



SECURITIES AND
FUTURES COMMISSION
證券及期貨事務監察委員會

**Consultation Paper on the Proposed Repeal of
Certain Class Exemptions made under
section 38A(2)/342A(2)
of the Companies Ordinance**

Hong Kong
August 2004

香港
2004年8月

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Foreword

The Securities and Futures Commission (the “SFC”) invites interested parties to submit written comments on the proposals discussed in this consultation paper and on related matters that impact upon the proposals, **no later than 17 September 2004**.

All comments from the public will be carefully considered before the proposals are finalised. A summary conclusions paper will be published after the end of the consultation period.

Any persons wishing to comment on the proposals should provide details of the organization whose views they represent. Please note that the names of those commenting and the contents of their submissions may be published on the SFC website and in other documents to be published by the SFC. In this connection, please read the Personal Information Collection Statement attached to this consultation paper as Appendix 1.

You may wish that the SFC should not publish your name. If this is the case, please state that you wish your name to be withheld from publication when you make your submission.

Written comments may be sent:

By mail to: Corporate Finance Division
The Securities and Futures Commission
8/F Chater House
8 Connaught Road Central
Hong Kong
Attn: Class Exemption Consultation

By fax to: (852) 2810-5385

By online submission at: <http://www.hksfc.org.hk>

By e-mail to: cfconsult@hksfc.org.hk

Additional copies of the consultation paper may be obtained from the above address. This consultation paper is also available at the SFC website at <http://www.hksfc.org.hk>.

Consultation Paper on the Proposed Repeal of Certain Class Exemptions made under section 38A(2)/342A(2) of the Companies Ordinance

Objective

1. The purpose of this consultation paper is to seek the views of market participants and other interested parties concerning the proposed repeal of sections 3 and 7 of the Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice (Cap. 32L) (“**Class Exemption Notice**”).

This proposal is made following the gazettal and enactment on 23 July 2004 of the Companies (Amendment) Ordinance 2004 (Ord. No. 30 of 2004) (“**Amendment Ordinance**”). The Amendment Ordinance makes changes to the provisions of Parts II and XII of the Companies Ordinance (“**CO**”), which deal with offers to the public of shares and debentures by Hong Kong-incorporated and overseas-incorporated companies. The SFC understands that the Amendment Ordinance will be brought into force towards the end of 2004 following publication in the Gazette in October 2004 of a Commencement Notice.

Background to the proposed repeal of sections 3 and 7 of the Class Exemption Notice

2. The SFC proposes to repeal sections 3 and 7 of the Class Exemption Notice. Section 3 applies to offers of shares in or debentures of a Hong Kong-incorporated company to “*persons whose ordinary business is to buy or sell shares or debentures whether as principal or agent*” (“**CO Professional Investors**”). The section exempts such companies and their prospectuses from compliance with the content, dual Chinese/English language and maximum offer duration requirements of sections 38(1) and (3) and 44A(2) of the CO¹. Section 7 of the Class Exemption Notice exempts companies which

¹ The text of section 3 of the Class Exemption Notice reads:

“(1) Where it is proposed to offer any shares in or debentures of a company incorporated under the Ordinance by a prospectus issued generally, the company, or any other company or person, and the prospectus are exempted, in relation to the offer, from compliance with the requirements of sections 38(1) and (3) and 44A(2) of the Ordinance if the offer is made only to persons whose ordinary business is to buy or sell shares or debentures, whether as principal or agent.

(2) For the purposes of subsection (1), the exemption in respect of section 38(1) of the Ordinance under this section has effect with regard to all of the requirements of the Third Schedule to the Ordinance.”

Section 3 was introduced to provide a more level playing field for Hong Kong-incorporated companies when they conduct share or debenture offerings to CO Professional Investors. In the case of overseas companies, section 343(2) of the CO provides that an offer of shares or debentures by such companies to CO Professional Investors will not be deemed an offer to the public. Accordingly, any offering document issued by overseas companies only to CO Professional Investors does not constitute a

are also collective investment schemes authorized by the SFC under section 104(1) of the Securities and Futures Ordinance (“SFO”) from the content and dual language requirements of the CO².

