

Marketing Mutual Funds in Hong Kong

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Marketing Mutual Funds in Hong Kong

Introduction

This note considers some of the Hong Kong regulatory issues arising from the marketing of shares in a mutual fund company incorporated outside Hong Kong (the “Fund”) to potential investors in Hong Kong. There are two principal areas to consider: (i) whether the entity marketing the Fund is required to be licensed or registered under the Securities and Futures Ordinance (the “SFO”); and (ii) the restrictions on the making of offers/invitations to the public under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (the “C(WUMP)O”) and under Part IV of the SFO.

Summary

Marketing by the Fund

The Fund can be marketed by the Fund itself without a licence under the SFO only to the limited categories of “professional investors” which are “institutional professional investors” (“**Institutional Professional Investors**”)¹ as set out in Part 1 of Annex A to this note.

Marketing by an Intermediary

The Fund can be marketed and/or distributed by an intermediary which is licensed or registered by the Securities and Futures Commission (the “SFC”) for regulated activity type 1 (“dealing in securities”):

- i to investors each paying a minimum consideration of HK\$ 500,000 for the shares; or
- ii if the total consideration payable for the shares is less than HK\$ 5 million; or
- iii to unlimited numbers of “professional investors” including all types of professional investors set out in Annex A, and overseas investors (who do not need to be professional investors); or
- iv subject to meeting the requirements for reliance on the private placement exemption specified in Section 2.1 below, to up to a limited number of other investors not constituting the Hong Kong “public”.

1. THE LICENSING REQUIREMENT UNDER THE SECURITIES AND FUTURES ORDINANCE (THE “SFO”)

1.1 Business of Dealing in Securities

¹ Institutional professional investors are investors within paragraphs (a) to (i) of the definition of “professional investor” in section 1 of Part 1 of Schedule 1 to the SFO.

A corporation generally needs to be licensed by the SFC to carry on a business in a regulated activity in Hong Kong. Carrying on a business is construed widely.

“Dealing in securities” constitutes regulated activity type 1 and is widely defined - a person “deals in securities” if he, whether as principal or agent, makes or offers to make an agreement with another person, or induces or attempts to induce another person to enter into or offer to enter into an agreement to acquire, dispose of, subscribe for or underwrite securities.

The marketing or distribution of the Fund in Hong Kong by the Fund itself or by an intermediary will prima facie constitute dealing in securities.

1.2 Marketing by the Fund

There is a limited exemption from the Type 1 licensing requirement for a person who, **as principal**, deals only with Institutional Professional Investors”.

Only the Fund can rely on this exemption. All marketing activities must be conducted by representatives of the Fund (e.g., by the Fund’s directors), and not by representatives of any intermediary (such as an investment manager or placing agent). In addition, all marketing materials will need to be issued in the name of the Fund itself, so that the Fund meets the requirement for dealing “as principal”.

The exemption restricts marketing and distribution of the Fund to Institutional Professional Investors, which is limited including only regulated entities such as licensed investment intermediaries, authorised financial institutions (such as banks), regulated insurance companies, regulated funds, and government and multilateral agencies.

The Fund can therefore market shares in itself to Institutional Professional Investors only without an SFC licence.

1.3 Marketing by an Intermediary

An intermediary would need to be licensed or registered for Regulated Activity Type 1 (dealing in securities) in order to market or distribute shares in the Fund in Hong Kong, unless an exemption applies.

(i) *Incidental Exemption*

An intermediary licensed for Type 9 regulated activity (asset management) does not need to be licensed for Type 1 regulated activity (dealing in securities), if it deals solely for the purposes of the intermediary’s asset management business. The exemption is narrowly interpreted. It can only be relied on by an SFC-licensed asset manager with respect to its marketing of funds under its management . The exemption cannot be relied on to market and/or

distribute the funds of a third party fund manager. This would be outside the scope of the exemption and require the asset manager to be separately licensed or registered for type 1 regulated activity.²

(ii) *Dealing through a Licensed/Registered Securities Dealer*

An exemption from the licensing requirement is available to an unlicensed entity that deals through a Hong Kong licensed securities dealer (holding a licence for regulated activity type 1).³ However, the exemption does not apply if the person appointing the licensed securities dealer to market the Fund (e.g. the fund manager or the Fund itself) receives any commission, rebate or other remuneration for introducing investors to the licensed dealer or purchasing securities from the licensed dealer on investors' behalf.

