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Dear Sirs

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

We would like to thank the Bills Committee for this opportunity to express our views with respect to the Securities and Futures and Companies Legislation (Structured Products Amendment) Bill 2010 (the "**Bill**").

We agree in principle with the disapplication of the public offering regimes contained in the Companies Ordinance (Cap. 32) ("**CO**") with respect to structured products in the form of debentures, and that public offers of structured products (regardless of their legal form) should be regulated under the Part IV offers of investments regime in the Securities and Futures Ordinance (Cap. 571) ("**SFO**"). However we continue to have concerns with respect to certain aspects of the Bill. We welcome the Bills Committee's interest in ensuring that due consideration is given to these legislative changes.

Below we have set out our principal concerns at this stage. Section references are made to the Bill unless otherwise stated.

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1. *Section 4(2), (7) and (8)*

These proposals carve out from the authorisation requirements the offering of listed securities (including listed structured products) and unlisted securities (excluding unlisted structured products) by or on behalf of an intermediary licensed or registered for any Types 1, 4 or 6 regulated activities.

Although not directly relevant to structured products, we would propose that the opportunity should be taken to extend these provisions to Type 9 licensed or registered intermediaries (which have the benefit of being able to conduct an incidental Type 1 regulated activity) in the context of their managing collective investment schemes that are authorised under section 104 of the SFO. This is a technical amendment.

2. **Section 15(5)** - ***Amending the definition of "securities" in the SFO to include structured products***

We have reservations with the way in which the Bill attempts to carve out structured products from the definition of "securities" in Schedule 1.

In order to ensure that the regulatory requirements in the SFO (and not only the disclosure requirements) will apply to all structured products being offered to the public, the definition of "securities" is to be amended to include structured products (not in the form of securities) in respect of which any offering document would be subject to section 103(1) of the SFO.

The original proposal was simply to include all "structured products" in the definition of "securities" (in Schedule 1 SFO) for the purposes of the SFO in its entirety. This was modified following industry concerns regarding the wide and potentially unintended consequences of such an amendment, which would have resulted in many institutions who deal exclusively in the professional markets being brought within the licensing regime and having to comply with other conduct requirements under the SFO. The definition in Schedule 1 as now amended is in our view unclear. We understand that the intention is for only structured products authorised under section 105 of the SFO to be included in the Schedule 1 amended definition of securities. If a structured product was required to be authorised under section 103 of the SFO, and was not, then that would be a breach of section 103 itself. We recommend that the current wording be revisited to ensure that this intention is clear.

3. ***Section 15(7) - currency linked instruments and interest rate instruments issued by authorized financial institutions***

The SFC proposes to exempt from the SFO authorisation requirements any offering document in respect of instruments issued by authorized financial institutions that are referenced to:

(a) changes in the level of any interest rate or a basket of interest rates;

(b) changes in the level of any currency exchange rate or a basket of currency exchange rates; or

(c) changes in the level of any interest rate or a basket of interest rates and changes in the level of any currency exchange rate or a basket of currency exchange rates.

However, the SFC has also noted in its Consultation Conclusions that the authorized financial institution would need to ensure that any features that are attached to currency linked instruments and interest rate instruments do not contain any derivative element. The meaning of "derivative element" is unclear and therefore further guidance will be needed as to what products will constitute currency linked instruments and interest rate instruments and, in particular, as to what is the meaning of "derivative element".

The SFC also noted that instruments issued by authorized financial institutions that are referenced to the price of gold or silver would not constitute currency linked instruments or money market instruments for the purposes of the SFO offering regime (and accordingly would not be exempt from the authorisation requirement on such grounds).

The use of the word "only" in the definitions of currency linked instruments and interest rate instruments should be replaced with "predominately".

4. ***Section 15(8) – a new definition of "structured product"***

It is proposed to introduce a wide definition of "structured product". For completeness we note that there is a separate regulatory regime for futures contracts and therefore we assume that the definition is not meant to cover futures contracts. This should be explicit.

With respect to proposed Schedule 1 amended Section 1A(2)(e) SFO of the new definition we would propose to add after "periodically" the word "or by reference to a period" to deal with the situations when there may be only one reset.

We also note that where proposed Schedule 1 amended Section 1A(1)(a)(i) and 1A(1)(a)(ii) SFO,"securities" should read "security".

5. ***Section 22 - 50 persons safe harbours for disapplying the structured products***

We believe that the safe harbours contained in the Seventeenth Schedule to the CO should be available for securities (including structured products). In particular, we strongly believe that the offer to not more than 50 persons safe harbour (paragraph 2 of Part 1 of the Seventeenth Schedule to the CO) should be preserved.

We see no reason why the 50 persons safe harbour, which will remain available to offers of shares or debentures (other than structured products) under the CO prospectus regime, should not also be available to offers of structured products and other securities generally. The Securities and Futures Commission ("**SFC**") has acknowledged, in paragraph 9 of its Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance and the Offers of Investments Regime in the Securities and Futures Ordinance ("**Consultation Paper**"), that the private placement exemption is retained in concept in the SFO. since offers that are not made to the public will not be subject to the prohibition in section 103 of the SFO. Unfortunately, the concept of "the public" has not been authoritatively defined by the courts, nor the Bill, in the context of offers of securities or any relevant statutes, and this has and would continue to lead to considerable uncertainty as to whether any given offer would be prohibited under the SFO. Retaining the 50 persons safe harbour also provides consistency of treatment in respect of offers of structured products (regardless of legal form).

The SFC have previously acknowledged that the "HK$500,000 minimum denomination" safe harbour is heavily relied on, but believes that it would be inappropriate to introduce this safe harbour into the SFO at this time for a variety of reasons. For the "no more than 50 persons" safe harbour, the SFC noted that it is not commonly used and is therefore unnecessary; of course, the "no more than 50 persons" safe harbour is not commonly relied on because issuers have traditionally had the "HK$500,000 minimum denomination" safe harbour available to them. It is worth noting here that the "no more than 50 persons" safe harbour was only introduced into the CO in 2004 on the basis that, in practice, offers to less than 50 persons had been considered as an appropriate benchmark for private placements that did not constitute an offer to "the public". It may be that this practice, without the backing of a statutory bright line test, will be set to continue, but with less certainty. We would therefore urge certainty in this regard and that this safe harbour remain available.

When relying on the 50 persons safe harbour, the offeror is required to comply with the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (the "**Code of Conduct**"), including but not limited to the know-your-client requirements set out in paragraphs 5.2 (which sets out the basic suitability requirement) and 5.3 (which applies to derivative products) and the recently introduced new paragraph 5.1A.

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This means that investors who purchase structured products offered in reliance on the 50 persons safe harbour are subject to the same standards of suitability as retail investors. In particular with the introduction of paragraph 5.1A following implementation of the relevant recommendations in the SFC's Consultation Paper on Proposals to Enhance Protection for the Investing Public, this has been strengthened.

Yours faithfully

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