

For discussion
on 6 June 2002

Paper No. 9/02

**Subcommittee on Draft Subsidiary Legislation to be made
under the Securities and Futures Ordinance**

Securities and Futures (Collective Investment Schemes) Notice

This paper sets out the proposals to prescribe arrangements that are to be regarded as collective investment schemes by notice made by the Financial Secretary (FS) under section 393(1) of the Securities and Futures Ordinance (SFO) (5 of 2002).

Proposal

2. We propose to recommend the FS to make the Securities and Futures (Collective Investment Schemes) Notice, now in draft at **Annex 1**, under section 393(1) of the SFO.

Power to make the Notice

3. Part IV of the SFO deals with the regulatory framework for the offering of investment products drawing on the provisions of the existing Protection of Investors Ordinance (PIO) (Cap. 335). It imposes a general prohibition on the issue to the public of advertisements, invitations and documents relating to a wide range of investments. These investments mainly fall into a category described as “collective investment schemes”.

4. Similar to the PIO, the SFO does not exhaustively define what is meant by “collective investment schemes”. There is a definition in Schedule 1 to the SFO but this envisages the scope of the term to be enlarged or limited from time to time by a notice made under section 393. Under section 393(1)(a)(i), the FS may by notice published in the Gazette prescribe arrangements with certain specified characteristics as “collective investment schemes”. The draft Notice at Annex 1 prescribes that the arrangements for the purchase of gold coins or bullion which have the characteristics specified in section 393(1)(a)(i)(A)-(C) are regarded as collective investment schemes.

5. The Legal Services Division of the SFC and the Department of Justice have been consulted on the vires of the draft Notice. The advice is that the draft Notice would be intra vires if made as drafted.

Major features of the draft Notice

6. The draft Notice at Annex 1 is to be made by the FS under section 393(1). Schedule 1 to the draft Notice prescribes that arrangements for the purchase of gold coins or bullion that are made available in the course of business and have the purpose or effect of enabling the participating persons to do the following are to be regarded as collective investment schemes –

- (a) to acquire the ownership of the coins or bullion for valuable consideration;
- (b) to defer taking possession of the coins or bullion; and
- (c) to transfer ownership of the coins or bullion to specified persons.

7. The SFC considers that prescribing in the draft Notice the arrangements for the purchase of gold coins or bullion with the specified characteristics as collective investment schemes and bringing them within the regulatory framework for the offering of investment products would be consistent with the objectives in sections 4(a) and (c) of the SFO “to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry” and “to provide protection for members of the public investing in or holding financial products”.

Public consultation

8. The SFC released a consultation document and an exposure draft of the Notice on 25 March 2002 for comment by the public. Two submissions were received. We attach the following documents for Members’ reference –

- (a) Consultation Document on the draft Notice, at **Annex 2**, which sets out the underlying policy, together with the exposure draft of the Notice. The revised draft Notice is at Annex 1 for Members' consideration; and
- (b) Consultation Conclusions at **Annex 3**, which set out the conclusions from the consultation. No amendment to the substance of the draft Notice is considered necessary in the light of the submissions received. However, the draft Notice has been refined to improve the drafting and retitled to better reflect the scope of the enabling provision under section 393 of the SFO. The clarifications provided by the SFC in response to Hon Henry Wu's enquiries are annexed to the Consultation Conclusions.

Way forward

9. Subject to Members' views, we will submit the draft Notice to the FS for approval. If approved, the Notice will be published in the Gazette for tabling before the Legislative Council in the normal manner. The intention is that the Notice shall come into operation on the commencement of the SFO.

Securities and Futures Commission
Financial Services Bureau
30 May 2002

DRAFT

[cf: sections 104 and 393(1) of the Securities and Futures Ordinance and Part 1 of Schedule 1 thereto in respect of definition of "collective investment schemes"]

**SECURITIES AND FUTURES (COLLECTIVE
INVESTMENT SCHEMES) NOTICE**

(Made under section 393(1) of the Securities and Futures Ordinance
(5 of 2002))

1. Commencement

This Notice shall come into operation on the day on which Part XVI of the Securities and Futures Ordinance (5 of 2002) comes into operation.

