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## Private Placement of Bonds

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## Note

# Private placement of bonds

This note outlines the typical procedure for a company listed on The Hong Kong Stock Exchange Limited (“**Exchange**”) to issue bonds by way of private placement to borrow money from independent parties.

While the terms of the bonds are a commercial issue, we understand that often bonds:

- will be issued to no more than 50 bondholders
- have a duration of between 3 and 5 years
- will be placed through a securities company in Hong Kong (“**Securities Co**”), as placing agent

This note is intended to provide you with an overview of:

- the structure and parties involved in the private placement of unlisted bonds
- the legal documentation required for the private placement of unlisted bonds
- a typical timetable of a bond issue
- Hong Kong tax and stamp duty considerations relating to a bond issue
- the regulatory requirements in relation to the issue of bonds by a listed issuer

## The Parties

As the relevant bonds will be issued by way of private placement to independent parties, we assume a simple structure whereby a lead manager (who would normally syndicate the issue, deal with allotment of bonds between managers, deal with over allotments/stabilisation etc.) would not be required. Further, we assume that the bonds will not be underwritten by managers but will be sold directly to the places / lenders.

*(NB: we have assumed in this note that clearing would not be done through a common depositary and bonds will be issued / registered upon receipt of subscription monies – i.e. no temporary global form, definitive form or permanent form distinction and this note is qualified accordingly)*

The following are key parties that may be involved in the relevant issue:

- (i) the **issuer**: Usually an offshore company

primarily responsible for payment of principal and interest on the bonds and during the preparation of the issue, and is responsible for, *inter alia*:

- (a) mandating the placing agent, Securities Co, to manage the issue
- (b) agreeing the main terms and conditions of the bonds with the placing agent
- (c) obtaining, with assistance from its counsel, all necessary consents and approvals for the issue from all applicable regulatory bodies
- (d) taking responsibility for the information memorandum
- (e) appointing the fiscal agent/ trustee and the paying agents (as required)
- (f) meeting relevant fees and expenses (including management fees, selling concessions, legal expenses incurred by the placing agent, fiscal agent / trustee, printing and distribution costs of information memorandum etc.)
- (g) passing all necessary resolutions for the issue
- (h) executing all relevant documents

- (ii) the **guarantor**: (if any)

guarantees the obligations of the issuer, including all payment obligations, under the issue

(iii) the **placing agent**: Usually a Hong Kong Securities Company

primarily responsible for arranging the transaction, including the sale of the bonds, legal documentation and settlement procedure; in particular, it will be responsible for:

- (a) agreeing the terms of the mandate with the issuer / guarantor
- (b) advising the issuer / guarantor regarding the timing of the issue and pricing
- (c) instructing lawyers to prepare issue documentation and negotiation of the terms therein
- (d) liaising with the issuer / guarantor generally and regarding the appointment of fiscal agent and paying agents
- (e) sourcing and liaising with potential investors for the bond issue
- (f) liaising with the issuer regarding settlement procedures at closing
- (g) generally monitoring the timetable throughout

(iv) the **fiscal agent**: this will be an independent agent of the issuer and will have a chiefly administrative role; its responsibilities will include, *inter alia*:

- (a) authenticating the bonds upon original issue and execution by the issuer
- (b) arranging for security printing of the bonds
- (c) replacement of lost or damaged bonds throughout the life of the issue
- (d) receiving monies from the issuer in respect of the principal and interest payments and making these available to the bondholders
- (e) maintaining records regarding all payments made under the bonds and the bonds which have been cancelled or replaced

It should be noted that a fiscal agent will have no personal liability in respect of the bonds vis-à-vis the bondholders and will only be obliged to pay when necessary funds are received from the issuer.

