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# Regulation Of Offers Of Investments Under Part IV Securities And Futures Ordinance

## A. Introduction

Part IV of the Securities and Futures Ordinance (the **SFO**) which came into effect on April 1 2003 regulates the offer of investment products to the public in Hong Kong. It builds on the provisions of the repealed Protection of Investors Ordinance (the **PIO**) which prohibited the issue of investment advertisements to the public unless authorised by the SFC and elaborates on the SFC's power to authorise unit trusts and mutual funds previously contained in the Securities Ordinance.

While the general principles underlying the legislation remain essentially the same, the adoption of certain new definitions, notably the new definition of 'collective investment scheme' which covers mutual funds, unit trusts and other pooled investment arrangements, have widened the range of investment products to which the offering restrictions and offences apply. Other significant changes include a new definition of 'professional investor' for the purposes of the exemption from the prohibition on issue of investment advertisements to the public and a new power for the SFC to withdraw an authorisation already granted.

The purpose of this memorandum is to provide a summary of the new regime regulating offers of investments. In considering the offering restrictions under Part IV, this memorandum will also cover some of the proposed amendments to the Companies Ordinance prospectus regime contained in the Companies (Amendment) Bill 2003.

## B. Prohibition On Unauthorised Investment Advertisements

1.1 Section 103(1) SFO builds on the prohibition in the repealed PIO in providing that it shall be an offence if a person issues, or has in his possession for the purposes of issue, whether in Hong Kong or elsewhere, an advertisement, invitation or document which to his knowledge is or contains an invitation to the public:

1. to enter into or offer to enter into:
   1. an agreement to acquire, dispose of, subscribe for or underwrite securities; or
   2. a regulated investment agreement; or
2. 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.

1.2 '**Regulated Investment Agreement**'

A 'regulated investment agreement' is defined as an agreement, the purpose or effect, or the pretended purpose or effect, of which is to provide, whether conditionally or unconditionally, to any party to the agreement a profit, income or other returns calculated by reference to changes in the value of any property, but does not include an interest in a collective investment scheme.

1.3 '**Collective Investment Scheme**'

Collective investment scheme is the new term used in the SFO to cover mutual funds, unit trusts and other pooled investment arrangements. The definition of 'collective investment scheme' is broad bringing a wider range of investment products within the regulatory regime under Part IV. The principal elements of the definition are:

1. that the scheme constitutes arrangements in respect of any property under which the participants do not have day-to-day control over the management of the property (whether or not they have the right to be consulted or to give directions in respect of the management);
2. the property is managed as a whole by or on behalf of the person operating the scheme, or contributions from participants and profits or income are pooled, or both; and
3. the purpose or effect, or pretended purpose or effect, of the scheme is to enable participants to receive profits, income or other returns arising from the acquisition, holding, management or disposal of all or part of the scheme's property.

The Financial Secretary is also empowered to prescribe any arrangement or class of arrangements to be collective investment schemes by notice in the Gazette.

1.4 '**Deemed Invitations**'

The SFO introduces new deeming provisions whereby:

* 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)(a) or (b) is regarded as an advertisement, invitation or document which is or contains an invitation to do such act; and
* 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.

### 2. SFC Authorisation Of Investment Advertisements

The SFO explicitly empowers the SFC to authorise the issue of an investment advertisement subject to any conditions it considers appropriate (Section 105). Under the previous regime there was some ambiguity as to whether the SFC's power to authorise advertising material permitted it to impose structural and operational requirements on the product itself. The SFO therefore expressly provides that, in authorising any investment advertisement, the SFC may impose such conditions as it considers appropriate, including specifically, conditions on the matter to which the investment advertisement relates.

A new feature of the application procedure is that the applicant must nominate for approval by the SFC an individual to be served with notices and decisions relating to the issue (Section 105(2)).

