

## **LEGISLATIVE COUNCIL BRIEF**

Securities and Futures Ordinance  
(Chapter 571)

Companies Ordinance  
(Chapter 32)

### **SECURITIES AND FUTURES AND COMPANIES LEGISLATION (STRUCTURED PRODUCTS AMENDMENT) BILL 2010**

#### **INTRODUCTION**

A At the meeting of the Executive Council on 29 June 2010, the Council ADVISED and the Chief Executive ORDERED that the Securities and Futures and Companies Legislation (Structured Products Amendment) Bill 2010, at Annex A, should be introduced into the Legislative Council to transfer the regulation of public offers of structured products in the form of shares or debentures from the Companies Ordinance (“CO”) to the Securities and Futures Ordinance (“SFO”) so that structured products (regardless of their legal form) will be regulated under one regime, that is, the offers of investments regime under the SFO.

#### **JUSTIFICATIONS**

##### **The Existing Legislative Framework**

2. At present there are two regimes under which the Securities and Futures Commission (“SFC”) authorizes offer documents and marketing materials of investment products sold to the public –

- (a) the CO prospectus regime: it is not lawful to issue any form of application for shares in or debentures of a company<sup>1</sup> unless the form is issued with a prospectus which complies with the requirements in the CO and its registration has been authorized by the SFC; and
- (b) the offers of investments regime in Part IV of the SFO: 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. In applying the authorization requirements, the SFC refers to product codes and guidelines it has issued in respect of these products. These codes and guidelines set out the bases for the authorizations including disclosure requirements and, in some cases, structural features of these products.

3. The two regimes take into account the different risk and reward exposure of the respective types of products for an investor. In the case of equity or debt capital-raising, the investor's exposure is to the financial performance and prospects of the company issuing the shares or debentures. As for other investment products, in addition to the issuer's creditworthiness, the investor may also be exposed to the performance of the reference assets.

### **The Issues Involved**

4. Under the existing legislative framework, the public offer of structured products, depending on their legal form, may be subject to different regimes, even though such structured products may have similar economic risk and return profiles. For example, equity-linked notes and equity-linked instruments are structured products that have similar risk and return profiles. As equity-linked notes are in the legal form of a debenture, prospectuses of equity-linked notes are regulated under the CO prospectus regime. On the other hand, offer documents of equity-linked

---

<sup>1</sup> This covers the public offering of shares in and debentures of Hong Kong companies, and the public offering in Hong Kong of shares in and debentures of non-Hong Kong incorporated companies.

instruments are regulated under the SFO offers of investments regime since they are in the legal form of securities or regulated investment agreements or a hybrid of securities and regulated investment agreements.

5. The above legislative framework should be rationalized by transferring the regulation of public offers of structured products from the CO prospectus regime to the offers of investments regime in Part IV of the SFO so that all structured products (regardless of their legal form) will be regulated under the SFO offers of investments regime. Under the proposed regime, the SFC would authorize the issue of advertisements, invitations or documents relating to structured products; be empowered to authorize structured products; and publish codes and guidelines setting out its regulatory policy on such products.

## **The Legislative Proposals**

### Disapplication in the CO and definition

6. The proposed transfer would involve disapplying the prospectus provisions in the CO (i.e. sections 37 to 44B, 48A, sections 342 to 343, the Third Schedule, and the Seventeenth to Twenty-second Schedules) with respect to structured products. Regulation of public offers of all structured products will fall under the offers of investments regime in the SFO.

7. A wide definition for “structured products” is necessary to avoid the possibility of issuers designing new products to fall outside the definition but in reality embed derivatives or have similar economic risk and return profiles. Given our intention to put regulation of public offer of all structured products under the offers of investments regime in the SFO, and retain public offer of shares and debentures for equity or debt capital-raising purposes under the prospectus regime in the CO, we would carve out convertible and exchangeable bonds as well as subscription warrants issued for capital-raising purposes from the definition of “structured products” under the SFO.

8. To allow flexibility and cater for financial innovation, we propose expanding section 392 of the SFO to empower the Financial Secretary to prescribe, by notice published in the Gazette, that any

interests, rights or property are to be or not to be regarded as, among other things, structured products.

#### Authorization of Structured Products

9. We propose that the SFC be empowered to authorize structured products by replicating section 104 of the SFO, which now empowers the SFC to authorize collective investment schemes. The SFC authorization process will depend on compliance with codes and guidelines to be published by the SFC. In this regard, the SFC has issued a new Code on Unlisted Structured Investment Products (“the Code”) on 25 June 2010. The Code includes (a) eligibility requirements for an issuer or a guarantor; (b) eligibility requirements for collateral (where applicable); (c) continuous disclosure requirements; and (d) the requirement for key fact statements. Many of these had in the past been applied in practice by way of administrative measures. By issuing codes and guidelines under the SFO, the SFC would have more flexibility in setting out its regulatory policy on relevant products. As checks and balances, the decisions made by the SFC in respect of structured products will be subject to review by the Securities and Futures Appeals Tribunal.

#### Safe Harbours and exemptions

10. As we propose to disapply the prospectus provisions in the CO (including the safe harbours in the Seventeenth Schedule to the CO) with respect to structured products, the safe harbours would no longer be available to structured products. We note that there are market concerns with respect to the loss of these safe harbours, in particular, the one for “an offer to not more than 50 persons” and the one on “an offer in respect of which the minimum denomination of, or the minimum consideration payable by a person for, the shares or in the case of debentures, the minimum principal amount to be subscribed or purchased, is not less than \$500,000”. Some market players argue that the unavailability of these safe harbours for structured products would in general impede the development of our private banking and wealth management business; and that since SFC’s authorization would be required, the market will not be able to offer structured products to investors in a timely and cost efficient manner.

11. These safe harbours are currently available only under the CO, not the SFO which has its own exemptions<sup>2</sup>. The “not more than 50 persons” and “minimum denomination of \$500,000” safe harbours, when introduced in 2004, formed part of a package to improve the prospectus regime to facilitate market development. They were based on similar exemptions in overseas markets. From the perspective of investor protection and in light of development of the structured products market in the past few years, we consider it inappropriate to relax the public offering regime in the SFO by replicating these CO safe harbours. The safe harbours will be retained in the CO for shares and debentures issued for equity or debt capital-raising purpose, i.e. not for structured products.

### Listed Structured Products

12. The Stock Exchange of Hong Kong (“SEHK”) is the frontline regulator responsible for reviewing and approving listing documents for listed structured products (e.g. derivative warrants and callable bull/bear contracts). Under the current regulatory framework, listed structured product issuers generally issue marketing materials via relevant SFC licencees<sup>3</sup> without having to seek the SFC’s prior authorization. These SFC licencees must, however, abide by the Guidelines on Marketing Materials for Listed Structured Products published by the SFC in September 2006. To avoid regulatory duplication, we propose that the SEHK remains as the frontline regulator for listed structured products after the proposed transfer. Accordingly, the issue by the SFC licencees of offering documents and marketing materials of listed structured products and the products themselves should be exempted from the SFC’s authorization.

### Classifying “Structured Products” as “Securities”

13. At present, the majority of the most common structured products that are publicly offered are securities-based and already subject

---

<sup>2</sup> These exemptions are set out under section 103(2) and 103(3) of the SFO. The more commonly relied upon exemptions which will be applicable to structured products are (a) the issue of any advertisement, invitation or document made in respect of structured products which are intended to be disposed of only to professional investors; and (b) the issue of any advertisement, invitation or document by an authorised financial institution in respect of traditional banking products, e.g., bank issued leveraged foreign exchange contracts, certificates of deposits, currency-linked instruments and interest rate-linked instruments.

<sup>3</sup> These are Type 1 (dealing in securities), Type 4 (advising on securities) and Type 6 (advising on corporate finance) licensed intermediaries.

to the regulatory requirements on “securities” in the SFO<sup>4</sup>. The SFC originally proposed to add structured products to the definition of “securities” in section 1 of Part 1 of Schedule 1 to the SFO, so that all structured products will be subject to the existing regulatory requirements on “securities”. However, there are market concerns that this proposal may be too sweeping with implications in particular for the market in bilateral transactions which are not offered to the public. We therefore propose to apply the regulatory requirements on “securities” only to structured products the offering documents for which the SFC authorization is required (i.e. where the offering documents contain an invitation to the public but no exemption applies). This is to pre-empt the possibility of the market devising non securities-based structured products to avoid such regulatory requirements on “securities” in the future.

## **THE BILL**

14. The main provisions of the Bill are -

- (a) clauses 3 and 4 amend section 102 of the SFO to add relevant definitions to Part IV of the SFO, amend section 103 to prohibit the issue of offer documents and marketing materials in relation to a public offer of unlisted structured products without SFC’s authorization, and to apply certain exemptions to structured products;
- (b) clauses 5, 6, 9 and 16 create a new section 104A to the SFO to empower the SFC to authorize structured products, amend section 106 to provide the SFC with the corresponding power to withdraw authorization, amend section 111 to provide for the manner of service of documents by the SFC in relation to structured products, and amend Schedule 8 to the SFO to empower the

---

<sup>4</sup> Such regulatory requirements include the licensing or registration requirements for persons that sell securities products to the public, and the conduct requirements on these licensed or registered persons. In gist, corporations carrying on regulated activities (including Type 1 (dealing in securities); Type 4 (advising on securities); etc) must be licensed or registered under the SFO. Only individuals satisfying the “fit and proper” test may be licensed or registered. The conduct of such intermediaries is governed by the Code of Conduct issued by the SFC, which sets out the general principles underpinning the conduct of securities business in Hong Kong. The Code of Conduct imposes, among other things, general requirements of honesty, fairness and due diligence on intermediaries and their staff who perform regulated activities. The SFC is empowered to take enforcement action under the SFO for breaches of requirements relating to regulated activities or the Code of Conduct.

Securities and Futures Appeal Tribunal to review the SFC's exercise of its new authorization power;

- (c) clauses 7, 8, 10 and 11 expand sections 107 and 108 of the SFO to enable the criminal offence and civil liability in relation to inducing others to invest money in securities to cover all structured products, and expand the SFC's investigation and enforcement powers under sections 182 and 213 of the SFO to cover all structured products;
- (d) clause 12 expands section 379 of the SFO to apply the SFC's avoidance of conflict of interest arrangements to all structured products;
- (e) clauses 13 and 15 add the definition of structured product and other relevant terms into Schedule 1 to the SFO, and expand section 392 of the SFO to empower the Financial Secretary to prescribe interests, rights or property as being (or not being), among other things, structured products;
- (f) clauses 14 and 17 add to Schedule 10 to the SFO transitional arrangements with respect to prospectuses of structured products authorized under the CO before the commencement of the Bill and unlicensed persons currently carrying on a business of dealing in or advising on structured products that are not in the form of securities;
- (g) clauses 18 – 27 amend section 2(1) of the CO to clarify its definition, add sections 38AA and 342AA to the CO to disapply its prospectus provisions with respect to structured products, and consequentially amend cross-references in various schedules to the CO; and
- (h) clauses 28 and 29 make consequential amendments to Schedule 16 to the Inland Revenue Ordinance and section 2 of the Securities and Futures (Short Selling and Securities Borrowing and Lending (Miscellaneous)) Rules.

