



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

## **Consultation Paper on the Evidential Requirements under the Securities and Futures (Professional Investor) Rules**

October 2010



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## 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 Data<sup>1</sup> 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 Personal Data (Privacy) Ordinance, Cap. 486 (**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:
  - (a) to administer the relevant provisions<sup>2</sup> and codes and guidelines published pursuant to the powers vested in the SFC;
  - (b) in performing the SFC's statutory functions under the relevant provisions;
  - (c) for research and statistical purposes;
  - (d) for other purposes permitted by law.

### Transfer of Personal Data

3. Personal Data may be disclosed by the SFC to members of the public in Hong Kong and elsewhere, as part of the public consultation on this consultation paper. The names of persons who submit comments on this 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's website and in documents to be published by the SFC during the consultation period or at its conclusion.

### 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 this consultation paper. The SFC has the right to charge a reasonable fee for processing any data access request.

### Retention

5. Personal Data provided to the SFC in response to this consultation paper will be retained for such period as may be necessary for the proper discharge of the SFC's functions.

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

2 Defined in Schedule 1 to the Securities and Futures Ordinance (Cap. 571) to mean provisions of the Securities and Futures Ordinance 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.



## Enquiries

6. Any enquiries regarding the Personal Data provided in your submission on this 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  
8th Floor, Chater House  
8 Connaught Road Central  
Hong Kong

**A copy of the Privacy Policy Statement adopted by the SFC is available upon request.**



# Consultation Paper on the Evidential Requirements under the Securities and Futures (Professional Investor) Rules

## Introduction

1. The SFC invites comments on the proposals described in this consultation paper including the proposed amendments to the Securities and Futures (Professional Investor) Rules (Cap. 571D) (**Professional Investor Rules**). An indicative draft of these proposed amendments is set out in Appendix A to facilitate market comments. The proposals are aimed at refining the evidential requirements for ascertaining whether a person meets the relevant assets or portfolio threshold so as to qualify as a professional investor under the Professional Investor Rules.
2. This consultation paper does not seek to revisit the review of the professional investor regime in the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (**Code of Conduct**) that was the subject of a separate consultation exercise which concluded in May 2010.<sup>3</sup>
3. A consultation conclusions paper will be published after the end of the consultation period and careful consideration of all public comments received. Revisions reflecting comments taken on board will be incorporated into the draft amendment rules, which will be subject to negative vetting by the Legislative Council.

## Background

4. If an investor is classified as a “professional investor” under the Professional Investor Rules, the legal restrictions imposed by the Securities and Futures Ordinance (Cap. 571) (**SFO**) on the following acts do not apply:
  - (a) the issuance of advertisements, invitations or documents in relation to securities, regulated investment agreements and collective investment schemes<sup>4</sup>;
  - (b) the making of unsolicited calls<sup>5</sup>; and
  - (c) the communication of an offer in relation to securities<sup>6</sup>.

Further, the offering of any shares in (or debentures of) a company to professional investors is not subject to the prospectus regime under the Companies Ordinance (Cap. 32) (**CO**) (i.e., an SFC authorised prospectus will not be required)<sup>7</sup>.

5. There are two types of professional investors under the SFO. The first type are specified entities set out in paragraphs (a) to (i) of the definition of “professional investor” in Part 1 of Schedule 1 to the SFO (e.g., banks and insurance companies). The second type are persons belonging to a class which is prescribed under the

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3 See Section 3 of the Consultation Conclusions on Proposals to Enhance Protection for the Investing Public published by the SFC on 28 May 2010 on the SFC’s website at [www.sfc.hk](http://www.sfc.hk). The SFC considers that it is in the best interests of the investing public to maintain the existing minimum portfolio requirement at HK\$8 million.

4 Section 103 of the SFO.

5 Section 174 of the SFO.

6 Section 175 of the SFO.

7 Paragraph 1 of Part 1 of Schedule 17 to the CO.



Professional Investor Rules (**high net worth professional investors**). This consultation paper is related to these high net worth professional investors.

