

MARKETING SHARES OF AN OVERSEAS COMPANY IN HONG KONG

INTRODUCTION

This article considers some of the Hong Kong regulatory issues arising from the marketing of shares (“**Shares**”) of a company incorporated outside Hong Kong (the “**Company**”) as part of a placing (the “**Placing**”) of shares of the Company in various jurisdictions, including Hong Kong. It is assumed that, in connection with the Placing, the Company will provide potential investors in Hong Kong with certain written materials (including presumably a “red-herring” offering document) relating to the Company. There are two principal areas to consider: (i) whether the entity marketing the Shares is required to be licensed or registered under the Securities and Futures Ordinance (the “SFO”); and (ii) the restrictions on the making of offers/invitations to the public under the Companies Ordinance (the “CO”) and under Part IV of the SFO.

SUMMARY

Marketing by the Company

The Shares can be marketed by the Company itself without a licence under the SFO only to the limited categories of “professional investors” set out in Part A of Annex A to this note.

Marketing by an Intermediary

The Share can be marketed by an intermediary which is licensed or registered by the Securities and Futures Commission (the “SFC”) to “deal in securities”:

- i to investors each paying a minimum consideration of HK\$ 500,000 for the shares; or
- ii in circumstances where the total consideration payable for the shares is less than HK\$ 5 million; or
- iii to unlimited numbers of “professional investors” within Parts A and B of Annex A, overseas investors and, subject to meeting the requirements for reliance on the private placement exemption specified in Section 2.1 below, to up to a maximum of 50 other investors.

1. THE LICENSING REQUIREMENT UNDER THE SECURITIES AND FUTURES ORDINANCE (THE “SFO”)

1.1 Business of Dealing in Securities

The SFO requires a person to be licensed or registered under the SFO in order to carry on, or hold oneself out as carrying on, a business in a regulated activity. Carrying on a business in a regulated activity while unlicensed is an offence punishable by a fine of up to HK\$ 5 million and up to 7 years’ imprisonment. Carrying on a business is construed widely.

“Dealing in securities” constitutes a regulated activity and is widely defined. A person is “dealing in securities” if he, whether as principal or agent, makes or offers to make an agreement with another person, or induces or attempts to induce another person to enter into or offer to enter into an agreement to acquire, dispose of, subscribe for or underwrite securities.

The marketing of the Shares in Hong Kong by the Company itself or by an intermediary will prima facie constitute dealing in securities.

1.2 Marketing by the Company

There is a limited exemption from the requirement to be licensed to deal in securities where a person, **as principal**, deals with a person who is a “professional investor” within the limited category of investors set out in Part A of Annex A attached hereto (“Type 1 professionals”).

Only the Company can rely on this exemption. All marketing activities must therefore be conducted by representatives of the Company and not representatives of any intermediary and all marketing materials must be issued in the name of the Company itself, in order that the Company meets the requirement that it is dealing “as principal”.

In addition, the Company may only market to Type 1 professionals. The definition of Type 1 professionals is however limited. In summary, it includes licensed investment intermediaries, authorised financial institutions, regulated insurance companies, regulated collective investment schemes, government and multilateral agencies. Significantly, Type 1 professionals do **not** include the categories of “high net worth” investors set out in Part B of Annex A or the subsidiaries or holding companies of licensed intermediaries or authorised financial institutions.

The Company may therefore market shares in itself to Type 1 professionals only without being licensed by the SFC.

1.3 Marketing by an Intermediary

An intermediary would need to be licensed or registered by the Securities and Futures Commission (“SFC”) to conduct Regulated Activity Type 1 (dealing in securities) in order to market the Shares in Hong Kong, unless an exemption applies.

(i) *Dealing through a Licensed/Registered Securities Dealer*

An exemption from the requirement to be licensed is available where a person deals through another person who is licensed or registered to deal in securities. Arrangements can therefore be made for the marketing of the Shares to be conducted by a Type 1 licensed/registered intermediary.

(ii) *Temporary Licence*

If an intermediary is not currently licensed under the SFO, it may be able to apply for a temporary licence for a period of up to three months. The main requirements for the grant of a corporate temporary licence are that the entity is: (i) carrying on a business outside Hong Kong which would be a regulated activity if carried on in Hong Kong; and (ii) authorised in its home jurisdiction by a regulator which performs a similar function to the SFC and has the power to investigate and discipline the entity in respect of its conduct in Hong Kong. The SFC has indicated on an informal basis that it would normally take up to 12 weeks to process a full licence for an entity unknown to the SFC, but that it should take less time for temporary licences where the applicant is already licensed in a recognised jurisdiction. They indicated a possible timetable of around one month if the structure is not complicated and around 2 months for less straightforward cases. Marketing must not commence until the temporary licence has been granted. Any representatives of the intermediary involved in the marketing activities would also need to apply for temporary licences.

