

Guidelines on using a "dual prospectus" structure to conduct programme offers of shares or debentures requiring a prospectus under the Companies Ordinance (Cap. 32)

1. INTRODUCTION

- 1.01 Pursuant to (a) section 4(2) of the Securities and Futures Commission Ordinance and (b) section 399 of the Securities and Futures Ordinance and section 32 of the Interpretation and General Clauses Ordinance, the Securities and Futures Commission (the "Commission") is empowered to issue guidelines indicating the manner in which, in the absence of any particular consideration or circumstance, it proposes to perform its functions. These guidelines, issued under (a) section 4(2) of the Securities and Futures Commission Ordinance and (b) section 399 of the Securities and Futures Ordinance and section 32 of the Interpretation and General Clauses Ordinance, and intended for the assistance of issuers of shares or debentures and their professional advisers, outline the Commission's proposed regulatory approach with respect to offerings of shares or debentures on a "repeat" or "programme" basis using separately registered programme and issue prospectuses.
- 1.02 Offerings of shares and debentures to the public are interest rate and market sensitive and must be launched to coincide with suitable market conditions. The law in Hong Kong relating to public offers of shares and debentures contemplates that each such offer is made with a prospectus that complies with certain content requirements, including those described in the Third Schedule to the Companies Ordinance (the "Ordinance") (unless specifically exempted by the Commission pursuant to section 38A or 342A of the Ordinance) and satisfies certain registration and other procedural formalities. In particular, each registration of a prospectus with the Registrar of Companies (the "Registrar") requires (i) the provision of a letter by any expert named in the prospectus consenting to the issue thereof, and (ii) the delivery of material contracts to the Registrar.

The legislative framework does not expressly provide for repeat or programme offering structures and hence makes no concession for offers conducted on a basis where prospectuses may be issued more frequently or within the ordinary course of a company's business (and in particular by the financial industry). Consequently, although it is technically possible to divide a prospectus into two or more parts, comprising, for example, (i) a programme section (containing financial and other generic information on the issuer but not the terms on which shares or debentures are to be offered in any proposed offering), (ii) an addendum to the programme section (containing updated information, including interim financial statements, when they become available) and (iii) an issue section issued in the context of a particular offer (containing specific information on the shares or debentures being offered at that time, and bringing up to date as necessary all the information in the programme section and any addendum), there is little advantage in doing so because the law does not naturally accommodate the registration of a prospectus in two or more parts where the constituent parts are registered on different dates.

- 1.03 Consequently, an issuer of shares or debentures intending to issue a prospectus in separate sections must re-register the programme section (and any addendum) with the Registrar every time an issue section is issued for an offering. Re-registration of the programme section with the Registrar requires each of formalities (i) and (ii) referred to in paragraph 1.02 above to be repeated without accommodation being given for the fact that the programme section has already been registered on a previous occasion. The repeat registration of the same documents places a considerable administrative burden on the issuer and provides no obvious additional regulatory benefit.
- 1.04 These guidelines describe an alternative "dual prospectus" approach to the structuring of programme offer documentation and the proposed regulatory treatment for issuers of shares or debentures wishing to use that approach. The proposed "dual prospectus" structure contemplates the separate registration of the programme section and issue section described above, but each as a separate and stand-alone prospectus within the meaning of the Ordinance and fulfilling the prospectus requirements under that Ordinance, hereinafter referred to as "the programme prospectus" and the "issue prospectus". Under the proposed structure, the programme prospectus will not have to be re-registered upon each filing of an issue prospectus. While the structure contemplates treating the programme prospectus (and any addendum) and the issue prospectus as separate prospectuses each registered on a stand-alone basis as if they were entirely independent of each other, it recognises that in practice each constituent prospectus used in connection with an issue is dependent on the others and forms only part of the offering documentation. To ensure investors receive all necessary information relating to the offer, a condition will be attached (to the relevant certificate of exemption issued pursuant to section 38A(1) or 342A(1) of the Ordinance) prohibiting the distribution of any constituent prospectus without the other constituent prospectuses accompanying it or being readily accessible at the same location or at another acceptable location.
- 1.05 These guidelines do not have the force of law and should not be interpreted in any manner that would conflict with the provisions of any applicable law or regulatory requirements. The guidelines represent a regulatory policy position taken by the Commission for market development purposes within what it understands to be the boundaries of applicable law. The guidelines should not be construed as legal advice or as a definitive interpretation of the relevant statutory provisions. Issuers should seek legal advice if they are in any doubt as to the relevant statutory provisions or as to whether their particular circumstances or proposals would breach applicable legal or regulatory requirements.