(iii) *Temporary Licence*

An unlicensed intermediary can apply for a temporary licence for a period of up to three months, subject to a maximum temporary licensing period of six months over two years. The principal requirement for the grant of a corporate temporary licence is that the entity is authorised in its home jurisdiction by a regulator which performs a similar function to the SFC and has the power to investigate and discipline the entity in respect of its conduct in Hong Kong. The SFC has indicated informally that the process for granting a full licence will typically take 12 months but that the processing period should be shorter for granting a temporary licence to an entity that is already licensed in a recognised jurisdiction. The SFC has indicated a possible timetable of around one month if the structure is not complicated, and around 2 months for less straightforward cases. Marketing cannot commence until the temporary licence has been granted. Any representatives of the intermediary involved in the marketing activities will also need to apply for temporary licences.

In practice, obtaining a temporary licence in Hong Kong is difficult. One of the application requirements is that the applicant has lodged an application under section 130(1) SFO for the keeping of records and documents. Also, a temporary licence cannot be obtained for regulated activity type 9 (asset management) or type 8 (securities margin financing). A temporary licensee is also prohibited from holding client assets.

1.4 Marketing from outside Hong Kong

² Source: SFC FAQs on Licensing Related Matters, Topic 10 – Incidental Exemption, Question 10.6

³ Paragraph (iv) of the definition of “dealing in securities” in Schedule 5 to the SFO

An entity (such as a fund manager or placing agent) which markets interests in the Fund from outside Hong Kong to persons in Hong Kong is prima facie “dealing in securities” and will require a Type 1 licence in the absence of an available exemption. In practice, the SFC is unwilling to license entities operating offshore because they fall under the regulatory jurisdiction of the home regulator. Offshore funds will therefore often appoint Type 1 licensed brokers to distribute the fund in Hong Kong to rely on the exemption allowing an unlicensed entity to “deal in securities” through a licensed entity (see paragraph (ii) under 1.3 above).

“Active marketing” under s.115 of the SFO

Section 115 of the SFO prohibits a person “*actively marketing*” to the Hong Kong public, whether on his own behalf or that of a third party and whether in or from outside Hong Kong, any services which would be a regulated activity and require an SFC licence if provided in Hong Kong.

Providing the services in Hong Kong will be deemed to amount to carrying on the regulated activity in Hong Kong, while the entity marketing the services will be regarded as holding itself out as conducting business in that regulated activity in Hong Kong,⁴ both of which are offences under the SFO if conducted by an unlicensed entity.⁵

Section 115 relates to the active marketing of “services”. The marketing of products (e.g. a securities product such as interests in a fund) should not normally be caught by this. As discussed at 1.3(ii) “*Dealing through a Licensed/Registered Securities Dealer*” above, an unlicensed offshore fund manager can market/distribute a fund in Hong Kong through a Hong Kong-licensed securities dealer under section 114 of the SFO.⁶ An offshore fund manager, or a Type 1 licensed entity appointed to market the fund, must however ensure that it does not actively market the offshore fund manager’s *services as a fund manager* (as opposed to the fund itself) in Hong Kong.

“Active marketing”

As to what constitutes “active marketing” of a service, there is considerable uncertainty. According to the SFC’s [FAQs](#), “actively markets” can include, frequently calling on and marketing services (which includes offering products) to Hong Kong investors; running a mass media programme targeting Hong Kong’s investing public; and internet activities targeting Hong Kong investors. The factors the SFC says it will consider include: whether there is a detailed marketing plan to promote the services; whether the services are extensively advertised via direct mailing, local newspaper advertisements, broadcasting or other “push” technology over the Internet (as opposed to where services are passively available on a “take it or leave it” basis).

⁴ Paragraphs (i) and (ii) of Section 115 of the SFO

⁵ Sections 114(1)(a) and 114(1)(b) of the SFO

⁶

However, enforcement cases brought by the SFC have seen the SFC argue against its own FAQ and that actual sales resulting from advertising activities are sufficient to establish active marketing. The SFC's interpretation as set out in the FAQ was also dismissed by the Securities and Futures Appeals Tribunal ("SFAT") as being no more than "*straws in the interpretative wind*". This dismissal was subsequently affirmed by the Court of Appeal.⁷ Unfortunately, neither the SFAT nor the Court of Appeal provided any definitive guidance on the meaning of "actively marketing", noting only that it will depend on "*the particular facts and circumstances ... in any given case.*"

Section 115 prohibits actively marketing services "*to the public*" in Hong Kong. However, there is no brightline test for how many potential investors constitute the "public" under the SFO as there is under CWUMPO under which the "private placement" exemption allows an offer to 50 persons without the publication of a prospectus. Whether the SFC would allow an offer to 50 non-professional investors to be exempt from the prohibition under section 115 is debatable. Given the uncertainty, it would be prudent to restrict any offshore marketing efforts directed at Hong Kong investors as much as possible, ideally to as few as 20 professional investors, with as many institutional professional investors as possible.

