

► Proposals for the Reform of the Companies Ordinance Prospectus Regime



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CURRENT PROSPECTUS REGIME – OVERVIEW OF APPLICABLE PROVISIONS

- ▶ **S37** – dating of prospectus
- ▶ **S38** – specific requirements
- ▶ **S38A** – exemption of certain persons and prospectus from compliance
- ▶ **S38B** – advertisements concerning prospectuses
- ▶ **S38BA** – Commission may publish guidelines relating to advertisements
- ▶ **S38C** – expert’s consent
- ▶ **S38D** – registration of prospectus
- ▶ **S39A** – amendment of prospectus consisting of one document
- ▶ **S39B** – prospectus may consist of more than one document
- ▶ **S39C** – submission of certified copies
- ▶ **S40** – civil liability for misstatement in prospectus
- ▶ **S40A** – criminal liability for misstatements in prospectus
- ▶ **S342** – similar provisions in relation to overseas companies
- ▶ **S360** – power to amend requirements as to accounts. Schedules, tables, forms and fees

CURRENT PROSPECTUS REGIME – OVERVIEW OF APPLICABLE PROVISIONS

17th Schedule	List of offers not fall within definitions
18th Schedule	Warning language
19th Schedule	Contents and publication requirement of advertisements
20th Schedule	Amendment of prospectus
21st Schedule	Prospectus may consist of more than one document
22nd Schedule	Persons specified for S40

DEFINITION OF PROSPECTUS – S2

Prospectus

- ▶ (a) subject to paragraph (b), means any prospectus, notice, circular, brochure, advertisement, or other document:
 - (i) offering any shares in or debentures of a company (including a company incorporated outside Hong Kong, and whether or not it has established a place of business in Hong Kong) to the public for subscription or purchase for cash or other consideration; or
 - (ii) calculated to invite offers by the public to subscribe for or purchase for cash or other consideration any shares in or debentures of a company (including a company incorporated outside Hong Kong, and whether or not it has established a place of business in Hong Kong);-
- ▶ (b) does not include any prospectus, notice, circular, brochure, advertisement, or other document:
 - (i) to the extent that is a publication falling within section 38B(2) (see next slide); or
 - (ii) to the extent that it contains or relates to an offer specified in Part 1 of the Seventeenth Schedule as read with the other Parts of that Schedule

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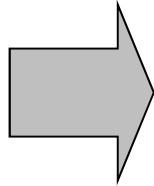
DEFINITION OF PROSPECTUS – S2

Offer to Sell

- ▶ “Offer to sell” in relation to any shares or debentures includes
 - (a) any act of omission or other thing calculated to invite offers to purchase the shares or debentures;
 - (b) any reference to offer for sale

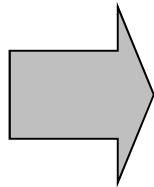
CO REQUIREMENTS IN RELATION TO PROSPECTUSES

Section 37



Prospectus must be dated

Section 38



Section 38 – contains specific requirements as to particulars in prospectus:

- ▶ Language requirements (English and Chinese translation or vice versa)
- ▶ Must contain the matters and reports set out in the Third Schedule to the CO
- ▶ Must contain the following statement:

“IMPORTANT – if you are in any doubt about the contents of this prospectus, you should obtain independent professional advice.”

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SECTION 38 AND THIRD SCHEDULE REQUIREMENTS IN RELATION TO PROSPECTUSES

- ▶ Third Schedule CO contains detailed requirements on content of prospectus, including:
 - “sufficient particulars and information to enable a reasonable person to form as a result thereof a valid and justifiable opinion of the shares or debentures and the financial condition and profitability of the company at the time of the issue of the prospectus, taking into account the nature of the shares or debentures being offered and the nature of the company, and the nature of the persons likely to consider acquiring them.”

SECTION 38 AND THIRD SCHEDULE REQUIREMENTS IN RELATION TO PROSPECTUSES

- ▶ Consultation Paper on Possible Reforms to the Prospectus Regime published by the SFC in August 2005
- ▶ Consultation Conclusions published in September 2006
- ▶ Of the Consultation Paper's 21 original proposals, 12 will be taken forward and 3 have been revised in the light of market response

TRANSFER CO PROSPECTUS REGIME TO THE SFO

- ▶ The provisions of the CO relating to the public offering of shares and debentures will be moved to the SFO as a discrete part, separate from the investment advertisement regime in Part IV SFO.

SHIFT OF FOCUS TO TRANSACTION BASED APPROACH

- ▶ The focus of the CO prospectus regime will be changed from a “document-based” to a “transaction-based” approach by regulating the act of offering rather than the document containing the offer.
- ▶ All public offers of shares or debentures will be required to be contained in a CO compliant prospectus unless they fall within one of the exemptions in the Seventeenth Schedule to the CO.
- ▶ Reduced disclosure requirements for secondary issues of shares listed on the SEHK.
- ▶ New exemptions will be added to the Seventeenth Schedule
- ▶ Offers by persons other than the issuer: the SFC is considering the adoption of a “knowledge” element in the prospectus content requirements.

OPTIONS AND OTHER RIGHTS

- ▶ It will be clarified that the CO prospectus regime applies to offers of options or other rights in or over shares or debentures, where the issuer of the option or other right is in the same group of companies as the issuer of the underlying shares or debentures.

