

LEGISLATIVE COUNCIL BRIEF

COMPANIES ORDINANCE (CAP. 32)

COMPANIES ORDINANCE (EXEMPTION OF COMPANIES AND PROSPECTUSES FROM COMPLIANCE WITH PROVISIONS) (AMENDMENT) NOTICE 2010

INTRODUCTION

1. At its meeting on 15 November 2010, pursuant to section 38A and 342A of the Companies Ordinance (Cap.32) (“CO”), the Securities and Futures Commission (the “Commission”) made the Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) (Amendment) Notice 2010 (the “Amendment Notice”) at the Annex. The Commission proposes to grant a class exemption to allow, subject to certain conditions, distribution of paper application forms together with electronic prospectuses (called a “mixed media offer” for short, to reflect that the application form and the prospectus are issued in different mediums – paper and electronic).

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. Sections 38(3) and 342(3) of the CO provide, inter alia, that subject to sections 38A and 342A respectively, it shall not be lawful to issue any form of application for shares in or debentures of a company incorporated under the CO or outside Hong Kong unless the form is issued with a prospectus that complies with the requirements of sections 38 and 342 of the CO respectively. The latter has been interpreted to require the distribution of printed application forms together with printed prospectuses. This has resulted in large wastage of paper as most investors only pick up the application forms but not the prospectus.
3. 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 the requirements under the CO (namely, those under sections 38(1), 38(3), 42(1), 42(4), 342(1) and 342(3) of the CO) if, having regard to the circumstances, the SFC considers that compliance with any or all of the requirements would be either irrelevant or unduly burdensome in the case of that

class. 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.

SUMMARY OF THE PROPOSED CLASS EXEMPTION

4. The proposed exemption will allow companies seeking to conduct a public offering of shares and debentures that will be listed on the SEHK to issue paper application forms (the “Paper Application Forms”) with electronic copies of the relevant prospectus (the “e-prospectus”).
5. A company who wish to issue Paper Application Forms with the e-prospectus must:
 - (a) publish an announcement about the proposed offer with details of the mixed media offer prior to the commencement of the offer period;
 - (b) post the e-prospectus on the HKEx website and on another website, usually the company’s own website, at the start of the offer and on at least one of the websites thereafter;
 - (c) provide at least three copies of the printed prospectus for inspection at every location where the Paper Application Forms are distributed; and
 - (d) provide copies of the printed prospectus, free of charge, at specified locations to all investors who request one.
6. The specified locations comprise:
 - (a) the depository counter of Hong Kong Securities Clearing Company Limited;
 - (b) the offices of the company’s Hong Kong share registrar, sponsor or co-ordinator offices; and
 - (c) the designated branches of the receiving or placing banks (if any).
7. The announcement and the application form must include a statement which notifies investors where they can inspect or obtain a copy of the printed prospectus and access the e-prospectus.
8. To reduce the risk of disrupting the offer process due to website failure, the condition in the Amendment Notice requiring the electronic listing document to be readily accessible has been structured so that it need only be available on either the HKEx or the company’s websites after the commencement of the offer period from 6 a.m. until midnight Mondays to Fridays. In the unlikely event of a failure of both websites during

these hours the mixed media offer only needs to be suspended if the failure lasts for four consecutive hours or more.

9. To ensure the integrity and accessibility of the e-prospectus, the e-prospectus must be:
 - (a) freely viewable, downloadable and printable in separate files or in its entirety;
 - (b) tamper-resistant; and
 - (c) available from the company's homepage or at least within two clicks (i.e., two webpages) from the company's homepage.
10. As it is important investors rely on information in the prospectus, it is a condition of the Amendment Notice that:
 - (a) the webpages displaying the link to the e-prospectus and the e-prospectus itself must not contain any promotional material about the listing applicant or the offer; and
 - (b) a notice be given, upon access to the e-prospectus on the company's website, to remind investors that the offer is made solely on information contained in the prospectus.

