

For discussion on
8 January 2004

Paper No. CA1-02/04

**Bills Committee on
Companies (Amendment) Bill 2003
Schedule 1 – Amendments to the Companies Ordinance
relating to prospectuses
Clause-by-clause examination – additional amendments**

At **Annex** is a mark-up version of those provisions in Schedule 1 of the Companies (Amendment) Bill 2003 (clauses 3, 8, 15, 16, 20, 26 and 27) to which the Administration would like to propose amendments in addition to those proposed in the Paper No. CA1-07/03 issued by the Administration on 21 November 2003. The additional amendments are proposed in response to comments raised at meetings of the Bills Committee on 9 and 18 December 2003 when Members conducted clause-by-clause examination and considered Paper No. CA1-07/03. The additional proposed amendments are bold typed for easy reference. The reasons for the amendments are set out in the footnotes.

Financial Services and the Treasury Bureau
Securities and Futures Commission
2 January 2004

SCHEDULE 1

[ss. 2 & 4 &
Sch. 5]

AMENDMENTS TO THE COMPANIES ORDINANCE
RELATING TO PROSPECTUSES

3. **Exemption of certain persons and
prospectuses from compliance
with certain requirements**

Section 38A is amended -

(a) by repealing subsections (1) and (2) and substituting -

"(1) Where it is proposed to offer any shares in or debentures of a company to the public by a prospectus or class of prospectuses issued generally, there may, on the request of the applicant, and subject to such conditions (if any) as the Commission thinks fit, be issued by the Commission a certificate of exemption from compliance with any or all of the requirements of the relevant provisions if, having regard to the circumstances, the Commission considers that the exemption will not prejudice the interest of the investing public and compliance with any or all of those requirements -

(a) would be irrelevant or unduly
burdensome; or

(b) is otherwise unnecessary or

inappropriate.¹

- ~~(a) compliance with any or all of those requirements would be irrelevant or unduly burdensome; or~~
- ~~(b) the exemption will not prejudice the interest of the investing public.~~

(2) Whether or not a request referred to in subsection (1) has been made, the Commission may, by notice published in the Gazette, and subject to such conditions (if any) as the Commission thinks fit and specified in the notice, exempt -

- (a) any class of companies; or
- (b) any class of prospectuses issued by companies,

from any or all of the requirements of the relevant provisions if, having regard to the circumstances, the Commission considers that the exemption will not prejudice the interest of the investing public and compliance with any or all of those requirements, in the case of that class of companies or prospectuses, as the case may be -

(c) would be irrelevant or unduly

¹ Technical amendment in response to Members' comments raised at Bills Committee meetings on 9 and 18 December 2003. It provides greater clarity that any exemption granted by SFC would not prejudice the interest of the investing public.

burdensome; or

(d) is otherwise unnecessary or
inappropriate.";

~~(c) compliance with any or all of those
requirements would be irrelevant
or unduly burdensome in the case
of that class of companies or
prospectuses, as the case may be,
or~~

~~(d) the exemption will not prejudice
the interest of the investing
public."²~~

(b) by adding -

"(4) In this section, "relevant provisions"
(有關條文) means any of the provisions of -

(a) section 38(1), (1A), (3) or (7),
~~38AA(1),³38D(3), (3A)⁴~~ or (4),
42(1) or (4), 44A(1), (2) or (6)
or 44B(1) or (2); or

(b) Part 1 of the Twentieth Schedule
or Part 1 of the Twenty-first
Schedule.

(5) The Commission may, by order published

² Technical amendment in response to Members' comments. See Note 1 above.

³ Amendment proposed in Paper No. CA1-07/03 issued on 21 November 2003.

⁴ Amendment proposed in Paper No. CA1-07/03 issued on 21 November 2003.

in the Gazette, amend subsection (4).

- (6) The Commission shall publish, by means of an on-line medium, such particulars of exemptions granted, ~~suspended or withdrawn~~⁵ under subsection (1) as it considers appropriate."

(7) Where the Commission proposes to issue

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(a) a notice of exemption under
subsection (2); or

(b) an amendment order under
subsection (5),

it shall publish a draft of the proposed
notice or order, in such manner as it
considers appropriate, for the purpose of
inviting representations on the proposed
notice or order by the public.