2. Certain arrangements to be regarded as collective investment schemes

For the purposes of the Ordinance (other than the definition of "securities" in Part 1 of Schedule 1 to the Ordinance), the arrangements set out in Schedule 1 are to be regarded as collective investment schemes.

SCHEDULE 1

[s. 2]

Item	Description of arrangements
1.	Any arrangements for the purchase of gold coins or gold bullion that are made available in the course of business and

have the purpose or effect, or pretended purpose or effect,
of enabling the participating persons -

- (a) to acquire the ownership of the coins or
bullion for valuable consideration;
- (b) to defer taking possession of the coins or
bullion; and
- (c) to transfer or retransfer the ownership of the
coins or bullion to a person who is a party to,
or is referred to in, the arrangements.

Financial Secretary

2002

Explanatory Note

This Notice prescribes that, for the purposes of the Securities and Futures Ordinance (5 of 2002) (other than the definition of "securities" in Part 1 of Schedule 1 to the Ordinance), any arrangements of the description set out in

Schedule 1 to the Notice for the purchase of gold coins or bullion are to be regarded as collective investment schemes.



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

**A Consultation Paper on the Securities
and Futures (Gold Purchase) Notice**

《證券及期貨（購買黃金）公告》諮詢文件

Hong Kong
March 2002

香港
2002年3月

Consultation

This consultation document invites public comments on the draft Securities and Futures (Gold Purchase) Notice (“the draft Notice”) which the Financial Secretary proposes to make under section 393 of the Securities and Futures Ordinance (No. 5 of 2002) (“the Ordinance”) when it commences.

Introduction

1. Part IV of the Ordinance deals with the regulatory framework for the offering of investment products drawing on the provisions of the existing Protection of Investors Ordinance (Cap. 335) (“the PIO”). It imposes a general prohibition on the issue to the public of advertisements, invitations and documents relating to a wide range of investments. These investments mainly fall into a category described as “collective investment schemes”.

2. A breach of this general prohibition is an offence but the prohibition is subject to a number of exemptions that are mainly carried over from the current legislation. An important exception is the issue of advertisements, invitations and documents that the Securities and Futures Commission (“SFC”) has authorized to be issued.

3. Apart from authorizing the issue of advertisements, invitations and documents, section 104 of the Ordinance also empowers the SFC to authorize the collective investment schemes themselves. As in the case of authorizing the issue of advertisements, invitations and documents relating to investments, in authorizing collective investment schemes, the SFC may -

- (a) impose such conditions as it considers appropriate;
- (b) amend or cancel these conditions or impose new ones; and
- (c) in appropriate cases, withdraw any authorization granted.

4. The PIO imposes a general prohibition on the issue to the public of advertisements relating to “investment arrangements” but does not exhaustively define that term. Instead power is given to the Financial Secretary to enlarge or limit the type of arrangements to be regarded as “investment arrangements”. Similarly, the Securities and Futures Ordinance does not exhaustively define what is meant by “collective investment schemes”. There is a definition in Schedule 1 to the Ordinance but this envisages the scope of the term will be enlarged or limited from time to time by a Notice made under section 393. Under section 393, the Financial Secretary is given the power by Notice to prescribe arrangements that are to be regarded as “collective investment schemes” if they meet with certain specified criteria or are not to be so regarded. This provides the flexibility to address changing market conditions by quickly amending the Notice rather than the primary legislation.

5. There are controls built into the legislative system, whereby any Notice made by the Financial Secretary must be subject to negative vetting by the Legislative Council. The Financial Secretary first wishes to conduct a public consultation on the

terms of the draft Notice. The SFC therefore now releases the draft Notice (see Attachment 1) for public consultation.

6. The public may obtain copies of the consultation document and the attachments free of charge at the SFC's office and on the SFC's Internet website at <http://www.hksfc.org.hk>.

7. The SFC invites interested parties to submit written comments on the draft Notice or to comment on related matters that might have a significant impact upon the draft Notice **no later than 22nd April 2002**. Any person wishing to comment should provide details of any organization whose views they represent. In addition, persons suggesting alternative approaches are encouraged to submit proposed text to amend the draft Notice.

