

立法會
Legislative Council

LC Paper No. CB(1)886/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/SS/1/11/1

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

First meeting on
Tuesday, 1 November 2011, at 8:30 am
in Conference Room 2A of the Legislative Council Complex

Members present : Hon CHAN Kam-lam, SBS, JP (Chairman)
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Ting-kwong, BBS, JP
Hon KAM Nai-wai, MH

Member absent : Hon James TO Kun-sun
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 Charles GRIEVE
Senior Director
Securities and Futures Commission (Corporate
Finance)

Ms Yvonne MOK
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)

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 Election of Chairman

Ir Dr Raymond HO, the member with the highest precedence among those at the meeting, presided over the election of the Chairman of the Subcommittee. He invited nominations for the chairmanship of the Subcommittee. Mr CHAN Kam-lam was nominated by Mr WONG Ting-kwong and the nomination was seconded by Ir Dr HO. Mr CHAN Kam-lam accepted the nomination. There being no other nomination, Mr CHAN Kam-lam was declared Chairman of the Subcommittee.

II Meeting with the Administration

(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)

Background information on the Rules

(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)

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

Admin Follow-up actions to be taken by the Administration

3. The Administration/Securities and Futures Commission (SFC) was

requested to take the following actions: -

- (a) Provide information on how regulators in jurisdictions other than Hong Kong (such as the United Kingdom, the United States, Australia and Singapore) define "Professional Investors", including the qualifying criteria for Professional Investors, the assets and/or portfolio thresholds, and other relevant evidential and/or procedural requirements;
- (b) In respect of enforcement to safeguard the interests of Professional Investors:-
 - (i) explain the regulatory role of SFC;
 - (ii) provide a copy of the circular regarding the annual confirmation exercise of Professional Investors issued by SFC in March 2011;
 - (iii) advise whether and when the Hong Kong Monetary Authority (HKMA) has issued the circular to banks or drawn their attention to the circular;
 - (iv) provide details on the courses of action taken by HKMA in respect of enforcement to ensure compliance; and
 - (v) advise whether standard practice and/or procedures were in place for bank staff to explain to clients the risks and consequences of being treated as a Professional Investor;
- (c) On the number of Professional Investors in the market: -
 - (i) advise whether banks have provided the number of clients ascertained and treated as Professional Investors to HKMA;
 - (ii) provide figures of (i) if available; and
 - (iii) provide the number of Professional Investors involved in complaint cases arising from the incident of Lehman-Brothers bankruptcy;
- (d) With respect to the sale of investment products by banks and other intermediaries, provide information on the different legal and regulatory requirements imposed on banks/intermediaries or their sales staff in dealing with Professional Investors and non-Professional Investors;

- (e) In relation to the minimum portfolio requirement for a high net worth investor to be classified as a "Professional Investor" under the Securities and Futures (Professional Investor) Rules (Cap. 571 sub. leg. D), provide: -
- (i) reasons for maintaining the minimum portfolio requirement of not less than HK\$8 million (or the equivalent in foreign currency) which has remained the same since 2001;
 - (ii) a comparison with the minimum portfolio thresholds adopted in other jurisdictions; and
 - (iii) information on whether and when SFC has reviewed and consulted the industry and the public on the minimum portfolio requirement, and the feedback received in this regard.

III Any other business

Invitation for views and date of next meeting

4. The Chairman advised that SFC had issued a Consultation Paper on the Evidential Requirements under the Securities and Futures (Professional Investor) Rules and published the consultation conclusions on 23 February 2011. He then invited members to consider whether market participants and the public should be invited to give views on the Securities and Futures (Professional Investor) (Amendment) Rules 2011 (the Amendment Rules).

5. Members agreed to invite relevant organizations and District Councils to give views on the Amendment Rules, and to place an invitation notice on the Legislative Council website to invite public views.

(Post-meeting note: With the concurrence of the Chairman, a meeting to receive views from deputations and members of the public was scheduled for 9 November 2011 at 8:30 am. A proposed list of organizations to be invited to give views at the meeting was circulated to members vide LC Paper No. CB(1)243/11-12 on 1 November 2011.)

Legislative timetable

6. As more time was required for the Subcommittee to receive views from stakeholders and the public and to scrutinize the subsidiary legislation, members agreed that the Chairman of the Subcommittee would move a motion at the

Action

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Council meeting on 9 November 2011 to extend the scrutiny period to 30 November 2011.

