

Dated _____

[LENDER] (1)

[BORROWER] (2)

and

SECURITIES AND FUTURES COMMISSION (3)

**MODEL LONG TERM
SUBORDINATED LOAN AGREEMENT**

THIS SUBORDINATED LOAN AGREEMENT is made the _____ day of _____ .

BETWEEN

- (1) [Name of Lender] [of/whose registered office is situate at]* [address] ("**the Lender**" which term includes its permitted successors and assigns);
- (2) [Name of Borrower] [of/whose registered office is situate at]* [address] ("**the Borrower**"); and
- (3) The Securities and Futures Commission whose office is situate at [54/F, One Island East, 18 Westlands Road, Quarry Bay,] Hong Kong ("**the Commission**").

WHEREAS

- (1) The Borrower is a licensed corporation carrying on [Type 1, 2, 3, 4, 5, 6, 7, 8, 9 regulated activity/activities*] under the Securities and Futures Ordinance (Cap. 571) ("**the Ordinance**").

- (2) The Borrower is required to comply at all times with the Securities and Futures (Financial Resources) Rules (Cap 571 sub leg) ("the Financial Resources Rules") which are made under section 145 and section 397 of the Ordinance.
- (3) The Lender has agreed to advance the Loan set out herein to the Borrower upon and subject to the terms of this Agreement to assist the Borrower in complying with the Financial Resources Rules.
- (4) The Commission has agreed to treat the Loan as an approved subordinated loan for the purposes of compliance by the Borrower with the Financial Resources Rules on the terms and subject to the conditions contained in the letter of approval and in this Agreement.

NOW THIS AGREEMENT WITNESSETH that for the purposes aforesaid and in consideration of the premises and of the sum of one dollar (\$1) now paid by the Commission to the Borrower (the receipt whereof is hereby acknowledged) and of the sum of one dollar (\$1) now paid by the Commission to the Lender (the receipt whereof is hereby acknowledged) it is agreed by and between the parties hereto as follows:

1. DEFINITIONS AND INTERPRETATION

(1) Definitions

In this Agreement unless the context otherwise requires:

"Agreement" means this Agreement as amended from time to time;

"approved subordinated loan" has the meaning assigned to it by section 2(1) of the Financial Resources Rules;

"business day" has the meaning assigned to it by section 1 of Part 1 of Schedule 1 to the Ordinance ;

"insolvency" means and includes liquidation, winding-up, bankruptcy, administration, receivership, dissolution, re-organization or any analogous event whether voluntary or involuntary (and whether or not involving insolvency) or any assignment of assets for the benefit of creditors or any arrangement with creditors generally;

"Insolvency Officer" means and includes any person duly appointed to administer and distribute the assets of the Borrower in the event of the Borrower's insolvency;

"judicial or other proceedings" has the meaning assigned to it by section 1 of Part 1 of Schedule 1 to the Ordinance;

"letter of approval" means the letter from the Commission to the Borrower notifying the Borrower of the approval by the Commission of the Loan;

"licensed corporation" has the meaning assigned to it by section 1 of Part 1 of Schedule 1 to the Ordinance;

"Loan" means the amount advanced to the Borrower pursuant to Clause 2(1) hereof or the amount for the time being outstanding in respect thereof, as the context may require;

"regulated activity" has the meaning assigned to it by section 1 of Part 1 of Schedule 1 to the Ordinance;

"Repayment Date" means the date specified by the Lender in a written notice to the Borrower provided that the date specified is not within [two¹] years from the date of this Agreement and repayment is made in accordance with the terms of this Agreement;

"Senior Creditors" means all persons who are:

- (a) unsubordinated creditors of the Borrower; or
- (b) subordinated creditors of the Borrower other than those whose claims are expressed to rank and do rank *pari passu* with or junior to the claims of the Lender hereunder;

"Senior Liabilities" means all present and future sums liabilities and obligations payable or owing by the Borrower (whether actual or contingent, jointly or severally or otherwise) but not including Subordinated Liabilities; and

"Subordinated Liabilities" means all present and future sums liabilities and obligations payable or owing by the Borrower to the Lender (whether actual or contingent, jointly or severally or otherwise) in respect of the Loan and all [interest]* costs charges and expenses due and payable thereon.

