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## Court of Final Appeal allows appeal of Pacific Sun Advisors Limited and its director

20 Mar 2015

The Court of Final Appeal (CFA) today upheld an appeal by Pacific Sun Advisors Limited (Pacific Sun) and its director Mr Andrew Pieter Mantel in relation to issuing advertisements to promote a collective investment scheme (CIS) without the authorization of the Securities and Futures Commission (SFC) (Note 1).

The ruling of the CFA overturned a decision by the Court of First Instance on the interpretation of section 103 of the Securities and Futures Ordinance (SFO) (Note 2).

Pacific Sun and Mantel were charged in 2013 with issuing unauthorized advertisements to the public at large to subscribe for interests in a CIS in contravention of section 103 of the SFO which requires any advertisement, invitation or document containing an invitation to the public to acquire securities or interest in a CIS needs to be authorized by the SFC unless it falls within a specified statutory exclusion.

Pacific Sun and Mantel were acquitted after they argued successfully that they could rely upon an exclusion contained in section 103(3)(k) of the SFO which applies if the securities are or are intended to be disposed of only to professional investors (Note 3).

The SFC then sought clarification from the Court of First Instance about the application of this exclusion. The Court of First Instance ruled that the exclusion only applied if the offer to the public was limited on its face to professional investors. The Court of First Instance remitted the case back to the Magistrate for further hearing in relation to another aspect of the case (Note 4).

The Court of Final Appeal has decided the Court of First Instance erred in its ruling in that the exclusion applies even if the intention to dispose of the securities or interests in a CIS only to professional investors is not expressed in the advertisement, invitation or document.

The Court of Final Appeal made it clear that the burden of establishing the exclusion applies rests on the defendant and not on the SFC.

The Court of Final Appeal also stated that the professional investor exemption would not apply if a person published an unauthorized offer to the public and sold the advertised securities to a retail investor.

Today's ruling means advertisements of CIS that may be unsuitable for retail investors can be issued to the general public even if the issuer only intends to sell them to professional investors. It also means a contravention of section 103 of the SFO, which occurs upon issue of a relevant unauthorized offer to the public, can only be established well after the offer to the public has been issued.

The SFC will study today's decision to determine whether there should be any proposal to amend section 103 of the SFO.

The consequence of today's decision by the Court of Final Appeal is that the acquittal verdict at the Eastern Magistracy stands.

End

Notes:

1. Pacific Sun is licensed by the SFC to carry on Type 4 (advising on securities) and Type 9 (asset management) regulated activities. Mantel, who is licensed by the SFC to carry on Type 4 (advising on securities) and Type 9 (asset management) regulated activities accredited to Pacific Sun, is a responsible officer of Pacific Sun.
2. Under section 103(3)(k) of the Securities and Futures Ordinance, an advertisement does not need SFC authorization when the advertisement is in respect of securities, structured products or interests in a CIS that are or are intended to be disposed of only to professional investors.

3. Please see the SFC's press release dated [21 March 2013](#).
4. Please see the SFC's press releases dated [27 January 2014](#) and [10 June 2014](#).
5. Please see the judgement (FACC 11/2014) which is available on the Judiciary's website ([www.judiciary.gov.hk](http://www.judiciary.gov.hk)).

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