

LEGISLATIVE COUNCIL BRIEF

Companies Ordinance (Cap. 32)

COMPANIES ORDINANCE (EXEMPTION OF COMPANIES AND PROSPECTUSES FROM COMPLIANCE WITH PROVISIONS) (AMENDMENT) NOTICE 2002

INTRODUCTION

Pursuant to sections 38A and 342A of the Companies Ordinance (Cap. 32) (CO), the Securities and Futures Commission (SFC) has made the Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) (Amendment) Notice 2002 (the Notice) at the **Annex**.

BACKGROUND

The SFO

2. The Notice would replace the existing notice gazetted on 12 February 1993 which exempts any mutual fund corporation authorized by the SFC under section 15(1) of the Securities Ordinance (Cap. 333) (SO) from compliance with the requirements of sections 38(1), 38(3), 342(1) and 342(3) of the CO. The Notice is necessary as the SO will be repealed when the Securities and Futures Ordinance (Cap. 571) (SFO) comes into operation. At that juncture the power of the SFC to authorize mutual fund corporations under the SO will be subsumed under its broader power to authorize any type of collective investment scheme under the SFO.

3. The SFO was enacted in March 2002. It consolidates and modernizes ten existing ordinances governing the securities and futures markets into a composite piece of legislation to keep the regulatory regime on a par with international standards and practices.

4. On 22 February 2002, the House Committee of the Legislative Council established the Subcommittee on Draft Subsidiary Legislation to be made under the SFO (the Subcommittee) to study the subsidiary legislation necessary for commencing the SFO. From March 2002 to October 2002, the Subcommittee held 12 meetings and considered a total of 37 sets of draft subsidiary legislation, including the

vires to make them. As the Notice under the CO is consequential to the commencement of the SFO, it was submitted to the Subcommittee for information in the interests of transparency and completeness.

THE PROPOSALS

Major policy considerations

5. The intention behind the exemption is to reduce unnecessary compliance burden by minimizing any regulatory overlap. In authorizing a mutual fund corporation under section 104(1) of the SFO, the SFC, having regard to the features of the corporation, will impose conditions regulating, among other matters, the content and language of documents prepared for offering shares in the corporation to the public. Such conditions serve similar regulatory purposes as the requirements under sections 38(1), 38(3), 342(1) and 342(3) of the CO (including the requirements prescribed in Schedule 3 to the CO) which prescribe content and language requirements for prospectuses issued by companies incorporated in or outside Hong Kong in relation to offers of shares in or debentures of such companies to the public. Another consideration is that given the unique nature of mutual fund corporations, a number of requirements under Schedule 3 to the CO (such as items 7 to 9¹) are not appropriate for application to them. As such, the SFC considers that it would be unduly burdensome to require mutual fund corporations

¹ Items 7 to 9 of Schedule 3 to the CO prescribe the following information requirements:

7. Where shares are offered to the public for subscription, particulars as to-
 - (a) the minimum amount which, in the opinion of the directors, must be raised by the issue of those shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters-
 - (i) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;
 - (ii) any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company;
 - (iii) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters;
 - (iv) working capital; but, so long as the general purpose of the issue is clearly stated and the issue is fully underwritten, this sub-paragraph need not be complied with, and
 - (b) the amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided.
8. The date and time of the opening of the subscription lists.
9. The amount payable on application and allotment on each share, and, in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the 2 preceding years, the amount actually allotted, and the amount, if any, paid on the shares so allotted.

authorized under section 104(1) of the SFO to comply with these CO provisions.

THE NOTICE

6. Section 2 of the Notice adds a new section 7 to the Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice (Cap. 32 Sub. Leg. L) to exempt companies which are collective investment schemes authorized by the SFC under section 104(1) of the SFO and prospectuses issued by those companies from compliance with the requirements of sections 38(1), 38(3), 342(1) and 342(3) of the CO, including all the requirements under Schedule 3 to the CO.

PUBLIC CONSULTATION

7. The Notice seeks only to continue the exemption which has been welcomed by market participants since its introduction in 1993. This is a technical amendment with no change in policy so public consultation was not considered necessary. The SFC informed the Standing Committee on Company Law Reform of the Notice on 28 October 2002.

8. A draft of the Notice was submitted to the Subcommittee for information at its meeting held on 20 September 2002. Members did not make any comment on the draft at the meeting.

FINANCIAL AND STAFFING IMPLICATIONS

9. There are no financial or staffing implications for the Government.

COMMENCEMENT DATE

10. The Notice will come into operation on the day appointed for the commencement of the SFO, together with other subsidiary legislation necessary for the commencement. We expect this to take place shortly, after completion of the negative vetting procedure through the Legislative Council and allowing the industry a reasonable period of

time for making necessary adjustments with reference to the subsidiary legislation. We aim to announce the target commencement date by the end of 2002.

PUBLICITY

11. The Notice will be published in the Gazette on 6 December 2002. The SFC will issue a press release on the same day.

ENQUIRIES

12. For any enquiries on this brief, please contact Mr. Gary Ho of the Investment Products Department of the SFC at 2240 9591.

The Securities and Futures Commission
6 December 2002

**COMPANIES ORDINANCE (EXEMPTION OF COMPANIES AND PROSPECTUSES
FROM COMPLIANCE WITH PROVISIONS) (AMENDMENT)
NOTICE 2002**

(Made by the Securities and Futures Commission under sections 38A
and 342A of the Companies Ordinance (Cap. 32))

1. Commencement

This Notice shall come into operation on the day appointed for the commencement of the Securities and Futures Ordinance (Cap. 571).

2. Section added

The Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice (Cap. 32 sub. leg.) is amended by adding -

"7. Exemptions for companies that are collective investment schemes

(1) Where -

(a) it is proposed to offer any shares in or debentures of a company incorporated under the Ordinance by a prospectus issued generally;

and

(b) the company is a collective investment scheme authorized by the Commission under section 104(1) of the Securities and Futures Ordinance (Cap. 571),

the company and the prospectus are exempted from compliance with the requirements of section 38(1) and (3) of the Ordinance.

(2) Where -

- (a) it is proposed to offer any shares in or debentures of a company incorporated outside Hong Kong by a prospectus issued generally; and
- (b) the company is a collective investment scheme authorized by the Commission under section 104(1) of the Securities and Futures Ordinance (Cap. 571),

the company and the prospectus are exempted from compliance with the requirements of section 342(1) and (3) of the Ordinance.

(3) For the purposes of subsections (1) and (2), the exemption in respect of section 38(1) and (3) or 342(1) and (3) (as the case may be) of the Ordinance under this section has effect with regard to all of the requirements of the Third Schedule to the Ordinance.

(4) In this section, "collective investment scheme" (集體投資計劃) has the meaning assigned to it by section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571).".


Andrew Len Tao SHENG

Chairman,
Securities and Futures Commission

2nd December, 2002

Explanatory Note

This Notice is made by the Securities and Futures Commission under sections 38A and 342A of the Companies Ordinance (Cap. 32) ("the Ordinance"). It exempts companies which are collective investment schemes authorized by the Commission under section 104(1) of the Securities and Futures Ordinance (Cap. 571) and prospectuses issued by those companies from compliance with the requirements of sections 38(1) and (3) and 342(1) and (3) of the Ordinance, and the requirements of the Third Schedule to the Ordinance.