

2002 年 6 月 6 日
討論文件

第 10/02 號文件

**《證券及期貨條例》附屬法例
擬稿小組委員會**

《證券及期貨（專業投資者）規則》

本文件載述證券及期貨事務監察委員會（證監會）有關在“專業投資者”的定義另外加入 4 個類別的人士，以及定義的新增類別的適用範圍方面的建議。

建議

2. 證監會建議根據《證券及期貨條例》（2002 年第 5 號）第 397(1)條訂立《證券及期貨（專業投資者）規則》。有關規則的擬稿現載於**附件 1**。

訂立規則的權力

3. 根據《證券及期貨條例》附表 1 第 1 部，“專業投資者”一詞的定義包括不同類別的人士，例如中介人、認可財務機構、保險公司及認可交易所公司。在該定義第(j)段下，根據《證券及期貨條例》第 397 條訂立的規則內所訂明的其他人士，亦可就該條例的一般或個別條文的應用，被視為符合“專業投資者”的資格。第 397(1)(o)條賦權證監會可訂立規則，以“訂明或指明本條例規定由或可藉根據本條例訂立的規則訂明、指明或規定的事宜，或就該等事宜訂定條文”。

4. 規則擬稿新訂 4 類人士為“專業投資者”。有關定義適用於整條《證券及期貨條例》（附表 5 除外）。證監會認為，若按規則擬稿內容訂立有關規則，並不會超越其立法權限。

規則擬稿的主要內容

5. 規則擬稿增訂 4 類人士為“專業投資者”，證監會是在參照過該等人士在投資活動中保障自己的能力才作出有關的增訂。這些人士被界定為符合其中一類新增的專業投資者類別後，若有關投資活動是以其作為目標，則某些保障投資者措施（在《證券及期貨條例》第 103、174 及 175 條¹所訂明的措施及在即將訂立的附屬法例內有提述“專業投資者”的條文中所訂明的措施）將會被免除或加以修改。該 4 類新增人士類別為－

- (a) 根據一個或以上的信託而作為受託人，獲受託管理不少於 4,000 萬港元或等值的外幣資產的信託法團；
- (b) 擁有不少於 800 萬港元或等值的外幣的投資組合的個人（不論是單獨一人或是與配偶或子女共同擁有的聯名帳戶）（投資組合的定義指由證券、認可財務機構或海外等級機構發出的存款證，及/或由保管人代其持有的款項組成的投資組合）；
- (c) 擁有不少於 800 萬港元或等值的外幣的投資組合，或不少於 4,000 萬港元或等值的外幣的總資產的法團或合夥；及

¹ 第 103 條禁止發出關於投資的廣告、邀請或文件。

第 107 條主要是禁止進行未獲邀約的造訪。

第 175 條主要是規定在作出關於證券的要約時，必須以書面形式載列有關資料。

- (d) 其唯一業務是持有投資及由屬於上述第(b)段所述的個人（不論是單獨一人或是與配偶或子女共同擁有的聯名帳戶）全資擁有的法團。

6. “專業投資者”一般被視為較具保障本身權益的能力，當有關活動是以專業投資者作為目標時，某些投資者保障措施將不會再適用或會予以修改，從而降低市場遵守法規的成本，不過專業投資者將仍然可以獲得足夠程度的投資者保障。因此，證監會認為規則擬稿與《證券及期貨條例》第4(a)及(c)條的目標一致。有關目標為－

- (a) “維持和促進證券期貨業的公平性、效率、競爭力、透明度及秩序”；及
- (c) “向投資於或持有金融產品的公眾提供保障”。

諮詢公眾

7. 證監會於 2001 年 2 月 1 日發表諮詢文件及有關規則的諮詢擬稿，以諮詢公眾意見。證監會共接獲 10 份意見書。證監會已考慮所有接獲的意見及就規則擬稿作出適當的修改。現附上下列文件供委員參考－

- (a) 規則擬稿的諮詢文件（**附件 2**），當中載有相關的政策，以及有關規則的諮詢擬稿。委員會理解到諮詢文件及規則的諮詢擬稿內的若干建議，可能已因應諮詢期間所接獲的意見作出修訂。經修訂的規則擬稿現載於附件 1，供委員審閱；及
- (b) 諮詢總結報告、公眾意見的摘要及證監會的回應（**附件 3**），當中載有諮詢所得的總結及證監會就接獲的意見作出的回應（以表列方式載述）。載列意見摘要及證監會回應的文件附有提交意見人士的名單。

未來工作

8. 視乎委員的意見，證監會將會根據其獲賦予的權力訂立有關規則，並在憲報刊登，然後循正常程序呈交立法會省覽。按現時計劃，有關規則會在《證券及期貨條例》正式生效時實施。

證券及期貨事務監察委員會
財經事務局
2002年5月31日

[參考：《證券及期貨條例》第 103、174、175、397(1)(o) 條及附表 1 第 1 部有關“專業投資者”的定義]

證券及期貨(專業投資者)規則

(由證券及期貨事務監察委員會根據《證券及期貨條例》
(2002 年第 5 號)第 397(1)條訂立)

1. 生效日期

本規則自《證券及期貨條例》(2002 年第 5 號)第 XVI 部開始實施的日期起實施。

2. 釋義

在本規則中，除文意另有所指外 —

“有聯繫者”(associate)，就任何個人而言，指該人的配偶或子女；

“保管人”(custodian)指 —

(a) 主要業務是作為另一人的證券或其他財產的保管人(不論是以信託或合約形式保管)的法團；或

(b) 業務包括作為另一人的證券或其他財產的保管人(不論是以信託或合約形式保管)的下述人士 —

(i) 認可財務機構；

(ii) 並非認可財務機構但受香港以外地方的法律規管的銀行；

(iii) 持牌法團；

擬稿

- (iv) 經營提供投資服務的業務並受香港以外地方的法律規管的人；

“保管人結單” (custodian statement)指由保管人發出的帳戶結單；

“投資組合” (portfolio)指由任何下述項目組成的投資組合 —

- (a) 證券；
- (b) 由下述機構或銀行發行的存款證 —
 - (i) 認可財務機構；或
 - (ii) 並非認可財務機構但受香港以外地方的法律規管的銀行；
- (c) 就任何個人、法團或合夥而言，由保管人替該人、法團或合夥持有的款項；

“有關日期” (relevant date) —

- (a) 就本條例第 103(3)(k)條所描述的廣告、邀請或文件而言，指發出或為發出而管有有關廣告、邀請或文件的日期；
- (b) 就本條例第 174(2)(a)條所描述的造訪而言，指進行有關造訪的日期；
- (c) 就本條例第 175(5)(d)條所描述的要約而言，指提出有關要約的日期；
- (d) 就根據本條例訂立的規則規定履行某項責任的其他情況而言，指規定履行該項責任的日期；

擬稿

“信託法團” (trust corporation)指 —

- (a) 根據《信託人條例》(第 29 章)第 VIII 部註冊的任何信託公司；或
- (b) 其他符合以下說明的法團 —
 - (i) 其經營的業務的性質與(a)段中提述的信託公司所經營的業務的性質相似；並
 - (ii) 受香港以外地方法律的規管。