3. The Amendment Ordinance amends the definition of “prospectus” in section 2(1) of the CO to provide that documents relating to 12 categories of offers specified in Part 1 of the proposed new Seventeenth Schedule (“**17th Schedule**”) to the CO (collectively, the “**New CO Exempt Offers**”) would be exempt from the entire prospectus regime in the CO³. These exemptions will apply to documents offering shares in or debentures of Hong Kong-incorporated and overseas-incorporated companies. For the purposes of the Class Exemption Notice, only two categories of the New CO Exempt Offers are relevant, namely: (i) an offer to professional investors within the meaning of the SFO⁴ (“**New SFO Professional Investors CO Exempt Offer**”) and (ii)

prospectus or require compliance with CO content, registration and other prospectus-related requirements. The Class Exemption Notice did not in practice achieve an entirely level playing field for Hong Kong-incorporated companies because the relevant statutory exemption power in section 38A(2)/342A(2) of the CO under which the Class Exemption Notice was issued could not technically be used to exempt Hong Kong-incorporated companies from all prospectus-related requirements. Thus, for example, even where such a company relies upon section 3 of the Class Exemption Notice, any offering documents issued to CO Professional Investors are subject to the prospectus registration requirements under section 38D of the CO.

² The text of section 7 of the Class Exemption Notice reads:

- “(1) Where-
- (a) it is proposed to offer any shares in or debentures of a company incorporated under the Ordinance by a prospectus issued generally; and
 - (b) the company is a collective investment scheme authorized by the Commission under section 104(1) of the Securities and Futures Ordinance (Cap 571),
the company and the prospectus are exempted from compliance with the requirements of section 38(1) and (3) of the Ordinance.
- (2) Where-
- (a) it is proposed to offer any shares in or debentures of a company incorporated outside Hong Kong by a prospectus issued generally; and
 - (b) the company is a collective investment scheme authorized by the Commission under section 104(1) of the Securities and Futures Ordinance (Cap 571),
the company and the prospectus are exempted from compliance with the requirements of section 342(1) and (3) of the Ordinance.
- (3) For the purposes of subsections (1) and (2), the exemption in respect of section 38(1) and (3) or 342(1) and (3) (as the case may be) of the Ordinance under this section has effect with regard to all of the requirements of the Third Schedule to the Ordinance.
- (4) In this section, “collective investment scheme” (集體投資計劃) has the meaning assigned to it by section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571).”

For the same reasons as are given in Footnote 1 above, the relevant statutory exemption power could not technically be used to exempt the relevant companies from all prospectus-related requirements. Thus, even where such a company relies upon section 7 of the Class Exemption Notice, any offering documents are subject to the prospectus registration requirements under section 38D/342C of the CO.

³ See sections 1 and 24 of Schedule 1 of the Amendment Ordinance for details of the relevant amendments.

⁴ “Professional Investor” for the purposes of the SFO is defined in Schedule 1 to the SFO and the Securities and Futures (Professional Investor) Rules (Cap. 571D). The full text is not set out here. The

an offer in connection with an SFC authorized collective investment scheme when the issue of each advertisement or document has also been authorized by the SFC (“**New CIS CO Exempt Offer**”)⁵.

Rationale for the proposed repeal

4. The SFC proposes to repeal sections 3 and 7 of the Class Exemption Notice because they will be superseded and therefore become redundant upon the entry into force of sections 1 and 24 of Schedule 1 of the Amendment Ordinance. Repeal will also avoid unnecessary duplication and complexity in this area of the law.
5. The class of professional investors described in section 3 is narrower in scope and less specific than the class of professional investors covered by the New SFO Professional Investors CO Exempt Offer. For example, professional investors under the SFO expressly include:
 - (a) an intermediary within the meaning of the SFO, or any other person carrying on the business of the provision of investment services and regulated under the law of any place outside Hong Kong, or a wholly owned subsidiary, holding company or fellow wholly owned subsidiary of such intermediary or person;
 - (b) an insurer authorised under the Insurance Companies Ordinance;
 - (c) any trust corporation with total assets of not less than HK\$40 million (or its equivalent in any foreign currency);
 - (d) any individual, either alone or with any of his associates on a joint account, having a portfolio of not less than HK\$8 million (or its equivalent in any foreign currency);

text of the New SFO Professional Investors CO Exempt Offer (contained in section 1 of Part 1 of the new 17th Schedule) reads:

“An offer to professional investors within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571) (including professional investors falling within paragraph (j) of the definition of “professional investor” in that section).”

