

Guidelines on applying for a relaxation from the procedural formalities to be fulfilled upon registration of a prospectus under the Companies Ordinance (Cap.32)

1. INTRODUCTION

- 1.01 Pursuant to (a) section 4(2) of the Securities and Futures Commission Ordinance and (b) section 399 of the Securities and Futures Ordinance and section 32 of the Interpretation and General Clauses Ordinance, the Securities and Futures Commission (the “Commission”) is empowered to issue guidelines indicating the manner in which, in the absence of any particular consideration or circumstance, it proposes to perform its functions. These guidelines, issued under (a) section 4(2) of the Securities and Futures Commission Ordinance and (b) section 399 of the Securities and Futures Ordinance and section 32 of the Interpretation and General Clauses Ordinance, and intended for the assistance of issuers of securities and their professional advisers, relate to the formalities when seeking authorisation for registration of a prospectus pursuant to section 38D or 342C of the Companies Ordinance (the “Ordinance”).
- 1.02 In accordance with sections 38D and 342C of the Ordinance, a copy of a prospectus, having endorsed thereon or attached thereto, amongst other things, any consent to the issue thereof required by section 38C or 342B from any person as an expert (“expert’s consent letter”), is required to be authorised for registration and registered by the Registrar of Companies (the “Registrar”) before publication by the issuer. In cases involving a prospectus relating to shares or debentures to be listed on The Stock Exchange of Hong Kong Limited (the “Exchange”), such authorisation for registration is administered by the Exchange. In cases not involving such a listing of shares or debentures, the authorisation for registration is administered by the Commission.
- 1.03 Under section 38D(2)(c) and 342C(2)(c) of the Ordinance, every prospectus shall conform to such requirements as are specified by the Registrar under section 346 of the Ordinance and applicable to prospectuses to be registered. According to section 38D(7)(a)(iv) and 342C(7)(a)(iv), the Registrar shall not register a prospectus unless it conforms to those requirements. The Requirements for Documents Guidelines 2001 issued by the Registrar on 1 November 2001 pursuant to section 346 (the “Registrar’s Guidelines”) state that prospectuses are required, amongst other things, to be printed on A4 paper of a certain thickness and weight. The current practice is to submit to the Commission (or the Exchange, in the case of listed offerings), for authorisation for registration, the definitive prospectus¹ satisfying these requirements together with the original of any expert’s consent letter.

¹ For the purposes of these guidelines, the “definitive prospectus” is the version of the prospectus that is distributed to the public.

- 1.04 Market practitioners have commented in a number of instances that, in the circumstances of their case, because of the particular arrangements for printing the definitive prospectus or the use of overseas-based experts, the requirement to submit the definitive prospectus and original expert's consent letters for registration introduces an additional level of complexity into the administration of the registration process which is difficult to manage satisfactorily. These guidelines aim to address these concerns.
- 1.05 The Commission will, in the performance of its function of considering whether to authorise the registration of a prospectus under section 38D or 342C of the Ordinance, exercise its discretion on a case-by-case basis. As a matter of general principle, however, the Commission anticipates that it will be predisposed to consider favourably any application made in compliance with these guidelines.
- 1.06 These guidelines may describe only the way in which the Commission proposes to exercise its own functions. Accordingly, the guidelines apply where the Commission administers authorisation for registration. The Exchange has nevertheless indicated that it supports these guidelines and proposes to apply equivalent practices when the Exchange administers the authorisation for registration. Issuers of shares or debentures to be listed on the Exchange wishing to avail themselves of these guidelines should inform the Exchange at the earliest opportunity. Practitioners are also reminded that in the case of listed securities these guidelines are subject to Exchange listing rules and practice from time to time.
- 1.07 These guidelines do not have the force of law and should not be interpreted in any manner that would conflict with the provisions of any applicable law or regulatory requirements. The guidelines represent a regulatory policy position taken by the Commission for market development purposes within what it understands to be the boundaries of applicable law. The guidelines should not be construed as legal advice or as a definitive interpretation of the relevant statutory provisions. Issuers should seek legal advice if they are in any doubt as to the relevant statutory provisions or whether their particular circumstances or proposals would breach applicable legal or regulatory requirements.