### 3. Exemptions

3.1 The SFO contains a number of exemptions to the prohibition on unauthorised investment advertisements which are set out in Sections 103(2) and (3). These have for the most part been carried forward from the PIO and apply to the following:

1. any advertisement, invitation or document (an **investment advertisement**) made by or on behalf of:
   1. an intermediary licensed or registered for Type 1 (dealing in securities), Type 4 (advising on securities) or Type 6 (advising on corporate finance) regulated activities (whether as principal or agent) in respect of securities;
   2. an intermediary licensed or registered for Type 2 (dealing in futures contracts) or Type 5 (advising on futures contracts) regulated activities (whether as principal or agent) in respect of futures contracts;
   3. an authorised financial institution (ie. a bank, restricted licence bank or deposit taking company authorised under the Banking Ordinance) (whether as principal or agent) or an intermediary licensed for Type 3 (leveraged foreign exchange trading) regulated activity (whether as principal or agent), in respect of futures contracts;
   4. a recognised exchange company or recognised clearing house in respect of the provision of its services;
   5. a corporation to holders of securities or creditors of, or employees of or agents acting in a professional capacity on behalf of, that corporation (or a related corporation) in respect of securities of that corporation (or related corporation);
   6. the Government in respect of securities issued by it;
   7. a credit union in respect of shares in the credit union;
   8. a trustee of a trust (not being a collective investment scheme) to its beneficiaries; or
   9. a person engaged in the business of selling and purchasing property other than securities (whether as principal or agent) in the ordinary course of that business.

* a, b, c and i **do not** apply to investment advertisements in respect of interests in unauthorised collective investment schemes (Section 103(11)).

1. certain types of investment advertisements including the following:
   1. a prospectus which complies with, or is exempt from compliance with, Part II or (in the case of an overseas company) Part XII of the Companies Ordinance or an extract from or abridged form of such a prospectus the publication of which does not breach Section 38B(1) of the Companies Ordinance;
   2. an application form for shares or debentures of a corporation issued with a prospectus which complies with or is exempt from the Parts II or XII of the Companies Ordinance;
   3. an application form for the securities of a corporation issued (or the possession is for the purposes of issue) in connection with an invitation in good faith to enter into an underwriting agreement with respect to those securities;
   4. any investment advertisement in respect of the issue, whether in Hong Kong or elsewhere, of a certificate of deposit (**CD**) by an authorised financial institution;
   5. any investment advertisement made in respect of the issue, whether in Hong Kong or elsewhere, of a CD of HK$1 million (or its foreign currency equivalent) or more:
      1. by a multilateral agency specified in Part 4 of Schedule 1 (e.g. the World Bank and the International Finance Corporation); or
      2. by a bank incorporated outside Hong Kong having no place of business in Hong Kong where the Hong Kong Monetary Authority has declared in writing that it is satisfied that the bank is likely to be adequately supervised by the relevant authority in the jurisdiction in which it is incorporated or has its principal place of business;
   6. any investment advertisement in respect of the issue, whether in Hong Kong or elsewhere, of a bill of exchange, promissory note or other instrument described in Part 2 of Schedule 4 (other than a CD) of HK$1 million (or its foreign currency equivalent) or more issued by:
      1. an authorised financial institution;
      2. a multilateral agency;
      3. an exempted body (as specified in Part 3 of Schedule 4). The list of exempted bodies includes the Government, the Airport Authority and the KCRC as well as listed companies and their wholly owned subsidiaries provided that they satisfy the 'relevant condition' that their net assets are HK$ 100 million (or its foreign currency equivalent) or more;
      4. a corporation which satisfies the relevant condition (i.e. has net assets of HK$ 100 million or more) and is guaranteed by an authorised financial institution, a multilateral agency or by an exempted body (other than a listed company which does not comply with the relevant condition or its subsidiary); and
      5. a wholly owned subsidiary of a listed corporation and is guaranteed by that listed corporation and the listed company satisfies the relevant condition;
   7. any investment advertisement in respect of the issue of securities which has been approved by a recognised stock exchange where the advertisement complies with the listing rules except where compliance has been waived or modified;
   8. any investment advertisement in respect of securities regulated in a jurisdiction outside Hong Kong which have been admitted to trading on a recognised stock market;
   9. any investment advertisement made in respect of securities, or interests in any collective investment scheme or regulated investment agreement, which are or are intended to be disposed of only to persons outside Hong Kong;
   10. any investment advertisement in respect of securities, or interests in a collective investment scheme or regulated investment agreement, which are or are intended to be disposed of only to 'professional investors'.

