

**For discussion
on 20 September 2002**

Paper No. 30/02

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

**Securities and Futures Ordinance
(Amendment of Schedule 8) Order 2002**

This paper sets out the proposals of the Securities and Futures Commission (SFC) to make certain decisions of the SFC or an investor compensation company performing SFC functions made under the subsidiary legislation of the Securities and Futures Ordinance (SFO) (Cap. 571) reviewable by the Securities and Futures Appeals Tribunal (SFAT) established under Part XI of the SFO.

Proposal

2. The SFC proposes to recommend the Chief Executive in Council to make the Securities and Futures (Amendment of Schedule 8) Order 2002 (the draft Order), now in draft at **Annex 1**, under section 234 of the SFO.

Power to make the Order

3. Under section 217 of the SFO, a person aggrieved by a “specified decision” may apply to the SFAT for a review of the decision. The SFAT is an independent full-time body chaired by a Judge, which may review, on application, the merits of the specified decision afresh. “Specified decisions” (as defined in section 217) are set out in Part 2 of Schedule 8 to the SFO, in a number of divisions. Division 1 sets out the list of “specified decisions” which the SFC may make under the primary legislation. Division 3 is intended to set out the list of specified decisions which the SFC, or a recognized investor compensation company performing an SFC function transferred to it, may make in respect of the new investor compensation arrangements established under Part XII of the SFO.

Time for specified decisions to take effect

4. Section 232(2) of the SFO prescribes the time at which specified decisions, except those set out in Division 5 of Part 3 of Schedule 8, are to take effect¹. Division 5 of Part 3 sets out the list of specified decisions which will take effect other than at the time specified in section 232(2)(a), (b) or (c).
5. Under section 234, the Chief Executive in Council may by Order amend Parts 2 and 3 of Schedule 8.
6. The Department of Justice has advised that the draft Order would be *intra vires* if made as drafted.

Major features of the draft Order

7. In line with the approach taken in the primary legislation, we consider that certain decisions made by the SFC under subsidiary legislation should be subject to the review of the SFAT upon application by the party affected. This also applies to certain decisions made by the SFC or a recognized investor compensation company performing a function transferred to it by the SFC under rules made under section 80 of the SFO. The list of specified decisions in the draft Order represents decisions that the SFC indicated, in consultation papers of individual subsidiary legislation to be made under the SFO, would be subject of review by the SFAT. It also includes decisions added in response to comments received during public consultation of relevant subsidiary legislation and subsequent review of the SFC.
8. Specifically, clause 2(a)(i) of the draft Order will add the following decisions of the SFC to Division 1 of Part 2 of Schedule 8 to the SFO so that they will be subject to review by the SFAT –

- (a) Decisions made under the draft Securities and Futures (Stock Market Listing) Rules²

Clause 6(2)

Objection to a listing of securities

¹ Section 232(2) of the SFO basically provides that a specified decision will take effect after (a) expiry of the appeal period specified in section 217(3) (i.e. 21 days); (b) at the time the subject being affected by the specified decision notified that he will not lodge an appeal; or (c) if an appeal is lodged, after the conclusion of relevant review proceedings.

² Please refer to Paper No. 29/02 issued on 13 September 2002.

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| Clause 6(3)(b) | Imposition of any condition when SFC does not object to a listing |
| (b) <u>Decisions made under the draft Securities and Futures (Disclosure of Interests – Securities Borrowing and Lending) Rules³</u> | |
| Clause 8(3) | Refusal to approve a corporation as an approved lending agent |
| Clause 8(4) | Imposition of any condition when giving an approval under clause 8(3) |
| Clause 8(6) | Withdrawal of an approval given to an approved lending agent |
| (c) <u>Decisions made under the draft Securities and Futures (Contracts Limits and Reportable Positions) Rules⁴</u> | |
| Clause 4(4)(c) | Refusal to give a notice to allow a person to hold or control futures contracts or options contracts in excess of the limits prescribed in the rules |

9. Clause 2(a)(ii) of the draft Order will add the following decisions of a recognized investor compensation company performing a decision of the SFC to Division 3 of Part 2 of Schedule 8 to the SFO so that they will be subject to review by the SFAT -

³ Please refer to Paper No. 21/02 issued on 8 July 2002.

⁴ Please refer to Paper No. 26/02 issued on 7 September 2002.