(2) Interpretation

In this Agreement, unless the context otherwise requires:

- (a) Clause Headings are inserted for ease of reference only and shall not affect the construction of this Agreement;
- (b) References to Clauses are to be construed as references to Clauses of this Agreement;
- (c) Words importing the singular shall include the plural and vice versa and words importing the masculine gender shall include the feminine and neuter genders and vice versa; and

¹ Minimum period

- (d) Any reference to an ordinance or subsidiary legislation shall be deemed to be a reference to that ordinance or subsidiary legislation as from time to time amended, re-enacted or substituted.

2. THE LOAN

- (1) The Lender agrees to and does hereby advance by way of unsecured loan the amount of [insert currency and dollar amount] to the Borrower (the receipt whereof is hereby acknowledged) upon the terms and subject to the conditions of this Agreement.
- (2) The Borrower undertakes to the Commission that forthwith upon receiving a written request by the Commission to do so it will provide to the Commission written details of all principal and all [interest]* costs charges and expenses in respect of the Loan outstanding for the time being and all payments of any amount (whether by way of repayment and whether in respect of principal [, interest]* or otherwise) made in such period as the Commission may specify in the request.

3. INTEREST

- (1) [The Loan is non-interest bearing.]*

[The provisions of this Clause are subject in all respects to the provisions of Clause 5.

Until repayment of the Loan in full, the Borrower shall pay to the Lender interest on the Loan or on any part or parts thereof for the time being remaining due hereunder, provided that no such payment shall be made unless the Borrower complies with all applicable provisions of the Financial Resources Rules at the time of and immediately after such payment.]*

- (2) [Interest on the Loan shall be calculated and paid as follows:

- (a) Interest Rate

- Interest shall be calculated at the annual rate of [insert interest rate basis, which should not be higher than the current market rate].

- (b) Calculation of Interest

- Interest shall accrue on the basis of the actual number of days elapsed in a year of [360/365]* days. Each interest computation by the Lender shall (in the absence of manifest error) be conclusive and binding upon the Borrower.

- (c) Payment of Interest

Interest shall be paid [monthly/ other (specified) period or intervals]* and any unpaid amount shall be compounded on the last day of the [month/ other period or intervals]* and shall itself bear interest as if it were part of the Loan.]*

[Notes:

1. Clause 3(2) may be adapted to reflect other methods of calculating and paying interest; and may be deleted if the loan is non-interest bearing.]

4. REPAYMENT

- (1) Subject to the provisions of Clause 5, the Borrower may repay the whole or any part of the Loan at any time prior to the Repayment Date and in any event shall repay the Loan by the Repayment Date provided that no repayment shall be made unless:
 - (a) the Borrower has given both the Lender and the Commission one month's prior written notice of its intention to make such repayment specifying the amount and the date of the repayment;
 - (b) the Borrower has supplied the Commission with such documents and information in relation to the repayment and within the time as prescribed by the Commission;
 - (c) the Commission has given prior written consent thereto; and
 - (d) the Borrower complies with all applicable provisions of the Financial Resources Rules at the time of and immediately after such repayment.
- (2) The Lender hereby agrees that any sums received by it in respect of the Loan in breach of the terms of this Agreement, whether received by way of repayment or otherwise and whether made by or on behalf of the Borrower, shall be regarded as void for the purposes of this Agreement and shall be held by the Lender on trust to return the same forthwith to the Borrower or, where applicable, to the Insolvency Officer, upon receipt of a written request to do so by the Commission, the Borrower or the Insolvency Officer.
- (3) The trust created by Clause 4(2) and Clause 8(2)(f) shall, for the purposes of the Perpetuities and Accumulations Ordinance (Cap. 257) be of a duration of eighty years from the date of receipt of such sum or the obtaining of such security (as the case may be) by the Lender, provided always that it will cease on the date on which the Commission is satisfied that all the Subordinated Liabilities have been irrevocably paid and discharged in full.

5. SUBORDINATION

In the event of the Borrower's insolvency or the Borrower becoming unable at any time to comply with any applicable provisions of the Financial Resources Rules , the rights of the Lender in respect of the Subordinated Liabilities will be subordinated in all respects to the rights of Senior Creditors in respect of the Senior Liabilities. Accordingly any [payment under Clause 3 or]* repayment under Clause 4 is conditional upon the solvency of the Borrower and compliance by the Borrower with all applicable provisions of the Financial Resources Rules both at the time of such [payment or]* repayment and immediately thereafter and such [payment/ repayment] shall not be made unless this condition is satisfied.