15. The existing provisions in the SFO and CO being amended are at Annex B and Annex C respectively.

### **LEGISLATIVE TIMETABLE**

16. The legislative timetable is -

Publication in the Gazette	2 July 2010
First Reading and commencement of Second Reading debate	14 July 2010
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

### **IMPLICATIONS OF THE PROPOSAL**

17. The proposals in the Bill are in conformity with the Basic Law, including the provisions concerning human rights. They have no financial, civil service, productivity, environmental or sustainability implications. On economic implications, transferring the regulation of public offers of structured products from the CO to the SFO would help rationalize the regulatory framework. The proposals in the Bill do not affect the current binding effect of the existing provisions of the SFO and the CO.

### **PUBLIC CONSULTATION**

18. On 30 October 2009, the SFC commenced a two-month consultation on Possible Reforms to the Prospectus Regime in the CO and the Offers of Investments Regime in the SFO. The SFC published its consultation conclusions on 22 April 2010. The SFC has received 13 written submissions on the consultation proposals and has held more than 16 meetings to discuss aspects of the consultation paper with industry representatives. The respondents generally support, in principle, the proposed transfer of the regulation of public offers of structured products from the CO to the SFO subject to comments on certain detailed arrangements. The major concerns are addressed in paragraphs 7, 10, 11 and 13 above.

19. On 3 May 2010, we consulted the Legislative Council Panel on Financial Affairs on the proposal. Members of the Panel supported the proposal in general.

### **PUBLICITY**

20. A press release will be issued on 30 June 2010. A spokesman will be available to handle media enquiries.

### **ENQUIRIES**

21. Any enquiries on this brief may be addressed to Mr Anthony Li, Principal Assistant Secretary for Financial Services and the Treasury (Financial Services) at telephone number 2527 0534.

**Financial Services Branch  
Financial Services and the Treasury Bureau  
30 June 2010**

**SECURITIES AND FUTURES AND COMPANIES  
LEGISLATION (STRUCTURED PRODUCTS AMENDMENT)  
BILL 2010**

**CONTENTS**

Clause Page

PART 1

PRELIMINARY

1.	Short title	1
2.	Commencement	1

PART 2

AMENDMENTS TO SECURITIES AND FUTURES  
ORDINANCE

3.	Section 102 amended (Interpretation of Part IV)	1
4.	Section 103 amended (Offence to issue advertisements, invitations or documents relating to investments in certain cases)	2
5.	Section 104A added	
	104A. Commission may authorize structured products	5
6.	Section 106 amended (Withdrawal of authorization under section 104 or 105, etc.)	6
7.	Section 107 amended (Offence to fraudulently or recklessly induce others to invest money)	7
8.	Section 108 amended (Civil liability for inducing others to invest money in certain cases)	8
9.	Section 111 amended (Service of notices, etc. on approved persons)	8
10.	Section 182 amended (Investigations)	8
11.	Section 213 amended (Injunctions and other orders)	8

12.	Section 379 amended (Avoidance of conflict of interests)	8
13.	Section 392 substituted	
	392. Financial Secretary to prescribe interests, etc. as securities, etc.	9
14.	Section 407 amended (Savings, transitional, consequential and related provisions, etc.)	10
15.	Schedule 1 amended (Interpretation and general provisions)	11
16.	Schedule 8 amended (Securities and Futures Appeals Tribunal)	18
17.	Schedule 10 amended (Savings, transitional, consequential and related provisions, etc.)	19

### PART 3

#### AMENDMENTS TO COMPANIES ORDINANCE

18.	Section 2 amended (Interpretation)	21
19.	Section 38AA added	
	38AA. Exemption for structured products	21
20.	Section 342AA added	
	342AA. Exemption for structured products	22
21.	Third Schedule amended (Matters to be Specified in Prospectus and Reports to be set out therein)	22
22.	Seventeenth Schedule amended (Offers specified for the purposes of paragraph (b)(ii) of the definition of “prospectus” in section 2(1) of this Ordinance)	22
23.	Eighteenth Schedule amended (Warning, etc. Statements to be contained in certain documents)	23
24.	Nineteenth Schedule amended (Contents and publication requirements of advertisements mentioned in section 38B(2)(e) of this Ordinance)	23
25.	Twentieth Schedule amended (Amendment of prospectus consisting of one document)	23
26.	Twenty-first Schedule amended (Provisions in accordance with which a prospectus may consist of more than one document)	23
27.	Twenty-second Schedule amended (Persons specified for the purposes of section 40 of this Ordinance)	23

## PART 4

## CONSEQUENTIAL AMENDMENTS

**Inland Revenue Ordinance**

28. Schedule 16 amended (Specified transactions) 24

**Securities and Futures (Short Selling and Securities  
Borrowing and Lending (Miscellaneous)) Rules**

29. Section 2 amended (Interpretation) 24

## A BILL

To

Transfer the regulation of public offers of structured products in the form of shares or debentures from the prospectus regime of the Companies Ordinance to the offers of investments regime of the Securities and Futures Ordinance and to make consequential and related amendments.

Enacted by the Legislative Council.

## PART 1

### PRELIMINARY

#### **1. Short title**

This Ordinance may be cited as the Securities and Futures and Companies Legislation (Structured Products Amendment) Bill 2010.

#### **2. Commencement**

This Ordinance comes into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

## PART 2

### AMENDMENTS TO SECURITIES AND FUTURES ORDINANCE

#### **3. Section 102 amended (Interpretation of Part IV)**

(1) Section 102(1) of the Securities and Futures Ordinance (Cap. 571) is amended, in the definition of “approved person”, in paragraph (a), by repealing “or”.

(2) Section 102(1) is amended, in the definition of “approved person”, by adding –

“(aa) in relation to a structured product, means an individual approved by the Commission under section 104A(3); or”.

(3) Section 102(1) is amended, in the English text, in the definition of “representative”, in paragraph (b)(ii), by repealing the full stop and substituting a semicolon.

(4) Section 102(1) is amended, in the Chinese text, in the definition of “獲豁免團體”, by repealing the full stop and substituting a semicolon.

(5) Section 102(1) is amended by adding –  
 ““securities” (證券) has the same meaning as that given by the definition of “securities” in section 1 of Part 1 of Schedule 1 except that it does not include structured products that are securities only because of paragraph (g) of that definition.”.

**4. Section 103 amended (Offence to issue advertisements, invitations or documents relating to investments in certain cases)**

(1) Section 103(1)(a)(ii) is repealed and the following substituted –

“(ii) a regulated investment agreement or an agreement to acquire, dispose of, subscribe for or underwrite any other structured product; or”.

(2) Section 103(2)(a) is repealed and the following substituted –

“(a) made by or on behalf of an intermediary licensed or registered for Type 1, Type 4 or Type 6 regulated activity (whether acting as principal or agent) in respect of –

- (i) listed securities; or
- (ii) unlisted securities (excluding unlisted securities that are structured products);”.

(3) Section 103(2)(e) is repealed and the following substituted –

- “(e) made by or on behalf of a corporation in respect of securities or structured products of the corporation, or of a related corporation of the corporation, to –
- (i) holders of securities of the corporation or related corporation;
  - (ii) creditors of the corporation or related corporation;
  - (iii) employees employed by the corporation or related corporation; or
  - (iv) agents acting in a professional capacity on behalf of the corporation or related corporation;”.

(4) Section 103(2)(f) and (i) is amended by adding “or structured products” after “securities”.

(5) Section 103(3) is amended by adding –

- “(ea) of any advertisement, invitation or document made in respect of the issue, whether in Hong Kong or elsewhere, of a currency-linked instrument, an interest rate-linked instrument or a currency and interest rate-linked instrument by an authorized financial institution;”.

(6) Section 103(3)(j) and (k) is repealed and the following substituted –

- “(j) of any advertisement, invitation or document made in respect of securities or structured products, or interests in any collective investment scheme, that are or are intended to be disposed of only to persons outside Hong Kong;
- (k) of any advertisement, invitation or document made in respect of securities or structured products, or interests in any collective investment scheme, that are or are intended to be disposed of only to professional investors.”.

(7) Section 103(5)(a) is repealed and the following substituted –

- “(a) as or on behalf of an intermediary licensed or registered for Type 1, Type 4 or Type 6 regulated activity (whether acting as principal or agent) any advertisement, invitation or document made in respect of –
- (i) listed securities; or
  - (ii) unlisted securities (excluding unlisted securities that are structured products);”.
- (8) Section 103(6)(a) is repealed and the following substituted –
- “(a) in the case of any advertisement, invitation or document made in respect of any of the following to an intermediary licensed or registered for Type 1, Type 4 or Type 6 regulated activity, or a representative of such an intermediary that carries on such a regulated activity for the intermediary –
- (i) listed securities; or
  - (ii) unlisted securities (excluding unlisted securities that are structured products);”.
- (9) Section 103 is amended by adding –
- “(11A) Nothing in subsection (2)(i) applies to anything done by a person in respect of any structured products that –
- (a) are not authorized by the Commission under section 104A; or
  - (b) are not listed securities.”.

## **5. Section 104A added**

The following is added –

**“104A. Commission may authorize structured products**

(1) On an application by any person, the Commission may authorize a structured product, subject to the condition specified in subsection (2) and to any other conditions it considers appropriate.

(2) It is a condition of authorization of a structured product that, at any time when the product is authorized –

(a) there is an individual approved by the Commission under subsection (3) as an approved person for the purpose of being served by the Commission with notices and decisions for the product; and

(b) the Commission is informed –

(i) subject to subparagraph (ii), of the current contact details of the approved person, including, as applicable, the address, telephone and facsimile numbers, and electronic mail address of the approved person;

(ii) if there is any change in those contact details, of the change within 14 days after the change takes place.

(3) For the purposes of subsection (2)(a), on an application by any person, the Commission may approve an individual nominated in the application in respect of a structured product as an approved person for the purpose of being served by the Commission with notices and decisions for the product.

(4) The Commission may at any time, by notice in writing served on the approved person for a structured product –

- (a) amend or revoke any of the conditions (other than the condition specified in subsection (2)) imposed, or impose new conditions, in respect of the authorization of the product; or
- (b) withdraw the person's approval under subsection (3).

