

For discussion
on 6 June 2002

Paper No.10/02

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

Securities and Futures (Professional Investor) Rules

This paper sets out the proposals of the Securities and Futures Commission (SFC) to include in the definition of “professional investor” four additional classes of persons and the application of this extended part of the definition.

Proposal

2. The SFC proposes to make the Securities and Futures (Professional Investor) Rules, now in draft at **Annex 1**, under section 397(1) of the Securities and Futures Ordinance (the “SFO”) (5 of 2002).

Power to make the Rules

3. The term “professional investor” is defined in Part 1 of Schedule 1 to the SFO to include various classes of persons, such as intermediaries, authorized financial institutions, insurance companies and recognized exchange companies. Paragraph (j) of the definition provides that other persons prescribed by rules under section 397 of the SFO will also qualify as “professional investors”, either generally or for the purposes of any provision of the SFO. Section 397(1)(o) empowers the SFC to make rules to “prescribe, specify or provide for any matter which this Ordinance provides is, or may be, prescribed, specified or provided for by rules made under this section”.

4. The draft Rules prescribe four additional classes of persons as “professional investor” for application throughout the SFO except Schedule 5. The SFC is of the view that the draft Rules would be *intra vires* if made as drafted.

Major features of the draft Rules

5. The draft Rules prescribe four additional classes of persons as “professional investor”. They are drawn by reference to the ability to protect themselves in their investment activities. The implication of falling within any of the four additional classes is that certain investor protection measures (prescribed in sections 103, 174 and 175¹ of the SFO and those provisions in the subsidiary legislation to be made that refer to “professional investor”) are to be dispensed with or modified when the relevant activities are targeted at him. The four additional classes of persons are –

- (a) any trust corporation having been entrusted under the trust or trusts of which it acts as trustee with assets of at least HK\$40 million or its equivalent in any foreign currency;
- (b) any individual (either alone or with his spouse or children on a joint account) having a portfolio (defined to mean a portfolio comprising securities, certificates of deposit issued by an authorized financial institution or the overseas equivalent, and/or money held by a custodian for him) of at least HK\$8 million or its equivalent in any foreign currency;
- (c) any corporation or partnership having either a portfolio of at least HK\$8 million or total assets of at least HK\$40 million or its equivalent in any foreign currency; and
- (d) any corporation whose sole business is to hold investments and is wholly owned by an individual who (either alone or with his spouse or children on a joint account) falls within the description in paragraph (b) above.

¹ Section 103 prohibits the issuance of unauthorized advertisements, invitations or documents relating to investments.

Section 174 essentially prohibits cold calling.

Section 175 generally prohibits the offer of securities not accompanied by an offering document containing relevant information.

6. “Professional investors” are generally considered more capable of protecting their interests. By disapplying or modifying certain investor protection measures where the relevant activities are targeted at them, a sufficient degree of investor protection would still be maintained while reducing the compliance cost to the market. Accordingly, the SFC considers that the draft Rules would be consistent with its objectives in sections 4(a) and (c) of the SFO –

- (a) “to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry”; and
- (b) “to provide protection for members of the public investing in or holding financial products”.

Public consultation

7. The SFC released a consultation document and an exposure draft of the Rules on 1 February 2002 for comment by the public. A total of 10 submissions were received. The SFC has considered all the comments received and revised the draft Rules as appropriate. We attach the following documents for Members’ reference –

- (a) Consultation Document on the draft Rules, at **Annex 2**, which sets out the underlying policy, together with the exposure draft of the Rules. Members would appreciate that certain proposals in the Consultation Document and the exposure draft of the Rules may have become outdated as the proposals and draft Rules were refined in the light of the comments received during the consultation period. The draft Rules as revised are at Annex 1 for Members’ consideration; and
- (b) Consultation Conclusions and Summary of Comments and SFC’s Responses, at **Annex 3**, which set out the conclusions from the consultation and the SFC’s responses to the comments received in the form of a table. A list of respondents is attached to the Consultation Conclusions.

Way forward

8. Subject to Members' views, the SFC will proceed to make the Rules under the authority vested in it and publish the Rules so made in the Gazette for tabling before the Legislative Council in the normal manner. The intention is that the Rules shall come into operation on the commencement of the SFO.

