

**A Consultative Paper on the  
Companies (Amendment) Bill 2008**

**4 January 2008**



**Financial Supervision Commission Barrantee Oaseirys**

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# *SECTION I*

## *I. INTRODUCTION*

The purpose of the Companies (Amendment) Bill is to make important amendments to the Companies Acts 1931 to 2004, Companies Act 2006, Limited Liability Companies Act 1996 and other related legislation. A number of these have been requested by industry practitioners. Some others relate to evolving international standards (in particular of the International Organisation of Securities Commissions – (‘IOSCO’)) and previous recommendations of the IMF.

The Bill will make amendments identified by the IOM Society of Chartered Accountants, which should remove the conflict or potential conflict between the statutory accounting and auditing provisions in the Companies Acts and the generally accepted accounting standards which their members are required to follow under their professional rules.

Although the Isle of Man is not part of the EU, the EU 8<sup>th</sup> Directive on Statutory Audits<sup>1</sup> affects Isle of Man companies admitted to trade on EU Member States’ regulated markets and accordingly the Bill will provide the mechanism to allow the Island to comply with the Directive.

Some of the proposed amendments to the Companies Acts 1931 to 2004 apply also to the Companies Act 2006.

The corporate service provider (‘CSP’) industry asked for clarification of the requirements under the Companies Act 2006 in respect of the keeping of accounting records at the office of the company’s registered agent. Any relaxation of this obligation needs to be balanced against the Island’s obligations to cooperate internationally in the reduction of financial crime.

CSPs and the legal and accountancy professions also requested some other miscellaneous amendments, particularly to the Companies Act 1931 and Limited Liability Companies Act 1996.

The Bill is only intended to make the most urgently required changes. It is not a full scale company law review and it would therefore be appreciated if responses could be restricted to the questions which are summarised in Section 7 and general comments restricted to the proposals in the Bill. However, if you are aware of any other urgently required amendments to company law, please raise them with as much explanation and justification as possible. If they are straight-forward, we will be pleased to consider them as part of this consultation. Otherwise, any broad issues which require further debate will need to be addressed in any future company and insolvency law review, which the Minister for the Treasury has indicated will take place in due course.

Ideally, we would like the Bill to receive Royal Assent before the IMF visit or at least to have completed its progress through both Branches of Tynwald in the 2007/2008 legislative session (i.e. before the summer recess). It would therefore be much appreciated if we could have your response as soon as possible and at the latest by **15<sup>th</sup> February 2008** so that the

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<sup>1</sup> Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directive 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC.

Bill can be finalised and printed as a Green Bill for submission into the Keys at the earliest possible opportunity.

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## **SECTION 2**

### **2. IOSCO PRINCIPLES**

- 2.1 There are a number of areas where the Island needs to update its legislation more closely to comply with IOSCO's principles of supervision. These standards form the basis for assessments by the IMF.
- 2.2 IOSCO Principles 14 to 20 are aimed at issuers, market intermediaries, securities markets and secondary markets and are intended to ensure investor protection and that global money markets are fair, orderly and efficient. In the absence of a securities market or secondary market, the IMF look to the jurisdiction's company law to meet these IOSCO Principles. The Bill addresses the implementation of Principles 14 to 16 in particular. Principles 17 to 20, which refer specifically to collective investment schemes, are being addressed via regulation of the investment business sector and/or via the Collective Investment Schemes Bill 2008 which will shortly be introduced into the Keys for consideration.
- 2.3 The IMF's last assessment looked at companies incorporated under the Companies Acts 1931 to 2004 ('1931 Act companies'). However, as the Companies Act 2006 has since introduced a new form of Manx company ('2006 Act companies'), it is anticipated that the IMF will also look at 2006 Act companies on their forthcoming visit. Therefore, although the majority of amendments proposed in the Bill relate to 1931 Act companies, the Bill also addresses some of the possible IMF issues in relation to how 2006 Act companies meet the IOSCO Principles. It is not, however, proposed to introduce many new requirements for 2006 Act companies, so as not to change the nature and intention of that Act.

#### **2.4 IOSCO Principle 14**

*There should be full, accurate and timely disclosure of financial results and other information which is material to investors' decisions*

- 2.4.1 On their last visit, the IMF considered Principle 14 to be broadly implemented but made some recommendations relating to the length of time between the end of a company's financial year end and its financial statements being available to shareholders/members. It is proposed to address this IMF recommendation by reducing the period currently applicable to both public and private 1931 Act companies (9 months or 12 months if the company's operations are off-Island). The obligation on public and private companies is proposed to be different - 6 months for public companies and 9 months for private companies, which is in line with English company law. It is considered that this amendment should satisfy the IMF.  
(See Clause 9 in the Bill – *Amendment of section 2 in the Companies Act 1982*.)
- 2.4.2 The IMF also suggested that for companies other than collective investment schemes, there should be powers of intervention where there is fear that a prospectus may be false or misleading. It has also been observed in the light of the IMF's subsequently developed methodology, that there is currently no general duty on the directors of 1931 Act companies to disclose all material information or to supply information in a timely manner to investors/potential investors.

