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G6/123/4C (2003) Pt. 12

26 September 2003

Miss Monna Lai
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Legal Service Division
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central

Dear Miss Lai,

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

I refer to your letter of 10 September 2003 and would like to set out below our response to your comments on Schedule 1 to the Companies (Amendment) Bill 2003.

The new section 2

A. Scope of the definition

2. With regard to the definition of “prospectus” in the new section 2(1), the word “document” takes its meaning from its context, which is why we include the phrase “unless the context otherwise requires” at the beginning of section 2. It is clear that what is meant is any document which offers shares/debentures to the public or invites offers by the public. We believe that there should be no ambiguity about the meaning of “document”.

3. The phrase “trustees or members of a partnership or unincorporated association in their capacity as such” in section 4(a) of Part 4 of the 17th Schedule refers to three categories of offerees, namely –

- (i) trustees;
- (ii) members of a partnership; and
- (iii) members of an unincorporated association.

As far as we are aware, the wording is well understood by the market in general.

B. Scope of exemption under the definition

4. We agree that the Chinese text of “charitable institution or trust of a public character” in section 9(a) of Part 1 of the 17th Schedule should be amended as suggested for consistency with the Inland Revenue Ordinance (Cap. 112). We will consider making a technical amendment to the Chinese text.

5. The purpose of the 17th Schedule is to remove from the definition of “prospectus” the offering of documentation in relation to specified types of offers, in order to clarify the types of offers that can be made without triggering the prospectus regime. In particular, section 12 of the 17th Schedule is intended to avoid double regulation as all advertisements or other documents relating to collective investment schemes authorised by the Securities and Futures Commission (SFC) are regulated under the Securities and Futures Ordinance (SFO) (Cap. 571). In proposing the exclusion of collective investment schemes from the prospectus regime, we have taken into account how the relevant terms are defined under SFO and consider that this will not affect the applicability of the prospectus regime under the Companies Ordinance.

The new sections 38(3) and 38AA

6. Regarding your question (a)(i), your interpretation set out in your letter is correct – the existing section 38(3) (with or without the proposed amendment in the proviso) does not apply if no application

form is issued, since the existing prospectus regime in the Companies Ordinance is document-based.

7. As for your question (a)(ii), it is correct to say that only the issuer will be liable under the new section 38(3), which has all along been the case under the existing prospectus regime.

8. It is correct to say that a sale or offer for sale of shares in or debentures of a company made without any documentation is not subject to section 38AA(1).

9. There is no time limit for the restriction referred to in the new section 38AA(1). For the purpose of investor protection, the vendor should only be allowed to sell (by way of an offer to the public) when detailed prospectus-type information is made available to potential offerees, either in a prospectus issued for that purpose, or in a listing document/prospectus issued upon listing.

The new section 38A

10. The existing section 38A(1) (and the new section 38A(1)) does not contain a power for the Commission to suspend or withdraw a certificate of exemption. We will consider whether to make technical amendments to this section.

11. The purpose of requiring on-line publication by the Commission of an exemption granted under subsection (1) is to achieve transparency and efficiency. The company applying for exemption under the new section 38A(1) will be informed of SFC's decision separately. The SFC's practice is to address a "Certificate of Exemption" to the applicant and issue this by fax and post on or before the day on which the prospectus is published.

The new section 38B

12. This legislative amendment exercise is to facilitate offers of shares and debentures by, among other things, permitting issue of

advertisement around the time of an offer to increase investors' awareness of the relevant offer. Mandatory requirements should be kept to the minimum without compromising investor protection so as not to limit the ability of issuers to advertise in innovative ways and thus make this facilitative initiative unattractive to issuers.

13. Information on the date on, and place at, which the prospectus to which the offer awareness advertisement relates, is procedural and administrative in nature, and is subject to change from time to time. We therefore do not consider it helpful to an issuer if such information is made mandatory in advertisements. As regards the name of the company, we note that the issuer will naturally want to put the name of the company in the relevant advertisement. There is no need to mandate such details in the statute.

Section 342CC

14. We will consider whether the parties required to produce certified copies etc. under the new section 342CC(b)(i) should be the same as those required under section 342C(3) as both sections concern companies incorporated outside Hong Kong and, if so, whether to make technical amendments to the new section 342CC(b)(i).

Section 342D

15. You enquire about the policy intent for the difference between the level of penalty for offences under section 342D and section 342AB. We believe that in terms of the level of penalty, no meaningful comparison could be drawn between section 342D which mainly regulates the issue, circulation and distribution of the prospectus and application form, and section 342AB which regulates the sale of shares and debentures without a prospectus. It would be more appropriate to compare the level of penalty to be imposed on breaches of sections 342AB and 38AA(4) as both sections regulate the sale of shares and debentures without a prospectus. In this context, you may wish to note that both breaches are subject to the same maximum penalty.

16. We would forward the Chinese version of the reply to you shortly.

Yours sincerely,

(Mrs Dorothy Ma)
for Secretary for Financial Services and
the Treasury

c.c. DoJ (Attn.: Mr John Wilson
Miss Carmen Chu)
SFC (Attn.: Mr Ashley Alder)

Internal
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