

**Bills Committee on Securities and Futures and Companies Legislation
(Structured Products Amendment) Bill 2010**

**Purposes and Effect of Certain Exemption Provisions
in Section 103 of the Securities and Futures Ordinance**

Purpose

This paper provides further information on the respective purposes and scopes of the exemption provisions under subsections (2), (5) and (6) of section 103 of the Securities and Futures Ordinance (“SFO”).

Background

2. At the meeting of the Bills Committee held on 20 January 2011, Members requested the Administration to explain the respective purposes and scopes of the exemption provisions under the various subsections of section 103 of the SFO, particularly subsections (2), (5) and (6).

Section 103(2)

3. Section 103(1) creates a criminal offence if a person issues, or possesses for the purposes of issue, advertisements, invitations or documents **which to his knowledge is or contains an invitation** to the Hong Kong public to invest in securities, regulated investment agreements (“RIA”) and collective investment schemes (“CIS”), unless the issue is authorized by the Securities and Futures Commission (“SFC”) under section 105(1).

4. Section 103(2) exempts from the prohibition in section 103(1) advertisements, invitations or documents that are, among other things, made by or on behalf of persons licensed or registered for the regulated activities of dealing in securities, advising on securities or corporate finance where the advertisement, invitation or documents is in respect of securities [i.e. section 103(2)(a)]. In other words, the above persons would not commit an offence if they issue advertisements, invitations or documents in respect of the product

related to the regulated activity that each of these persons is licensed to conduct. The general rationale for such exemption is that these persons are regulated by the SFC and accordingly, subject to the conduct requirements in the SFO and the Code of Conduct. It would be unnecessary to impose additional regulations on these persons.

5. The proposed amendment to section 103(2)(a) is to reflect our policy intent that offer documents and advertisements in respect of unlisted structured products (whether in the form of securities or otherwise) would require prior SFC's authorization, regardless of whether they are made by or on behalf of persons holding relevant licences. The current drafting in clause 4(2) of the Bill in effect excludes unlisted structured products from the exemption in the existing section 103(2)(a) and achieves the aforesaid policy intent.

Section 103(5)

6. The exemptions in section 103(5) closely mirror those in section 103(2)(a) – (c). We have checked that in Paper No. CSA03/01¹ presented to the then Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000, that section 103(5) was added as a Committee Stage Amendment (“CSA”). It was explained in that paper that “As the conduct of an intermediary is regulated under Part VII, issue of advertisement, invitation or document by it should be exempted here to avoid double regulation, rationale similar to the exemption granted under clause 102(3) [now section 103(3) of the SFO]. This also reflects the existing practice.”

7. From the SFC's experience in administering section 103 of the SFO, it appears that section 103(5) does not provide any protection or exemption in addition to that provided under section 103(2). Since the market is familiar with section 103(2) and (5) and these two subsections are consistent with one another, we do not consider it necessary to repeal section 103(5). As regards the amendment to section 103(5)(a) proposed in the Bill (i.e. clause 4(7) of the Bill), it mirrors the proposed amendment to section 103(2)(a) mentioned in paragraph 5 above. Otherwise section 103(5)(a) would provide a wider exemption than that in amended section 103(2)(a) – this would not be the policy intention.

¹ Available at <http://www.legco.gov.hk/yr00-01/english/bc/bc04/papers/bc04-1204-cb1-358-2e.pdf>.

Section 103(6)

8. Section 103(6) complements the exemption in section 103(2) in that section 103(2) provides an exemption to certain intermediaries for the issuing of certain documents to investors, and section 103(6) provides an exemption to a person (e.g. product manufacturer) for the **issuing of certain documents to certain intermediaries**. For example, under the existing provisions where a product issuer issues documents in respect of securities to a licensed securities dealer, these documents do not require the SFC's authorization as the product issuer is exempted under section 103(6)(a). If the licensed securities dealer then issues these documents to investors, these documents also do not require the SFC's authorization as the intermediary is exempted under section 103(2)(a).

9. Since the Bill proposes excluding unlisted structured products from the exemption in section 103(2)(a), the same exclusion has to be effected for section 103(6)(a). This is reflected in clause 4(8) of the Bill.

**Financial Services and the Treasury Bureau
Securities and Futures Commission
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