**2.4.3** To address these issues, firstly it is proposed to introduce a power for the Financial Supervision Commission ('the Commission') to direct a company to correct a false or misleading statement in its prospectus. Notice of that direction will be placed on the company's public file so that it is clear that there is a misstatement in the prospectus even if the company does not comply with the direction and file a corrected prospectus.

(See Clause 2 in the Bill – *Insertion of new section 38DA in the Companies Act 1931.*)

**2.4.4** Secondly, it is proposed to introduce a general duty on the directors of a 1931 Act company to provide investors with all information which is material to an offer of securities etc. This new provision mirrors the duty on directors of 2006 Act companies under section 45 of that Act regarding offering documents which must contain all material information.

(See Clause 1 in the Bill – *Insertion of new section 35A in the Companies Act 1931.*)

**2.4.5** The observation made in the context of the forthcoming IMF visit that there is no requirements in the Isle of Man's company law in respect of accounting standards and no power for the Commission to intervene to prevent unsuitable accounting practices or to enforce reporting deadlines, may largely be addressed by an amendment which is being made in response to the IOM Society of Chartered Accountants' requested changes. The amendment referred to in paragraph 3.4.2 therefore may well serve more than one purpose.

## **2.5** **IOSCO Principle 15**

*Holders of securities in a company should be treated in a fair and equitable manner*

**2.5.1** On their visit in 2003 the IMF noted that the Isle of Man does not have a secondary market and regarded this principle as implemented.

**2.5.2** In the light of the IMF's developed methodology it may be observed that there are no disclosure rules directly relating to a takeover bid, no general disclosure requirements and no rules protecting shareholders from unfair actions by directors in the context of takeovers and mergers.

**2.5.3** Such observation would not, however, be entirely correct insofar as there has been oversight of takeovers involving relevant Isle of Man companies by the UK Takeover Panel since its establishment in 1968. This arises from the functions of the Takeover Panel which are to issue and administer the City Code on Takeovers and Mergers and to supervise and regulate takeovers and other matters to which the Code applies. The City Code applies to UK, Channel Island and Isle of Man registered and traded companies if any of their securities are admitted to trading on a regulated market in the United Kingdom or any stock exchange in the Channel Islands or Isle of Man. We are advised that the Panel's remit in some circumstances also includes companies whose securities are admitted to trade on AIM.

**2.5.4** The English Companies Act 2006 placed the Takeover Panel on a statutory footing in compliance with the EU Directive on Takeover Bids (2004/25/EC). In order for the Panel to continue its oversight of Isle of Man companies under its new powers, it is proposed to extend formally their powers to the Isle of Man, subject to Tynwald's approval.

**2.5.5** This information may be of interest to anyone providing services for companies which are affected by the City Code but as it is not proposed to make any change to domestic law, there is nothing in the Bill regarding takeovers for you to consider or comment upon.

## **2.6** **IOSCO Principle 16**

*Accounting and auditing standards should be of a high and internationally acceptable quality*

**2.6.1** In the light of the IMF's subsequently developed methodology, it has been observed that the Island does not have its own audit oversight body or audit standard setting body. Coincidentally some of the provisions in the Bill to facilitate compliance with the EU 8<sup>th</sup> Directive on Statutory Audits and to address the conflict between accounting standards and company law will respectively in part introduce audit oversight and require the application of generally accepted accounting practice and principles. (See 3.4.2 and 3.7 below.)

**2.6.2** The proposed new provisions in the Companies Act 2006 ('CA06') in respect of auditor oversight, adherence to accounting standards and the Commission's regulation making powers, mirror the changes to the Companies Act 1982 ('CA82') noted above which are being made to bring Manx company law in line with the IOSCO Principles.