⁵ The text of the relevant exemption (contained in section 12 of Part 1 of the new 17th Schedule) reads:

“An offer -

- (a) in connection with a collective investment scheme authorized under section 104 of the Securities and Futures Ordinance (Cap 571); and*
- (b) 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).”*

- (e) any corporation or partnership having a portfolio of not less than HK\$8 million (or its equivalent in any foreign currency) or total assets of not less than HK\$40 million (or its equivalent in any foreign currency); or
 - (f) any corporation the sole business of which is to hold investments and which is wholly owned by an individual who, either alone or with any of his associates on a joint account, falls within the description in paragraph (d) above.
6. The expression “*persons whose ordinary business is to buy or sell shares or debentures whether as principal or agent*” is not elaborated in the CO. It may include a Type 1 intermediary (within the meaning of the SFO) and a corporation whose sole business is to hold investments, but may exclude an insurer authorised under the Insurance Companies Ordinance or a corporation having a portfolio of not less than HK\$8 million. However these two categories of investor are professional investors under the SFO, and upon the Amendment Ordinance coming into force documents offering shares or debentures to any professional investor as defined in the SFO will constitute a New CO Exempt Offer and be exempt from the entire prospectus regime in the CO. In the case of Hong Kong-incorporated companies the new exemption goes further than section 3 of the Class Exemption Notice because it applies to all of the prospectus-related requirements⁶ in the CO.
7. The New CIS CO Exempt Offer covers the same subject matter as section 7 of the Class Exemption Notice since both relate to an offer of shares or debentures by a company that is an SFC authorized collective investment scheme. However, as in the case of the New SFO Professional Investors CO Exempt Offer, the new exemption goes further than the Class Exemption Notice because it applies to all of the prospectus-related requirements in the CO rather than just the content requirements set out in the Third Schedule⁷.
8. The repeal of sections 3 and 7 of the Class Exemption Notice would be effected by publication in the Gazette of an amendment notice. The amendment notice will be subject to negative vetting by the Legislative Council. The timing of the proposed repeal of sections 3 and 7 of the Class Exemption Notice will be synchronised with the timing of the proposed entry into force of the provisions of the Amendment Ordinance relating to the New CO Exempt Offers so that at all times either the existing exemptions or the new exemptions will be available.

⁶ See Footnote 1 above.

⁷ See Footnote 2 above. Subsection (3) of section 7 provides that the exemption applies to the content requirements of the Third Schedule to the CO. Accordingly, among other things, the prospectus registration requirements under section 38D/342C of the CO continue to have effect.

Question 1

Do you agree that section 3 of the Class Exemption Notice will be redundant when the provisions in the Amendment Ordinance constituting the New SFO Professional Investors CO Exempt Offer enter into force and should therefore be repealed? If not, why not?

Question 2

Do you agree that section 7 of the Class Exemption Notice will be redundant when the provisions in the Amendment Ordinance constituting the New CIS CO Exempt Offer enter into force and should therefore be repealed? If not, why not?

Personal Information Collection Statement

1. This Personal Information Collection Statement (“PCIS”) is made in accordance with the guidelines issued by the Privacy Commissioner for Personal Data. The PCIS sets out the purposes for which your Personal Data⁸ will be used following collection, what you are agreeing to with respect to the Commission’s use of your Personal Data and your rights under the Personal Data (Privacy) Ordinance, Cap. 486 (“PDPO”).

Purpose of Collection

2. The Personal Data provided in your submission to the Commission in response to this consultation paper may be used by the Commission for one or more of the following purposes:
 - to administer the relevant provisions⁹ and codes and guidelines published pursuant to the powers vested in the Commission;
 - in performing the Commission’s statutory functions under the relevant provisions;
 - for research and statistical purposes; and
 - for other purposes permitted by law.

Transfer of Personal Data

3. Personal Data may be disclosed by the Commission to members of the public in Hong Kong and elsewhere, as part of the public consultation on the consultation paper. The names of persons who submit comments on the consultation paper together with the whole or part of their submission may be disclosed to members of the public. This will be done by publishing this

⁸ Personal Data means personal data as defined in the Personal Data (Privacy) Ordinance.

⁹ Defined in Schedule 1 to the SFO to mean provisions of the SFO and subsidiary legislation made under it; and provisions of Parts II and XII of the CO so far as those Parts relate directly or indirectly, to the performance of functions relating to: prospectuses; the purchase by a corporation of its own shares; a corporation giving financial assistance for the acquisition of its own shares etc.

information on the Commission's web site and in documents to be published by the Commission during the consultation period or its conclusion.

Access to Data

4. You have the right to request access to and correction of your Personal Data in accordance with the provisions of the PDPO. Your right of access includes the right to obtain a copy of your Personal Data provided in your submission on the consultation paper. The Commission has the right to charge a reasonable fee for processing any data access request.

Retention

5. Personal Data provided to the Commission in response to the consultation paper will be retained for such period as may be necessary for the proper discharge of the Commission's functions.

Enquiries

6. Any enquiries regarding the Personal Data provided in your submission on the consultation paper, or requests for access to Personal Data or correction of Personal Data, should be addressed in writing to:

The Data Privacy Officer

The Securities and Futures Commission

8/F Chater House

8 Connaught Road Central

Hong Kong