3. 訂明為專業投資者的人士

為施行本條例附表 1 第 1 部“專業投資者”的定義的(j)段，現訂明就本條例的任何條文(附表 5 除外)，訂明就本條例的任何條文(附表 5 除外)，以下人士屬該定義所指的人 —

- (a) 擔任一項或多於一項信託的信託人而在該等信託下獲託付不少於\$40,000,000 或等值外幣的總資產的信託法團，而該法團獲託付的總資產值是 —
 - (i) 已載於 —
 - (A) 就該信託法團；並
 - (B) 在有關日期前 16 個月內，
擬備的最近期的經審計的財務報表內；
 - (ii) 通過參閱 —
 - (A) 就該項信託或該等信託中任何一項信託；並

擬稿

(B) 在有關日期前 16 個月內，

擬備的一份或多於一份屬最近期的經審計的財務報表而獲確定；或

(iii) 通過參閱 —

(A) 就該項信託或該等信託中任何一項信託；並

(B) 在有關日期前 12 個月內，

向該信託法團發出的一份或多於一份保管人結單而獲確定；

(b) 單獨或聯同其有聯繫者於某聯權共有帳戶擁有不少於 \$8,000,000 或等值外幣的投資組合的個人，而該投資組合的總值是 —

(i) 已載於由該人的核數師或專業會計師在有關日期前 12 個月內發出的證明書內；或

(ii) 通過參閱在有關日期前 12 個月內發給該人的(單獨或聯同有關有聯繫者)一份或多於一份保管人結單而獲確定；

(c) 擁有 —

(i) 不少於 \$8,000,000 或等值外幣的投資組合；或

(ii) 不少於 \$40,000,000 或等值外幣的總資產，

的法團或合夥，而該投資組合或總資產的總值是通過參閱 —

擬稿

- (A) (I) 就該法團或合夥(視屬何者而定)；並
- (II) 在有關日期前 16 個月內，
擬備的最近期的經審計的財務報表而獲確定；
或
- (B) 在有關日期前 12 個月內發給該法團或合夥(視屬何者而定)的一份或多於一份保管人結單而獲確定；及
- (d) 唯一業務是持有投資並由符合(b)段描述的個人(單獨或聯同其有聯繫者於某聯權共有帳戶)全資擁有的法團。

證券及期貨事務監察委員會主席

2002 年 月 日

註釋

本規則由證券及期貨事務監察委員會根據《證券及期貨條例》(2002 年第 5 號)第 397(1)條訂立，目的在於施行本條例附表 1 第 1 部“專業投資者”的定義的(j)段。在本規則中獲訂明為專業投資者的人士可就本條例中的若干禁止條文獲得豁免。然而，就施行本條例附表 5 而言，該等人士不會被視為專業投資者。

諮詢文件
《證券及期貨(專業投資者)規則》草擬本
（“《草擬規則》”）

引言

1. 《證券及期貨條例草案》（“《條例草案》”）第 384 條賦予證監會訂立規則的權力，以便其在附屬法例中訂明有關規定。這個立法基礎與近年訂立的證券法例(例如英國的《金融服務及市場法》)的做法一致，即有效的監管取決於監管者是否具備充分的靈活性，透過修訂規則而非主體法例迅速地應付不斷演變的市場作業方式及全球環境。
2. 《草擬規則》除必須通過立法會不表示反對或不作出修訂方可作實這個審議程序之外，證監會現發表《草擬規則》，以諮詢公眾意見。
3. 爲了確保我們建議的規則，在保障投資者權益和符合市場普遍需要兩者之間取得適當平衡，證監會在擬訂《草擬規則》之前，曾經諮詢證券及期貨業界的代表。我們特此感謝他們提供寶貴意見。
4. 證監會已透過金融服務網絡(FinNet)向所有註冊商號發出本諮詢文件。本諮詢文件除可在證監會辦事處免費索取外，亦載於在證監會網站(網址：<http://www.hksfc.org.hk>)。
5. 證監會誠邀公眾就《草擬規則》提交意見。有關意見書請於 **2002 年 2 月 28 日**辦公時間結束前，以下列方式提交：
郵遞： 證監會專業投資者規則
香港中環皇后大道中 15 號
置地廣場公爵大廈 12 字樓
傳真： 2293-5710
網上提交：<http://www.hksfc.org.hk>
電郵： professional_investor_rules@hksfc.org.hk

請注意，評論者的姓名／名稱及其意見書的內容，可能會在證監會網站及其他將由證監會印製的文件中發表。因此，請參閱附於本諮詢文件的〈個人資料收集聲明書〉(見附件 1)。

如你不希望證監會發表你的姓名／名稱及／或意見，請在提交意見書時，要求證監會不要公布你的姓名／名稱及／或意見書的內容。

背景

6. 2000 年 11 月發表的《條例草案》載有關於“專業投資者”¹的定義。有關定義識別出若干類別的人士為專業投資者，包括中介人、認可財務機構、保險公司及認可交易所公司等。這個構思的目的是容許中介人在與“專業投資者”進行交易時，毋須遵守《條例草案》對中介人實施的若干投資者保障措施。
7. 為了靈活執行起見，有關定義亦賦予證監會制訂規則的權力，就“專業投資者”的定義加入其他類別的人士。該等規則可以列明就整條法例或就某項條文所述情況而言，該等新增類別的人士會被視為專業投資者。
8. 在藍紙《條例草案》發表之後，業界提出的回覆建議證監會運用其制定規則的權力，在適當的情況下，將其他類別的人士界定為“專業投資者”。
9. 順應上述回覆，再加上與市場人士的進一步對話，證監會現建議依據《條例草案》第 384 條發表一系列草擬規則，就《條例草案》的 3 項條文所述的情況而言，額外增加 3 類人士為“專業投資者”。證監會發表本諮詢文件的目的，便是就該等建議及《草擬規則》諮詢市場意見。

¹ 根據藍紙《條例草案》附表 1 第 1 部，“專業投資者”指—

- (a) 認可交易所、認可結算所、認可控制人或認可投資者賠償公司；
- (b) 持牌人或獲豁免人士，或經營提供投資服務的業務並受香港以外地方的法律規管的其他人；
- (c) 認可財務機構，或並非認可財務機構但受香港以外地方的法律規管的銀行；
- (d) 根據《保險公司條例》(第 41 章)獲授權的保險人，或經營保險業務並受香港以外地方的法律規管的其他人；
- (e) 根據《受託人條例》(第 29 章)第 VIII 部註冊的信託公司；
- (f) 集體投資計劃，或營辦集體投資計劃的人；
- (g) 退休金或公積金，或管理退休金或公積金的人；
- (h) 任何政府(市政府當局除外)；或
- (i) 屬於為施行本段而藉根據本條例第 384 條訂立的規則訂明的類別的人。

主要事項

10. 建議的《草擬規則》將會擴大《條例草案》中“專業投資者”的定義，以加入下列類別的人士：

- 獲委託管理資產合共不少於 4,000 萬港元的信託公司；
- 擁有投資組合不少於 1,600 萬港元的高資產淨值的個人；及
- 擁有投資組合不少於 1,600 萬港元或擁有資產不少於 4,000 萬港元的業務。