7. There being no other business, the meeting ended at 9:36 am.

Council Business Division 1
Legislative Council Secretariat
17 January 2012

**Proceedings of the Subcommittee on Securities and Futures
(Professional Investor) (Amendment) Rules 2011
First meeting on Tuesday, 1 November 2011, at 8:30 am
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000144 – 000230	Ir Dr Raymond HO Mr CHAN Kam-lam	Election of Chairman	
000353 – 000740	Chairman Administration Mr Charles GRIEVE	Briefing by the Administration and the Securities and Futures Commission (SFC) on the Securities and Futures (Professional Investor) (Amendment) Rules 2011 (the Amendment Rules)	
000741 – 001015	Chairman Mr WONG Ting-kwong Mr Charles GRIEVE Ms Yvonne MOK	Mr WONG Ting-kwong's enquiry on whether the Amendment Rules included any changes to the minimum portfolio requirement for classifying investors as professional investor ("PI") under the Securities and Futures (Professional Investor) Rules (Cap. 571 sub. leg. D) ("PI Rules") and how the requirement was determined. SFC's response that the Amendment Rules did not make any changes to the minimum portfolio requirement under the PI Rules. The minimum portfolio requirement of HK\$8 million had formed part of the public consultation on proposals to	

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		<p>enhance protection for the investing public conducted by SFC in 2009. Out of the 87 respondents, only thirteen were of the view that the threshold should be increased. Most respondents held the view that investment knowledge, expertise and experience were more crucial than the portfolio threshold in determining whether an investor should be treated as a PI.</p>	
<p>001017 – 001432</p>	<p>Mr WONG Ting-kwong Chairman Ms Yvonne MOK</p>	<p>Mr WONG Ting-kwong's view that investment knowledge and expertise were major considerations in determining whether an investor should be treated as a PI. In view of the significant depreciation of Hong Kong currency, the rise in real estate prices and the general increase in the wealth of Hong Kong people, he asked the Administration/SFC to review whether there was a need to raise the minimum portfolio threshold in the long run.</p> <p>SFC's advice that an intermediary could not automatically treat an investor as a PI simply because the investor met the minimum portfolio requirement. Apart from the investor's knowledge, expertise and investment experience assessment requirement, the intermediary</p>	

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		<p>must also obtain written consent from the investor agreeing to be classified as a PI and confirming that the risks and consequences of being treated as a PI had been explained to him/her.</p> <p>To facilitate members to consider whether review of the existing portfolio threshold was required, the Chairman requested the Administration/SFC to provide information on how regulators in jurisdictions other than Hong Kong defined PI, the qualifying criteria for PI, the assets and/or portfolio thresholds, and other relevant evidential and/or procedural requirements.</p>	<p>The Administration/SFC to take follow up action as requested in paragraph 3(a) of the minutes.</p>
<p>001438 – 002359</p>	<p>Ir Dr Raymond HO Mr Charles GRIEVE Ms Yvonne MOK Ms Alexandra YEONG</p>	<p>Ir Dr Raymond HO's concern whether the definition of PI in the PI Rules was sufficiently wide to cover all relevant financial institutions, such as trust corporations, insurance companies and funds.</p> <p>The SFC's explanation that paragraphs (a) to (i) of the definition of PI in Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571) (SFO) had set out specific types of entities (including market professionals and institutional investors) that were PI. Pursuant to paragraph (j) of the definition</p>	

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		<p>of PI, SFC was empowered to prescribe additional classes of persons (high net worth investors) who met the specified monetary thresholds to be PI under the PI Rules. Prior to treating an investor, who had been classified as a PI under the PI Rules, as a PI under the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (Code of Conduct) and thereby waiving the regulatory requirements set out in paragraph 15.5 of the Code of Conduct, the intermediary should fulfill the requirements set out under paragraphs 15.3, 15.3A, 15.3B, 15.4(a), 15.4(b) and 15.4(c) of the Code of Conduct.</p> <p>Ir Dr Raymond HO's view that, for clarity, the definition of PI should be set out in a single piece of legislation.</p>	
<p>002417 – 002702</p>	<p>Mr KAM Nai-wai Ms Yvonne MOK Ms Alexandra YEONG</p>	<p>Mr KAM Nai-wai's enquiry about the meaning of the term 'portfolio' in the PI Rules.</p> <p>SFC's explanation of "portfolio" as defined under section 2 of the PI Rules.</p>	
<p>002703 – 002846</p>	<p>Mr KAM Nai-wai Legal adviser</p>	<p>Mr KAM's enquiry on whether the Subcommittee could amend the minimum portfolio requirement of HK\$8 million set</p>	