Decisions made under the draft Securities and Futures (Investor Compensation – Claims) Rules⁵

Clause 4(4)	Refusal to determine that a claim which is not lodged within the time limit provided in clause 4(3) of the Rules is not barred
Clause 7(1)(a), (b) or (c)	Determination as to whether there has been a default, as to the date of default, or as to the amount of loss sustained
Clause 9(3)	Aggregation of separate claims or parts of those claims

10. In addition, clause 2(b) of the draft Order will amend Division 5 of Part 3 of Schedule 8 to the SFO to include decisions of the SFC made under clauses 6(2) and 6(3)(b) of the draft Securities and Futures (Stock Market Listing) Rules (see paragraph 8(a) above), so that they will take immediate effect according to clause 6(5) therein.

Public consultation

11. The SFC released a consultation document and an exposure draft of the Order on 5 August 2002 for comment by the public. No comments were received during the consultation. On further review, the SFC considers that a decision of the SFC under clause 4(4) of the draft Securities and Futures (Contract Limits and Reportable Positions) Rules for refusal to allow a person to hold a position in excess of the limits imposed by those Rules should also be made subject to review by the SFAT (see paragraph 8(c) above).

12. We attach the following documents for Members' reference -

- (a) Consultation Document on the draft Order, at **Annex 2**, which sets out the underlying policy, together with the exposure draft of the Order. The draft Order as revised are at Annex 1 for Members' consideration; and

⁵ Please refer to Paper No. 7/02 issued on 31 May 2002.

- (b) Consultation Conclusions in respect of the consultation exercise, at **Annex 3**.

Way forward

13. Subject to Members' views, the draft Order at Annex 1 would be submitted to the Chief Executive in Council for approval. If approved, the Order will be published in the Gazette for tabling before the Legislative Council in the normal manner. The intention is that the Order shall come into operation on the commencement of the SFO.

Securities and Futures Commission
Financial Services and the Treasury Bureau
13 September 2002

[Cf : sections 215 (definition of "specified decision"), 217, 232 and 234 of and Parts 2 and 3 of Schedule 8 to the Securities and Futures Ordinance]

**SECURITIES AND FUTURES ORDINANCE
(AMENDMENT OF SCHEDULE 8) ORDER 2002**

(Made by the Chief Executive in Council under section 234 of the Securities and Futures Ordinance (Cap. 571))

1. Commencement

This Order shall come into operation on the day on which Part XI of the Securities and Futures Ordinance (Cap. 571) comes into operation.

2. Securities and Futures Appeals Tribunal

Schedule 8 to the Securities and Futures Ordinance (Cap. 571) is amended -

(a) in Part 2 -

(i) in Division 1, by adding -

- | | |
|---|--|
| "73. Section 6(2) of the Securities and Futures (Stock Market Listing) Rules (L.N. of 2002) | Objection to a listing of securities. |
| 74. Section 6(3)(b) of the Securities and Futures (Stock Market Listing) Rules (L.N. of 2002) | Imposition of any condition. |
| 75. Section 8(3) of the Securities and Futures (Disclosure of | Refusal to approve a corporation as an |

- | | |
|--|------------------------------------|
| Interests -
Securities
Borrowing and
Lending) Rules
(L.N. of 2002) | approved
lending
agent. |
| 76. Section 8(4) of
the Securities
and Futures
(Disclosure of
Interests -
Securities
Borrowing and
Lending) Rules
(L.N. of 2002) | Imposition
of any
condition. |
| 77. Section 8(6) of
the Securities
and Futures
(Disclosure of
Interests -
Securities
Borrowing and
Lending) Rules
(L.N. of 2002) | Withdrawal
of an
approval. |
| 78. Section 4(4)(c)
of the Securities
and Futures
(Contracts Limits
and Reportable
Positions) Rules
(L.N. of 2002) | Refusal to
give
notice."; |

(ii) in Division 3, by adding -

- | | |
|--|---|
| "1. Section 4(4) of
the Securities
and Futures
(Investor
Compensation -
Claims) Rules
(L.N. of 2002) | Refusal to
determine
that a claim
which is not
lodged within
the time
limit
provided in
section 4(3)
of the
Securities
and Futures
(Investor
Compensation
- Claims)
Rules (L.N.
of 2002)
is not
barred. |
|--|---|

2. Section 7(1)(a), Determination
(b) or (c) of the as to whether
Securities and there has
Futures (Investor been a
Compensation - default, as
Claims) Rules to the date
(L.N. of 2002) of default,
or as to the
amount of
loss
sustained.

3. Section 9(3) of Aggregation
the Securities of separate
and Futures claims or
(Investor parts of
Compensation - those
Claims) Rules claims.";
(L.N. of 2002)

(b) in Part 3, in Division 5, by adding -

- "16. A specified Section 6(5) of the
decision set out in Securities and
item 73 of Division Futures (Stock
1 of Part 2. Market Listing)
Rules (L.N. of
2002).

