

LEGISLATIVE COUNCIL BRIEF
COMPANIES ORDINANCE (CAP.32)

**COMPANIES ORDINANCE (EXEMPTION OF COMPANIES AND
PROSPECTUSES FROM COMPLIANCE WITH PROVISIONS)
(AMENDMENT) NOTICE 2004**

INTRODUCTION

1. 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 2004 (“**Amendment Notice**”) at Annex 1.

BACKGROUND AND ARGUMENT

2. Every prospectus offering shares or debentures that is issued, circulated or distributed in Hong Kong must comply with various requirements under the CO. Pursuant to sections 38A and 342A of the CO, the SFC may exempt any class of companies or any class of prospectuses from some of these requirements (namely, those under sections 38(1), 38(3), 42(1), 42(4), 44A(2), 342(1) and 342(3) of the CO) if, having regard to the circumstances, the SFC considers that compliance with any or all of such requirements would be either irrelevant or unduly burdensome in the case of that class.

3. The Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice (Cap. 32L) (“**Notice**”) sets out the class exemptions previously made by the SFC pursuant to sections 38A and 342A of the CO.

4. The Amendment Notice repeals sections 3 and 7 of the Notice as those sections will be superseded by and become redundant once Schedule 1 of the

Companies (Amendment) Ordinance 2004 (“**Amendment Ordinance**”), which was gazetted on 23 July 2004, comes into operation.

5. Section 3 of the Notice provides that where any shares or debentures in a Hong Kong incorporated company are proposed to be offered by a prospectus issued generally, then the company and the prospectus are exempted from compliance with the requirements of sections 38(1), 38(3) and 44A(2) of the CO if the offer is made only to “*persons whose ordinary business is to buy or sell shares or debentures whether as principal or agent*”.

6. Section 7 of the Notice provides that where any shares or debentures in a company, whether incorporated in Hong Kong or elsewhere, are proposed to be offered by a prospectus issued generally and the company is a collective investment scheme authorized by the SFC under section 104(1) of the Securities and Futures Ordinance (“**SFO**”), then the company and the prospectus are exempted from compliance with the requirements of sections 38(1) and 38(3) of the CO (in the case of Hong Kong incorporated companies) or sections 342(1) and 342(3) of the CO (in the case of overseas incorporated companies).

7. Schedule 1 of the Amendment Ordinance amends the definition of “*prospectus*” in section 2(1) of the CO so that it excludes all documents containing or relating to any of the twelve categories of offers specified in the new Seventeenth Schedule to the CO. These categories include –

- (1) offers to “*professional investors*” – which is defined to include a wide and specific range of investors who are in the business of buying and selling shares or debentures or hold portfolios of not less than HK\$8 million (and the full text of the definition is set out at Annex 2); and
- (2) offers by collective investment schemes authorized by the SFC where the issue of each advertisement, invitation or document has been authorized by the SFC under section 105 of the SFO.

Documents relating to such offers will therefore be exempted from the entire prospectus regime and all prospectus-related requirements under the CO once Schedule 1 of the Amendment Ordinance comes into operation.

8. There is therefore an overlap between the exclusions under Schedule 1 of the Amendment Ordinance and the exemptions under sections 3 and 7 of the Notice. Moreover, the exclusions under Schedule 1 of the Amendment Ordinance are wider than the exemptions under sections 3 and 7 of the Notice in that they apply to all prospectus-related requirements under the CO.

9. It follows that the existing class exemptions under sections 3 and 7 of the Notice will be superseded and therefore become redundant upon the commencement of Schedule 1 of the Amendment Ordinance. Their repeal avoids unnecessary duplication in this area of law.

THE AMENDMENT NOTICE

10. Section 2 of the Amendment Notice repeals section 3 of the Notice. Section 3 of the Amendment Notice repeals section 7 of the Notice.

PUBLIC CONSULTATION

11. The SFC has conducted a public consultation on the proposed repeal. Only four responses were received and all expressed support for the proposed repeal.

FINANCIAL AND STAFFING IMPLICATIONS

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

COMMENCEMENT DATE

13. The Amendment Notice shall come into operation on 7 January 2005.

PUBLICITY

14. The Amendment Notice will be published in the Gazette on 12 November 2004. The SFC will issue a press release on the same day to publicise the repeal.

