



"Offers of Investments" under the Securities and Futures Ordinance

The Answers to Frequently Asked Questions contained in this section of our website are designed to assist you to understand the policy of Commission staff on the implementation of certain provisions of the Securities and Futures Ordinance and related subsidiary legislation. The Answers tend to be framed as general statements and do not consider your particular circumstances. Some provisions have important exceptions or qualifications which may not be referred to in the Answers but which may apply in your circumstances. The Answers should not be regarded as a substitute for obtaining professional legal advice. You should seek independent legal or other professional advice before taking action on matters to which the Answers may be relevant or if you have any doubt about how the law applies to you. You are encouraged to read the information contained in the section of our website entitled "Important Legal Information" before reading the Answers.

	Question	Answer
Part IV of the Securities and Futures Ordinance on Offers of Investments:		
1.	What is a collective investment scheme?	<p>"Collective investment scheme" is a term introduced under, and defined in Schedule 1 to, the Securities and Futures Ordinance (SFO) to apply to investment products of a collective nature. It embraces and modernizes the concepts of "unit trust", "mutual fund corporation" and "investment arrangements", as defined in the now repealed Securities Ordinance and the Protection of Investors Ordinance (PIO).</p> <p>To provide flexibility to address changing market conditions and the development of new products, the Financial Secretary is empowered under section 393 of the SFO to prescribe by notice in the Gazette that certain products are, or are not, to be regarded as collective investment schemes. For instance, in exercise of this power the Financial Secretary has made the Securities and Futures (Collective Investment Schemes) Notice to prescribe certain "paper gold schemes" as collective investment schemes. This replaces the "Gold Purchase Order" issued under the PIO.</p> <p>For the avoidance of doubt, it is the SFC's policy intention that the public offering of both open-ended and closed-end funds are subject to SFC authorization under the</p>

	Question	Answer
		<p>SFO, unless specifically exempted under section 103.</p> <p>For further information regarding what a CIS is and CIS involving interests in real property, please refer to Appendix 1 to these Frequently Asked Questions.</p>
2.	<p>Is it an offence under the SFO for a person to distribute to the public in Hong Kong advertisements, invitations or documents for a collective investment scheme ("CIS") which has not been authorized by the SFC?</p>	<p>It is an offence under section 103 of the Securities and Futures Ordinance ("SFO") to issue an advertisement, invitation or document which is or contains an invitation to the Hong Kong public to invest in collective investment schemes ("CIS") unless the issue is authorized by the SFC or an exemption applies.</p> <p>The SFC would consider whether it is appropriate to authorize the issue of such advertisement, invitation or document under section 105 of the SFO. Given the nature of CIS is in effect asking investors for a mandate to discretionarily invest in a portfolio of securities and futures, it is necessary for investor protection to ensure that the operators of a CIS such as the fund manager meet the eligibility requirements laid down in the relevant product code issued by the SFC before they can operate to run the CIS. Since a CIS that is not authorized by the SFC under section 104 of the SFO is not required to comply with these requirements set out in the SFC's product codes, the SFC would not generally consider it appropriate to authorize any advertisement, invitation or document in respect of such unauthorized CIS under section 105.</p> <p>Section 103(11) also sets out the various exemptions under section 103 of the SFO that would not be applicable to the offering of unauthorized CIS.</p>
3.	<p>What is the exemption for "professional investors"?</p>	<p>The exemption for "professional investors" is provided in section 103(3)(k) of the SFO. In short, it provides that the general prohibition of financial promotion under section 103(1) does not apply to the issue of advertisements, invitations or documents made in respect of collective investment schemes that are offered only to professional investors.</p> <p>The term "professional investor" is defined in Schedule 1 to the SFO and that definition is enlarged for certain purposes only by the Securities and Futures (Professional Investor) Rules (the Rules).</p>