Securities and Futures Commission
Financial Services Bureau
30 May 2002

DRAFT

[cf : sections 103, 174, 175, 397(1)(o) of the Securities and Futures Ordinance and Part 1 of Schedule 1 thereto in respect of the definition of "professional investor"]

SECURITIES AND FUTURES (PROFESSIONAL INVESTOR) RULES

(Made by the Securities and Futures Commission under section 397(1) of the Securities and Futures Ordinance (5 of 2002))

1. Commencement

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

2. Interpretation

In these Rules, unless the context otherwise requires -
"associate" () in relation to an individual, means the spouse or child of the individual;

"custodian" () means -

- (a) a corporation the principal business of which is to act as a custodian of securities or other property for another person, whether on trust or by contract; or
- (b) any of the following persons -
 - (i) an authorized financial institution;

(ii) a bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong;

(iii) a licensed corporation;

(iv) a person carrying on the business of the provision of investment services and regulated under the law of any place outside Hong Kong,

whose business includes acting as a custodian of securities or other property for another person, whether on trust or by contract;

"custodian statement" () means a statement of account issued by a custodian;

"portfolio" () means a portfolio comprising any of the following -

(a) securities;

(b) a certificate of deposit issued by -

(i) an authorized financial institution; or

(ii) a bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong;

(c) in relation to an individual, corporation or partnership, money held by a custodian for the individual, corporation or partnership;

"relevant date" () -

- (a) in the case of an advertisement, invitation or document described in section 103(3)(k) of the Ordinance, means the date on which the advertisement, invitation or document is issued, or possessed for the purposes of issue;
- (b) in the case of a call described in section 174(2)(a) of the Ordinance, means the date on which the call is made;
- (c) in the case of an offer described in section 175(5)(d) of the Ordinance, means the date on which the offer is made; or
- (d) in any other case which, by virtue of any rules made under the Ordinance, requires compliance with an obligation, means the date by which the obligation is required to be complied with;

"trust corporation" () means -

- (a) any trust company registered under Part VIII of the Trustee Ordinance (Cap. 29); or
- (b) any other corporation which -
 - (i) carries on a business which is of a nature similar to that of a trust company referred to in paragraph (a); and
 - (ii) is regulated under the law of any place outside Hong Kong.

3. Persons prescribed as professional investors

For the purposes of paragraph (j) of the definition of "professional investor" in Part 1 of Schedule 1 to the Ordinance, the following persons are prescribed as within the meaning of that definition for the purposes of any provision of the Ordinance other than Schedule 5 -

(a) any trust corporation having been entrusted under the trust or trusts of which it acts as a trustee with total assets of not less than \$40 million or its equivalent in any foreign currency -

(i) as stated in the most recent audited financial statement prepared -

(A) in respect of the trust corporation;
and

(B) 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 -

(A) in respect of the trust or any of the trusts; and

(B) within 16 months before the relevant date; or

(iii) as ascertained by referring to one or more custodian statements issued to the trust corporation -

(A) in respect of the trust or any of the trusts; and

(B) within 12 months before the relevant date;

(b) any individual, either alone or with any of his associates on a joint account, having a portfolio of not less than \$8 million or its equivalent in any foreign currency as -

(i) stated in a certificate issued by an auditor or a professional accountant of the individual within 12 months before the relevant date; or

(ii) 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;

(c) any corporation or partnership having -

(i) a portfolio of not less than \$8 million or its equivalent in any foreign currency; or

(ii) total assets of not less than \$40 million or its equivalent in any foreign currency,

as ascertained by referring to -

- (A) the most recent audited financial statement prepared -
 - (I) in respect of the corporation or partnership (as the case may be); and
 - (II) within 16 months before the relevant date; or
- (B) one or more custodian statements issued to the corporation or partnership (as the case may be) within 12 months before the relevant date; and
- (d) any corporation the sole business of which is to hold investments and which is wholly owned by an individual who, either alone or with any of his associates on a joint account, falls within the description in paragraph (b).

Chairman,
Securities and Futures Commission

[] 2002

Explanatory Note

These Rules are made by the Securities and Futures Commission under section 397(1) of the Securities and Futures Ordinance (5 of 2002) for the purposes of paragraph (j) of the definition of "professional investor" in Part 1 of Schedule 1 to the Ordinance. Persons prescribed as professional investors by these Rules are exempted in relation to certain prohibitions in the Ordinance. However, such persons are not regarded as professional investors for the purposes of Schedule 5 to the Ordinance.