(5) Without limiting any other ground on which the Commission may refuse to authorize a structured product under subsection (1), the Commission may refuse to do so if it is not satisfied that the authorization is in the interest of the investing public.

(6) An application made under subsection (1) or (3) must be accompanied by any information and documents that the Commission requires.

(7) If the Commission refuses to authorize a structured product, or to approve an individual as an approved person, the Commission must notify the applicant in writing of the refusal and the reasons for it.

(8) The Commission may publish, in any manner it considers appropriate, particulars of a structured product authorized under subsection (1).

(9) Particulars published under subsection (8) are not subsidiary legislation.”.

## **6. Section 106 amended (Withdrawal of authorization under section 104 or 105, etc.)**

(1) Section 106 is amended, in the heading, by adding “, **104A**” after “**104**”.

(2) Section 106(1) is amended by adding “an authorization of a structured product under section 104A,” after “scheme under section 104,”.

(3) Section 106(1)(a) is amended by adding “, 104A(6)” after “104(6)”.

(4) Section 106(1)(b) and (c) is amended by adding “, 104A” after “104”.

(5) Section 106(2) is repealed and the following substituted –

“(2) Subject to subsection (3), the Commission must withdraw the authorization of a collective investment scheme, a structured product or the issue of an advertisement, invitation or document on a request in writing made by the approved person for the scheme, product or issue (as the case may be).”.

(6) Section 106(3) is amended by adding “or structured product” before “or of”.

(7) Section 106(3)(a) is amended by adding “or structured product” after “investment scheme”.

(8) Section 106(3)(a) is amended by adding “or product” after “the scheme”.

(9) Section 106(5) is amended by adding “or structured product” after “investment scheme” wherever it appears.

(10) Section 106(5) is amended by adding “, the product” after “the scheme”.

(11) Section 106(6) is amended by adding “or structured product” after “investment scheme” wherever it appears.

(12) Section 106(6) is amended by adding “, the product” after “the scheme”.

**7. Section 107 amended (Offence to fraudulently or recklessly induce others to invest money)**

Section 107(1)(a)(ii) is repealed and the following substituted –

“(ii) a regulated investment agreement or an agreement to acquire, dispose of, subscribe for or underwrite any other structured product; or”.

**8. Section 108 amended (Civil liability for inducing others to invest money in certain cases)**

Section 108(1)(a)(ii) is repealed and the following substituted –

- “(ii) a regulated investment agreement or an agreement to acquire, dispose of, subscribe for or underwrite any other structured product; or”.

**9. Section 111 amended (Service of notices, etc. on approved persons)**

Section 111(1)(b) is amended by adding “, 104A(2)(b)” after “section 104(2)(b)”.

**10. Section 182 amended (Investigations)**

(1) Section 182(1)(b)(iii) is amended by adding “structured product,” after “any”.

(2) Section 182(1)(b)(iv) is amended by adding “, structured product” after “any securities” where it twice appears.

(3) Section 182(1)(f) is amended by adding “, 104A” after “section 104”.

**11. Section 213 amended (Injunctions and other orders)**

Section 213(2)(e) is amended by adding “, structured product” after “securities” where it twice appears.

**12. Section 379 amended (Avoidance of conflict of interests)**

(1) Section 379(1) is amended by adding “, structured product” after “securities” where it twice appears.

(2) Section 379(2) is amended by adding “or a structured product” after “holder of securities”.

(3) Section 379(2)(a) is repealed and the following substituted –

“(a) to exchange the securities or structured product or to convert the securities or structured product to another form of securities or structured product;”.

(4) Section 379(2)(c) is amended by adding “or another structured product” after “securities” where it twice appears.

(5) Section 379(2)(d), (e) and (f) is amended by adding “or structured product” after “securities”.

(6) Section 379(3)(a) is amended by repealing “regulated investment agreement” where it twice appears and substituting “structured product”.

(7) Section 379(3)(a)(iii)(A) is amended by repealing “or” at the end.

(8) Section 379(3)(a)(iii) is amended by adding –

“(C) in the case of a structured product, is interests, rights or property based on a structured product of or issued by the same issuer, and of the same class, as that in which he has an interest; or”.

### **13. Section 392 substituted**

Section 392 is repealed and the following substituted –

#### **“392. Financial Secretary to prescribe interests, etc. as securities, etc.**

(1) For the purposes of this Ordinance, the Financial Secretary may, by notice published in the Gazette, prescribe, either generally or in a particular case, that –

(a) any interests, rights or property, whether in the form of an instrument or otherwise, or any class or description of any such interests, rights or property, are to be regarded as –

(i) currency-linked instruments;

(ii) currency and interest rate-linked instruments;

- (iii) futures contracts;
  - (iv) interest rate-linked instruments;
  - (v) securities; or
  - (vi) structured products; or
- (b) any interests, rights or property, whether in the form of an instrument or otherwise, or any class or description of any such interests, rights or property, are not to be regarded as –
- (i) currency-linked instruments;
  - (ii) currency and interest rate-linked instruments;
  - (iii) futures contracts;
  - (iv) interest rate-linked instruments;
  - (v) securities; or
  - (vi) structured products.

(2) Without limiting subsection (1), a notice under that subsection may prescribe the circumstances under which or the purposes for which any interests, rights or property, or any class or description of any interests, rights or property, referred to in the notice are to be regarded, or not to be regarded, as –

- (a) currency-linked instruments;
- (b) currency and interest rate-linked instruments;
- (c) futures contracts;
- (d) interest rate-linked instruments;
- (e) securities; or
- (f) structured products.”.

**14. Section 407 amended (Savings, transitional, consequential and related provisions, etc.)**

Section 407 is amended by adding –

“(3) Part 3 of Schedule 10 provides for the savings and transitional arrangements that apply on, or relate to, the commencement of the Securities and Futures and Companies Legislation (Structured Products Amendment) Ordinance 2010 ( of 2010).”.

**15. Schedule 1 amended (Interpretation and general provisions)**

(1) Schedule 1 is amended by repealing “[ss. 2, 19, 66, 164, 171, 174, 175, 202 & 406 & Sch. 9]” and substituting “[ss. 2, 19, 66, 102, 164, 171, 174, 175, 202 & 406 & Schs. 9 & 10]”.

(2) Schedule 1 is amended, in section 1 of Part 1, in the definition of “debenture”, by repealing “securities” and substituting “debt securities”.

(3) Schedule 1 is amended, in section 1 of Part 1, in the definition of “financial product”, by adding –

“(e) any structured product;”.

(4) Schedule 1 is amended, in section 1 of Part 1, in the definition of “securities”, in paragraph (f), by repealing “notice,” and substituting “notice;”.

(5) Schedule 1 is amended, in section 1 of Part 1, in the definition of “securities”, by adding –

“(g) a structured product that does not come within any of paragraphs (a) to (f) but in respect of which the issue of any advertisement, invitation or document that is or contains an invitation to the public to do any act referred to in section 103(1)(a) of this Ordinance is authorized, or required to be authorized, under section 105(1) of this Ordinance.”.

(6) Schedule 1 is amended, in section 1 of Part 1, in the definition of “securities”, in paragraph (vi), by adding “(excluding a debenture that is a structured product)” after “transferable”.

(7) Schedule 1 is amended, in section 1 of Part 1, by adding –

““currency and interest rate-linked instrument” (貨幣及利率掛鈎票據) means –

- (a) an instrument that is a structured product only because 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 a combination of –
  - (i) changes in the value or level (or a range within the value or level) of any one or more currency exchange rates or currency exchange rate indices or the occurrence or non-occurrence of any specified event or events relating to any one or more currency exchange rates or currency exchange rate indices; and
  - (ii) changes in the value or level (or a range within the value or level) of any one or more interest rates or interest rate indices or the occurrence or non-occurrence of any specified event or events relating to any one or more interest rates or interest rate indices; or
- (b) 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 currency and interest rate-linked instruments in accordance with the notice, but does not include 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 currency and interest rate-linked instruments in accordance with the notice;

“currency-linked instrument” (貨幣掛鈎票據) means –

- (a) an instrument that is a structured product only because 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 value or level (or a range within the value or level) of any one or more currency exchange rates or currency exchange rate indices; or
  - (ii) the occurrence or non-occurrence of any specified event or events relating to any one or more currency exchange rates or currency exchange rate indices; or
- (b) 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 currency-linked instruments in accordance with the notice,

but does not include 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 currency-linked instruments in accordance with the notice;

“interest rate-linked instrument” (利率掛鈎票據) means –

- (a) an instrument that is a structured product only because 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 value or level (or a range within the value or level) of any one or more interest rates or interest rate indices; or
  - (ii) the occurrence or non-occurrence of any specified event or events relating to any one or more interest rates or interest rate indices; or
- (b) 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 interest rate-linked instruments in

accordance with the notice,

but does not include 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 interest rate-linked instruments in accordance with the notice;

“structured product” (結構性產品) has the meaning given by section 1A of this Part;”.

(8) Schedule 1 is amended, in Part 1, by adding –

**“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 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; 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.”.

**16. Schedule 8 amended (Securities and Futures Appeals Tribunal)**

Schedule 8 is amended, in Division 1 of Part 2, by adding –

- |  |   |
|--|---|
| “8A. Section 104A(1) of this Ordinance | Refusal to authorize a structured product, or imposition of any conditions. |
| 8B. Section 104A(3) of this            | Refusal to approve an individual  |

Ordinance	nominated in respect of a structured product.
8C. Section 104A(4)(a) of this Ordinance	Amendment or revocation of any condition, or imposition of any new condition.
8D. Section 104A(4)(b) of this Ordinance	Withdrawal of approval of an individual nominated in respect of a structured product.”.

**17. Schedule 10 amended (Savings, transitional, consequential and related provisions, etc.)**

Schedule 10 is amended by adding –

“PART 3

SAVINGS AND TRANSITIONAL PROVISIONS  
RELATING TO SECURITIES AND FUTURES AND  
COMPANIES LEGISLATION (STRUCTURED  
PRODUCTS AMENDMENT) ORDINANCE 2010

1. Section 103(1) of this Ordinance does not apply in relation to a structured product that is the subject of –

- (a) a programme prospectus and its addenda, if any, and an issue prospectus and its addenda, if any, that, before the date of commencement of section 19 of the Securities and Futures and Companies Legislation (Structured Products Amendment) Ordinance 2010 ( of 2010), were authorized and registered under section 38D of the Companies Ordinance (Cap. 32); or
- (b) in the case of a company incorporated outside Hong Kong, a programme prospectus and its addenda, if any, and an issue prospectus and its addenda, if any, that, before the date of

commencement of section 20 of the Securities and Futures and Companies Legislation (Structured Products Amendment) Ordinance 2010 ( of 2010), were authorized and registered under section 342C of the Companies Ordinance (Cap. 32).

