Charltons - Hong Kong Law Newsletter - 23 August 2004

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# Hong Kong Legal Update

## 1. Enactment Of The Companies (Amendment) Ordinance 2004

The Companies (Amendment) Ordinance 2004 (the 'Amendment Ordinance') was enacted on July 23, 2004 and is expected to come into effect towards the end of this year after the publication of a commencement notice in the Gazette in October.

### Alignment of Regimes Governing Offers of Investment Products

Among the changes to be implemented by the Amendment Ordinance is that it will align the 2 regimes governing the offer of investment products under the Companies Ordinance (the 'CO') and the Securities and Futures Ordinance (the 'SFO').

First, the Amendment Ordinance excludes from the CO prospectus regime, documents making an offer to 'professional investors' as specifically defined in the SFO (rather than by reference to the CO's current restricted definition of 'professionals' as 'persons whose ordinary business is to buy or sell shares or debentures, whether as principal or agent'). The provision will apply to both Hong Kong and overseas incorporated companies. Currently, the 'professionals only' exemption under the CO (S.343(2)) applies only to overseas companies, although it was effectively extended to Hong Kong companies by the Companies Ordinance (Exemption of Companies from Compliance with Provisions) Notice 2001 (the 'Exemption Notice').

Second, the Amendment Ordinance will exclude the offering documentation for 11 further categories of offers from the CO prospectus regime and, with 2 exceptions, will allow the exclusions to be used in combination. Accordingly the new 'professionals only' and offers to not more than 50 persons exclusions will be able to be used concurrently (which is a reversal of the present position under both the CO and the SFO).

Consequential amendments made by the Amendment Ordinance to the SFO will also mean that documents excluded from the CO prospectus regime (ie. within any of the 11 new categories) will also be exempted from the prohibition on unauthorised investments under S. 103(1) SFO.

For further information on the new exclusions from the CO prospectus regime, please see our [November 2003 newsletter](/newsletters/hklaw/en/2003/8/nl-hklaw-20031118-8.html) on Regulation of Offers of Investments under Part IV of the SFO (under 'The Professionals Exemption under the Companies Ordinance').

### Consultation Paper on Repeal of Class Exemptions

In view of the forthcoming implementation of the Amendment Ordinance, the SFC published on August 18, 2004 its Consultation Paper proposing to repeal Sections 3 and 7 of the Exemption Notice. These sections provide class exemptions from certain CO prospectus requirements (but not the registration requirements of S. 38D CO) for 'professionals only' offers by Hong Kong companies (Section 3) and for collective investment schemes authorised by the SFC under S.104(1) SFO. The prospectus requirements from which the offers are exempted are the content and English/Chinese dual language requirements and, in the case of Section 3, the maximum offer duration requirements.

Under the Amendment Ordinance, offers to SFO 'professionals' by Hong Kong companies and offers in connection with a collective investment scheme authorised under S.104 SFO will be exempted from the CO prospectus regime. Accordingly, the SFC considers that the implementation of the Amendment Ordinance will render Sections 3 and 7 of the Exemption Notice redundant and proposes that they should be repealed on the coming into effect of the Amendment Ordinance. As the Amendment Ordinance will exempt both categories of offers from all CO prospectus-related requirements, they will no longer be subject to the prospectus registration requirements of S.38D CO.

Copies of the Consultation Paper are available on the [SFC website](http://www.hksfc.org.hk). The consultation period expires on September 17, 2004.

## 2. Hong Kong Stock Exchange Proposals To Reduce Minimum Spreads

The Hong Kong and Exchanges Clearing Limited ('HKEx') published a consultation paper on August 6, 2004 inviting comments on its proposals to reduce minimum spreads (ie. the minimum price fluctuations of orders and transactions in HKEx's Automatic Order Matching and Execution System). The consultation period ends on October 6, 2004.

HKEx proposes to implement the changes in 2 phases: Phase 1 would reduce spreads for shares priced above HK$ 30 and, subject to the success of Phase 1, Phase 2 would be implemented 4 to 6 months later. Phase 2 currently comprises 2 alternative proposals.

The HKEx's summary of its proposals for Phases 1 and 2 is reproduced below.