Consultation Document
The Draft Securities and Futures (Professional Investor) Rules
(the “draft Rules”)

Introduction

1. The Securities and Futures Bill (the “Bill”) empowers the SFC to make rules under clause 384 to prescribe requirements in subsidiary legislation. The basis for this approach is that, consistent with modern securities legislation such as the UK Financial Services and Markets Act, effective regulation depends upon the regulator having the flexibility to quickly address changing market practices and global conditions by amending the rules rather than the primary legislation.
2. Besides being subjected to negative vetting by the Legislative Council, the SFC now releases the draft Rules for public consultation.
3. In order to ensure that our proposed rules appropriately balance investor protection and general market needs, the SFC has consulted representatives from the securities and futures industry before formulating the draft Rules. We wish to acknowledge and thank them for their invaluable input.
4. The SFC has used the FinNet communication network to send copies of this consultation document to all registered firms. Copies of the consultation document are available free of charge at the SFC’s office and may also be found on the SFC’s Internet website at <http://www.hksfc.org.hk>.
5. The public is invited to submit comments before close of business on **28 February 2002**. They may be sent to:

By mail: SFC Professional Investor Rules
 12/F, Edinburgh Tower
 The Landmark
 15 Queen’s Road, Central
 Hong Kong

By fax: 2293-5710

By way of on-line: <http://www.hksfc.org.hk>

By e-mail: professional_investor_rules@hksfc.org.hk

Please note that the names of the commentators and the contents of their submissions may be published on the SFC's website and in other documents to be published by the SFC. In this connection, please read the Personal Information Collection Statement at Appendix 1.

If you do not wish your name and/or submission to be published by the SFC, please state that you wish your name and/or submission to be withheld from publication when you make your submission.

Background

6. A definition of "professional investor"¹ was introduced in the Bill, published in November 2000. The definition identifies various classes of persons as professional investors, such as intermediaries, authorized financial institutions, insurance companies and recognized exchange companies, etc. The idea is that certain investor protection measures in the Bill imposed upon intermediaries can be dispensed with in the case of "professional investors".
7. To provide flexibility, the definition also empowers the Commission to make rules adding other categories or classes of persons to the definition of "professional investor". These rules may either specify these additional categories or classes of persons as professional investors for the purposes of the entire Ordinance, or only for the purposes of particular provisions in the Ordinance.

¹ "professional investor" is defined in Part 1 of Schedule 1 to the Blue Bill to mean –

- (a) any recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company;
- (b) any licensed or exempt person, or any other person carrying on the business of the provision of investment services and regulated under the law of any place outside Hong Kong;
- (c) any authorized financial institution, or any bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong;
- (d) any insurer authorized under the Insurance Companies Ordinance (Cap. 41), or any other person carrying on insurance business and regulated under the law of any place outside Hong Kong;
- (e) any trust company registered under Part VIII of the Trust Ordinance (Cap. 29);
- (f) any collective investment scheme, or any person by whom a collective investment scheme is operated;
- (g) any pension or provident fund, or any person by whom a pension or provident fund is managed;
- (h) any government (other than a municipal government authority); or
- (i) any person of a class prescribed by rules made under section 384 of this Ordinance for the purposes of this paragraph.

8. Since the publication of the Blue Bill, submissions made by the industry proposed that the Commission should use its rule-making power to add further classes of persons as “professional investor” under appropriate situations.
9. Working on the basis of these submissions, and with the benefit of further dialogues with the market, the Commission now proposes a set of draft rules to be issued under section 384 of the Bill to add three additional categories or classes of persons as “professional investor” for purposes of three provisions in the Bill. This consultation paper is issued to seek the market’s view on these proposals and the draft Rules.

Highlights

10. The proposed draft Rules will expand the definition of “professional investor” in the Bill to include also the following categories or classes of persons:
 - trustee companies that have been entrusted with at least HK\$40 million in assets;
 - high net worth individuals, with a portfolio of at least HK\$16 million; and
 - businesses with either a portfolio of at least HK\$16 million or not less than HK\$40 million in assets.

The reasoning is that these persons should be sufficiently sophisticated that investor protection requirements imposed upon intermediaries under these three provisions could be disapplied. Releasing intermediaries from compliance with such requirements when dealing with such persons will facilitate the provision of investment services to their clients.

