



SECURITIES AND FUTURES COMMISSION

證券及期貨事務監察委員會

**Consultation paper on proposed amendments
to Schedule 5 to the Securities and Futures
Ordinance**

關於《證券及期貨條例》附表 5 的建議
修訂的諮詢文件

**Hong Kong
February 2005**

香港
2005 年 2 月

Introduction

1. In light of the development of the industry and the comments received from market participants (including various industry associations) on the new licensing regime under the SFO, the Commission intends to effect certain amendments to Part 2 of Schedule 5 to the SFO which contains the definitions of the different types of regulated activity. These definitions principally impact on the licensing and registration matters under Part V of the SFO.

Proposed amendments

2. The proposed amendments are summarized as follows: -
 - (a) Amend the definition of “asset management” (i.e. Type 9 regulated activity) to additionally include real estate investment scheme management¹ – *Amendment (a)*;
 - (b) Amend the definition of “dealing in securities” (i.e. Type 1 regulated activity) to carve out the related dealing activities carried on by an approved money broker within the meaning of section 2(1) of the Banking Ordinance (“BO”) where the transaction concerned is conducted on behalf of authorized financial institutions – *Amendment (b)*;
 - (c) Amend the definitions of “advising on securities” (i.e. Type 4 regulated activity) and “advising on futures contracts” (i.e. Type 5 regulated activity) to carve out related advisory activities conducted by a person who manages a portfolio of securities and futures contracts under a collective investment scheme² where such advisory activities are conducted solely for the purposes of carrying on Type 9 regulated activity which he is already licensed or registered for – *Amendment (c)*; and
 - (d) Amend the definition of “dealing in securities” (i.e. Type 1 regulated activity) so that the exclusion in paragraph (v)(B) for dealings by a person as principal only applies when a person as principal acquires, subscribes for or underwrites securities but not when such a person disposes of securities – *Amendment (d)*.

¹ “Real estate investment scheme management” in relation to a person, means providing a service of operating a collective investment scheme for another person by the person, where the property that is being managed under the scheme consists primarily of immovable property; and the scheme is authorised under section 104 of the SFO.

² The term “collective investment scheme” is defined under Part 1 of Schedule 1 to the SFO.

Reasons for the proposed amendments

Amendment (a) - Licensing of managers of Real Estate Investment Trust (“REIT”)

3. As the law presently stands, the definition of “asset management” generally relates to a person providing or holding himself out as providing a service of managing a portfolio of securities or futures contracts for another person.
4. The SFC notes that the existing licensing net may not cover fund managers of REITs which are offered to the public because the investment portfolios under management do not necessarily consist of “securities” or “futures contracts” as defined under the SFO.
5. To keep pace with industry development and foster protection to investors at large, we, therefore, propose that the definition of “asset management” be extended to include real estate investment scheme management. Under the proposed amendment, fund managers of authorized REITs will be required to be licensed by the SFC for Type 9 regulated activity.

Amendment (b) - Money brokers exemption

6. Currently, certain trading activities of an approved money broker undertaken on behalf of its clients may fall within the definition of “dealing in securities” hence triggering the relevant licensing requirements. The Hong Kong Foreign Exchange & Deposit Brokers’ Association, whose membership comprises approved money brokers³, made a submission to the SFC seeking licensing exemptions for its members in that regard. It was submitted that, among other things, the primary business activities of approved money brokers include dealing in foreign currencies, derivatives and bonds, etc. In addition, the brokers’ clientele consists of authorized financial institutions only (i.e. banks, restricted licence banks and deposit-taking companies).
7. Having discussed with the Hong Kong Monetary Authority (“HKMA”), the SFC considers that there are merits in the submission as these approved money brokers are already subject to the regulation and supervision of the HKMA, and the proposed exclusions will not result in risk to investors given that they only deal for authorized financial institutions.
8. Against this background, the SFC proposes that the definition of “dealing in securities” be amended to the effect that where the related dealing activities are carried on by an approved money broker and each of the counterparts to the transaction concerned is an authorized financial institution whom the broker acts for, such dealing activities will be excluded from the definition.

³ “Approved money broker” means a money broker which holds a valid certificate of approval attached to a notice served on that broker by the HKMA under section 118C(1)(a) of the BO.