Prices from (HK$)

Current Minimum Spread

Phase 1

Phase 2

Proposed Minimum Spread(>$30)

(Option A ) Proposed Minimum Spread(>$2)

(Option B ) Proposed Minimum Spread(>$0.25

0.01

0.001

No Change

No Change

No Change

0.25

0.005

0.001

0.01

0.010

1.00

0.002

2.00

0.025

0.050

0.005

5.00

0.0500.0500.050

0.010

2.00

0.020

2.00

No Change After Phase 1

No Change After Phase 1

30.00

0.100

0.050

50.00

0.250

100.00

0.500

0.100

200.00

1.000

0.200

500.00

0.500

1,000.00

2.500

1.000

2,000.00

2.000

5,000.00 to 9,995.00

5.000

The consultation paper can be downloaded from the [HKEx website](http://www.hkex.com.hk/consul/paper/consultpaper.htm).

## 3. IPO Subscription Refund Cheques

A new measure applicable to all IPOs opening after August 9, 2004 requires cheques returning application monies to unsuccessful individual applicants of IPO shares to be printed with part of the applicant's Hong Kong identity card (or passport) number. For joint applicants, the identity information of the first-named applicant should be printed.

On being presented with a refund cheque, banks should cross-check the name and printed part of the identity card (or passport) number shown on the cheque against their own record of the account holder's information. Banks may request other proof of identity or take other steps for verification in the event of a discrepancy. They may also reject the deposit if unable to identify the payee.

Information about the new measure should be added to IPO application forms and prospectuses.

The SFC is continuing to work with the Hong Kong Association of Banks, the HKMA and the Federation of Share Registrars towards a fully electronic refund process in the long term.

## 4. September 30, 2004 Deadline for Compliance with Listing Rules' INED Requirements by Issuers Limited Pre-March 2004

The transitional period for companies listed on the Main Board and GEM of HKEx prior to March 31, 2004 to comply with certain of the March amendments to the Listing Rules expires on September 30, 2004.

The following requirements must be met by such issuers by September 30, 2004:

1. Listed issuers' boards of directors must have a minimum of 3 Independent Non-Executive Directors ('INEDs') (Main Board Rule 3.10/GEM Rule 5.05);
2. At least one INED must have appropriate professional qualifications or accounting or related financial management expertise (Main Board Rule 3.10(2)/GEM Rule 5.05(2));
3. INEDs appointed by listed issuers before March 31, 2004 have until September 30, 2004 to confirm to the Exchange in writing their independence in accordance with the new guidelines set out at Main Board Rule 3.13 and GEM Rule 5.09 and that there are no other factors affecting their independence (Main Board Rule 3.15/GEM Rule 5.11). If an INED fails to meet the new independence guidelines, a new INED must be appointed to replace him; and
4. Main Board listed issuers must have established an audit committee meeting the requirements of Rule 3.21.

To see further information on the March 2004 amendments to the Main Board and GEM Listing Rules, please see our [March](/newsletters/hklaw/en/2004/11/nl-hklaw-20040325-11.html) and [May](/newsletters/hklaw/en/2004/13/nl-hklaw-20040517-13.html) 2004 newsletters.

## 5. Migration To The New Licensing Regime Under The SFO

The 2-year transitional period for corporations and their employees carrying on 'regulated activities' under Part V of the SFO to become licensed (or, in the case of authorised institutions, registered) under the SFO expires on March 31, 2005. The deemed licences and registrations which applied during the transitional period lapse on that date. Consequently persons who fail to apply for their new SFO licence or registration prior to March 31, 2005 will no longer be entitled to carry on regulated activities. To carry on (or hold oneself out as carrying on) a business in a regulated activity without an appropriate SFO licence/registration is a criminal offence subject to fines and/or imprisonment.

As regards sole-proprietors registered under the pre-SFO regime, they are required to incorporate in order to become licensed under the SFO. They must also ensure that they have at least 2 responsible officers.

For further information on the licensing regime under the SFO please see our [October 2003 newsletter](/newsletters/hklaw/en/2003/7/nl-hklaw-20031016-7.html). Sample completed migration application forms can be downloaded from the SFC website.

## 6. SFC Releases Findings Of Surveys On Fund Management Activities And Fund Trading Practices

The SFC released the findings of its Fund Management Activities Survey 2003 on July 6, 2004 and its Report of the Survey on Fund Trading Practices (Market Timing, Late Trading and Selective Disclosure) on July 8, 2004. Copies of both are available on the [SFC website](http://www.hksfc.org.hk) under 'Press Releases, Publications and Speeches' - 'Publications' - 'Surveys and Reports'.

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