1.4 Marketing from outside Hong Kong

The SFO expressly extends the licensing requirement to marketing activities conducted from outside Hong Kong. Essentially, if a person outside Hong Kong actively markets its services to the public in Hong Kong and those services involve one of the nine regulated activities under the SFO, the person will need to be licensed by the SFC¹. The SFO expressly provides for companies and individuals based outside Hong Kong to be eligible to be licensed by the SFC to cater for this.

The marketing of the Shares to the public in Hong Kong by an off-shore intermediary would therefore require the intermediary to be SFO licensed. Members of its staff conducting the marketing activities would also need to be licensed as representatives. “Active marketing” for these purposes includes, for example, calling on Hong Kong investors and offering products and internet activities targeting Hong Kong investors (see further at Part 3 below).

2. THE COMPANIES ORDINANCE PROSPECTUS REGIME

Any prospectus distributed in Hong Kong which offers for subscription or purchase shares in or debentures of a company incorporated outside Hong Kong must comply with the content and registration requirements set out in the Companies Ordinance (the “CO”)².

A prospectus is defined as any prospectus, notice, circular, brochure, advertisement or other document which:

- **offers** any shares or debentures of a company to **the public** for subscription or purchase; or
- is **calculated to invite offers** by **the public** to subscribe for or purchase any shares or debentures of a company.

Accordingly any documents distributed to the “public” which contain an offer or invitation to acquire shares in the Company will be subject to the CO prospectus requirements unless a specific exemption applies.

The prospectus requirements do not apply to public offers of shares which are made verbally, although verbal advertisements and invitations are subject to the prohibition on unauthorised investment advertisements in Section 103 SFO.

2.1 Exemptions

The Seventeenth Schedule to the CO (the “Seventeenth Schedule”) sets out twelve safe harbours which exclude certain categories of offers from the prospectus regime. The most important of these in terms of the offer of the Shares are the following:

(i) *Professionals Exemption*

The offering documentation for offers to professional investors (as defined in Section 1 of Part 1 of Schedule 1 to the SFO) is excluded from the CO “prospectus” definition and hence from all the CO prospectus requirements.

The definition of professionals which applies for the purposes of this exemption includes all the categories of investors listed in Part A of Annex A to this note (i.e.

¹ Section 115 SFO

² Section 342C CO

Type 1 professionals) and those listed in Part B of Annex A (“Type 2 professionals”).

It is therefore possible to market the Shares to the categories of high net worth investors referred to in Part B of Annex A in reliance on this exemption. However, the offeror must obtain the documentary proof specified in paragraphs 10, 11, 12 and 13 (as relevant) to establish that the investor qualifies as a “professional investor”.

(ii) *Private Placement Exemption*

An exemption is available for offers made to a maximum of 50 persons in Hong Kong provided that the offer document contains in a prominent position the warning statement specified in Part 3 of the Eighteenth Schedule to the CO (the “specified warning statement”) which is as follows:

“WARNING

The contents of this document have not been reviewed by any regulatory authority in Hong Kong. You are advised to exercise caution in relation to the offer. If you are in any doubt about any of the contents of this document, you should obtain independent professional advice.”

In counting the 50 offerees, an offer is taken with any other offer of shares by the same person within the preceding 12 months which relied on the same exemption. Accordingly, it is not possible to increase the number of offerees by staggering placements of the shares.

Where the private placement exemption is to be relied on, the following steps should be taken:

- (a) Each information memorandum issued should be numbered in series and individually addressed to each offeree;
- (b) The information memorandum should include the specified warning statement on the front cover;
- (c) The information memorandum should contain a warning that the addressee may not copy or pass the information memorandum to any other person;
- (d) Subscriptions for shares in the Company should only be accepted from the offeree and the offeree should only be able to purchase shares in the Company as principal;
- (e) Placees should be required to agree not to sell their shares in Hong Kong in the 6 months following the allotment of the shares, except in circumstances which do not constitute an “offer to the public” within the meaning of the CO. This is to ensure that the anti-avoidance provisions of Section 343(1) CO are not triggered; and
- (f) There should be no public advertising at all in Hong Kong in relation to the offer of shares in the Company. This issue of promotional material must be strictly limited to offerees.

