

Guidelines on use of offer awareness and summary disclosure materials in offerings
of shares and debentures under the Companies Ordinance

1. INTRODUCTION

- 1.01 Section 399 of the Securities and Futures Ordinance (“SFO”) empowers the Securities and Futures Commission (the “Commission”) to issue guidelines indicating the manner in which, in the absence of any particular consideration or circumstance, it proposes to perform its functions. These guidelines, issued under section 399 and intended for the assistance of issuers or vendors of shares or debentures and their professional advisers, relate to the content and manner of publication of certain materials which may be issued to the public in Hong Kong in connection with an offer of shares or debentures made by a prospectus.
- 1.02 The guidelines clarify the Commission’s view regarding the treatment of certain types of such materials. First, they describe a type of material that the Commission would regard as neither falling within the prohibition in section 103(1) of the SFO or the definition of “prospectus” in section 2 of the Companies Ordinance (“CO”), nor as amounting to an extract from or abridged version of a prospectus within the meaning of section 38B of the CO. Secondly, they describe a type of material that the Commission would regard as being an extract from or abridged version of a prospectus, rather than a full prospectus. Issuers or vendors of shares or debentures that propose to issue materials to the public that refer to or supplement the prospectus and application form must consider carefully the legal and regulatory requirements that may apply to those materials. For the avoidance of doubt, these guidelines are not issued under, and should not be construed as a notice pursuant to, section 38B(2A)(a) of the CO, which empowers the Commission by notice in the Gazette to specify the form and manner of publication of an extract from or abridged version of a prospectus or any class of prospectuses.
- 1.03 The CO and SFO set out requirements concerning the form and manner of publication of prospectuses, extracts from or abridged versions of prospectuses, and advertisements, and provide for registration or authorization of materials in certain circumstances. Section 38B(1) of the CO dealing with advertisements concerning prospectuses makes it unlawful to publish by way of advertisement in any manner any extract from or abridged version of a prospectus relating to shares or debentures of a company whether incorporated in or outside Hong Kong. Section 38B(2) provides a number of exceptions to the prohibition, including in paragraph (c) the publication of an advertisement, invitation or document which has been authorized by the Commission under section 105 of the SFO and, in paragraph (d), the publication of an extract from or abridged version of a prospectus that has been approved by the Commission in a particular case. Section 103 of the SFO makes it an offence to issue any advertisement or invitation to the public to enter into or offer to enter into an agreement to deal in securities. Again, and in addition to section 105 referred to above, subsections (2) and (3) of section 103 contain exceptions to the prohibition, including that in 103(3)(a)(iii), which exempts

shares or debentures in Hong Kong by a prospectus whether issued before or after registration of the relevant prospectus. However, they do not apply where the issuer of the prospectus is a collective investment scheme authorized by the Commission under section 104 of the SFO, as advertising by such schemes is subject to other regulations.

- 2.02 The guidelines apply to all communication media used to disseminate information including brochures, correspondence, circulars, flyers, leaflets, mail shots, newspapers and magazines, posters and other visual advertising media, television or radio, electronic media including the Internet, ATM services and telephone hotlines, and any form of wireless video or audio transmission. The guidelines apply whether the communication is targeted at or restricted to a particular audience or customer base or is open to the general public.
- 2.03 The guidelines apply to offers of shares or debentures where a prospectus is required to be registered by the Registrar of Companies pursuant to sections 38D or 342C of the CO. In cases involving a prospectus offering shares or debentures to be listed on The Stock Exchange of Hong Kong Limited (the “Exchange”), authorisation for registration of the prospectus is administered by the Exchange. In cases not involving such a listing the Commission administers the authorisation for registration.
- 2.04 These guidelines may describe only the way in which the Commission proposes to exercise its own functions. Accordingly, the guidelines apply where publicity and/or disclosure materials are proposed to be used in a case where the Commission administers authorisation for registration of the prospectus. Practitioners are reminded that in the case of listed securities the listing rules require all “publicity materials” released in Hong Kong by particular applicants for listing to be approved by the Exchange before release. Accordingly, in such cases these guidelines are subject to Exchange listing rules and practice from time to time. The Exchange has nevertheless indicated that it supports these guidelines and proposes to apply equivalent practices when the Exchange administers authorisation for registration of a prospectus. Issuers of shares or debentures to be listed on the Exchange wishing to avail themselves of these guidelines should inform the Exchange at the earliest opportunity.

