

Guidelines on use of offer awareness and summary disclosure materials in offerings
of shares and debentures under the Companies Ordinance

1. INTRODUCTION

- 1.01 Section 399 of the Securities and Futures Ordinance (“SFO”) empowers the Securities and Futures Commission (the “Commission”) to issue guidelines indicating the manner in which, in the absence of any particular consideration or circumstance, it proposes to perform its functions. These guidelines, issued under section 399 and intended for the assistance of issuers or vendors of shares or debentures and their professional advisers, relate to the content and manner of publication of certain materials which may be issued to the public in Hong Kong in connection with an offer of shares or debentures made by a prospectus.
- 1.02 The guidelines clarify the Commission’s view regarding the treatment of certain types of such materials. First, they describe a type of material that the Commission would regard as neither falling within the prohibition in section 103(1) of the SFO or the definition of “prospectus” in section 2 of the Companies Ordinance (“CO”), nor as amounting to an extract from or abridged version of a prospectus within the meaning of section 38B of the CO. Secondly, they describe a type of material that the Commission would regard as being an extract from or abridged version of a prospectus, rather than a full prospectus. Issuers or vendors of shares or debentures that propose to issue materials to the public that refer to or supplement the prospectus and application form must consider carefully the legal and regulatory requirements that may apply to those materials. For the avoidance of doubt, these guidelines are not issued under, and should not be construed as a notice pursuant to, section 38B(2A)(a) of the CO, which empowers the Commission by notice in the Gazette to specify the form and manner of publication of an extract from or abridged version of a prospectus or any class of prospectuses.
- 1.03 The CO and SFO set out requirements concerning the form and manner of publication of prospectuses, extracts from or abridged versions of prospectuses, and advertisements, and provide for registration or authorization of materials in certain circumstances. Section 38B(1) of the CO dealing with advertisements concerning prospectuses makes it unlawful to publish by way of advertisement in any manner any extract from or abridged version of a prospectus relating to shares or debentures of a company whether incorporated in or outside Hong Kong. Section 38B(2) provides a number of exceptions to the prohibition, including in paragraph (c) the publication of an advertisement, invitation or document which has been authorized by the Commission under section 105 of the SFO and, in paragraph (d), the publication of an extract from or abridged version of a prospectus that has been approved by the Commission in a particular case. Section 103 of the SFO makes it an offence to issue any advertisement or invitation to the public to enter into or offer to enter into an agreement to deal in securities. Again, and in addition to section 105 referred to above, subsections (2) and (3) of section 103 contain exceptions to the prohibition, including that in 103(3)(a)(iii), which exempts

an extract from or abridged version of a prospectus the publication of which would not contravene section 38B(1) of the CO by virtue of the availability of an exemption under section 38B(2).

- 1.04 The Commission considers that certain publicity materials that are issued by the issuer of a prospectus and are designed only to raise investor awareness of the occurrence of a public offer of shares or debentures will not constitute a prospectus or an extract from or abridged version of a prospectus within sections 2 and 38B, respectively of the CO nor a prohibited advertisement within section 103(1) of the SFO. Such materials may assist the issuer of the prospectus in the efficient conduct of an offer of the shares or debentures and facilitate greater retail investor participation. Potential investors would be given greater notice of the offer and have more time to arrange their financial and other affairs in anticipation of the offer. In these guidelines, the Commission specifies requirements concerning the form and manner of publication for publicity materials that it considers will not fall within the statutory provisions described above. In these guidelines, the expression "offer awareness materials" refers only to those materials that satisfy the specified requirements.
- 1.05 The Commission also considers that disclosure materials such as mini-prospectuses and fact sheets that summarize or highlight key information concerning a public offer of shares or debentures should be encouraged, as they are likely to facilitate greater understanding by potential investors of the information contained in the prospectus. The Commission considers that these documents will often amount to extracts from or abridged versions of a prospectus, rather than a full prospectus. Any document that constitutes an extract from or abridged version of a prospectus must be expressly authorized prior to issue. In these guidelines, the Commission specifies requirements concerning the form and manner of publication for disclosure materials that it considers will constitute extracts from or abridged versions of a prospectus. In these guidelines, the expression "summary disclosure materials" refers only to those materials that satisfy the specified requirements.
- 1.06 These guidelines do not have the force of law and should not be interpreted in any manner that would conflict with the provisions of any applicable law or regulatory requirements. The guidelines represent a regulatory policy position taken by the Commission for market development purposes within what it understands to be the boundaries of applicable law. The guidelines should not be construed as legal advice or as a definitive interpretation of the relevant statutory provisions. Issuers and vendors of shares and debentures should seek legal advice if they are in any doubt as to the relevant statutory provisions or whether their particular circumstances or proposals would breach applicable legal or regulatory requirements.