### **Question 1**

**Do you support the proposal to amend the Companies Acts 1931 to 2004 (re 1931 Act companies) by –**

- (a) reducing the period for preparing and laying financial statements before the members for –**
  - (i) public companies to 6 months, and**
  - (ii) private companies to 9 months (see 2.4.1 above);**
- (b) introducing a power for the Commission to direct a company to correct a misstatement in its prospectus with such a notice being placed on the company's public file (see 2.4.3 above);**
- (c) placing a general duty on the directors of 1931 Act companies to disclose all material information to investors in relation to an offer to enable them to make informed decisions (see 2.4.4 above)?**

**If you do not support any of the above proposals, please provide your reasons.**

## **SECTION 3**

### **3. OTHER PROPOSED CHANGES TO ACCOUNTING AND AUDIT PROVISIONS IN COMPANIES ACT 1982**

#### **3.1 Conflict between accounting/audit provisions in company law and generally accepted accounting standards**

3.2 The accountancy profession has identified a number of accounting requirements in the CA82 which conflict with the accounting standards their members are required to follow. It is felt that these conflicts are impeding the audit profession on the Island from carrying out its work to the appropriate standard whilst still complying with the company law requirements.

#### **3.3 Financial Reporting Standard 21 ('FRS 21')**

3.3.1 The CA 82 requires dividends to be shown in the profit and loss account. FRS 21 brings accounting practice into line with company law insofar as company law requires that a dividend payment proposed by the directors must be confirmed by the members and only then crystallises as a liability. Therefore a proposed dividend that has not yet been approved by the members should not be treated as a liability in the company's accounts. Although neither the English legislation nor the accounting standards prohibit inclusion of dividends on the face of the profit and loss account, it is generally thought better to exclude them because they are not part of financial performance of the company. In the UK it is now normal practice to disclose the dividends in the notes to the accounts only.

3.3.2 It is proposed to resolve this conflict by –

- (a) repealing paragraph 12(1)(h) of Schedule 1 to CA82 so that it will no longer be a requirement to show dividends in the profit and loss account, and
  - (b) inserting a new paragraph 14A which will require that matters relating to dividends be shown in the notes to the accounts.
- (See Clause 15 – *Amendment of Schedule 1 CA82.*)

#### **Question 2**

**Do you agree with the proposals to address the conflict between the current statutory accounting/audit requirements and FRS 21 and current best advice on the treatment of dividends in the accounts?**

**If not, please give your reasons and explain how you think this should be addressed.**

#### **3.4 Financial Reporting Standard 25 ('FRS 25')**

3.4.1 The accountancy profession advise that the major effect of FRS 25 relates to the debt/equity analysis on the balance sheet. The requirement of FRS 25 to show preference shares as a liability and hence their associated dividend as an interest expense in the profit and loss account, conflicts with paragraph 12(1)(h) of Schedule 1 CA82, which as noted in 3.3.2 above will be repealed.

(See Clause 15 – *Amendment to Schedule 1 CA82.*)

**3.4.2** The Bill follows the example set in English company law<sup>2</sup> which aligned the requirement of FRS 25 with the statutory requirements by inserting a requirement that the directors of a company must have regard for generally accepted accounting principles or practice. The new provision will allow accounting standards to take precedence over the requirements in CA82. Generally accepted accounting standards are defined as meaning International Reporting Standards and UK Accounting Standards but this can be extended on the advice of the Island's accountancy profession.  
(See Clause 11 – *Insertion of new section 3A (Additional provisions concerning the presentation of accounts)*).

**3.4.3** In addition, the Bill also allows the directors of a 1931 Act company to depart from the requirements under the Companies Acts 1931 – 2004 where it is necessary in order that the financial statements give a true and fair view. This follows the example set by in English company law<sup>3</sup>.  
(See Clauses 10 and 12 – *Amendment of section 3 and section 6 (re individual company accounts and group accounts respectively)*.)

### **Question 3**

**Do you agree with the proposals to address the conflict between the current statutory accounting/audit requirements and FRS 25 and, in particular, the proposed new provisions which would allow departure from the statutory requirements, as necessary, in order to –**

- (a) give a true and fair view and/or;**
- (b) where accounting standards so require?**
- (c) and the effect of (b) also being to impose an obligation to comply with generally accepted accounting standards; and**
- (d) is the definition of generally accepted accounting standards appropriate?**

**If you do not agree with any of the above, please explain why and suggest alternatives.**

### **3.5 Financial Reporting Standard 26 ('FRS 26')**

**3.5.1** FRS 26 deals with 'fair value accounting' but as the Isle of Man's Companies Acts are silent on the valuation basis, there is no conflict between the CA82 and FRS 26. Although it may be desirable to clarify the position in our domestic law, it may not be appropriate to replicate the UK's prescriptive rules<sup>4</sup>. The accountancy professionals consider that there is not sufficient time to consider the implications fully. They therefore suggest that it may be better to re-visit all the accounting and auditing provisions as part of a full scale company and insolvency law review.

**3.5.2** In the meantime, however, the Bill addresses the accountancy profession's request for 'future-proofing' to allow future conflicts between accounting standards and company law to be resolved in a more timely manner. For this and any other purpose, the Bill introduces a regulation making power relating to accounts and audit.