2. APPLICATION

- 2.01 These guidelines apply to offerings on a programme basis of shares or debentures where a prospectus is required to be registered by the Registrar.

- 2.02 In cases involving a programme offering of shares or debentures to be listed on the Main Board or Growth Enterprise Market of The Stock Exchange of Hong Kong Limited (the "Exchange"), authorisation for registration of the prospectus is administered by the Exchange. In cases not involving such a listing the Commission administers the authorisation for registration. The power to issue a certificate of exemption pursuant to section 38A or 342A of the Ordinance is vested in the Commission whether the prospectus relates to listed or unlisted shares or debentures. Accordingly, any programme offering proposing to use the "dual prospectus" structure will require an application for exemption to be made to the Commission. In the case of a listed offering, current administrative procedures agreed between the Exchange and the Commission provide that, where a certificate of exemption is requested by the issuer, a recommendation for the grant of that exemption will be made by the Exchange to the Commission prior to any certificate of exemption being granted by the Commission.
- 2.03 These guidelines may describe only the way in which the Commission proposes to exercise its own functions. Accordingly, the guidelines apply where the Commission administers authorisation for registration. Practitioners are reminded that in the case of listed shares or debentures these guidelines are subject to Exchange listing rules and practice from time to time. The Exchange has nevertheless indicated that it supports these guidelines and proposes to apply equivalent practices when the Exchange administers authorisation for registration and makes recommendations to the Commission for the grant of exemptions under section 38A or 342A of the Ordinance. Issuers of shares or debentures to be listed on the Exchange wishing to avail themselves of these guidelines should inform the Exchange at the earliest opportunity.

3. FEATURES OF THE "DUAL PROSPECTUS" STRUCTURE

- 3.01 The Commission considers that a programme offering which uses a "dual prospectus" structure with the characteristics described in paragraph 3.02 can be accommodated within the prospectus regime in Parts II and XII of the Ordinance provided that the issuer (i) makes an application pursuant to section 38A or section 342A of the Ordinance for a certificate of exemption in respect of each of the constituent prospectuses, (ii) satisfies the Commission that it is appropriate in the circumstances of the case to grant relevant exemptions from section 38(1) or 342(1) of the Ordinance on the statutory grounds of "undue burden" or "irrelevance", and (iii) accepts the need to ensure investors are not prejudiced by the issuer's offering structure (which may include imposing conditions to the certificate of exemption relating to one or more of the constituent prospectuses contemplated by the structure).
- 3.02 The "dual prospectus" structure has the following principal characteristics:
- (a) The programme prospectus, any addendum to the programme prospectus, and the issue prospectus would be separately authorised for registration by the Commission (in the case of an offering of shares or debentures

not proposed to be listed) or by the Exchange (in the case of an offering of shares or debentures proposed to be listed) and registered by the Registrar as prospectuses in their own right in accordance with the prospectus regime in the Ordinance. The authorisation and registration formalities will apply to each constituent prospectus viewed on a stand-alone basis. Thus, each constituent prospectus (accompanied, where applicable, by any documents required to be registered with it by reason of section 38D or 342C of the Ordinance) will need to be registered only once during the life of the programme.

