

立法會
Legislative Council

LC Paper No. LS18/10-11

**Paper for the House Committee Meeting
on 17 December 2010**

**Further Report by Legal Service Division on
Companies Ordinance (Exemption of Companies and Prospectuses from
Compliance with Provisions) (Amendment) Notice 2010 (L.N. 158)
gazetted on 3 December 2010**

In the report of the Legal Service Division (LSD) for the House Committee meeting on 3 December 2010 on the above Notice (LC Paper No. LS12/10-11), we informed Members that LSD would make a further report after completing scrutiny of L.N. 158.

2. L.N. 158 amends the Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice (Cap. 32 sub. leg. L) (the Exemption Notice) to grant exemption to a class of companies from compliance with the requirements relating to prospectuses for offering of shares or debentures to the public under the Companies Ordinance (Cap. 32). Under the new section 9A of the Exemption Notice, as added by the Notice, a company (whether incorporated in or outside Hong Kong) seeking to conduct a public offering of shares or debentures can issue a paper application form (together with an electronic prospectus) without it being accompanied by a printed form prospectus (mixed media offer), if it complies with certain conditions stipulated in the new section.

3. The new section 9A(7) of the Exemption Notice requires an offeror to publish an announcement suspending the mixed media offer (the suspension announcement) if he knows that any conditions for the mixed media offer will not be satisfied or is not satisfied in relation to the offer. LSD has sought clarification from the Securities and Futures Commission (the Commission) on whether and how the publication of the suspension announcement would affect the offer of the offeror's shares or debentures to the public and applications submitted before its publication.

4. The Commission has since given its reply which is summarized as follows –

- (a) The Exemption Notice operates only to exempt companies in relation to the method of distribution of the application forms, thereby allowing a different mode of distribution. Whether an offeror is able to satisfy the conditions specified in the Exemption Notice will only affect the method of distribution of the printed application forms, rather than the validity of the offer itself;
- (b) accordingly, if an offeror publishes a suspension announcement to suspend the mixed media offer, the offeror may continue to offer its shares or debentures to the public by distributing printed application forms together with printed form prospectuses during the offer period; and
- (c) if a suspension announcement is published, the announcement would not affect the validity of any applications submitted prior to the suspension of a mixed media offer.

5. According to the Commission, to enable those involved in making offers to be aware of the implications of suspension of the mixed media offer, it has provided guidance to the market through the *Frequently Asked Questions Series 13* of the Hong Kong Stock Exchange (*released on 26 November 2010*).

6. The correspondence between LSD and the Commission is at Annexes I and II respectively.

7. In the light of the Commission's clarification set out in paragraph 4 above, we consider that there are no outstanding legal and drafting issues that require follow up actions.

Encl

Prepared by

YICK Wing-kin
Assistant Legal Adviser
Legislative Council Secretariat
14 December 2010

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By Fax (2521 7884)

10 December 2010

Ms Vania CHENG
Senior Counsel of the Legal Services Division
The Securities and Futures Commission
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Hong Kong

Dear Ms CHENG,

Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) (Amendment) Notice 2010 (L.N. 158 of 2010)

We are scrutinising the legal and drafting aspects of the above Notice which amends the Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice (Cap. 32 sub. leg. L) (the Exemption Notice) by adding a new section 9A to the Exemption Notice. We have the following questions relating to the new section 9A for your clarification-

Section 9A(7)

If an offeror has published a suspension announcement under section 9A(7)(a) to suspend the mixed media offer (i.e. distribution of paper application forms together with electronic prospectuses), please clarify whether or not the offeror may continue to offer its shares or debentures to the public by distributing printed application forms together with printed form prospectuses during the offer period. If that is the case, for the avoidance of doubt, would it be desirable to make a provision to clarify this point?

Section 9A(7) and (8)

Please clarify whether the validity of the offer would be affected by the publication of a suspension announcement. If an offeror has published a suspension announcement after the offer period has commenced, and before the suspension announcement is published some applications have already been submitted to the offeror under the "mixed media offer", please clarify whether those applications are valid in the circumstances; or whether the validity of those applications would be determined by whether or not the offeror is able to duly publish a resumption announcement under section 9A(8)(b) during the offer period. Please consider making provisions to deal with the above issues.

To enable us to make a further report to the House Committee meeting on 17 December 2010, it is appreciated that your reply in both languages could reach us as soon as possible, preferably before noon on 14 December 2010.