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		<p>out in the subsidiary legislation.</p> <p>ALA6's explanation on the relevant requirements. A Member could propose to amend the subsidiary legislation if the object or effect of the amendment would not dispose of or charge any part of the revenue or other public moneys of Hong Kong. The requirement under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) must also be complied with (i.e. the subsidiary legislation should be amended in a manner consistent with the power to make such subsidiary legislation).</p> <p>The Administration/SFC was requested to provide detailed information on the public consultation conducted by SFC on the minimum portfolio requirement.</p>	<p>The Administration to take follow up action as requested in paragraph 3(e) of the minutes.</p>
002851 – 004115	Mr KAM Nai-wai Ms Yvonne MOK Administration	<p>Mr KAM Nai-wai's enquiry on the following:</p> <ul style="list-style-type: none"> (i) the number of PIs involved in complaint cases arising from the Lehman-Brothers bankruptcy incident; (ii) the number of individuals being ascertained and treated as PIs in the market; 	<p>The Administration to take follow up action as requested in paragraph 3(c)(iii) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>SFC's response that they did not have statistics on the number of banks' clients being classified and treated as PIs.</p> <p>The Chairman asked the Administration to advise whether banks had provided the number of clients treated as PIs to Hong Kong Monetary Authority (HKMA), and provided the figures, if available.</p> <p>Mr KAM Nai-wai's enquiry about whether intermediaries were required to explain to their clients the risks and consequences of being treated as PIs; and whether intermediaries were required to obtain consent from their clients prior to treating them as PIs.</p> <p>SFC's response that under paragraph 15.4 of the Code of Conduct, prior to treating a client as a PI, an intermediary should provide a written explanation to the client explaining the risks and consequences of being treated as a PI, in particular the information that would not be provided to the client. The written explanation should inform the client of his/her right to withdraw from being treated as a PI. The intermediary should also obtain written consent from the client that the latter wished to be classified as a PI.</p>	<p>The Administration to take follow up action as requested in paragraph 3(c)(i) and (ii) of the minutes.</p>

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		<p>SFC's further response that on 18 March 2011, SFC had issued a circular to licensed corporations and registered institutions that an intermediary should have in place procedures to enable it to carry out a confirmation exercise annually. In carrying out the annual confirmation exercise, the intermediary should remind its clients in writing of (i) the risks and consequences of being treated as a PI; and (ii) the right of the clients to withdraw from being treated as a PI.</p> <p>Mr KAM Nai-wai's enquiry about how the SFC's circular on annual confirmation exercise was made known to banks and in what ways the banks reminded their clients accordingly.</p> <p>The Chairman asked the Administration to provide information on whether and when the HKMA had issued the SFC's circular on annual confirmation exercise to banks.</p> <p>Mr KAM Nai-wai's enquiry about the courses of action taken by HKMA to ensure compliance and whether standard practice or procedures were in place for bank staff to explain to clients the risks and consequences of being treated as a PI.</p>	<p>The Administration to take follow up action as requested in paragraph 3(b)(ii) and (iii) of the minutes.</p> <p>The Administration/ SFC to take follow up action as requested in paragraph 3(b)(iv) and (v) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		SFC's explanation of its regulatory and monitoring role to ensure compliance with relevant laws (e.g. SFO and the PI Rules) and regulatory standards under the Code of Conduct through on-site inspections and off-site surveillance.	The Administration to take follow up action as requested in paragraph 3(b)(i) of the minutes.
004115 – 004634	Chairman Mr KAM Nai-wai Ms Yvonne MOK	<p>Mr KAM Nai-wai's enquiry about the measures to ensure that intermediaries would not treat an investor as a PI if the investor had not met the requisite qualifying criteria. He further enquired whether the intermediaries and their sales staff were required to explain to PIs the risks of individual investment products before selling to them.</p> <p>SFC's response that if an investor was a PI as classified under SFO, certain legal restrictions provided under the SFO (sections 103, 174 and 175) did not apply. In addition, if an intermediary followed the procedural requirements as specified in the Code of Conduct in dealing with its PI clients, it could be further exempted from complying with the regulatory requirements set out in paragraph 15.5 of the Code of Conduct. Before waiving the specific regulatory requirements as set out in paragraph 15.5 of the Code of Conduct, an intermediary</p>	

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		<p>should assess and be reasonably satisfied that the individual PI was knowledgeable and had sufficient expertise in relevant products and markets having regard to (i) the type of products in which the person had traded; (ii) the frequency and size of trades (to have traded not less than 40 transactions per annum); (iii) the person's dealing experience (to have been active in the relevant market for at least 2 years); (iv) the person's knowledge and expertise in the relevant products; and (v) the person's awareness of the risks involved in trading in the relevant products and/or markets. However, some requirements set out in the Code of Conduct could not be waived. For example, in relation to the sale of derivative products including futures contracts or options, or any leveraged transaction to PIs, the intermediary should still comply with the "know your client" requirement under paragraph 5.3 of the Code of Conduct by assuring that the investor understood the nature and risks of the products and had sufficient net worth to be able to assume the risks and bear the potential losses of trading in the products.</p> <p>In response to Mr KAM Nai-wai's request, the Administration/SFC would provide information on the</p>	<p>The Administration/SFC to take</p>

Time Marker	Speaker	Subject(s)	Action Required
		different legal and regulatory requirements imposed on banks/intermediaries or their sales staff in dealing with PIs and non-professional investors with respect to the sale of investment products.	follow up action as requested in paragraphs 3(d) of the minutes
004635 – 005725	Chairman Ir Dr Raymond HO Mr KAM Nai-wai Ms Audrey EU Mr WONG Ting-kwong Administration Legal adviser	Invitation of views Legislative timetable Date of next meeting	Clerk to issue invitation letters and post invitation notice on LegCo website.

Council Business Division 1
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17 January 2012