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<sup>2</sup> By The Companies Act 1985 (International Accounting Standards and Other Accounting Amendments) Regulations 2004 (S.I. 2004/2947) which added paragraph 5A to Part I of Schedule 4 to the English Companies Act 1985.

<sup>3</sup> The 'true and fair view over-ride' was achieved by s.226A(5) and (6) of the English Companies Act 1985.

<sup>4</sup>The Companies Act 1985 (International Accounting Standards and Other Accounting Amendments) Regulations 2004 (S.I. 2004/2947) added a new "Section D (Fair Value Accounting)" to Schedule 4 to the English Companies Act 1985, which permits fair value accounting for financial instruments (IAS 32 and 39), investment property (IAS 40) and biological assets (IAS 41).

(See Clause 14 – *Inserting a new section 17C CA82 (Regulations concerning accounts and audit).*)

#### **Question 4**

**Do you agree with the proposal to introduce a regulation-making power to facilitate amendment of accounting / auditing provisions without having to do so by primary legislation which has a very long lead-in time?**

The intention of such ‘future-proofing’ is so that the Island can react more quickly when there are changes to generally accepted accounting practice, and if needed and it is considered appropriate, to address international pressures for change and to facilitate local circumstances by being so able.

### **3.6 Auditor qualification**

**3.6.1** The current auditor qualification requirement in section 14 CA82 relates to membership of one of the relevant professional accountancy bodies. Although the prohibition on bodies corporate acting as auditors was removed via the Companies, etc (Amendment) Act 2003, because the bye-laws of some of the professional bodies do not treat accountancy firms as ‘members’, membership is an inappropriate criterion for auditor qualification for bodies corporate, partnerships and limited liability companies. The Commission has worked closely with ICAEW in identifying how the auditor qualification can be amended to allow accountancy firms to act as auditors. The proposed solution follows Jersey’s approach, which takes account of the Chartered Accountants’ bye-laws. This approach makes separate provision for individuals, bodies corporate, partnerships and LLCs. (As Isle of Man law does not include the English law concept of limited liability partnerships which, have separate legal personality (whereas the Manx limited partnership does not), these proposed new provisions do not take account of English LLPs.)

**3.6.2** Although these provisions may appear rather complex, they aim to take account of the potential different structuring of accountancy firms in the Island which may be established as partnerships, bodies corporate or limited liability companies. We would welcome comments on the workability of the proposed new provision for domestic audit firms.

(See Clause 13 – *Substitution of section 14, and new sections 14A to 14H.*)

**3.6.3** It should also be noted that the current qualified acceptance of LLCs will disappear and there will be an additional power for the Commission, on application, to authorise an individual or firm to act as auditor on a case by case basis.

(See Clause 13 - *new section 14E.*)

**3.6.4** In the interim, however, the Commission is proposing in the interim to use its power to add to the current list of accountancy bodies in section 14 CA82 (see 6.1 below).

**3.6.5** There is also a new power for the Commission by regulations to establish a register of auditors in such circumstances as may be prescribed. It is envisaged that in order to comply with the 8<sup>th</sup> EU Directive on Statutory Audits, the Commission will have to keep a register of auditors of companies admitted to trading on EU Member States’ regulated markets.

(See Clause 13 - *new section 14G.*)

### Question 5

(a) Do you agree with the proposed new approach to auditor qualification, bearing in mind that a change to section 14 CA82 is necessary to allow bodies corporate and unincorporated to act as auditors of Isle of Man companies and that the bye-laws of some of the accountancy professional bodies only recognise individuals and not 'audit firms' as members?

(b) Is there too much detail including circumstances which are unlikely to ever arise and does it cover the circumstances pertaining in the Island in respect of how audit firms are structured? If any of the circumstances do not apply to the Island or if there are other scenarios which need to be covered, please provide the detail of what you suggest should be included in these provisions.

### **3.7 Auditor oversight**

3.7.1 The Bill introduces a power for the Commission by regulations to establish or appoint a body to oversee audits of Isle of Man companies in such circumstances and for such purposes as may be prescribed by regulation. The new section 17B CA82 is specific and will allow the Commission to make regulations to meet the requirements of Chapter XI of the Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts.<sup>5</sup>

3.7.2 The Commission has (together with Jersey and Guernsey) been negotiating with the UK's Professional Oversight Board ('POB') to take on the oversight of audits of Isle of Man companies which are admitted to trading on an EU Member State's regulated market. These proposals have been accepted in principle by Brussels (in the forum of EU Member States audit regulatory bodies). The mechanics of how this will work have yet to be finalised but with the regulation-making power in place, the Island will be able to confirm to the EU that we will be able to comply with the 8<sup>th</sup> Directive. It should also be noted that the power to keep a register of auditors may also need to be used to establish a register of relevant audits for this purpose (see 3.6.5 above).