3.2 **The Professional Investor Exemption under the SFO**

One important change introduced by the SFO is that, with respect to the 'professionals exemption' referred to at paragraph (j) above, it includes a specific definition of 'professional investor' which sets out the categories of persons who will be regarded as 'professionals'. This replaces the more generic wording previously contained in the PIO which applied the exemption to 'persons whose ordinary business involves the acquisition, disposal or holding of securities, whether as principal or agent'. The new definition therefore makes for greater certainty as to who is within the definition. The definition which is contained in Schedule 1 to the SFO and the Securities and Futures (Professional Investor) Rules is lengthy and is attached at Annex A.

3.3 **The 'Professionals Exemption' under the Companies Ordinance**

An important point to note is that the corresponding provision of the Companies Ordinance (the **CO**) has not yet been amended in line with the SFO. Section 343(2) which contains the so-called 'professionals exemption' for companies incorporated outside Hong Kong provides that an offer of shares or debentures to 'persons whose ordinary business is to buy or sell shares or debentures, whether as principal or agent' shall not be deemed to be an offer to the public triggering the CO prospectus requirements. This definition is narrow as, in practice, many investors (including large corporate investors) who are not buying or selling shares or debentures in the ordinary course of their business may not, strictly speaking, be within the definition.

The benefit of the 'professionals exemption' was also effectively made available to Hong Kong incorporated companies by the Companies Ordinance (Exemption of Companies from Compliance with Provisions) Notice 2001 (as amended in 2002 and 2003). That notice exempts Hong Kong incorporated companies and their prospectuses from compliance with the dual language and contents requirements of Section 38(1) CO where the shares or debentures are offered only 'to persons whose ordinary business is to buy or sell shares or debentures, whether as principal or agent'. Offers to 'professionals' are also exempted from the requirements of Section 38(3) (requiring distribution of application forms with prospectuses) and Section 44A2 (the 30-day time limit for allotment of shares and debentures after the issue of a prospectus). Prospectuses issued only to professionals by Hong Kong companies must however be registered with the Registrar of Companies under Section 38D CO whereas prospectuses of overseas companies issued only to professionals are not required to be registered

It is proposed that the CO be brought into line with the SFO. The CO requires any 'prospectus' to comply with the registration and contents requirements of the CO. The Companies (Amendment) Bill 2003 (the **CAB**) proposes in relation to both Hong Kong and overseas incorporated companies, to exclude from the definition of 'prospectus' any document containing an offer to investors falling within the much wider SFO definition of 'professional investors' (Section 27 CAB). This will also mean that prospectuses of Hong Kong incorporated companies making offers only to professionals will no longer be required to be registered with the Registrar of Companies.

3.4 **Other proposed amendments to the prospectus regime under the Companies Ordinance**

3.4.1 Other proposed exemptions

The CAB proposes to exclude the offering documentation for 11 further categories of offers from the CO 'prospectus' definition. This will allow such offers to be made by both Hong Kong and overseas incorporated companies without triggering the prospectus regime. The most important of the proposed categories are:

1. Offers to not more than 50 persons.
2. Offers for which the total consideration payable for the relevant shares or debentures does not exceed $5,000,000.
3. Offers where the minimum consideration payable by any person is not less than $500,000.
4. Offers made in connection with an invitation made in good faith to enter into an underwriting agreement.
5. Offers made in connection with a takeover, merger or share repurchase made in compliance with the relevant SFC codes.
6. Offers in respect of an exchange of shares in the same company which does not result in an increase in the issued share capital of the company or an exchange of debentures of the same company which does not result in an increase in the aggregate principal amount outstanding under the debentures.
7. Offers made in connection with a collective investment scheme authorised under Section 104 SFO in respect of which the documentation has been been approved under Section 105 SFO.