2. THE PROSPECTUS REGIME

The distribution of a prospectus in Hong Kong offering shares in a company (whether incorporated in or outside Hong Kong) must comply with the content and registration requirements set out in the C(WUMP)O.⁸

A prospectus is defined as any prospectus, notice, circular, brochure, advertisement or other document which:

- **offers** any shares or debentures of a company to **the public** for subscription or purchase; or
- is **calculated to invite offers** by **the public** to subscribe for or purchase any shares or debentures of a company.

Accordingly any documents distributed to the "public" which contain an offer or invitation to acquire shares in the Fund will be subject to the C(WUMP)O prospectus requirements unless an exemption applies.

The prospectus requirements do not apply to public offers of shares which are made verbally, although verbal advertisements and invitations are subject to the prohibition on unauthorised investment advertisements in Section 103 SFO (see further below).

⁷ *Ng Chiu Mui & Anor v SFC* Unreported, CACV 141/2009, 26 May 2010

⁸ Sections 38D and 342C C(WUMP)O

2.1 Exemptions

The Seventeenth Schedule to the C(WUMP)O (the “**Seventeenth Schedule**”) sets out twelve safe harbours which exclude certain categories of offers from the prospectus requirements. The most important of these in terms of offering shares in a Fund are:

(i) *Professionals Exemption*

An offering document for an offer to professional investors (as defined in section 1 of Part 1 of Schedule 1 to the SFO (“**Professional Investors**”)) is excluded from the C(WUMP)O “prospectus” definition and hence from all the C(WUMP)O prospectus requirements.

Professional Investors for the purposes of this exemption include all categories of Professional Investors set out in Annex A.

This exemption allows Fund shares to be marketed and sold to the categories of high net worth investors set out in Parts 2 and 3 of Annex A, as well as to Institutional Professional Investors. However, firms offering shares to these categories of Professional Investors must satisfy themselves that the investors meet the relevant assets or portfolio threshold at the relevant date to qualify as Professional Investors.

(ii) *Private Placement Exemption*

An exemption is available for offers made to a maximum of 50 persons in Hong Kong provided that the offer document contains in a prominent position the warning statement specified in Part 3 of the Eighteenth Schedule to the C(WUMP)O (the “**specified warning statement**”) which is:

“**WARNING**”

The contents of this document have not been reviewed by any regulatory authority in Hong Kong. You are advised to exercise caution in relation to the offer. If you are in any doubt about any of the contents of this document, you should obtain independent professional advice.”

In counting the 50 offerees, the offer must be taken with any other offer of shares by the same person within the preceding 12 months which relied on the same exemption. It is not therefore possible to increase the number of offerees by staggering share placements.

Where the private placement exemption is relied on, the following steps should be taken:

- Each offering memorandum issued should be numbered in series and individually addressed to each offeree;
- The offering memorandum should include the specified warning statement on the front cover;
- The offering memorandum should contain a warning that the addressee may not copy or pass it on to any other person;
- Subscriptions for shares in the Fund should only be accepted from the offeree and the offeree should only be able to purchase shares in the Fund as principal;
- Placees should be required to agree not to sell their shares in Hong Kong in the 6 months following the allotment of the shares, except in circumstances which do not constitute an “offer to the public” within the meaning of the C(WUMP)O. This is to ensure that the anti-avoidance provisions of Sections 41(1) and 343(1) C(WUMP)O are not triggered;⁹ and
- There should be no public advertising at all in Hong Kong in relation to the offer of shares in the Fund. The issue of promotional material must be strictly limited to offerees.

