

For discussion
on 8 January 2004

Paper No. CA1-01/04

Bills Committee on Companies (Amendment) Bill 2003

**Schedule 1 – Amendments to the Companies Ordinance
relating to prospectuses**

Offences relating to amendment of prospectuses

BACKGROUND

At the Bills Committee meeting on 18 December 2003, a Member raised the following questions arising from Clauses 8 and 20 concerning offences relating to amendment of prospectuses (i.e. proposed new sections 39A(5), 39B(6), 342CA(5) and 342CB(6)) –

- (a) whether non-compliance with the guidelines published by the Securities and Futures Commission (SFC) under the proposed new sections 39A(2), 39B(3), 342CA(2) and 342CB(3) would result in a breach of the law;
- (b) whether the fines imposed on the above offences were criminal fines;
- (c) whether the level of fines should be stated in the relevant sections, instead of the Twelfth Schedule separately;
- (d) whether the scope of persons (i.e. the company and every officer of the company who is in default) liable to a fine under these sections was too wide;
- (e) whether “reasonable excuse” and “negligence” would be defence; and
- (f) whether conviction record of the above offences would be retained by the Police.

This paper sets out our response to the Member’s questions.

CONSTITUTION OF OFFENCE

2. The proposed new sections 39A(2), 39B(3), 342CA(2) and 342CB(3) empower SFC to publish guidelines in relation to compliance with relevant sections and Schedules. These guidelines are specifically stated **not** to be subsidiary legislation under sections 39A(3), 39B(4), 342CA(3) and 342CB(4), and cannot on their own impose any legal obligations for compliance. They seek to assist issuers in complying with the requirements relating to amendment of prospectuses for the purpose of registration under CO. A failure to comply with the guidelines will **not** render a person liable to any judicial or other proceedings, but may be used as evidence that provisions of the sections have been contravened if it appears to the court to be relevant. Similar power to publish guidelines is also expressly provided for under section 399 of the Securities and Futures Ordinance (Cap. 571) to provide guidance for the furtherance of SFC's regulatory objectives and in relation to the operation of any provision of the Ordinance. In that case, guidelines published by the Commission are also not subsidiary legislation.

NATURE AND PROVISION OF FINE

3. Clause 26 of the Bill proposes amendments to the Twelfth Schedule to the effect that the "mode of prosecution" in respect of offences under sections 39A(5), 39B(6), 342CA(5) and 342CB(6) would be "summary offences"¹, and that the level of fine would be at "level 6", which is \$100,000 according to Schedule 8 to the Criminal Procedure Ordinance (Cap. 221). These arrangements are in line with those applicable to other offences of similar nature under the existing CO.

4. The level of fines is specified in the Twelfth Schedule which provides for the penalties for all other offences under CO, instead of the relevant sections concerning the offences. This arrangement is in line with all other provisions concerning offences under CO.

¹ A summary offence is a less serious offence than an indictable offence for which both the procedures and punishment tend to be less onerous. A summary offence can only be tried in a magistrate court unless tried together with an indictable offence, in which case it may be tried in a district court. The maximum level of fine which may be imposed by a magistrate court is lower than that by a district court.

SCOPE OF PERSONS LIABLE

5. We consider that subjecting the company concerned to a fine for contravention of sections 39A(1), 39B(2), 342CA(1) and 342CB(2) does not have sufficient deterrent effect. Every officer of the company responsible for the contravention (i.e. “officer who is in default” under this Bill) should also be held liable for greater deterrent effect and better investor protection. Under section 351 of CO relating to provision for punishment and offence, “officer who is in default” means any officer of the company, or any person in accordance with whose directions or instructions the directors of the company are accustomed to act, who **knowingly** and **wilfully** authorises or permits the default, refusal or contravention mentioned in such provision. This section has been operating well since 1984 when it was first introduced to CO. We believe that the scope of persons proposed to be liable under sections 39A(5), 39B(6), 342CA(5) and 342CB(6) is appropriate.

DEFENCE

6. Given the defined scope of “officer who is in default” under section 351 of CO as set out in paragraph 5 above, a specific intent is required for securing conviction of offences under sections 39A(5), 39B(6), 342CA(5) and 342CB(6). Mere negligence is not sufficient for securing a conviction. As for “reasonable excuse”, if the court is satisfied that an officer has “knowingly and wilfully” authorised or permitted the default, there will simply be no room of any reasonable excuse. The “reasonable excuse” defence is therefore not necessary in the proposed sections in question.

RECORD OF CONVICTION OF OFFENCES

7. Under section 59 of the Police Force Ordinance (Cap. 232), the Commissioner of Police may retain the identifying particulars of any person who is convicted of any offence. In other words, the discretion to retain such particulars lies with the Commissioner. The primary purpose of maintaining police records on previous offenders is to assist the Police Force in the execution of statutory duties, in particular the prevention and detection of crime. The basic criteria for determining whether an offence is recordable depends on the gravity of the offence and whether under prevailing legal, judicial and social attitudes, it is sufficiently heinous to merit conviction of that offence being recorded. The Police will apply

the same criteria when determining whether the offences under the proposed sections 39A(5), 39B(6), 342CA(5) and 342CB(6) should be recordable.

CONCLUSION

8. In the course of drafting the proposed new sections 39A(5), 39B(6), 342CA(5) and 342CB(6), we have given due consideration to similar provisions in other parts of CO. The drafting of these proposed new sections is consistent with that of other provisions in CO concerning offences of similar nature which are familiar to and well understood by market practitioners.

Financial Services and the Treasury Bureau
Securities and Futures Commission
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