2. Section 1(a) ceases to have effect in relation to a structured product on the earlier of –

- (a) the earliest of the dates specified in section 8 of Part 1 of the Twenty-first Schedule to the Companies Ordinance (Cap. 32); or
- (b) the day after the last date of the period specified in the issue prospectus as being the period during which the structured product is offered to the public.

3. Section 1(b) ceases to have effect in relation to a structured product on the earlier of –

- (a) the earliest of the dates specified in section 8 of Part 2 of the Twenty-first Schedule to the Companies Ordinance (Cap. 32); or
- (b) the day after the last date of the period specified in the issue prospectus as being the period during which the structured product is offered to the public.

4. For the period of 6 months beginning on the date of commencement of section 15(5) of the Securities and Futures and Companies Legislation (Structured Products Amendment) Ordinance 2010

( of 2010), Part V of this Ordinance does not apply in relation to the carrying on of a business in a regulated activity if –

- (a) the business was carried on immediately before that date; and
- (b) the activity is a regulated activity only because of paragraph (g) of the definition of “securities” in section 1 of Part 1 of Schedule 1 to this Ordinance (as added by section 15(5) of the Securities and Futures and Companies Legislation (Structured Products Amendment) Ordinance 2010 ( of 2010)).”.

## PART 3

### AMENDMENTS TO COMPANIES ORDINANCE

#### **18. Section 2 amended (Interpretation)**

(1) Section 2(1) of the Companies Ordinance (Cap. 32) is amended, in the definition of “debenture”, by repealing “securities” and substituting “debt securities”.

(2) Section 2(1) is amended by adding –

““structured product” (結構性產品) has the meaning given by section 1A of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571);”.

#### **19. Section 38AA added**

The following is added –

##### **“38AA. Exemption for structured products**

If it is proposed to offer any shares in or debentures of a company that are structured products, the following provisions do not apply in relation to the offer –

- (a) sections 37, 38, 38A, 38B, 38BA, 38C, 38D, 39A, 39B, 39C, 40, 40A, 40B, 41, 41A, 42, 43, 44, 44A, 44B and 48A;
- (b) the Third Schedule; and
- (c) the Seventeenth to the Twenty-second Schedules.”.

**20. Section 342AA added**

The following is added –

**“342AA. Exemption for structured products**

If it is proposed to offer any shares in or debentures of a company incorporated outside Hong Kong that are structured products, the following provisions do not apply in relation to the offer –

- (a) this Part (other than this section);
- (b) the Third Schedule; and
- (c) the Seventeenth to the Twenty-second Schedules.”.

**21. Third Schedule amended (Matters to be Specified in Prospectus and Reports to be set out therein)**

The Third Schedule is amended by repealing “[ss. 2B, 38, 38A, 38D, 42, 342, 342A, 342C & 360 & 2nd, 4th, 20th & 21st Schs.]” and substituting “[ss. 2B, 38, 38A, 38AA, 38D, 42, 342, 342A, 342AA, 342C & 360 & 2nd, 4th, 20th & 21st Schs.]”.

**22. Seventeenth Schedule amended (Offers specified for the purposes of paragraph (b)(ii) of the definition of “prospectus” in section 2(1) of this Ordinance)**

The Seventeenth Schedule is amended by repealing “[ss. 2, 38, 43, 48A, 342 & 360 & 18th Sch.]” and substituting “[ss. 2, 38, 38AA, 43, 48A, 342, 342AA & 360 & 18th Sch.]”.

**23. Eighteenth Schedule amended (Warning, etc. Statements to be contained in certain documents)**

The Eighteenth Schedule is amended by repealing “[ss. 38, 342 & 360 & 17th & 21st Schs.]” and substituting “[ss. 38, 38AA, 342, 342AA & 360 & 17th & 21st Schs.]”.

**24. Nineteenth Schedule amended (Contents and publication requirements of advertisements mentioned in section 38B(2)(e) of this Ordinance)**

The Nineteenth Schedule is amended by repealing “[ss. 38B & 360]” and substituting “[ss. 38AA, 38B, 342AA & 360]”.

**25. Twentieth Schedule amended (Amendment of prospectus consisting of one document)**

The Twentieth Schedule is amended by repealing “[ss. 38A, 39A, 342A, 342CA & 360 & 12th Sch.]” and substituting “[ss. 38A, 38AA, 39A, 342A, 342AA, 342CA & 360 & 12th Sch.]”.

**26. Twenty-first Schedule amended (Provisions in accordance with which a prospectus may consist of more than one document)**

The Twenty-first Schedule is amended by repealing “[ss. 38A, 39B, 342A, 342CB & 360 & 12th & 18th Schs.]” and substituting “[ss. 38A, 38AA, 39B, 342A, 342AA, 342CB & 360 & 12th & 18th Schs.]”.

**27. Twenty-second Schedule amended (Persons specified for the purposes of section 40 of this Ordinance)**

The Twenty-second Schedule is amended by repealing “[ss. 40 & 360]” and substituting “[ss. 38AA, 40, 342AA & 360]”.

## PART 4

### CONSEQUENTIAL AMENDMENTS

#### **Inland Revenue Ordinance**

##### **28. Schedule 16 amended (Specified transactions)**

Schedule 16 to the Inland Revenue Ordinance (Cap. 112) is amended, in the definition of “debenture”, by repealing “securities” and substituting “debt securities”.

#### **Securities and Futures (Short Selling and Securities Borrowing and Lending (Miscellaneous)) Rules**

##### **29. Section 2 amended (Interpretation)**

Section 2 of the Securities and Futures (Short Selling and Securities Borrowing and Lending (Miscellaneous)) Rules (Cap. 571 sub. leg. R) is amended, in the Chinese text, in the definition of “證券莊家”, by repealing “結構式產品” and substituting “結構性產品”.

#### **Explanatory Memorandum**

The object of this Bill is to transfer the regulation of public offers of structured products in the form of shares or debentures from the prospectus regime of the Companies Ordinance (Cap. 32) (“Cap. 32”) to the offers of investments regime of the Securities and Futures Ordinance (Cap. 571) (“Cap. 571”) and to make consequential and related amendments.

2. Clause 1 sets out the short title of the Bill.
3. Clause 2 provides for commencement by commencement notice of the Secretary for Financial Services and the Treasury.
4. Part 2 amends Cap. 571.
5. Clause 3 amends section 102 of Cap. 571 which contains definitions for the purposes of Part IV of Cap. 571 (Offers of investments). The clause adds a new

paragraph to the definition of “approved person” to include persons approved under new section 104A (see clause 5). The clause also adds a definition of “securities”. The definition is the same as the general definition of “securities” in Cap. 571, except that it does not include structured products that are securities only because of the new paragraph (g) of that definition being inserted by clause 15(5). References to structured products are added to Part IV as appropriate, by clauses 4 to 9.

6. Clause 4 amends section 103 of Cap. 571 so that the section will apply to structured products. The effect of the amendments is to prohibit the issue of advertisements, invitations or documents in relation to a public offer of structured products without authorization under section 105(1) of Cap. 571. Certain exemptions in section 103 that currently apply in relation to securities are extended to apply also to structured products.

7. Clause 5 adds a new section 104A to Cap. 571. The new section empowers the Securities and Futures Commission (“the Commission”) to authorize a structured product and sets out the authorization process. The new powers of the Commission are similar to its current powers in section 104 of Cap. 571 to authorize a collective investment scheme.

8. Clause 6 amends section 106 of Cap. 571 so that the current process under that section for withdrawal of authorization of a collective investment scheme or of the issue of an advertisement, invitation or document will also apply to authorization of a structured product.

9. Clause 7 amends section 107 of Cap. 571 so that the offence of making a fraudulent or reckless misrepresentation for the purpose of inducing a person to invest, which currently applies in relation to securities, regulated investment agreements and collective investment schemes, will also apply in relation to structured products.

10. Clause 8 amends section 108 of Cap. 571 so that civil liability for a fraudulent, reckless or negligent misrepresentation inducing a person to invest, which currently applies in relation to securities, regulated investment agreements

and collective investment schemes, will also apply in relation to structured products.

11. Clause 9 amends section 111 of Cap. 571 so that the manner of service of documents by the Commission on an approved person for a collective investment scheme or an approved person for the issue of an advertisement, invitation or document will also apply to service of documents on an approved person for a structured product.

12. Clause 10 amends section 182 of Cap. 571 to confer investigatory powers on the Commission in relation to the offering of structured products, giving advice in relation to structured products and the conditions of authorization of structured products under section 104A (see clause 5). These powers correspond to those that the Commission currently has in relation to other types of financial product.

13. Clause 11 amends section 213(2)(e) of Cap. 571 so that the power of the Court of First Instance to make an order declaring a contract relating to any securities to be void or voidable also applies to a contract relating to any structured product. This power is exercisable by the Court in the circumstances set out in section 213(1) of Cap. 571 (for example, where a person has contravened Cap. 571).

14. Clause 12 amends section 379 of Cap. 571 by adding references to structured products to subsections (1) and (2) and substituting references in subsection (3)(a) to regulated investment agreements with references to structured products (which include regulated investment agreements). The effect of the amendments to subsections (1) and (2) is to prohibit members of the Commission or others performing official functions from conducting transactions in structured products that are connected with matters being investigated or considered by the Commission or that are the subject of proceedings under Cap. 571, subject to the exceptions set out in subsection (2). The effect of the amendment to subsection (3)(a) is to require members of the Commission or others performing official functions to inform the Commission if

they are required, in the course of performing official functions, to consider any matter concerning a structured product in which they have an interest, or in certain other circumstances set out in section 379(3) of Cap. 571. These requirements correspond to those in relation to other types of financial product.

15. Clause 13 substitutes section 392 of Cap. 571. Currently, that section empowers the Financial Secretary to prescribe interests, rights or property to be regarded, or not to be regarded, as securities or as futures contracts, for the purposes of Cap. 571. The new section 392 extends this power to apply also in relation to structured products, currency-linked instruments, interest rate-linked instruments and currency and interest rate-linked instruments.

16. Clause 14 amends section 407 of Cap. 571 to provide a lead-in for new Part 3 of Schedule 10, which sets out savings and transitional provisions for Cap. 571 relating to the transfer from Cap. 32 of the regulation of shares and debentures that are structured products.

