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Secretary for Financial Services  
and the Treasury  
Financial Services and the Treasury Bureau  
(Attn: Miss Susie HO, DS (FS) 2)  
18/F, Tower 1  
Admiralty Centre  
18 Harcourt Road  
Hong Kong

By Fax (2865 6778) and By Post

10 September 2003

Dear Miss HO,

**Companies (Amendment) Bill 2003**  
**Schedule 1 - Amendments to the Companies Ordinance**  
**Relating to Prospectuses**

I am scrutinising the legal and drafting aspects of the Bill and have the following comments on Schedule 1 to the Bill:

**The new section 2**

The new section 2 proposes to repeal the existing definition of "prospectus" in the Companies Ordinance (Cap 32) ("the Ordinance") and replace it by the following:

" Prospectus" means:

- (a) any prospectus, notice, circular, brochure, advertisement, or other document -
  - (i) offering any shares in or debentures of a company to the public for subscription or purchase for cash or other consideration; or
  - (ii) calculated to invite offers by the public to subscribe for or purchase for cash or other consideration any shares in or debentures of a company;
- (b) excluding any prospectus, notice, circular, brochure, advertisement, or

other document which -

- (i) amounts to a publication falling within section 38B(2); or
- (ii) contains or relates to an offer specified in Part 1 of the 17<sup>th</sup> Schedule.

1. Scope of the definition

- (a) Under section 2 of the Ordinance, "document" is defined as "including summons, notice, order, and other legal process, and registers". This definition appears to be inappropriate in the circumstances.
- (b) Section 4(a) of Part 4 of the 17<sup>th</sup> Schedule provides that for the purposes of section 2 of Part 1, the making of an offer of shares or debentures to trustees or members of a partnership or unincorporated association in their capacity as such is to be treated as the making of an offer to a single person. Please clarify whether "trustees" refers to "trustees of a partnership or unincorporated association" or otherwise?

2. Scope of exemption under the definition

Under Part 1 of the 17<sup>th</sup> Schedule, the following offers will not fall within the definition of "prospectus":

- (a) Section 9 provides that an offer by a charitable institution or trust of a public character mentioned in section 88 of the Inland Revenue Ordinance (Cap 480) where the proceeds of the offer will be applied towards the objectives of the charitable institution or trust will be an exemption. The Chinese version of this section "慈善機構或屬公共性質的信託" is at variance with the Chinese version of section 88 of the Inland Revenue Ordinance "屬公共性質的慈善機構或信託". Please amend sections 9(a) and 9(c).
- (b) Section 12 provides that an offer in connection with a collective investment scheme authorized under section 104 of the Securities and Futures Ordinance (Cap 571) and in connection with which the issue of each advertisement, invitation or document has been authorized under section 105 of the Securities and Futures Ordinance (Cap 571) will be an exemption.

Under section 102 of the Securities and Futures Ordinance (Cap 571):

"advertisement" is defined to include every form of advertising, whether made orally or produced mechanically, electronically, magnetically, optically, manually or by any other means; and

"document" is defined to mean any publication (including a newspaper, magazine or journal, a poster or notice, a circular, brochure, pamphlet or handbill, or a prospectus) -

- (i) directed at, or the contents of which are likely to be accessed or read (whether concurrently or otherwise) by, the public; and
- (ii) whether produced mechanically, electronically, magnetically, optically, manually or by any other means.

As "advertisement" is not defined in the Ordinance and the definition of "document" in the Ordinance is different from that in the Securities and Futures Ordinance (Cap 571), please clarify the applicable definitions.

**The new sections 38(3) and 38AA**

- (a) The new sections 38(3) provides that it shall not be lawful to issue any form of application for shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirement of the section. It appears that:
  - (i) this section will not apply if the shares in or debentures of a company are offered for subscription or sale without an application form.
  - (ii) only the issuer will be liable under this section. The other parties involved in the transaction e.g. the underwriter will not be liable.

Please clarify.

- (b) The new section 38AA(1) provides that a person who acquires shares in or debentures of a company pursuant to an offer specified in the 17<sup>th</sup> Schedule shall not, by means of any document, sell or offer to sell, the shares in or debentures to the public unless the shares or debentures are the subject of a prospectus which complies with the Ordinance or are of the same class which are listed on a recognized stock market.
  - (i) It appears that this section will not apply if the shares in or debentures of a company are sold or offered for sale without a document (as currently defined in the Ordinance). Please clarify.

- (ii) Is there any time limit for this restriction?

### **The new section 38A**

The new section 38A(6) provides that the Commission shall publish, by means of an on-line medium, such particulars of exemptions granted, suspended or withdrawn under subsection (1) as it considers appropriate. As the suspension or withdrawal of the exemption by the Commission may have serious impact on the transaction, please clarify:

- (a) the power of the Commission to suspend or withdraw the exemption.
- (b) whether the exemption granted refers to the certificate of exemption issued by the Commission under subsection (1)?
- (c) the policy intent for the publication by means of an on-line medium.

### **The new section 38B**

The new section 38B(1) prohibits the publication of any extract from or abridged version of a prospectus by way of advertisement or an advertisement in relation to a proposed prospectus. The new section 38B(2)(e) provides that the publication of an advertisement which complies with the requirements of the 19<sup>th</sup> Schedule applicable to the advertisement shall not contravene the new section 38B. One of the mandatory particulars specified in section 1 of the 19<sup>th</sup> Schedule is a warning statement that the potential investors should read the prospectus for detailed information about the company and the proposed offering before deciding whether or not to invest in the shares or debentures concerned. Please account for the policy intent that the name of the company to which the advertisement relates and the dates on which, and the places at which, the prospectus to which the advertisement relates is or will be available to the public are discretionary, and not mandatory particulars, to be contained in the advertisement.

### **Section 342CC**

The requisite parties making certified copy under the new section 342CC(b)(i) is different from those required under section 342C(3). What is the policy intent for such difference?

### **Section 342D**

Please account for the policy intent for the difference between the level of penalty under the following sections:

|     | <u>Section</u> | <u>Offence</u>   | <u>Penalty</u> |
|-----|----------------|--|----------------|
| (a) | 342D           | issue, circulation or distribution of a prospectus or issue of a form of application for shares or debentures in contravention of sections 342 to 342C | \$150,000      |
| (b) | 342AB          | selling of shares or debentures without a prospectus   | \$100,000      |

It is appreciated that your reply in both Chinese and English could reach us by 19 September 2003.

Yours sincerely

(Monna LAI)  
Assistant Legal Adviser