*NB: In respect of the bond issue of the issuer:*

- *there is not usually a need for more than one paying agent but rather just one fiscal / principal agent*
- *there is not usually a need for a trustee as they tend to be used in more complex structures (e.g. secured issues where the trustee will be holding security or where the issuer's covenants in the bonds require close monitoring) and which will cost substantially more than a fiscal agent*

(v) the **agent bank**: (if required) (*NB: not required for fixed rate bond issue*)

where the bonds are floating rate notes (FTNs) or index-linked or linked to fluctuations of currencies, a reference / agent bank may be required. The reference / agent bank's principal duty will be to periodically calculate the rate and amount of interest payable on the notes in accordance with their terms and publishing this information to the bondholders

## Procedure and primary documentation

The following is a brief summary of the main documents that we anticipate will be involved in the private placement of unlisted bonds by the issuer (other than those relevant to regulatory requirements):

(i) **mandate**

*Parties*: to be entered into between the issuer and Securities Company

*Purpose:*

- sets out the principal terms of the issue and its pricing
- authorises the placing agent to arrange the issue

(ii) **information memorandum**

*Purpose:*

- this is the selling and/or marketing document that will be distributed to the potential investors
- should contain the following broad components
  - responsibility statement, selling restrictions and contents list
  - terms and conditions of bond
  - use of proceeds
  - an overview of the business of the issuer, including a statement of its equity and long term indebtedness
  - various financial statements and auditor's report
  - description of tax treatment of bonds
  - section relating to subscription and sale
  - details of the issuer, fiscal agent, lawyers, paying agents etc.

*NB: must ensure strict compliance with all regulatory provisions applicable to the document (see section below on regulatory requirements in relation to a bond issue of a listed issuer)*

(iii) **subscription agreement**

*Parties:* to be entered into between the issuer with each subscriber of bonds

*Purpose:*

- agreement under which the issuer agrees to issue and sell to the subscriber and the subscribers agree to purchase from the issuer and pay for the bonds
- it should contain the following provisions:
  - representations of the issuer (including such representation as to the truth, accuracy and completeness of the particulars contained in the information memorandum, including financial statements; confirmation of due incorporation and good standing etc.)
  - indemnities by the issuer to the subscribers in case of any material breach of representation
  - fees, costs and expenses
  - condition precedents and closing conditions (which may include such things as delivery of legal opinions, auditors' comfort letters and closing certificates, representations remaining true and there being no material adverse change etc.)
  - "force majeure" events which will result in the subscriber being released from the obligation to purchase the bonds

(iv) **auditors' report and comfort letters**

- the auditors' report will usually be included in the information memorandum, and for

the issuer, can be a restatement of its auditors' report in the most recent financial statements

- it is usual to obtain a consent letter from the auditors agreeing to the inclusion of the report in the information memorandum
- if the financial information is dated, it is usual to obtain a comfort letter from auditors confirming there has been no material adverse change in the financial position of the issuer since the date the accounts were audited

(v) **fiscal agency agreement**

this agreement provides for the following:

- appointment of the fiscal agent
- authentication of the bonds (guarantees the genuineness of signatures of the relevant officers executing the bond on behalf of the issuer)
- payment of principal and interest to the holders of the bonds (the issuer undertakes to place the fiscal agent with funds to meet payments of principal and interest falling due in respect of the bonds)
- keeping of records with respect of payment and cancellation of bonds and coupons (in respect of interest)
- resignation and replacement of fiscal agent
- calling of meetings of the bondholders
- fees and expenses payable to the fiscal agent
- schedule of the bonds (temporary and definitive) together with interest coupons
- schedule of terms of guarantee (if any)

If the issuer gives authority to the fiscal agent to appoint sub-paying agents, this is effected by way of a letter from the fiscal agent to each of the sub-paying agents.

(vi) **bond**

assuming bearer bonds, the terms and conditions of the bonds will be printed on the reverse and interest coupons will be attached. The conditions usually printed on the bonds will include the following provisions:

- ranking of the bonds
- negative pledge
- interest
- payments
- taxation
- redemption and purchase
- events of default
- replacement of lost or stolen bonds
- meetings of bondholders

if the bonds are registered bonds:

- the name of the placee and the particulars of the bonds will be recorded in a register held by the issuer
- the issuer may require the engagement of a registrar / administrative agent (usually a bank or a trust company) to carry out, *inter alia*, the following responsibilities:
  - maintaining necessary records, which show the bondholder's name and address;

- and when sales occur, the name of the transferor and transferee;
- authenticating, delivering, or redeeming the bonds on behalf of the issuer; and
- processing principal and interest payments.