17. Clause 15 amends section 1 of Part 1 of Schedule 1 to Cap. 571 to add or amend definitions of terms that are used in Cap. 571. Subclause (2) amends the definition of “debenture” to clarify that a debenture is a debt security. A similar amendment is being made to the definition of “debenture” in Cap. 32 by clause 18(1). Subclause (3) adds structured products to the definition of “financial product” so that the regulation of structured products will come within the Commission’s objectives, functions and powers regarding the regulation of financial products (see, for example, section 4(c) of Cap. 571). Subclauses (4) and (5) amend the definition of “securities” to include as securities those structured products that would not otherwise be securities but that are structured products in respect of which an advertisement, invitation or document issued in relation to an offer of investment is authorized or required to be authorized under section 105 of Cap. 571. The effect of this is that the provisions of Cap. 571 that apply to securities will also now apply to those structured products. Subclause (6) excludes non-negotiable and non-transferable debentures that are structured products from paragraph (vi) of the definition of “securities”. Therefore, that

category of debentures will be “securities” for the purposes of Cap. 571. Subclause (7) adds definitions of “currency-linked instrument”, “interest rate-linked instrument” and “currency and interest-rate linked instrument”. Those terms are used in the new section 103(3)(*ea*) being added by clause 4(5). Subclause (7) also adds a signpost definition of “structured product”, which is defined in new section 1A of Part 1 of Schedule 1.

18. Clause 15(8) adds a new section 1A to Part 1 of Schedule 1 to Cap. 571. The new section defines “structured product” for the purposes of Cap. 571. Structured products include certain types of instruments, regulated investment agreements (which are already defined in section 1 of Part 1 of Schedule 1), and any interests, rights or property prescribed under section 392 of Cap. 571 as being regarded as structured products. Subsection (2) excludes certain things from the definition, including certain debentures, collective investment schemes, gambling products, insurance contracts, and any interests, rights or property prescribed under section 392 as not being regarded as structured products.

19. Clause 16 amends Schedule 8 to Cap. 571 to provide that specified decisions of the Commission in relation to the authorization of structured products under new section 104A (see clause 5) are reviewable by the Securities and Futures Appeals Tribunal on application by an aggrieved person.

20. Clause 17 adds new Part 3 to Schedule 10 to Cap. 571. The new Part sets out savings and transitional provisions relating to the transfer from Cap. 32 of the regulation of shares and debentures that are structured products. Sections 1 to 3 provide that section 103(1) of Cap. 571 (the prohibition against issuing an unauthorized advertisement, invitation or document in relation to a public offer of structured products) does not apply to an offer of structured products that is the subject of a programme prospectus and issue prospectus authorized and registered under Cap. 32 before the commencement of the amendments. Such an offer may continue to be made in accordance with the programme prospectus and issue prospectus until the authorization for the offer would cease to have effect under the relevant provisions of Cap. 32. Section 4 provides a grace

period of 6 months for obtaining a licence or registration under Part V of Cap. 571 for the carrying on of an existing business of dealing in or advising on structured products that will become securities because of the expansion of the definition of “securities” made by clause 15(5). Before commencement of the amendments, a licence or registration under Part V was not needed for dealing in or advising on structured products referred to in paragraph (g) of the definition of “securities” (as added by clause 15(5)) but after that commencement, dealing in or advising on those structured products will become a regulated activity, and so a licence or registration under Part V of Cap. 571 will be required.

21. Part 3 amends Cap. 32.

22. Clause 18 amends section 2(1) of Cap. 32, which contains definitions of terms used in Cap. 32. Subclause (1) amends the definition of “debenture” to clarify that a debenture is a debt security. A similar amendment is being made to the definition of “debenture” in Cap. 571 by clause 15(2). Subclause (2) adds a definition of “structured product” by reference to the new definition in section 1A of Part 1 of Schedule 1 to Cap. 571 (see clause 15(8)).

23. Clause 19 adds a new section 38AA to Cap. 32. The effect of the new section is to exclude from the prospectus regime of Cap. 32 the public offering by Hong Kong companies of shares or debentures that are structured products. This is because the public offering of all structured products will be regulated by the offers of investments regime in Part IV of Cap. 571 through the amendments made by Part 2 of the Bill.

24. Clause 20 adds a new section 342AA to Cap. 32. The effect of the new section is to exclude from the prospectus regime of Cap. 32 the public offering by non-Hong Kong companies of shares or debentures that are structured products. This is because the public offering of all structured products will be regulated by the offers of investments regime in Part IV of Cap. 571 through the amendments made by Part 2 of the Bill.

25. Clauses 21 to 27 amend cross-references in various Schedules to Cap. 32 as a consequence of the amendments made by clauses 19 and 20.

26. Part 4 contains consequential amendments to the Inland Revenue Ordinance (Cap. 112) and the Securities and Futures (Short Selling and Securities Borrowing and Lending (Miscellaneous)) Rules (Cap. 571 sub. leg. R).

27. Clause 28 amends the definition of “debenture” in Schedule 16 to the Inland Revenue Ordinance (Cap. 112) to clarify that a debenture is a debt security. The amendment maintains consistency with the definitions of “debenture” in Caps. 32 and 571, which are being similarly amended by clauses 18(1) and 15(2), and consistency with the definition of “debenture” in section 2(1) of Cap. 112, which incorporates the Cap. 32 definition of the term.

28. Clause 29 makes a consequential amendment to the Securities and Futures (Short Selling and Securities Borrowing and Lending (Miscellaneous)) Rules (Cap. 571 sub. leg. R) to align the term “structured product” in the Chinese text with that in Cap. 571.

**"Gzkwipi 't t qxkukpu'lp'vj g'Ugewt klguc'pf 'Hwwt gu'Qt f lpcpeg'dglpi 'co gpf gf**

" Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
„ Section:	<b>102</b>	Heading:	<b>Interpretation of Part IV</b>	Version Date:	01/04/2003

## PART IV

## OFFERS OF INVESTMENTS

**Division 1-Interpretation**

(1) In this Part, unless the context otherwise requires-

"advertisement" (廣告) includes every form of advertising, whether made orally or produced mechanically, electronically, magnetically, optically, manually or by any other means;

"approved person" (核准人士)-

(a) in relation to a collective investment scheme, means an individual approved by the Commission under section 104(3); or

(b) in relation to the issue of an advertisement, invitation or document, means an individual approved by the Commission under section 105(3);

"document" (文件) means any publication (including a newspaper, magazine or journal, a poster or 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;

"exempted body" (獲豁免團體) means a body specified in Part 3 of Schedule 4;

"invitation" (邀請) includes an offer and an invitation, whether made orally or produced mechanically, electronically, magnetically, optically, manually or by any other means;

"issue" (發出), 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 or sound or any other medium,

and also includes causing or authorizing the material to be issued;

"relevant authority" (監管當局), in relation to a place outside Hong Kong, means an authority which the Monetary Authority is satisfied is a recognized banking supervisory authority of that place;

"representative" (代表)-

(a) in relation to a licensed corporation, means an individual-

- (i) who is licensed as a licensed representative for a regulated activity; and
  - (ii) who carries on that regulated activity for the licensed corporation as a licensed corporation to which he is accredited; or
- (b) in relation to a registered institution, means an individual-
- (i) whose name is entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance (Cap 155) as that of a person engaged by the registered institution in respect of a regulated activity; and
  - (ii) who carries on that regulated activity for the registered institution.

(2) For the purposes of this Part-

- (a) an advertisement, invitation or document issued by a person shall be regarded as being issued by him on every day on which he causes or authorizes it to be so issued;
- (b) an advertisement, invitation or document issued by one person on behalf of another shall be regarded as an advertisement, invitation or document (as the case may be) issued by both persons.

Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 154 of 2004
Section:	103	Heading:	<b>Offence to issue advertisements, invitations or documents relating to investments in certain cases</b>	Version Date:	03/12/2004

---

## **Division 2-Regulation of offers of investments, etc.**

(1) Subject to subsections (2), (3) and (5) to (9), a person commits an offence if he issues, or has in his possession for the purposes of issue, whether in Hong Kong or elsewhere, an advertisement, invitation or document which to his knowledge is or contains an invitation to the public-

- (a) to enter into or offer to enter into-
  - (i) an agreement to acquire, dispose of, subscribe for or underwrite securities; or
  - (ii) a regulated investment agreement; or
- (b) to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme,

unless the issue is authorized by the Commission under section 105(1).

(2) Subsection (1) does not apply to the issue, or the possession for the purposes of issue, of any advertisement, invitation or document-

- (a) made by or on behalf of an intermediary licensed or registered for Type 1, Type 4 or Type 6 regulated activity (whether acting as principal or agent) in respect of securities;
- (b) made by or on behalf of an intermediary licensed or registered for Type 2 or Type 5 regulated activity (whether acting as principal or agent) in respect of futures contracts;
- (c) made by or on behalf of-
  - (i) an authorized financial institution (whether acting as principal or agent); or
  - (ii) an intermediary licensed for Type 3 regulated activity (whether acting as principal or agent), in respect of leveraged foreign exchange contracts;
- (d) made by or on behalf of a recognized exchange company or recognized clearing house in respect of the provision of services by such recognized exchange company or recognized clearing house (as the case may be);
- (e) made by or on behalf of a corporation to holders of securities or creditors of, or employees employed by or agents acting in a professional capacity on behalf of, that corporation, or a related corporation of that corporation, in respect of securities of that corporation or that related corporation;
- (f) made by or on behalf of the Government in respect of securities issued by it;
- (g) made by or on behalf of a credit union in respect of shares in the credit union;
- (ga) to the extent that the advertisement, invitation or document relates to an offer falling within paragraph (b)(ii) of the definition of "prospectus" in section 2(1) of the Companies Ordinance (Cap 32); (Added 30 of 2004 s. 3)
- (h) made by or on behalf of a person acting as a trustee of a trust, not being a collective investment scheme, to beneficiaries under the trust; or

(i) made by or on behalf of a person who is engaged in the business of selling and purchasing property other than securities (whether acting as principal or agent) in the ordinary course of that business.