SCOPE OF THE REGIME: BODIES AND PLACE OF INCORPORATION

- ▶ The CO prospectus regime will apply to “bodies” rather than “companies” and without regard to their legal form or place of incorporation.

UNIFICATION OF CO AND SFO REGIMES

- ▶ Proposed merger of the CO prospectus regime and the SFO investment advertisement regime will not occur.
- ▶ Steps to harmonise the legal and regulatory treatment of investment arrangements with similar risks and rewards.
- ▶ The definition of “debenture” will be amended to exclude “structured products”.
- ▶ Public offers of structured products will be subject to regulation under Part IV of the SFO.
- ▶ Plain vanilla debenture offers and share offers (including offers of options or other rights where the issuer of the option or other right is in the same group as the issuer of the underlying shares or debentures) will be regulated under the CO prospectus regime.
- ▶ Non-statutory product codes or guidelines will supplement the SFO investment advertisement regime.

NEW SAFE HARBOUR FOR TAKEOVER AND MERGER OFFERS AND SCHEMES OF ARRANGEMENT IN COMPLIANCE WITH LAWS OF A COMPANY'S HOME JURISDICTION

- ▶ Offers made to holders of shares or debentures of a company incorporated in a “recognised jurisdiction” in the context of a takeover or merger or under a compromise or scheme of arrangement will be exempted from the CO prospectus regime provided that the offer complies with the laws and regulatory requirements of the company's home jurisdiction and any principal stock exchange on which it is listed.

ADJUSTMENT OF ANTI-AVOIDANCE MECHANISM

- ▶ Proposals revised to focus on the safe harbours most prone to abuse - the “50 persons private placement” and “HK\$5 million small-scale offering” exemptions.
- ▶ New provisions whereby:
 1. closely related offers made within a period of 12 months (whether or not made by the same entity) will be aggregated when determining the offeree/offer size limits; and
 2. the SFC will be empowered to aggregate “closely related” offers within such period when determining whether the relevant safe harbour has been abused.
- ▶ The criteria for determining whether offers are “closely related” will be set out in SFC guidelines.

PERSONS LIABLE FOR PROSPECTUS

The scope of the CO prospectus liability regime will be amended to:

- ▶ **include** (i) the issuer and/or offeror of the shares or debentures and (ii) each person who accepts, and is stated in the prospectus as accepting responsibility for the prospectus; and
- ▶ **remove** (i) “promoters” and (ii) persons who “authorise the issue of a prospectus”.

Prospectus liability will **not** be imposed on **sponsors** as was originally proposed.

S40A CO will be amended so that criminal liability will only be incurred if there is fraud or recklessness.

AMENDMENT OF REASONABLE BELIEF DEFENCE

- ▶ Belief must be founded on all reasonable inquiries.

OVERALL DISCLOSURE STANDARD AND PROSPECTUS CONTENTS

Overall disclosure standard will be:

- ▶ moved into the body of the CO prospectus regime
- ▶ supplemented by prescribed content requirements for different instruments

DISCLOSURE FOR RIGHTS ISSUES

Reduced (rather than negligible) content requirements to apply to prospectuses for:

- ▶ rights issues; and
- ▶ issues of shares or debentures that are uniform with listed shares or debentures.

INCORPORATION BY REFERENCE

- ▶ New provision to allow incorporation by reference of information located outside the prospectus

SUPPLEMENTAL PROSPECTUS AND RIGHT OF WITHDRAWAL

An issuer will have to publish a supplemental prospectus if it becomes aware of a new circumstance that:

- ▶ has arisen since the prospectus date but prior to the announcement of the results of allocation;
- ▶ would have been required to be disclosed in the prospectus had it occurred prior to the prospectus date; and
- ▶ is materially adverse from the perspective of prospective investors.

The issuer will have to:

- ▶ notify investors of the availability of the supplemental prospectus; and
- ▶ grant investors the right to withdraw their allocations and be repaid in full.

PRE-DEAL RESEARCH

The new proposals are that:

- ▶ an advanced draft prospectus may be made available to selected analysts (including connected analysts) for the purposes of preparing the research report;
- ▶ the red-herring prospectus will have to be made available to the public after the listing application has been heard and in-principle approval has been granted;
- ▶ Paragraph 16 of the Code of Conduct for Persons Licensed by or Registered with the SFC will be amended to prohibit analysts from obtaining:
 - a) any forward looking information (including both qualitative and quantitative forecasts) about the prospective issuer; and
 - b) any material information not already contained in the draft prospectus or in the public domain.

Possible requirement for sponsors to be present at all meetings between the listing applicant and analysts.

**REPEAL OF REQUIREMENTS RE. STATEMENTS IN LIEU OF
PROSPECTUS IN S43 CO**

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PROPOSALS THAT WILL NOT BE TAKEN FORWARD

- ▶ to extend the class of persons who can claim compensation for a prospectus misstatement to secondary market purchasers;
- ▶ to remove the requirement for claimants to prove that they have actually read and relied on the prospectus;
- ▶ to extend the 3-day waiting period before allotments of shares or debentures in the case of IPOs and remove such period for public offers of shares or debentures of a class already listed;
- ▶ to require that application forms must be accompanied by a prospectus;
- ▶ to introduce a separate regulatory regime for offers to employees;
- ▶ to provide that an issue or sale of securities in contravention of the law should be void or voidable.

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