

Bills Committee on Companies (Amendment) Bill 2003

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

**Inclusion of “dependents” as “qualifying persons”
under section 8 of Part I of the Seventeenth Schedule**

BACKGROUND

At the meeting on 30 October 2003 when the Bills Committee considered the proposed exempt offer to persons who are “qualifying persons” of the issuer provided under the proposed section 8 of Part I of the Seventeenth Schedule of the Companies (Amendment) Bill 2003 (the Bill), the Administration undertook to provide Members with further information on –

- (a) the market response to the proposal for exempting offers to “employees’ dependents” from the prospectus regime;
- (b) the equivalent/corresponding provisions in the United States; and
- (c) regulatory experience in overseas jurisdictions, including the regulator problems encountered in administering similar exemptions.

This paper sets out the information required.

INCLUSION OF “DEPENDENTS” AS “QUALIFYING PERSONS”

2. Members enquired about the rationale for the inclusion of “dependents”¹ as “qualifying persons”² under section 8 of Part 1 of the Seventeenth Schedule since the company should be rewarding its

¹ Section 6(c) of Part 4 of the Seventeenth Schedule provides that “dependent”, in relation to a person, means (i) the wife, husband, widow or widower of the person; or (ii) any child, or stepchild, of the person under the age of 18 years.

² Under section 6(a) of Part 4 of the Seventeenth Schedule, “qualifying person” in relation to a company includes a bona fide director, employee, officer, and consultants, and their dependents.

employees/directors/officers/consultants but not their immediate family members.

SFC's regulatory experience

3. Under the existing section 48A(2) of the Companies Ordinance (CO), any offer which can be properly regarded in all the circumstances as being a domestic concern of the persons making and receiving it shall not be taken as an offer to the public and thus would not fall under the prospectus regulatory regime. Such offers include one where there is a pre-existing special relationship between the offeror and the members of the group (e.g. employees of the offeror) to whom the offer is made. According to SFC's existing practice and understanding of market players, "dependents" of the members of the group to whom the offer is made would also fall under this category as they have a sufficiently close nexus with the offerees. In other words, the existing regime already allows the exclusion of offers to "dependents" of members of the group who have a special relationship with the offeror from the prospectus requirements under CO. The proposed section 8 of Part I of the Seventeenth Schedule would provide certainty to this type of offer that can be made without triggering the prospectus regime. SFC's past experience is that the risk of abuse is minimal.

Practices in overseas jurisdictions

4. There are similar practices in overseas jurisdictions to exempt offers to employees' dependents. In Australia, under its Corporations Act, no disclosure document is required for an offer to executive officers or their spouse, parent, child, brother or sister, or a body corporate controlled by any of such persons.

5. In the United Kingdom, an offer made to bona fide employees or former employees of a company, or the wife, husband, widow, widower or child or stepchild under the age of 18 of such employees or former employees is an exempt offer not requiring a prospectus under the Financial Services and Markets Act 2000.

6. In the United States, offers and sales of securities under a compensatory benefit plan (including any purchase, option, bonus, pension or similar plan) established by a company for the participation of their employees, directors, trustees, officers or consultants and advisors,

and their family members³ who acquire such securities from such persons through gifts or domestic relation orders are exempt from the registration requirements of the Securities Act 1933 subject to certain conditions and disclosure requirements. Care however should be taken when drawing reference from the United States model because its securities offering, taxation and liability regimes are different.

7. SFC understands from their overseas regulators counterparts that there is no significant abuse of similar exemptions in these jurisdictions.

Market views

8. The proposal provided for under section 8 of Part I of the Seventeenth Schedule was included in the Consultation Paper on Proposed Amendments to the Companies Ordinance to Facilitate Offers of Shares and Debentures issued in March 2003. No comment has been received on the scope of “dependents” during the consultation exercise.

CONCLUSION

9. In view of SFC’s regulatory experience and practices and experiences in overseas jurisdictions, we believe that it is appropriate for “dependents” of a “qualifying person” to be included in the offer under section 8 of Part I of the Seventeenth Schedule.

Financial Services and the Treasury Bureau
Securities and Futures Commission

6 November 2003

³ Family members include any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, former spouse, sibling, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive relationships.