- (b) The “dual prospectus” structure relies upon the proposition that the constituent programme and issue prospectuses (with addendum as applicable) will be read together. It follows that it is appropriate to treat the constituent prospectuses collectively when an assessment is being made as to adequacy of disclosure generally and as to compliance with the content requirements for prospectuses prescribed by sections 38(1) and 342(1) of the Ordinance specifically. As each constituent prospectus will be treated as a prospectus in its own right, the issuer will need to apply to the Commission for a certificate of exemption for those prescribed content requirements which do not appear in that constituent prospectus.
- (c) While the Commission (and the Exchange, in the case of listed offerings) may for investor protection reasons in a particular case express a view about where specified particulars should be located within a prospectus, it is primarily a matter for the issuer to determine what information will go into each constituent prospectus. Recent experience derived from the documentation used for structured products sold in Hong Kong suggests that issuers tend to adopt a broadly uniform approach when offering a structured product using split “base” and “supplemental” documentation. Using this as an example, the programme prospectus (and, where applicable, any addenda) would normally contain information about the issuer and the programme which is not offer-specific - for example, a description of the issuer and its business, its financial statements and other relevant financial information, risk factors, terms and conditions of the issuance programme, Hong Kong taxation treatment of the shares or debentures to be offered under the programme, and information on purchase or subscription arrangements, market making, transfer, settlement, and custody matters. The issue prospectus would normally contain offer-specific information - for example, details of the relevant issue, timetable for the offering, and specific application procedures. Having regard to the disclosure standard contained in paragraph 3 of the Third Schedule (see sub-paragraph (e) below), the issue prospectus would also provide any remaining particulars required to be given to potential investors and bring up-to-date the programme prospectus (by revising or supplementing any of the business or financial information contained in that document) to the date of the issue prospectus. It is implicit in a programme structure that an offer of shares or debentures will be made from time to time. Furthermore, some programmes have a

reverse enquiry feature allowing potential investors to make to the issuer proposals for shares or debentures to be issued under the programme. For both these reasons, the Commission considers that programme prospectuses and any addenda are “calculated to invite offers” for shares or debentures and hence registrable on a stand-alone basis in advance of an issue.

- (d) As the programme prospectus (and, where applicable, any addenda) would normally contain only generic information about the issuer, the issuer would have to apply to the Commission for exemption under section 38A(1) or section 342A(1) from, among others, those content requirements in the Third Schedule relating to details about a specific offer. Likewise, as the issue prospectus would normally contain only offer-specific information, the issuer would have to apply to the Commission for exemption from, among others, those content requirements in the Third Schedule relating to general information about the issuer and the programme.
- (e) As mentioned in sub-paragraph (c) above, one function of the issue prospectus is to bring the programme prospectus up-to-date to the date of the current offer. The information provided to investors at the time of an offering will need to satisfy the content requirements of the Ordinance as at that date. Paragraph 3 of the Third Schedule to the Ordinance requires that the prospectus shall set out “*sufficient particulars and information to enable a reasonable person to form as a result thereof a valid and justifiable opinion of the shares or debentures and the financial condition and profitability of the company at the time of the issue of the prospectus*”. While it may be entirely appropriate for an issuer to apply for an exemption from the paragraph 3 requirement in relation to the programme prospectus (particularly where that document is not designed to include all the relevant information), it will not be appropriate to apply for one in relation to the issue prospectus (since, at the time of issue of that document, the constituent prospectuses must collectively satisfy the paragraph 3 requirement), and the Commission cannot foresee any circumstance where it would grant one.
- (f) The issuer should not overwhelm or confuse potential investors with documentation describing changes to information contained in the programme prospectus. Before each new offering the issuer should consider carefully whether it would be better to revise and republish the programme prospectus rather than provide particulars of changes in an addendum or in the issue prospectus. The scale or significance of the revisions or updating required will influence this decision. Unless the Commission is satisfied that there are sound reasons for an exception to be made, the programme prospectus should not normally have a validity period of more than 12 months and the issuer should issue a new programme prospectus ahead of any offer made following the publication of the issuer’s latest annual report and accounts.