* It is proposed that the offer documentation in the cases of 1, 2, 3 and 6 will be required to contain a warning statement that it has not been reviewed or endorsed by any regulatory authority of Hong Kong. Suggested wording will be set out in Part 3 of the new 18th Schedule to the Companies Ordinance.

Although not explicit in the draft legislation, the SFC has stated in writing that offering documentation in relation to an offer targeted at persons outside Hong Kong will be outside the scope of the CO prospectus regime. They have also confirmed that any part of an offer made to persons outside Hong Kong will not be subject to the prospectus regime.

3.4.2 Ability to combine exemptions

A further important change proposed by the CAB is that, with the exception of the 2 exclusions under paragraphs 2 and 3 of section 3.4.1 above, each exclusion will be able to be used in combination with any of the others (Part 4 of the proposed new 17th Schedule to the Companies Ordinance). Accordingly, where an offer is structured into separate parts, provided that each part falls within one of the exclusions, then the whole offer will be excluded. For example, documents making an offer to professional investors and to not more than 50 other persons would not be regarded as 'prospectuses' under the new CAB proposals. This is a reversal of the current position, the SFC having indicated in the past that the professionals and private placement exemptions cannot be used concurrently, which is also the currently accepted view with respect to the SFO.

The CAB is still being reviewed by the Bills Committee and will not become law until some time this year.

3.4.3 New ground for exemption

Another proposal of the CAB is to widen the SFC's existing power to grant an exemption from the prospectus requirements under Sections 38A and 342A of the Companies Ordinance by adding a further ground for exemption: that the exemption will not prejudice the interest of the investing public. It is also proposed that the number of provisions in respect of which the exemption may be granted is increased (Section 3 CAB).

3.4.4 Prospectus provisions extended to prospectuses making offers for sale by overseas companies

The CAB proposes that prospectuses offering shares or debentures 'for sale' (ie. not only those making offers for subscription as is currently the case) by overseas companies will trigger the Companies Ordinance prospectus provisions, as has always been the case for Hong Kong incorporated companies.

3.4.5 Consequential amendments to the SFO

Consequential amendments to the SFO made by the CAB will mean that any document excluded from the CO definition of 'prospectus' (i.e. the offering documents for any offer within the safe harbours in the new 17th Schedule to the CO as summarised at paragraph 3.4.1 above) will also be exempted from the prohibition on unauthorised investment advertisements in Section 103(1) SFO by virtue of a new exemption to be added at Section 103(2) SFO.

3.5 **Private Placements under the SFO**

Although this is not technically an exemption, investment advertisements not issued to the public should not fall foul of the legislation. It is our view that a private placement to a small group of identified investors (up to a maximum of 20) should not constitute an offer to the public if appropriate precautions are taken. However, this is an untested area under the SFO as yet. In particular, the SFC has given no indication as to the maximum number of placees which can safely be regarded as not constituting an offer to the public. Further, whether or not an offer is to the public will depend on the circumstances of each case. We therefore recommend that anyone contemplating an offer by way of private placement should contact us for advice specific to the particular offer.

As discussed above, the CAB proposes to provide a specific exemption from the Companies Ordinance prospectus provisions for offers to less than 50 persons. This is in line with industry practice which has taken the limit of 50 persons as the benchmark for private placements in relation to the Companies Ordinance.

In view of the current disparity between the SFO and Companies Ordinance definitions of 'professionals' and the uncertainty surrounding the acceptable limit on the number of placees for private placements under the SFO, one option would be to offer to a limited number of persons (making the offer a private placement for the purposes of the Companies Ordinance in view of the restricted definition of 'professionals') and to ensure that all the placees are within the much wider SFO definition of 'professionals' or are overseas investors to take advantage of the specific exemptions under Section 103(3).