Amendment (c) - Incidental advice of fund managers

9. According to the existing licensing requirements, fund managers have to be licensed or registered for Type 9 regulated activity (asset management) in order to provide portfolio management services to clients concerning securities or futures contracts. Where a fund manager also advises clients on securities and/or futures contracts, say by way of issuing research reports or providing advice on whether, which, the time at which, or the terms or conditions on which securities are to be acquired or disposed of and/or futures contracts are to be entered into, he is additionally required to be licensed or registered for Type 4 regulated activity (advising on securities) and/or Type 5 regulated activity (advising on futures contracts), as the case may be.
10. The SFC received submissions from the industry seeking certain licensing exemptions such that fund managers (who are already licensed or registered for Type 9 regulated activity) will not be required to be licensed or registered for Type 4 and/or Type 5 regulated activities.
11. In that connection, the SFC considers that a person who is licensed for Type 9 regulated activity and provides a service of managing a portfolio of securities and/or futures contracts under a collective investment scheme will generally have the requisite expertise, attributes and resources to give clients investment advice for the purposes of providing them with his asset management services. For instance, a fund manager who intends to market the funds under his management may first provide certain investment advice or related research results to prospective investors to demonstrate his expertise in the area. Under such circumstances, we consider that additional licensing requirements on the fund manager with respect to Type 4 and/or Type 5 regulated activities may not be necessary.
12. Therefore, the SFC proposes that: -
 - (a) the definition of “advising on securities” be amended to exclude the related advisory activity carried on by a person who is licensed or registered for Type 9 regulated activity where:-
 - (i) the person provides a service of managing a portfolio consisting of securities for another person under a collective investment scheme; and
 - (ii) the advisory activity concerned is carried on solely for the purposes of carrying on Type 9 regulated activity; and
 - (b) the definition of “advising on futures contracts” be amended to exclude the related advisory activity carried on by a person who is licensed or registered for Type 9 regulated activity where:-
 - (i) the person provides a service of managing a portfolio consisting of futures contracts for another person under a collective scheme; and

- (ii) the advisory activity concerned is carried on solely for the purposes of carrying on Type 9 regulated activity.

Amendment (d) - Redress disposal of securities to non-professional investors

- 13. The rationale behind the carve-out from the requirement to be licensed or registered for Type 1 regulated activity pursuant to the exemption in paragraph (v) of the definition of “dealing in securities” in Part 2 of Schedule 5 to the SFO is to exclude the following activities from the requirement: -
 - (a) all dealings by persons as principal with professional investors; and
 - (b) acquisitions of securities (from any person) by a person acting on his own behalf.
- 14. Where a person is disposing securities to another person other than a professional investor⁴ (whether as agent or principal), the policy intent is that he should be licensed or registered for Type 1 regulated activity. Otherwise, the person can sell, issue or dispose of securities to the public at large without being regulated hence giving rise to investor protection concern.
- 15. Currently, the exemption to the definition of “dealing in securities” in the SFO extends to disposals of securities by any person acting as principal, even if the person is dealing with a non-professional investor. This could have the unintended effect mentioned above.
- 16. Furthermore, from a drafting perspective, the inclusion of the expression “disposes of” in paragraph (v)(B) would have the effect of rendering the exemption in paragraph (v)(A) redundant, because any sale (or purchase) of securities by a person, as principal, to any person would be exempt pursuant to the exemption under paragraph (v)(B), regardless of whether or not the deal is made with a professional investor.
- 17. The current wording of the carve-out does not reflect the legislative intent. Therefore, the SFC proposes to rectify this by deleting the expression “disposes of” in paragraph (v)(B) of the definition of “dealing in securities”.

Implementation

- 18. The SFC proposes that the above amendments will be effected pursuant to section 142 of the SFO under which the Financial Secretary is conferred with the power to amend Schedule 5 to the SFO by notice published in the Gazette. The draft amendment notice is attached at **Appendix 2**.

⁴ The term “professional investor” is defined under Part 1 of Schedule 1 to the SFO. It includes, amongst others, licensed corporations and registered institutions.

Personal Information Collection Statement

1. This Personal Information Collection Statement (the “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 Commission’s use of your Personal Data and your rights under the Personal Data (Privacy) Ordinance, Cap. 486 (the “PDPO”).

Purpose of Collection

2. The Personal Data provided in your submission to the Commission in response to this Consultation Paper may be used by the Commission for one or more of the following purposes:
 - to administer the relevant provisions⁶ and codes and guidelines published pursuant to the powers vested in the Commission;
 - in performing the Commission’s statutory functions under the relevant provisions;
 - for research and statistical purposes; and
 - for other purposes permitted by law.