17. A specified Section 6(5) of the
decision set out in Securities and
item 74 of Division Futures (Stock
1 of Part 2. Market Listing)
Rules (L.N. of
2002).".

Clerk to the Executive Council

COUNCIL CHAMBER

2002

Explanatory Note

This Order is made by the Chief Executive in Council under section 234 of the Securities and Futures Ordinance (Cap. 571). It amends Divisions 1 and 3 of Part 2 of Schedule 8 to the Ordinance by adding certain decisions of the Securities and Futures Commission or a recognized investor compensation company to the list of specified decisions which may be reviewed by the Securities and Futures Appeals Tribunal. In addition, it adds to Division 5 of Part 3 of Schedule 8 to the Ordinance certain specified decisions of the Commission which take effect earlier than the period specified in section 232(2)(a), (b) or (c) of the Ordinance.



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

**A Consultation Paper on the Securities and
Futures (Amendment of Schedule 8) Order**

《證券及期貨(修訂附表 8)令》諮詢文件

Hong Kong
August 2002

香港
2002 年 8 月

Consultation

This consultation document invites public comments on the draft **Securities and Futures (Amendment of Schedule 8) Order** (“the draft Order”). The SFC intends to recommend to the Chief Executive in Council to make the draft Order under section 234 of the Securities and Futures Ordinance (5 of 2002) (“the Ordinance”) when it commences.

Introduction

1. Under Part XI of the Ordinance the existing part-time Securities and Futures Appeals Panel will be replaced by an independent full-time appeals body, chaired by a judge called the Securities and Futures Appeals Tribunal (“SFAT”).
2. The matters over which the SFAT will have jurisdiction (being decisions of the SFC, the HKMA and an investor compensation company (“ICC”)) are specified in Part 2 of Schedule 8 and are defined as “specified decisions”.
3. Under section 234 of the Ordinance the Chief Executive in Council has power to amend Part 2 of Schedule 8 to add or delete specified decisions. Persons affected by any specified decisions can apply to the SFAT for a review of the decision. The SFC intends to recommend to the Chief Executive in Council to add decisions under certain sections of the subsidiary legislation to be made under the Ordinance to the list of “specified decisions”. Further details of these decisions are set out in paragraphs 9 and 10 below.
4. Section 232(2) of the Ordinance prescribes the time when specified decisions, other than those set out in Division 5 of Part 3 of Schedule 8, are to take effect. Under section 234, the Chief Executive in Council has power to amend Part 3 of Schedule 8. The SFC intends to recommend to the Chief Executive in Council to add to Division 5 of Part 3 of Schedule 8 two decisions of the Commission under the proposed Securities and Futures (Stock Market Listing) Rules which will take effect earlier than the period specified in section 232(2)(a), (b) or (c). Further details are set out in paragraph 11 below.
5. Upon a review of the decision under appeal, the Tribunal may confirm, vary or set aside the decision or substitute any other decision which the Tribunal considers more appropriate or it may remit the matter to the SFC (or the HKMA or the ICC as the case may be) with directions to revisit the decision. Before making a decision, the SFAT must give the parties a reasonable opportunity of being heard and the civil standard of proof will apply in the determination of any questions or issues by the Tribunal.
6. An application for review of a specified decision must be made by the person against whom the decision is made within 21 days of notice of the decision. The SFAT has a power to extend the time for appeal if it is satisfied that there is good reason for granting an extension.

7. The SFAT has extensive powers to consider any material, require witnesses to attend and testify or produce evidence, administer oaths and affirmations, prohibit the disclosure of information about SFAT proceedings, to stay proceedings and make other ancillary orders. It is a criminal offence to disobey an SFAT order or to interfere with or disrupt SFAT proceedings. The SFAT has the same powers as the Court of First Instance to punish contempt of the Tribunal.

8. A party to a review has a right of appeal to the Court of Appeal ("CA") against a decision of the SFAT on a point of law. The CA may allow or dismiss the appeal or remit the matter to the SFAT with such directions as it considers appropriate. An appeal to the CA against an SFAT decision does not operate as a stay of execution of that decision unless the CA otherwise orders.