3.7.3 As noted in 3.5.2 above, there is also a general power to amend the accounting and auditing provisions which includes the appointment of an audit oversight board in circumstances other than to comply with the EU 8<sup>th</sup> Directive.

3.7.4 These proposed amendments may also to some extent address IMF concerns regarding auditor oversight.  
(See Clause 14 – *Insertion of new sections 17B and 17C CA82*).

### Question 6

Do you have any comments on the proposal to introduce a specific regulation-making power to allow Manx auditors to continue to audit companies which are admitted to trading on the regulated markets of EU Member States and the extension of this to 2006 Act companies?

(Question 4 above refers to the more general regulation making power.)

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<sup>5</sup> The Island is a 'third country' for the purpose of the Directive and this change is required in order for our auditors to be able to audit Isle of Man companies which are admitted to trade on the regulated markets in the EU Member States. The Directive requires such Third Countries to have auditor oversight equivalent to that in the relevant EU Member State.

## **SECTION 4**

### **4. ACCOUNTING PROVISIONS IN THE COMPANIES ACT 2006**

#### **4.1 Duty of Registered Agent to hold company's accounting records**

4.1.1 CSPs who act as registered agents of companies registered under CA06 ('2006 Act companies') have asked for guidance on the accounting records requirements. It appears that the detailed definition of 'accounting records' in section 80(2) is considered to be more onerous than the equivalent requirement for 1931 Act companies under section 1 CA82. It has been suggested that the obligation on the registered agent is not practicable and may make the use of the 2006 Act company unattractive, particularly for a company whose accounting functions are carried out off-Island in the jurisdiction where the company carries on its principal activities.

4.1.2 However, representations to relax the accounting records requirement in CA06 need to be balanced against the Island's commitment to international cooperation in the reduction of financial crime. Fundamental to that commitment is the ability for the appropriate authorities to access a company's records and in particular, its accounting records. It is therefore proposed to allow the accounting records to be held elsewhere if the directors so decide, provided the registered agent knows where the records are being held and can access them. In addition to the registered agent being able to get hold of copies (or the originals if required) of the company's accounting records in a timely manner, there should be an obligation on a 2006 Act company to provide the registered agent with copies of those records at intervals of no more than 6 months. This would be equivalent to the obligation on a 1931 Act company whose accounting records are off-Island. These proposed amendments should facilitate members, directors, the Attorney General and the Commission exercising their respective rights to inspect the company's accounting records under section 82 CA06.

4.1.3 It was also suggested that the current definition of 'financial statements' could be clarified. The proposed amendment brings this definition into closer alignment with the generally understood description of a company's balance sheet, profit and loss account and notes to the accounts.

*(See Clauses 20 and 21 – Amendment to sections 78 and section 80 CA06 respectively.)*

#### **Question 7**

**Do you have any comments on the proposed amendments to the 'accounting records' provisions in CA06?**

**If you disagree with the proposed approach, please explain how you would suggest the Isle of Man could meet its international obligations to cooperate in the reduction of financial crime if a 2006 Act company's accounting records are not held in the Isle of Man or if held off-Island, they cannot be accessed in a timely manner in the Island?**

#### **4.2 Right to require financial statements to be prepared**

4.2.1 As noted in Section 2 of this paper, the IMF are concerned with investor protection and although the 2006 Act company was not in existence at the time of their last visit, it is anticipated that they will look for adequate investor protection in the 2006 Act.

The Commission therefore welcomed the suggestion from some CSPs and Advocates that there should be a right for any member or director of the company to demand that financial statements be prepared.

(See Clause 22 – *new section 80A.*)

#### **4.3 Accounting and auditing provisions where an audit is required by a securities market**

**4.3.1** Although, in the context of the duty on the registered agent to hold the company's accounting records, section 80(3) CA06 defines 'financial statements, CA06 is otherwise silent on the preparation of financial statements and audit.

**4.3.2** Concerns may be raised that there is potential risk to the Island's reputation because there are no rules relating to the preparation of financial statements or their audit. This observation is made with particular reference to the large number of Isle of Man companies, including 2006 Act companies, currently trading on AIM. The accountancy professionals have suggested that in the absence of accounting and audit provisions for 2006 Act companies, their accounts may be not to the standard required under Manx law for 1931 Act companies and could be audited by an unqualified auditor. To address this concern, it is proposed that where a 2006 Act company is listed or admitted to trade on a securities market and that market requires the company to prepare audited accounts, there should be some minimal rules to ensure that those accounts will be of an appropriate quality.