6. There are four types of high net worth professional investors, namely:
- (a) a trust corporation with total assets of not less than HK\$40 million (or the equivalent in foreign currency);
  - (b) an individual who (either alone or with his/her spouse or children on a joint account) has a portfolio of not less than HK\$8 million (or the equivalent in foreign currency);
  - (c) a corporation or partnership with either a portfolio of not less than HK\$8 million (or the equivalent in foreign currency) or total assets of not less than HK\$40 million (or the equivalent in foreign currency); and
  - (d) a corporation the sole business of which is to hold investments and which is wholly owned by an individual who (either alone or with his/her spouse or children on a joint account) has a portfolio of not less than HK\$8 million (or the equivalent in foreign currency) (i.e., an individual who falls within paragraph (b) above).
7. The Professional Investor Rules set out specific methods (evidential requirements) to ascertain the relevant assets or portfolio thresholds for the first three types of high net worth professional investors. These evidential requirements are:
- (a) For a trust corporation – (i) the most recent audited financial statement prepared in respect of the trust corporation and within 16 months before the relevant date; (ii) one or more audited financial statements, each being the most recent audited financial statement, prepared in respect of the trust or any of the trusts and within 16 months before the relevant date; or (iii) one or more custodian statements issued to the trust corporation in respect of the trust or any of the trusts and within 12 months before the relevant date.<sup>8</sup>
  - (b) For an individual – (i) a certificate issued by an auditor or a certified public accountant within 12 months before the relevant date; or (ii) one or more custodian statements issued to the individual (either alone or with his/her spouse or children) within 12 months before the relevant date.<sup>9</sup>
  - (c) For a corporation or partnership – (i) the most recent audited financial statement prepared in respect of the corporation or partnership and within 16 months before the relevant date; or (ii) one or more custodian statements issued to the corporation or partnership within 12 months before the relevant date.<sup>10</sup>
8. In October 2009, the SFC published the Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance and the Offers of Investments Regime in the Securities and Futures Ordinance<sup>11</sup>. During the consultation process, some

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8 Section 3(a) of the Professional Investor Rules.

9 Section 3(b) of the Professional Investor Rules.

10 Section 3(c) of the Professional Investor Rules.

11 See the Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance and the Offers of Investments Regime in the Securities and Futures Ordinance published by the SFC on 30 October 2009 on the SFC's website at [www.sfc.hk](http://www.sfc.hk).



market participants expressed that as the Professional Investor Rules have very specific evidential requirements, they have found it difficult in practice to ascertain and treat clients as professional investors. Consequently, market participants have been unable to utilise the professional investor exemption. The SFC acknowledged the views expressed and undertook to study this matter further and consult the market in due course.<sup>12</sup>

9. The purpose of this consultation paper is to seek the market's views on the SFC's proposals to refine the evidential requirements under the Professional Investor Rules. The SFC wishes to stress that this review of the evidential requirements in the Professional Investor Rules relates only to the method in which the assets or portfolio thresholds in the Professional Investor Rules may be established so as to classify a person as a professional investor for the purposes of the Professional Investor Rules. This consultation does not review any of the other elements of the professional investor regime including the assets/portfolio thresholds prescribed under the Professional Investor Rules or the provisions in the Code of Conduct – these other elements were the subject of a separate consultation exercise which concluded in May 2010.<sup>13</sup>

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12 See paragraph 31 in the Consultation Conclusions on Possible Reforms to the Prospectus Regime in the Companies Ordinance and the Offers of Investments Regime in the Securities and Futures Ordinance published by the SFC on 22 April 2010 on the SFC's website at [www.sfc.hk](http://www.sfc.hk).