(3) Subsection (1) does not apply to the issue, or the possession for the purposes of issue-

(a) of-

(i) a prospectus which complies with or is exempt from compliance with Part II of the Companies Ordinance (Cap 32);

(ii) in the case of a corporation incorporated outside Hong Kong, a prospectus which complies with or is exempt from compliance with Part XII of that Ordinance;

(iii) a publication falling within section 38B(2) of the Companies Ordinance (Cap 32); (Replaced 30 of 2004 s. 3)

(b) of a document relating to the securities of a body corporate incorporated in Hong Kong that is not a registered company, being a document which-

(i) would, if the body corporate were a registered company, be a prospectus to which section 38 of the Companies Ordinance (Cap 32) applies, or would apply if not excluded by section 38(5)(b) or 38A of that Ordinance; and

(ii) contains all the matters which, by virtue of Part XII of that Ordinance, it would be required to contain if the body corporate were a corporation incorporated outside Hong Kong and the document were a prospectus issued by that corporation;

(c) of a form of application for the shares or debentures of a corporation, where it is issued, or the possession is for the purposes of issue, together with-

(i) a prospectus with respect to those shares or debentures which complies with or is exempt from compliance with Part II of the Companies Ordinance (Cap 32) or, in the case of a corporation incorporated outside Hong Kong, complies with or is exempt from compliance with Part XII of that Ordinance; or

(ii) in the case of a body corporate incorporated in Hong Kong that is not a registered company, a document containing all the matters which, by virtue of Part XII of that Ordinance, it would be required to contain if the body corporate were a corporation incorporated outside Hong Kong and the document were a prospectus issued by that corporation with respect to those shares or debentures;

(d) of a form of application for the securities of a corporation, where it is issued, or the possession is for the purposes of issue, in connection with an invitation made in good faith to a person to enter into an underwriting agreement with respect to those securities;

(e) of any advertisement, invitation or document made in respect of the issue, whether in Hong Kong or elsewhere, of a certificate of deposit by an authorized financial institution;

(f) of any advertisement, invitation or document made in respect of the issue, whether in Hong Kong or elsewhere, of a certificate of deposit-

(i) the amount or denomination of which is not less than the sum specified in Part 1 of Schedule 4; and

(ii) by-

(A) a multilateral agency; or

(B) a bank incorporated outside Hong Kong and having no place of business in Hong Kong, where the Monetary Authority has declared in writing that he is satisfied that the bank is likely to be

adequately supervised by the relevant authority of any place in which it is incorporated or has its principal place of business;

(g) of any advertisement, invitation or document made in respect of the issue, whether in Hong Kong or elsewhere, of any instrument specified in Part 2 of Schedule 4 (other than a certificate of deposit), where the amount or denomination of the instrument is not less than the sum specified in Part 1 of Schedule 4 and the instrument-

- (i) is issued by an authorized financial institution or a multilateral agency, or by an exempted body which, if it is a corporation or a wholly owned subsidiary specified in item 11 of Part 3 of Schedule 4, complies with the relevant condition;
  - (ii) is issued by a corporation which complies with the relevant condition, and is guaranteed by an authorized financial institution or a multilateral agency, or by an exempted body (other than a corporation specified in item 11 of Part 3 of Schedule 4 which does not comply with the relevant condition, or a wholly owned subsidiary of the corporation); or
  - (iii) is issued by a wholly owned subsidiary specified in item 11 of Part 3 of Schedule 4 and is guaranteed by the corporation of which it is such a subsidiary and which complies with the relevant condition;
- (h) of any advertisement, invitation or document made in respect of the issue of securities the listing of which on a recognized stock market has been approved by the recognized exchange company by which the recognized stock market is operated, where the advertisement, invitation or document complies with the rules made under section 23 or 36 governing the listing of securities, except to the extent that compliance is, in accordance with those rules, waived, modified or not required;
- (i) of any advertisement, invitation or document made in respect of securities regulated in a jurisdiction outside Hong Kong which have been admitted to trading on a recognized stock market under or pursuant to rules made under section 23 or 36;
- (j) of any advertisement, invitation or document made in respect of securities, or interests in any collective investment scheme or regulated investment agreement, which are or are intended to be disposed of only to persons outside Hong Kong;
- (k) of any advertisement, invitation or document made in respect of securities, or interests in any collective investment scheme or regulated investment agreement, which are or are intended to be disposed of only to professional investors.

(4) A person who commits an offence under subsection (1) is liable-

- (a) on conviction on indictment to a fine of \$500000 and to imprisonment for 3 years and, in the case of a continuing offence, to a further fine of \$20000 for every day during which the offence continues; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months and, in the case of a continuing offence, to a further fine of \$10000 for every day during which the offence continues.

(5) A person shall not be regarded as committing an offence under subsection (1) by reason only that he issues, or has in his possession for the purposes of issue-

- (a) as or on behalf of an intermediary licensed or registered for Type 1, Type 4 or Type 6 regulated activity (whether acting as principal or agent), any

advertisement, invitation or document made in respect of securities;  
(b) as or on behalf of an intermediary licensed or registered for Type 2 or Type 5 regulated activity (whether acting as principal or agent), any advertisement, invitation or document made in respect of futures contracts;  
(c) as or on behalf of-

- (i) an authorized financial institution (whether acting as principal or agent); or
- (ii) an intermediary licensed for Type 3 regulated activity (whether acting as principal or agent),  
any advertisement, invitation or document made in respect of leveraged foreign exchange contracts.

(6) A person shall not be regarded as committing an offence under subsection (1) by reason only that he issues any advertisement, invitation or document, or has any advertisement, invitation or document in his possession for the purposes of issue-

- (a) in the case of any advertisement, invitation or document made in respect of securities, to an intermediary licensed or registered for Type 1, Type 4 or Type 6 regulated activity, or a representative of such intermediary that carries on such regulated activity for such intermediary;
- (b) in the case of any advertisement, invitation or document made in respect of futures contracts, to an intermediary licensed or registered for Type 2 or Type 5 regulated activity, or a representative of such intermediary that carries on such regulated activity for such intermediary; or
- (c) in the case of any advertisement, invitation or document made in respect of leveraged foreign exchange contracts, to-
  - (i) an authorized financial institution; or
  - (ii) an intermediary licensed for Type 3 regulated activity, or a representative of such intermediary that carries on such regulated activity for such intermediary.

(7) A person shall not be regarded as committing an offence under subsection (1) by reason only that he issues, or has in his possession for the purposes of issue, any advertisement, invitation or document if-

- (a) the advertisement, invitation or document (as the case may be) was so issued, or possessed for the purposes of issue, in the ordinary course of a business (whether or not carried on by him), the principal purpose of which was receiving and issuing materials provided by others;
- (b) the contents of the advertisement, invitation or document (as the case may be) were not, wholly or partly, devised-
  - (i) where the business was carried on by him, by himself or any officer, employee or agent of his; or
  - (ii) where the business was not carried on by him, by himself; and
- (c) for the purposes of the issue-
  - (i) where the business was carried on by him, he or any officer, employee or agent of his; or
  - (ii) where the business was not carried on by him, he, did not select, add to, modify or otherwise exercise control over the contents of the advertisement, invitation or document (as the case may be).

(8) A person shall not be regarded as committing an offence under subsection (1) by reason only

that he issues by way of live broadcast, or has in his possession for the purposes of issue by way of live broadcast, any advertisement, invitation or document if-

- (a) the advertisement, invitation or document (as the case may be) was so issued, or possessed for the purposes of issue, in the ordinary course of the business of a broadcaster (whether or not he was such broadcaster);
- (b) the contents of the advertisement, invitation or document (as the case may be) were not, wholly or partly, devised-
  - (i) where he was the broadcaster, by himself or any officer, employee or agent of his; or
  - (ii) where he was not the broadcaster, by himself;
- (c) for the purposes of the issue-
  - (i) where he was the broadcaster, he or any officer, employee or agent of his; or
  - (ii) where he was not the broadcaster, he, did not select, add to, modify or otherwise exercise control over the contents of the advertisement, invitation or document (as the case may be); and
- (d) in relation to the broadcast-
  - (i) where he was the broadcaster, he; or
  - (ii) where he was not the broadcaster, he believed and had reasonable grounds to believe that the broadcaster, acted in accordance with the terms and conditions of the licence (if any) by which he or the broadcaster (as the case may be) became entitled to broadcast as a broadcaster and with any code of practice or guidelines (however described) issued under or pursuant to the Telecommunications Ordinance (Cap 106) or the Broadcasting Ordinance (Cap 562) and applicable to him or the broadcaster (as the case may be) as a broadcaster.

(9) It is a defence to a charge for an offence under subsection (1) for the person charged to prove that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence with which he is charged.

(10) For the purposes of any proceedings under this section-

- (a) an advertisement, invitation or document which consists of or contains information likely to lead, directly or indirectly, to the doing of any act referred to in subsection (1)(a) or (b) shall be regarded as an advertisement, invitation or document (as the case may be) which is or contains an invitation to do such act;
- (b) an advertisement, invitation or document which is or contains an invitation directed at, or the contents of which are likely to be accessed or read (whether concurrently or otherwise) by, the public shall be regarded as an advertisement, invitation or document (as the case may be) which is or contains an invitation to the public.

(11) Nothing in subsection (2)(a), (b), (c) or (i) or (5)(a), (b) or (c) applies to anything done by any person in respect of any interest in a collective investment scheme that is not authorized by the Commission under section 104.

(12) In this section-

"guaranteed" (作出擔保) means guaranteed fully, unconditionally, irrevocably and in writing;

"registered company" (註冊公司) means a company registered under the Companies Ordinance (Cap 32);

"relevant condition" (有關條件), in relation to a corporation (including a wholly owned subsidiary of any other corporation), means a condition that the amount by which the aggregate of the corporation's assets exceeds the aggregate of its liabilities, as calculated in accordance with generally accepted accounting principles, is not less than the sum specified in Part 4 of Schedule 4.

Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	106	Heading:	<b>Withdrawal of authorization under section 104 or 105, etc.</b>	Version Date:	01/04/2003

---

(1) Subject to subsection (5), where, in relation to an authorization of a collective investment scheme under section 104, or an authorization of the issue of an advertisement, invitation or document under section 105, the Commission decides that-

- (a) any information provided to the Commission pursuant to section 104(6) or 105(6) (as the case may be) was at the time when it was provided false or misleading in a material particular;
- (b) any of the conditions imposed in respect of the authorization under section 104 or 105 (as the case may be) are not being complied with;
- (c) any information provided to the Commission in purported compliance with any of the conditions imposed in respect of the authorization under section 104 or 105 (as the case may be) was at the time when it was provided false or misleading in a material particular; or
- (d) it is desirable to withdraw the authorization in order to protect the interest of the investing public,

the Commission may withdraw the authorization.

(2) Subject to subsection (3), the Commission shall, upon a request in writing made by an approved person for a collective investment scheme or the issue of an advertisement, invitation or document to withdraw the authorization of the scheme or of the issue (as the case may be), withdraw the authorization.

(3) Subject to subsection (5), the Commission may refuse to withdraw an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (2) where it considers that-

- (a) in the case of an authorization of a collective investment scheme, it is in the public interest that any matter concerning the scheme should be investigated before the authorization is withdrawn under subsection (2); or
- (b) the withdrawal of the authorization would not be in the interest of the investing public.

(4) Subject to subsection (5), where the Commission withdraws an authorization under subsection (1) or (2), it may impose such conditions on the withdrawal of the authorization as it considers appropriate.

(5) The Commission shall not-

- (a) withdraw an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (1);
- (b) refuse to withdraw an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (3); or
- (c) impose any conditions on the withdrawal of an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (4),

without first giving the approved person for the scheme or the issue (as the case may be) a reasonable opportunity of being heard.