2. APPLICATION

- 2.01 These guidelines apply to all publicity materials and disclosure materials issued to the public in Hong Kong in connection with a proposed offer of

shares or debentures in Hong Kong by a prospectus whether issued before or after registration of the relevant prospectus. However, they do not apply where the issuer of the prospectus is a collective investment scheme authorized by the Commission under section 104 of the SFO, as advertising by such schemes is subject to other regulations.

- 2.02 The guidelines apply to all communication media used to disseminate information including brochures, correspondence, circulars, flyers, leaflets, mail shots, newspapers and magazines, posters and other visual advertising media, television or radio, electronic media including the Internet, ATM services and telephone hotlines, and any form of wireless video or audio transmission. The guidelines apply whether the communication is targeted at or restricted to a particular audience or customer base or is open to the general public.
- 2.03 The guidelines apply to offers of shares or debentures where a prospectus is required to be registered by the Registrar of Companies pursuant to sections 38D or 342C of the CO. In cases involving a prospectus offering shares or debentures to be listed on The Stock Exchange of Hong Kong Limited (the "Exchange"), authorisation for registration of the prospectus is administered by the Exchange. In cases not involving such a listing the Commission administers the authorisation for registration.
- 2.04 These guidelines may describe only the way in which the Commission proposes to exercise its own functions. Accordingly, the guidelines apply where publicity and/or disclosure materials are proposed to be used in a case where the Commission administers authorisation for registration of the prospectus. Practitioners are reminded that in the case of listed securities the listing rules require all "publicity materials" released in Hong Kong by particular applicants for listing to be approved by the Exchange before release. Accordingly, in such cases these guidelines are subject to Exchange listing rules and practice from time to time. The Exchange has nevertheless indicated that it supports these guidelines and proposes to apply equivalent practices when the Exchange administers authorisation for registration of a prospectus. Issuers of shares or debentures to be listed on the Exchange wishing to avail themselves of these guidelines should inform the Exchange at the earliest opportunity.

3. GENERAL PRINCIPLES FOR CONTENTS OF OFFER AWARENESS AND SUMMARY DISCLOSURE MATERIALS

- 3.01 The Commission considers that certain publicity and disclosure materials do not contain an offer or invitation to the public (nor are calculated to invite such an offer or invitation from the public) to subscribe or purchase shares or debentures and should accordingly not amount to an advertisement or invitation within the meaning of section 103(1) of the SFO or a prospectus or an extract from or abridged version of a prospectus within the meaning of sections 2 and 38B, respectively of the CO. By contrast, other materials will contain such an offer or invitation (or be calculated to invite one) and/or

constitute a prospectus or an extract from or abridged version of a prospectus, and will require an exemption, registration or authorization. The content and form of the materials, including any legending used to clarify their legal nature, are key considerations determining where they fall within the legal framework. Issuers of any such materials should consider in all cases whether specific legending is necessary and appropriate in their particular case and should seek legal advice if in doubt.

In paragraphs 4 to 6 below, the Commission lists the contents of particular materials that it believes would satisfy both the relevant legal requirements and its regulatory objectives for such materials. This paragraph 3 sets out some general principles that the Commission considers must also be met before any such materials satisfy these requirements and objectives.