The draft Notice

8. The draft Notice prescribes for the purposes of the Ordinance that the following arrangements are to be regarded as "collective investment schemes". Any arrangements for the purchase of gold coin or gold bullion that are made available in the course of business and have the purpose or effect, or pretended purpose or effect, of enabling persons -

- (a) to obtain the ownership of the coin or bullion for valuable consideration;
- (b) to defer taking possession of the coin or bullion; and
- (c) to transfer or retransfer the ownership of the coin or bullion to a person who is a party to, or is referred to in, the arrangements.

9. The draft Notice has been prepared having regard to the matters contained in the existing Protection of Investors (Gold Purchase) Order made under section 2A of the PIO.

New Policy Initiatives

10. No new policy changes have been incorporated into the draft Notice which are intended simply to replicate the existing subsidiary legislation.

Other matters

11. Please note that the names of the commentators and the contents of their submissions may be published on the SFC web site and in other documents to be published by the SFC. In this connection, please read the Personal Information Collection Statement attached to this consultation paper.

12. You may not wish your name and/or submission to be published by the SFC. If this is the case, please state that you wish your name and/or submission to be withheld from publication when you make your submission.

13. Written comments may be sent -

By mail to: SFC (Gold Purchase Notice)
12/F, Edinburgh Tower
The Landmark
15 Queen's Road Central
Hong Kong

By fax to: (852) 2877 0318

By on-line submission at: <http://www.hksfc.org.hk>

By e-mail to: Gold_Purchase_Notice@hksfc.org.hk

14. The draft Notice should be read in conjunction with the Securities and Futures Ordinance itself.

Personal Information Collection Statement

1. This Personal Information Collection Statement (“PICS”) is made in accordance with the guidelines issued by the Privacy Commissioner for Personal Data. The PICS sets out the purposes for which your Personal Data¹ will be used following collection, what you are agreeing to with respect to the SFC’s use of your Personal Data and your rights under the PDPO.

Purpose of Collection

2. The Personal Data provided in your submission to the SFC in response to this Consultation Paper may be used by the SFC for one or more of the following purposes:
 - to administer the relevant Ordinances, Notice, regulations, codes and guidelines
 - made or promulgated pursuant to the powers vested in the SFC
 - for the purposes of performing the SFC’s statutory functions under the relevant Ordinances
 - for research and statistical purposes
 - other purposes permitted by law

Transfer of Personal Data

3. Personal Data may be disclosed by the SFC to the members of the public in Hong Kong and elsewhere, as part of the public consultation on the Consultation Paper. The names of persons who submit comments on the Consultation Paper together with the whole or part of their submission may be disclosed to members of the public. This will be done by publishing this information on the SFC web site and in documents to be published by the SFC throughout and at the conclusion of the consultation period.

Access to Data

4. You have the right to request access to and correction of your Personal Data in accordance with the provisions of the PDPO. Your right of access includes the right to obtain a copy of your Personal Data provided in your submission on the Consultation Paper. The SFC has the right to charge a reasonable fee for processing any data access request.

Enquiries

5. Any enquiries regarding the Personal Data provided in your submission on the Consultation Paper, or requests for access to Personal Data or correction of Personal Data, should be addressed in writing to:

The Data Privacy Officer
The Securities and Futures Commission
12/F, Edinburgh Tower, The Landmark
15 Queen’s Road Central, Hong Kong

A copy of the Privacy Policy Statement adopted by the SFC is available upon request.

¹ Personal Data means personal data as defined in the Personal Data (Privacy) Ordinance, Cap 486 (“PDPO”)

SECURITIES AND FUTURES (GOLD PURCHASE) NOTICE

(Made under section 393(1) of the Securities and Futures Ordinance (No. 5 of 2002))

1. Commencement

This Notice comes into operation on the day appointed for the commencement of Part XVI of the Securities and Futures Ordinance (No.5 of 2002).

2. Certain arrangements to be regarded as collective investment schemes

For the purposes of the Ordinance the following arrangements are to be regarded as collective investment schemes -

any arrangements for the purchase of gold coin or gold bullion that are made available in the course of business and have the purpose or effect, or pretended purpose or effect, of enabling the participating persons -

- (i) to obtain the ownership of the coin or bullion for valuable consideration;
- (ii) to defer taking possession of the coin or bullion; and
- (iii) to transfer or retransfer the ownership of the coin or bullion to a person who is a party to, or is referred to in, the arrangements.