《草擬規則》的理據是鑑於上述人士本身應該是熟練的投資者，因此對中介人實施關乎該 3 項條文的投資者保障規定應該予以撤銷。放寬中介人在與該等人士進行交易時遵守有關規定的措施，將會利便中介人向該等客戶提供投資服務。

11. 然而，擴大“專業投資者”的定義的建議，只適用於《條例草案》第 102、108 條(在最新版本的《條例草案》中，有關條文已更改為第 VII 部第 169A 條)及第 169 條。採取局部放寬措施，是由於該等投資者應該是掌握熟練的投資技巧，使指定的條文可以給予放寬。然而，就《條例草案》所述的所有情況而言，他們可能未具備足夠的經驗，被視作為“專業投資者”。

12. 基本上，第 102、108 及 169²條禁止中介人從事若干行為，涉及專業投資者則屬例外(除其他豁免外)。簡單來說，第 102 條禁止發出與投資有關的未經認可的廣告、邀請或文件。第 108 條普遍禁止就其要約文件未附載有關資料的證券提出要約。第 169 條主要禁止進行未獲邀約的造訪。有關條文已載於附件 2，以供參閱。

²第 102 條取材自《保障投資者條例》(第 335 章)第 4 條。

第 108 條取材自《證券條例》(第 333 章)第 72 條。

第 169 條取材自《證券條例》第 73 和 74 條、《商品交易條例》(第 250 章)第 60A 條及《槓桿式外匯買賣條例》(第 451 章)第 39 條。

13. 《草擬規則》的作用是容許中介人與《草擬規則》載列的 3 類人士(參閱上文第 10 段)，以及《條例草案》所定義的其他“專業投資者”，進行第 102、108 及 169 條禁止的活動。
14. 值得注意的是，證監會亦建議《條例草案》所載的“專業投資者”的定義應該予以修訂，以便就第 102、108 及 169 條的目的而言，加入(除其他實體外)受規管中介人、認可財務機構及銀行的控股公司及全資附屬公司。建議的修訂定義的修訂標示文本現載於附件 3。
15. 我們擬備《草擬規則》的目的，是要利便中介人提供投資服務，但亦同時維持對投資者有足夠的保障和保持市場持正操作。證監會相信就《條例草案》第 102、108 及 169 條所述的情況而言，《草擬規則》所述類別的專業投資者應該有能力和具備充足資源來保障其本身利益。
16. 上述監管取向與其他主要司法管轄區的監管取向大概一致。在英國，《2000 年金融服務及市場法 2001 年(投資推廣)令》訂明(在若干情況下)，向“經核證高資產淨值的個人”³傳達資料時，可獲豁免遵守若干投資推廣限制。在美國，依據《1933 年證券法案》規則 D，向“認可投資者”⁴傳達資料以銷售證券時，可就管限涉及未經註冊的證券的有限度要約或銷售的規則獲得若干豁免。

³ 根據該命令，“經核證高資產淨值的個人”指任何一

- (a) 擁有仍然有效的高資產淨值證明書的個人；及
- (b) 在傳達資料當日止 12 個月期間內，曾經簽署載有訂明條件的聲明的個人。

就上述目的而言，高資產淨值證明書—

- (a) 必須是書面形式或其他易讀的形式；
- (b) 如果證明書的日期是在傳達資料當日止 12 個月期間內，並且在該期間內簽署，是仍然有效的；
- (c) 必須註明就簽署該證明書的人士的意見而言，與該證明書有關的人士是—
 - (i) 在證明書簽發當日之前的財政年度，每年收入不少於 10 萬英鎊；或
 - (ii) 在證明書簽發當日之前的財政年度，一直持有價值不於 25 萬英鎊的淨資產；
- (d) 必須由收件人的會計師或收件人的僱主簽署。

⁴ “認可投資者”包括(除其他事項外)—

- (a) 並非為取得要約所涉的證券而成立及資產總值超過 500 萬美元的法團；
- (b) 在進行購入交易時，其個人資產淨值或與其配偶的共同資產淨值超過 100 萬美元的自然人；
- (c) 在最近的過去兩年的每年個人收入超過 20 萬美元，或在該兩年中與其配偶的每年共同收入超過 30 萬美元，以及有合理理由預期現年度的收入會達到相同水平的自然人；
- (d) 並非為取得要約所涉的證券而成立及資產總值超過 500 萬美元，並且由投資技巧熟練的人士發出購入指示的信託；及
- (e) 全部產權持有人為認可投資者的實體。

《草擬規則》

17. 證監會在《草擬規則》中建議制訂簡單的測試，以確定有關人士就第 102、108 和 169 條所述的情況而言，是否達到資產或投資組合價值的規定，以符合成為專業投資者的資格。該等測試包括—
- (a) 按其最近期但關乎不超過16個月前截止的期間的審計的財務報表，獲委託管理資產合共不少於4,000萬港元(或等值)的信託公司；
 - (b) 經核數師核證或按其保管人發出的當期帳戶結單中所載，持有不少於1,600萬港元(或等值)的證券及／或貨幣存款投資組合的個人；
 - (c) 按其最近期但關乎不超過16個月前截止的期間的審計的財務報表，或按其保管人發出的當期帳戶結單所載，持有不少於1,600萬港元(或等值)的證券及／或貨幣存款投資組合，或資產總值不少於4,000萬港元(或等值)的法團或合夥。
18. 上述測試旨在提供簡單和直接的方法，來評核有關人士是否符合成為指定類別人士的資格。在評核時，參考財政年度截止日期處於過去 16 個月的財政年度的經審計的財務報表，是為了要參考去年度的經審計的財務報表，同時給予有關人士一段時間，在本年度內制訂該等財務報表。
19. 上文第(b)段提述的個人，根據《草擬規則》第 2 條的定義，包括該人的配偶及其子女。如果該人本身擁有不少於 1,600 萬港元的投資組合，或與其配偶及／或子女共同持有不少於 1,600 萬港元的投資組合，便屬於符合資金限額的規定。如果投資組合並非共同持有，個人的資產便應該分開計算。對於中介人而言，該等資產或投資組合價值的限額應該是較易於掌握的，以及較考慮投資者的資產淨值及投資經驗更容易作出判斷。
20. 附件 4 載有將會依據《條例草案》第 384 條訂立的《草擬規則》。

諮詢

21. 證監會歡迎市場從業員和投資大眾對《草擬規則》發表任何意見。證監會尤其希望上述人士就下列事宜提出討論：

- 建議的 3 類人士是否適宜被視作專業投資者；
- 就該 3 類人士建議的資金限額是否恰當；
- 用以確定有關資金限額的建議方法是否恰當；及
- 是否亦仍有其他類別的人士應訂明為專業投資者。

— 完 —

個人資料收集聲明書

1. 本個人資料收集聲明書(“聲明書”)是按照香港個人資料私隱專員公署發出的指引編寫的。本聲明書列出證券及期貨事務監察委員會(“證監會”)收集你的個人資料⁵的用途、你就證監會使用你的個人資料而同意的事項，以及你根據《個人資料(私隱)條例》(“《私隱條例》”)享有的權利。

