

**Bills Committee on
Companies (Amendment) Bill 2003**

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

Exemption powers of the Securities and Futures Commission

Background

At the meeting of the Bills Committee on 2 October 2003, the Administration was asked to –

- (a) consider whether the words “as it considers appropriate” should be removed from the proposed sections 38A(6)/342A(6) for the purpose of ensuring transparency of the operation of the Securities and Futures Commission (SFC) (see paras 5 - 6 below); and
 - (b) consider the appropriate manner in which the exemptions granted under the proposed sections 38A(1)/342A(1) would be published to enhance transparency (see paras 3-4 below).
2. At the meeting of the Bills Committee on 17 October, the Administration was asked to –
- (a) consider whether the exemption and amendment powers of SFC under new sections 38A(2)/342A(2) and 38A(5)/342A(5) should be put on the same footing as SFC’s powers of amendments under new section 360(6), and thus should be subject to the same public consultation procedures before the relevant order of exemptions/amendments is published in the Gazette¹(see paras 8 – 11 below) and
 - (b) provide a comparison of the exemption and amendment powers of SFC and the corresponding checks and balances under the prospectus regulatory regime (with the proposed amendments in the Companies (Amendment) Bill 2003 (the Bill)) with the equivalent/corresponding provisions of overseas jurisdictions (see para 7 below).

¹ Under the proposed section 360(6), SFC may, by order published in the Gazette, amend the Third, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first or Twenty-second Schedule. Under the proposed section 360(7), SFC shall publish a draft of the proposed order for the purpose of inviting representations on the proposed order by the public.

Publication of particulars of exemptions granted

3. Members may wish to note that SFC may only grant exemptions under sections 38A and 342A on the following statutory grounds -

- (a) compliance with any or all of certain prospectus-related requirements would be irrelevant or unduly burdensome; and
- (b) the exemption will not prejudice the interest of the investing public².

In exercising its powers, including those provided for under this Bill, SFC must take into consideration its statutory regulatory objectives and functions under sections 4 – 6 of the Securities and Futures Ordinance (SFO). In addition, to ensure transparency of SFC's operations, we propose in the Bill that SFC shall publish on-line such particulars of exemptions granted under the new sections 38A(1) and 342A(1) as it considers appropriate. SFC's plan is to set up a designated webpage on the SFC website setting out all the relevant prospectus-related provisions in the Companies Ordinance in respect of which an exemption has been granted to an applicant, the statutory grounds on which it is granted (i.e. the grounds set out in (a) and (b) above) and the reasons therefor. This will be formatted to ensure maximum transparency and utility.

4. The information set out in SFC's website mentioned in paragraph 3 above will also be published in the relevant prospectus.

5. SFC, in enhancing transparency, must also have regard to its obligations of preserving secrecy and confidentiality (see section 6 of SFO). The flexibility afforded by the wording "as it considers appropriate" is important for pragmatic reasons. For example, an application for exemption may relate to, or be supported by, confidential or commercially sensitive information, and thus it is not appropriate to publish full particulars of the exemption. In other cases, the text of the exemption itself may be complex and lengthy, and the use of summary language to explain clearly the nature of, and reasons for, the exemption would facilitate investors' understanding. These and other instances where publication of all particulars of an exemption would not be in the interests of the applicant or the market require the flexibility now contained in sections 38A(6) and 342A(6).

6. The same issue was considered in detail during the passage of section 309(5) of SFO (governing the transparency of exemptions granted by

² The ground that the exemption would not prejudice the interest of the investing public is a new ground proposed in the Companies (Amendment) Bill 2003.

SFC from the disclosure regime) through the legislature. It was agreed that a reasonable degree of flexibility must be preserved. The proposal in this Bill mirrors section 309(5) of SFO.

Comparison of exemption and amendment powers with overseas jurisdictions

7. Legislative proposals in the Bill concerning the exemption and amendment powers of SFC are less than those available in the prospectus regulatory regime in Australia and the United Kingdom. The corresponding checks and balances governing SFC's exercise of powers are in general more than those in the two regimes mentioned above. SFC's powers and corresponding checks and balances under the prospectus regulatory regime are largely similar to those available in Singapore. Members may wish to refer to the paper on "Comparison of the Prospectus Regulatory Regime between Hong Kong and Overseas Jurisdictions" issued by the Administration on 22 October 2003 to the Bills Committee (LC Paper No. CB(1)84/03-04(06)) for further details.

Requirements for public consultation

8. Under the proposed new sections 38A(2)/342A(2), SFC may, by notice published in the Gazette, 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" as defined in the proposed new sections 38A(4)/342A(4). Under the proposed new sections 38A(5)/342A(5), SFC may, by order published in the Gazette, amend sections 38A(4)/342A(4) which define the "relevant provisions". Members noted that while the notices and orders published in the Gazette mentioned above would be subject to negative vetting of the Legislative Council, the Bill does not require public consultation on the class exemption or amendment proposals. This differs from the requirement in the proposed new section 360(7) where SFC is required (subject to the proposed new section 360(9)) to consult the public on proposed orders to amend specified schedules relating to certain prospectus requirements and the new safe harbour provisions (which is one of the objectives of this Bill). Members asked whether a similar requirement could be imposed where SFC proposes to exercise its exemption and amendment powers under the new sections 38A(2)/342A(2) and 38A(5)/342A(5).

9. SFC's power to exempt a class of companies or prospectuses is not a new one. Under the existing sections 38A(2) and 342A(2), SFC may exempt a class of companies or class of prospectuses issued by companies from compliance with certain prospectus-related provisions by notice in the Gazette (which is subject to negative vetting by the Legislative Council) on the ground that compliance with any or all of those requirements would be either irrelevant or unduly burdensome. Although there is no statutory requirement for public consultation in the existing ordinance, it is SFC's practice to consult relevant stakeholders in respect of proposals to introduce class exemptions pursuant to section 38A(2) or 342A(2).

10. It is SFC's intention to consult the public on any proposals to exempt any class of companies or prospectuses or to amend the "relevant provisions" under the proposed new sections 38A and 342A. In response to Members' suggestion, we intend to introduce a Committee Stage Amendment to the effect that SFC will conduct public consultation on the draft proposals/orders under proposed new sections 38A(2), 38A(5), 342A(2) and 342A(5) in a manner similar to that provided for under the proposed sections 360(7), (8) and (9).

11. Members have asked whether a minimum period of consultation should be stipulated in the law. We gave due consideration to this when drafting section 398 of SFO and came to the conclusion that since different issues involve different levels of complexity, it was inappropriate to specify a single minimum period of consultation which is applicable in all cases. Moreover, some proposals may involve critical investor protection issues and legislative amendments may have to be put in place within a short period of time to accommodate the needs of the rapidly changing market. SFC would ensure that the consultation period would be of an appropriate length, taking into account the complexity of issues involved and other factors such as investor protection and market development.

Financial Services and the Treasury Bureau
Securities and Futures Commission
29 October 2003