

7 July 2008

## **Mutual recognition of cross-border offering of collective investment schemes By the Securities and Futures Commission (“SFC”) and Australian Securities and Investment Commission (“ASIC”)**

The SFC signed a Declaration on Mutual Recognition of Cross-border Offering of Collective Investment Schemes (“Declaration”) with ASIC on 7 July 2008. The Declaration provides the framework for the mutual recognition by the SFC and ASIC of schemes offered to retail investors and is a significant milestone towards strengthening regulatory ties and co-operation between the SFC and ASIC.

### **SFC’s recognition of managed investment schemes registered with ASIC**

To enable the Hong Kong public offering of certain MIS registered with the ASIC, and the Australian public offering of certain collective investment schemes authorized by the SFC, the SFC and ASIC has agreed on a mutual recognition framework as set out in the Declaration. Pursuant to this Declaration, the SFC will process an application for authorization of an Australian managed investment schemes (“MIS”) on the basis that it has substantially complied with the disclosure, operational and reporting requirements of the SFC Code on Unit Trusts and Mutual Funds (“UT Code”) if the MIS:

- (a) is managed by an ASIC-licensed manager<sup>1</sup>;
- (b) is registered with ASIC;
- (c) is not a hedge fund as categorized in the UT Code;
- (d) meets the requirements referred to in paragraph 2 below; and
- (e) is not principally marketed to investors in Hong Kong<sup>2</sup>.

Currently, under ASIC’s Regulatory Guide 178 Foreign Collective Investment Schemes, there is a standard condition that “the foreign collective investment scheme operator must not source more than 30% of the value of investments in the scheme or company from investors resident in Australia”. Hence SFC authorised funds seeking mutual recognition under the Declaration will be subject to this threshold limit in terms of investments held by Australian investors.

As a matter of mutuality and for the purpose of recognising an Australian MIS for SFC authorisation, we adopt the equivalent threshold limit in assessing whether a scheme is principally marketed to investors in Hong Kong. Therefore, an Australian MIS is currently not considered as principally marketed to investors in Hong Kong if Hong Kong investors account for no more than 30% of the value of the MIS. Further, it is expected that the manager of the Australian MIS will monitor and ensure compliance with this threshold limit.

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<sup>1</sup> As defined under the Declaration as “responsible entities licensed by ASIC”.

<sup>2</sup> The test of whether the MIS is so marketed is in paragraph 3(a) of this Circular.



### **Streamlined application of the UT Code to Australian MIS seeking SFC authorization pursuant to this Declaration**

1. Australian MIS are generally not required to observe requirements in the UT Code, except for the specific areas set out in paragraphs 2 and 3 below.
2. To ensure proper investor protection and consistency with existing Hong Kong authorized schemes, Australian MIS are required to comply with the relevant provisions in the UT Code in respect of the following matters:
  - a) appointment of an ASIC-regulated custodian that holds an Australian Financial Services licence and is separate from the manager for safe-custody of scheme assets;
  - b) core investment restrictions;
  - c) the monthly dealing requirement; and
  - d) appointment of a Hong Kong representative and an approved person.
3. To facilitate our processing of the authorization application, all applications are expected to provide evidence or confirmation to demonstrate the eligibility of the Australian MIS under the Declaration, including but not limited to an undertaking in the form of a deed by the manager of the Australian MIS to the SFC (which is irrevocable except with the prior written consent of the SFC) that
  - a) it will take all reasonable steps to ensure that no more than 30% by value of all interests in the Australian MIS are held by persons who the manager has reason to believe are in Hong Kong;
  - b) it will comply with the requirements set out in paragraph 2 and the specific provisions in the UT Code, as set out in Annex A;
  - c) it will notify the SFC in a timely manner:
    - i. any significant changes, pricing errors and breaches concerning the MIS according to Australian requirements;
    - ii. any breach or non-compliance with any of the matters under the undertaking; and
    - iii. any enforcement or disciplinary action taken by ASIC or any other overseas regulatory authorities against the Australian MIS manager, and any significant change to its regulatory status or that of the Australian MIS such as (1) significant change to the licence, registration, authorisation or other approval granted by ASIC relevant to the operation of the Australian MIS; and (2) exemption, waiver or other relief granted;