收集資料的目的

2. 證監會可能會為以下其中一個或以上的目的，使用你就《〈證券及期貨(專業投資者)規則〉草擬本諮詢文件》(“諮詢文件”)提交的意見書中所提供的個人資料：
 - 執行依據證監會獲賦與的權力而制訂或公布的有關條例、規則、規定守則及指引
 - 根據有關條例執行證監會的法定職能
 - 進行研究或統計
 - 其他法例所容許的目的

轉移個人資料

3. 證監會就諮詢文件徵詢公眾意見時，可向香港或其他地區的公眾人士披露其所取得的個人資料。此外，證監會亦可能會向公眾人士披露就諮詢文件發表意見的人士的姓名／名稱及其意見書的全部／部分內容。證監會可以在諮詢期內或諮詢期完結時，將上述資料刊載於本會網站或由本會印製的刊物之內。

查閱資料

4. 根據《私隱條例》的規定，你有權要求查閱或改正你的個人資料。上述權利包括你有權索取你就諮詢文件提交的意見書中所提供的個人資料的副本。證監會有權就處理任何查閱資料的要求收取合理的費用。

查詢

5. 對於就諮詢文件提交的意見書中所提供的個人資料的任何查詢，或要求查閱或改正個人資料，請以書面形式向以下人士提出：

個人資料私隱主任
證券及期貨事務監察委員會
香港皇后大道中 15 號
置地廣場公爵大廈 12 樓

你亦可向證監會索閱本會的保障私隱政策聲明的副本。

⁵ 個人資料是指《個人資料(私隱)條例》(第 486 章)(“《私隱條例》”)所界定的個人資料。

《條例草案》第 102 條

1. 除若干例外情況外，第 102(1)條述明，任何人發出或為發出而管有任何廣告、邀請或文件，而他知道該廣告、邀請或文件(視屬何情況而定)屬或載有請公眾作出以下作為的邀請的，即屬犯罪—
 - (a) 訂立或要約訂立—
 - (i) 旨在取得、處置、認購或包銷證券的協議；或
 - (ii) 受規管投資協議；或
 - (b) 取得或要約取得集體投資計劃的權益，或參與或要約參與集體投資計劃，

但如該項發出獲得證監會認可，則屬例外。

2. 第 102 條第(2)、(3)及(5)至(9)款提供若干例外情況，其中較為重要的包括—
 - (a) 持牌或獲豁免中介人就與其相關的受規管活動(未經認可的集體投資計劃除外)而發出該等資料；及
 - (b) 就證券或就集體投資計劃或受規管投資協議的權益而發出的該等資料，而該等證券或權益是只轉讓予或擬只轉讓予專業投資者。

《條例草案》第 108 條 (即第 169A 條)

3. 除若干例外情況外，《條例草案》第 108(1)條禁止持牌或獲豁免證券交易商或顧問傳達為取得或處置某團體的或由某團體發行的證券而提出的要約，除非(除其他情況外)該要約載於一份以法定語文寫成的文件中或以口頭傳達，其後轉為在一份以法定語文寫成的文件中，並且載有規定的資料。第(5)款述明該條文不適用於向(除其他人士外)以下人士提出的要約—
 - (a) 專業投資者；
 - (b) 以專業身分行事的律師或專業會計師；或
 - (c) 由交易所參與者在認可證券市場的日常交易過程中提出的要約。

《條例草案》第 169 條

4. 除若干例外情況外，《條例草案》第 169(1)條訂明任何持牌人或獲豁免人士不得在進行未獲邀約的造訪時或在進行未獲邀約的造訪後，以主事人或代理人身分作出以下作為—
- (a) 與另一人訂立或要約與另一人訂立符合以下說明的協議—
- (i) 協議的內容或目的是該另一人售賣或購買任何證券、期貨合約或槓桿外匯交易合約；
 - (ii) 協議的內容或目的是他向該另一人提供證券保證金融資；或
 - (iii) 協議的目的或作用，或伴稱的目的或作用是向該另一人提供(不論是否附有條件)—
 - (A) 從證券、期貨合約或槓桿外匯交易合約中取得的利潤、收益或其他回報；或
 - (B) 藉參照任何證券、期貨合約或槓桿式外匯交易合約的價值的變動而計算的利潤、收益或其他回報；或
- (b) 誘使或企圖誘使另一人訂立(a)段提述的協議，
- 不論他在進行該造訪時，有沒有作出任何其他作為或事情。
5. 同樣地，《條例草案》第條 169 條第(2)及(3)款提供各項寬免條文。第(2)款述明(除其他事項外)中介人不得僅因以下理由而視為違反第(1)款—
- (a) 他造訪另一人，而該另一人是以其專業身分行事的律師或專業會計師，或是持牌人、獲豁免人士、放債人、原有客戶或專業投資者；及
 - (b) (不論以主事人或代理人身分)與該另一人訂立或要約與該另一人訂立第(1)(a)款提述的協議，或誘使或企圖誘使該另一人訂立該協議。

“專業投資者” (professional investor) 指 -

- (a) 認可交易所、認可結算所、認可控制人或認可投資者賠償公司，或根據本條例第 95(2) 條獲認可提供自動化交易服務的人；
- (b) 中介人，或經營提供投資服務的業務並受香港以外地方的法律規管的其他人；
- (c) 認可財務機構，或並非認可財務機構但受香港以外地方的法律規管的銀行；
- (d) 根據《保險公司條例》(第 41 章) 獲授權的保險人，或經營保險業務並受香港以外地方的法律規管的其他人；
- (f)

符合以下說明的計劃 -

- (i) 根據本條例第 103 條獲認可的集體投資計劃；或
- (ii) 根據在香港以外地方的法律按類似方式組成及如果該計劃是根據該地方的法律受規

管，獲准許根據該地方的法律營辦的計劃，

或營辦該等計劃的人；

(g)

《強制性公積金計劃條例》(第485章)第2(1)條界定的註冊計劃，或該註冊計劃的按《強制性公積金計劃(一般)規例》(第485章，附屬法例)第2條界定的成分基金，或本身就該等註冊計劃而言是該條例第2(1)條界定的核准受託人或服務提供者或該等註冊計劃或成分基金的投資經理的人；

(ga) 符合以下說明的計劃 -

(i) 《職業退休計劃條例》(第426章)第2(1)條界定的註冊計劃； 或

(ii) 該條例第2(1)條界定的離岸計劃及如果該計劃是根據其本藉所屬地方的法律受規管，獲准許根據該地方的法律營辦的計劃，

或本身就該等計劃而言是該條例第2(1)條界定的管理人；

(h) 任何政府(市政府當局除外)，執行中央銀行職能的機構，或多邊機構；

(ha) 除為施行本條例附表6外，符合以下說明的法團 -

(i) 該法團是以下的全資附屬公司 -

(A) 中介人，或經營提供投資服務的業務並受香港以外地方的法律規管的其他人；或

(B) 認可財務機構，或並非認可財務機構但受香港以外地方的法律規管的銀行；

(ii) 該法團是持有以下的所有已發行股本的控股公司 -

(A) 中介人，或經營提供投資服務的業務並受香港以外地方的法律規管的其他人；或

(B) 認可財務機構，或並非認可財務機構但受香港以外地方的法律規管的銀行；或

(iii) 第(ii)分節提述的控股公司的其他全資附屬公司；

(i) 屬於為施行本段而藉根據本條例第 384 條訂立的規則訂明為為施行本條例的條文屬於本定義所指的類別的人，或在為施行本條例的條文而藉如此訂立的規則訂明為屬於本定義所指的類別的範圍內的人；