ENQUIRIES

15. For any enquiries on this brief, please contact Ms Sonia Leung, Senior Manager of the Corporate Finance Division of the SFC at 2283 6170 or Ms Lisa Chen, Counsel of the Legal Services Division of the SFC at 2283 6183.

Securities and Futures Commission

8 November 2004

**COMPANIES ORDINANCE (EXEMPTION OF COMPANIES AND
PROSPECTUSES FROM COMPLIANCE WITH PROVISIONS)
(AMENDMENT) NOTICE 2004**

(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 7 January 2005.

2. Exemptions in relation to offers made to certain persons

Section 3 of the Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice (Cap. 32 sub. leg. L) is repealed.

3. Exemptions for companies that are collective investment schemes

Section 7 is repealed.

Andrew Len Tao SHENG
Chairman,
Securities and Futures Commission

8 November 2004

Explanatory Note

This Notice is made by the Securities and Futures Commission under sections 38A and 342A of the Companies Ordinance (Cap. 32) and repeals sections 3 (exemptions in relation to offers made to certain persons) and 7 (exemptions for companies that are collective investment schemes) of the Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice (Cap. 32 sub. leg. L).

Definition of “professional investor”

professional investor" (專業投資者) means –

- (a) any recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company, or any person authorized to provide automated trading services under section 95(2) of this Ordinance;
- (b) any intermediary, or any other person carrying on the business of the provision of investment services and regulated under the law of any place outside Hong Kong;
- (c) any authorized financial institution, or any bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong;
- (d) any insurer authorized under the Insurance Companies Ordinance (Cap 41), or any other person carrying on insurance business and regulated under the law of any place outside Hong Kong;
- (e) any scheme which –
 - (i) is a collective investment scheme authorized under section 104 of this Ordinance; or
 - (ii) is similarly constituted under the law of any place outside Hong Kong and, if it is regulated under the law of such place, is permitted to be operated under the law of such place,
 or any person by whom any such scheme is operated;
- (f) any registered scheme as defined in section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap 485), or its constituent fund as defined in section 2 of the Mandatory Provident Fund Schemes (General) Regulation (Cap 485 sub. leg. A), or any person who, in relation to any such registered scheme, is an approved trustee or service provider as defined in section 2(1) of that Ordinance or who is an investment manager of any such registered scheme or constituent fund;
- (g) any scheme which –
 - (i) is a registered scheme as defined in section 2(1) of the Occupational Retirement Schemes Ordinance (Cap 426); or
 - (ii) is an offshore scheme as defined in section 2(1) of that Ordinance and, if it is regulated under the law of the place in which it is domiciled, is permitted to be operated under the law of such place,
 or any person who, in relation to any such scheme, is an administrator as defined in section 2(1) of that Ordinance;
- (h) any government (other than a municipal government authority), any institution which performs the functions of a central bank, or any multilateral agency;
- (i) except for the purposes of Schedule 5 to this Ordinance, any corporation which is –
 - (i) a wholly owned subsidiary of –
 - (A) an intermediary, or any other person carrying on the business of the provision of investment services and regulated under the law of any place outside Hong Kong; or

- (B) an authorized financial institution, or any bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong;
- (ii) a holding company which holds all the issued share capital of –
 - (A) an intermediary, or any other person carrying on the business of the provision of investment services and regulated under the law of any place outside Hong Kong; or
 - (B) an authorized financial institution, or any bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong; or
- (iii) any other wholly owned subsidiary of a holding company referred to in subparagraph (ii); or
- (j) any person of a class which is prescribed by rules made under section 397 of this Ordinance for the purposes of this paragraph as within the meaning of this definition for the purposes of the provisions of this Ordinance, or to the extent that it is prescribed by rules so made as within the meaning of this definition for the purposes of any provision of this Ordinance; (The Securities and Futures (Professional Investor) Rules have been made for the purpose of paragraph (j) of the definition of “professional investor”. These prescribe further categories of persons as professional investors, each defined by reference to the size of their portfolio.)