(6) Where the Commission-

- (a) withdraws an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (1);
- (b) withdraws an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (2);
- (c) refuses to withdraw an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (3);
- or
- (d) imposes any conditions on the withdrawal of an authorization of a collective investment scheme or of the issue of an advertisement, invitation or document under subsection (4),

it shall by notice in writing notify the approved person for the scheme or the issue (as the case may be) of the decision and, in the case of paragraph (a), (c) or (d), the reasons for which it is made.

(7) Where the Commission withdraws an authorization under subsection (1) or (2), it may publish notice of the withdrawal and the reasons therefor in such manner as it considers appropriate.

(8) A notice or any other matter published under subsection (7) is not subsidiary legislation.

Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	107	Heading:	<b>Offence to fraudulently or recklessly induce others to invest money</b>	Version Date:	01/04/2003

---

(1) A person commits an offence if he makes any fraudulent misrepresentation or reckless misrepresentation for the purpose of inducing another person-

- (a) to enter into or offer to enter into-
  - (i) an agreement to acquire, dispose of, subscribe for or underwrite securities; or
  - (ii) a regulated investment agreement; or
- (b) to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme.

(2) A person who commits an offence under subsection (1) is liable-

- (a) on conviction on indictment to a fine of \$1000000 and to imprisonment for 7 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(3) For the purposes of this section-

- (a) "fraudulent misrepresentation" (欺詐的失實陳述) means-
  - (i) any statement which, at the time when it is made, is to the knowledge of its maker false, misleading or deceptive;
  - (ii) any promise which, at the time when it is made, its maker has no intention of fulfilling, or is to the knowledge of its maker not capable of being fulfilled;
  - (iii) any forecast which, at the time when it is made, is to the knowledge of its maker not justified on the facts then known to him; or
  - (iv) any statement or forecast from which, at the time when it is made, its maker intentionally omits a material fact, with the result that-
    - (A) in the case of the statement, the statement is rendered false, misleading or deceptive; or
    - (B) in the case of the forecast, the forecast is rendered misleading or deceptive;
- (b) "reckless misrepresentation" (罔顧實情的失實陳述) means-
  - (i) any statement which, at the time when it is made, is false, misleading or deceptive and is made recklessly;
  - (ii) any promise which, at the time when it is made, is not capable of being fulfilled and is made recklessly;
  - (iii) any forecast which, at the time when it is made, is not justified on the facts then known to its maker and is made recklessly; or
  - (iv) any statement or forecast from which, at the time when it is made, its maker recklessly omits a material fact, with the result that-
    - (A) in the case of the statement, the statement is rendered false, misleading or deceptive; or
    - (B) in the case of the forecast, the forecast is rendered misleading or deceptive.

Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	108	Heading:	<b>Civil liability for inducing others to invest money in certain cases</b>	Version Date:	01/04/2003

---

(1) Where a person makes any fraudulent misrepresentation, reckless misrepresentation or negligent misrepresentation by which another person is induced-

- (a) to enter into or offer to enter into-
  - (i) an agreement to acquire, dispose of, subscribe for or underwrite securities; or
  - (ii) a regulated investment agreement; or
- (b) to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme,

the first-mentioned person shall, whether or not he also incurs any other liability (whether under this Part or otherwise), be liable to pay compensation by way of damages to the other person for any pecuniary loss that the other person has sustained as a result of the reliance by the other person on the misrepresentation.

(2) For the purposes of this section, where a company or other body corporate has made any fraudulent misrepresentation, reckless misrepresentation or negligent misrepresentation by which another person is induced to do any act referred to in subsection (1)(a) or (b), any person who was a director of the company or body corporate at the time when the misrepresentation was made shall, unless it is proved that he did not authorize the making of the misrepresentation, be presumed also to have made the misrepresentation.

(3) For the avoidance of doubt, where a court has jurisdiction to determine an action brought under subsection (1), it may, where it is, apart from this section, within its jurisdiction to entertain an application for an injunction, grant an injunction in addition to, or in substitution for, damages, on such terms and conditions as it considers appropriate.

(4) This section does not confer a right of action in any case to which section 40 of the Companies Ordinance (Cap 32) (whether with or without reference to section 342E of that Ordinance) applies.

(5) A person may bring an action under subsection (1) even though the person against whom the action is brought has not been charged with or convicted of an offence by reason of a contravention of this Part.

(6) Nothing in this section affects, limits or diminishes any rights conferred on a person, or any liabilities a person may incur, under the common law or any other enactment.

(7) For the purposes of this section-

- (a) "fraudulent misrepresentation" (欺詐的失實陳述) means-
  - (i) any statement which, at the time when it is made, is to the knowledge of its maker false, misleading or deceptive;
  - (ii) any promise which, at the time when it is made, its maker has no intention of fulfilling, or is to the knowledge of its maker not capable of being fulfilled;
  - (iii) any forecast which, at the time when it is made, is to the knowledge of its maker not justified on the facts then known to him; or
  - (iv) any statement or forecast from which, at the time when it is made, its maker intentionally omits a material fact, with the result that-
    - (A) in the case of the statement, the statement is rendered false, misleading or deceptive; or
    - (B) in the case of the forecast, the forecast is rendered misleading

or deceptive;

(b) "reckless misrepresentation" (罔顧實情的失實陳述) means-

(i) any statement which, at the time when it is made, is false, misleading or deceptive and is made recklessly;

(ii) any promise which, at the time when it is made, is not capable of being fulfilled and is made recklessly;

(iii) any forecast which, at the time when it is made, is not justified on the facts then known to its maker and is made recklessly; or

(iv) any statement or forecast from which, at the time when it is made, its maker recklessly omits a material fact, with the result that-

(A) in the case of the statement, the statement is rendered false, misleading or deceptive; or

(B) in the case of the forecast, the forecast is rendered misleading or deceptive;

(c) "negligent misrepresentation" (疏忽的失實陳述) means-

(i) any statement which, at the time when it is made, is false, misleading or deceptive and is made without reasonable care having been taken to ensure its accuracy;

(ii) any promise which, at the time when it is made, is not capable of being fulfilled and is made without reasonable care having been taken to ensure that it can be fulfilled;

(iii) any forecast which, at the time when it is made, is not justified on the facts then known to its maker and is made without reasonable care having been taken to ensure the accuracy of those facts; or

(iv) any statement or forecast from which, at the time when it is made, its maker negligently omits a material fact, with the result that-

(A) in the case of the statement, the statement is rendered false, misleading or deceptive; or

(B) in the case of the forecast, the forecast is rendered misleading or deceptive.

Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	111	Heading:	<b>Service of notices, etc. on approved persons</b>	Version Date:	01/04/2003

---

(1) Notwithstanding section 400, any written notice, decision or direction or other document (however described) to be, or required to be, issued or served (however described) to or on an approved person by the Commission for the purposes of this Ordinance shall for all purposes be regarded as duly issued or served only if-

- (a) it is delivered to him by hand; or
- (b) it is-
  - (i) left at, or sent by post to, the last address;
  - (ii) sent by facsimile transmission to the last facsimile number; or
  - (iii) sent by electronic mail transmission to the last electronic mail address,
 shown by the particulars of which the Commission is informed in respect of the approved person for the purposes of section 104(2)(b) or 105(2)(b) (as the case may be).

(2) Where a notice, decision or direction or other document (however described) is regarded as duly issued or served to or on an approved person under subsection (1)(b), it shall for all purposes be regarded as issued or served to or on the approved person, and as coming to his notice, at the time when-

- (a) where it is left at an address, it is so left at that address;
- (b) where it is sent by post to an address, it would in the ordinary course of post be delivered to that address;
- (c) where it is sent by facsimile transmission to a facsimile number, it would in the ordinary course of transmission by facsimile be received at that number; or
- (d) where it is sent by electronic mail transmission to an electronic mail address, it would in the ordinary course of transmission by electronic mail be received at that address.

### Division 3-Powers of investigations

(1) Where-

- (a) the Commission has reasonable cause to believe that an offence under any of the relevant provisions may have been committed;
- (b) the Commission has reasonable cause to believe that a person may have engaged in defalcation, fraud, misfeasance or other misconduct in connection with-
  - (i) dealing in any securities or futures contract or trading in any leveraged foreign exchange contract;
  - (ii) the management of investment in any securities, futures contract or leveraged foreign exchange contract;
  - (iii) offering or making any leveraged foreign exchange contract or collective investment scheme;
  - (iv) giving advice in relation to the allotment of securities, or the acquisition or disposal of, or investment in, any securities, futures contract, leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme; or
  - (v) any transaction involving securities margin financing;
- (c) the Commission has reasonable cause to believe that market misconduct may have taken place;
- (d) the Commission has reasonable cause to believe that the manner in which a person has engaged or is engaging in any of the activities referred to in paragraph (b)(i) to (v) is not in the interest of the investing public or in the public interest;
- (e) the Commission-
  - (i) for the purpose of considering whether to exercise any power under section 194 or 196, has reason to inquire whether any person is or was at any time guilty of misconduct, or is not a fit and proper person, as described in section 194(1) or (2) or 196(1) or (2); or
  - (ii) for the purpose of assisting the Monetary Authority to consider whether to exercise any power under section 58A or 71C of the Banking Ordinance (Cap 155), has reason to inquire whether any person-
    - (A) is or was at any time guilty of misconduct, or is not or has ceased to be a fit and proper person, as described in section 58A(1) of that Ordinance; or
    - (B) is or was at any time guilty of misconduct, or should cease to be regarded as a fit and proper person, as described in section 71C(4) of that Ordinance;
- (f) the Commission has reason to inquire whether any of the conditions imposed in respect of an authorization under section 104 or 105 are being complied with; or
- (g) a matter in respect of the investigation of which the Commission decides to provide assistance under section 186 is, in the opinion of the Commission, of a nature similar to the matter described in paragraph (a), (b), (c), (d), (e) or (f) as that which the Commission has reasonable cause to believe or has

reason to inquire (as the case may be),

the Commission may in writing direct one or more of its employees or, with the consent of the Financial Secretary, appoint one or more other persons, to investigate any of the matters referred to in paragraphs (a) to (g).

(2) The costs and expenses incurred by an investigator, other than an employee of the Commission, are to be paid out of moneys provided by the Legislative Council.

(3) The Commission shall furnish an investigator with a copy of his direction or appointment (as the case may be), and the investigator, before first imposing any requirement on a person under section 183(1), (2) or (3), shall produce a copy of the direction or appointment (as the case may be) to that person for inspection.

(4) Before the Commission directs any of its employees, or appoints any person-

(a) to investigate any matter under subsection (1)(e)(i), to the extent that the investigation is for the purpose of considering whether to exercise any power under section 196; or

(b) to investigate any matter under subsection (1)(e)(ii),

the Commission shall consult the Monetary Authority.