- (g) It should be clear on the face of the issue prospectus that the offering is made on the basis of information contained in both the issue prospectus and the programme prospectus (and where applicable, any addendum). Thus, the issue prospectus and any application form must include a warning statement that the programme prospectus (and any addendum) form a constituent part of the offering documentation and potential investors should read them for further details about the issuer and the programme concerned. The issue prospectus must state that the directors take responsibility for the contents of the constituent prospectuses and that in the context of the shares or debentures being issued such documents collectively satisfy the prospectus requirements of the Ordinance (unless exempted by the Commission). The issue prospectus should list the exemptions granted by the Commission for the prospectuses collectively.

4. APPLICATION FOR AN EXEMPTION

- 4.01 Pursuant to section 38A(1) or 342A(1) of the Ordinance (as the case may be) an applicant may request the Commission to grant an exemption from section 38(1) or section 342(1) of the Ordinance. It is assumed that in respect of a particular programme or issue prospectus forming part of the "dual prospectus" structure, various exemptions from relevant content requirements in section 38(1) or 342(1) of the Ordinance and more specifically from the Third Schedule to the Ordinance will be required. The Commission anticipates that Commission staff will be able to grant these applications as a matter of course to the extent that the exempted contents will be found in another constituent prospectus.
- 4.02 The application for exemption should be directed to the Corporate Finance Division of the Commission. When deciding what matters to include in its written application, the applicant should have regard to the statutory grounds on which exemptions may be granted (namely that a particular requirement is "irrelevant" or "unduly burdensome") set out in section 38A or section 342A of the Ordinance (as the case may be) as well as these guidelines. Where a particular content requirement is absent in one constituent prospectus because it will be included in another constituent prospectus, the application should make this clear. In such a case, the statutory ground for granting the exemption should be that the inclusion of the information in question in the relevant prospectus is irrelevant on the basis that it will be included in another prospectus to be made available with that prospectus. The issuer will need to satisfy the Commission (and the Exchange, in the case of listed offerings) as to the proposed destination of each of the prescribed statutory content requirements (unless exempted pursuant to section 38A or 342A, as the case may be) within the package forming the offer documentation. It may be necessary for issuers to produce a sample of the proposed format and contents of each constituent prospectus before the registration of any one of them can be authorised.

- 4.03 The Commission may request additional information or make such enquiries as it considers appropriate when considering an application for exemptions under the “dual prospectus” structure. Exemptions requested will be considered on a case-by-case basis and exemptions granted in any particular instance should not be regarded as a precedent for other cases.

5. CONDITIONS AND OTHER SAFEGUARDS

- 5.01 There is no requirement that the “dual prospectus” structure should be adopted for offerings of shares or debentures; it is for each issuer to decide whether the structure will suit its proposed offering. In general terms, the Commission expects to handle the vetting and authorisation of programme prospectuses and consider the possible grant of any exemptions from the requirements of the Ordinance in much the same way as applies to prospectuses for stand-alone offerings using a single prospectus. However, the Commission recognises that the “dual prospectus” structure has features that give rise to investor protection considerations that do not arise in a conventional offering using a single prospectus. The Commission intends that investors should not be prejudiced by use of the “dual prospectus” structure and will seek to identify and address all areas of potential concern. In particular, the Commission will wish to be satisfied in each case that investors are given ready access to all constituent prospectuses for the offer and are placed in a position where they can make an application on the basis of the information contained in all of them. The Commission will not permit an issuer to seek to avoid or reduce its legal and regulatory obligations to investors merely because, at the issuer’s option, the information concerning an offer is contained in more than one prospectus. Indeed, the Commission would expect an issuer to ensure that such an outcome could not arise.
- 5.02 Sections 38A(1) and 342A(1) of the Ordinance permit the Commission to grant a certificate of exemption subject to such conditions (if any) as it thinks fit. There is no legal requirement that the certificate of exemption should be subject to conditions, and the Commission may be satisfied that an alternative approach will ensure investor protection in a particular case. For example, investor protection concerns of the Commission could be addressed by statements made in the prospectus or in other transaction documentation, or by representations made by the issuer to the Commission. The Commission will look at each case on its own facts when considering what conditions or other investor protection safeguards may be appropriate. Conditions imposed in any particular case will be as specified in the certificate of exemption given in relation to the relevant programme and issue prospectus.
- 5.03 However, it is expected that in all cases involving a “dual prospectus” structure the Commission will impose conditions or provide investor protection safeguards which are designed to address a potential prejudice referred to in paragraph 5.01. Thus, the Commission will seek to ensure that the investor (i) has access to the same information that would have been available if the offering were conducted on a single prospectus basis and (ii) will not be