證券及期貨(專業投資者)規則

(由證券及期貨事務監察委員會

根據《證券及期貨條例》(2002 年第 號)第 384(1)條訂立)

1. 生效日期

本規則自《證券及期貨條例》(2002 年 號)第 XVI 部的指定生效日期起實施。

2. 釋義

在本規則中，除文意另有所指外 —

"保管人" (custodian) 指主要業務是作為另一人的證券或其他財產的保管人的法團，不論是以信託或合約形式進行；

"個人" (individual) 指自然人及包括該人的配偶及子女，即如該人與其配偶、子女共同持有投資組合，則"個人"一詞亦包括該人的配偶及子女；

"合夥" (partnership) 指為牟利而共同經營業務的人之間所存在的關係；

"投資組合" (portfolio) 指由以下組成的投資組合 -

- (a) 證券；或
- (b) 貨幣存款。

3. 指明為專業投資者的人士

(1) 除第(2)款另有規定外，為施行本條例附表 1 第 1 部“專業投資者”一詞的定義的第(i)段，以下人士是專業投資者 -

- (a) 按其最近期但關乎不超過16個月前截止的期間的經審計的財務報表所載，獲受託管理不少於4,000萬港元或等值的其他貨幣資產的受託人公司；
- (b) 按其核數師核證或其保管人所發出的當期帳戶結單所載，擁有投資組合總值不少於1,600萬港元或等值的其他貨幣的個人；及

(c) 按其最近期但關乎不超過16個月前截止的期間的經審計的財務報表或其保管人所發出的當期帳戶結單所載

-

(i) 擁有所不少於1,600萬港元或等值的其他貨幣的投資組合；或

(ii) 擁有所不少於4,000萬港元或等值的其他貨幣的總資產，

的法團或合夥。

(2) 就本條例附表 6 的目的而言，本規則不適用。

證券及期貨事務監察委員會主席

2002 年 2 月 日

註 釋

本規則由證券及期貨事務監察委員會根據《證券及期貨條例》(2002 年第 號)第 384(1)條訂立，目的在於施行本條例附表 1 第 1 部“專業投資者”的定義中第(i)段。據此，該等人士可獲豁免遵守載列於本條例第 102(3)(j)條(有關發出與某些投資有關的廣告、邀請或文件)、第 169(2)(a)條(有關未獲邀約的造訪)及第 169A(5)(d)(i)

條(有關傳達為取得或處置證券而提出的要約)的若干禁止條文。然而，就本條例附表 6 第 2 部中有關受規管活動的定義的目的而言，該等人士不會被視為專業投資者。



SECURITIES AND
FUTURES COMMISSION
證券及期貨事務監察委員會

Consultation Conclusions on the Draft Securities and Futures (Professional Investor) Rules

《證券及期貨(專業投資者)規則》草擬本
諮詢文件總結

Hong Kong
MAY 2002

香港
2002年5月

引言

1. 2002年2月1日，證券及期貨事務監察委員會(“證監會”)發表《證券及期貨(專業投資者)規則》草擬本的諮詢文件(“諮詢文件”)。有關諮詢期已於2002年2月28日結束。
2. 該諮詢文件建議將《證券及期貨條例》內有關“專業投資者”的定義擴大至包括以下類別人士：
 - 獲委託管理資產不少於4,000萬港元的受託人公司；
 - 擁有投資組合不少於1,600萬港元的高資產淨值的個人；及
 - 擁有投資組合不少於1,600萬港元或擁有資產不少於4,000萬港元的法團或合夥。
3. 本文件旨在為有興趣人士就證監會在諮詢期間收集到的主要意見作出分析，以及述明證監會作出有關結論的理據。本文件應連同有關諮詢文件一併閱讀。
4. 證監會共收到10份來自業界從業員、法律界專業人士及其他有興趣人士的意見書。除未能獲回應者同意發表有關意見的兩份意見書外，其餘所有的意見書均已載於證監會網站內。

諮詢意見概覽及證監會的回應

5. 回應者一般歡迎有關建議規則。他們所提出的意見所涉及的範圍深度各有不同，部分集中於大原則，其餘則集中於一些細節及就某些事宜作出澄清。其中數名回應者亦建議設立其他準則或標準，以界定專業投資者的資格。
6. 因應有關意見，證監會決定除其他事項之外，採取以下做法：
 - 將(成為專業投資者)個人、法團或合夥人擁有的投資組合限額降低至800萬港元，以便與《操守準則》的有關規定看齊；
 - 包括純粹作為投資控股公司及由本身為專業投資者的個人全資擁有的法團為專業投資者；

- 澄清商號在合計客戶的投資組合價值時，可以援引超過一張由不同保管人發出的結單；
 - 擴大保管人的定義至業務涉及持有客戶資產的認可機構、持牌法團及海外相等機構；及
 - 將《操守準則》內有關專業投資者的定義加以修訂，以便與有關法例內的有關定義貫徹一致。
7. 對諮詢文件作出回應的人士所提出的主要意見及證監會的回應撮要(英文本)載於附件 1。

鳴謝

8. 證監會對於業界及其他有興趣的人士就諮詢文件提供的寶貴建議及意見，謹此致謝。

**Summary of comments received on the Draft
Securities and Futures (Professional Investor) Rules**

Specific Comments

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
1	Rule 2 (Interpretation)	Definition of terms – "corporation"	HKAB and 1 unnamed respondent suggested adding a separate definition for "corporation" as the definition for this term in Schedule 1 to the Securities & Futures Bill excludes a company or other body corporate prescribed by rules made under section 384 of the Bill.	The definition of corporation in Schedule 1 to the Securities and Futures Ordinance does not generally exclude a company or other body corporate prescribed by rules made under section 397 of the SF Ordinance. The exclusion only applies where the rules specifically state that such a company or a body corporate should be so excluded. Therefore a new definition is not required.
2	Rule 2 (Interpretation)	Definition of terms – "custodian"	HKAB, HKMA, Linklaters and 2 unnamed respondents considered the proposed definition, which required a corporation to principally act as a custodian, too narrow. They advocated the inclusion of, amongst others, authorized institutions, fund managers and intermediaries.	We accept the comment and have amended the definition of "custodian" to include an authorized institution, a licensed corporation and their overseas equivalents, provided their businesses involve holding client assets. A fund manager will fall within the definition if its business involves holding client assets.
3	Rule 2 (Interpretation)	Definition of terms – "custodian statement"	Linklaters suggested adding a separate definition for "custodian statement" in the interest of clarity. The definition put forward was "a statement or statements issued by any custodian, provided any such statement is not more than 12 months old".	We accept the comment and have accordingly added a definition for "custodian statement" in Rule 2. Rule 3 has also been amended to clarify that custodian statements not more than 12 months old are acceptable.