It is possible to combine the professionals exemption and the private placement exemption so that documents offering the Fund shares to unlimited numbers of professional investors and to a maximum of not more than 50 non-professional investors will be exempt from the C(WUMP)O prospectus requirements. If both exemptions are relied on, no more than 50 copies of the offering memorandum should be issued to non-professional investors and the steps for private placements set out above should also be taken in respect of offers to such persons.

(iii) *Small Offer Exemption*

Where the maximum consideration payable for the offer shares does not exceed HK\$ 5 million (or its foreign currency equivalent) the offer will be exempt from the C(WUMP)O prospectus requirements.¹⁰ In determining whether the HK\$ 5 million condition is satisfied, offers are taken together with any other offer

⁹ Section 41(1) and 343(1) of C(WUMP)O provide that if a company agrees to allot shares with a view to them being offered to the public for sale, then any document offering the shares for sale to the public will be deemed to be a “prospectus”. In the absence of proof to the contrary, it will be assumed that a company allotted its shares with a view to them being offered to the public if: (i) the shares are offered for sale to the public within six months of their allotment; or (ii) the full amount of the consideration due in respect of the shares has not been received on the offer date.

¹⁰ Paragraph 3 of Part 1 of the Seventeenth Schedule to C(WUMP)

of shares by the same person within the preceding 12 months which relied on the same exemption.

For the exemption to be available, the offer documentation must also contain the specified warning statement in a prominent position.

(iv) *Sophisticated Investor Exemption*

There is an exemption for offers where the minimum consideration payable by any person for the shares at least HK\$ 500,000 (or its foreign currency equivalent). The specified warning statement must be included in the offer documentation in a prominent position. To rely on this exemption, **every** investor must pay a minimum of HK\$ 500,000. If they do so, investors do not additionally need to be “professionals” within the definition referred to above.

(v) *Offers to Persons outside Hong Kong*

References in the safe harbours to an “offer” do not include an offer to the extent that it is made to persons outside Hong Kong.¹¹ Offers made to persons outside Hong Kong can therefore be disregarded in determining whether any relevant exemption applies. For example, when determining whether the number of offerees are within the 50 person limit allowed under the private placement exemption, it is only necessary to count the number of offerees in Hong Kong.

3. PART IV OF THE SECURITIES AND FUTURES ORDINANCE

3.1 Investment Advertisements

It is an offence under Section 103(1) of the SFO for a person to issue in Hong Kong an advertisement, invitation or document which is or contains an invitation to the public:

- to enter into or offer to enter into an agreement to acquire, dispose of, subscribe for or underwrite securities: or
- to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme,

unless the issue is authorised by the SFC under Section 105(1) SFO or an exemption applies.

“Collective investment scheme” is the term used in the SFO to cover

¹¹ Paragraph 1(b) of Part 4 of the Seventeenth Schedule to the C(WUMP)O.

mutual funds, unit trusts and other pooled investment arrangements. The Fund will constitute a collective investment scheme for the purposes of the SFO. It is the SFC's policy intention that the public offering of both open-ended and closed-end funds should be subject to SFC authorisation under the SFO unless specifically exempted.

Unlike the C(WUMP)O, the SFO regime covers advertisements and invitations made verbally as well as in written documents.¹²

3.2 SFC Authorisation Requirement for Public Offers

In order for shares in a fund to be marketed to the public in Hong Kong, the fund must be authorised by the SFC under Section 104 SFO. The conditions for authorisation are set out in the Code on Unit Trusts and Mutual Funds. In addition, any invitation to the public to acquire shares in the fund, must be authorised by the SFC under Section 105 SFO.

3.3 Exemptions

There are a number of exemptions from the investment advertisement requirements.

Most importantly, any invitation to the public which relates to an offer within the safe harbours of the Seventeenth Schedule to the C(WUMP)O, is also exempt from the prohibition on unauthorised investment advertisements by virtue of Section 103(2)(ga) SFO. Accordingly, SFC authorisation is not required for invitations relating to an offer:

- (i) to investors each paying a minimum consideration of HK\$ 500,000 for the shares; or
- (ii) in circumstances where the total consideration payable for the shares is less than HK\$ 5 million; or
- (iii) to unlimited numbers of "professional investors" within Annex A, overseas investors and up to a maximum of 50 other investors.

3.3.1 Advertisements issued to professional investors

Advertisements marketing securities and collective investment schemes (i.e. funds) to Professional Investors (i.e. all the categories of investors listed in Annex A to this note) are exempt from the SFC authorisation requirements.¹³

Funds can therefore be marketed to high net worth investors (as set out in Parts 2 and 3 of Annex A) as well as Institutional Professional Investors

¹² See the definitions of "advertisement" and "invitation" in Section 102 SFO.