6. ENFORCEMENT

- (1) If the Borrower fails to pay any principal [interest]* costs charges or expenses in respect of the Loan under the terms of this Agreement within [insert number] days of the date upon which it is due and payable, the Lender may, in order to enforce payment, at its discretion and after taking such preliminary steps or actions as may be necessary, institute any judicial or other proceedings for the insolvency of the Borrower provided that the Lender shall first have given to the Commission [insert number of not less than fourteen] days' written notice of its intention to institute such proceedings.
- (2) The Lender shall not be entitled to exercise any remedy against the Borrower other than as specifically provided by Clause 6(1).

7. ASSIGNMENT

- (1) This Agreement shall benefit and shall be binding upon the parties hereto and their respective successors and permitted assignees or transferees. Any reference in this Agreement to any party shall be construed accordingly.
- (2) The Borrower shall not assign, transfer or otherwise dispose of all or any of its rights or obligations under this Agreement.

8. COVENANTS AND AGREEMENTS

- (1) The Borrower hereby covenants with the Commission that it will comply with the terms of this Agreement and with the terms and conditions contained in the letter of approval and will not, without the prior written consent of the Commission:
 - (a) create or suffer to exist any security over any of its assets which secures any part of the Subordinated Liabilities;
 - (b) redeem, purchase or otherwise acquire any of the Subordinated Liabilities;
 - (c) amend, cancel or replace the terms of this Agreement or the terms of any document evidencing or providing for the Subordinated Liabilities;

- (d) make any repayment of any of the Subordinated Liabilities otherwise than in accordance with the terms of this Agreement; or
 - (e) take or omit to take any action whereby the subordination as provided for in Clause 5 might be terminated, impaired or adversely affected.
- (2) The Lender hereby covenants with the Commission that it will comply with the terms of this Agreement and will not, without the prior written consent of the Commission:
 - (a) assign, transfer or otherwise dispose of this Agreement or all or any of the rights, benefits or obligations hereunder including the whole or any part of the Subordinated Liabilities nor purport to do so;
 - (b) retain or set-off or purport to retain or set-off at any time any amount of the Loan against any amount otherwise payable by it to the Borrower except to the extent that payment of such amount of the Loan would be permitted at such time by this Agreement;
 - (c) amend, waive, cancel or replace the terms of this Agreement or the terms of any document evidencing or providing for the Subordinated Liabilities;
 - (d) attempt to obtain repayment of the whole or any part of the Loan otherwise than in accordance with the terms of this Agreement;
 - (e) take or omit to take any action whereby the subordination of the Subordinated Liabilities or any part thereof as provided for in Clause 5 might be terminated, impaired or adversely affected;
 - (f) take any security from any person for all or any part of the Subordinated Liabilities and so that the Lender shall, upon obtaining security in breach of this Clause, hold the same on trust for the Borrower; or
 - (g) prove or claim in the event of the insolvency of the Borrower for the repayment of the Loan in competition with any Senior Creditor or seek in any way to diminish any distribution, dividend or payment which, but for such proof, the Senior Creditor would be entitled to receive.
- (3) The Lender also hereby covenants with the Commission:
 - (a) to give details to the Commission of the amount of the Subordinated Liabilities on request from time to time; and
 - (b) to notify the Commission forthwith of any breaches which come to the attention of the Lender in the performance by the Borrower of its obligations under this Agreement.

- (4) The Borrower and the Lender hereby jointly and severally agree and acknowledge the right of the Commission at any time to withdraw its approval of the Loan as an approved subordinated loan for the purposes of compliance by the Borrower with the Financial Resources Rules in the event of either the Borrower or the Lender failing to comply with any of the terms of this Agreement or in the event of the Borrower failing to comply with any of the terms and conditions contained in the letter of approval.

9. DOCUMENTATION

The parties hereto jointly and severally acknowledge that this Agreement forms the entire agreement relating to the Subordinated Liabilities. If there are any other terms relating to the Subordinated Liabilities existing at the date hereof and not comprised in this Agreement, such terms shall be of no further force and effect. No amendment to this Agreement shall be of any effect unless it is in writing subscribed to by all the parties hereto. Any amendment to this Agreement made or purported to be made without the prior written consent of the Commission shall be void, and at any time after the Commission shall have become aware of any such amendment it shall be entitled to declare by notice in writing to the Borrower and the Lender that the Loan will no longer be taken into account for the purposes of determining compliance by the Borrower with the Financial Resources Rules. Any such declaration shall be without prejudice to any other rights or any other action which the Commission might be entitled to take or to exercise in respect of a breach of this Agreement constituted by any such purported amendment and no failure or delay on the part of the Commission with respect to the making of such declaration shall prejudice its rights in relation to the Borrower and/or the Lender either generally or pursuant to this Agreement.