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
4	Rule 2 (Interpretation)	Definition of terms – "individual"	<p>Linklaters observed that the definition was too narrow and suggested the inclusion of siblings, parents and grandparents. HKMA questioned the rationale of not treating any joint account satisfying the portfolio threshold as a professional investor account since the definition included a person's spouse and children.</p> <p>Linklaters assumed that any joint account might be treated as a professional investor account where each joint account holder satisfied the portfolio test (without double counting).</p>	<p>Spouse and children are included to facilitate the operation of "family investment accounts". However, to further extend the treatment to any other joint account satisfying the threshold poses investor protection concern. The suggested amendment may, for example, result in having resources pooled from a large group of people adopted for determining their sophistication and eventually for waiving certain investor protection measures. (The definition of "individual" has been deleted but the principle is retained in the amended draft Rules.)</p> <p>The assumption is in line with our view.</p>
5	Rule 2 (Interpretation)	Definition of terms – "portfolio"	<p>HKAB, Linklaters and an unnamed respondent recommended the inclusion of precious metals and certificates of deposit.</p> <p>HKAB and an unnamed respondent suggested that the word "or" in the definition be replaced by "and/or".</p>	<p>Generally speaking, "precious metals" are relatively illiquid and may not be a good indication of a person's resources available for protecting his interest in case necessary. Moreover, putting money worth to "precious metals" involve valuation thus making them a less accurate but more complicated means of determining a person's wealth.</p> <p>Regarding certificates of deposit, they are now included in the amended definition of "portfolio".</p> <p>We have amended the definition of "portfolio" to put beyond doubt that a combination of the specified assets is permitted.</p>
6	Rule 3 (Persons that are professional)	General comments	<p>DBS and an unnamed respondent observed that the proposed portfolio and asset thresholds differed from those of the Code of Conduct issued by the SFC and</p>	<p>The SFC will align the definition of "professional investor" in the Code of Conduct with that in the legislation to achieve a uniform set of thresholds.</p>

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
	investors.)		<p>advocated an alignment.</p> <p>HKMA expressed the desirability of setting out the required recency of custodian statements (for the purpose of substantiating the portfolio value), in view of the Rules requiring audited financial statements that are not more than 16 months old.</p> <p>DBS and an unnamed respondent argued that portfolio size should not be the sole criterion for determining professional investor status. Reference should also be made to the investor's investment experience and trading pattern. The unnamed respondent contended that an investor with an average annual turnover of at least US\$0.5 million should be classified as a professional investor. Clifford Chance believed that an investor who had a certificate issued by a licensed person that the investor was sufficiently knowledgeable to understand the risks associated with investment should also be so classified.</p>	<p>We accept the comment and have amended Rule 3 to clarify that custodian statements not more than 12 months old are acceptable.</p> <p>The SFC is of the view that the suggested classes of persons may not have sufficient resources to protect themselves. In particular, an investor with a high annual turnover may be a day trader, who may not have the requisite resources. As regards the addition of other criteria such as investment experience, trading pattern or through certification by intermediaries for determining professional investor status, concerns have been expressed that this may make the definition less objective. The SFC therefore does not accept this suggestion.</p>
7	Rule 3 (Persons that are professional investors.)	3(1)(a) – trustee company having been entrusted with total assets of not less than HK\$40 million	<p>HKMA queried whether the term “trustee company” appearing in the clause referred to a trust company registered under the Trustee Ordinance.</p> <p>HKMA, Linklaters and an unnamed respondent observed that the financial statements of trustee companies might not state the value of entrusted assets. HKMA suggested setting out the means of ascertaining such asset value, for example, by making references to the audited financial statements of the trusts concerned. Linklaters observed that custodian and bank statements could be relied upon for the purpose.</p>	<p>The term “trustee company” was intended to cover both overseas trust companies and trust companies registered under the Trustee Ordinance. This is now clarified in Rule 2 under the new term “trust corporation”.</p> <p>We accept the comment and have amended the draft Rules to allow the suggested means of verification.</p>

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
			<p>Linklaters suggested that the 16-month recency of audited accounts be revised to 24 months, to facilitate trustee companies operating in jurisdictions where the accounts filing requirements are less stringent than Hong Kong.</p> <p>Mr N. B. Bentley argued for the removal of trustee companies as professional investors on the basis that they are experts in trust law and practice but not investment.</p>	<p>The SFC is not agreeable to this suggestion out of concern that the information thus obtained may not be sufficiently up to date. It should be noted that apart from the audited financial statements, current statements of account from custodians may be relied upon for such purpose.</p> <p>The draft Rules aim to reduce the compliance burden in cases where the targeted investors, though may not necessarily have the requisite knowledge of the securities market themselves, have sufficient financial resources to protect their own interests. It should be noted that the dispensation is only applicable to certain requirements imposed under sections 103, 174 and 175 of the SF Ordinance and requirements which may make reference to "professional investor" under the subsidiary legislation.</p>
8	Rule 3 (Persons that are professional investors.)	3(1)(b) – high net worth individual having a portfolio of not less than HK\$16 million.	<p>HKAB, DBS, Linklaters and 2 unnamed respondents recommended the reduction of the monetary threshold to HK\$8 million, in line with that of the Code of Conduct. They reasoned that investors in Hong Kong tended to spread their assets over several custodians.</p> <p>Mr Vincent Kwan suggested the inclusion of an individual having an annual income in excess of HK\$1.5 million as</p>	<p>The SFC accepts that the threshold could be reduced to HK\$8 million (in line with that of the Code of Conduct) without undermining investor protection. The revised threshold is also comparable to those of the major jurisdictions. In the United States, an individual having a net worth of US\$1M is regarded as an accredited investor for the purposes of rules governing the limited offer and sale of securities without registration. In the United Kingdom, a person having net assets of not less than GB250,000 is regarded as a high net worth individual for the purposes of certain financial promotion restrictions.</p> <p>The SFC is concerned that such an investor may not have the necessary resources to protect his own</p>

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
			<p>a professional investor. DBS and 2 unnamed respondents suggested that a person having an annual income of HK\$1 million should also be included.</p> <p>Mr Vincent Kwan argued for the inclusion of any member of a recognised professional body as a professional investor. DBS and 2 unnamed respondents suggested that licensed persons, lawyers and accountants should be similarly included. An unnamed respondent further contended that an individual trustee having been entrusted with total assets of not less than US\$1 million should likewise be included.</p> <p>Mr N. B. Bentley argued for the removal of this category of persons as a professional investor. He contended that it was not the quantum of wealth, but personal expertise, that made an experienced investor.</p> <p>HKAB and an unnamed respondent claimed that Asian investors preferred to keep their financial status private and hence the requirement to obtain an auditor's certificate might not be popular. They suggested that the clause be re-drafted to read, "as stated in the current total relationship balance set out in the statement of account issued by his custodian". Linklaters observed that an individual was unlikely to have an auditor, and suggested that his portfolio value should be verified by an accountant instead of an auditor.</p>	<p>interests as a professional investor.</p> <p>Likewise, the SFC is concerned that the suggested classes of persons may not have the requisite resources to protect their interests as professional investors.</p> <p>The draft Rules aim to reduce the compliance burden in cases where the targeted investors, though may not necessarily have the requisite knowledge of the securities market, have sufficient financial resources to protect their own interests. It should be noted that the dispensation is only applicable to certain requirements imposed under sections 103, 174 and 175 of the SF Ordinance and requirements which may make reference to "professional investor" under the subsidiary legislation.</p> <p>We accept the comment and have amended the draft Rules to allow the suggested means of verification.</p>