- 3.02 The materials must not contain anything that is inconsistent with the information contained in the prospectus.
- 3.03 The materials must be in plain and clear language. The contents must not be false, biased, misleading or deceptive, and the issuer must have reasonable grounds to believe that this is the case. Materials must be carefully framed if they are not to result in statutory liability for the issuer of the materials and/or its directors.
- 3.04 The font size of all warning statements and legal legends in the materials must be at least 40% of the font size that predominates in the materials and must not be presented in a style that is designed to reduce their impact. Such statements and legends must be capable of being read with ease by anyone scanning the material.
- 3.05 The materials must be issued by the issuer of the prospectus. They must state their date of issue and identify the issuer. The materials must be authorized for issue by the issuer and include a statement that the issuer of the prospectus or its directors take responsibility for the contents.
- 3.06 In the case of materials designed for broadcast on a monitor or screen, or transmission by radio, the following shall apply:
 - (a) the statements prescribed in paragraphs 4.02(e)-(h), 5.01(e)-(h), and 6.03(c)-(h) (as the case may be) below must be audibly read out at the end of each broadcast and (except for a radio transmission) also be in writing;
 - (b) for television and other screen based media, text containing the prescribed statements must be displayed for such time as to be sufficiently prominent to allow the viewer to read the entire text of the statements with reasonable ease; and
 - (c) for radio broadcasts, the prescribed statements must be delivered by way of a voice-over that is sufficiently distinct from the rest of the content of the broadcast to be prominent.

4. CONTENTS OF OFFER AWARENESS MATERIALS ISSUED PRIOR TO REGISTRATION OF A PROSPECTUS

4.01 The Commission considers that publicity materials released prior to the registration of a prospectus that contain only information on procedural and administrative arrangements for the proposed offer could play a useful role in the offer process. The Commission's intention is that materials that comply with paragraph 3 and either paragraph 4 or 5 (as the case may be) of these guidelines will bring the materials within a regulatory regime that does not require any pre-vetting of their form and manner of publication. The regulatory treatment relies upon the fact that the form and manner of publication of the material are controlled, by providing, among other things, that:

- (a) the material is strictly limited to communicating procedural and administrative information regarding the proposed offer, and
- (b) nothing in the content and manner of publication of the material promotes the issuer of the shares or debentures, or the offer.

Materials that comply with the prescribed requirements will constitute "offer awareness materials" for the purposes of these guidelines.

4.02 The Commission's view is that publication of material containing the following information only would not constitute an advertisement falling within the prohibition in section 103(1) of the SFO nor give rise to a prospectus or an extract from or abridged version of a prospectus for the purposes of sections 2 and 38B of the CO:

- (a) the name and the place of incorporation of the issuer and a description of the shares or debentures proposed to be offered;
- (b) the date on which and locations at which the prospectus will become available to the public;
- (c) details of the administrative procedures relevant to retail investors that are likely to assist their participation in the offer;
- (d) if a listing is being applied for on the Exchange and/or elsewhere, a statement that the issuer is seeking a listing of the shares or debentures on the Exchange and/or any other applicable stock exchanges;
- (e) a statement that the material is issued by the issuer of the prospectus and a responsibility statement;
- (f) a statement that potential investors should read the prospectus for detailed information about the proposed offer before deciding whether or not to invest in the shares or debentures proposed to be offered;
- (g) a statement that the material does not constitute an offer or an invitation to induce an offer by any person to acquire, purchase or subscribe for the shares or debentures proposed to be offered; and
- (h) a statement that no application for the shares or debentures mentioned in the material should be made by any person nor would such application be accepted without the completion of a formal application form or other application procedure that is to be issued with or in respect of the prospectus.

The material need not include each of items (a)-(d) but must include items (e)-(h). The material may also include other relevant legends designed to provide further clarification as to its legal nature, provided such legends are consistent with the material not being a prospectus nor a document falling within the prohibitions under section 103(1) of the SFO or section 38B(1) of the CO.

- 4.03 The Commission believes that offer awareness materials should not be published too far in advance of the launch of the proposed offer because of the risk that changes become necessary to the administrative and procedural arrangements set out in the materials. Publication must not be intended to indirectly or impliedly promote the offer or the issuer or otherwise condition the market ahead of the offer. The issuer of the prospectus should consider whether the use of offer awareness materials when combined with "brand" marketing and/or media attention that sometimes accompanies initial public offerings in Hong Kong may condition the market. The issuer of the prospectus should take into account all relevant circumstances when determining how far in advance of the date of the prospectus it is appropriate to begin publishing offer awareness materials, and the scale and frequency of such publication thereafter. While it is a matter for the issuer of the prospectus in each case to determine these matters by reference to the particular circumstances of the case, the Commission considers that offer awareness materials should not normally be issued earlier than 14 days before the date of the prospectus for the Hong Kong offer.
- 4.04 Offer awareness materials should not be used after the close of the offer period and materials displayed in public places should be removed as soon as practicable thereafter.
- 4.05 Offer awareness materials may be issued in either English or Chinese or both.

