

Asia
Pacific
Bangkok
Beijing
Hanoi
Ho Chi Minh City
Hong Kong
Jakarta
Kuala Lumpur
Manila
Melbourne
Shanghai
Singapore
Sydney
Taipei
Tokyo

Europe &
Middle East
Abu Dhabi
Almaty
Amsterdam
Antwerp
Bahrain
Baku
Barcelona
Berlin
Brussels
Budapest
Cairo
Dusseldorf
Frankfurt / Main
Geneva
Kyiv
London
Madrid
Milan
Moscow
Munich
Paris
Prague
Riyadh
Rome
St. Petersburg
Stockholm
Vienna
Warsaw
Zurich

North & South
America
Bogota
Brasilia
Buenos Aires
Caracas
Chicago
Dallas
Guadalajara
Houston
Juarez
Mexico City
Miami
Monterrey
New York
Palo Alto
Porto Alegre
Rio de Janeiro
San Diego
San Francisco
Santiago
Sao Paulo
Tijuana
Toronto
Valencia
Washington, DC

29 November 2010

Legislative Council
8 Jackson Road Central
Hong Kong

Dear Sirs,

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

Baker & McKenzie is pleased to respond to the invitation from the Legislative Council (the **Council**) to provide a submission to the Bills Committee on the *Securities and Futures and Companies Legislation (Structured Products Amendment) Bill 2010 (Bill)*. We are grateful for the opportunity to comment on the Bill and look forward to participating at the meeting to be held by the Bills Committee on 6 December 2010.

Set forth below are our principal comments on the Bill.

1. Section 2(f)(i) of definition of "Structured Product"

We note, and agree with, the recommendation of the Securities and Futures Commission (the **Commission**) in paragraph 28 of the *Consultation Conclusions on Possible reforms to the Prospectus Regime in the Companies Ordinance and the Offers of Investments Regime in the Securities and Futures Ordinance (Conclusions)* to exempt employee incentive schemes (such as phantom share option offers) from the prohibition in section 103 of the Securities and Futures Ordinance. We note that the Commission's preferred approach was to achieve this by way of an express exclusion in the definition of "structured product" rather than by way of an amendment or expansion of the scope of section 103(2)(e).

We note that the relevant section now provides that a "structured product" does not include:

- "(f) a product that is offered by a corporation only to a person who is –
- (i) a bona fide employee or former employee of the corporation or of another corporation in the same group of companies;"

EDMOND CHAN
ELSA S.C. CHAN
RICO W.K. CHAN
BARRY W.M. CHENG
MILTON CHENG
DEBBIE F. CHEUNG
CHEUNG YUK-TONG
P.H. CHIK***
ROSSANA C.M. CHU
STEPHEN R. ENO*
DAVID FLEMING
ANTHONY JACOBSEN***
SUSAN KENDALL
DOROTHEA KOO
HARVEY LAU***

ANGELA W.Y. LEE**
LAWRENCE LEE
NANCY LEIGH
CHEUK VAN LEUNG
JACKIE LO***
ANDREW W. LOCKHART
LOO SHIH YANN
KAREN MAN
ALLEN NG
JASON NG
CLEMENT NGAI***
MICHAEL A. OLESNICKY
ANTHONY K.S. POON*
GARY SEIB
JACQUELINE SHEK

STEVEN SIEKER
CHRISTOPHER SMITH***
DAVID SMITH
MARTIN TAM
TAN LOKE KHOO
PAUL TAN
POH LEE TAN
CYNTHIA TANG**
KAREENA TEH
JENNIFER VAN DALE
TRACY WUT
RICKY YIU*
PRISCILLA YU

REGISTERED FOREIGN
LAWYERS
SCOTT D. CLEMENS
(NEW YORK)
STANLEY JIA
(NEW YORK)
ANDREAS W. LAUFFS
(NEW YORK)
WON LEE
(NEW YORK)
EUGENE LIM
(SINGAPORE)
MARCO MARAZZI
(ITALY)
SCOTT PALMER
(NEW YORK)

BEATRICE M. SCHAFFRATH
(NEW YORK)
JOSEPH T. SIMONE
(CALIFORNIA)
BRIAN SPIRES
(MARYLAND)
RICHARD WEISMAN
(MASSACHUSETTS, NEW YORK)
HOWARD WU
(CALIFORNIA)
WINSTON K.T. ZEE
(WASHINGTON, DC)
DANIAN ZHANG
(WASHINGTON, DC)

*Notary Public
**China-Appointed Attesting Officer
***Non-Resident in Hong Kong

It appears to us that the proposed drafting would potentially apply to a wide range of employee incentive schemes. As presently drafted, it is not limited to products that are offered only in the context of a share option scheme or a phantom share option scheme (which involve, or are typically calculated by reference to, the value of the shares of the particular employer or employer group company).

The exclusion would potentially capture any structured product offered to an employee by the employer, regardless of whether such product is in respect of the securities of the employer or employer group company. For example, the exemption could technically apply to structured products in respect of securities managed by the employer group, and offered by the employer group to the employees.

Subject to our comments on section 103(2)(e)(iii) set out in paragraph 2 below, we would like to clarify the legislative intent with respect to the application of the exclusion to employment incentive schemes, and to consider if amendments to the above drafting are required.

2. Section 103(2)(e)(iii)

We have a similar comment with respect to the scope of the exemption in section 103(2)(e)(iii) in the context of employees incentive schemes.

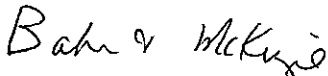
As presently drafted, section 103(2)(e)(iii) appears to limit the operation of the exemption only to structured products *of* the corporation to its employees. The words “structured products of the corporation”, however, seem rather vague and could give rise to ambiguities as to its scope.

We would appreciate some clarity on how this section was intended to operate in the context of the exclusion in section 2(f)(i) of the definition of ‘structured product’.

* * *

If you have any questions in relation to this submission or would like to discuss further, please feel free to contact Milton Cheng on 2846 1056 or Karen Man on 2846 1004.

Yours faithfully,


Baker & McKenzie