- d) nothing in the constitution of the Australian MIS may exclude the jurisdiction of the courts of Hong Kong to entertain an action or legal proceedings concerning the MIS;
  - e) it submits to the non-exclusive jurisdiction of the Hong Kong courts in legal proceedings in relation to the Australian MIS;
  - f) it covenants to comply with any order of a Hong Kong court in respect of any matter relating to the provision of the financial services in relation to the Australian MIS or the operation of the Australian MIS;
  - g) it covenants that, on written request of either ASIC or SFC, it will give or vary written consent and take all other practicable steps to enable and assist ASIC to disclose to SFC and SFC to disclose to ASIC any information or document that ASIC or SFC has that relates to the operator or the Australian MIS; and
  - h) it consents to the disclosure by SFC to ASIC and ASIC to SFC of any information or document that SFC or ASIC has that relates to the Australian MIS or its manager.
4. The manager of the Australian MIS is also required to submit the following information in support of its application:
- a) how it will plan for, monitor and assess its compliance with the requirements and conditions of the Declaration and this Circular and any Hong Kong regulatory requirements to which it will be subject; and
  - b) the interests in the Australian MIS that it intends to offer in Hong Kong and how it plans to seek members in Hong Kong.
5. In general, the SFC will deem an Australian MIS to have complied substantially with the requirements of the UT Code. There are, however, a few minimum operational and disclosure requirements that the SFC would expect an Australian MIS to comply with. Please refer to Annex A for details.
6. To facilitate Hong Kong investors' understanding of Australian MIS, the Australian manager is expected to disclose salient scheme information to enable Hong Kong investors to make an informed investment decision. For instance, the Hong Kong offering document should highlight the nature and consequences of significant differences between the Australian regulatory requirements and the Hong Kong regulatory requirements<sup>3</sup>. A simple Hong Kong covering document (a Hong Kong wrapper) to supplement the Australian offering document is acceptable provided they together comply with our disclosure requirements in the UT Code that are applicable (see Annex A).

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<sup>3</sup> The SFC expects such disclosure to be substantially similar to that required under the class order issued in relation to Hong Kong funds under ASIC's Regulatory Guide 178: Foreign Collective Investment Schemes. For details, please refer to the "Checklist for Australian MIS seeking SFC's authorization under the mutual recognition arrangement" which will be posted on SFC's website at [www.sfc.hk](http://www.sfc.hk).



7. Distribution of an Australian MIS in Hong Kong must be conducted by intermediaries properly licensed with the SFC. Applicants are also reminded to refer to the relevant provisions in the UT Code and the Securities and Futures Ordinance regarding marketing and advertising of a collective investment scheme in Hong Kong in light of the specific circumstances of the Australian MIS.
8. It is under Hong Kong laws that the offering document of a fund should seek SFC's authorization prior to issuance to the Hong Kong public. Thus the Australian manager is reminded to ensure that the Australian MIS offering document and its significant changes must be submitted to the SFC for authorization prior to distribution in Hong Kong<sup>4</sup>. Such authorization of the offering document of MIS recognized by the SFC under the Declaration will be conducted in a streamlined manner.
9. The SFC understands that the Declaration marks the first time for Australian MIS to seek authorization from the SFC. The SFC therefore encourages Applicants to consult the Investment Products Department early for any clarifications or guidance on how the relevant requirements may be pragmatically complied with or adopted in light of their specific circumstances and taking into account the best practices or the relevant professional standards in Australia.
10. For details of the administrative matters involved in the application process, please refer to the "Checklist for Australian MIS seeking SFC's authorization under the mutual recognition arrangement" which will be posted on SFC's website at [www.sfc.hk](http://www.sfc.hk). The SFC may issue further checklists, Frequently Asked Questions ("FAQ") and other circulars from time to time to provide practical guidance to the industry. Please refer to SFC's website or contact the Investment Products Department.

**Investment Products Department  
Securities and Futures Commission**

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<sup>4</sup> In other cases, the revised Hong Kong offering document must be filed with the SFC in accordance with Chapter 11.1B of the UT Code.



## Annex A

### ***Key operational and disclosure requirements in the UT Code to be complied with by Australian MIS***

Documents to be submitted to the SFC	Chapter 1.3 (excluding Chapter 1.3(e))
Documents available for inspection by investors in Hong Kong	Chapter 5.10(c), Clause 20 of Appendix C*
Offering & dealing arrangements	Chapter 6.2, 6.14, 10.6 – 10.8, Clause 12 of Appendix C*, and adoption of forward pricing mechanism
Price publication	Chapter 11.7, Clause 8 of Appendix C*
Specific information disclosure	Clause 16 and 23 of Appendix C*, Where applicable, Chapter 8.2(d); 8.4A (p)
Guarantor of guaranteed funds	Chapter 8.5(b) & (i).
Notification and financial reporting to investors and the SFC	Chapter 11.2: bilingual notice to Hong Kong investors and the SFC according to Australian requirements; Chapter 11.6: availability of electronic version of financial reports acceptable provided that hard copy of the report must be available upon request; Chapter 11.8: financial reports filed with the SFC according to Australian requirements; Chapter 11.9, 11.10.
De-authorization	Chapter 11.4

\* Such disclosure requirements can be satisfied by way of disclosure in a simple Hong Kong wrapper complementing the Australian offering document.