It is also possible to combine the professionals exemption and the private placement exemption so that documents offering shares in the Company to unlimited numbers of professional investors and to a maximum of not more than 50 other persons (who do not qualify as professional investors) will be exempt from the CO prospectus requirements. If reliance is to be placed on both exemptions, no more than 50 copies of the information memorandum should be issued to persons who do not qualify as professional investors and the steps specified at (a) to (f) above should also be taken in respect of any offers to such persons.

(iii) *Small Offer Exemption*

Offers for which the total consideration payable for the relevant shares does not exceed HK\$ 5 million (or its foreign currency equivalent) are also exempt from the CO prospectus requirements.

In determining whether the HK\$ 5 million condition is satisfied, offers are taken together with any other offer of shares by the same person within the preceding 12 months which relied on the same exemption.

The offer documentation must also contain the specified warning statement in a prominent position.

(iv) *Sophisticated Investor Exemption*

There is an exemption for offers where the minimum consideration payable by any person for the shares is not less than HK\$ 500,000 (or its foreign currency equivalent). The specified warning statement must be included in the offer documentation in a prominent position.

To rely on this exemption, **every** investor must pay a minimum of HK\$ 500,000. If they do so, investors do not additionally need to be “professionals” within the definition referred to above.

(v) *Offers to Persons outside Hong Kong*

References in the safe harbours to an “offer” do not include an offer to the extent that it is made to persons outside Hong Kong³. Offers made to persons outside Hong Kong can therefore be disregarded in determining whether any relevant exemption applies. For example, when determining whether the number of offerees are within the 50 person limit allowed under the private placement exemption, it is only necessary to count the number of offerees in Hong Kong.

3. PART IV OF THE SECURITIES AND FUTURES ORDINANCE

3.1 Investment Advertisements

It is an offence under Section 103 SFO for a person to issue in Hong Kong an advertisement, invitation or document which is or contains an invitation to the public to enter into or offer to enter into an agreement to acquire, dispose of, subscribe for or underwrite securities, unless the issue is authorised by the SFC under Section 105(1) SFO.

³ Paragraph 1(b) of Part 4 of the Seventeenth Schedule.

It should be noted that the SFO regime covers advertisements and invitations made verbally as well as written documents⁴.

3.2 Exemptions

There are a number of exemptions from the investment advertisements requirements.

Most importantly in terms of the Company, any invitation to the public which relates to an offer within the safeharbours of the Seventeenth Schedule to the CO, is also exempt from the prohibition on unauthorised investment advertisements by virtue of Section 103(2)(gaa) SFO. Accordingly, SFC authorisation is not required for invitations relating to an offer:

- (i) to investors each paying a minimum consideration of HK\$ 500,000 for the shares; or
- (ii) in circumstances where the total consideration payable for the shares is less than HK\$ 5 million; or
- (iii) to unlimited numbers of “professional investors” within Parts A and B of Annex A, overseas investors and up to a maximum of 50 other investors.

4. INTERNET MARKETING

The SFC has stated that the provisions of the SFO and CO relating to the advertisement, offering and dealing of securities apply equally to activities conducted over the internet. The sending of marketing material over the internet is therefore subject to the same restrictions under the CO and the SFO.

The SFC’s primary concern is to regulate activities which are targeted at persons residing in Hong Kong or are detrimental to the interests of the Hong Kong investing public or to the market integrity of Hong Kong. Factors which will be taken into account in determining whether an advertisement is targeted at Hong Kong investors include:

- (i) Whether the information is targeted via “push” technology (such as e-mail) to persons residing in Hong Kong;
- (ii) Whether the information provided over the internet appears to target Hong Kong residents (such as the use of local distribution agents; references to Hong Kong dollars; the use of Chinese language and the publication in a Hong Kong newspaper or publication of the internet address where such information can be accessed).

4.1 The Licensing Requirement

As mentioned in Section 1.4 above, marketing activities conducted from outside Hong Kong which target Hong Kong investors may trigger the SFO’s licensing requirements. The SFC’s Guidance Note on Internet Regulation published in 1999 (the “SFC Guidance Note”) states that the SFC will require persons who use the internet to induce people residing in Hong Kong to deal in securities to be registered or licensed by the SFC.

4.2 The CO Prospectus Regime and Part IV of the SFO

⁴ See the definitions of “advertisement” and “invitation” in Section 102 SFO.

The SFC Guidance Note also states that the requirements of the CO prospectus regime and the SFO's prohibition on unauthorised invitations to the public apply to invitations and offers made by means of the internet.

In addition, internet advertisements to acquire shares in a Company are likely to be caught by Section 103(10) SFO which contains deeming provisions whereby:

- (i) any 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 Section 103(1) is regarded as an advertisement, invitation or document which is or contains an invitation to do such act; and
- (ii) any 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 is deemed to be or contain an invitation to the public.