### 4. Penalties For Breach Of Section 103(1) SFO

The offence of breaching Section 103(1) carries a maximum fine of $500,000 and up to 3 years' imprisonment. A further fine of $20,000 is payable for each day that the offence continues (Section 103(4)).

### 5. Defences

Sections 103(5) to (9) contain a number of defences to the Section 103(1) offence.

Section 103(5) provides defences for investment advertisements issued or held in possession for the purposes of issue as or on behalf of:

* intermediaries licensed or registered for Type 1, Type 4 or Type 6 regulated activity (whether as principal or agent) in respect of securities;
* intermediaries licensed or registered for Type 2 or Type 5 regulated activity (whether as principal or agent) in respect of futures contracts;
* authorised financial institutions (whether as principal or agent) or intermediaries licensed for Type 3 regulated activity (whether as principal or agent) in respect of leveraged foreign exchange contracts.

These defences do not however apply to investment advertisements in respect of interests in unauthorised collective investment schemes (Section 103(11)).

Section 103(6) contains corresponding defences for investment advertisements issued or held in possession for the purposes of issue to intermediaries licensed or registered for the same types of regulated activities (or their representatives carrying on the relevant regulated activity for the intermediary) and authorised financial institutions in respect of the same types of investments.

Defences are also available to conduits and live broadcasters who issue any prohibited material in the ordinary course of their business provided that they have no right to control or modify the content of the material (Sections 103(7) and (8)).

It is also a defence if the person can show that he took all reasonable steps and exercised all due diligence to avoid commission of the offence (Section 103(9)).

## C. Authorisation Of Collective Investment Schemes

### 1. Ambit Of The SFC's Power Of Authorisation

Under the previous regime (Section 15 Securities Ordinance), only 2 categories of products were specifically regulated, namely unit trusts and mutual funds. Other investment products such as investment-linked assurance schemes and pooled retirement funds were regulated only to the extent that their marketing materials were required to be authorised by the SFC under the PIO. The SFO now specifically empowers the SFC to authorise any collective investment scheme subject to any conditions it considers appropriate (ie. to authorise the product itself) (Section 104(1)).

The SFO's new definition of 'collective investment scheme' (see paragraph B.1.3 above) introduced to cover unit trusts, mutual funds and other pooled investment arrangements ensures that a broader range of investment products are now appropriately regulated.

SFC authorisation of a collective investment scheme will be required where it is to be marketed to the 'public' unless invitations in respect of the scheme can rely on any of the exemptions in Section 103 to the offence in Section 103(1). It follows that interests in unauthorised collective investment schemes can be offered only to persons outside Hong Kong or only to 'professional investors' in reliance on the exemptions under Sections 103(3)(j) and (k).

It is also our view that it should be possible to offer unauthorised schemes by way of private placement (see paragraph B.3.4. above) so as not to constitute an 'offer to the public' provided that appropriate precautions are taken. We would however reiterate that this is very much an untested area under the SFO. As the question of whether an offer is 'to the public' will always depend on the circumstances of each particular case, we recommend that anyone contemplating such an offer should consult us for advice specific to the particular offer.

The procedures to be followed in applying for authorisation are set out in the Code on Unit Trusts and Mutual Funds (the **Code**). As with applications for authorisation of investment advertisements, a new feature of the application process is that the applicant must nominate for approval by the SFC an individual to be served with notices and decisions relating to the scheme (Section 104(2)(a)). On application, the SFC will vet the constitutive and offering documents of the collective investment scheme against the Code. In general, the SFC will simultaneously grant authorisation of the scheme and the offering documentation under Sections 104 and 105, respectively. If the scheme is a corporate, authorisation will also be given for the prospectus to be registered at the Companies Registry. If the CAB proposals are passed, registration at Companies Registry will no longer be required since offers made in respect of a collective investment scheme authorised under Section 104 whose offering documentation has been approved under Section 105 will be excluded from the definition of 'prospectus'.