THE AMENDMENT NOTICE

11. The Amendment Notice is attached at the Annex. The main provisions of the Amendment Notice are:-
 - (a) Clause 2 amends the Notice and clause 3 adds a new section 9A in the Notice.
 - (b) Section 9A(1) of the Notice provides an exemption from compliance with the requirements of section 38(3) of the CO so that a company incorporated under the CO which will be conducting a public offering of shares or debentures on a recognized exchange company's stock market can issue a Paper Application Form without an accompanying printed prospectus, if it complies with certain conditions.
 - (c) Section 9A(2) of the Notice provides a similar exemption from compliance with the requirements of section 342(3) of the CO for companies incorporated outside Hong Kong, which is also subject to compliance with certain conditions.
 - (d) Section 9A(3) of the Notice sets out the conditions applicable to the exemption, including requiring the offeror to:-
 - (i) make an announcement to the public prior to the commencement of the offer period regarding the mixed media offer;

- (ii) provide copies of the printed prospectus to investors for collection free of charge at specified locations and for inspection at every location where the Paper Application Forms are distributed;
 - (iii) make the e-prospectus readily accessible from both the company's website and the recognized exchange company's website at the commencement of the offer period and thereafter from either of the websites; and
 - (iv) take certain specified measures that are designed to ensure the integrity and accessibility of the e-prospectus.
- (e) Section 9A(4) of the Notice provides that if certain information is included in an announcement in the 5 business days prior to the commencement of the offer period, adequate disclosure is regarded as having been made.
- (f) According to section 9A(5) of the Notice, the condition that the e-prospectus be readily accessible will be regarded as satisfied even if it is not readily accessible from both the company's website and the recognized exchange company's website for a period of less than 4 consecutive hours during the offer period. Section 9A(6) provides that certain hours will not be included in determining the time during which the e-prospectus is not readily accessible.
- (g) Under section 9A(7) of the Notice, if the offeror knows that any of the conditions will not be satisfied after the announcement is published, then it must suspend the mixed media offer and publish a suspension notice. According to section 9A(8), the mixed media offer may proceed once the conditions are again satisfied and the offeror has published a resumption announcement.
- (h) Section 9A(9) and (10) of the Notice set out the interpretation of terms in section 9A.

PUBLIC CONSULTATION

12. In 2008, the Commission and the HKEx consulted the public and published the Joint Consultation Paper 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 to be listed on the SEHK, with a Listing Document Displayed on Certain Websites. The Commission and the HKEx published the consultation conclusion on 26 November 2010. There were a total of 13 responses ranging from an environmental group, professional

associations, market practitioners, law firms and members of the public. The respondents generally supported for the proposal with certain suggestions on the finer details of the proposal.

FINANCIAL AND STAFFING IMPLICATIONS

13. There are no financial or staffing implications for the SFC.

LEGISLATIVE TIMETABLE

14. The legislative timetable is as follows:

Publication in the Gazette	3 December 2010
Tabling in the Legislative Council	8 December 2010

COMMENCEMENT

15. The Amendment Rules will come into operation on 1 February 2011.

PUBLICITY

16. A press release was issued on 26 November 2010. A spokesman will be available to handle media enquiries.

ENQUIRIES

17. Any enquiries on this brief may be addressed to Mr Charles Grieve, Senior Director (at 2840 9207) or Ms Suet Peng Siew, Associate Director (at 2840 9580), both of the Corporate Finance Division of the Commission.

The Securities and Futures Commission

26 November 2010

Companies Ordinance (Exemption of Companies and Prospectuses from
Compliance with Provisions) (Amendment) Notice 2010

Section 1

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**Companies Ordinance (Exemption of Companies and
Prospectuses from Compliance with Provisions)
(Amendment) Notice 2010**

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

1. Commencement

This Notice comes into operation on 1 February 2011.

**2. Companies Ordinance (Exemption of Companies and
Prospectuses from Compliance with Provisions) Notice
amended**

The Companies Ordinance (Exemption of Companies and
Prospectuses from Compliance with Provisions) Notice (Cap. 32
sub. leg. L) is amended as set out in section 3.

3. Section 9A added

After section 9—

Add

**“9A. Exemptions from requirement to issue form of application
for shares or debentures with prospectus**

(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;
- (b) the shares or debentures have been approved by a recognized exchange company for listing on a stock market it operates; and

- (c) a form of application for the shares or debentures in printed form is issued,
then, subject to the conditions specified in subsection (3), the offeror is exempted from compliance with the requirements of section 38(3) of the Ordinance to the extent that the offeror may issue the printed application form without it being accompanied by a printed form prospectus relating to the offer.
- (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;
 - (b) the shares or debentures have been approved by a recognized exchange company for listing on a stock market it operates; and
 - (c) a form of application for the shares or debentures in printed form is issued,
then, subject to the conditions specified in subsection (3), the offeror is exempted from compliance with the requirements of section 342(3) of the Ordinance to the extent that the offeror may issue the printed application form without it being accompanied by a printed form prospectus relating to the offer.
- (3) The conditions referred to in subsections (1) and (2) are—
 - (a) during the period of 5 business days prior to the commencement of the offer period, adequate disclosure is made to the public that a printed application form will be issued without it being accompanied by a printed form prospectus relating to the offer;