Financial Secretary

2002

Explanatory Note

This Notice prescribes that, for the purposes of the Securities and Futures Ordinance (No. 5 of 2002), any arrangements of the sort described in section 2 of the Notice for the purchase of gold coin or bullion are to be regarded as collective investment schemes.



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

Consultation Conclusions on the draft Securities and Futures (Gold Purchase) Notice

《證券及期貨(購買黃金)公告》草擬本
諮詢總結

Hong Kong
May 2002

香港
2002年5月

INTRODUCTION

1. On 25 March 2002, the Securities and Futures Commission ("SFC") issued a consultation paper to solicit comments on the draft Securities and Futures (Gold Purchase) Notice (the "draft Notice").
2. In general, the SFC is empowered under Part IV of the Securities and Futures Ordinance (No. 5 of 2002) (the "Ordinance") to authorize a wide range of investments that are offered to the public in Hong Kong. These investments mainly fall into a category described as "collective investment schemes".
3. With a view to providing adequate flexibility to address changing market conditions, the term "collective investment scheme" is not exhaustively defined in the Ordinance. As set out in the definition of the term in Schedule 1 to the Ordinance, its scope can be enlarged or limited from time to time by a notice made under section 393.
4. Under section 393 of the Ordinance, the Financial Secretary is given the power by notice to prescribe arrangements that are to be regarded as "collective investment schemes" if they meet with certain specified criteria or are not to be so regarded. The draft Notice has been prepared having regard to the matters contained in the existing Protection of Investors (Gold Purchase) Order made under section 2A of the Protection Investor Ordinance (Cap. 335). It prescribes that those arrangements for the purchase of gold coins or gold bullion which have the characteristics as specified in section 393(1)(a)(i) are to be regarded as "collective investment schemes" for the purposes of Part IV of the Ordinance.
5. The consultation exercise ended on 22 April 2002.
6. It is advisable to read this document in conjunction with the consultation paper itself.

CONSULTATION EXERCISE

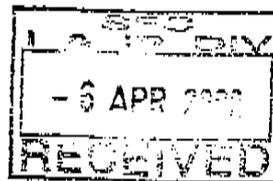
7. A press release regarding the consultation exercise was issued on 25 March 2002. The consultation paper and the draft Notice were posted on the website of the SFC and distributed to all registrants through FinNet.
8. Two submissions were received. One of them was from Legislative Councilor Hon. Henry Wu King-cheong, BBS, who sought to obtain more information on the application of the draft Notice. The other one was from the Hong Kong Securities Institute attaching the results of a survey to its members on the draft Notice. According to the Hong Kong Securities Institute, the two members who responded to the survey had no comment on the draft Notice.
9. The two submissions and our response to Hon. Henry Wu are set out in Attachment 1.

CONSULTATION CONCLUSIONS

10. After the completion of the consultation exercise, it is considered that no amendment to the substance of the draft Notice will be necessary. However, its name will be changed to "Securities and Futures (Collective Investment Schemes) Notice" to better reflect the scope of the provisions under section 393 of the Ordinance.



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



立法會 LEGISLATIVE COUNCIL

胡經昌議員 Hon. Henry K. C. Wu

Ref: LC-02/079

April 4, 2002

Mrs Alexa Lam
Executive Director
Securities and Futures Commission
12th Floor, Edinburgh Tower, The Landmark
15 Queen's Road Central
HONG KONG

By fax and post

Dear *ALEXA*,

Re: Securities and Futures Ordinance -
Consultation on the Securities and Futures (Gold Purchase) Notice

It is understood that the Financial Secretary is given the power under the Securities and Futures Ordinance by Notice to prescribe arrangements that are to be regarded as "collective investment schemes" of which the current consultation is intended *for the purchase of gold coin or gold bullion that are made available in the course of business of enabling persons in such activities as defined under section 8 of the Consultation.*

Since banks, bullion houses and retail jewelry shops have been carrying out dealing and trading of gold bullion and gold coins in their normal course of business, I would like your clarification on the following:

1. would banks (or authorized institutions) be subject to such Notice;
2. would members of the Chinese Gold and Silver Exchange Society (and other overseas bullion companies) be subject to such Notice;
3. would retail jewelry shops (both large and small) be subject to such Notice;
4. and if the answer of any of the above is affirmative, please clarify how they would NOT be committing an offence in their normal business and also the effect to their business; and
5. the number of cases that were dealt with in the past three years.