*(NB: this may be the fiscal agent)*

(vii) **agent bank agreement**

where the bonds are FTNs or index-linked or linked to fluctuations of currencies, this document would be required to appoint the agent bank for determination of the rates of interest for the bonds

- (viii) **guarantee:** may be either endorsed on the bond or included in a separate deed of guarantee
- (ix) **legal opinions:** often required as condition precedent to closing covering such aspects as power, capacity, authority and due execution, and legal, valid and binding nature of the documents under relevant laws
- (x) **signing and closing agenda:** (optional) to assist an issue to be assigned and closed smoothly

*NB: there will be no invitation or allotment telexes as there will not be any syndication. Accordingly, there will not be an agreement among managers.*

Further documents that may be required include:

- (i) **internal approval documents** of the issuer (e.g. board resolutions)
- (ii) **power of attorney** of the issuer appointing authorised signatories
- (iii) **incumbency certificate** setting out the offices occupied, and specimen signatures of, all persons executing documents on behalf of the issuer
- (iv) letter from the issuer appointing agents for **service of process**
- (v) **closing certificate** from a senior officer or director of the issuer to the effect that there has been no material adverse change in the condition of the issuer and no breach of representation and warranties at the time of closing

### **Timetable of bond issue**

The timetable of a bond issue can vary from a few days to several months depending on the complexity of the terms and conditions, the parties and their jurisdictions and whether the issuer is a first-time issuer. The issuer should consider the following:

- (i) it will need sufficient time to collate information necessary for inclusion in the information memorandum; this may be affected by factors such as availability of necessary information such as financial statements;
- (ii) the fact that the bonds are issued by way of placement and will be unlisted and not underwritten may simplify the timetable significantly; and
- (iii) it is usual to allow a week between signing and closing for satisfaction of the conditions.

The following is a typical timeline for a bond issue:

**Initial meeting:** to determine

- the basic terms and condition of the bonds
- the timetable and allocation of responsibilities
- marketing and strategy
- general form and content of information memorandum
- decision as to appointment of fiscal agent, agent bank, legal advisers etc.

**Announcement**

An announcement *may* need to be released to the market when it is definitively determined that the issuer will issue the bonds (*see section below on regulatory requirements relating to issue of bonds by a Hong Kong listed issuer*).

**Post-announcement**

- the subscription agreement, fiscal agent agreement, agent bank agreement (if any), deed of guarantee (if any) and other ancillary documents will be negotiated between relevant parties
- the placing agent will proactively liaise with potential investors

**Prior to signing**

- all relevant resolutions of the issuer and, if relevant, the guarantor approving the issue of bonds and authorising the signature and sealing of any and all documents necessary or required in connection with the issue will be passed
- all necessary government and regulatory consents will have been obtained by the issuer and, where relevant, the guarantor
- the subscription agreement, information memorandum, fiscal agency agreement, agent bank agreement (if applicable), auditors' signing comfort letter, bond notes, closing certificates, legal opinions etc. will be agreed between the relevant parties
- all relevant powers of attorney required will be executed

*(NB: the information memorandum may be finalised, signed by the issuer and despatched prior to signing)*

**Signing**

The following will be executed, signed and sealed (as relevant):

- subscription agreement (will be exchanged);
- information memorandum (signed by the issuer and, where relevant, the guarantor)
- agent bank agreement (if applicable)
- fiscal agency agreement
- bond notes (executed by the issuer, but not to be authenticated until closing)
- deed of guarantee (where relevant)
- executed comfort letter to be have been received from the issuer's auditors, and where relevant, the guarantor's auditors

*(NB: the issuer to take custody of fiscal agent agreement, bond notes and deed of guarantee pending delivery at closing, these will be dated on the date of closing)*

**Post-signing and before closing**

- the issuer’s receiving bank account details and payment instructions are to be confirmed
- legal opinions, auditor’s comfort letter and closing certificates etc. in a form confirmed by potential investors
- all conditions precedent in the subscription agreement checked

### ***Closing***

The following documents to be produced, dated and delivered at closing:

- closing certificates
- legal opinions
- auditors’ comfort letter
- fiscal agency agreement
- deed of guarantee (where relevant)
- bonds (authenticated by the fiscal agent) ready for delivery pending receipt of subscription monies

### **Hong Kong tax and stamp duty considerations**

*\* We are not tax professionals and are not qualified to provide tax advice, the information contained in this section is for indicative purposes only. the issuer should seek independent tax advice from qualified tax professionals.*

