

立法會
Legislative Council

LC Paper No. CB(1)1000/11-12
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by the Administration)

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**Subcommittee on Securities and Futures (Professional Investor)
(Amendment) Rules 2011**

**Second meeting on
Wednesday, 9 November 2011, at 8:30 am
in Conference Room 1 of the Legislative Council Complex**

- Members present** : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon James TO Kun-sun
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Ting-kwong, BBS, JP
Hon KAM Nai-wai, MH
- Member absent** : Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon CHIM Pui-chung
- Public officers attending** : Miss Belinda KWAN
Principal Assistant Secretary for Financial Services
and the Treasury (Financial Services)
- Miss Sara TSE
Assistant Secretary for Financial Services
and the Treasury (Financial Services)
- Mr Stephen PO
Senior Director
Securities and Futures Commission
(Intermediaries Supervision)

Ms Alexandra YEONG
Director
Securities and Futures Commission
(Corporate Finance)

Miss Clara CHIU
Senior Manager
Securities and Futures Commission
(Intermediaries Supervision)

Miss April KWONG
Senior Manager
Securities and Futures Commission
(Corporate Finance)

**Attendance by
Invitation**

: HRL Morrison & Co Capital Management (Int) Ltd.

Mr Anthony MUH
Chief Executive Officer

The Law Society of Hong Kong

Ms Sara OR Sin Man
Member of Investment Products and Financial Services
Committee

Hong Kong Securities Professionals Association

Ms Jeanne LEE Sai Yin
Chairman

Hong Kong Investor Relations Association

Ms Eva CHAN
Chairman

Clifford Chance, Hong Kong

Ms Lisa CHEN
Consultant

UBS AG

Miss Clara YEE
Executive Director, Legal & Compliance

The Institute of Securities Dealers Limited

Mr Jojo CHOY
Chairman

Clerk in attendance : Ms Annette LAM
Chief Council Secretary (1)7

Staff in attendance : Ms Wendy KAN
Assistant Legal Adviser 6

Mr Fred PANG
Council Secretary (SC)2

Miss Iris CHEUNG
Legislative Assistant (1)7

I Meeting with deputations and the Administration

Submissions from deputations not attending the meeting

(LC Paper No. CB(1)281/11-12(01) -- Submission from The Hong
(*English version only*) Kong Association of Banks dated
4 November 2011

LC Paper No. CB(1)281/11-12(02) -- Submission from Hong Kong
(*Chinese version only*) Securities Association dated
4 November 2011

LC Paper No. CB(1)281/11-12(03) -- Submission from Hong Kong
(*English version only*) Investment Funds Association
dated 7 November 2011)

Relevant papers

- (LC Paper No. CB(1)281/11-12(04) -- List of follow-up actions arising from the discussion at the meeting on 1 November 2011
- LC Paper No. CB(1)281/11-12(05) -- Administration's response to item 1 on the list of follow-up actions arising from the discussion at the meeting on 1 November 2011
- LC Paper No. CB(1)223/11-12(01) -- Marked-up copy of the Rules (Restricted to Members)
- LC Paper No. CB(1)223/11-12(02) -- Letter dated 22 September 2011 from Assistant Legal Adviser to the Securities and Futures Commission
- LC Paper No. CB(1)223/11-12(03) -- The Securities and Futures Commission's response to Assistant Legal Adviser's letter dated 22 September 2011
- L.N. 135 of 2011 -- Securities and Futures (Professional Investor) (Amendment) Rules 2011
- (issued by the Securities and Futures Commission on 14 September 2011)* -- The Legislative Council Brief
- LC Paper No. LS99/10-11 -- Legal Service Division Report
- (issued by the Securities and Futures Commission on 4 October 2010)* -- Consultation Paper on the Evidential Requirements under the Securities and Futures (Professional Investor) Rules
- (issued by the Securities and Futures Commission on 23 February 2011)* -- Consultation Conclusions on the Evidential Requirements under the Securities and Futures (Professional Investor) Rules)

Presentation of views

The Chairman welcomed representatives of the Administration, Securities and Futures Commission (SFC) and deputations to the meeting. He reminded the deputations that their views presented at the meeting would not be covered by the protection and immunity provided under the Legislative Council (Powers and Privileges) Ordinance (Cap. 382).