(8) Where the Commission issues a notice or
order mentioned in subsection (7) after
a draft is published under that
subsection in relation to the notice or

⁵ Technical amendment for greater clarity in response to the comment of the Assistant Legal Adviser to the Bills Committee via her letters dated 10 September and 25 November 2003. The amendment clarifies that SFC does not have the powers to withdraw or suspend exemptions granted.

order, it shall -

(a) publish, in such manner as it
considers appropriate, an account
setting out in general terms -

(i) the representations made on
the draft; and

(ii) the response of the
Commission to the
representations; and

(b) where the notice or order is
published **issued**⁶ with
modifications which in the opinion
of the Commission result in the
notice or order being
significantly different from the
draft, publish, in such manner as
it considers appropriate, details
of the difference.

(9) Subsections (7) and (8) do not apply if
the Commission considers, in the
circumstances of the case, that -

(a) it is inappropriate or unnecessary
that such subsections should apply;

⁶ Technical amendment for greater clarity in response to the comment of the Assistant Legal Adviser to the Bills Committee via her letter dated 25 November 2003.

or

(b) any delay involved in complying
with such subsections would not
be -

(i) in the interest of the
investing public; or

(ii) in the public interest.".⁷

8. Sections added

The following are added -

"39A. Amendment of prospectus consisting of one document

(1) A prospectus -

(a) consisting of one document; and

(b) to which the provisions of this Part are
applicable,

may only be amended in accordance with the provisions of Part 1
of the Twentieth Schedule.

(2) The Commission may prepare and publish guidelines in
relation to compliance with subsection (1).

(3) Guidelines published under subsection (2) are not
subsidiary legislation.

(4) The provisions of Part 1 of the Twentieth Schedule may
alter the operation of a provision of this Part in relation to
any prospectus, or class of prospectuses, which may be amended

⁷ Amendment proposed in Paper No. CA1-07/03 issued on 21 November 2003.

under subsection (1).

(5) If any company contravenes subsection (1), the company and every officer of the company who is in default shall be liable to a fine.

(6) For the avoidance of doubt, it is hereby declared that this section and Part 1 of the Twentieth Schedule do not apply to a prospectus to which section 39B applies.

39B. Prospectus may consist of more than one document, etc.

(1) A prospectus to which the provisions of this Part are applicable may consist of more than one document in accordance with the provisions of Part 1 of the Twenty-first Schedule.

(2) A prospectus to which subsection (1) applies may only be amended in accordance with the provisions of Part 1 of the Twenty-first Schedule.

(3) The Commission may prepare and publish guidelines in relation to compliance with subsection (1) or (2).

(4) Guidelines published under subsection (3) are not subsidiary legislation.

(5) The provisions of Part 1 of the Twenty-first Schedule may alter the operation of a provision of this Part in relation to any prospectus, or class of prospectuses, which falls within subsection (1) or which may be amended under subsection (2).

(6) If any company contravenes subsection ~~(1) or~~⁸(2), the company and every officer of the company who is in default shall be liable to a fine.

15. Dating of prospectus and particulars to be contained therein

Section 342 is amended -

(a) in subsection (1) -

(i) by adding "or purchase" after
"subscription";

(ii) by adding "(which date shall, unless the contrary is proved, be taken as the date of publication of the prospectus)" after
"dated";

(b) by adding -

"(2A) Every prospectus to which subsection (1) applies must contain a statement specified in Part 2 of the Eighteenth Schedule.";

(c) in subsection (3), -

~~(i)~~ in the proviso -

(A) by repealing "either";

(B) in paragraph (a), by repealing "or" at
the end;

⁸ Technical amendment to clarify that the fine will only be applicable to amendments of a prospectus consisting of more than one document which do not comply with Part 1 of the Twenty-first Schedule.

(C) in paragraph (b), by repealing
"public." and substituting "public;
or";

(D) by adding -

"(c) in connexion with an offer
specified in Part 1 of the
Seventeenth Schedule as read
with the other Parts of that
Schedule.";

~~(ii) by adding after the proviso -~~

~~"If any person acts in
contravention of the provisions of this
subsection, the person shall be liable
to a fine.";~~⁹

(d) by adding -

"(7) It is hereby declared that the
provisions of the Third Schedule applied by this
section are also applied to a guarantor
corporation in relation to an offer or invitation
to the public to subscribe for or purchase
debentures of a company incorporated outside Hong
Kong.

