

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

Quick Read

Securities and Futures Commission (SFC) published its “*Consultation Conclusions on the Evidential Requirements under the Securities and Futures (Professional Investor) Rules*” (**PI Consultation Conclusions**) on 23 February 2011 in response to its corresponding consultation paper published on 4 October 2010. The major aim of the consultation was to allow more flexibility by adopting a principles-based approach so that firms may use methods which they consider appropriate in the circumstances to satisfy themselves that an investor qualifies as a high-net-worth professional investor at the relevant time under the Securities and Futures (Professional Investor) Rules (Cap 571D of the Laws of Hong Kong) (**Professional Investor Rules**). Having said that, firms may continue with the existing practices and apply the current methods set out in the Professional Investor Rules to ascertain the relevant assets or portfolio thresholds for high-net-worth professional investors.

Proposals Adopted

The proposals adopted in the PI Consultation Conclusions are summarised as follows:

A PRINCIPLES-BASED APPROACH

The SFC will adopt a principles-based approach and make corresponding amendments to the Professional Investor Rules so that firms may use any methods they consider appropriate in the circumstances to establish the different types of high-net-worth professional investor at the relevant date. At present, there are four types of high-net-worth professional

investor under the Professional Investor Rules as specified below :

- A trust corporation with total assets of not less than HK\$40 million;
- An individual who has a portfolio of not less than HK\$8 million;
- A corporation or partnership with either a portfolio of not less than HK\$8 million or total assets of not less than HK\$40 million; and
- A corporation the sole business of which is to hold investments and which is wholly owned by an individual who has a portfolio of not less than HK\$8 million.

The existing Professional Investor Rules set out specific evidential requirements for ascertaining the relevant assets or portfolio thresholds for high-net-worth professional investors. Under the principles-based approach, the Professional Investor Rules will not specify the requirements or measures for determining whether a person meets the relevant assets or portfolio threshold at the relevant date and firms may use any methods they consider appropriate to satisfy themselves that an investor meets the relevant threshold requirement to qualify as a professional investor. Firms should keep proper records of their process of assessment to prove that they have exercised professional judgement in arriving at a reasonable conclusion that a client qualifies as a professional investor.

THE RELEVANT DATE

As explained above, to qualify as a high-net-worth professional investor, an investor will have to meet the relevant assets or portfolio threshold as specified

in the Professional Investor Rules *at the relevant date*. “Relevant date” is defined in section 2 of the Professional Investor Rules as:

- In the case of an advertisement, invitation or document described in section 103(3)(k) of the Securities and Futures Ordinance (Cap 571 of the Laws of Hong Kong)(SFO), means the date on which the advertisement, invitation or document is issued, or possessed for the purposes of issue;
- In the case of a call described in section 174(2)(a) of the SFO, means the date on which the call is made;
- 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
- 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.

EXISTING PRACTICES

As mentioned above, the existing Professional Investor Rules set out specific evidential requirements for ascertaining the relevant assets or portfolio thresholds for high-net-worth professional investors. The SFC has decided to retain the current methods set out in the existing Professional Investor Rules and so if a firm wants to continue to apply the existing practices, it may do so at its discretion. Such existing practices are outlined as follows:

- For a trust corporation – (a) the most recent audited financial statement prepared in respect of the trust corporation and within 16 months before the relevant date; (b) 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 (c) 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.

- For an individual – (a) a certificate issued by an auditor or a certified public accountant within 12 months before the relevant date; or (b) 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.
- For a corporation or partnership – (a) the most recent audited financial statement prepared in respect of the corporation or partnership and within 16 months before the relevant date; or (b) one or more custodian statements issued to the corporation or partnership within 12 months before the relevant date.

THE SCOPE OF HIGH-NET-WORTH PROFESSIONAL INVESTORS

Any corporation which is wholly owned by one or more trust corporations, individuals or corporations/partnerships where each of such trust corporations, individuals or corporations/partnerships would qualify as a professional investor will qualify as a professional investor.

Way Forward

The amended Professional Investor Rules will be gazetted in due course following review by the Department of Justice (no specific date is mentioned).

Copies of the PI Consultation Conclusions can be downloaded via the link below:

<http://www.sfc.hk/sfc/doc/EN/speeches/public/consult/PIConPaper23Feb11Final.pdf>

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