**4.3.3** The proposed additions to CA06 have been kept to the minimum in keeping with the nature of the 2006 Act company. However, such accounts would be expected to give a true and fair view, comply with generally accepting accounting standards and be audited by a person who is qualified for appointment as in auditor (in terms of the auditor qualification provisions under CA82).

(See Clause 22 – *new sections 80B and 80C.*)

#### **Question 8**

**Bearing in mind the accountancy profession's concerns that the lack of accounting and auditing rules in the Companies Act 2006 may pose a reputation risk for the Island, do you agree that these minimal 'rules' are appropriate to the circumstances in which a 2006 Act company is obliged to prepare audited accounts which may have wider publication than the accounts of a private company and therefore be open to scrutiny?**

**If not, please give your reasons and any alternative suggestions.**

**4.3.4** To ensure that 2006 Act companies can be admitted to trade on EU Member States' regulated markets in compliance with the EU 8<sup>th</sup> Directive on Statutory Audits (see 3.7 above), it is proposed to introduce a new provision regarding public oversight of relevant audits. This mirrors the proposed addition in respect of 1931 Act companies – the new section 17B CA82 to be introduced by Clause 14.

(See Clause 22 – *new section 80D (Public oversight).*)

**4.2.3** It is also proposed to add a power for the Commission to make regulations concerning accounts and audit. This mirrors the proposed addition in respect of 1931 Act companies – the new section 17C CA82 to be introduced by Clause 14.

(See Clause 22 – *new section 80E.*)

**See Questions 4 and 6 above**

## **SECTION 5**

### **5. OTHER MISCELLANEOUS AMENDMENTS**

#### **5.1 Statements in lieu of prospectus**

5.1.1 We were asked to remove the requirement in the Companies Act 1931 that a statement in lieu of prospectus must be filed. This change was requested by the industry on the grounds that it serves no useful purpose and is not understood by lawyers in London.

(See Clause 3 – *Repeal of section 40 CA31*)

#### **5.2 Exemption from prospectus requirements**

5.2.1 The Companies Act 2006 repealed the whole of Part XII CA31 and the Commission only recently became aware that the effect of this repeal was *inter alia* to remove the power for the Treasury to make regulations to exempt companies from the prospectus requirements. Such regulations are needed for collective investment schemes and therefore clause 4 will reinstate s.324A CA31.

#### **5.3 Registration of charges**

5.3.1 The amendments in relation to the registration of charges address a pragmatic problem for the Companies Registry insofar as company law requires that the original deed of charge be filed with the Companies Registry and the original document may already have had to be filed at the Deed Registry. The change will allow a copy document to be accepted by Companies Registry for filing.

5.3.2 They also address an issue of lack of clarity which was raised by industry. The change is to specify that the requirement to register relates to a charge over property which is owned beneficially by the company.

(See Clauses 5, 6 and 7 – *Amendment to sections 79, 81 and 91 CA31*)

#### **Question 9**

Do you have any comments on the proposal to –

- (a) remove the requirement for a 1931 Act company to file a statement in lieu of prospectus?
- (b) clarify that the registration of charges only applies to charges over property which is beneficially owned by the company?

If not, please give your reasons and any alternative suggestions.

#### **5.4 Financial assistance for acquisition of shares**

5.4.1 The new English Companies Act 2006 will repeal the prohibition on private companies giving financial assistance for the acquisition of their shares. This repeal is currently scheduled to come into effect in October 2008. As a result, the statutory whitewash procedure available to private companies under the English Companies Act 1985 will also be repealed as this will no longer be required. Pursuant to the English Companies Act 2006, public companies and their subsidiaries will still be prohibited from providing financial assistance for the acquisition of shares in themselves. A public company will also be prohibited from providing financial assistance for the acquisition of shares in its private holding company.

**5.4.2** Accordingly, we received a request that the prohibition in the Companies Act 1992 ('CA92') be removed in order to bring the Island into line with the new provisions under the English Companies Act 2006.  
(See Clause 16 – *Substitution of section 6 to 8 CA92*)

**5.4.3** However, we were advised that there has been concern in England that the repeal of the prohibition on private companies giving financial assistance and the consequential repeal of the statutory whitewash procedure will result in the law reverting to the old common law position which existed prior to the introduction of the statutory prohibition on financial assistance and whitewash procedure. To alleviate these concerns, consideration will be given to whether it will be appropriate for the commencement order bringing the repeal into effect to contain a saving provision making it clear that the repeal will not revive any equivalent common law rule which existed prior to the introduction of the statutory prohibition on financial assistance.