(1) Where-

- (a) a person has-
  - (i) contravened-
    - (A) any of the relevant provisions;
    - (B) any notice or requirement given or made under or pursuant to any of the relevant provisions;
    - (C) any of the terms and conditions of any licence or registration under this Ordinance; or
    - (D) any other condition imposed under or pursuant to any provision of this Ordinance;
  - (ii) aided, abetted, or otherwise assisted, counselled or procured a person to commit any such contravention;
  - (iii) induced, whether by threats, promises or otherwise, a person to commit any such contravention;
  - (iv) directly or indirectly been in any way knowingly involved in, or a party to, any such contravention; or
  - (v) attempted, or conspired with others, to commit any such contravention; or
- (b) it appears, whether or not during the course or as a result of the exercise of any power under Part VIII, to the Commission that any of the matters referred to in paragraph (a)(i) to (v) has occurred, is occurring or may occur,

the Court of First Instance, on the application of the Commission, may, subject to subsection (4), make one or more of the orders specified in subsection (2).

(2) The orders specified for the purposes of subsection (1) are-

- (a) an order restraining or prohibiting the occurrence or the continued occurrence of any of the matters referred to in subsection (1)(a)(i) to (v);
- (b) where a person has been, or it appears that a person has been, is or may become, involved in any of the matters referred to in subsection (1)(a)(i) to (v), whether knowingly or otherwise, an order requiring the person to take such steps as the Court of First Instance may direct, including steps to restore the parties to any transaction to the position in which they were before the transaction was entered into;
- (c) an order restraining or prohibiting a person from acquiring, disposing of, or otherwise dealing in, any property specified in the order;
- (d) an order appointing a person to administer the property of another person;
- (e) an order declaring a contract relating to any securities, futures contract, leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme to be void or voidable to the extent specified in the order;
- (f) for the purpose of securing compliance with any other order made under this section, an order directing a person to do or refrain from doing any act specified in the order;
- (g) any ancillary order which the Court of First Instance considers necessary in consequence of the making of any of the orders referred to in paragraphs (a) to (f).

(3) The Commission shall-

- (a) before making an application pursuant to subsection (1) for an order affecting any person that is an exchange participant or a clearing participant, use its best endeavours to inform the recognized exchange company or the recognized clearing house (as the case may be) of the proposed application by notice in writing; and
- (b) where before the making of the application it has not informed the recognized exchange company or the recognized clearing house (as the case may be) of the proposed application by notice in writing, forthwith after the making of the application inform the recognized exchange company or the recognized clearing house (as the case may be) thereof by notice in writing.

(4) The Court of First Instance shall, before making an order under subsection (1), satisfy itself, so far as it can reasonably do so, that it is desirable that the order be made, and that the order will not unfairly prejudice any person.

(5) The Court of First Instance may, before making an order under subsection (1), direct that a notice of the application made in respect thereof be given to the persons it considers appropriate, or be published in the manner it considers appropriate, or both.

(6) Where the Court of First Instance considers it desirable to do so, it may grant such interim order as it considers appropriate pending the determination of an application made pursuant to subsection (1).

(7) An order may be made under subsection (1) whether or not it appears to the Court of First Instance that-

- (a) the person against whom the order is made intends to engage again, or to continue to engage, in any of the matters referred to in subsection (1)(a)(i) to (v);
- (b) the person against whom the order is made has previously engaged in any of such matters;
- (c) there is an imminent danger of damage to any person in the event of the order not being made.

(8) Where the Court of First Instance has power to make an order against a person under subsection (1), it may, in addition to or in substitution for such order, make an order requiring the person to pay damages to any other person.

(9) The Court of First Instance may reverse, vary or discharge an order made or granted by it under subsection (1) or (6) or suspend the operation of the order.

(10) A notice published under subsection (5) is not subsidiary legislation.

Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	379	Heading:	<b>Avoidance of conflict of interests</b>	Version Date:	01/04/2003

---

(1) Subject to subsection (2), any member of the Commission or any person performing any function under any of the relevant provisions shall not directly or indirectly effect or cause to be effected, on his own account or for the benefit of any other person, a transaction regarding any securities, futures contract, leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme-

- (a) which transaction he knows is or is connected with a transaction or a person that is the subject of any investigation or proceedings by the Commission under any of the relevant provisions or the subject of other proceedings under any provision of this Ordinance; or
- (b) which transaction he knows is otherwise being considered by the Commission.

(2) Subsection (1) does not apply to any transaction which a holder of securities effects or causes to be effected by reference to any of his rights as such holder-

- (a) to exchange the securities or convert them to another form of securities;
- (b) to participate in a scheme of arrangement sanctioned by the Court of First Instance under the Companies Ordinance (Cap 32);
- (c) to subscribe for other securities or dispose of a right to subscribe for other securities;
- (d) to charge or pledge the securities to secure the repayment of money;
- (e) to realize the securities for the purpose of repaying money secured under paragraph (d); or
- (f) to realize the securities in the course of performing a duty imposed by law.

(3) Any member of the Commission or any person performing any function under any of the relevant provisions shall forthwith inform the Commission if, in the course of performing any function under any such provisions, he is required to consider any matter relating to-

- (a) any securities, futures contract, leveraged foreign exchange contract, regulated investment agreement, or an interest in any securities, futures contract, leveraged foreign exchange contract, collective investment scheme or regulated investment agreement-
  - (i) in which he has an interest;
  - (ii) in which a corporation, in the shares of which he has an interest, has an interest; or
  - (iii) which-
    - (A) in the case of securities, is of or issued by the same issuer, and of the same class, as those in which he has an interest; or
    - (B) in the case of a futures contract, is interests, rights or property based upon securities of or issued by the same issuer, and of the same class, as those in which he has an interest; or
- (b) a person-
  - (i) by whom he is or was employed;
  - (ii) of whom he is or was a client;
  - (iii) who is or was his associate; or
  - (iv) whom he knows is or was a client of a person with whom he is or

was employed or who is or was his associate.

(4) A person who, without reasonable excuse, contravenes subsection (1) or (3) commits an offence and is liable-

(a) on conviction on indictment to a fine of \$1000000 and to imprisonment for 2 years; or

(b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

Chapter:	571	Title:	SECURITIES AND FUTURES ORDINANCE	Gazette Number:	L.N. 12 of 2003
Section:	392	Heading:	<b>Financial Secretary to prescribe interests, etc. as securities and futures contracts</b>	Version Date:	01/04/2003

---

### **Division 3-Power to make rules, and codes or guidelines, etc.**

(1) For the purposes of this Ordinance, the Financial Secretary may by notice published in the Gazette prescribe, either generally or in a particular case, that-

- (a) any interests, rights or property, whether in the form of an instrument or otherwise, or any class or description of any such interests, rights or property, is to be regarded as securities or futures contracts;
- (b) any interests, rights or property, whether in the form of an instrument or otherwise, or any class or description of any such interests, rights or property, is not to be regarded as securities or futures contracts.

(2) Without limiting the generality of subsection (1), a notice under that subsection may prescribe the circumstances under which or the purposes for which any interests, rights or property, or any class or description of interests, rights or property, referred to in the notice is to be regarded, or not to be regarded, as securities or futures contracts (as the case may be).

"  
"Ej cr vgt<"793"Vkrq"UGE WT K/KGU'CPF 'HWWWTGU" I tc| gwg'pwo dgt<"NP 03: 9'qh  
"QTF K CPEG"4229  
"Uej gf wrg<"3"J gcf lpi <"K VGT RTGVCVIQP 'CPF "Xgtukqp 'F cvg<"36B44229"  
"I GP GT CN'RTQXKIQP U

Jugevkqpu"4.'3; . '88.'386.'393.  
".....396.'397.'424"  
".....628(' Uej gf wrg'; \_  
".....RCTV3"

".....K VGT RTGVCVIQP "

"30Kvgr t gcvkqp'qh'y ku'Qtf kpcpeg

"debtenture" (債權證) includes debtenture stocks, bonds, and other securities of a corporation,  
"whether constituting a charge on the assets of the corporation or not;

"Shkpcpeknr tqf ve\$\* ) means/ ".....

- \*c+cp{ "ugewt kkgu="
- \*d+cp{ 'hwwt gu'eqptcev=
- \*e+cp{ 'eqmgevkg'kpxguo gpv'uej go g="
- \*f+cp{ 'hgxgtci gf 'hqtgki p'gzej cpi g'eqptcev="

"securities" (證券) means-

- (a) shares, stocks, debentures, loan stocks, funds, bonds or notes of, or issued by, a body, whether incorporated or unincorporated, or a government or municipal government authority;
- (b) rights, options or interests (whether described as units or otherwise) in, or in respect of, such shares, stocks, debentures, loan stocks, funds, bonds or notes;
- (c) certificates of interest or participation in, temporary or interim certificates for, receipts for, or warrants to subscribe for or purchase, such shares, stocks, debentures, loan stocks, funds, bonds or notes;
- (d) interests in any collective investment scheme;
- (e) interests, rights or property, whether in the form of an instrument or otherwise, commonly known as securities;
- (f) interests, rights or property which is interests, rights or property, or is of a class or description of interests, rights or property, prescribed by notice under section 392 of this Ordinance as being regarded as securities in accordance with the terms of the notice,

but does not include-

- (i) shares or debentures of a company that is a private company within the meaning of section 29 of the Companies Ordinance (Cap 32);
- (ii) any interest in any collective investment scheme that is-
  - (A) a registered scheme as defined in section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap 485), or its constituent fund as defined in section 2 of the Mandatory Provident Fund Schemes (General) Regulation (Cap 485 sub. leg. A);
  - (B) an occupational retirement scheme as defined in section 2(1) of the Occupational Retirement Schemes Ordinance (Cap 426); or
  - (C) a contract of insurance in relation to any class of insurance business specified in the First Schedule to the Insurance Companies Ordinance (Cap 41);
- (iii) any interest arising under a general partnership agreement or proposed general partnership agreement unless the agreement or proposed agreement relates to an undertaking, scheme, enterprise or investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar undertakings, schemes, enterprises or investment contracts (whether or not that person is, or is to become, a party to the agreement or proposed agreement);
- (iv) any negotiable receipt or other negotiable certificate or document evidencing the deposit of a sum of money, or any rights or interest arising under the receipt, certificate or document;
- (v) any bill of exchange within the meaning of section 3 of the Bills of Exchange Ordinance (Cap 19) and any promissory note within the meaning of section 89 of that Ordinance;
- (vi) any debenture that specifically provides that it is not negotiable or transferable;
- (vii) interests, rights or property which is interests, rights or property, or is of a class or description of interests, rights or property, prescribed by notice under section 392 of this Ordinance as not being regarded as securities in