5. CONTENTS OF OFFER AWARENESS MATERIALS ISSUED UPON OR AFTER REGISTRATION OF A PROSPECTUS

- 5.01 Offer awareness materials may alternatively or additionally be released on or after registration of the prospectus. The Commission's view is that publication of material containing the following information only would not constitute an advertisement falling within the prohibition in section 103(1) of the SFO nor give rise to a prospectus or an extract from or abridged version of a prospectus for the purposes of sections 2 and 38B, respectively of the CO:
- (a) the name and the place of incorporation of the issuer and a description of the shares or debentures being offered;
 - (b) the date of the prospectus and the locations at which it is available to the public;
 - (c) details of the administrative procedures relevant to retail investors that are likely to assist their participation in the offer;

- (d) if a listing is being applied for on the Exchange and/or elsewhere, a statement that the issuer is seeking a listing of the shares or debentures on the Exchange and/or any other applicable stock exchange;
- (e) a statement that the material is issued by the issuer of the prospectus and a responsibility statement;
- (f) a statement that potential investors should read the prospectus for detailed information about the offer before deciding whether or not to invest in the shares or debentures being offered;
- (g) a statement that the material does not constitute an offer or an invitation to induce an offer by any person to acquire, purchase or subscribe for the shares or debentures being offered; and
- (h) a statement that no application for the shares or debentures mentioned in the material should be made by any person nor would such application be accepted without the completion of a formal application form or other application procedure that is issued with or in respect of the prospectus.

The material need not include each of items (a)-(d) but must include items (e)-(h). The material may also include other relevant legends designed to provide further clarification as to its legal nature, provided such legends are consistent with the material not being a prospectus nor a document falling within the prohibitions under section 103(1) of the SFO or section 38B(1) of the CO.

- 5.02 Offer awareness materials falling within this paragraph 5 should not be used after the close of the offer period and materials displayed in public places should be removed as soon as practicable thereafter.

6. SUMMARY DISCLOSURE MATERIALS

6.01 When a prospectus complying with the requirements of the CO has been published, an issuer may also publish a document in the nature of an "extract from or abridged version of a prospectus" under section 38B(2)(d) of the CO if it is published in accordance with such form and manner of publication as may have been authorized by the Commission (in the case of unlisted offers) or the Exchange (in the case of listed offers) under section 38B(2A)(b) of the CO.

6.02 The Commission's view is that in order for a document to constitute an "extract from or abridged version of a prospectus" for the purposes of section 38B of the CO, rather than a prospectus, there must be a prospectus in issue at the time the extract or abridged version is published. The Commission believes that materials such as mini-prospectuses and fact sheets that summarize or highlight key information concerning an offer of shares or debentures should be encouraged, as they are likely to facilitate greater understanding by potential investors of the information contained in the prospectus. It considers that those documents that comply with the requirements in this paragraph 6 will amount to extracts from or abridged versions of a prospectus, rather than a full prospectus. Any document that constitutes an extract from or abridged version of a prospectus must be expressly authorized prior to issue. Materials that comply with the specified requirements will constitute "summary disclosure materials" for the purposes of these guidelines.

6.03 The Commission's position is that summary disclosure materials must comply with the general principles set out in paragraph 3 of these guidelines. Such material must also not contain any substantive information that is not contained in the prospectus, and must include the following:

- (a) a statement that the prospectus, which alone contains full details of the issuer and offer, has been published and is available for collection at specified locations;
- (b) the date of the prospectus;
- (c) in the case of summary disclosure material that is intended to provide a fair summary of the information in the prospectus (such as a mini-prospectus that summarizes the information in the prospectus), a statement that it is an extract from or abridged version of the prospectus and the directors of the issuer of the prospectus are satisfied that it contains a fair summary of the material information in the prospectus and does not omit anything which the directors consider to be material in the context of the offer;
- (d) in the case of summary disclosure material that is not intended to provide a fair summary of the information in the prospectus (such as a fact sheet containing offer statistics and procedural information relating to applications), a statement that it is an extract from or

abridged version of the prospectus and does not contain a fair summary of the material information in the prospectus;