prejudiced in any claim against the issuer by reason of any feature or consequence of the "dual prospectus" structure which would not arise under a single prospectus structure.

5.04 While conditions or other safeguards to secure availability and accessibility of the constituent parts of the programme documentation will depend on the offering mechanism to be used in the circumstances of the case, and may vary from case to case, they are likely to include the following requirements:

- (a) That the issue prospectus and any application form shall only be made available or distributed to the public if the issuer has made adequate arrangements for the programme prospectus (and any addendum) to be made available with the issue prospectus or accessible by or distributable to a potential investor with ease, free of charge, and as soon as practicable following a request and that such arrangements continue for the duration of the relevant offer period. That distribution of the issue prospectus and any application form at any particular location may only continue for so long as copies of the programme prospectus (and any addendum) are available or distributed at that location or another location readily accessible to the investor from, and to which the investor can be directed by staff at, the first location. That if supplies of the programme prospectus (and any addendum) run out or cease to be available or distributed at that location or at such other location, distribution of the issue prospectus and application form must stop and only resume when copies of the programme prospectus (and any addendum) are again readily available at that location or at such other location.
- (b) That the issue prospectus and any application form shall (i) contain prominent cross-references to the programme prospectus (and any addendum), (ii) state that these other documents are distributed with or have been made available at the same location as, the issue prospectus and application form (if any), or are readily available at another location free of charge during the period that the relevant offer is open for application, and include details of that location, and (iii) state that if in doubt potential investors should ask for details of distribution points at the place where they obtained the issue prospectus.
- (c) That in an offering structure that does not require potential investors to complete an application form issued or prescribed by the issuer of the prospectus, the issuer of the prospectus shall require that all locations at which the issue prospectus is distributed and where application or purchase instructions for the shares or debentures from investors are received shall have administrative procedures in place (i) to inform applicants and other interested persons that the application for or purchase of the shares or debentures referred to in the issue prospectus shall be regarded as having been made on the basis of the constituent prospectuses relating to the offer identified by their respective dates of publication and that they should refer to all such prospectuses, (ii) to

make the constituent prospectuses readily available to potential investors free of charge prior to receipt of application or purchase instructions, or refer them to a location where they may obtain them with ease free of charge, and (iii) to provide that any application or purchase instruction from an investor will not be accepted without obtaining the investor's prior confirmation that he or she has read or had access to the constituent prospectuses.

5.05 The Commission considers that for reasons of transparency and ease of reference, whenever the "dual prospectus" structure is adopted in any offering of shares or debentures, the constituent prospectuses should be available to the public for so long as those shares or debentures continue to exist. It is not the intention of the Commission that the issuer should be required, by this means, to produce an "evergreen" prospectus that must be kept permanently up-to-date irrespective of whether an offering is current. The Commission is of the view that the following methods are acceptable:

- (a) displaying the documentation on the website of the issuer, and, in the case of a listed issue, on the HKEx website; and
- (b) making the documentation available for collection free of charge by anyone who requests the same.

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