¹³ Section 103(2)(ga) of the SFO

(with Part 1 of Annex A) under this exemption. However, the offeror must establish that investors who are not Institutional Professional Investors meet the relevant assets or portfolio threshold at the relevant date¹⁴ to qualify as a Professional Investor. Firms should keep proper records of their assessment process so as to demonstrate that they have exercised professional judgment and have reached a reasonable conclusion that their clients meet the relevant thresholds.

4. INTERNET MARKETING

The SFC has stated that the provisions of the SFO and C(WUMP)O relating to the advertisement, offering and dealing of collective investment schemes (i.e. funds) apply equally to activities conducted over the internet. The sending of marketing material over the internet is therefore subject to the same restrictions under the C(WUMP)O and the SFO.

The SFC's primary concern is to regulate activities which are targeted at persons residing in Hong Kong or are detrimental to the interests of the Hong Kong investing public or to the market integrity of Hong Kong. Factors which will be taken into account in determining whether an advertisement is targeted at Hong Kong investors include:

- (i) Whether the information is targeted via "push" technology (such as e-mail) to persons residing in Hong Kong;
- (ii) Whether the information provided over the internet appears to target Hong Kong residents (such as the use of local distribution agents; references to Hong Kong dollars; the use of Chinese language and the publication in a Hong Kong newspaper or publication of the internet address where such information can be accessed).

4.1 THE LICENSING REQUIREMENT

As mentioned in Section 1.4 above, marketing activities conducted from outside Hong Kong which target Hong Kong investors may trigger the SFO's licensing requirements. The SFC's Guidance Note on Internet Regulation published in 1999 (the "**SFC Guidance Note**") states that the SFC will require persons who use the internet to induce people residing in Hong Kong to deal in securities to be registered or licensed by the SFC. In practice, however the SFC will not license an offshore entity, but will license a Hong Kong subsidiary (but not a branch) of an offshore entity, to carry on a business of conducting a regulated activity in Hong Kong. In order to conduct marketing in Hong Kong, an offshore entity will need to incorporate a subsidiary which will need to obtain a Type 1 licence to be able to market the fund itself.

¹⁴ "Relevant date" means in the case of any advertisement, invitation or document to enter an agreement to acquire or subscribe for securities, the date of issue of the advertisement, invitation or document (Section 2 of the Securities and Futures (Professional Investor) Rules).

Ng Chiu Mui & Anor v SFC

In the case of *Ng Chiu Mui & Anor v SFC*,¹⁵ the SFC took disciplinary action against three individuals of Hantec International Limited (“**HIL**”), a Hong Kong company licensed for regulated activity Type 3 (leveraged foreign exchange trading). Hantec International was part of the Hantec Group which also included a New Zealand company, Cosmos Hantec International (“**CHI**”) which was an offshore leveraged foreign exchange dealer.

In the case, the SFAT found that CHI had been actively marketing its services to the Hong Kong public through the Hong Kong-licensed entity, HIL. The conduct of those services by CHI amounted to regulated activity Type 3 and since CHI was not licensed in Hong Kong, it was in breach of section 114 of the SFO. In reaching its decision that CHI had been “actively marketing” its services to the Hong Kong public, the SFAT took into account that:

- Representatives of HIL encouraged individuals to open accounts with CHI to trade leveraged foreign exchange contracts;
- HIL’s licensed representatives were identified as the designated “account executives” in the account opening documents relating to the leveraged foreign exchange trading conducted by CHI; and
- CHI’s internal documents indicated that Hong Kong was one of its target markets.

The fact that HIL was licensed under the SFO made no difference to the outcome: CHI’s active marketing of its *services* through HIL breached section 115 of the SFO notwithstanding that HIL was a licensed entity. While the marketing of a product through a Hong Kong licensed entity is clearly allowed under section 114 of the SFO, this is not the case for section 115 of the SFO.

Consequently, a Hong Kong SFC-licensed entity can only actively market the services which it provides itself, and not those provided by its offshore group company.

4.2 INTERNET MARKETING - THE PROSPECTUS REGIME AND PART IV OF THE SFO

The SFC Guidance Note also states that the requirements of the C(WUMP)O prospectus regime and the SFO prohibition on unauthorised invitations to the public apply to invitations and offers made by means of the internet.

