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Clerk to Bills Committee on Securities and Futures and Companies
Legislation (Structured Products Amendment) Bill 2010
Legislative Council Secretariat
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Dear Sirs

Invitation for Submission on Securities and Futures and Companies Legislation (Structured Products Amendment) Bill 2010

Thank you for your letter dated 2 November 2010. Allen & Overy appreciates the opportunity to express its views on the Securities and Futures and Companies Legislation (Structured Products Amendment) Bill 2010 (the **Bill**). We would be pleased to discuss the issues below further, or to assist in any way that the Bills Committee responsible for the Bill (**Bills Committee**) deems appropriate.

We set out below our key comments on the Bill for the Bills Committee's consideration.

Disapplication of the Companies Ordinance (CO) prospectus regime to public offers of structured products in the form of debentures and transfer of such offers to the investment regime under Part IV of the Securities and Futures Ordinance (SFO)

We are generally very supportive of the proposal to rationalise and harmonise the two existing offering regimes, and to transfer the regulation of structured products in debenture form from the CO to the SFO.

Safe Harbours under the CO and the concept of "Public"

We note however that after the proposed disapplication of the prospectus provisions with respect to structured products, the following exemptions, which are commonly relied on by market participants under the current CO prospectus regime, will no longer be applicable to offers of structured products:

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1. an offer to not more than 50 persons in Hong Kong;
2. an offer in respect of which the total consideration payable does not exceed the specified amount of HK\$5 million or its equivalent in another currency; and
3. an offer in respect of which the minimum denomination, or the minimum principal amount to be subscribed for or purchased, is not less than the specified amount of HK\$500,000 or its equivalent in another currency.

We do not agree that such safe harbours should be removed and would suggest they should be incorporated into the SFO regime. These exemptions were introduced into the CO offering regime a number of years ago and are currently being relied on by a large number of market participants for sales of structured notes (particularly the HK\$500,000 denomination exemption). The removal of such safe harbours would mean that, unless an exemption under the SFO is available, the Securities and Futures Commission (SFC)'s approval would be required for offerings of structured products which might previously have been exempted. By importing the CO safe harbours into the SFO, the offering regimes under the two ordinances would be further harmonised. We note that this point had been raised in our submission to the SFC but we would greatly appreciate if this could be given further consideration, due to the significant adverse impact the removal of such safe harbours would have on the Hong Kong structured products market and Hong Kong's competitiveness as an international financial hub as a whole.

Also, we would appreciate if the Bill would include clarity on the concept of "public" under section 103 and other relevant sections of the SFO (for example, section 115). At present, the concept is not clear and market participants have different interpretations. Many market participants are therefore very keen and eager to seek confirmation and clarity that an offer to not more than 50 persons will not constitute an offer to the public. This would ensure consistency of approach between the CO and SFO regimes. At the very least, firm guidance as to the SFC's interpretation would be very welcome in this area.

Exclusions from the Definition of "structured product"

We generally agree with and are supportive of the proposed exclusions from the definition of "structured product". In this regard, there are some comments on some of these exclusions that we would like to seek your clarification and confirmation on.

- (i) We refer to paragraph (2)(c) of the meaning of "structured product" which excludes a collective investment scheme from the definition of "structured product", and the newly added sections 38AA and 342AA of the Companies Ordinance (Exemption for Structured Products) (page reference: C1167-C1169 of the Bill). Our view is that a collective investment scheme in the form of a mutual fund (i.e. a company) would therefore continue to be regulated under the Companies Ordinance prospectus regime and the safe harbours under the CO would still be applicable to it. We would be grateful if the Bills Committee could kindly confirm this point.
- (ii) We refer to paragraph (2)(d) of the meaning of "structured product" which excludes a depositary receipt from the definition of "structured product". "Depositary receipt" is not a defined term in either the SFO or the CO. Would the Bills Committee consider this opportunity to include a definition so that the market has more clarity as to what depositary receipts cover?

Yours faithfully,



Allen & Overy