2. At the invitation of the Chairman, seven deputations as listed below presented their views on the Securities and Futures (Professional Investor) (Amendment) Rules 2011:

- (a) The Law Society of Hong Kong;
- (b) Hong Kong Securities Professionals Association;
- (c) Hong Kong Investor Relations Association;
- (d) Clifford Chance, Hong Kong;
- (e) UBS AG;
- (f) HRL Morrison & Co Capital Management (Int) Ltd.; and
- (g) The Institute of Securities Dealers Limited.

(Post-meeting Note: The submissions from the Law Society of Hong Kong and the Hong Kong Securities Professionals Association received after the meeting were circulated to members vide LC Paper Nos. CB(1)315/11-12(01) and (02) on 10 November 2011.)

3. The Subcommittee deliberated (Index of proceedings attached at **Appendix**).

II Any other business

Date of next meeting

4. The Chairman reminded members that the third meeting would be held on Friday, 11 November 2011 at 4:30 pm, or immediately after the House Committee meeting scheduled to start at 4:00 pm, whichever was later. The notice of meeting and the agenda for the meeting had been issued to members vide LC Paper No. CB(1)266/11-12 dated 4 November 2011.

5. There being no other business, the meeting ended at 9:50 am.

Council Business Division 1
Legislative Council Secretariat
3 February 2012

**Subcommittee on Securities and Futures (Professional Investor)
(Amendment) Rules 2011**

**Second meeting on
Wednesday, 9 November 2011, at 8:30 am
in Conference Room 1 of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
001026 – 001243	Chairman	Opening remarks by the Chairman	
001244 – 001257	The Law Society of Hong Kong (LSHK)	Presentation of views. LSHK did not have specific comments on the Securities and Futures (Professional Investor) (Amendment) Rules 2011 (the Amendment Rules).	
001258 – 001523	Hong Kong Securities Professionals Association (HKSPA)	Presentation of views. HKSPA's view that: (i) the existing minimum portfolio requirement of HK\$8 million under the Securities and Futures (Professional Investor) Rules (Cap.571 sub. leg. D) (the PI Rules) was comparable to other jurisdictions, e.g. higher than that in the United Kingdom (EUR 500,000); (ii) any excessive increase in the minimum portfolio requirement would adversely affect the private placement activities in Hong Kong and hinder the market activities of direct placement of newly listed	

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		<p>company's shares in an initial public offering (IPO) to professional investors (PIs) in Hong Kong;</p> <p>(iii) knowledge, expertise and investment experience of clients were more crucial than their portfolio in determining whether they should be classified as PIs; and</p> <p>(iv) the minimum portfolio requirement was only for the purpose of classifying an investor as a PI under the PI Rules. Before an investor could be treated as a PI under the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (SFC) (Code of Conduct), the intermediary must fulfill the requirements under paragraphs 15.3 to 15.4 of the Code of Conduct.</p>	
001524 – 001537	Hong Kong Investor Relations Association (HKIRA)	<p>Presentation of views.</p> <p>HKIRA did not have specific comments on the Amendment Rules.</p>	
001538 – 001551	Clifford Chance, Hong Kong (CCHK)	<p>Presentation of views.</p> <p>CCHK supported the amendments and did not have specific comments.</p>	

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001552 – 001607	UBS AG	<p>Presentation of views.</p> <p>USB AG's views had been incorporated into the submission of the Hong Kong Association of Banks.</p>	
001608 – 002133	<p>Mr James TO Hong Kong Securities Professionals Association (HKSPA) Chairman</p>	<p>Mr James TO said that certain investors of Lehman Brothers-related products had expressed their grievances of being classified as PIs. He invited the deputations' views on whether the qualifying criteria and procedural requirements for ascertaining PIs under the current regulatory regime were clear and appropriate.</p> <p>HKSPA commented that different from bank customers, clients of securities firms who suffered loss did not usually raise complaints. HKSPA was of the view that bank staff, in a bid to achieve the sales target set by their banks, might sell the Lehman Brothers-related products, without rigorously complying with the suitability requirements.</p>	
002134 – 002930	<p>Mr KAM Nai-wai Hong Kong Securities Professionals Association (HKSPA)</p>	<p>Mr KAM Nai-wai said that he was given to understand that certain investors who had purchased Lehman Brothers-related products from banks did not know that the declaration they had signed in banks was a confirmation that they wished to be treated as a PI. They were also not aware of the risks and consequences of consenting to being treated as a</p>	