10. CONTINUING OBLIGATIONS AND TERMINATION

- (1) The obligations of the Borrower and the Lender hereunder shall be continuing obligations and shall be and remain fully effective until the repayment of the Loan in full in accordance with the provisions of this Agreement.
- (2) This Agreement may be terminated at any time by the Lender and the Borrower upon agreement provided that the Commission has given its prior written consent to the termination. Termination of this Agreement shall be without prejudice to the rights and claims of the Commission accrued or made at or prior to the date of termination.

11. THE COMMISSION

- (1) The Commission is a party to this Agreement only for the purpose of ensuring the enforceability of the provisions of this Agreement so as to satisfy itself that such requirements of the Financial Resources Rules as are applicable to the Borrower are met and the Commission is not, and shall not be deemed to be, a trustee for, or to have any obligation of any nature to, the Senior Creditors or any of them.

- (2) Each of the Lender and the Borrower shall on demand indemnify the Commission against all claims, losses, costs, expenses and other liabilities made against or incurred by the Commission as a consequence of the Commission being a party to, or taking or omitting to take any action under, this Agreement.

12. PARTIAL INVALIDITY

The illegality, invalidity or unenforceability of any provision of this Agreement under the law of any jurisdiction shall not affect its legality, validity or enforceability under the law of any other jurisdiction nor the legality, validity or enforceability of any other provisions of this Agreement.

13. NOTICES

- (1) Any notice or document to be served under this Agreement shall be:

- (a) delivered by hand;
- (b) sent by registered post;

to the party's address as specified above or as notified in writing to the other parties for the purposes of this Clause; or

- (c) sent by facsimile transmission to the party's facsimile number notified in writing to the other parties for the purposes of this Clause.

- (2) Any such notice or document shall be deemed to have been served:

- (a) if delivered by hand, at the time of delivery; or
- (b) if sent by registered post, at 10 a.m. on the second business day after the date it is posted; or
- (c) if sent by facsimile transmission, one hour after the time of dispatch, if dispatched before 4 p.m. on any business day, and in any other case at 10 a.m. on the business day following the day of dispatch.

- (3) In proving service, it shall be sufficient to prove:

- (a) in the case of delivery by hand, that delivery was made;
- (b) in the case of registered post, that the envelope containing the notice or document was properly addressed and posted by pre-paid registered post;
or

- (c) in the case of facsimile transmission, that a corresponding facsimile transmission report was generated.

14. GOVERNING LAW AND JURISDICTION

(1) This Agreement shall be governed by and construed in accordance with the laws of the Hong Kong Special Administrative Region and each of the parties hereto irrevocably submits to the non-exclusive jurisdiction of the courts of the Hong Kong Special Administrative Region in relation to any disputes howsoever arising out of or in connection with this Agreement.

[(2) The Lender irrevocably consents to any process in any judicial or other proceedings anywhere being served by [mailing a copy by registered post or insert other acceptable means] to its agent in the Hong Kong Special Administrative Region. The Lender hereby appoints [insert name of agent] of [address] as its agent in the Hong Kong Special Administrative Region to accept service of any legal process.]*

[Note: Clause 14(2) would be required where the Lender is an overseas individual, corporation or unincorporated body.]

IN WITNESS WHEREOF the parties hereto [have set their respective hands and seals]* [and/or]* [have caused their respective Common Seals to be hereunto affixed]* on the date first before written.

The Lender

Signed Sealed and Delivered by
[Full name of the individual Lender] in the presence of:

Or

The Common Seal of [name of corporate Lender]
was hereunto affixed in the presence of:

The Borrower

Signed Sealed and Delivered by

* Delete where appropriate

[Full name of the individual Borrower] in the presence of:

or

The Common Seal of [name of corporate Borrower] was hereunto affixed in the presence of:

The Commission

Signed by:

Executive Director/Senior Director*

For and on behalf of the Securities and Futures Commission

[Notes:

- 1. The statement that “the parties have set their respective hands and seals” is applicable where the Lender/Borrower is an individual; whereas “the parties have caused their respective Common Seals...” is applicable where the Lender/Borrower is a corporation.**
- 2. Where the Lender and/or the Borrower are corporations, they should check their Articles of Association (if applicable) regarding the correct mode of execution of contracts that apply to them.]**