11. The proposed expanded definition of "professional investor" however will only apply to clauses 102, 108 (which, in the latest version of the Bill, has been moved to Part VII as clause 169A) and 169 of the Bill. The rationale for this partial relaxation is that while these investors should be sufficiently sophisticated to merit a relaxation of the provisions specified, they may not be so experienced that they should be regarded as "professional investors" for all purposes under the Bill.
12. In essence, clauses 102, 108 and 169² prohibit intermediaries from engaging in certain conduct, except (among other exemptions) in relation to professional investors. Briefly, clause 102 prohibits the issuance of unauthorized advertisements, invitations or documents relating to investments. Section 108

² Section 102 is derived from section 4 of the Protection of Investors Ordinance (Cap. 335).
Section 108 is derived from section 72 of the Securities Ordinance (Cap. 333).
Section 169 is derived from sections 73 and 74 of the Securities Ordinance, section 60A of the Commodities Trading Ordinance (Cap. 250) and section 39 of the Leveraged Foreign Exchange Trading Ordinance (Cap. 451).

generally prohibits the offer of securities not accompanied by an offering document containing relevant information. Section 169 essentially prohibits cold calling. For easy reference, these sections are set out in Appendix 2.

13. The effect of the draft Rules will be that intermediaries will be able to conduct the activities prohibited under clauses 102, 108 and 169 in relation to the three categories of persons set out in the draft Rules (see paragraph 10, above), in addition to other “professional investors” as defined under the Bill.
14. It should be noted, in conjunction, that the SFC has also proposed that the definition of “professional investor” in the Bill be amended so as to include, among others, holding companies and wholly owned subsidiaries of regulated intermediaries, authorized financial institutions and banks for the purposes of sections 102, 108 and 169. A marked-up version of the proposed amended definition is in Appendix 3.
15. We have prepared the draft Rules with the aim of facilitating the provision of investment services by intermediaries while maintaining a sufficient degree of investor protection and preserving market integrity. The SFC believes that the classes of professional investors so prescribed should be in a position to protect their own interests in the contexts of sections 102, 108 and 169 of the Bill, and have the resources to do so.
16. The above approach is also broadly in line with that of other major jurisdictions. In the United Kingdom, the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 provides (under certain conditions) an exemption from financial promotion restrictions in respect of relevant communications made to a “certified high net worth individual”³. In the United States, pursuant to Regulation D (promulgated under the Securities Act of 1933), certain exemptions from rules governing the limited offer and sale of

³ Under the Order, “certified high net worth individual” means any individual –

- (a) who has a current certificate of high net worth; and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in prescribed terms.

For the above purposes, a certificate of high net worth –

- (a) must be in writing or other legible form;
- (b) is current if it is signed and dated within the period of twelve months ending with the day on which the communication is made;
- (c) must state that in the opinion of the person signing the certificate, the person to whom the certificate relates either –
 - (i) had, during the financial year immediately preceding the date on which the certificate is signed, an annual income of not less than GB£100,000; or
 - (ii) held, throughout the financial year immediately preceding the date on which the certificate is signed, net assets to the value of not less than GB£250,000;
- (d) must be signed by the recipient’s accountant or by the recipient’s employer.

securities without registration are also available in respect of communications to sell securities made to “accredited investors”⁴

The Draft Rules

17. In the draft Rules, the SFC proposes to prescribe simple tests for ascertaining whether a person meets the assets or portfolio values requirement so as to qualify as a professional investor for the purposes of clauses 102, 108 and 169. These are -
- (a) any trustee company having been entrusted with total assets of not less than HK\$40 million (or equivalent) as stated in its audited financial statements for the financial year ended within the previous 16 months;
 - (b) any individual having a portfolio of not less than HK\$16 million (or equivalent) in securities and/or currency deposits as certified by his auditor or as stated in the current statement of account issued by his custodian; and
 - (c) any corporation or partnership having a portfolio of not less than HK\$16 million (or equivalent) in securities and/or currency deposits, or total assets of not less than HK\$40 million (or equivalent) as stated in its audited financial statements for the financial year ended within the previous 16 months or in the current statement of account issued by its custodian.
18. These tests are designed to make the evaluation of whether the person qualifies as a member of the class specified simple and straightforward. The reference to audited financial statements for the financial year ended within the previous 16 months is intended to refer to the previous year's audited financial statements whilst allowing a period of time for those statements to be produced during the current year.