*\* The summary below only refers to taxes that may be charged in Hong Kong in respect of the bonds. Additional taxes may be chargeable on the bonds by tax authorities of other jurisdictions.*

#### **Profits tax imposed on bondholders**

The bondholders will be subject to profits tax (currently at the rate of 16.5% for corporations) in respect of any profits that they derive from the bonds (including any interests earned)<sup>1</sup> – these should be deemed to have arisen or derived from Hong Kong. There is an exemption<sup>2</sup> from profits tax for long term debt instruments with an original maturity of 7 years or longer or is undated and cannot be redeemed within the 7 years. If the bonds are issued with a term of 3 to 5 years, they will not qualify for this exemption.

#### **Withholding tax**

There is no withholding tax in Hong Kong (except when payments are made to foreign associates) and therefore the issuer should not be subject to any withholding tax. However, withholding tax may be charged by the relevant tax authority in the jurisdiction of the fiscal / paying agent. The question of whether payment amounts under the bonds should be specified to be inclusive of or exclusive of withholding tax should be considered.

#### **Stamp duty**

No Hong Kong stamp duty will be payable on the issue or redemption of bonds nor will Hong Kong stamp duty be payable on the disposition or transfer of bonds provided that the register of holders of the bonds will be maintained outside Hong Kong. If the register of the bond is maintained in Hong Kong, the bonds will be considered Hong Kong stock as defined by the Stamp Duty Ordinance (Cap. 117 of the Laws of Hong Kong)<sup>3</sup> and stamp duty will be chargeable on the transfer (at the rate of 0.1% of the value on each contract note – i.e. 0.1% payable by the transferor on the sold note and

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<sup>1</sup> Inland Revenue Ordinance (Cap. 112 of the Laws of Hong Kong) (“IRO”)

<sup>2</sup> s 26A of the IRO

<sup>3</sup> The term “stock” is broad in scope for stamp duty purposes, and includes bonds or notes issued by any corporate or non-corporate body (section 2(1) of the Stamp Duty Ordinance (Cap 117 of the Laws of Hong Kong)).

0.1% payable by the transferee on the bought note)<sup>4</sup>. There is also an exemption available for debt securities that are neither denominated nor redeemable in Hong Kong dollars.

### Regulatory requirements in relation to issue of bonds by a listed issuer

*\* This section focuses on regulatory requirements in Hong Kong only in relation to the issue of bonds. It is important that all applicable laws and regulations (including those of the jurisdiction of the issuer and the placee of the bonds) are duly complied with in relation to the placement.*

#### Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance prospectus and Securities and Futures Ordinance authorisation considerations

Under the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32 of the Laws of Hong Kong) (“CO”), it is unlawful to issue any form of application for bonds of a company to the Hong Kong public unless the form is issued with a prospectus complying with the requirements of the CO and which is registered with the Registrar of Companies in Hong Kong.

Further, Part IV of the Securities and Futures Ordinance (Cap 571 of the Laws of Hong Kong) (the “SFO”) provides that a person is not permitted to issue any document which contains an invitation to the public to subscribe for any securities<sup>5</sup> unless the issue is authorised by the Securities and Futures Commission (the “SFC”). This means that for the bonds of the issuer to be marketed to the public in Hong Kong, the bonds must be authorised by the SFC.

There are certain exemptions to the prospectus requirement under the CO and the authorisation requirement under the SFO. The following are some exemptions that may or may not be applicable to the issue by the issuer depending on a number of factors (such as the identity of the proposed placees and the terms of the bonds):

- professionals exemption

offers made to professional investors (as defined in Section 1 of Part 1 of Schedule 1 of the SFO - please refer to *Appendix A*)

If and when the professional investors exemption is relied on by the issuer, it is common for the information memorandum to include representations that (a) no bonds will be offered or sold, by any means, to any person other than to “professional investors” as defined in the SFO and any rules made under that ordinance; or (b) in other circumstances which do not result in the document being a “prospectus” as defined in the CO or which do not constitute an offer to the public within the meaning of that ordinance; and (c) it has not issued, and will not issue or have in its possession for the purposes of issue, whether in Hong Kong or elsewhere, any advertisement, invitation or document relating to the bonds, which is directed at, or the contents of which are likely to be accessed or read by, the public of Hong Kong (except if permitted to do so under the securities laws of Hong Kong) other than with respect to bonds which are or are intended to be disposed of only to persons outside Hong Kong or only to “professional investors” as defined in the SFO and any rules made under that ordinance.