Yours sincerely,

(YICK Wing-kin)
Assistant Legal Adviser

cc. DoJ (Attn.: Ms Mabel CHEUNG, Sr Govt Counsel
Ms Phyllis POON, Sr Govt Counsel (By Fax: 2845 2215))

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SECURITIES AND FUTURES COMMISSION

證券及期貨事務監察委員會

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14 December 2010

Our Ref: 107/LG/0204/2800/010
Your Ref: LS/S/7/10-11

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Dear Mr. Yick

Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) (Amendment) Notice 2010 (L.N. 158 of 2010)

Thank you for your letter of 10 December 2010 regarding the Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) (Amendment) Notice 2010 (Cap.32 sub leg L) (the **Exemption Notice**). Our responses to the queries that you have raised regarding the new section 9A are set out below:-

Section 9A(7)

If an offeror publishes a suspension announcement under section 9A(7)(a) to suspend the mixed media offer (ie, distribution of paper application forms together with electronic prospectuses), the offeror may continue to offer its shares or debentures to the public by distributing printed application forms together with printed form prospectuses during the offer period. The Exemption Notice operates only to exempt companies in relation to the method of distribution of the printed application forms, thereby allowing a different mode of distribution. If the exemption does not apply, then the position reverts to the usual requirement under the Companies Ordinance of having to distribute printed application forms together with printed form prospectuses.

We do not consider that it is necessary to make a provision to clarify this point. We have covered this issue in HKEx's *Frequently Asked Questions Series 13 (Released on 26 November 2010)* (the **FAQs**) and we therefore believe that those involved in making offers will be aware of the implications of suspension.

In the FAQs, we stated that :-

“When an offeror need to suspend a Mixed Media Offer during the offer period, it must publish a suspension announcement on the HKEx website as soon as possible. The offeror is encouraged to consult the SEHK and/or the SFC as soon as possible on how best to conduct the remaining offer process. The offer can only carry on if it can comply with the Companies Ordinance requirement that



when an offeror issue a printed application form, it must issue the application form with a printed prospectus” (emphasis added).

In addition to the FAQs, we advised at paragraph 89(c) of the *Joint Consultation Conclusions on the Proposal to allow a Companies Ordinance (CO) Offeror to issue a CO Paper Application Form for Shares in or Debentures of a Company to be listed on the SEHK, and a Collective Investment Scheme (CIS) Offeror to supply a CIS Paper Application Form for Interests in an SFC-authorized CIS to be listed on the SEHK, with a Listing Document Displayed on Certain Websites (November 2010)* (the **Consultation Conclusions**) that:-

“...in the event the Mixed Media Offer is suspended, the public offer may proceed provided that CO Paper Application Forms are issued together with Paper Prospectuses”.

Section 9A(7) and (8)

If a suspension announcement is published, this would not affect the validity of any applications submitted prior to the suspension of a mixed media offer. As stated above, the Exemption Notice operates only to exempt companies in relation to the method of distribution of the application forms, thereby allowing a different mode of distribution, ie the printed application form may be distributed with an electronic form prospectus instead of with a printed form prospectus. Whether an issuer is able to comply with the requirements of the Exemption Notice and rely on the exemption affects the method of distribution of the printed application forms, rather than the validity of the offer itself.

Notwithstanding that an issuer cannot comply with the conditions in the Exemption Notice, it can continue with its offer as long it reverts to distributing each printed application form together with a printed form prospectus. In such circumstances, if the issuer were to run out of printed form prospectuses at a certain location, then it would have to cease distribution of printed application forms at that particular location. Investors can continue to submit their completed application forms during the period when the mixed media offer is suspended.

As mentioned above, we have already provided guidance to the market in the FAQs and Consultation Conclusions that, following a suspension, the offer can carry on as long as the offeror issues a printed application form together with a printed form prospectus. We believe that those who are involved in making offers will be aware of the implications of suspension and therefore do not consider that it is necessary to add a provision for clarification.



If you have any further questions or require any additional information, please do not hesitate to contact me.

Yours sincerely

Vania Cheng
Senior Counsel
Legal Services

c.c. DoJ (Attn: Ms. Mable Cheung, Sr Govt Counsel)
Ms. Phyllis Poon, Sr Govt Counsel) by fax : 2845 2215

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