### 2. Withdrawal Of Authorisation

One of the weaknesses of the previous legislation was that the SFC could not withdraw an authorisation already granted even where the conditions for authorisation had been breached. This is rectified by the SFO (Section 106) which gives the SFC a new power to withdraw authorisation of a collective investment scheme or of the issue of an investment advertisement where:

1. the SFC decides that:
   * any information provided to the SFC was, at the time when it was provided, false or misleading in any material particular;
   * any of the conditions that were imposed in respect of the authorisation are not being complied with;
   * it is desirable to withdraw the authorisation to protect the interest of the investing public; or
2. the approved person for the investment scheme or issue of the investment advertisement makes a written request to the SFC to withdraw the authorisation.

The approved person for the scheme or issue must be given a reasonable opportunity of being heard prior to withdrawal of its authorisation.

The SFC is also entitled to amend or revoke any conditions for authorisation of a collective investment scheme or issue of an investment advertisement or to impose new conditions.

## D. Other Offences Under Part IV SFO

### 1. Offence To Fraudulently Or Recklessly Induce Others To Invest Money

1.1 The SFO retains the prohibition on the making of fraudulent or reckless misrepresentations for the purpose of inducing others to invest money previously contained in the PIO. The new terminology of the SFO has however widened the scope of the prohibition. Under Section 107(1) a person commits on offence if he makes any fraudulent or reckless representation for the purpose of inducing another person to:

1. enter into or offer to enter into:
   1. an agreement to acquire, dispose of, subscribe for or underwrite securities; or
   2. a regulated investment agreement; or
2. acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme.

1.2 A 'fraudulent misrepresentation' is defined as:

1. any statement which, at the time when it is made, is to the knowledge of its maker, false, misleading or deceptive;
2. any promise which, at the time when it is made, its maker has no intention of fulfilling or knows that it is not capable of being fulfilled;
3. any forecast which, at the time when it is made, its maker knows is not justified on the facts known to him;
4. any statement or forecast from which, at the time when it is made, its maker intentionally omits a material fact, with the result that the statement is rendered false, misleading or deceptive, or in the case of a forecast, the forecast is rendered false or misleading.

1.3 A 'reckless misrepresentation' is defined as:

1. any statement which, at the time when it is made, is false, misleading or deceptive and is made recklessly;
2. any promise which, at the time when it is made, is not capable of being fulfilled and is made recklessly;
3. any forecast which, at the time when it is made, is not justified on the facts then known to its maker and is made recklessly; or
4. any statement of forecast from which, at the time when it is made, its maker recklessly omits a material fact, with the result that the statement is rendered false, misleading or deceptive, or in the case of a forecast, the forecast is rendered false or misleading.

1.4 The offence under Section 107 carries a maximum fine of HK$1 million and up to 7 years' imprisonment.

### 2. Civil Liability For Inducing Others To Invest Money

2.1 The SFO also preserves a right of action for investors to seek compensation for any pecuniary loss suffered as a result of any fraudulent, reckless or negligent misrepresentation. Again the new terminology of the SFO has increased the number of investment products to which the statutory right applies. Section 108 imposes civil liability for pecuniary loss on any person who makes a fraudulent, reckless or negligent misrepresentation by which another person is induced:

1. to enter into or offer to enter into:
   1. an agreement to acquire, dispose of, subscribe for or underwrite securities; or
   2. a regulated investment agreement; or
2. to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme.

2.2 Fraudulent and reckless misrepresentation have the same definitions as in Section 107. 'Negligent misrepresentation' is defined as:

1. any statement which, at the time when it is made, is false, misleading or deceptive and is made without reasonable care having been taken to ensure its accuracy;
2. any promise which, at the time when it is made, is not capable of being fulfilled and is made without reasonable care having been taken to ensure that it can be fulfilled;
3. any forecast which, at the time when it is made, is not justified on the facts then known to the maker and is made without reasonable care having been taken to ensure the accuracy of those facts; or
4. any statement or forecast from which, at the time when it is made, its maker negligently omits a material fact, with the result that the statement is rendered false, misleading or deceptive or, in the case of a forecast, the forecast is rendered misleading or deceptive.