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		<p>PI. Mr KAM invited HKSPA to advise how securities firms ensured their clients' understanding of the risks and consequences of being treated as a PI.</p> <p>HKSPA advised that prior to selling derivative products such as callable bull/bear contracts or warrants to their clients, intermediaries would explain to their clients the worst scenario of investing in such products. The clients were well informed of the product risks prior to investing in the products and therefore had no grievances against the securities firms for losses sustained subsequently.</p>	
002931 – 003416	<p>Chairman The Law Society of Hong Kong (LSHK) Mr KAM Nai-wai Administration Hong Kong Securities Professionals Association (HKSPA)</p>	<p>Mr KAM Nai-wai opined that in view of the continuing depreciation of Hong Kong currency, there was a need to raise the minimum portfolio threshold to enhance investor protection. He queried why raising the minimum portfolio requirement would adversely affect investment activities.</p> <p>LSHK's view that any excessive increase in the minimum portfolio requirement under the PI Rules would have adverse impact on the private placement market and undermine the development of the financial market in Hong Kong.</p> <p>HKSPA's view on the difficulty of determining the appropriate level</p>	

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		<p>of minimum portfolio requirement. A client with portfolio more than the required threshold did not necessarily had the requisite knowledge and investment experience. It was more important for intermediaries to know their clients and assess the suitability of investment products to clients.</p> <p>The Administration explained that the minimum portfolio requirement of HK\$8 million had formed part of the public consultation on proposals to enhance protection for the investing public conducted by SFC in the fourth quarter of 2009. According to SFC, the majority of the respondents who had given views on the minimum portfolio requirement opined that the minimum portfolio requirement should be maintained at HK\$8 million. The Administration would provide the reasons for maintaining the existing level of minimum portfolio requirement in its written response to the list of follow-up actions arising from the discussion at the meeting on 1 November 2011.</p>	
003417 – 004550	<p>Ms Audrey EU The Law Society of Hong Kong (LSHK) Mr KAM Nai-wai Mr Stephen PO Clifford Chance, Hong Kong (CCHK)</p>	<p>Ms Audrey EU noted that most deputations present held the view that the existing level of the minimum portfolio requirement was acceptable. She invited deputations' views on whether there were any ambiguities in the definition of "portfolio" in the PI</p>	

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		<p>Rules.</p> <p>LSHK considered the definition clear and concise. LSHK and CCHK indicated that they were not aware of any arguments in the market over the definition of "portfolio".</p> <p>Mr KAM Nai-wai said that SFC should ensure there were no ambiguities over the definition of "portfolio", and enquired whether the definition of "portfolio" included investment-linked insurance products.</p> <p>According to CCHK, the market had asked for clarification whether the definition of "portfolio" included investment-linked insurance products, and that most market participants considered it prudent to exclude such products from the definition of "portfolio".</p> <p>SFC's clarification that the statutory definition of "portfolio" did not include investment-linked insurance products. "Portfolio" was defined under section 2 of the PI Rules.</p> <p>The Chairman's view that excluding investment-linked insurance products from the definition of "portfolio" helped to avoid ambiguity.</p> <p>In response to Mr KAM Nai-wai's further enquiries, SFC advised that Lehman Brothers-related</p>	

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		<p>Minibonds which were debentures under the Companies Ordinance (Cap. 32) were one type of securities under the definition of "portfolio" in the PI Rules. The definition of the term "securities" was set out in the Securities and Futures Ordinance (Cap. 571).</p> <p>Ms Audrey EU enquired about the different regulatory requirements for ascertaining individual and non-individual investors (such as corporations, partnerships and sole proprietors) as PIs. Ms EU enquired whether the market had any problems following the requirements and whether non-individual investors were entitled to less investor protection than individual investors under the current PI regime.</p> <p>LSHK advised that prior to treating a partnership or corporation as a PI, intermediaries were required to ascertain whether the corporation's or partnership's assets or portfolio had met the minimum requirement, and assess whether the committees/personnel responsible for making investment decisions in these companies had the required investment experience, knowledge and expertise.</p>	
004551 – 004830	Chairman Ms Audrey EU Hong Kong Securities Professionals Association (HKSPA)	Ms Audrey EU was concerned whether there were cases in which an investor would avoid from being classified and treated as a PI by keeping his/her	