In addition, internet advertisements to acquire shares in a fund are likely to be caught by Section 103(10) of the SFO which contains deeming provisions whereby:

¹⁵ *Ng Chiu Mui & Anor v SFC* Unreported, CACV 141/2009, 26 May 2010

- (i) any advertisement, invitation or document which consists of or contains information likely to lead, directly or indirectly, to the doing of any act referred to in Section 103(1) is regarded as an advertisement, invitation or document which is or contains an invitation to do such act; and
- (ii) any advertisement, invitation or document which is or contains an invitation directed at, or the contents of which are likely to be accessed or read (whether concurrently or otherwise) by, the public is deemed to be or contain an invitation to the public.

Where the information memorandum is to be sent via the internet, it should therefore be sent by individual e-mails (rather than by posting on a website) and include the appropriate Hong Kong selling restrictions and, where the private placement exemption is relied on, legends warning the addressees not to pass the information to any other person.

This note is intended for information purposes only. Specific advice should be sought in relation to any particular situation. The provision or accessing of this note does not create a lawyer client relationship between Charltons and any reader of this note.

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ANNEX A

DEFINITION OF “PROFESSIONAL INVESTORS”

There are 3 principal categories of professional investors – Institutional Professional Investors, Corporate Professional Investors and Individual Professional Investors.

The categories of Institutional Professional Investors are set out in paragraphs (a) to (i) of Part 1 of Schedule 1 to the Securities and Futures Ordinance, while the definitions of Corporate Professional Investors and Individual Professional Investors are set out in the Securities and Futures (Professional Investor) Rules.

1. Institutional Professional Investors

Institutional Professional Investors are persons falling under paragraphs (a) to (i) of the definition of “professional investor” in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (the **SFO**):

- a. any recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company, or any person authorized to provide automated trading services under section 95(2) of the SFO;
- b. any SFC-licensed corporation or SFC-registered institution, 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;
- c. any authorized financial institution, or any bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong;
- d. any insurer authorized under the Insurance Companies Ordinance (Cap. 41), or any other person carrying on insurance business and regulated under the law of any place outside Hong Kong;
- e. any scheme which-
 - i. is a collective investment scheme authorized under section 104 of the SFO; or
 - ii. is similarly constituted under the law of any place outside Hong Kong and, if it is regulated under the law of such place, is permitted to be operated under the law of such place,or any person by whom any such scheme is operated;
- f. any registered scheme as defined in section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485), or its constituent fund as defined in section 2 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A), or any person who, in relation to any such registered scheme, is an approved trustee or service provider as defined in section 2(1) of that Ordinance or who is an investment manager of any such registered scheme or constituent fund;
- g. any scheme which-

- i. is a registered scheme as defined in section 2(1) of the Occupational Retirement Schemes Ordinance (Cap 426); or
- ii. is an offshore scheme as defined in section 2(1) of that Ordinance and, if it is regulated under the law of the place in which it is domiciled, is permitted to be operated under the law of such place,

or any person who, in relation to any such scheme, is an administrator as defined in section 2(1) of that Ordinance;

- h. any government (other than a municipal government authority), any institution which performs the functions of a central bank, or any multilateral agency; or

Except for the purposes of the exemptions from the licensing requirements under Schedule 5 to the SFO:

- i. any corporation which is-
 - i. a wholly owned subsidiary of:
 - A. an SFC-licensed corporation or SFC-registered institution, 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
 - B. an authorized financial institution, or any bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong; or
 - ii. a holding company which holds all the issued share capital of:
 - A. an SFC-licensed corporation or SFC-registered institution, 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
 - B. an authorized financial institution, or any bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong; or
 - iii. any other wholly owned subsidiary of a holding company referred to in subparagraph (ii).

2. Corporate Professional Investors

Corporate Professional Investors are trust corporations, corporations or partnerships falling under sections 4, 6 or 7 of the Securities and Futures (Professional Investor) Rules (Cap. 571D) (the **PI Rules**). These are:

- a. **Trust Corporations** - a trust corporation which has been entrusted under the trust or trusts of which it acts as a trustee with total assets of not less than **HK\$40 million** or its foreign currency equivalent.