- (b) throughout the offer period, copies of the printed form prospectus are available for collection at specified locations, free of charge, upon request by any member of the public;
- (c) throughout the offer period, at least 3 copies of the printed form prospectus are available for inspection at every location where the printed application forms are distributed;
- (d) throughout the offer period, the electronic form prospectus relating to the offer is in a form which is reasonably tamper-resistant;
- (e) the electronic form prospectus is readily accessible by the public—
 - (i) at the commencement of the offer period, from both the company's designated website and the recognized exchange company's designated website; and
 - (ii) at any time during the offer period after its commencement, subject to subsection (5), from either the company's designated website or the recognized exchange company's designated website;
- (f) the electronic form prospectus that is on the company's designated website is directly linked from—
 - (i) the homepage of that designated website; or
 - (ii) another webpage within that designated website that is directly linked from the homepage;
- (g) the webpage (other than the homepage) within the company's designated website displaying—
 - (i) the link to the electronic form prospectus; or

- (ii) the electronic form prospectus,
does not contain any promotional information
about the offeror or the offer;
- (h) when the electronic form prospectus is accessed
from the company's designated website, a notice is
to be displayed stating that the securities are being
offered solely on the basis of the information
provided in the prospectus;
- (i) the typeface, format and contents of the electronic
form prospectus are identical to those of the printed
form prospectus;
- (j) each of the electronic form prospectus and the
printed form prospectus contains, in a prominent
place on the face of the prospectus, a statement in a
clear and legible form—
 - (i) that the contents of the electronic form
prospectus and the printed form prospectus
are identical;
 - (ii) that throughout the offer period, copies of the
printed form prospectus are available for
collection at specified locations, free of
charge, upon request by any member of the
public;
 - (iii) of the particulars of the specified locations;
and
 - (iv) that throughout the offer period, at least 3
copies of the printed form prospectus are
available for inspection at every location
where the printed application forms are
distributed; and
- (k) the printed application form is to state in a
prominent place—

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- (i) that throughout the offer period, prospective investors may access and download the electronic form prospectus from either the company's designated website or the recognized exchange company's designated website;
 - (ii) the address of each of the designated websites, the place on the website where the electronic form prospectus may be accessed and how that prospectus may be accessed;
 - (iii) that throughout the offer period, copies of the printed form prospectus are available for collection at specified locations, free of charge, upon request by any member of the public;
 - (iv) the particulars of the specified locations;
 - (v) that throughout the offer period, at least 3 copies of the printed form prospectus are available for inspection at every location where the printed application forms are distributed; and
 - (vi) that prospective investors should read the prospectus prior to submitting an application.
- (4) For the purposes of subsection (3)(a), adequate disclosure is regarded as having been made during the period of 5 business days prior to the commencement of the offer period if—
- (a) an announcement is published in accordance with the requirements of the relevant listing rules on at least one of those 5 business days; and
 - (b) the announcement contains the following information—

- (i) that the offeror proposes to offer shares in or debentures of a company by a prospectus issued generally;
- (ii) that the shares or debentures are the subject of an application to a recognized exchange company for listing;
- (iii) that the offeror intends to rely on this section and issue a printed application form for the shares or debentures without it being accompanied by a printed form prospectus relating to the offer;
- (iv) that throughout the offer period, prospective investors may access and download the electronic form prospectus relating to the offer from either the company's designated website or the recognized exchange company's designated website;
- (v) the address of each of the designated websites, the place on the website where the electronic form prospectus may be accessed and how that prospectus may be accessed;
- (vi) that throughout the offer period, copies of the printed form prospectus will be available for collection at specified locations, free of charge, upon request by any member of the public;
- (vii) the particulars of the specified locations; and
- (viii) that throughout the offer period, at least 3 copies of the printed form prospectus will be available for inspection at every location where the printed application forms are distributed.

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- (5) The condition specified in subsection (3)(e)(ii) is regarded as being satisfied even if the electronic form prospectus relating to the offer is, for a period of less than 4 consecutive hours during the offer period after its commencement, not readily accessible by the public from both the company's designated website and the recognized exchange company's designated website.
- (6) For the purposes of subsection (5)—
- (a) an hour, or part of an hour, falling on a Saturday, Sunday or public holiday; or
 - (b) an hour, or part of an hour, between midnight and 6:00 a.m. from Monday to Friday,
- is not included in determining the time during which the electronic form prospectus is not readily accessible by the public.
- (7) If, after the offeror has published an announcement in accordance with subsection (4), the offeror knows that any of the conditions specified in subsection (3) will not be satisfied or is not satisfied in relation to the offer, the offeror—
- (a) must, as soon as practicable, publish a suspension announcement in accordance with the rules of the recognized exchange company; and
 - (b) must not issue the printed application form during the offer period without it being accompanied by a printed form prospectus relating to the offer.
- (8) After the publication of a suspension announcement under subsection (7)(a), the offeror may, during the offer period, issue the printed application form without it being accompanied by a printed form prospectus relating to the offer if—

- (a) each of the conditions specified in subsection (3) has been or is satisfied in relation to the offer; and
- (b) it has published a resumption announcement in accordance with the rules of the recognized exchange company.