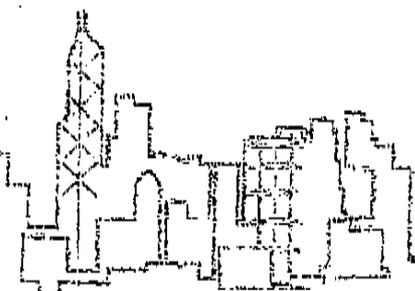
Should you require further elaboration, please do not hesitate to contact me. Thank you very much for your kind attention and assistance.

Yours sincerely,

Henry K. C. Wu

c.c. Mr. Stephen Ip, Secretary for Financial Services - FSB

繁榮中港增長 穩定時局 理財 理財



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

12th Floor, Edinburgh Tower, The Landmark, 15 Queen's Road Central, Hong Kong

香港中環皇后大道中十五號置地廣場公爵大廈十二樓

Alexa C Lam 張灼華
Executive Director 執行董事

BY FAX (3110 8809) & BY MAIL

9 April 2002

The Hon Henry KC Wu, BBS
Member of Legislative Council
Room 420, West Wing
Central Government Offices
Hong Kong

Dear Henry,

Securities and Futures Ordinance (No. 5 of 2002) (the "Ordinance")**- Consultation on the draft Securities and Futures (Gold Purchase) Notice (the "draft Notice")**

Thank you for your letter dated 4 April 2002 regarding the draft Notice.

As highlighted in paragraph 10 of the corresponding consultation paper issued by the Commission on 25 March 2002, the draft Notice is intended to replicate the existing Protection of Investors (Gold Purchase) Order (Cap. 335A) (the "**Order**") enacted in 1983.

Similar to its predecessor, the draft Notice is intended to include "paper gold schemes" offered by *any person* in the course of business as "collective investment schemes". In other words, the public offering of "paper gold schemes" would be subject to the general prohibition on financial promotion under section 103(1) of the Ordinance and thus require prior authorization from the Commission. To date, there are six "paper gold schemes" authorized by the Commission. Their names and promoters are listed on our website at www.hksfc.org.hk under the section on "Intermediaries, Licensing & Investment Products".

The features of "paper gold schemes" are specified in the draft Notice. In short, the purpose or effect of "paper gold schemes" is to enable participants:

- (a) to obtain the ownership of gold coins or gold bullion for valuable consideration;
- (b) to defer taking possession of the coins or bullion; and
- (c) to transfer or retransfer the ownership of the coins or bullion to a person who

Tel : (852) 2289-8128 Fax : (852) 2526-5304

E-mail : alam@hksfc.org.hkWebsite : <http://www.hksfc.org.hk>



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The Hon Henry KC Wu, BBS
Member of Legislative Council
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is a party to, or is referred to in, the schemes.

Our understanding is that the ordinary sale and purchase of gold coins or gold bullion would not normally involve the offering of "paper gold schemes". Nevertheless, we believe that it would be useful to set out briefly the reasons for introducing the Order in 1983 so as to further address the issues raised in your letter.

The Protection of Investors (Gold Purchase) Order

In 1980, Tse Lee Yuen Jewellery Limited, which operated a chain of jewellery shops, offered a "Gold Accumulation Plan" (the "**Plan**") to the public. In short, the Plan allowed participants to acquire gold in small units, which would be deposited with Tse Lee Yuen for safe custody. In return, Tse Lee Yuen gave an undertaking to deliver the gold on demand or to buy the gold back at prices it offered. As an acknowledgement, participants would be given a receipt or deposit book in which transactions were recorded. The problem was that Tse Lee Yuen had not been holding adequate stock of physical gold against its liabilities under the Plan. Due to cash flow problems, Tse Lee Yuen closed its shops without prior notice and went out of business in 1982.

As originally conceived, the Plan did not fall within the definition of "investment arrangements" under the original Protection of Investors Ordinance (Cap. 335) ("**PIO**"). The service offered under the Plan involved transactions in physical gold only. It did not provide for a distribution of profits or income to participants -- an element required under the statutory definition.

