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29 November 2010

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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;"

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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'.

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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,

Bah & McKyjo Baker & McKenzie