

Bills Committee on Companies (Amendment) Bill 2003**Schedule 1 – Amendments to the Companies Ordinance
relating to prospectuses****Additional amendments to Schedule 1**

Members have discussed and endorsed the proposed committee stage amendments (CSAs) to Schedule 1 (Paper No. CA 1-02/04) at the Bills Committee meeting on 8 January 2004, subject to the clarification of a number of matters. These are about offences relating to amendment of prospectuses under the proposed sections 39A, 39B, 342CA and 342CB, and the safe harbour relating to offers of shares for no consideration under section 7 in Part 1 of the proposed Seventeenth Schedule.

2. Further to the above-mentioned CSAs, we have proposed a few technical amendments in response to Members' questions.
3. The marked up version at the **Annex** seeks to -
 - (a) address Members' questions referred to in paragraph 1 above; and
 - (b) set out the supplementary CSAs referred to in paragraph 2 above, with explanatory notes as appropriate.

Financial Services and the Treasury Bureau
Securities and Futures Commission
20 May 2004

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.¹~~

(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 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.

¹ Technical amendment. In view of Members' comments at the Bills Committee meeting on 8 January 2004, we have further examined proposed ss.39A(2) and (3), 39B(3) and (4), 342CA(2) and (3), and 342CB(3) and (4), and are satisfied that their objectives can be achieved by s.399 of the Securities and Futures Ordinance (SFO) and hence they can be dropped. The guidelines made under s.399 of SFO are not subsidiary legislation, and a breach of these guidelines is not a breach of the law.

In considering ss.39A, 39B, 342CA and 342CB at the Bills Committee meeting on 8 January 2004, Hon Emily Lau raised the question about the number of summonses issued and cases convicted in relation to offences liable to a fine at level 6 under 12th Schedule to the Companies Ordinance in the past three years. We have consulted SFC whose advice is that there has been no such cases in the past three years (from 1 January 2001 – 31 December 2003).

(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.²~~

(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).

² Technical amendment. See note 1 above.

(6) If any company contravenes subsection ~~(1) or~~³(2), the company and every officer of the company who is in default shall be liable to a fine.

³ Technical amendment proposed in Paper No. CA1-02/04 issued on 2 January 2004 and endorsed by Members at the Bills Committee meeting on 8 January 2004.

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 relation to compliance with subsection (1).~~

~~(3) Guidelines published under subsection (2) are not subsidiary legislation.⁴~~

(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.

⁴ Technical amendment. See note 1 above.

(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~~

(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~~⁶(2), the company and every officer of the company who is in default shall be liable to a fine.

⁵ Technical amendment. See note 1 above.

⁶ Technical amendment proposed in Paper No. CA1-02/04 issued on 2 January 2004 and endorsed by Members at the Bills Committee meeting on 8 January 2004. See note 3 above.

SEVENTEENTH SCHEDULE

OFFERS SPECIFIED FOR THE PURPOSES OF PARAGRAPH (b) (ii) OF THE DEFINITION OF
"PROSPECTUS" IN SECTION 2(1) OF THIS ORDINANCE

PART 1

LIST OF OFFERS, ETC. NOT FALLING
WITHIN DEFINITION

7. An offer of shares in a 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 issued shares
of a particular class in the company,
provided the offer is of fully paid-up shares
of the same class; and⁷

~~(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~~

⁷ At the Chairman's request at the Bills Committee meeting on 8 January 2004, we have consulted Ms Alice Chan of the University of Hong Kong on our proposed committee stage amendments (CSAs) submitted to the Bills Committee on 2 January 2004 (Paper No. CA1-02/04).

We have improved the proposed CSAs in view of Ms Chan's suggestions. Specifically, Ms Chan pointed out that "holders of shares" is defined in paragraph 5 in Part 4 of the Seventeenth Schedule. In view of her comments, we suggest that the word "issued" in section 7(a)(ii) be deleted to ensure consistency and for greater clarity.

Ms Chan has also made some drafting suggestions to this section. We have explained to her that her proposed amendments have the benefit of using plain English, but are less familiar to the market and may result in inconsistency with the rest of the Companies Ordinance in terms of drafting. Ms Chan also suggested that the concept of "class" should be specified elsewhere and hence be removed from section 7(a). We have examined the possibility and concluded that this suggestion could not adequately meet our policy objective, i.e. to provide certainty to the requirement of treating all members of a class equally.

~~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; and~~

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