⁴ “Accredited investors” include, amongst others, –

- (a) a corporation, not formed for the purpose of acquiring the securities offered, with total assets in excess of US\$5 million;
- (b) a natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds US\$1 million;
- (c) a natural person who had an individual income in excess of US\$200,000 in each of the two most recent years or joint income with that person's spouse in excess of US\$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;
- (d) a trust, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of US\$5 million whose purchase is directed by a sophisticated person; and
- (e) an entity in which all of the equity owners are accredited investors.

19. It will be noted that the individual referred to in paragraph (b), above, is defined in section 2 of the draft Rules to include the person's spouse and their children. The threshold requirement can be met where the individual alone has a portfolio of not less than HK\$16 million, or, where the spouse and/or children are included, the portfolio is held in their joint names. It is considered that in the absence of joint portfolios, individuals should be considered separately. These thresholds of assets or portfolio values are considered more user-friendly to intermediaries and easier to ascertain than, for example, a combination of net worth and experience as an investor.
20. A copy of the draft Rules, to be made pursuant to section 384 of the Bill, is attached as Appendix 4.

Consultation

21. The SFC welcomes any comment industry practitioners and members of the investing public may have on the draft Rules. In particular, the SFC would appreciate discussion as to whether:
 - the proposed three classes of persons are suitable to be regarded as professional investors;
 - the proposed monetary thresholds for the three classes of persons are appropriate;
 - the proposed means of ascertaining the monetary thresholds are practicable; and
 - any further classes of persons should be so prescribed.

– End –

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 Data⁵ 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 Personal Data (Privacy) Ordinance (“PDPO”).

Purpose of Collection

2. The Personal Data provided in your submission to the SFC in response to the Consultation Document on the Draft Securities and Futures (Professional Investor) Rules (“the Consultation Document”) may be used by the SFC for one or more of the following purposes:
 - to administer the relevant Ordinances, rules, 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 Document. The names of persons who submit comments on the Consultation Document 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

⁵ Personal Data means personal data as defined in the Personal Data (Privacy) Ordinance, Cap 486 (“PDPO”)

on the Consultation Document. 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 Document, 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.

Section 102 of the Bill

22. Section 102(1), subject to certain exceptions, provides that a person commits an offence if he issues, or has in his possession for the purposes of issue, an advertisement, invitation or document which to his knowledge is or contains an invitation to the public –
- (a) to enter into or to offer to enter into –
 - (i) an agreement to acquire, dispose of, subscribe for or underwrite securities; or
 - (ii) a regulated investment agreement; or
 - (b) to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme,
- unless the issue is authorized by the SFC.
23. Various exceptions to the general prohibition are provided under subsections (2), (3) and (5) to (9) of section 102. The more significant exceptions include–
- (a) the issue of such materials by licensed or exempt intermediaries in relation to their corresponding regulated activities except in respect of unauthorized collective investment schemes; and
 - (b) the issue of such materials made in respect of securities or interests in any collective investment scheme or regulated investment agreement, which are or are intended to be disposed of only to professional investors.

Section 108 (169A) of the Bill

24. Section 108(1) of the Bill prohibits, subject to certain exceptions, a licensed or exempt securities dealer or adviser from communicating an offer to acquire or dispose of any securities of, or issued by, a body unless (amongst others) the offer is contained, or if communicated verbally, reduced to writing, in a document in an official language and contains the required information. Subsection (5) states that the section does not apply to, amongst others, an offer made –
- (a) to a professional investor;
 - (b) to a solicitor or a professional accountant acting in his professional capacity; or

- (c) by an exchange participant in the ordinary course of trading on a recognized stock market.

Section 169 of the Bill

25. Section 169(1) of the Bill provides, subject to certain exceptions, that a licensed or exempt person shall not, as principal or agent, during or as a consequence of an unsolicited call made by him –

- (a) make or offer to make with another person –
 - (i) an agreement for that other person to sell or purchase, or with a view to having that other person sell or purchase, any securities, futures contract or leveraged foreign exchange contract;
 - (ii) an agreement for him to provide, or with a view to having him provide, to that other person securities margin financing; or
 - (iii) an agreement the purpose or effect, or pretended purpose or effect, of which is to provide, whether conditionally or unconditionally, to that other person a profit, income or other returns –
 - (A) from any securities, futures contract or leveraged foreign exchange contract; or
 - (B) calculated by reference to changes in the value of any securities, futures contract or leveraged foreign exchange contract; or
- (b) induce or attempt to induce another person to enter into an agreement referred to in paragraph (a),

whether or not in making the unsolicited call he does any other act or thing.

