



# Regulatory Regime for Offers of Investments

Harold Ko

Investment Products Department  
Securities and Futures Commission

January 2003



# *Outline*

- ◆ Regulatory framework for offers of investments under the SFO
- ◆ Major differences from the existing framework
- ◆ The “jigsaw puzzle”



*Regulatory Framework for  
Offers of Investments  
under the SFO*



## *Part IV of the SFO*

- ◆ Part IV of the SFO deals with the regulatory framework for offers of investments
  
- ◆ It seeks to maintain Hong Kong's status as a regional centre for fund management activity by
  - ❖ providing a favourable environment for the continued availability of as wide a range of investment products as the market could offer
  - ❖ creating a level playing field for market participants
  - ❖ promoting sound business standards
  - ❖ ensuring an appropriate level of investor protection



## *The Regulatory Framework*

- ◆ The framework builds upon the existing Protection of Investors Ordinance and Securities Ordinance
- ◆ Several changes have been introduced to resolve some of the practical difficulties faced in the past and address potential issues that may arise in the wake of increasing market and product development



# *Major Differences from the Existing Framework*



## *“Collective Investment Scheme”*

- ◆ Introduced a single notion of “collective investment scheme”
  
- ◆ Moved away from the “antique” terms focusing on the form or structure of the products
  
- ◆ Based on the nature of the products
  - ❖ collective management by a third party operator in such a way that investors would have no day-to-day control over the underlying properties
  - ❖ pooling of interests among investors
  - ❖ provision of profits or returns



# *Securities and Futures (Collective Investment Schemes) Notice*

- ◆ Based on the existing Protection of Investors (Gold Purchase) Order
- ◆ “Paper gold schemes” to be regarded as collective investment schemes and subject to the regime under Part IV of the SFO



## *Explicit Power to Authorize Collective Investment Schemes and Impose Conditions*

- ◆ SFC is explicitly empowered to impose appropriate conditions when authorizing different collective investment schemes, such as
  - ❖ unit trusts
  - ❖ mutual funds
  - ❖ Luxembourg FCPs
  - ❖ European contractual type funds
  - ❖ “investment arrangements”



## *New Statutory Authorization Conditions*

- ◆ There is an individual approved as an “approved person” for the purpose of being served by the SFC with notices and decisions in relation to the authorization
  
- ◆ The SFC is informed of the current contact details of the approved person, including
  - ❖ address
  - ❖ telephone and facsimile numbers
  - ❖ email address



# *Withdrawal of Authorization*

- ◆ The SFC may withdraw an authorization upon a request in writing made by the corresponding approved person
  
- ◆ The SFC may also withdraw an authorization if it decides that
  - ❖ the information concerning the application was, at the time when it was submitted, false or misleading in a material particular
  - ❖ any of the authorization conditions imposed in respect of the authorization are not being complied with
  - ❖ it is desirable to withdraw the authorization in order to protect the interest of the investing public



## *Withdrawal of Authorization (II)*

- ◆ The SFC would not withdraw an authorization without first giving the corresponding approved person a reasonable opportunity of being heard
- ◆ Where the SFC withdraws an authorization, it would by notice in writing notify the corresponding approved person of the decision and, in some cases, the reasons for which it is made



## *New Exemption (I)*

- ◆ Introduced a new exemption for collective investment schemes that are offered only to “professional investors”
- ◆ The term “professional investor” is defined in Schedule 1 to the SFO



## *“Professional Investor”*

- ❖ Any intermediary or any other person carrying on the business of the provision of investment services and regulated outside Hong Kong
- ❖ Any authorized financial institution or any bank regulated outside Hong Kong
- ❖ Any authorized insurer or any other person carrying on insurance business and regulated outside Hong Kong
- ❖ Any authorized collective investment scheme or any other scheme which is similarly constituted and regulated outside Hong Kong
- ❖ Any person of a class which is prescribed by rules made under section 397 of the SFO



# *Securities and Futures (Professional Investor) Rules*

- ◆ Trust corporations having been entrusted with total assets of not less than HK\$40 million
- ◆ Individuals having a portfolio comprising of securities or certificates of deposit of not less than HK\$8 million
- ◆ Corporations or partnerships having a portfolio comprising of securities or certificates of deposit of not less than HK\$8 million or total assets of not less than \$40 million



## *New Exemption (II)*

- ◆ Introduced a new exemption for securities admitted to trading on a recognized stock market pursuant to rules made under Part III of the SFO regarding exchange companies
- ◆ These securities could potentially include exchange traded funds listed on certain overseas exchanges



# *The “Jigsaw Puzzle”*



## *General Prohibition on Financial Promotion*

- ◆ The policy intent is that only those investments which are subject to certain regulatory safeguards should be offered to the public
- ◆ In general, a person commits an offence if he issues an advertisement, invitation or document which is or contains an invitation to the public to invest money unless the issue is authorized by the SFC (section 103(1))



# *Recognition of Other Regulatory Safeguards*

- ◆ Exemptions from the general prohibition having regard to the “status” of the issuers
  - ❖ Invitations made by a licensed person or registered institution in respect of a financial product covered by its regulated activity (section 103(2)(a) to (c))
  - ❖ Invitations made by a recognized exchange company or recognized clearing house in respect of the provision of its services (section 103(2)(d))
  - ❖ Invitations made by a person who is engaged in the business of selling and purchasing property other than securities in the ordinary course of that business (section 103(2)(i))
  
- ◆ These exemptions do not apply to anything done in respect of unauthorized collective investment schemes (section 103(11))



## *Recognition of Other Regulatory Safeguards (II)*

- ◆ Exemptions from the general prohibition having regard to the “status” of the materials issued
  - ❖ Prospectuses which comply with the Companies Ordinance (section 103(3)(a))
  - ❖ Application forms for shares or debentures issued together with prospectuses which comply with the Companies Ordinance (section 103(3)(c))
  - ❖ Materials made in respect of the issue of listed securities approved by the recognized exchange company and in compliance with the rules made under Part III of the SFO governing the listing of securities (section 103(3)(h))



## *Offence to Fraudulently or Recklessly Induce Others to Invest Money*

- ◆ In general, a person commits an offence if he makes any “fraudulent misrepresentation” or “reckless misrepresentation” for the purpose of inducing another to invest money (section 107(1))
  - ❖ Statements that are false, misleading or deceptive
  - ❖ Promises that are not capable of being fulfilled
  - ❖ Forecasts that are not justified on the facts then known



## *Civil Liability for Inducing Others to Invest Money*

- ◆ In general, where a person makes any “fraudulent misrepresentation”, “reckless misrepresentation” or “negligent misrepresentation” by which another person is induced to invest money, the inducer shall be liable to pay compensation for any pecuniary loss that the other person has sustained as result of the reliance on the misrepresentation (section 108(1))