

29 November 2011

Hon Jasper Tsang Yok-Sing
President
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear President

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

On behalf of its members, the International Swaps and Derivatives Association, Inc. (ISDA) respectfully presents this letter to the Legislative Council (“**LegCo**”).

By way of brief introduction, ISDA is the leading global trade association in the privately negotiated derivatives industry with over 825 members from 57 countries on six continents. ISDA’s pioneering work in developing the ISDA Master Agreement and a wide range of related documentation materials, and in ensuring the enforceability of their netting and collateral provisions, has helped to significantly reduce credit and legal risk. ISDA has been a leader in promoting sound risk management practices and processes, and engages constructively with policymakers and legislators around the world to advance the understanding and treatment of derivatives as a risk management tool.

It has come to our attention that a motion may be put forward for consideration by the LegCo at the meeting to be held on 30 November 2011 in respect of certain further amendments to the Securities and Futures (Professional Investor) Rules (Cap 571D) (“**Rules**”). We are given to understand that the proposed changes may encompass the inclusion of the qualitative accreditation requirements currently set out in the Code of Conduct for Persons Licensed by or Registered with the SFC (“**Code of Conduct**”) and/or further qualitative requirements to the Rules.

Our members are concerned about the proposed changes and wanted to take this opportunity to reiterate a number of points for your consideration.

The professional investor exemption (“**Exemption**”) to the public offering restrictions as currently set out in the Rules has been a longstanding feature of the regulatory framework governing the structured products market in Hong Kong. The Exemption plays a vital role in bringing a wide variety of structured products to the market and its importance continues to be reflected in the recent reforms to the restrictions relating to the offer of structured products under the Securities and Futures Ordinance (Cap 571) (“**SFO**”).

The current Exemption has enabled many sophisticated and active professional investors to access an array of products that may not otherwise be available to the general public. The Code of Conduct has been recently amended to reinforce investor protection in the selling process (which already sets out the requirements that the relevant individual must have certain knowledge and expertise in respect of certain types of products). Mirroring the requirements set out in the Code of Conduct into the Rules would make the Exemption extremely difficult to rely upon.

As such, we are of the view that any additional qualitative and other requirements set out in the Code of Conduct may not necessarily be an accurate, practical or effective means of assessing whether a client is suitable for any given product. Further, categorisation of clients based on a list of pre-set criteria may potentially and unnecessarily alienate many investors (who may in fact be experienced, well-informed and sophisticated) from accessing products via private placements. This will lead to a number of obviously undesirable consequences, such as:

- i. severely restricting an investor’s freedom to choose as to the type and range of products available to the market; and

- ii. reducing Hong Kong's level of competitiveness as compared to other markets, many of which have viable private placement exemptions.

Further, the change would not necessarily increase the degree of investor protection. It is critical to note that financial institutions conduct know-their-customers checks and assess the suitability of an investment product for their customer on a transaction-by-transaction basis. Such requirements apply even when products are offered to professional investors under the Rules and financial institutions would not generally rely on exemptions to avoid these requirements. In other words, classification of whether an investor as a "professional investor" under the Rules only opens the gateway to access those products via private placements, and investors are not deprived of the safeguards already put in place which are designed to ensure suitability.

We are a strong proponent of and have at all times advocated for the protection of investors and the promotion of a fair, efficient, competitive and transparent securities market. That said, we must also balance that position with the market's desire for the wide range of products that investors expect from an international financial centre such as Hong Kong.

We respectfully urge LegCo to consider the potentially damaging consequences of codifying and including the additional qualitative accreditation requirements in the Rules and would welcome an opportunity to discuss this subject with you further.

Yours sincerely

Keith Noyes
Regional Director, Asia Pacific
International Swaps and Derivatives Association, Inc.

cc. Hon. CHAN Kam-Lam, SBS, JP, Chairman of Financial Affairs Panel, Legislative Council