(9) In this section—

business day (營業日) means a day other than—

- (a) a public holiday;
- (b) a Saturday; or
- (c) a gale warning day or a black rainstorm warning day as defined in section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1);

designated website (指定網站)—

- (a) in relation to a company, means a website designated by the company for the purposes of this section;
- (b) in relation to a recognized exchange company, means the website of the company designated by it;

offer period (要約期), in relation to an offer of shares in or debentures of a company by a prospectus, means the period during which the shares or debentures are offered;

offeror (要約人), in relation to an offer of shares in or debentures of a company by a prospectus, means any company that makes the offer;

printed application form (印刷本申請表格), in relation to an offer of shares in or debentures of a company by a prospectus, means the form of application for the shares or debentures in printed form;

printed form prospectus (印刷本招股章程) means the printed version of a prospectus offering shares in or debentures of a company which—

- (a) complies with the relevant listing rules of the recognized exchange company concerned;
- (b) complies with—
 - (i) if the company is incorporated under the Ordinance, Part II of the Ordinance; or
 - (ii) if the company is incorporated outside Hong Kong, Part XII of the Ordinance; and
- (c) without limiting paragraph (b), has been registered under—
 - (i) if the company is incorporated under the Ordinance, section 38D of the Ordinance; or
 - (ii) if the company is incorporated outside Hong Kong, section 342C of the Ordinance;

relevant listing rules (有關上市規則) means the listing rules applicable to the stock market referred to in subsection (1)(b) or (2)(b);

relevant stock market (有關證券市場) means the stock market referred to in subsection (1)(b) or (2)(b);

specified locations (指明地點) means—

- (a) for an offer of shares in a company by a prospectus—
 - (i) if any of the shares in the company are already listed on the relevant stock market, the depository counter of Hong Kong Securities Clearing Company Limited, the designated branches of the receiving banks specified in the prospectus, if any, and the place of business of the company's approved share registrar in Hong Kong; or
 - (ii) if none of the shares in the company are listed on the relevant stock market, the depository

counter of Hong Kong Securities Clearing Company Limited, the designated branches of the receiving banks specified in the prospectus, if any, and the principal place of business of the sponsors acting in respect of the application for listing of the shares; or

- (b) for an offer of debentures of a company by a prospectus, the depository counter of Hong Kong Securities Clearing Company Limited, the designated branches of the placing banks specified in the prospectus and the principal place of business of the co-ordinator for the offer specified in the prospectus.
- (10) For the purposes of this section, an electronic form prospectus is readily accessible from a website if it is capable of being viewed, downloaded, retained and printed as a copy from the website in its entirety, whether as a single file or as multiple files, by the public without a password or paying any charges.”.

Alexa Lam
Acting Chief Executive Officer,
Securities and Futures Commission

19 November 2010

Explanatory Note

The Securities and Futures Commission may, by notice published in the Gazette under sections 38A(2) and 342A(2) of the Companies Ordinance (Cap. 32) (*the Ordinance*), exempt any class of companies from the requirements of sections 38(3) and 342(3) of the Ordinance, respectively. Section 38(3) of the Ordinance provides that it is not lawful to issue any form of application for shares in or debentures of a company unless the form is issued with a prospectus that complies with section 38 of the Ordinance. Section 342(3) of the Ordinance provides that it is not lawful to issue any form of application for shares in or debentures of a company incorporated outside Hong Kong unless the form is issued with a prospectus that complies with Part XII of the Ordinance.

2. This Notice exempts an offeror company which issues a printed application form for shares in or debentures of a company (*relevant company*) from the requirement to issue it together with a printed form prospectus relating to the offer. The exemption is subject to certain conditions. One of the conditions is that, at the commencement of the offer period, an electronic form prospectus relating to the offer must be readily accessible by the public from the relevant website of the relevant company and the relevant website of the recognized exchange company which has approved the shares or debentures for listing. During the offer period after its commencement, the electronic form prospectus must also be readily accessible by the public from either of the above websites.