Similarly, the subscription agreement and application forms should contain a declaration from the subscribers that they are “professional investors” within the definition of the SFO.

- private placement exemption

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<sup>4</sup> Head 2 of First Schedule of the Stamp Duty Ordinance (Cap 117 of the Laws of Hong Kong).

<sup>5</sup> The definition of “securities” under Schedule 1 of the SFO includes, bonds or notes of, or issued by, a body, whether incorporated or unincorporated.

offers made to a maximum of 50 persons in Hong Kong provided that the offer documentation contains in a prominent position, the following warning, as specified in Part 3 of the Eighteenth Schedule to the CO (“**Warning Statement**”):

“*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”*

Further, the following precautions should be taken to ensure that the private placement is not treated as a general offer to the public in Hong Kong:

- (a) each information memorandum issued should be numbered in series and individually addressed to each offeree;
- (b) the information memorandum should contain a warning that the addressee may not copy or pass the information memorandum to any other person;
- (c) subscription for the bonds should only be accepted from the offeree and the offeree should only be able to subscribe for the bonds as principal;
- (d) the transfer of the interests in the bond by the offeree to any person in Hong Kong should be restricted for a minimum period following allotment;
- (e) there should be no public advertising in Hong Kong in relation to the placement of bonds and any promotional material must be strictly limited to offerees; and
- (f) any document returned by an offeree should not be reissued.

It should be noted that, in counting the 50 offerees, offers of securities of the same class made by the same person in reliance on this exemption in the previous 12 months must be aggregated. It is not therefore possible to increase the number of offerees by staggering offers of the bonds.

- small offer exemption

offer in respect of which the total consideration payable for the bonds concerned does not exceed HK\$5 million (or its foreign currency equivalent). The offer documentation must also contain the specified Warning Statement in a prominent position. Again, offers relying on this exemption are taken together with other offers made by the same person during the previous 12 months that relied on the same exemption.

- sophisticated investor exemption

offers where the minimum principal amount to be subscribed by any person is not less than HK\$500,000 (or its foreign currency equivalent). The offer documentation must also contain the specified Warning Statement in a prominent position. In order for this exemption to apply, every person must subscribe to the minimum principal amount of HK\$ 500,000.

- offers to persons outside Hong Kong

offers to the persons outside Hong Kong can be disregarded in determining whether any exemption applies since those offers do not need to be taken into account.

### Structured Products

The above exemptions do not apply to structured products which include debt securities which are equity-linked or credit-linked. Essentially, a debt security will be a structured product if some or all of the return or amount due (or both the return and amount due) or the method of settlement is determined by reference to one or more of:

- changes in the price, value or level (or a range within the price, value or level) of any type of securities, commodity, index, property, interest rate, currency exchange rate or futures contract;
- changes in the price, value or level (or a range within the price, value or level) of a basket of more than one type of securities, commodity, index, property, interest rate, currency exchange rate or futures contract; or
- the occurrence or non-occurrence of an event or events specified in the instrument (excluding an event or events relating only to the issuer or guarantor of the instrument or to both of them).

Offers of structured products are governed solely by Part IV of the SFO. An invitation to the public to acquire structured products requires authorisation by the SFC unless an exemption is available. The exemptions available under the SFO are narrower than under the CO. Essentially, the only exemptions available are:

- professionals exemption

offers made to professional investors (as defined in Section 1 of Part 1 of Schedule 1 of the SFO - please refer to *Appendix A*)

- an offer which is structured so that it is not an offer “to the public”

the general consensus is that an offer to 50 persons (or less) in Hong Kong would not constitute the public.

The steps listed at paragraphs (a) to (f) in relation to the private placement exemption under the Companies (Winding Up and Miscellaneous Provisions) Ordinance above should also be taken to ensure that any invitation to acquire bonds which are “structured products” does not constitute an invitation to the public requiring SFC authorisation.