13 See footnote 3.



## Proposals for refining the evidential requirements under the Professional Investor Rules

10. In view of the comments from market participants that the current evidential requirements under the Professional Investor Rules are limited in scope and provide little flexibility and having studied the Professional Investor Rules as well as practices in overseas markets, the SFC proposes to refine the evidential requirements under the Professional Investor Rules. The SFC proposes to allow firms to use any method to establish the different types of high net worth professional investors whilst preserving the existing methods set out in sections 3(a) to 3(c) of the current Professional Investor Rules (as outlined in paragraph 7 above).
11. Accordingly, the SFC proposes to adopt a principles-based approach and amend the Professional Investor Rules so that:
  - (a) To qualify as a professional investor, an investor (whether a trust corporation or an individual or a corporation/partnership) will have to meet the relevant assets or portfolio threshold (which will remain unchanged from the current levels) at the relevant date. Firms may use any method to satisfy themselves that such investor meets the relevant assets or portfolio threshold at the relevant date.
  - (b) The Professional Investor Rules will not prescribe the requirements for ascertaining whether a person meets the relevant assets or portfolio threshold at the relevant date. The SFC takes the view that it would not be desirable to seek to prescribe all the possible ways that an investor could demonstrate he/she/it has the relevant assets so as to qualify as a professional investor under the Professional Investor Rules. The SFC will rely on the firms' professional judgement to decide the methods by which they can satisfy themselves that their clients have the required assets or portfolio levels at the relevant date. The SFC expects firms to keep proper records of their assessment process so as to demonstrate that they have exercised professional judgement and have reached a reasonable conclusion that their clients meet the relevant thresholds, e.g., keeping copies of the documents they have relied on to assess clients' means.
  - (c) "relevant date" is defined in section 2 of the Professional Investor Rules as:
    - (i) in the case of an advertisement, invitation or document described in section 103(3)(k) of the SFO, means the date on which the advertisement, invitation or document is issued, or possessed for the purposes of issue;
    - (ii) in the case of a call described in section 174(2)(a) of the SFO, means the date on which the call is made;
    - (iii) in the case of an offer described in section 175(5)(d) of the SFO, means the date on which the offer is made; or
    - (iv) in any other case which, by virtue of any rules made under the SFO, requires compliance with an obligation, means the date by or on which the obligation is required to be complied with.



- (d) To enable firms that wish to continue with the existing practices to do so, the existing methods set out in sections 3(a) to 3(c) of the current Professional Investor Rules (as outlined in paragraph 7 above) will be preserved.
  - (e) Any corporation which is wholly owned by one or more individuals or corporations/partnerships where each of those individuals or corporations/partnerships would qualify as a professional investor under section 3(b) or section 3(c) (as the case may be) of the Professional Investor Rules, will qualify as a professional investor.
12. An indicative draft of the proposed amendments to the Professional Investor Rules is set out in Appendix A.
13. The SFC believes that the proposed approach will create more flexibility for firms to take steps that they consider necessary to satisfy themselves that their clients have the requisite assets or portfolio levels to be treated as professional investors. Some market participants may ask whether self-certification by a client would be an acceptable means to establish the relevant assets or portfolio level of such client at the relevant date. The SFC is of the view that it will be up to firms to exercise their professional judgement to determine whether it is appropriate/sufficient to rely on a client's self-certification to satisfy themselves that the client has the required assets or portfolio level at the relevant date taking into account all the relevant circumstances.

Question 1

Do you agree that the proposed approach is the best way to serve the purpose of providing flexibility? Please explain your view.

Do you have any other suggestions?

Question 2

Do you agree that the existing methods set out in sections 3(a) to 3(c) of the Professional Investor Rules (as outlined in paragraph 7 above) should be preserved? Please explain your view.

Do you have any other suggestions?

Question 3

Do you agree that the "relevant date" should be used as the time reference for ascertaining whether a high net worth professional investor meets the relevant assets or portfolio threshold? Please explain your view.

Do you have any other suggestions?



#### Question 4

Do you agree that section 3(d) of the existing Professional Investor Rules should be extended so that any corporation which is wholly owned by one or more individuals or corporations/partnerships where each of those individuals or corporations/partnerships would qualify as a professional investor under section 3(b) or section 3(c) (as the case may be) of the Professional Investor Rules, will qualify as a professional investor? Please explain your view.

Do you have any other suggestions?

#### Question 5

Do you have any comments on the indicative draft of the proposed amendments to the Professional Investor Rules in Appendix A? Please explain your view.

Do you have any suggestions on alternative wordings for the proposed amendments? If so, please give your suggestions and explain your view.



## Seeking Comments

14. The SFC welcomes any comments from the public and the industry on the proposals made in this consultation paper and the indicative draft of the proposed amendments to the Professional Investor Rules in Appendix A to this consultation paper. Please submit comments to the SFC in writing by no later than 5 November 2010.