It was, however, considered that the Plan, while outside the ambit of the original PIO in the strict letter of the law, was nonetheless within its spirit. It was clear that the public exposure to the Plan would not have been so extensive but for the highly aggressive advertising campaign carried out by Tse Lee Yuen.

It was, therefore, proposed in 1983 that the PIO be amended to enable the then Governor in Council to specify certain arrangements having some specific features as "investment arrangements". The public offering of such arrangements would, as a result, be subject to the general prohibition on financial promotion under section 4(1) of the PIO. Following the amendment, the Order was introduced.

Since the introduction of the Order in 1983, "paper gold schemes" offered to the public in Hong Kong would need to be authorized by the Commission. For your information, the Commission has not prosecuted any person for offering unauthorized "paper gold schemes"



*9 April 2002
The Hon Henry KC Wu, BBS
Member of Legislative Council
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in the past three years.

The Draft Securities and Futures (Gold Purchase) Notice

As mentioned in the consultation paper on the draft Notice, section 393 of the Ordinance empowers the Financial Secretary to prescribe any arrangement as a "collective investment scheme" provided that the arrangement satisfies certain specified criteria. The intention of the draft Notice is to set out those criteria in relation to "paper gold schemes" as specified in the Order.

We trust the above clarifies. If not, please feel free to contact me at 2840-9337 or Harold Ko, Senior Manager of Investment Products Department at 2840-9269.

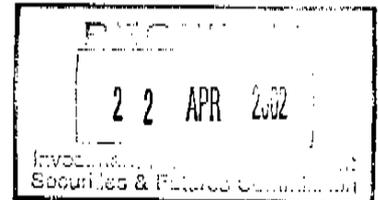
Yours sincerely,

Alexa C Lam
Executive Director
Intermediaries and Investment Products

c.c. Mr Stephen Ip, Secretary for Financial Services, Financial Services Bureau

22 April 2002

Securities and Futures Commission
12/F Edinburgh Tower
The Landmark
15 Queen's Road Central
Hong Kong



Dear Sir/ Madam

Securities and Futures (Gold Purchase) Notice

Following the release of the Public Consultation on Securities and Futures (Gold Purchase) Notice, the Hong Kong Securities Institute (HKSI) has sent a questionnaire to our corporate members to seek their views on the document. We are pleased to enclose, for your information, the results of this survey.

As a professional organization our aim in consulting our members was firstly to draw their attention to the consultation paper, and secondly to act as a forum for them to present their views.

A total of 180 questionnaires were sent out to our corporate members on 17 April, 2002 and at the close of the consultation period we had received 2 responses. Enclosed for your information is a copy of the results of the questionnaire we sent to our corporate members. Please do not hesitate to contact Ms Donna Canestra on 3120 6158 or Ms Daisy Lo on 3120 6159 if you have any queries about our survey.

Yours faithfully

Sam KH Lee
Acting Chief Executive

**QUESTIONNAIRE ON CONSULTATION PAPER ON
SECURITIES AND FUTURES (GOLD PURCHASE) NOTICE
April 2002**

The following information is presented using the same paragraph numbering in the draft Notice. Please indicate your view as to whether you agree with the SFC recommendations by using the following scaling system:

- 1 Agree
- 2 No comment
- 3 Disagree

You may put forward other suggestions using the space provided in each question or on a separate sheet of paper.

Paragraph	Description	Answer
Securities and Futures (Gold Purchase) Notice		
2	<p><i>Certain arrangements to be regarded as collective investment schemes</i></p> <p><i>For the purposes of the Ordinance the following arrangements are to be regarded as collective investment schemes -</i></p> <p><i>any arrangements for the purchase of gold coin or gold bullion that are made available in the course of business and have the purpose or effect, or pretended purpose or effect, of enabling the participating persons -</i></p> <p>(i) <i>to obtain the ownership of the coin or bullion for valuable consideration;</i></p> <p>(ii) <i>to defer taking possession of the coin or bullion; and</i></p> <p>(iii) <i>to transfer or retransfer the ownership of the coin or bullion to a person who is a party to, or is referred to in, the arrangements.</i></p>	<p>1 - 0%</p> <p>2 - 100%</p> <p>3 - 0%</p> <p>1 - 0%</p> <p>2 - 100%</p> <p>3 - 0%</p> <p>1 - 0%</p> <p>2 - 100%</p> <p>3 - 0%</p>