(8) In subsection (7), "guarantor
corporation" (提供擔保的法團), in relation to an

⁹ Technical amendment. Proposed section 342(3)(ii) is obsolete as the existing section 342D already provides for penalty for breaching sections 342 to 342C.

offer or invitation to the public to subscribe for or purchase debentures of a company incorporated outside Hong Kong, means a corporation that guarantees or agrees to guarantee -

- (a) the repayment of any money received or to be received by the company in response to the offer or invitation;
- (b) any other obligations of the company under or in respect of the debentures; or
- (c) in favour of the company any amount -
 - (i) to which the company is entitled; and
 - (ii) receipt of which, as stated in the prospectus concerned, is intended to enable the company to wholly or partly discharge any of its obligations under or in respect of the debentures."

16. **Exemption of certain persons and prospectuses from compliance with certain requirements**

Section 342A is amended -

(a) by repealing subsections (1) and (2) and substituting -

"(1) Where it is proposed to offer any shares in or debentures of a company incorporated outside Hong Kong (whether the company has or has not established a place of business in Hong Kong) to the public by a prospectus or class of prospectuses issued generally, there may, on the request of the applicant, and subject to such conditions (if any) as the Commission thinks fit, be issued by the Commission a certificate of exemption from compliance with any or all of the requirements of the relevant provisions if, having regard to the circumstances, the Commission considers that the exemption will not prejudice the interest of the investing public and compliance with any or all of those requirements -

(a) would be irrelevant or unduly burdensome; or

(b) is otherwise unnecessary or inappropriate.¹⁰

~~(a) compliance with any or all of those requirements would be irrelevant or unduly burdensome; or~~

¹⁰ Technical amendment in response to Members' comments. See Note 1 above.

~~(b) the exemption will not prejudice the interest
of the investing public.~~

(2) Whether or not a request referred to in subsection (1) has been made, the Commission may, by notice published in the Gazette, and subject to such conditions (if any) as the Commission thinks fit and specified in the notice, exempt -

(a) any class of companies; or

(b) any class of prospectuses issued by
companies,

from any or all of the requirements of the relevant provisions if, having regard to the circumstances, the Commission considers that the exemption will not prejudice the interest of the investing public and compliance with any or all of those requirements, in the case of that class of companies or prospectuses, as the case may be -

(c) would be irrelevant or unduly burdensome; or

(d) is otherwise unnecessary or

inappropriate.”¹¹

¹¹ Technical amendment in response to Members' comments. See Note 1 above.

- ~~(c) compliance with any or all of those requirements would be irrelevant or unduly burdensome in the case of that class of companies or prospectuses, as the case may be; or~~
- ~~(d) the exemption will not prejudice the interest of the investing public."~~

(b) by adding -

"(4) In this section, "relevant provisions" (有關條文)

means any of the provisions of -

- (a) section 44A(1), (2) or (6), 44B(1) or (2), 342(1), (2A), (3) or (7), ~~342AB(1)~~¹² or 342C(3), ~~(3A)~~¹³ or (4); or

- (b) Part 2 of the Twentieth Schedule or Part 2 of the Twenty-first Schedule.

(5) The Commission may, by order published in the Gazette, amend subsection (4).

(6) The Commission shall publish, by means of an on-line medium, such particulars of exemptions granted, ~~suspended or withdrawn~~¹⁴ under subsection (1) as it considers appropriate."

(7) Where the Commission proposes to issue -

- (a) a notice of exemption under subsection (2);

¹² Amendment proposed in Paper No. CA1-07/03 issued on 21 November 2003.

¹³ Amendment proposed in Paper No. CA1-07/03 issued on 21 November 2003.

¹⁴ Technical amendment. See Note 5 above.

or

(b) an amendment order under subsection (5),

it shall publish a draft of the proposed notice or order,
in such manner as it considers appropriate, for the
purpose of inviting representations on the proposed
notice or order by the public.

(8) Where the Commission issues a notice or order
mentioned in subsection (7), after a draft is
published under that subsection in relation to the
notice or order, it shall -

(a) publish, in such manner as it considers
appropriate, an account setting out in
general terms -

(i) the representations made on the draft;
and

(ii) the response of the Commission to the
representations; and

(b) where the notice or order is published
issued¹⁵ with modifications which in the
opinion of the Commission result in the
notice or order being significantly
different from the draft, publish, in such

¹⁵ Technical amendment. See Note 6 above.

manner as it considers appropriate, details
of the difference.

(9) Subsections (7) and (8) do not apply if the
Commission considers, in the circumstances of the
case, that -

(a) it is inappropriate or unnecessary that
such subsections should apply; or

(b) any delay involved in complying with such
subsections would not be -

(i) in the interest of the investing public;

or

(ii) in the public interest." ¹⁶

20. Sections added

The following are added -

"342CA. Amendment of prospectus consisting of one document

(1) A prospectus -

(a) consisting of one document; and

(b) to which the provisions of this Part are
applicable,

may only be amended in accordance with the provisions of Part 2
of the Twentieth Schedule.