A “trust corporation” is:

- i. any trust company registered under Part 8 of the Trustee Ordinance (Cap. 29); or

- ii. any other corporation which carries on a business which is of a nature similar to that of a trust company referred to in paragraph (i) and is regulated under the law of any place outside Hong Kong.

b. Corporations include:

- i. a corporation which has:
 - A. a portfolio¹⁶ of at least **HK\$8 million** or its equivalent in any foreign currency; or
 - B. total assets of at least **HK\$40 million** or its foreign currency equivalent;
- ii. a corporation whose principal business is to hold investments and which is wholly owned by one or more of the following:
 - A. a trust corporation referred to in section 4 of the PI Rules (see paragraph 2(a) above);
 - B. an individual referred to in section 5(1) of the PI Rules (see paragraph 3 below);
 - C. a corporation referred to in this paragraph (ii) or paragraph (i);
 - D. a partnership referred to in section 7 of the PI Rules (see paragraph (c) below);
 - E. a professional investor within the meaning of paragraphs (a), (d), (e), (f), (g) or (h) of the definition of “professional investor” in section 1 of Part 1 of the SFO (as set out in Part 1 above);
- iii. a corporation which wholly owns a corporation referred to in paragraph (i) above.

c. A partnership which has:

- i. a portfolio¹⁷ of at least **HK\$8 million** or its equivalent in any foreign currency; or
- ii. total assets of not less than **HK\$40 million** or its equivalent in any foreign currency.

Ascertaining total assets or portfolio of Corporate Professional Investors

The total assets entrusted to a trust corporation, or the portfolio or total assets of a corporation or partnership should be determined by referring to one or more of the following:

¹⁶ “portfolio” means a portfolio comprising any of the following: (a) securities; (b) a certificate of deposit issued by: (i) an authorized financial institution; or (ii) a bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong; (c) in relation to an individual, corporation or partnership, money held by a custodian for the individual, corporation or partnership.

¹⁷ Ibid.

- a. the most recent audited financial statement prepared within 16 months before the relevant date of the trust corporation (or a trust of which it acts as trustee), corporation or partnership; or
- b. any one or more of the following documents issued or submitted within 12 months before the relevant date:
 - i. a statement of account or a certificate issued by a custodian
 - a “custodian” is:
 - A. a corporation whose principal business is to act as a custodian of securities or other property for another person, whether on trust or by contract; or
 - B. any of the following persons whose business includes acting as a custodian custodian of securities or other property for another person, whether on trust or by contract authorized financial institution;
 - C. a bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong;
 - D. a licensed corporation; or
 - E. a person carrying on the business of the provision of investment services and regulated under the law of any place outside Hong Kong;
 - ii. a certificate issued by an auditor or a certified public accountant; or
 - iii. a public filing submitted by or on behalf the trust corporation (whether on its own behalf or in respect of a trust of which it acts as a trustee), corporation or partnership.
 - A “public filing” is a document that, pursuant to legal or regulatory requirements in Hong Kong or in a place outside Hong Kong, has been submitted to a person or body that is under a duty to publish the document to, or otherwise make the document available for inspection by, members of the public in Hong Kong or in a place outside Hong Kong.

3. Individual Professional Investors

Individual Professional Investors are individuals who have a portfolio¹⁸ of at least **HK\$8 million** (or its foreign currency equivalent) when any one or more of the following are taken into account:

- a. a portfolio in his or her own account;
- b. a portfolio in a joint account with his or her associate;
 - an “associate” is a spouse or child.

¹⁸ Supra note 16

- c. his or her share of a portfolio on a joint account with one or more persons who are not associates.
 - an individual's share is the share specified in a written agreement between the accountholders, or if none, an equal share of the portfolio;
- d. a portfolio of a corporation which, at the relevant date, has as its principal business the holding of investments and is wholly owned by the individual.

4. Ascertaining portfolio of Individual Professional Investors

The portfolio (including a share of a portfolio) of an individual is determined by reference to one or more of the following documents issued or submitted within 12 months before the relevant date:

- i. a statement of account or a certificate issued by a custodian;
- ii. a certificate issued by an auditor or a certified public accountant; or
- iii. a public filing submitted by or on behalf the individual.

A “public filing” is a document that has been submitted by or on behalf of the individual pursuant to legal or regulatory requirements in Hong Kong or elsewhere to a person or body that is under a duty to publish the document to, or otherwise make the document available for inspection by, members of the public in Hong Kong or elsewhere.