts should be paid in accordance with the proposal of voluntary arrangement.

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?*

Yes, we do. However, we further suggest FSTB to consider that for certified public accountants ("CPA"), only holder of practising certificate ("PC") should be allowed to take up appointment as provisional supervisors which is similar to the requirement for solicitors. Presently, accountants joining HKICPA are required to pass a Hong Kong company law examination prior to the granting of the PC. The impact of taking away the PC will be a very effective safeguard against misbehaved practising CPA vs a CPA with no PC.

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.*

No, we do not.

Question 13

*Do you agree with giving creditors the choice to replace the provisional supervisor appointed by the company or its directors or the provisional liquidators or liquidators of the company and approve the remuneration of the provisional supervisor at the first meeting of creditors to be held within 10 working days from the commencement of provisional supervision? If not,*

*please elaborate on the reasons and suggest alternatives.*

Yes, we do.

Question 14

*Do you support imposing personal liability on provisional supervisors as proposed in paragraphs 5.14 to 5.17 above? If not, please suggest alternatives which would effectively address the issues set out under paragraphs 5.16(a) to (c).*

No, we do not. We suggest FSTB to consider not to impose personal liability on provisional supervisor with reference to the provisions in the United Kingdom since she does not impose statutory personal liability. Also, if FSTB accepts our suggestion for Question 11 above, provisional supervisors with practising certificate for being CPA or solicitors is enough to hold them liable for their work during the provisional supervision. In order to reduce liability, the provisional supervisors will tend to terminate all employees immediately and reduce the chance of rescuing a viable business.

Question 15

*Do you support the introduction of insolvent trading provisions? In case you do not, please explain and suggest alternatives to (a) encourage timely initiation of provisional supervision; and (b) deter irresponsible depletion of the company's assets.*

No, we do not. As companies incorporated under share capital of HK\$1 are immediately deemed insolvent for their next transaction like engaging staff or renting an office space. These are common situation for SMEs. In this regard, it is not practical to impose such provisions and we suggest FSTB to consider ways to educate the directors more on company law requirements, corporate governance and ethics to deter insolvent trading.

Question 16

*Do you agree with the proposed revised formulation of "insolvent trading"? If not, please suggest alternatives.*

Yes, it has been improved. Given the concern in question 15 for SMEs, we suggest FSTB to further consider to use the wording of "took reasonable step" rather than "took every step with a view to minimizing the potential loss to the company's creditors as he ought to have taken" in the old bill. In simple term, how can one ascertain he took "every step".

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.*

No comments.

Question 18

*Do you support the proposal to largely follow the 2001 Bill approach with respect to protection of “major secured creditors” and other secured creditors’ rights? If you think any changes are needed, please elaborate and explain.*

No comments.

Question 19

*What are your views on retaining or removing the “headcount test” in the voting at meetings of creditors (i.e. requirement (a) stated in paragraphs 8.1 and 8.2 above) for resolutions to be passed at meetings of creditors?*

No comments.