

立法會
Legislative Council

LC Paper No. CB(1)1199/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/SS/1/11/1

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

**Third Meeting on
Friday, 11 November 2011, at 4:30 pm,
in Conference Room 2B 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 James TO Kun-sun
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
Hon KAM Nai-wai, MH

Member absent : Hon Abraham SHEK Lai-him, SBS, JP

Public officers attending : Financial Services and the Treasury Bureau

Miss Belinda KWAN
Principal Assistant Secretary (Financial Services)

Securities and Futures Commission

Ms Yvonne MOK
Director (Intermediaries Supervision)

Ms Alexandra YEONG
Director (Corporate Finance)

Miss April KWONG
Senior Manager (Corporate Finance)

Miss Clara CHIU
Senior Manager (Intermediaries Supervision)

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 the Administration

(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)313/11-12(01) -- Administration's response to item 2 to item 4 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)

Relevant papers

- (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 (issued on 4 October 2011) -- 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)

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

Admin Follow-up actions to be taken by the Administration

2. The Administration/Securities and Futures Commission (SFC) was requested to consider: -
- (a) making it an explicit requirement in the Securities and Futures (Professional Investor) (Amendment) Rules 2011 (the Amendment Rules) or relevant legislation requiring intermediaries to comply with the relevant requirements under the Code of Conduct for Persons Licensed by or Registered with the SFC (the Code of Conduct) in dealing with/serving professional investors;

- (b) making it an explicit requirement in the Amendment Rules or relevant legislation requiring the intermediaries to assess an investor's knowledge, expertise and investment experience prior to treating an investor as a professional investor;
 - (c) including in the Amendment Rules or relevant legislation the assessment/qualifying criteria similar to the "elective professional clients" adopted in the United Kingdom (UK); and
 - (d) introducing, in the long run, a licence regime for professional investors in respect of different financial products and markets by way of the issue of a licence or certificate to accord an investor with the status of a professional investor.
3. The Administration/SFC was requested to explain the reasons and practical difficulties, if any, for not considering the suggestions in paragraph 2 above; and advise whether any comparable jurisdictions have adopted the practice suggested in paragraph 2(d) above.
4. The Administration/SFC was requested to provide information on the different sanctions, criminal and/or civil liabilities for: -
- (a) non-compliance with/breach of the legal requirements under the Securities and Futures (Professional Investor) Rules (Cap. 571 sub. leg. D) (the PI Rules) or relevant legislation, including an intermediary treating an investor who has not met the minimum portfolio requirement under the PI Rules as a professional investor; and
 - (b) non-compliance with/breach of the requirements set out in the Code of Conduct for dealing with/serving professional investors.
5. The Administration/SFC was requested to explain why qualifying criteria such as the assessment on the investor's knowledge, expertise and investment experience and the written consent requirement as set out in the Code of Conduct are not included in the definition of "Professional Investor" under the PI Rules.
6. In relation to A2(d) in LC Paper No. CB(1)313/11-12(01), the Administration's response to the list of follow-up actions arising from the meeting on 1 November 2011, advise: -
- (a) the disciplinary actions to be taken by the Hong Kong Monetary Authority (HKMA) where major breaches and non-compliances

with regulatory requirements were identified;

- (b) under what circumstances would HKMA take disciplinary actions against persons registered for conducting regulated activities; and
- (c) under what circumstances and on what grounds would HKMA refer cases of major breaches or non-compliance to SFC for enforcement actions.

II Any other business

Legislative timetable

7. Members noted that the scrutiny period of the Amendment Rules had been extended to 30 November 2011. The deadline for giving notice to move a resolution to amend the Amendment Rules was 23 November 2011.

Date of next meeting

8. The Chairman proposed that a meeting be held in the following week to consider the Administration's response to follow-up actions arising from the discussion at the meeting. Members agreed.

(Post-meeting note: The Chairman had directed that the next meeting be held on Wednesday, 16 November 2011 at 8:30 am. The notice of meeting and the agenda for the meeting had been issued vide LC Paper No. CB(1)332/11-12 on 11 November 2011.)

