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COMPANIES REGISTRY EXTERNAL CIRCULAR NO. 5/2011

Implementation of the Securities and Futures and Companies Legislation (Structured Products Amendment) Ordinance 2011

This circular is to remind you that the Securities and Futures and Companies Legislation (Structured Products Amendment) Ordinance 2011 (“Amendment Ordinance”) was gazetted on 13 May 2011 and took effect on the same day.

Purpose

2. The Amendment Ordinance transfers the regulation of public offers of structured products in the form of shares or debentures from the prospectus regime of Companies Ordinance (“CO”) to the offers of investments regime under the Securities and Futures Ordinance (“SFO”). As from 13 May 2011:

- (a) The issue of advertisements and offer documents for structured products, be they in the form of shares or debentures, or any other legal form, must be authorized by the Securities and Futures Commission (“SFC”), unless exempted by the SFO.
- (b) The exemptions provided for in the Seventeenth Schedule to the CO will no longer be available to structured products in the form of shares and debentures¹; instead the exemptions in section 103 of the SFO will apply.

Major Changes

3. There are two regimes under which the SFC authorizes offer documents and marketing materials of investment products sold to the public –

- (a) **the CO prospectus regime**; pursuant to which, unless exempted, it is not lawful to issue any prospectus offering any shares in or debentures of a company, including companies incorporated outside Hong Kong, to the public for subscription or purchase unless such prospectus complies with the requirements in the CO², and its registration with the Registrar of Companies under section 38D or 342C of the CO has been authorized by the SFC; and

¹ The commonly relied on exemptions under the Seventeenth Schedule to the CO are : (a) an offer in respect of which the minimum denomination of, or the minimum consideration payable by any person for the shares and debentures, is not less than \$500,000; and (b) an offer to not more than 50 persons.

² CO Sections 37 to 44B, 48A, sections 342 to 343, the Third Schedule, and the Seventeenth to Twenty-second Schedules

- (b) **the offers of investments regime in Part IV of the SFO**; pursuant to which the issue of advertisements, invitations or documents containing invitations to the public regarding securities, regulated investment agreements and collective investment schemes is prohibited unless they are authorized by the SFC or exempted under Part IV of the SFO.

4. Prior to enactment of the Amendment Ordinance, the public offer of structured products, depending upon their legal form, could have been subject to different regimes, even though such structured products may have had similar economic risk and return profiles. The Amendment Ordinance rationalizes the position such that all structured products, regardless of their legal form, will be regulated under Part IV of the SFO offers of investments regime. The major changes are:

- (a) “Structured product” is defined in the new section 1A in Part 1 of Schedule 1 to the SFO, which is reproduced in **Annex A** to this Circular.
- (b) Part IV of the SFO prohibits the issue of advertisements and offer documents in relation to a public offer of structured products without SFC’s authorisation.
- (c) The new section 104A of the SFO empowers the SFC to authorize structured products.
- (d) The prospectus provisions in the CO are not applicable to structured products³.
- (e) The exemptions in the Seventeenth Schedule to the CO are no longer available to structured products in the form of shares or debentures.
- (f) The reference to “securities” in the definition of “debenture” in section 2(1) of the CO is replaced by “debt securities” to clarify that a debenture under CO does not include all types of securities.

5. Consequently, with effect from 13 May 2011, the issue of advertisements and offer documents for structured products (be they in the form of shares or debentures, or any other legal form) must be authorized by the SFC, unless otherwise exempted by the SFO. A prospectus relating to an offer for subscription or purchase of shares in or debentures of a company, which are not structured products, must still be authorized by the SFC and registered by the Registrar of Companies in accordance with the CO prospectus regime.

³ CO sections 38AA and 342AA

6. For the avoidance of doubt, where the structured product is in the form of a share or debenture, requirements in the CO (other than the prospectus provisions) in relation to shares or debentures (for example, the requirement for a register of members / debenture holders (as the case may be)) will continue to apply to Hong Kong incorporated companies.