Transfer of Personal Data

3. Personal Data may be disclosed by the Commission to 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 Commission’s web site and in documents to be published by the Commission during the consultation period or at its conclusion.

⁵ Personal Data means personal data as defined in the Personal Data (Privacy) Ordinance.

⁶ Defined in Schedule 1 to the Securities and Futures Ordinance (Cap. 571) (“SFO”) to mean provisions of the SFO and subsidiary legislation made under it; and provisions of Parts II and XII of the Companies Ordinance (Cap. 32) so far as those Parts relate directly or indirectly, to the performance of functions relating to: prospectuses; the purchase by a corporation of its own shares; a corporation giving financial assistance for the acquisition of its own shares etc.

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 Commission has the right to charge a reasonable fee for processing any data access request.

Retention

5. Personal Data provided to the Commission in response to the Consultation Paper will be retained for such period as may be necessary for the proper discharge of the Commission's functions.

Enquiries

6. 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
8/F Chater House
8 Connaught Road Central
Hong Kong

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**SECURITIES AND FUTURES ORDINANCE (AMENDMENT OF
SCHEDULE 5) NOTICE 2005**

(Made by the Financial Secretary under section 142 of the
Securities and Futures Ordinance (Cap. 571))

1. Regulated activities

Part 2 of Schedule 5 to the Securities and Futures Ordinance
(Cap. 571) is amended -

(a) in the definition of "advising on futures
contracts", by adding -

"(iva) a person -

(A) who is licensed or registered for
Type 9 regulated activity;

(B) who provides a service of managing
a portfolio of futures contracts
under a collective investment
scheme for another person; and

(C) who gives such advice or issues
such analyses or reports solely
for the purposes of providing the
service described in subparagraph
(B);"

(b) in the definition of "advising on securities", by adding -

"(iva) a person -

- (A) who is licensed or registered for Type 9 regulated activity;
- (B) who provides a service of managing a portfolio of securities under a collective investment scheme for another person; and
- (C) who gives such advice or issues such analyses or reports solely for the purposes of providing the service described in subparagraph (B) ;";

(c) in the definition of "asset management" -

- (i) by repealing "'asset management" (資產管理)" and substituting "'securities or futures contracts management" (證券或期貨合約管理)";
- (ii) in paragraph (h), by repealing the semicolon and substituting a full stop;

(d) in the definition of "dealing in securities" -

- (i) in paragraph (v) (B), by repealing "disposes of,";
- (ii) in paragraph (xiii), by repealing "or" at

the end;

(iii) in paragraph (xiv), by adding "or" at the end;

(iv) by adding -

"(xv) in any case where each of the parties to the transaction or proposed transaction under which securities are or will be acquired, disposed of, subscribed for or underwritten as described in paragraph (a) is an authorized financial institution, is an approved money broker within the meaning of section 2(1) of the Banking Ordinance (Cap. 155) and performs the act for each of the parties to the transaction or proposed transaction;"

(e) in the definition of "securities margin financing", in paragraph (vii), by repealing the full stop and substituting a semicolon;

(f) by adding -

"asset management" (資產管理) means -

(a) real estate investment scheme

management; or

- (b) securities or futures contracts management;

“real estate investment scheme management” (地產投資計劃管理), in relation to a person, means providing a service of operating a collective investment scheme for another person by the person, where -

- (a) the property that is being managed under the scheme consists primarily of immovable property; and
- (b) the scheme is authorized under section 104 of this Ordinance;”.

Financial Secretary

2005

Explanatory Note

This Notice amends Part 2 of Schedule 5 to the Securities and Futures Ordinance (Cap. 571) as follows -

- (a) the definitions of "advising on futures contracts" and "advising on securities" are amended so that the giving of advice by a person, who is licensed or registered for Type 9 regulated activity, solely for the purposes of carrying on securities or futures contracts management, as the case may be, under a collective investment scheme is to be excluded from the definitions;
- (b) the definition of "asset management" is amended to become "securities or futures contracts management" and a new definition of "real estate investment scheme management" is introduced. These 2 kinds of investment management then constitute the newly defined "asset management";
- (c) the definition of "dealing in securities" is amended so that in a case where all parties to the dealing concerned are authorized financial institutions and the dealing is by an approved money broker who represents each of the parties concerned, the dealing is to be excluded from the definition; and

(d) the definition of "dealing in securities" is also amended so that any person who, as principal, disposes of securities is not to be excluded from the definition.