#### **Question 10**

**Bearing in mind that the proposed substitution relating to the giving of financial assistance for the acquisition of shares follows the example in the new English Companies Act 2006 (sections 677 to 683), you are asked to consider if –**

- (a) this is desirable and**
- (b) whether you consider the risk referred to in 5.4.3 above is likely and if so, whether it would be adequately addressed if it is possible to include a saving provision in the commencement order?**

**In particular, those who suggested this change should consider carefully whether it achieves what they desired and if not, suggest what revisions they consider necessary.**

#### **5.5 Winding up of a limited liability company**

**5.5.1** It is proposed to remove the automatic winding up of a limited liability company where on the death, retirement, resignation etc. of one of the members, the company fails to file a notice stating that the remaining members agree to continue in business. The Commission agrees with this amendment which was requested by the industry but this will not have retrospective effect to correct past defaults in filing the required notice.

*(See Clause 19 – Amendment of sections 27 and 28 Limited Liability Companies Act 1996)*

#### **Question 11**

**Do you have any comments on the proposal on the proposed amendment to the Limited Liabilities Companies Act 1996 which will remove the automatic default to winding up if no notice of the intention to continue the LLC is filed on the death or resignation of one of the members?**

#### **5.6 Amendment to Contracts (Rights of Third Parties) Act 2001**

**5.6.1** The need for this amendment was identified by and is at the request of the Attorney General's Chambers.

## **SECTION 6**

### **6. OTHER ISSUES NOT COVERED IN THE BILL**

#### **6.1 Interim amendment to section 14 Companies Act 1982 (Auditor qualification)**

**6.1.1** As noted in 3.6.3 above, the new section 14E CA82 will allow the Commission to authorise a person who would not otherwise qualify under the new sections 14 to 14C to be appointed as auditor of a 1931 Act company. It is anticipated that this power will only be used in exceptional circumstances and the power is to be exercised on a case by case basis. However, in the interim, the Commission has been made aware of an unforeseen effect of the abolition of non-resident duty companies which were exempt from the auditor qualification provisions. Therefore, if such companies of their own volition decided to have their accounts audited, they were not subject to the auditor qualification and may have had their accounts audited in a jurisdiction where other rules apply.

**6.1.2** The Commission considers that where the audit is being conducted under rules equivalent to those in the Island and this is a consequence of the previous treatment of non-resident duty companies, the circumstances may be considered exceptional and the auditor authorised under the new powers. In the interim, the Commission proposes to use its current power to add to the list of 'accountancy bodies' in section 14(1) of the CA82, for the purpose of carrying out audits of companies whose securities are listed on the Singapore Stock Exchange, persons who are registered with Singapore's Accounting and Corporate Regulation Authority ('Public Accountants').

#### **Question 12**

**Do you have any objection to the addition of Singapore registered Public Accountants who audit companies with securities listed on the Singapore Stock Exchange (which has stringent rules regarding financial disclosures) by amendment to the current s.14 CA82?**

**Please note that it is proposed that the Bill will in due course substitute new auditor qualification provisions including a power for the Commission to authorise other auditors who do not meet the qualification criteria, on a case by case basis.**

#### **6.2 Elective resolution to dispense with audit**

**6.2.1** Since the coming into operation of the Companies (Audit Exemption) (Amendment) Regulations 2007 ('Audit Exemption Regulations 2007') the Commission has been asked to give guidance on the public filing of such a resolution. Companies Registry has accepted such resolutions for placing on the company's file on the advice that although it is not a statutory requirement to file as is the case for special resolutions, because elective resolutions must be unanimous (not just 75% of those voting as is the case with a special resolution), the importance of the resolution indicates that it should be on the public record. After consulting with Income Tax Division of Treasury and having considered the issues, the Board of the Commission has made a policy decision in respect of amending the Audit Exemption Regulations 2007 in cooperation with Income Tax so that in future there will be a requirement to file such resolutions. This policy is subject to the agreement of the Treasury,

### Question 13

Comments are invited on this proposal which is aimed at ensuring that the transparency in respect of significant matters in the affairs of a 1931 Act company are available for public inspection should extend to a unanimous resolution to dispense with the audit of its financial statements. The form of the amendment to the Audit Exemption Regulations 2007 has not yet been decided but the Commission wishes to take this opportunity to gauge opinion on the proposal.

## **SECTION 7**

### **7. SUMMARY OF QUESTIONS**

#### **Question 1**

Do you support the proposal to amend the Companies Acts 1931 to 2004 (re 1931 Act companies) by –

- (a) reducing the period for preparing and laying financial statements before the members for –
  - (i) public companies to 6 months, and
  - (ii) private companies to 9 months (see 2.4.1 above);
- (b) introducing a power for the Commission to direct a company to correct a misstatement in its prospectus with such a notice being placed on the company's public file (see 2.4.3 above);
- (c) placing a general duty on the directors of 1931 Act companies to disclose all material information to investors in relation to an offer to enable them to make informed decisions (see 2.4.4 above)?