Enquiries

7. The SFC is the principal regulatory authority of investment products offered to the public. In this respect, enquiries concerning the public offer of structured products should be directed to:

Securities and Futures Commission
8th Floor, Chater House
8 Connaught Road Central
Hong Kong
Tel No.: (852) 2840 9222
Email address: enquiry@sfc.hk

8. Enquiries concerning the registration of prospectuses with the Registrar of Companies may be directed to:

Ms. Polly Yip
Assistant Principal Solicitor
Companies Registry
15/F Queensway Government Offices
Hong Kong
Tel No.: (852) 2867 2826
Email address: crenq@cr.gov.hk

9. This circular is intended to provide a general guide to the Amendment Ordinance. You are advised to seek legal advice in case of doubt.

Ms Ada LL CHUNG
Registrar of Companies

c.c. Securities and Futures Commission
CR HQ/7-9/49/1

Meaning of “structured product” under Part 1 of Schedule 1 to the SFO

1A. Meaning of "structured product"

(1) In this Ordinance, subject to subsection (2), "structured product" (結構性產品) means-

(a) an instrument under which some or all of the return or amount due (or both the return and the amount due) or the method of settlement is determined by reference to one or more of-

(i) changes in the price, value or level (or a range within the price, value or level) of any type or combination of types of securities, commodity, index, property, interest rate, currency exchange rate or futures contract;

(ii) changes in the price, value or level (or a range within the price, value or level) of any basket of more than one type, or any combination of types, of securities, commodity, index, property, interest rate, currency exchange rate or futures contract; or

(iii) the occurrence or non-occurrence of any specified event or events (excluding an event or events relating only to the issuer or guarantor of the instrument or to both the issuer and the guarantor);

(b) a regulated investment agreement; or

(c) any interests, rights or property prescribed, or of a class or description prescribed, by notice under section 392 of this Ordinance as being regarded as structured products in accordance with the notice.

(2) A "structured product" does not include -

(a) a debenture issued for capital fund raising purposes that is convertible into or exchangeable for shares (whether issued or unissued) of the issuer of the debenture or of a related corporation of the issuer;

(b) a subscription warrant issued for capital fund raising purposes that entitles the holder to subscribe for shares (whether issued or unissued) of the issuer of the warrant or of a related corporation of the issuer;

(c) a collective investment scheme;

(d) a depositary receipt;

- (e) a debenture that would come within subsection (1)(a) only because it has a variable interest rate that is reset periodically to equate to a money market or interbank reference interest rate that is widely quoted (whether or not subject to a predetermined maximum or minimum rate) plus or minus a specified rate (if any);
- (f) a product under which some or all of the return or amount due (or both the return and the amount due) or the method of settlement is determined by reference to securities of a corporation, or of a related corporation of the corporation, and that is issued by the corporation only to a person who is -
 - (i) a bona fide employee or former employee of the corporation or of a related corporation of the corporation; or
 - (ii) a spouse, widow, widower, minor child (natural or adopted) or minor step-child of a person referred to in subparagraph (i);
- (g) a product that may be possessed, promoted, offered, sold, printed or published only-
 - (i) under a licence, permission or other authorization under the Betting Duty Ordinance (Cap 108) or the Gambling Ordinance (Cap 148); or
 - (ii) under the Government Lotteries Ordinance (Cap 334);
- (h) an instrument issued in relation to -
 - (i) a contest authorized by section 37 of the Broadcasting Ordinance (Cap 562); or
 - (ii) a contest included in a service licensed under Part IIIA of the Telecommunications Ordinance (Cap 106);
- (i) a contract of insurance in relation to any class of insurance business specified in the First Schedule to the Insurance Companies Ordinance (Cap 41); or
- (j) any interests, rights or property prescribed, or of a class or description prescribed, by notice under section 392 of this Ordinance as not being regarded as structured products in accordance with the notice.

Note: The Financial Secretary is empowered under section 392 of the SFO to prescribe by notice published in the Gazette that any interests, rights or property are to be or not to be regarded as structured products.