

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

Meaning of “Advertisement, Invitation or Document” in the Relevant Provisions, and the Scope of Application of the Regulatory Regime in Real Life Situations

Purpose

This paper briefs Members on the meaning of “advertisement, invitation or document” in Part IV (Offers of Investments) of the Securities and Futures Ordinance (“SFO”) (Cap. 571), thus explaining the scope of application of Part IV of the SFO.

Meaning of “Advertisement, Invitation or Document” and Scope of Application

2. Section 103 of the SFO prohibits a person from issuing, or possessing for the purposes of issue, whether in Hong Kong or elsewhere, an advertisement, invitation or document which to the person’s knowledge is or contains an invitation to the public to enter into or offer to enter into an agreement to acquire or dispose of, subscribe for or underwrite securities, a regulated investment agreement (“RIA”), or to acquire an interest in or participate in a collective investment scheme (“CIS”) unless the advertisement, invitation or document is authorised by the Securities and Futures Commission (“SFC”) under section 105 of the SFO or is otherwise exempted.

3. There are three folds to this prohibition:

- (i) It applies to “any person” who “issues”.
- (ii) The subject matter has to be an “advertisement”, “invitation” or “document”; and
- (iii) The advertisement, invitation or document must knowingly be or contain an invitation to the public regarding securities, RIAs or CISs.

4. The following terms are defined in section 102 of the SFO -

- “Advertisement” is defined to include “every form of advertising, whether made orally or produced mechanically, electronically, magnetically, optically, manually or by any other means”.
- “Document” is defined as “any publication (including a newspaper, magazine or journal, a poster, notice, a circular, brochure, pamphlet or handbill, or a prospectus)-
 - (a) directed at, or the contents of which are likely to be accessed or read (whether concurrently or otherwise) by, the public; and
 - (b) whether produced mechanically, electronically, magnetically, optically, manually or by any other means”.
- “Invitation” is defined to include “an offer and an invitation, whether made orally or produced mechanically, electronically, magnetically, optically, manually or by any other means”.
- “Issue” in relation to any material (including any advertisement, invitation or document), includes publishing, circulating, distributing or otherwise disseminating the material or the contents thereof, whether –
 - (a) by any visit in person;
 - (b) in a newspaper, magazine, journal or other publication;
 - (c) by the display of posters or notices;
 - (d) by means of circulars, brochures, pamphlets or handbills;
 - (e) by an exhibition of photographs or cinematograph films;
 - (f) by way of sound or television broadcasting;
 - (g) by any information system or other electronic device;
or
 - (h) by any other means, whether mechanically, electronically, magnetically, optically, manually or by

any other medium, or by way of production or transmission of light, image, sound or any other medium,

And also causing or authorising the material to be issued.

5. Therefore, depending on the facts of each case, if any material (which may be an offering document or advertisement) or the contents thereof, fall(s) within the definitions of “advertisement”, “invitation” or “document” (as defined - see above), and is/are published, circulated, distributed or otherwise disseminated, and knowingly contain(s) such an invitation to the public regarding securities, RIAs or CIS, the prohibition in section 103 would apply. As such, the issue of such material must be authorised by the SFC under section 105 unless it is exempted. The prohibition applies to any person who “issues” (as defined) the material in question.

6. Consistent with the applicability of section 103, the rules regarding advertisements under the Code on Unlisted Structured Investment Products, notably the Advertising Guidelines (Appendix D of the Code) apply to advertisements regardless of whether the issuer of the advertisement and the issuer of the product are the same person.

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