26. Similarly, various exceptions to the general prohibition are provided under subsections (2) and (3) of section 169. Subsection (2) provides, amongst others, that an intermediary shall not be regarded as contravening subsection (1) by reason only that he -

- (a) makes a call on another person who is a solicitor or professional accountant acting in his professional capacity, or a licensed person, exempt person, money lender, existing client, or professional investor; and

- (b) whether as principal or agent, makes or offers to make with that other person an agreement referred to in subsection (1)(a), or induces or attempts to induce that other person to enter into such an agreement.

"professional investor" () means -

- (a) any recognized exchange company, recognized clearing house, recognized exchange controller or recognized investor compensation company, or any person authorized to provide automated trading services under section 95(2) of this Ordinance;
- (b) any intermediary ~~licensed or exempt person~~, or any other person carrying on the business of the provision of investment services and regulated under the law of any place outside Hong Kong;
- (c) any authorized financial institution, or any bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong;
- (d) any insurer authorized under the Insurance Companies Ordinance (Cap. 41), or any other person carrying on insurance business and regulated under the law of any place outside Hong Kong;

~~(e) any trust company registered under Part VIII of the Trustee Ordinance (Cap. 29);~~

~~(f) any collective investment scheme, or any person by whom a collective investment scheme is operated;~~

any scheme which -

(i) is a collective investment scheme authorized under section 103 of this Ordinance; or

(ii) 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, or any person by whom any such scheme is operated;

~~(g) any pension or provident fund, or any person by whom a pension or provident fund is managed;~~

any registered scheme as defined in section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485), or its constituent fund as defined in section 2 of the Mandatory Provident Fund Schemes

(General) Regulation (Cap. 485 sub. Leg.),
or any 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;

(ga) any scheme which -

(i) is a registered scheme as defined in
section 2(1) of the Occupational
Retirement Schemes Ordinance (Cap.
426); or

(ii) is an offshore scheme as defined in
section 2(1) of that Ordinance and,
if it is regulated under the law of
the place in which it is domiciled,
is permitted to be operated under the
law of such place,

or any person who, in relation to any such
scheme, is an administrator as defined in
section 2(1) of that Ordinance;

(h) any government (other than a municipal
government authority), any institution

which performs the functions of a central bank, or any multilateral agency; or

(ha) except for the purposes of Schedule 6 to this Ordinance, any corporation which is -

(i) a wholly owned subsidiary of -

(A) an intermediary, or any other person carrying on the business of the provision of investment services and regulated under the law of any place outside Hong Kong; or

(B) an authorized financial institution, or any bank which is not an authorized 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 any other person carrying on

the business of the provision of investment services and regulated under the law of any place outside Hong Kong; or

(B) an authorized financial institution, or any bank which is not an authorized 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 sub-subparagraph (ii); or

(i) any person of a class which is prescribed by rules made under section 384 of this Ordinance for the purposes of this paragraph as within the meaning of this definition for the purposes of the provisions of this Ordinance, or to the extent that it is prescribed by rules so made as within the meaning of this

definition for the purposes of any
provision of this Ordinance;

SECURITIES AND FUTURES (PROFESSIONAL INVESTOR) RULES

(Made by the Securities and Futures Commission under
section 384(1) of the Securities and Futures
Ordinance (of 2002))

1. Commencement

These Rules shall come into operation on the day
appointed for the commencement of Part XVI of the
Securities and Futures Ordinance (of 2002).

2. Interpretation

In these Rules, unless the context otherwise requires -

"custodian" () means a corporation the principal
business of which is to act as a custodian of securities or
other property for another person, whether on trust or by
contract;

"individual" () means a natural person, and
includes the person's spouse and children where a
portfolio is held jointly with them;

"partnership" () means the relation which subsists between persons carrying on a business in common with a view to profit;

"portfolio" () means a portfolio comprising -

- (a) securities; or
- (b) currency deposits.

3. Persons that are professional investors

(1) Subject to subsection (2), for the purposes of paragraph (i) of the definition of "professional investor" in Part 1 of Schedule 1 to the Ordinance, the following persons are professional investors -

- (a) any trustee company having been entrusted with total assets of not less than HK\$40 million, or its equivalent in any other currency, as stated in its most recent audited financial statements provided they are not more than 16 months old;

(b) any individual having a portfolio of not less than HK\$16 million, or its equivalent in any other currency, as certified by his auditor or as stated in the current statement of account issued by his custodian; and

(c) any corporation or partnership having -

(i) a portfolio of not less than HK\$16 million, or its equivalent in any other currency; or

(ii) total assets of not less than HK\$40 million, or its equivalent in any other currency,

as stated in its most recent audited financial statements provided they are not more than 16 months old or in the current statement of account issued by its custodian.