(2) The Commission may prepare and publish guidelines in

¹⁶ Amendment proposed in Paper No. CA1-07/03 issued on 21 November 2003.

relation to compliance with subsection (1).

(3) Guidelines published under subsection (2) are not subsidiary legislation.

(4) The provisions of Part 2 of the Twentieth Schedule may alter the operation of a provision of this Part in relation to any prospectus, or class of prospectuses, which may be amended under subsection (1).

(5) If any company contravenes subsection (1), the company and every officer of the company who is in default shall be liable to a fine.

(6) For the avoidance of doubt, it is hereby declared that this section and Part 2 of the Twentieth Schedule do not apply to a prospectus to which section 342CB applies.

342CB. Prospectus may consist of more than one document, etc.

(1) A prospectus to which the provisions of this Part are applicable may consist of more than one document in accordance with the provisions of Part 2 of the Twenty-first Schedule.

(2) A prospectus to which subsection (1) applies may only be amended in accordance with the provisions of Part 2 of the Twenty-first Schedule.

(3) The Commission may prepare and publish guidelines in relation to compliance with subsection (1) or (2).

(4) Guidelines published under subsection (3) are not subsidiary legislation.

(5) The provisions of Part 2 of the Twenty-first Schedule

may alter the operation of a provision of this Part in relation to any prospectus, or class of prospectuses, which falls within subsection (1) or which may be amended under subsection (2).

(6) If any company contravenes subsection ~~(1) or~~¹⁷ (2), the company and every officer of the company who is in default shall be liable to a fine.

26. Punishment of offences under this Ordinance

The Twelfth Schedule is amended by adding -

"38AA(4)	Selling, etc. shares,	Summary level 6	-¹⁸
	etc. without		
	prospectus, etc.		
-38D(14)	Failure to provide copy	Summary level 3	-¹⁹
	of document on request		
39A(5)	Amendment of prospectus	Summary level 6	-
	consisting of one		
	document not done in		
	compliance with Part 1		
	of the Twentieth		

¹⁷ Technical amendment. See Note 8 above.

¹⁸ Amendment proposed in Paper No. CA1-07/03 issued on 21 November 2003.

¹⁹ Amendment proposed in Paper No. CA1-07/03 issued on 21 November 2003.

Schedule

39B(6) ~~Prospectus or~~ Summary level 6 -
~~a~~Amendment²⁰ of
 prospectus consisting
 of more than one
 document not done in
 compliance with Part 1
 of the Twenty-first
 Schedule

~~342(3)~~ ~~Issuing a company~~ Summary level 6 -²¹
~~prospectus that does~~
~~not comply with section~~
~~342~~

~~342AB(4)~~ ~~Selling, etc. shares,~~ Summary level 6 -²²
~~etc. without~~
~~prospectus, etc.~~

~~342C(13)~~ ~~Failure to provide copy~~ Summary level 3 -²³
~~of document on request~~

²⁰ Technical amendment for consistency with the wording in relation to offence under section 39A(5) which only concerns amendment of a prospectus.

²¹ Technical amendment consequential to amendments to clause 15. See Note 9 above.

²² Amendment proposed in Paper No. CA1-07/03 issued on 21 November 2003.

²³ Amendment proposed in Paper No. CA1-07/03 issued on 21 November 2003.

PART 1

LIST OF OFFERS, ETC. NOT FALLING
WITHIN DEFINITION

7. An offer of shares in the company -

(a) made -

(i) for no consideration, to any or all holders
of shares in the company; or

(ii) as an alternative to a dividend or other
distribution, to all holders of shares of a
particular class in the company, provided the
offer is of fully paid-up shares of the same
class; and

~~(a) of shares for no consideration to any or all
holders of shares in the company concerned, or an
offer of fully paid up shares of the company
concerned which are of the same class as any in
issue made as an alternative to a dividend or other
distribution, in cash to all holders of shares of
the same class in the company concerned; and²⁶~~

²⁶ Technical amendment for greater clarity in response to Ms Alice Chan's comments and the comment of the Assistant Legal Adviser to the Bills Committee via her letter dated 28 November 2003.

- (b) containing a statement specified in Part 3 of the Eighteenth Schedule to this Ordinance.