3. GENERAL PRINCIPLES FOR CONTENTS OF OFFER AWARENESS AND SUMMARY DISCLOSURE MATERIALS

- 3.01 The Commission considers that certain publicity and disclosure materials do not contain an offer or invitation to the public (nor are calculated to invite such an offer or invitation from the public) to subscribe or purchase shares or debentures and should accordingly not amount to an advertisement or invitation within the meaning of section 103(1) of the SFO or a prospectus or an extract from or abridged version of a prospectus within the meaning of sections 2 and 38B, respectively of the CO. By contrast, other materials will contain such an offer or invitation (or be calculated to invite one) and/or

constitute a prospectus or an extract from or abridged version of a prospectus, and will require an exemption, registration or authorization. The content and form of the materials, including any legending used to clarify their legal nature, are key considerations determining where they fall within the legal framework. Issuers of any such materials should consider in all cases whether specific legending is necessary and appropriate in their particular case and should seek legal advice if in doubt.

In paragraphs 4 to 6 below, the Commission lists the contents of particular materials that it believes would satisfy both the relevant legal requirements and its regulatory objectives for such materials. This paragraph 3 sets out some general principles that the Commission considers must also be met before any such materials satisfy these requirements and objectives.

3.02

The material need not include each of items (a)-(d) but must include items (e)-(h). The material may also include other relevant legends designed to provide further clarification as to its legal nature, provided such legends are consistent with the material not being a prospectus nor a document falling within the prohibitions under section 103(1) of the SFO or section 38B(1) of the CO.

- 4.03 The Commission believes that offer awareness materials should not be published too far in advance of the launch of the proposed offer because of the risk that changes become necessary to the administrative and procedural arrangements set out in the materials. Publication must not be intended to

- (d) if a listing is being applied for on the Exchange and/or elsewhere, a statement that the issuer is seeking a listing of the shares or debentures on the Exchange and/or any other applicable stock exchange;
- (e) a statement that the material is issued by the issuer of the prospectus and a responsibility statement;
- (f) a statement that potential investors should read the prospectus for detailed information about the offer before deciding whether or not to invest in the shares or debentures being offered;
- (g) a statement that the material does not constitute an offer or an invitation to induce an offer by any person to acquire, purchase or subscribe for the shares or debentures being offered; and
- (h) a statement that no application for the shares or debentures mentioned in the material should be made by any person nor would such application be accepted without the completion of a formal application form or other application procedure that is issued with or in respect of the prospectus.

The material need not include each of items (a)-(d) but must include items (e)-(h). The material may also include other relevant legends designed to provide further clarification as to its legal nature, provided such legends are consistent with the material not being a prospectus nor a document falling within the prohibitions under section 103(1) of the SFO or section 38B(1) of the CO.

- 5.02 Offer awareness materials falling within this paragraph 5 should not be used after the close of the offer period and materials displayed in public places should be removed as soon as practicable thereafter.

6. SUMMARY DISCLOSURE MATERIALS

6.01 6.

abridged version of the prospectus and does not contain a fair summary of the material information in the prospectus;

- (e) a statement that the directors of the issuer of the prospectus have authorized the issue of the summary disclosure material and take responsibility for its contents;
- (f) a warning statement that potential investors should read the prospectus for detailed information about the issuer and the offer before deciding whether or not to invest in the shares or debentures being offered;
- (g) a statement that the summary disclosure material does not constitute an offer or an invitation to induce an offer by any person to acquire, purchase or subscribe for the shares or debentures being offered; and
- (h) where an application form is issued with the prospectus or an application procedure is described in the prospectus, a statement that no application for any shares or debentures mentioned in the summary disclosure material should be made by any person nor would such application be accepted by the issuer of the prospectus without the completion of the formal application form or other application procedure that is issued with or in respect of the prospectus.

6.04 In addition, when approving summary disclosure material the Commission will wish to be satisfied that the following requirements will be met, namely that:

- (a) the summary disclosure material will only be made available or distributed from the time of issue of the prospectus;
- (b) any application form issued by the issuer of the prospectus will state that any application for or purchase of the shares or debentures referred to in the summary disclosure material can only be made on the basis of the full prospectus identified by its date of publication; and to implement the disclosure