- (e) a statement that the directors of the issuer of the prospectus have authorized the issue of the summary disclosure material and take responsibility for its contents;
- (f) a warning statement that potential investors should read the prospectus for detailed information about the issuer and the offer before deciding whether or not to invest in the shares or debentures being offered;
- (g) a statement that the summary disclosure material does not constitute an offer or an invitation to induce an offer by any person to acquire, purchase or subscribe for the shares or debentures being offered; and
- (h) where an application form is issued with the prospectus or an application procedure is described in the prospectus, a statement that no application for any shares or debentures mentioned in the summary disclosure material should be made by any person nor would such application be accepted by the issuer of the prospectus without the completion of the formal application form or other application procedure that is issued with or in respect of the prospectus.

6.04 In addition, when approving summary disclosure material the Commission will wish to be satisfied that the following requirements will be met, namely that:

- (a) the summary disclosure material will only be made available or distributed from the time of issue of the prospectus;
- (b) any application form issued by the issuer of the prospectus will state that any application for or purchase of the shares or debentures referred to in the summary disclosure material can only be made on the basis of the full prospectus identified by its date of publication; and
- (c) in an offering structure that does not require potential investors to complete an application form prescribed by the issuer of the prospectus, the issuer of the prospectus will require that all locations at which summary disclosure material is distributed and where application or purchase instructions for the shares or debentures from investors are received shall have administrative procedures in place (i) to inform interested persons that the application for or purchase of the shares or debentures referred to in the summary disclosure material can only be made on the basis of the prospectus relating to the offer identified by its date of publication and that they should refer to the prospectus, (ii) to make the prospectus readily available to potential investors free of charge prior to receipt of application or purchase instructions, or refer them to a location where they may obtain it with ease and free of charge, and (iii) to provide that any application or purchase instruction from an investor will not be accepted without obtaining the investor's prior confirmation that he or she has read or had access to the prospectus.

6.05 Summary disclosure materials must be issued in both English and Chinese (unless the Commission has granted an exemption under section 38A or 342A of the CO permitting publication of the relevant prospectus in one language

only, in which case any summary disclosure materials used must be published only in that language) but may be distributed in separate language versions. If separate language versions are used, the material must include a statement in the other language in a prominent place on the front page or cover of the material that a version in the other language is available and where a copy may be obtained. The issuer must ensure that there are sufficient copies of both language versions available for the duration of the offer.

7. VETTING OF OFFER AWARENESS MATERIALS AND SUMMARY DISCLOSURE MATERIALS

- 7.01 In relation to public offers of listed shares or debentures, issuers of “publicity materials” should note that Rules 9.08, 24.08 and 37.23 of the Main Board Listing Rules and Rules 12.10, 28.08 and 30.25 of the GEM Listing Rules require all materials falling within the scope of “publicity material released in Hong Kong relating to an issue of securities” to be pre-vetted by the Exchange. An applicant for listing proposing to issue any publicity or disclosure materials should contact the Exchange to determine whether pre-vetting is required. Materials that constitute an extract from or abridged version of a prospectus must be specifically vetted and approved by the Exchange under section 38B(2A)(b) of the CO.
- 7.02 In relation to public offers of unlisted shares or debentures, the Commission is of the view that:
- (a) if any publicity or disclosure material proposed to be issued to the public complies with paragraph 3 and either one of paragraphs 4 and 5 (as the case may be) of these guidelines the document does not constitute a prospectus within the meaning of section 2 of the CO or an advertisement within the prohibition under section 103(1) of the SFO or an extract from or abridged version of a prospectus within the meaning of section 38B of the CO. Accordingly, no pre-vetting or authorization by the Commission is required;
 - (b) if any publicity or disclosure material proposed to be issued to the public does not comply with paragraph 3 and/or either one of paragraphs 4 and 5 (as the case may be), the issuer and its advisers must consider whether the material falls within any of the statutory provisions in paragraph (a) above; and
 - (c) if any publicity or disclosure material proposed to be issued to the public complies with paragraphs 3 and 6 of these guidelines, the Commission will treat it as an extract from or abridged version of a prospectus within the meaning of section 38B of the CO and consider it for authorization under section 38B(2A)(b) of the CO.