	Question	Answer
		<p>For example, under the Rules an individual having a portfolio of not less than HK\$8 million or a corporation or partnership having a portfolio of not less than HK\$8 million or total assets of not less than HK\$40 million is regarded for the purposes of the section 103(3)(k) exemption as a "professional investor".</p> <p>The term "portfolio" is defined in the Rules to mean a portfolio comprising of securities, money held by a custodian or a certificate of deposit issued by an authorized financial institution or a bank which is regulated under the law of a place outside Hong Kong.</p>
3A.	What are the consequences of promoting interests in a CIS?	<p>If you conduct a business of promoting interests in a CIS without an SFC licence, you may commit an offence under section 114 of the SFO.</p> <p>The maximum penalties for doing this are fine of \$5,000,000 and seven years' imprisonment.</p>
4.	Does Part IV of the SFO impose any condition of authorization?	<p>Yes. It is a requirement that an applicant for authorization of a collective investment scheme under section 104 of the SFO must nominate an individual to be approved by the SFC as an "approved person". The approved person will then be the SFC's point of contact for the purpose of being served notices and decisions in respect of the scheme. There is a similar requirement in relation to applications for the authorization of any advertisements, invitations or documents under section 105 of the SFO. Generally speaking, a person approved in relation to a collective investment scheme authorized under section 104 will also be approved in relation to the issuance of advertisements, etc., authorized under section 105.</p> <p>Authorizations will not be granted under sections 104 and 105 of the SFO unless the SFC has approved such an individual as an approved person. This authorization requirement has been highlighted in the relevant product codes.</p> <p>The individual nominated should have his/ her ordinary residence in Hong Kong. The SFC should be provided with the individual's particulars, including his/her name, employer, position held, address, telephone and facsimile numbers and electronic mail address, if any, to facilitate contact by the SFC. In addition, the SFC should be informed of any change in his/her contact details within 14 days after the change</p>

	Question	Answer
		takes place.
5.	Does the approved person play any role in respect of the withdrawal of authorization under section 106 of the SFO?	Yes, a request for withdrawal of authorization under section 106 should be made in writing to the Commission by the approved person.
6.	What may happen if the conditions imposed by the SFC in respect of the authorization for a collective investment scheme are not being complied with?	The SFC may withdraw the authorization of the collective investment scheme pursuant to section 106(1) of the SFO. According to section 106(5), the SFC will not withdraw an authorization without first giving the approved person for the scheme a reasonable opportunity of being heard. Where the SFC withdraws the authorization, it will by notice in writing notify the approved person of the decision and the reasons for which it is made.
7.	Besides non-compliance with the corresponding authorization conditions, what are the circumstances under which the SFC may withdraw an authorization?	According to section 106(1) of the SFO, the SFC may also withdraw an authorization if it decides that: <ul style="list-style-type: none"> a) any information provided to the SFC was at the time when it was provided false or misleading in a material particular; or b) it is desirable to withdraw the authorization in order to protect the interest of the investing public.
8.	What are the fees payable to the SFC for authorization of a collective investment scheme?	The fees payable to the SFC for authorization of a collective investment scheme are set out in the Schedule 1 to the Securities and Futures (Fees) Rules. The applicant would generally be required to pay an application fee, authorization fee and annual fee in respect of the scheme seeking authorisation by the SFC.

Last update: 17 June 2016

Collective investment schemes involving interests in real property

These questions and answers (Q&As) provide information about arrangements in respect of interests in real property that may be a collective investment scheme (“CIS”) under the Securities and Futures Ordinance (“SFO”). They are for:

- members of the real estate industry to better understand whether they will be operating, managing or promoting any real estate arrangement that may be a CIS under the SFO, the offering to the public of which the SFO restricts and which may need an SFC licence to promote and advise investors to invest in such CIS; and
- investors to check whether the investment they are invited to invest in may be a CIS.

The information is general and not exhaustive. It does not take into account your particular circumstances. The law in this area is complicated. You should get your own legal advice.

We may update the Q&As from time to time.

