

Issued on: 31 July 2020

## **Companies (Corporate Rescue) Bill**

### **Legislative Proposals to introduce a statutory corporate rescue procedure and insolvent trading provisions**

This is in response to the email dated 6 July 2020 from the Financial Services and the Treasury Bureau on the latest legislative proposals (as of June 2020) to introduce a statutory corporate rescue procedure and insolvent trading provisions. Here, we limit our response to those issues pertaining to the statutory defence for insolvent trading provisions.

We will be happy to discuss further details with FSTB.

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#### **The defence for insolvent trading provisions: what duty of care?**

We previously commented on the proposed statutory defence in our 15 May 2018 statement in response to the 12 April 2018 letter from the FSTB, and the 3 August 2016 statement in response to the 10 June 2016 letter from the FSTB. On substance, we do not see material improvements from the proposals in April 2018 and June 2016.

We stand by the views and comments in our 3 August 2016 statement. To the extent the defence calls on directors to exercise duty of care, skill and diligence, the law should give and provide the full context for understanding that duty. Along with the Companies (Corporate Rescue) Bill, there should also be an ancillary amendment to the s465(4) of the Companies Ordinance to emphasise that the duty

“shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the duty.”

#### **The scope of the statutory defence: improve on it to make for a safe harbour**

Since the time the Advisory Group on Modernization of Corporate Insolvency Law convened to discuss the subject matter and since the time the basic elements of the legislative proposals were put together, certain things have changed.

Australia has some of the toughest laws on insolvent trading, but since September 2017 Australia has turned around to offer a safe harbour for directors to attempt turnarounds.

HKIoD thinks the scope, purpose and rationale of the safe harbour have good merits for Hong Kong to learn from. We urge the FSTB to revisit the matter and to further improve the defence to actually give directors acting responsibly the necessary leeway to remain in control and try to turn things around.

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