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

Council Business Division 1
Legislative Council Secretariat
29 February 2012

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

**Third Meeting on Friday, 11 November 2011, at 4:30 pm,
in Conference Room 2B of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000054 – 000127	Chairman	Opening remarks	
000128 – 000234	Administration Chairman	Briefing by the Administration on its response to list of follow-up actions arising from the discussion at the meeting on 1 November 2011.	
000235 – 000413	Mr CHIM Pui-chung	Mr CHIM Pui-chung's view that the Administration should consider introducing, in the long run, a licence regime for professional investors in respect of different financial products and markets by way of the issue of a licence or certificate to accord an investor with the status of a professional investor.	The Administration/SFC to take follow up actions as requested in paragraphs 2(d) and 3 of the minutes.
000414 – 000619	Mr KAM Nai-wai	Mr KAM Nai-wai referred to the assessment criteria for elective professional clients in UK as set out in LC Paper No. CB(1)281/11-12(05). He noted that while similar assessment criteria were included in the Code of Conduct, they were not specified under the existing legislation. He enquired whether the Administration would consider including similar	

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		assessment criteria in the Amendment Rules or relevant legislation.	
000620 – 000820	Administration Ms Yvonne MOK	<p>The Administration advised that the criteria for "elective professional clients" adopted by UK were specified in the Conduct of Business Sourcebook of the UK Financial Services Authority and were not included in the UK legislation.</p> <p>The Administration further advised that at the meeting on 9 November 2011, some deputations had expressed reservations over the proposal to incorporate certain regulatory requirements contained in the Code of Conduct into the Amendment Rules or relevant legislation. One of the deputations was concerned about the different liabilities arising from the breach of a requirement in the legislation and in the Code of Conduct.</p> <p>SFC advised that as the Code of Conduct was written in more layman language while the legislation was written in statutory language, it might not be appropriate to extract certain regulatory requirements from the Code of Conduct for incorporation into the PI Rules or relevant legislation. To specify such assessment criteria in the legislation might hinder private placement activities in the market.</p>	The Administration/SFC to take follow up actions as requested in paragraphs 2(c) and 3 of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
000821 – 001942	Mr KAM Nai-wai Ms Yvonne MOK Mr James TO Administration Ms Alexandra YEONG Chairman	<p>Mr KAM Nai-wai questioned why the incorporation of the assessment criteria in the PI Rules would hinder private placement activities in the market. Mr James TO raised similar query.</p> <p>SFC advised that if an investor was a professional investor as defined under the PI Rules, the legal restrictions under sections 103, 174 and 175 of the Securities and Futures Ordinance (Cap. 571) (SFO) did not apply. The Administration/SFC further advised that the market should be consulted first on the suggestion to include the assessment criteria in the relevant legislation.</p> <p>Mr James TO's view that the professional investor regime should be reviewed to address public concern over investor protection. He believed that the incorporation of the assessment criteria in the PI Rules would help enhance investor protection as non-compliance would attract criminal sanctions.</p> <p>SFC advised that the Amendment Rules were proposed in view of market participants' comments that the existing evidential requirements under the PI Rules were too prescriptive and provided little flexibility for them to assess and ascertain professional investors.</p>	

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		<p>Mr James TO was concerned whether and when the Administration/SFC would review the professional investor regime, and include the assessment requirements for professional investors contained in the Code of Conduct in the relevant legislation so as to address public concerns over investor protection. SFC advised that the public had been consulted in the fourth quarter of 2009 on a package of proposals to enhance investor protection. The assessment criteria in the Code of Conduct had been tightened after considering the views received from the market during the consultation. Mr James TO further opined that the Administration should strike a balance between investor protection and market interests. The Administration/SFC was requested to consider and explain the practical difficulties, if any, for including the qualifying criteria and written consent requirement in the Amendment Rules.</p>	<p>The Administration/SFC to take follow up actions as requested in paragraphs 3 and 5 of the minutes.</p>
001943 – 002317	<p>Ir Dr Raymond HO Administration Ms Yvonne MOK</p>	<p>Ir Dr Raymond HO referred to the Administration's response in A2(d) in LC Paper No. CB(1)313/11-12(01), and enquired about the different disciplinary actions that could be taken by HKMA where major breaches and non-compliance with regulatory requirements were identified and the circumstances under which HKMA</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>would refer cases of major breaches and non-compliance to SFC for enforcement action.</p> <p>The Administration's explanation of the regulatory role of SFC and HKMA. Where major breaches or non-compliance were identified, HKMA might take disciplinary actions against an executive officer and/or a relevant individual (i.e. staff registered for conducting regulated activities) and, where appropriate, refer to SFC for enforcement and disciplinary actions.</p>	<p>The Administration/SFC to take follow up actions as requested in paragraph 6 of the minutes.</p>
<p>002318 – 004924</p>	<p>Ms Audrey EU Ms Yvonne MOK Legal Adviser Chairman Administration Ms Clara CHIU Ms Alexandra YEONG</p>	<p>Ms Audrey EU's concern that the definition of "professional investor" was not in a single piece of legislation which might cause confusion and difficulties to the general public in understanding the qualifying criteria of a professional investor and the consequences and risks to be classified as a professional investor. She also raised concern that the definition of "professional investor" under the PI Rules had not included or made any reference to qualifying criteria, such as the assessment on the investor's knowledge, expertise and investment experience in the relevant product and/or market and the written consent requirement contained in the Code of Conduct.</p> <p>SFC advised that "professional</p>	