The draft Order

9. The draft Order would amend Division 1 of Part 2 of Schedule 8 to the Ordinance, by adding the following items such that the SFC decisions referred thereto would become appealable to the SFAT -

Item	Provision	Description of decision
73.	Section 6(2) of the Securities and Futures (Stock Market Listing) Rules	Objection to a listing of securities
74.	Section 6(3)(b) of the Securities and Futures (Stock Market Listing) Rules	Imposition of conditions to non-objection to a listing of securities
75.	Section 8(1) of the Securities and Futures (Disclosure of Interests - Securities Borrowing and Lending) Rules	Refusal to approve a corporation as an approved lending agent
76	Section 8(4) of the Securities and Futures (Disclosure of Interests - Securities Borrowing and Lending) Rules	Imposition of conditions on an approval of a corporation as an approved lending agent
77.	Section 8(6) of the Securities and Futures (Disclosure of Interests - Securities Borrowing and Lending) Rules	Withdrawal of an approval granted to an approved lending agent

10. The draft Order would amend Division 3 of Part 2 of Schedule 8 to the Ordinance, by adding the following items such that the SFC or ICC decisions referred thereto would become appealable to the SFAT -

Item	Provision	Description of decision
1.	Section 4(4) of the Securities and Futures (Investor Compensation - Claims) Rules	Determination that a claim not lodged within the time provided in section 4(3) is barred.
2.	Section 7(1) of the Securities and Futures (Investor Compensation - Claims) Rules	Determination of a default, the date of the default or the amount of loss sustained.
3.	Section 9(3) of the Securities and Futures (Investor Compensation - Claims) Rules	Aggregation of separate claims or parts of those claims

11. The draft Order would amend Division 5 of Part 3 of Schedule 8 to the Ordinance, by adding the following items such that the SFC decisions referred thereto

may take immediate effect notwithstanding that a right to appeal to the SFAT is provided to the person affected by the decision -

Item	Description of specified decision	Provision
16.	A specified decision set out in item 73 of Division 1 of Part 2	Section 6(5) of the Securities and Futures (Stock Market Listing) Rules
17.	A specified decision set out in item 74 of Division 1 of Part 2	Section 6(5) of the Securities and Futures (Stock Market Listing) Rules

New Policy Initiatives

12. The various consultation papers issued in respect of the new investor compensation arrangements contemplated that a right of appeal to the SFAT would be provided to claimants who were dissatisfied with the quantum of an award of compensation. The decisions in respect of which an application might be made have been enlarged beyond simply the quantum of an award to cover related matters such as refusal to extend the time for lodging a claim with the SFC or the ICC. The consultation paper on the Securities and Futures (Stock Market Listing) Rules also contemplated that an application for a review by the SFAT could be made against decisions related to SFC's objection to listing or conditions imposed upon a non-objection. Item 75 of Division 1 of Part 2 of Schedule 8 to the Ordinance is added in response to a submission received in response to the consultation on the draft Securities and Futures (Disclosure of Interests - Securities Borrowing and Lending) Rules ("the SBL Rules"). Similarly, items 76 and 77 which also relate to the approval of approved lending agents under the SBL Rules are also added for consistency.

Other matters

13. 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.

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

15. The public is invited to submit comments in writing before close of business on **19 August 2002**. Written comments may be sent -

By mail to: SFC (Amendment of Schedule 8 Order)
12/F, Edinburgh Tower
The Landmark
15 Queen's Road Central
Hong Kong

By fax to: (852) 2868 0252

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

By e-mail to: Amendment_of_Schedule_8_Order@hksfc.org.hk

16. The draft Order 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 ORDINANCE
(AMENDMENT OF SCHEDULE 8) ORDER 2002**

(Made by the Chief Executive in Council under section 234
of the Securities and Futures Ordinance (5 of 2002))

1. Commencement

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

2. Securities and Futures Appeals Tribunal

Schedule 8 to the Securities and Futures Ordinance (5 of 2002) is amended -

(a) in Part 2 -

(i) in Division 1, by adding -

“73.	Section 6(2) of the Securities and Futures (Stock Market Listing) Rules (L.N. of 2002)	Objection to a listing of securities.
74.	Section 6(3)(b) of the Securities and Futures (Stock Market Listing) Rules (L.N. of 2002)	Imposition of any condition.
75.	Section 8(1) of the Securities and Futures (Disclosure of Interests – Securities Borrowing and Lending) Rules (L.N. of 2002)	Refusal to approve a corporation as an approved lending agent.
76.	Section 8(4) of the Securities and Futures (Disclosure of Interests – Securities Borrowing and Lending) Rules (L.N. of 2002)	Imposition of any condition.
77.	Section 8(6) of the Securities and Futures (Disclosure of Interests – Securities Borrowing and Lending) Rules (L.N. of 2002)	Withdrawal of approval.”;