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
			<p>Linklaters suggested that in calculating the portfolio value, it should be possible to rely on more than one statement.</p> <p>Linklaters observed that the provision seemed to suggest that an individual would have to provide a new statement each time a financial institution wanted to treat him as a professional investor. This would be cumbersome and was not required under the Code of Conduct, where an annual confirmation was sufficient. Likewise, an annual review would be appropriate. It further suggested that the required recency of statements of account should be 12 months.</p>	<p>Rule 3 now makes clear that more than one custodian statement can be used for the purpose of determining the portfolio value.</p> <p>The intention is to require an annual confirmation. We have amended Rule 3 to clarify that custodian statements not more than 12 months old are acceptable.</p>
9	Rule 3 (Persons that are professional investors.)	3(1)(c) – corporation or partnership having either a portfolio of not less than HK\$16 million or total assets of not less than HK\$40 million	<p>HKAB, DBS, Linklaters and 2 unnamed respondents called for the reduction of the portfolio threshold to HK\$8 million, in line with the Code of Conduct. They observed that investors in Hong Kong tended to spread their assets over several custodians.</p> <p>Mr Vincent Kwan suggested the inclusion of any partnership or corporation having an annual income in excess of HK\$1.5 million as a professional investor.</p> <p>An unnamed respondent suggested the inclusion of statutory and charitable organisations in the clause (thus enabling these organisations to be treated as</p>	<p>The SFC accepts that the threshold could be reduced to HK\$8 million (in line with that of the Code of Conduct) without undermining investor protection. The revised threshold is also comparable to those of the major jurisdictions. In the United States, an individual having a net worth of US\$1M is regarded as an accredited investor for the purposes of rules governing the limited offer and sale of securities without registration. In the United Kingdom, a person having net assets of not less than GB250,000 is regarded as a high net worth individual for the purposes of certain financial promotion restrictions.</p> <p>As explained, the SFC is concerned that such an investor may not have the necessary resources to protect his own interests as a professional investor.</p> <p>The SFC is not convinced that it is proper to include these organisations as professional investors, more so in the case of charitable organisations.</p>

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
			<p>professional investors upon their fulfilling the required portfolio or asset thresholds).</p> <p>Mr N. B. Bentley expressed that although he had no objection to the clause in principle (as a business would have composite ability on its board of directors), he was concerned that such a vehicle could be abused. He thus suggested abandoning completely any attempt to extend the definition of professional investor.</p> <p>An unnamed respondent suggested the requirement on these companies having "audited" financial statements should be amended on the basis that these companies might not be required to have audited accounts. The other unnamed respondent suggested that in ascertaining the portfolio or asset value of such a holding company, one needed to look behind the corporate veil to the ultimate beneficial owner. Thus any statement of accounts evidencing the ownership of the assets by the beneficial owner should be sufficient.</p> <p>2 unnamed respondents observed that many Hong Kong investors used offshore companies as their investment vehicles.</p> <p>Linklaters suggested that the 16-month recency of</p>	<p>The draft Rules aim to reduce the compliance burden in cases where the targeted investors have sufficient financial resources to protect their own interests. It should be noted that the dispensation is only applicable to certain requirements imposed under sections 103, 174 and 175 of the SF Ordinance and requirements which may make reference to "professional investor" under the subsidiary legislation.</p> <p>The requirement for "audited" financial statements helps to ensure the integrity of the statements, and as such should remain. It should be noted that apart from the audited financial statements, current statements of account from custodians may be relied upon for such purpose.</p> <p>As regards the use of corporations solely as an investment holding vehicle by an individual, the SFC proposes to adopt the same approach as that of the Code of Conduct. Thus, where a corporation is 100% owned by an individual and acts solely as an investment holding company, the corporation may qualify as a professional investor where the individual is a professional investor in his own right. We have amended the draft Rules to this effect.</p> <p>As stated, the SFC is not agreeable to this extension</p>

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
			<p>audited accounts be revised to 24 months, to facilitate companies operating in jurisdictions where the account filing requirements are less stringent than Hong Kong.</p> <p>It further suggested that it should also be permissible for a partnership or corporation to substantiate its portfolio value in reliance on more than 1 statement.</p> <p>Linklaters and an unnamed respondent suggested that the statements issued by banks and intermediaries could be similarly used.</p>	<p>out of concern that the information thus obtained may not be sufficiently up to date. It should be noted that apart from audited financial statements, current statements of account from custodians may be relied upon for such purpose.</p> <p>Rule 3 now makes clear that more than one custodian statement can be used for the purpose of determining the portfolio value.</p> <p>We accept the comment and have amended the definition of "custodian" to the effect that statements issued by an authorized institution, a licensed corporation and their overseas equivalents (provided their businesses involve holding client assets) are also acceptable.</p>

General Comments

10	-		<p>An unnamed respondent observed that the Rules were silent as to when an investor was to be treated as a professional investor. It suggested that, practically, such classification should take place at the first point of sale, and recommended that a clarification be included in the Rules.</p> <p>Linklaters observed that whilst the new categories of "professional investor" were welcome, they would mean little in practice because of the prospectus requirements of the Companies Ordinance ("CO") and the narrow definition of professionals contained in Section 343(2) of that Ordinance. It hoped that the provisions on</p>	<p>The purpose of the draft Rules is to prescribe additional classes of persons as "professional investor" for application in a number of different provisions. An investor is to be treated as a professional investor if at the time the regulated act under the relevant provision is conducted, he meets the criteria of being a professional investor. This is now clarified in the amended draft Rules.</p> <p>Noted. The comment is under consideration in the context of the Companies Ordinance .</p>
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	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
			prospectuses in the CO will be reviewed at the earliest possible opportunity and the "professional investor" exception in the CO could be put in line with that stated in the Bill.	