(2) These Rules do not apply for the purposes of Schedule 6 to the Ordinance.

Chairman,
Securities and Futures Commission

February 2002

Explanatory Note

These Rules are made by the Securities and Futures Commission under section 384(1) of the Securities and Futures Ordinance (of 2002) for the purposes of paragraph (i) of the definition of "professional investor" in Part 1 of Schedule 1 to the Ordinance. This means that such persons attract exemptions from certain prohibitions as set out in sections 102(3)(j) (issuing advertisements, invitations or documents relating to certain investments), 169(2)(a) (unsolicited calls) and 169A(5)(d)(i) (communication of offers to acquire or dispose of securities) of the Ordinance. However, such persons are not regarded as professional investors for the purposes of the definitions of regulated activities in Part 2 of Schedule 6 to the Ordinance.



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

Annex 3

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

Introduction

1. On 1 February 2002, the Securities and Futures Commission (“SFC”) published a Consultation Document on the Draft Securities and Futures (Professional Investor) Rules (“Consultation Document”). The consultation period ended on 28 February 2002.
2. The Consultation Document contained proposals to expand the definition of “professional investor” in the Securities and Futures Ordinance to include also the following classes of persons:
 - trustee companies having been entrusted with total assets of not less than HK\$40 million;
 - high net worth individuals having a portfolio of not less than HK\$16 million; and
 - corporations or partnerships having either a portfolio of not less than HK\$16 million or total assets of not less than HK\$40 million.
3. The purpose of this document is to provide interested persons with an analysis of the main comments raised during the consultation exercise and the rationale for the SFC’s conclusions. *This document should be read in conjunction with the Consultation Document.*
4. A total of 10 submissions were received from industry practitioners, legal professionals and other interested parties. All the submissions with the exception of two, where consent for publication had not been obtained, have been published on the SFC’s website.

Summary of consultation comments and the SFC’s responses

5. The respondents generally welcomed the proposed rules. Comments varied considerably in range and depth, with some focusing on broad principles and others on points of detail and clarification. A few also suggested the setting up of other criteria or qualifications for classification as professional investor.
6. In response to the feedback, the SFC has decided, among others, to take the following approach:
 - reducing the portfolio threshold for individuals, corporations or partnerships (to become professional investors) to HK\$8 million, in line with that in the Code of Conduct;

- including as professional investors, corporations which act solely as investment holding companies and are wholly-owned by individuals who are professional investors in their own right;
 - clarifying that firms can rely on several statements issued by different custodians in aggregating their clients' portfolio values;
 - extending the definition of custodians to also include authorized institutions, licensed corporations and their overseas equivalents provided their businesses involve holding client assets; and
 - aligning the Code of Conduct definition for professional investors with that of the legislation.
7. A summary of the main consultation comments on the draft Rules and the SFC's responses are set out in Annex 1.

Final Note

8. The SFC would like to thank the industry participants and other interested persons who have made valuable suggestions and comments in response to the Consultation Document.

**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.

**Annex 1 to
Consultation Conclusions**

	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>

**Annex 1 to
Consultation Conclusions**

	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>

**Annex 1 to
Consultation Conclusions**

	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>

**Annex 1 to
Consultation Conclusions**

	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>

**Annex 1 to
Consultation Conclusions**

	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>

**Annex 1 to
Consultation Conclusions**

	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>

**Annex 1 to
Consultation Conclusions**

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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**Annex 1 to
Consultation Conclusions**

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	-	<p>General comments on the definition of "professional investor" in Schedule 1 to the Bill</p>	<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.

**Annex 1 to
Consultation Conclusions**

	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>

**Annex 1 to
Consultation Conclusions**

	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>

**Annex 1 to
Consultation Conclusions**

	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

**Annex 1 to
Consultation Conclusions**

Clause/Schedule in the Securities and Futures Bill	Section/Schedule in the Securities and Futures Ordinance
Definition of “professional investor” referred to in the summary Para. (f) Para. (g) Para. (ga)	 Para. (e) Para. (f) Para. (g)