	Question	Answer
Regulation of CIS in Hong Kong		
1.	What is a CIS?	<p>CIS is defined broadly in Schedule 1 to the SFO and generally has four relevant elements:</p> <ol style="list-style-type: none"> it must involve arrangements in respect of any property; investors do not have day-to-day control over the management of the property even if they have the right to be consulted or to give directions about the management of the property; the property is managed as a whole by or on behalf of the person operating the arrangements, <u>and/or</u> the contributions of the investors and the profits or income from which payments are made to them are pooled; and

	Question	Answer
		<p>d. the purpose or effect of the arrangements is for the investors to participate in or receive: (i) profits, income or other returns from the acquisition, holding, management or disposal of the property, or (ii) payments or other returns from: the acquisition, holding or disposal of, the exercise of any right in, the redemption of, or the expiry of, any interest in the property.</p>
2.	How is a CIS regulated in Hong Kong?	<p>The SFC regulates the promotion and the offering to the Hong Kong public of interests in a CIS under the SFO.</p> <p>It is an offence under the SFO to issue any marketing material which is or contains an offer to the Hong Kong public to acquire an interest or participate in a CIS unless it has been authorized by the SFC or an exemption under section 103 of the SFO applies.</p> <p>Promoting interests in a CIS may also need an SFC licence if it amounts to a business. To do so without an SFC licence may be an offence under the SFO.</p>
Features of real estate projects that may give rise to a CIS		
3.	Why would the sale of real estate amount to a sale of interests in a CIS?	<p>As stated above, the term CIS is defined broadly in Schedule 1 to the SFO to cover “arrangements” in respect of <u>any “property”</u>.</p> <p>“Property” is also widely defined under the SFO and includes “land” or any estate in land so <u>real estate</u> in Hong Kong or overseas is covered.</p> <p>If arrangements in respect of real property have the elements Q1 explains, they would be a CIS.</p>
4.	What types of real estate and/or real estate projects may be a CIS?	<p>Whether the sale of any type of real estate and/or real estate project amounts to a sale of interests in a CIS depends on the facts including how the arrangements involving real estate are operated and how the property in question is managed under the arrangements.</p> <p>Generally, real estate projects involving interests in hotels/holiday resorts, serviced apartments, student accommodation and shopping malls are more likely to be a CIS</p>

	Question	Answer
		because it is more likely that they need to be managed on behalf of investors. It is also more likely that real estate projects with “buy-to-let” or “buy and leaseback” features could be a CIS as they often involve a centralized letting and management service.
5.	<p>If investors own the individual units in a real estate project where:</p> <p>(i) the units are rented, (ii) the rent is pooled (e.g. the investor receives a proportion of the total income from all the units equal to the fraction their unit accounts for out of all the units), and (iii) a manager makes decisions about how to rent units, to whom, on what terms and whether any unit should be left unlet for a period,</p> <p>are the arrangements likely to amount to a CIS?</p>	<p>Yes, because:</p> <ul style="list-style-type: none"> a. the real estate project involves arrangements in respect of real property, even though investors may have rights to their own units; b. the centralized letting service means that owners of units do not have day-to-day control over the management of the property; c. the property is managed as a whole by the operator of the arrangements; and d. the purpose of the arrangements is for the investors to receive income from the property.
6.	<p>If there is no pooling of contributions and profits or income, would it still be a CIS?</p>	<p>Even if the contributions and profits or income are not pooled, it may still be a CIS. If the property is managed as a whole by or on behalf of the person operating the arrangements and the arrangements have the other elements explained in Q1, the arrangements could still be a CIS.</p>
7.	<p>What does “day-to-day control over the management of the property” mean?</p>	<p>“Day-to-day control” means routine, ordinary, everyday management or operational decisions. The phrase does not just mean the <i>legal</i> ability to decide what is to happen to the property. Rather, the test focuses on whether investors can really make management decisions about the property.</p> <p>Where the contracts appear to give the investors day-to-day control but they do not have that control in practice, the arrangements may still be a CIS even if the investors have the right to be consulted or give directions in respect of such management.</p>