This note is intended for information purposes only. Specific advice should be sought in relation to any particular situation.

ANNEX A

DEFINITION OF “PROFESSIONAL INVESTORS”

Part A

1. An exchange company, clearing house, exchange controller or investor compensation company recognised as such under the SFO, or a person authorised to provide automated trading services under Section 95(2) of the SFO.
2. An intermediary (i.e. a corporation licensed under the SFO to conduct any regulated activity), or a person carrying on the business of providing investment services which is regulated under the law of any place outside Hong Kong.
3. An authorised financial institution (i.e. a bank, restricted licence bank or deposit taking company authorised under the Banking Ordinance (Cap. 155 of Hong Kong)), or a bank which is not an authorised financial institution but is regulated under the law of any place outside Hong Kong.
4. An insurer authorised under the Insurance Companies Ordinance (Cap. 41) of Hong Kong, or a person carrying on insurance business and regulated under the law of any place outside Hong Kong.
5.
 - (i) A collective investment scheme authorised under Section 104 of the SFO; or
 - (ii) A scheme which is similarly constituted under the law of any place outside Hong Kong and, if it is regulated under the law of that place, is permitted to be operated under that law,

or a person who operates such scheme.
6. A registered scheme as defined in Section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) of Hong Kong, or its constituent fund as defined in Section 2 of the Mandatory Provident Fund Schemes (General) Regulation, or a person who, in relation to any such registered scheme, is an approved trustee or service provider as defined in Section 2(1) of that ordinance, or who is an investment manager of any such registered scheme or constituent fund.
7.
 - (i) A registered scheme as defined in Section 2(1) of the Occupational Retirement Schemes Ordinance (Cap. 426) of Hong Kong; or
 - (ii) An offshore scheme as defined in Section 2(1) of that ordinance which, if regulated under the law of the place where it is domiciled, is permitted to be operated under the law of such place,

or an administrator as defined in that Ordinance of any such scheme.
8. A government (other than a municipal government authority), an institution which performs the functions of a central bank, or a multilateral agency.

Part B

9. A corporation which is:
- (i) a wholly owned subsidiary of:
 - (A) an intermediary, or a person carrying on the business of providing investment services which is regulated under the law of any place outside Hong Kong; or
 - (B) an authorised financial institution, or a bank which is not an authorised financial institution but is regulated under the law of any place outside Hong Kong;
 - (ii) a holding company which holds all the issued share capital of:
 - (A) an intermediary, or a person carrying on the business of providing investment services which is regulated under the law of any place outside Hong Kong; or
 - (B) an authorised financial institution, or a bank which is not an authorised financial institution but is regulated under the law of any place outside Hong Kong; or
 - (iii) any other wholly owned subsidiary of a holding company referred to in subparagraph (ii).
10. A trust corporation holding assets on trust with a total value of not less than HK\$ 40 million or its foreign currency equivalent:
- (i) as stated in the most recent audited financial statement prepared in respect of the trust corporation within 16 months before the relevant date;
 - (ii) as ascertained by referring to one or more audited financial statements, each being the most recent audited financial statement, prepared in respect of the trust or any of the trusts and within 16 months before the relevant date; or
 - (iii) as ascertained by referring to one or more custodian statements issued to the trust corporation in respect of the trust or any of the trusts within 12 months before the relevant date.
11. An individual, either alone or with his spouse or children on a joint account, having a portfolio⁵ of not less than HK\$ 8 million or its foreign currency equivalent:
- (i) as stated in a certificate issued by an auditor or a certified public accountant of the individual within 12 months before the relevant date; or
 - (ii) as ascertained by referring to one or more custodian statements issued to the individual (either alone or with the associate) within 12 months before the relevant date.

⁵ The term “portfolio” is defined as a portfolio of securities, money held by a custodian or a certificate of deposit issued by a Hong Kong authorised financial institution or a bank which is regulated in any other jurisdiction.

12. A corporation or partnership having either:
- (i) a portfolio of not less than HK\$ 8 million or its foreign currency equivalent; or
 - (ii) total assets of not less than HK\$ 40 million or its foreign currency equivalent,
- as ascertained by referring to:
- (i) the most recent audited financial statement prepared in respect of the corporation or partnership (as the case may be) within 16 months before the relevant date; or
 - (ii) one or more custodian statements issued to the corporation or partnership (as the case may be) within 12 months before the relevant date; and
13. A corporation the sole business of which is to hold investments and which is wholly owned by an individual who, either alone or with associates on a joint account, falls within the description in paragraph (11).