The following types of debt securities do not constitute structured products: plain vanilla debentures (such as fixed rate bonds and zero coupon bonds), floating rate notes, and convertible and exchangeable bonds. Offers of these securities can thus rely on the exemptions set out under “Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance prospectus and Securities and Futures Ordinance authorisation considerations” above.

### Licensing requirements of the Securities and Futures Ordinance

The SFO provides that no person shall carry on a business in a regulated activity without being licensed or registered under the SFO.

Regulated activities include, *inter alia*, “dealing in securities” (Type 1 Regulated Activity). The term

“dealing in securities” is widely defined in the SFO and includes the “*making or offering to make an agreement with another person, or inducing or attempting to induce another person, to enter into or offer to enter into any agreement for or with a view to ...subscribing for or underwriting securities*”. In this regard, “securities” is defined to include bonds or notes of, or issued by, a body, whether incorporated or unincorporated and clearly includes the bonds contemplated in this note.

It is clear from the above that any marketing of the issuer’s bonds would constitute “dealing in securities” as it would be considered as offering or inducing another person to enter into any agreement to subscribe for its securities. Any marketing of the bonds that targets Hong Kong investors will therefore trigger the SFO’s licensing requirements.

If the bonds are to be marketed by the placing agent, Securities Company, therefore, it is imperative that the Securities Company is licensed to carry out Type 1 Regulated Activity.

#### Listing Rules requirements

If the issuer is a listed issuer trading on the main board of The Stock Exchange of Hong Kong Limited (“**Exchange**”), it will need to be comply with the Rules Governing the Listing of Securities on the Exchange (“**Listing Rules**”) as well as its statutory obligations under the SFO.

#### Inside Information Provisions under the SFO

The issuer is under a statutory obligation to disclose any inside information (i.e. price sensitive information) relating to it.

Under section 307B (1) of the SFO, an issuer must, as soon as reasonably practicable after any inside information has come to its knowledge, disclose the information to the public. For this purpose, “as soon as reasonably practicable” means the issuer should immediately take all steps that are necessary in the circumstances to disclose the information to the public. Breaches of the disclosure requirement are dealt with by the Market Misconduct Tribunal (“**MMT**”) which can impose a number of civil sanctions including a maximum fine of HK\$8 million on the corporation and on its directors and chief executive in certain circumstances.

“Inside information” is defined in Section 307A SFO as:

specific information that:

(a) is about:

(i) the corporation;

(ii) a shareholder or officer of the corporation; or

(iii) the listed securities of the corporation or their derivatives; and

(b) is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but would if generally known to them be likely to materially affect the price of the listed securities.

The SFC Guidelines on Disclosure of Inside Information<sup>6</sup> include the issue of debt securities as an example of the circumstances in which an issuer should consider whether there is an obligation to disclose inside information. The directors will therefore need to consider whether the issue of the bonds amounts to inside information. If it does, an announcement must be published on the website of

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<sup>6</sup> [http://en-rules.sfc.hk/net\\_file\\_store/new\\_rulebooks/h/k/HKSFC3527\\_4262\\_VER10.pdf](http://en-rules.sfc.hk/net_file_store/new_rulebooks/h/k/HKSFC3527_4262_VER10.pdf)

the Hong Kong Stock Exchange and the issuer's own website as soon as is reasonably practicable. Once the issue is the subject of a board decision, the announcement should be made immediately.

Prior to the making of a board decision, the issuer should be able to rely on the safe harbour from the disclosure obligation that exists for information that concerns an incomplete proposal or negotiation.<sup>7</sup> In order to rely on this safe harbour, the issuer must take reasonable precautions for preserving confidentiality of the information and the confidentiality of the information must be preserved. If confidentiality is lost, or the information is leaked, the safe harbour will cease to be available and the issuer must disclose the inside information as soon as practicable. Prior to the publication of an inside information announcement, it is imperative that the directors ensure that information in relation to the bond issue remains confidential. This may mean taking measures such as the use of codenames in correspondence, the use of private fax lines and e-mail accounts, limiting dissemination of the information to those who "need to know", and reminding parties involved of the need to keep such information strictly confidential etc.

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<sup>7</sup> Section 307D of the SFO.