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		<p>investor" was defined in section 1 of Part 1 of Schedule 1 to SFO. Pursuant to paragraph (j) of the definition of "professional investor", SFC was empowered to prescribe additional classes of persons to be professional investors under the PI Rules.</p> <p>SFC further advised that the Code of Conduct did not provide a legal definition of "professional investor". Paragraph 15 of the Code of Conduct provided specific actions that an intermediary must go through when the intermediary wished to waive certain requirements in the Code of Conduct in dealing with a professional investor.</p>	<p>The Administration/SFC to take follow up actions as requested in paragraph 5 of the minutes.</p>
<p>004925 – 010544</p>	<p>Mr CHIM Pui-chung Mr KAM Nai-wai Ms Yvonne MOK Administration Chairman Ir Dr Raymond HO</p>	<p>Mr KAM Nai-wai enquired about the different sanctions for breaches of the legal requirements under the PI Rules and breaches of the requirements set out in the Code of Conduct for dealing with/serving professional investors.</p> <p>SFC advised that breaches of SFO (e.g. provisions under sections 103, 174 and 175) might lead to criminal sanctions. The failure to properly assess an investor as a professional investor under any of these provisions might result in criminal prosecution. Disciplinary sanctions ranging from reprimand,</p>	

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		<p>fine and suspension or revocation of an intermediary's licence or registration would be imposed on intermediaries for breaches of the Code of Conduct.</p> <p>Mr KAM Nai-wai's view that the Administration/SFC should consider making it an explicit requirement in the legislation requiring intermediaries (a) to comply with the relevant requirements under the Code of Conduct in dealing with professional investors; or (b) to assess an investor's knowledge, expertise and investment experience prior to treating an investor as a professional investor.</p> <p>Ir Dr Raymond HO's view that the said requirements could be incorporated into section 3 of the Amendment Rules. The Chairman requested the Administration to consider members' suggestions.</p> <p>Mr CHIM Pui-chung reiterated his suggestion for introducing a licence regime for professional investors. He said that under the regime, an investor who had met the qualifying criteria would be issued a certificate or licence to be qualified as a professional investor. He opined that with the licence regime in place, intermediaries would no longer be required to undertake the annual confirmation exercise of professional investors to update</p>	<p>The Administration/SFC to take follow up actions as requested in paragraphs 2(a), 2(b) 3 and 4 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>clients' professional investor status.</p> <p>The Chairman opined that the purpose of conducting the annual confirmation exercise was to protect investors. He requested the Administration/SFC to consider whether the licence regime proposed by Mr CHIM should be introduced in the long run.</p> <p>SFC advised that the Code of Conduct required intermediaries to conduct a separate assessment on an investor's knowledge, expertise and investment experience prior to treating an existing professional investor as a professional investor in a different product type or market. The intermediary should also undertake a new assessment where a professional investor had ceased to trade in the relevant product or market for more than two years. It was therefore practically difficult for the Administration/SFC to issue a blanket licence or certificate to a professional investor.</p> <p>In response to Mr KAM Nai-wai's request, the Administration/SFC would provide information on whether any comparable jurisdictions had adopted a licence regime as suggested by Mr CHIM Pui-chung.</p>	<p>The Administration/SFC to take follow up actions as requested in paragraph 3 of the</p>

Time Marker	Speaker	Subject(s)	Action Required
			minutes.
010545 – 011200	Chairman Administration	Legislative timetable Next meeting	Clerk to prepare schedule of next meeting

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29 February 2012