2. RELAXATION OF CURRENT REQUIREMENTS

- 2.01 In order to facilitate the registration of a prospectus in cases where the issuer or its adviser satisfies the Commission that administrative difficulties will otherwise unjustifiably result, the Commission considers that, subject to the Registrar's Guidelines being amended or supplemented to accommodate these guidelines², current practices may be relaxed to the extent specified in paragraphs 2.02 and 2.03 below.

² The Registrar has indicated that the Registrar's Guidelines will be revised as necessary to accommodate these guidelines.

2.02 The issuer may deliver to the Commission for authorisation for registration two bound copies of the bulk print proof prospectus³ which is identical to the proposed definitive prospectus except that, if the circumstances so require, the text and images may be in black and white or grey-scale rather than colour (the “permitted dispensation”) provided that:

- (a) it is accompanied by a letter from or on behalf of the issuer (i) stating that the issuer wishes to take advantage of the facility referred to in paragraph 2.02 of these guidelines and the reason for wishing to do so, (ii) confirming that the copy of the prospectus submitted for authorisation complies with the Registrar’s Guidelines (as amended or supplemented from time to time) and is identical to the proposed definitive prospectus save for the circumstances falling within the permitted dispensation that are specified in the letter, and (iii) undertaking to deliver the definitive prospectus to the Commission in accordance with paragraph 2.02(d);
- (b) the bulk print proof prospectuses delivered to the Commission have been signed or certified and endorsed in accordance with sections 38D(3) or 342C(3) of the Ordinance, as applicable subject to paragraph 2.03 below;
- (c) the letter from the Commission to the Registrar authorising any bulk print proof prospectus for registration shall specify that the authorisation relates to a bulk print proof prospectus and where applicable provide brief particulars of any circumstances falling within the permitted dispensation that apply;
- (d) the definitive prospectus (which need not be signed/certified by the directors) is delivered to the Commission as soon as practicable after it becomes available in Hong Kong and no later than the date on which the prospectus is made available to the public in Hong Kong, accompanied by a letter from the issuer or its legal advisers confirming that the definitive prospectus is identical to the bulk print proof prospectus authorised for registration except for any circumstances falling within the permitted dispensation (as the circumstances may require); and
- (e) any failure to comply with the provisions of paragraph (d) will be treated as a failure to comply with these guidelines and the prospectus shall be regarded as having been issued in breach of section 38D or 342C of the Ordinance (as the case may be).

³ For the purposes of these guidelines, the “bulk print proof prospectus” is the version of the prospectus that is approved by the issuer for bulk printing into the definitive prospectus.

- 2.03 The issuer may deliver to the Commission with the prospectus⁴ to be authorised for registration a facsimile (fax) image of an expert's consent letter, provided that:
- (a) it is accompanied by a letter from or on behalf of the issuer (i) stating that the issuer wishes to take advantage of the facility referred to in paragraph 2.03 of these guidelines, (ii) confirming that the faxed image of the expert's consent letter was received by the issuer with a cover fax from the expert stating that the original expert's consent letter was being faxed with that cover, and that the original expert's consent letter had not yet been received by the issuer, and (iii) undertaking to deliver the original expert's consent letter to the Commission in accordance with paragraph 2.03(b);
 - (b) the original expert's consent letter is delivered to the Commission as soon as practicable and no later than 7 days after registration of the prospectus, accompanied by a letter from the issuer or its legal advisers confirming that the original expert's consent letter is identical to the faxed image sent earlier in accordance with paragraph 2.03(a) in terms of contents; and
 - (c) any failure to comply with the provisions of paragraph (b) will be treated as a failure to comply with these guidelines and the prospectus shall be regarded as having been issued in breach of section 38D or 342C of the Ordinance (as the case may be).

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⁴ The prospectus delivered to the Commission may be a bulk print proof prospectus within the meaning of paragraph 2.02 in cases where the issuer avails itself of the facility described in that paragraph.