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		<p>portfolio/assets in each of his/her banks below the required threshold. She enquired whether the portfolio of an investor should be the sum of his/her assets maintained in all banks.</p> <p>HKSPA explained that such case probably would not arise as an intermediary could not classify his/her client as a PI without the client's written consent. HKSPA and the Chairman's view that some investors might sometimes wish to be classified as PIs so that they could take part in direct placement of company's shares in IPO or purchase some specific types of investment products.</p>	
004831 – 005211	HRL Morrison & Co Capital Management (Int) Ltd. (HRL)	<p>Presentation of views.</p> <p>HRL's view that it was difficult to define the qualifying criteria for PIs merely in terms of the size of portfolio because of the constantly changing economic and market conditions.</p> <p>HRL referred to other jurisdictions' practice of also relying on the investors' investment experience, such as the breadth of the types of products in which the investors had traded and that their dealing experience in specific products would generally be beyond the dealing experience of ordinary investors. HRL was of the view that similar practice should be adopted in Hong Kong.</p>	

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005212 – 005410	The Institute of Securities Dealers Ltd. (ISDL) Chairman	<p>Presentation of views.</p> <p>ISDL highlighted that investors with a portfolio of HK\$8 million would not automatically be treated as PIs. Intermediaries would consider various factors such as the client's knowledge, investment experience, age and his/her tolerance to risks when assessing whether the client should be served as a PI. An intermediary could not treat a client as a PI without the latter's consent.</p> <p>ISDL was of the view that investment knowledge of clients was more crucial than their wealth in determining whether they should be treated as PIs. The existing minimum portfolio requirement of HK\$8 million should be maintained but SFC might consider imposing additional requirements on intermediaries with respect to sale of high risk products.</p>	
005411 – 010042	Ms Audrey EU The Institute of Securities Dealers Ltd. (ISDL) Hong Kong Securities Professionals Association (HKSPA)	<p>Ms Audrey EU invited the deputations' views on whether the knowledge, expertise and investment experience assessment requirement should be included in the legislation. Ms EU opined that the requirements would have to be translated into objective criteria for codification and incorporation into the law. She enquired about examples of statutory codification of similar requirements in other jurisdictions.</p>	

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		<p>HKSPA and ISDL's view that the investors' knowledge, expertise and investment experience assessment requirement had been specified in the Code of Conduct, and there was no need to include the requirement in the legislation.</p> <p>HKSPA's suggestion that consideration be given to requiring intermediaries to explain to clients the risks of investment in respect of products or markets in the worst scenario.</p> <p>Noting that investors were required to sign a declaration confirming their consent to be treated as PIs, Ms EU invited the deputations' views on the validity of the signed declaration if the investors subsequently claimed that they did not know its content.</p> <p>ISDL was of the view that investors including PIs were expected to check the content of declaration before signing it. Unless investors had been misled by bank staff into signing it, they should be bound by the signed declaration.</p>	
010043 – 011544	<p>Mr James TO HRL Morrison & Co Capital Management (Int) Ltd. (HRL) Clifford Chance, Hong Kong (CCHK) Hong Kong Securities Professionals Association (HKSPA) The Institute of Securities</p>	<p>Mr James TO's suggestion to include in the Amendment Rules or relevant legislation the expertise, experience and knowledge assessment/qualifying criteria similar to the "elective professional clients" adopted in the UK. He invited the deputations' views on the suggestion.</p>	

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	<p>Dealers Ltd. (ISDL) The Law Society of Hong Kong (LSHK) Chairman</p>	<p>HKSPA's concern that the suggestion would restrict intermediaries' flexibility in ascertaining PIs.</p> <p>ISDL expressed reservations about the suggestion as breaches of the legislation and the Code of Conduct would entail different liabilities. ISDL expressed concern about how the assessment requirements would be defined in the legislation, and whether the requirements would be difficult to follow as breaches of the legislation would attract criminal sanctions.</p> <p>HRL's view that the evidential and procedural requirements for ascertaining PIs under the PI Rules should be principle-based rather than descriptive. To avoid significant disparity in the practices adopted by different intermediaries, a separate set of guidelines should be in place to help intermediaries interpret the principle-based requirements.</p> <p>CCHK supported adopting a principle-based approach, to be supplemented by additional guidelines for intermediaries to follow.</p> <p>LSHK's view that intermediaries could make reference to the guidelines issued by SFC when complying with the requirements set out in the Code of Conduct. Whether or not an intermediary would comply with the regulatory</p>	

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		requirements depended to a large extent on the sanctions that could be imposed for breaches, rather than on whether or not the requirements were specified in the legislation.	
011545 – 011835	Chairman Administration	At the invitation of the Chairman, the Administration's response that the PI Rules were made in view of market participants' comments that the existing evidential requirements under the PI Rules were too specific and provided little flexibility. Amendments to the PI rules were proposed to allow more flexibility whereby intermediaries might use other methods that were appropriate in the circumstances to ascertain whether an investor was qualified as a PI.	