## Appendix A

### Indicative draft of proposed amendments to the Professional Investor Rules

[Note: Proposed amendments are marked up]

**Chapter: 571D**

**SECURITIES AND FUTURES (PROFESSIONAL INVESTOR) RULES**

(Cap 571, section 397(1))

**Section: 1** (Omitted as spent)

#### **Section: 2 Interpretation**

In these Rules, unless the context otherwise requires-

"associate" (有聯繫者), in relation to an individual, means the spouse or any child of the individual;

"custodian" (保管人) means-

- (a) a corporation the principal business of which is to act as a custodian of securities or other property for another person, whether on trust or by contract; or
- (b) any of the following persons-
  - (i) an authorized financial institution;
  - (ii) a bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong;
  - (iii) a licensed corporation;
  - (iv) a person carrying on the business of the provision of investment services and regulated under the law of any place outside Hong Kong, whose business includes acting as a custodian of securities or other property for another person, whether on trust or by contract;

"custodian statement" (保管人結單) means a statement of account issued by a custodian;

"portfolio" (投資組合) means a portfolio comprising any of the following-

- (a) securities;
- (b) a certificate of deposit issued by-
  - (i) an authorized financial institution; or
  - (ii) a bank which is not an authorized financial institution but is regulated under the law of any place outside Hong Kong;
- (c) in relation to an individual, corporation or partnership, money held by a custodian for the individual, corporation or partnership;

"relevant date" (有關日期)-

- (a) in the case of an advertisement, invitation or document described in section 103(3)(k) of the Ordinance, means the date on which the advertisement, invitation or document is issued, or possessed for the purposes of issue;
- (b) in the case of a call described in section 174(2)(a) of the Ordinance, means the date on which the call is made;
- (c) in the case of an offer described in section 175(5)(d) of the Ordinance, means the date on which the offer is made; or
- (d) in any other case which, by virtue of any rules made under the Ordinance, requires compliance with an obligation, means the date by or on which the obligation is required to be complied with;

"trust corporation" (信託法團) means-

- (a) any trust company registered under Part VIII of the Trustee Ordinance (Cap 29); or



- (b) any other corporation which-
  - (i) carries on a business which is of a nature similar to that of a trust company referred to in paragraph (a); and
  - (ii) is regulated under the law of any place outside Hong Kong.

### **Section: 3 Persons prescribed as professional investors**

For the purposes of paragraph (j) of the definition of "professional investor" in section 1 of Part 1 of Schedule 1 to the Ordinance, the following persons are prescribed as within the meaning of that definition for the purposes of any provision of the Ordinance other than Schedule 5-

- (a) any trust corporation having been entrusted under the trust or trusts of which it acts as a trustee with total assets of not less than \$40 million or its equivalent in any foreign currency at the relevant date or-
  - (i) as stated in the most recent audited financial statement prepared-
    - (A) in respect of the trust corporation; and
    - (B) within 16 months before the relevant date;
  - (ii) as ascertained by referring to one or more audited financial statements, each being the most recent audited financial statement, prepared-
    - (A) in respect of the trust or any of the trusts; and
    - (B) within 16 months before the relevant date; or
  - (iii) as ascertained by referring to one or more custodian statements issued to the trust corporation-
    - (A) in respect of the trust or any of the trusts; and
    - (B) within 12 months before the relevant date;
- (b) any individual, either alone or with any of his associates on a joint account, having a portfolio of not less than \$8 million or its equivalent in any foreign currency at the relevant date or-
  - (i) as stated in a certificate issued by an auditor or a certified public accountant of the individual within 12 months before the relevant date; or
  - (ii) as ascertained by referring to one or more custodian statements issued to the individual (either alone or with the associate) within 12 months before the relevant date;
- (c) any corporation or partnership having-
  - (i) a portfolio of not less than \$8 million or its equivalent in any foreign currency; or
  - (ii) total assets of not less than \$40 million or its equivalent in any foreign currency, at the relevant date, or as ascertained by referring to-
    - (iii) the most recent audited financial statement prepared-
      - (A) in respect of the corporation or partnership (as the case may be); and
      - (B) within 16 months before the relevant date; or
    - (iv) one or more custodian statements issued to the corporation or partnership (as the case may be) within 12 months before the relevant date; and
- (d) any corporation the sole business of which is to hold investments and which is wholly owned by any of the following persons, whether alone or in combination-
  - (i) an individual who, either alone or with any of his associates on a joint account, falls within the description in paragraph (b);
  - (ii) a corporation that falls within the description in paragraph (c); or
  - (iii) a partnership that falls within the description in paragraph (c).