Definition of “professional investor” in Schedule 1 to the Bill

11	-	General comments on the definition of “professional investor” in Schedule 1 to the Bill	<p>Mr David Clark suggested the definition of the term professional investor in the Code of Conduct to be brought in line with that of the Bill.</p> <p>Clifford Chance called for the exception provided for in the CO be brought in line with that of the Bill.</p> <p>Clifford Chance requested clarification of the term “public” referred to in the Bill, in particular whether the “limited persons (50)” rule applied.</p> <p>Mr David Clark observed that the definition of professional investor provided in the Bill did not cover other employee benefit arrangements, such as a trust established in connection with an employee share ownership scheme.</p>	<p>The SFC will align the definition of “professional investor” in the Code of Conduct with that in the legislation to achieve a uniform set of thresholds.</p> <p>Noted. The comment is under consideration in the context of the Companies Ordinance.</p> <p>The term is defined in Schedule 1 to the SF Ordinance to include any class of the public. In the context of the SF Ordinance, due to the broad spectrum of its use, each case may have to be considered in its own context.</p> <p>Under the circumstances, the trustee company could be covered under Rule 3, whereas the investment managers may likely be covered under the definition provided in Schedule 1 to the SF Ordinance as they are likely to be licensed corporations or authorized institutions. Further, certain employee benefit arrangements may fall outside the scope of “invitation to the public”, and thus the prohibition under section 103 of the SF Ordinance may not apply.</p>
12	Paragraph (d) (Defines insurers as professional investors.)	Scope of definition	Mr David Clark observed that approved pooled investment funds which were constituted as insurance policies were regarded for the purposes of Mandatory Provident Fund ("MPF") legislation as "pooled investment	It is noted that in addition to paragraph (d) of the definition (which covers insurers), paragraphs (f), (g), and (ga) may also cover such schemes.

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
			funds" (similar in concept to a collective investment scheme). He suggested that a clarification be made in this area, as there was a potential confusion on whether this type of investment vehicle was covered by paragraph (d).	
13	Paragraph (f) (Defines authorised and regulated collective investment schemes as professional investors.)	Scope of definition	<p>Mr David Clark observed that the definition of professional investor had not accounted for collective investment schemes not authorised under section 103 of the Bill (e.g. unauthorised unit trusts established for large Hong Kong pension schemes). It may be necessary to include these schemes as professional investors.</p> <p>This respondent also requested clarification on whether an unregulated offshore scheme constituted similarly to a collective investment scheme authorized under section 103 of the Bill fell within the definition.</p>	<p>It is noted that such schemes may be covered under paragraphs (d), (g), (ga) or Rule 3 of the draft Rules. In addition, investment managers may be professional investors in their own right.</p> <p>Such a scheme would be included if it is similarly constituted under the law of any place outside Hong Kong and, if it is regulated under the law of such place, is permitted to be operated under the law of such place.</p>
14	Paragraph (g) (Defines MPF schemes as professional investors.)	Scope of definition	<p>Mr David Clark observed that the reference to MPF schemes in paragraph (g) referred to an MPF scheme or its constituent fund. In practice, the majority of MPF schemes held only units in approved pooled investment funds at the constituent fund level. Normally, investment management was conducted at the approved pooled investment fund level. Therefore, the reference in this paragraph to a constituent fund will not help.</p> <p>The respondent added that the reference to "service provider" in paragraph (g) seemed too wide. It included persons who were not involved in securities dealing or investment advisory (e.g. the administrator of an MPF scheme responsible for record keeping). There seemed no reason for such a service provider to be regarded as a professional investor.</p>	<p>The SFC does not agree that the reference is not helpful, as investment activities at the constituent fund level cannot be ruled out. In addition, approved pooled investment funds would normally be covered under paragraph (f) (i.e. authorized collective investment schemes).</p> <p>As these service providers may carry on securities dealing and advisory activities incidental to their principal business activities, it is necessary to include them as professional investors.</p>

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
15	Paragraph (ga) (Defines registered and regulated pension or provident funds as professional investors.)	Scope of definition	<p>Mr David Clark noted that paragraph (ga) had omitted the following:</p> <p>(a) schemes established in Hong Kong and exempted from registration under the Occupational Retirement Schemes Ordinance ("ORSO");</p> <p>(b) schemes not required to be registered or exempted under the ORSO. Significant schemes such as the Hong Kong Civil Servant Pension Scheme might fall into this category; and</p> <p>(c) retirement schemes not falling within the definition of "occupational retirement scheme" within the ORSO. Some very significant overseas schemes (such as the new stakeholder pensions in the United Kingdom, French "caisses de retraite" or possibly certain United States multi-employer plans) could fall in this category.</p> <p>He further suggested that for the sake of clarity, the phrase "if it is regulated" should be replaced by "if it is subject to the supervision of any regulatory authority."</p> <p>He also noted that the reference in paragraph (ga)(ii) to an overseas scheme "permitted to be operated under the law of such place" was imprecise, since it was not clear what "operated" might mean. It might give rise to uncertainties as regards overseas schemes.</p> <p>He commented that the reference in paragraph (ga)(ii) to "any person who, in relation to any such scheme, is an administrator as defined in section 2(1) of the ORSO" did not catch the investment manager of a scheme established under the trust. It suggested that the</p>	<p>Should such schemes fall outside of paragraph (ga), the associated investment management activities may be covered by virtue of the investment managers being professional investors in their own right. The trustee companies for such schemes may also be covered by Rule 3 of the draft Rules.</p> <p>There seems to be little difference between the two phrases.</p> <p>The SFC would adopt a pragmatic approach and interpret the term "operated" in a sensible manner.</p> <p>The investment manager would likely be a professional investor in his own right, i.e., by virtue of its being a licensed corporation, authorized institution or insurer.</p>

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
			reference to "administrator" should be replaced by a reference to investment manager (or its delegates).	
16	Paragraph (h) (Defines governments, central banks and multilateral agencies as professional investors.)	Scope of definition	Mr David Clark sought confirmation on whether paragraph (h) included government controlled agencies/entities.	It is not the intention to extend the definition to such agencies out of concern that certain of these agencies may not be sufficiently sophisticated.
17	Paragraph (ha) (Defines wholly owned subsidiaries or holding companies of licensed corporations and authorized institutions as professional investors.)	Scope of definition	Mr David Clark suggested that paragraph (ha) should be expanded to include the wholly owned subsidiaries and holding companies of insurers.	It is not the intention to so extend the definition out of concern that such subsidiaries and holding companies may not be sufficiently sophisticated.

List of Respondents

Date received	Respondent
5 February 2002	Mr Vincent PC Kwan, Solicitor (“Mr Vincent Kwan”)
26 February 2002	Unnamed Respondent
27 February 2002	Unnamed Respondent
27 February 2002	Clifford Chance
28 February 2002	Mr NB Bentley, FCA, TEP
28 February 2002	Linklaters & Alliance (on behalf of 7 firms) (“Linklaters”)
28 February 2002	Mr David Clark
28 February 2002	Hong Kong Monetary Authority (“HKMA”)
28 February 2002	Hong Kong Association of Banks (“HKAB”)
14 March 2002	DBS Vickers Securities (“DBS”)

Derivation Table

Clause/Schedule in the Securities and Futures Bill	Section/Schedule in the Securities and Futures Ordinance
102(3)(j)	103(3)(k)
169(2)(a)	174(2)(a)
169A(5)(d)(i)	175(5)(d)(i)
384(1)	397(1)
Schedule 1, Part 1	Schedule 1, Part 1
Schedule 6	Schedule 5
Schedule 6, Part 2	Schedule 5, Part 2