## Appendix A

### Definition of “Professional Investors”

#### Part A

#### Definition of Professional Investors in Schedule 1 to the Securities and Futures Ordinance

1. An exchange company, clearing house, exchange controller or investor compensation company recognised as such under the SFO, or a person authorised to provide automated trading services under Section 95(2) of the SFO.
2. An intermediary (i.e. a corporation licensed under the SFO to conduct any regulated activity), or a person carrying on the business of providing investment services which is regulated under the law of any place outside Hong Kong.
3. An authorised financial institution (i.e. a bank, restricted licence bank or deposit taking company authorised under the Banking Ordinance (Cap. 155 of Hong Kong), or a bank which is not an authorised financial institution but is regulated under the law of any place outside Hong Kong.
4. An insurer authorised under the Insurance Companies Ordinance (Cap. 41) of Hong Kong, or a person carrying on insurance business and regulated under the law of any place outside Hong Kong.
5. (i) A collective investment scheme authorised under Section 104 of the SFO; or  
(ii) A scheme which is similarly constituted under the law of any place outside Hong Kong and, if it is regulated under the law of that place, is permitted to be operated under that law,  
  
or a person who operates such scheme;
6. A registered scheme as defined in Section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) of Hong Kong, or its constituent fund as defined in Section 2 of the Mandatory Provident Fund Schemes (General) Regulation, or a 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.
7. (i) A registered scheme as defined in Section 2(1) of the Occupational Retirement Schemes Ordinance (Cap.426) of Hong Kong; or  
(ii) An offshore scheme as defined in Section 2(1) of that ordinance which, if regulated under the law of the place where it is domiciled, is permitted to be operated under the law of such place,  
  
or an administrator as defined in that Ordinance of any such scheme.
8. A government (other than a municipal government authority), an institution which performs the functions of a central bank, or a multilateral agency.
9. **Except for the purposes of the exemptions from the licensing requirements,** a corporation which is:

- (i) a wholly owned subsidiary of:
  - (A) an intermediary, or a person carrying on the business of providing investment services which is regulated under the law of any place outside Hong Kong; or
  - (B) an authorised financial institution, or a bank which is not an authorised financial institution but is regulated under the law of any place outside Hong Kong;
- (ii) a holding company which holds all the issued share capital of:
  - (A) an intermediary, or a person carrying on the business of providing investment services which is regulated under the law of any place outside Hong Kong; or
  - (B) an authorised financial institution, or a bank which is not an authorised 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 sub-paragraph (ii).

**Part B**  
**Professional Investors within the Meaning of the Securities and Futures (Professional Investor) Rules**

1. A trust corporation holding assets on trust with a total value of not less than HK\$40 million or its foreign currency equivalent:
  - (i) as stated in the most recent audited financial statement prepared in respect of the trust corporation within 16 months before the relevant date;
  - (ii) as ascertained by referring to one or more audited financial statements, each being the most recent audited financial statement, prepared in respect of the trust or any of the trusts and within 16 months before the relevant date; or
  - (iii) as ascertained by referring to one or more custodian statements issued to the trust corporation in respect of the trust or any of the trusts within 12 months before the relevant date.
2. An 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 foreign currency equivalent:
  - (i) as stated in a certificate issued by an auditor or a certified public accountant of the individual within 12 months before the relevant date; or
  - (ii) as ascertained by referring to one or more custodian statements issued to the individual (either alone or with the associate) within 12 months before the relevant date.
3. A corporation or partnership having either:
  - (i) a portfolio of not less than HK\$8 million or its foreign currency equivalent; or
  - (ii) total assets of not less than HK\$40 million or its foreign currency equivalent, as ascertained by referring to:
    - (iii) the most recent audited financial statement prepared in respect of the corporation or

partnership (as the case may be) within 16 months before the relevant date; or

(iv) one or more custodian statements issued to the corporation or partnership (as the case may be) within 12 months before the relevant date; and

4. A corporation the sole business of which is to hold investments and which is wholly owned by an individual who, either alone or with associates on a joint account, falls within the description in paragraph (2).

**May 2016**

*This note is provided for information purposes only and does not constitute legal advice. Specific advice should be sought in relation to any particular situation. This note has been prepared based on the laws and regulations in force at the date of this note which may be subsequently amended, modified, re-enacted, restated or replaced.*