2.3 Directors' Liability

Where a company has made any fraudulent, reckless or negligent representation in the circumstances described in Section 108(1), any director of the company at that time is also presumed to have made the misrepresentation unless it is proved that he did not authorise the making of the misrepresentatioin.

### 3. Offence To Issue Advertisements Relating To The Carrying On Of Regulated Activities

It is an offence under Section 109 for a person to issue, or have in his possession for the purposes of issue:

1. an advertisement in which to his knowledge, a person holds himself out as being prepared to carry on Type 4, Type 5, Type 6 or Type 9 regulated activity and the person is not licensed or registered for such regulated activity under the SFO; or
2. any document which to his knowledge contains such an advertisement.

The offence is subject to a fine and imprisonment. Defences are available where a person issues an advertisement holding himself out as prepared to carry on one of the specified regulated activities to an intermediary which is licensed or registered for that regulated activity (or to a representative of such an intermediary). There are also defences for conduits and live broadcasters in similar terms to those available in relation to investment advertisements and for a person who can establish that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

## E. Appeals To The Securities And Futures Appeals Tribunal

Decisions of the SFC in relation to the authorisation of investment advertisements and collective investment schemes may be appealed to the new Securities and Futures Appeals Tribunal under Part XI SFO.

## Annex A

### The Definition Of 'Professional Investor' For The Purposes Of The Securities And Futures Ordinance

'Professional investors' are defined in Schedule 1 to the SFO and in the Securities and Futures (Professional Investor) Rules as:

1. any exchange company, clearing house, exchange controller or investor compensation company recognised under the SFO or any person authorised under the SFO to provide automated trading services;
2. any intermediary, or any other person carrying on the business of providing investment services which is regulated under the law of any place outside Hong Kong;
3. any authorised financial institution (i.e. a bank, restricted licence bank or deposit taking company authorised under the Banking Ordinance) or any bank which is not an authorised financial institution but is regulated under the law of any place outside Hong Kong;
4. any insurer authorised under the Insurance Companies Ordinance or any other person carrying on insurance business and regulated under the law of any place outside Hong Kong;
5. i. any collective investment scheme authorised under the SFO; or  
     
   ii. any 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 any person who operates such scheme;

1. any scheme registered under the Mandatory Provident Fund Schemes Ordinance, or its constituent fund, or any person who is an approved trustee or service provider of such registered scheme or who is an investment manager of such registered scheme or constituent fund;
2. i. a registered scheme under the Occupational Retirement Schemes Ordinance;  
   ii. or an offshore scheme as defined under 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 of any such scheme as defined in that Ordinance;

1. any government (other than a municipal government authority), any institution which performs the functions of a central bank, or any multilateral agency ;
2. any corporation which is:
   1. a wholly owned subsidiary of:
   * A. an intermediary, or any other 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 any bank which is not an authorised financial institution but is regulated under the law of any place outside Hong Kong;
   1. a holding company which holds all the issued share capital of:
   * A. an intermediary, or any other 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 any bank which is not an authorised financial institution but is regulated under the law of any place outside Hong Kong; or
   1. any other wholly owned subsidiary of a holding company referred to in sub-paragraph (ii); or
3. a trust corporation holding assets on trust with a total value of not less than HK$40 million or its foreign currency equivalent;
4. an individual, either alone or with any of his associates on a joint account, having a portfolio of not less than $8 million or its foreign currency equivalent;
5. a corporation or partnership having either:
   1. a portfolio of not less than $8 million or its foreign currency equivalent; or
   2. total assets of not less than HK$40 million or its foreign currency equivalent; and
6. any 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 (k).

This memorandum is intended as a summary only of the provisions of Part IV of the Securities and Futures Ordinance and of certain provisions of the Companies (Amendment) Bill 2003. Specific legal advice should be sought in relation to any particular situation.

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