If you do not support any of the above proposals, please provide your reasons.

#### **Question 2**

Do you agree with the proposals to address the conflict between the current statutory accounting/audit requirements and FRS 21 and current best advice on the treatment of dividends in the accounts?

If not, please give your reasons and explain how you think this should be addressed.

#### **Question 3**

Do you agree with the proposals to address the conflict between the current statutory accounting/audit requirements and FRS 25 and, in particular, the proposed new provisions which would allow departure from the statutory requirements, as necessary, in order to –

- (a) give a true and fair view and/or;
- (b) where accounting standards so require?
- (c) and the effect of (b) also being to impose an obligation to comply with generally accepted accounting standards; and
- (d) is the definition of generally accepted accounting standards appropriate?

If you do not agree with any of the above, please explain why and suggest alternatives.

#### **Question 4**

Do you agree with the proposal to introduce a regulation-making power to facilitate amendment of accounting / auditing provisions without having to do so by primary legislation which has a very long lead-in time?

The intention of such 'future-proofing' is so that the Island can react more quickly when there are changes to generally accepted accounting practice, and if needed and it is considered appropriate, to address international pressures for change and to facilitate local circumstances by being so able.

### Question 5

(a) Do you agree with the proposed new approach to auditor qualification, bearing in mind that a change to section 14 CA82 is necessary to allow bodies corporate and unincorporated to act as auditors of Isle of Man companies and that the bye-laws of some of the accountancy professional bodies only recognise individuals and not 'audit firms' as members?

(b) Is there too much detail including circumstances which are unlikely to ever arise and does it cover the circumstances pertaining in the Island in respect of how audit firms are structured? If any of the circumstances do not apply to the Island or if there are other scenarios which need to be covered, please provide the detail of what you suggest should be included in these provisions.

### Question 6

Do you have any comments on the proposal to introduce a specific regulation-making power to allow Manx auditors to continue to audit companies which are admitted to trading on the regulated markets of EU Member States and the extension of this to 2006 Act companies?

### Question 7

Do you have any comments on the proposed amendments to the 'accounting records' provisions in CA06?

If you disagree with the proposed approach, please explain how you would suggest the Isle of Man could meet its international obligations to cooperate in the reduction of financial crime if a 2006 Act company's accounting records are not held in the Isle of Man or if held off-Island, they cannot be accessed in a timely manner in the Island?

### Question 8

Bearing in mind the accountancy profession's concerns that the lack of accounting and auditing rules in the Companies Act 2006 may pose a reputation risk for the Island, do you agree that these minimal 'rules' are appropriate to the circumstances in which a 2006 Act company is obliged to prepare audited accounts which may have wider publication than the accounts of a private company and therefore be open to scrutiny?

If not, please give your reasons and any alternative suggestions.

### Question 9

Do you have any comments on the proposal to –

- (a) remove the requirement for a 1931 Act company to file a statement in lieu of prospectus?
- (b) clarify that the registration of charges only applies to charges over property which is beneficially owned by the company?

If not, please give your reasons and any alternative suggestions.

#### Question 10

Bearing in mind that the proposed substitution relating to the giving of financial assistance for the acquisition of shares follows the example in the new English Companies Act 2006 (sections 677 to 683), you are asked to consider if –

- (a) this is desirable and
- (b) whether you consider the risk referred to in 5.4.3 above is likely and if so, whether it would be adequately addressed if it is possible to include a saving provision in the commencement order?

In particular, those who suggested this change should consider carefully whether it achieves what they desired and if not, suggest what revisions they consider necessary.

#### Question 11

Do you have any comments on the proposal on the proposed amendment to the Limited Liabilities Companies Act 1996 which will remove the automatic default to winding up if no notice of the intention to continue the LLC is filed on the death or resignation of one of the members?

#### Question 12

Do you have any objection to the addition of Singapore registered Public Accountants who audit companies with securities listed on the Singapore Stock Exchange (which has stringent rules regarding financial disclosures) by amendment to the current s.14 CA82? The Bill will in due course substitute new auditor qualification provisions including a power for the Commission to authorise other auditors who do not meet the qualification criteria, on a case by case basis.

#### Question 13

Comments are invited on this proposal which is aimed at ensuring that the transparency in respect of significant matters in the affairs of a 1931 Act company are available for public inspection should extend to a unanimous resolution to dispense with the audit of its financial statements. The form of the amendment to the Audit Exemption Regulations 2007 has not yet been decided but we are taking this opportunity to gauge opinion on the proposal.