	Question	Answer
8.	If some investors have day-to-day control, but others don't, will arrangements involving interests in real property still be a CIS?	Yes. <u>All</u> investors must have day-to-day control over the management of their properties for a scheme not to be a CIS. Even if one investor does not have day-to-day control the scheme could still be a CIS.
9.	If investors have the right to be consulted or give directions about the management of their units, does it mean that they have day-to-day control?	No. Even if the investors have the right to be consulted or to give directions about the management of their units, that is not enough to stop a scheme from being a CIS. For example, if the operator makes all management decisions using generic mandates (such as a power of attorney) from the investors, even if the investors may have notional control over decision-making, the operator likely has effective day-to-day control over the management of the property, not the investors.
10.	If investors owning different units in the same project appoint the same property agent to lease their units for them, would the property agent be regarded as managing these units as whole and the arrangements be a CIS?	Whether a property is being "managed as a whole" depends on the facts. A property agent would not generally be regarded as managing these units as a whole if the individual investors only engage the property agent to carry out the administrative steps to lease out their units for them according to the terms specified by them under the relevant agency agreements, and the arrangements were that individual investors would direct and make key profit-generating decisions in respect of their own units (e.g. who to lease to, the term of the lease and the amount of rent).
11.	Would a project be regarded as being managed as a whole by a managing agent where: (a) a managing agent manages the project and arranges for leases to be entered into between each investor and a tenant; (b) the investor chooses the tenant and decides the lease terms; (c) the agent runs the project and relationships with tenants, including collecting rent, arranging repairs and insurance, cleaning and security; and (d) the individual investor receives the rent attributable to his/her individual unit?	A project would not generally be regarded as being managed as a whole if the investor made decisions on key matters relevant to an investor's profit (e.g. the identity of the tenant, the terms of the lease and the amount of rent). If so, the project would generally be regarded as being managed on an individual basis as each unit would be managed taking into account each investor's interests. If a managing agent decides things like cleaning and maintenance of common areas, which contribute indirectly to profit, or can get block discounts for all investors for insurance etc., the project would probably still not be "managed as a whole" by the agent.

	Question	Answer
Consequences of promoting or offering interests in a CIS involving real property		
12.	What are the consequences of offering interests in a CIS involving real property to the Hong Kong public?	<p>It is an offence under the SFO to issue marketing material which is or contains an offer to the Hong Kong public to acquire an interest or participate in a CIS involving real property unless it has been authorized by the SFC or an exemption under section 103 of the SFO applies.</p> <p>The maximum penalties for doing this are a fine of \$500,000 and three years' imprisonment.</p> <p>In addition, making a fraudulent or reckless misrepresentation to induce another person to invest in a CIS is also an offence under section 107 of the SFO.</p> <p>The maximum penalties for doing this are a fine of \$1,000,000 and seven years' imprisonment.</p>
13.	What are the consequences of promoting interests in a CIS involving real property?	<p>If you conduct a business of promoting interests in a CIS without an SFC licence, you may commit an offence under section 114 of the SFO.</p> <p>The maximum penalties for doing this are fine of \$5,000,000 and seven years' imprisonment.</p>
14.	Do I need SFC authorisation if only professional investors invest?	<p>It is an offence under the SFO to issue marketing material which is or contains an offer to the Hong Kong public to acquire an interest or participate in a CIS involving real property unless it has been authorized by the SFC or an exemption under section 103 of the SFO applies. One of the exemptions is the issue of marketing material for a CIS that is or intended to be sold only to "professional investors".</p> <p>"Professional investor" is defined in Schedule 1 to the SFO and the Securities and Futures (Professional Investor) Rules. See: http://www.sfc.hk/web/EN/rule-book/laws/securities-and-futures-ordinance.html</p>
15.	What must I do to get SFC authorization?	<p>In considering an application for authorisation of a CIS under the SFO, the SFC may refuse to authorize any CIS where it is not satisfied that the authorization is in the interest of the investing public.</p>

	Question	Answer
		<p>A CIS investing in real property seeking the SFC's authorization is generally required to comply with all the applicable requirements under the Code on Real Estate Investment Trusts including:</p> <ul style="list-style-type: none"> • the CIS must be listed on The Stock Exchange of Hong Kong Limited; • the CIS manager must be SFC licensed or be licensed by the regulator of an overseas regime acceptable to the SFC; • there must be a trustee; and • the assets of the CIS must be segregated and held in trust. <p>See: http://en-rules.sfc.hk/en/display/display.html?rbid=3527&element_id=1235</p>
16.	If I promote interests in a CIS investing in real property to professional investors only does that breach the SFO?	Even if you intend to only sell interests in a CIS investing in real property to professional investors, you may still be carrying on a business which needs an SFC licence. If you don't have an SFC licence, you may commit an offence (section 114 of the SFO). Please see Q13.

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