(ii) in Division 3, by adding -

- | | | |
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| “1. | Section 4(4) of the Securities and Futures (Investor Compensation – Claims) Rules (L.N. of 2002) | Determination that a claim not lodged within the time provided in section 4(3) is barred. |
| 2. | Section 7(1) of the Securities and Futures (Investor Compensation – Claims) Rules (L.N. of 2002) | Determination of a default, the date of default or the amount of loss sustained. |
| 3. | Section 9(3) of the Securities and Futures (Investor Compensation – Claims) Rules (L.N. of 2002) | Aggregation of separate claims or parts of those claims.”; |

(b) in Part 3, in Division 5, by adding -

- | | | |
|------|--|---|
| “16. | A specified decision set out in item 73 of Division 1 of Part 2. | Section 6(5) of the Securities and Futures (Stock Market Listing) Rules (L.N. of 2002). |
| 17. | A specified decision set out in item 74 of Division 1 of Part 2. | Section 6(5) of the Securities and Futures (Stock Market Listing) Rules (L.N. of 2002).”. |

Clerk to the Executive Council
COUNCIL CHAMBER

2002

Explanatory Note

This Order is made by the Chief Executive in Council under section 234 of the Securities and Futures Ordinance (5 of 2002). It amends Divisions 1 and 3 of Part 2 of Schedule 8 to the Ordinance by adding certain decisions of the Securities and Futures Commission or a recognized investor compensation company to the list of specified decisions in respect of which appeals lie to the Securities and Futures Appeals Tribunal. In addition, it adds to Division 5 of Part 3 of Schedule 8 to the Ordinance certain specified decisions of the Commission which take effect earlier than the period specified in section 232(2)(a), (b) or (c) of the Ordinance.



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

Consultation Conclusions on the draft Securities
and Futures Ordinance (Amendment of Schedule 8)
Order

《證券及期貨條例(修訂附表 8)令》草擬本
諮詢總結

Hong Kong
September 2002

香港
2002 年 9 月

INTRODUCTION

1. On 5th August 2002 the Securities and Futures Commission (“SFC”) issued a consultation paper to solicit public comments on the draft **Securities and Futures Ordinance (Amendment of Schedule 8) Order** (“the draft Order”). The SFC intends to recommend to the Chief Executive in Council to make the draft Order under section 234 of the Securities and Futures Ordinance (Cap. 571) (“the Ordinance”) when it commences.
2. Under Part XI of the Ordinance the existing part-time Securities and Futures Appeals Panel will be replaced by an independent full-time appeals body, chaired by a judge called the Securities and Futures Appeals Tribunal (“SFAT”). The matters over which the SFAT will have jurisdiction (being decisions of the SFC, the HKMA and an investor compensation company) are specified in Part 2 of Schedule 8 and are defined as "specified decisions".
3. Under section 234 of the Ordinance the Chief Executive in Council has power to amend Part 2 of Schedule 8 to add or delete specified decisions. Persons affected by any specified decisions can apply to the SFAT for a review of the decision. The SFC intends to recommend to the Chief Executive in Council to add decisions under certain sections of the subsidiary legislation to be made under the Ordinance to the list of “specified decisions”. Further details of these decisions are set out in paragraphs 9 and 10 of the consultation paper.
4. Section 232(2) of the Ordinance prescribes the time when specified decisions, other than those set out in Division 5 of Part 3 of Schedule 8, are to take effect. Under section 234, the Chief Executive in Council has power to amend Part 3 of Schedule 8. The SFC intends to recommend to the Chief Executive in Council to add to Division 5 of Part 3 of Schedule 8 two decisions of the Commission under the proposed Securities and Futures (Stock Market Listing) Rules which will take effect earlier than the period specified in section 232(2)(a), (b) or (c). Further details are set out in paragraph 11 of the consultation paper.
5. The consultation exercise was extended by one week and ended on 26 August 2002.

CONSULTATION EXERCISE

6. A press release regarding the consultation exercise was issued on 5th August 2002. The consultation paper and the draft Order were posted on the website of the SFC and distributed to all registrants through FinNet.
7. No submissions were received.

CONSULTATION CONCLUSIONS

8. After the completion of the consultation exercise, it is considered that no amendment to the substance of the draft Order will be necessary. However, certain drafting changes have been made so that the provisions of the draft Order better reflect the underlying provisions. An additional item has also been added to the draft Order as a specified decision. A refusal by the SFC to give a notice in writing under section 4(4)

of the Securities and Futures (Contract Limits and Reportable positions) Rules (i.e. the refusal by the SFC to state that it is satisfied that it is appropriate for a person to hold a position in excess of the limits imposed by those Rules) can now also be reviewed by the SFAT.