



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

《證券及期貨(賣空豁免及證券借出)規則草擬本》的諮詢總結

香港
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A. 引言

1. 在 2002 年 5 月 24 日，證券及期貨事務監察委員會（“證監會”）發表諮詢文件，邀請公眾人士就**《證券及期貨(賣空豁免及證券借出)規則》**的草擬本（“《草擬規則》”）發表意見。
2. 《草擬規則》訂出 - (a)豁免遵守《證券及期貨條例》(2002 年第 5 號)第 170 條有關“無擔保”賣空的禁制的情況；(b)第 171 條的申報規定並不適用的情況；及(c)證券借出的申報規定。
3. 有關諮詢期於 2002 年 6 月 21 日結束。
4. 就《草擬規則》收到的意見撮要(“意見撮要”)載於附件 1。
5. 證監會在考慮過所收到的意見後，對《草擬規則》作出若干被認為是適當的修訂。
6. 本報告旨在分析在諮詢過程中有關人士提出的主要意見，以及證監會作出有關總結的理據。本報告應連同該諮詢文件、《草擬規則》及意見撮要一併閱讀。

B. 諮詢公眾意見

背景

7. 證監會擬備該《草擬規則》，是為了解免進行莊家活動或對沖莊家持倉的莊家遵守第170條所訂出的賣空禁制。《草擬規則》大體上重申目前存在於《證券(雜項)規則》內的豁免，同時亦列出第171條的申報規定並不適用的情況。最後，《草擬規則》重申目前的《證券(證券借出)規則》的條文。
8. 從政策觀點來看，《草擬規則》主要旨在－
 - (a) 使各類聯交所及期交所註冊莊家都可以在履行莊家責任時及進行對沖活動時賣空證券。就此而言，《草擬規則》將目前部分莊家可以享有的豁免精簡化，消除目前法例中前後不一之處，及將有關豁免範圍擴大至適用於各類莊家；
 - (b) 使交易可以適時地執行，並且減輕憑藉證券借貸協議所獲得的擔保而發出賣空指示的賣方的合規負擔；及

- (c) 規定證券借出人必須備存記錄，以確保適當的審計線索獲得設立。就此而言，有關備存記錄的規定只是重申目前的法例條文，並沒有引入新的政策改變。

諮詢程序

- 9. 證監會除於2002年5月24日就有關的諮詢行動發出新聞稿外，亦將該諮詢文件及《草擬規則》登載於證監會網站內，以及透過金融服務網絡向所有註冊人發放。
- 10. 證監會共收到5份意見書。整體來說有關意見的基調都是正面的。評論者一般對《草擬規則》表示歡迎。有關意見無論在廣度或深度方面都各有不同，部分針對廣泛原則，其餘則集中於某些細節及尋求澄清某些事項。

C. 諮詢總結

下文撮述證監會收到的主要意見及證監會對有關意見所作出的反應。

第2款

- 11. 其中一名評論者認為應刪除《草擬規則》中某些定義，改為由業界專業人士或判例法作出詮釋。
- 12. 證監會認為有關定義使《草擬規則》的內容更清晰，以及有助業界從業員遵守有關條文。鑑於有關人士如不遵守《草擬規則》的內容可能會導致其需要接受刑事制裁，因此有關條文所涉及的範圍適宜盡量清晰。此外，很多有關名詞都只有極少判例法可以援引，或完全沒有判例法可以援引。

第3款

- 13. 有人建議所有自營交易都可以獲得豁免。
- 14. 證監會認為莊家有需要執行其莊家職能時進行無抵押賣空。目前的豁免旨在促進莊家活動，以協助增加有關證券或期貨合約的流通性。聯交所及期交所認可的莊家需符合有關交易所的嚴格資格標準，而有關資格標準亦必須獲得證監會認可。證監會將在稍後考慮檢討其監管制度及風險管理措施，以決定是否適宜將有關豁免擴大至交易所參與者的自營交易。

15. 一名評論者認為，除非《香港聯合交易所有限公司規則》(《聯交所規則》)亦作出相應的豁免及就限價賣空規則作出豁免，否則有關豁免將不會對業界參與者有任何幫助。
16. 證監會及聯交所正著手就有關規則引入豁免。《聯交所規則》內的相應豁免大約會在《草擬規則》的建議豁免生效時推出。
17. 有評論者問及，替金融管理專員委任的莊家進行賣空的交易商是否需要遵守《證券及期貨條例》第170(1)條的規定及《草擬規則》的條文。
18. 證監會認為，金融管理專員委任的莊家如透過代理人(不論是註冊交易商還是交易所參與者)進行賣空，該莊家是以主事人的身分進行有關出售，而根據《草擬規則》第3(1)(a)款的豁免，第170(1)條將不適用於有關交易。而就其代理人而言，只要該代理人相信或有合理理由相信其主事人正根據第3(1)(a)款進行賣空，則該代理人已履行其在第170(1)條下的責任。
19. 若干評論者表示不清楚有關莊家的豁免是否可用於進行莊家活動但卻非交易所參與者的發行人或其他人士。
20. 有關政策的用意，是有關豁免可以適用於有關交易所認可為是進行莊家活動或流通性提供服務的任何人士。這些人士雖然不一定是交易所參與者，但卻必須已經在有關交易所“註冊”或獲其認可為莊家。證監會認為該份用以諮詢公眾意見的《草擬規則》在這方面有欠明確。證監會已經對第2款作出修訂。
21. 有評論者問及第3(2)款是否適用於為對沖某種證券而賣空另一種證券，而該被對沖的證券與該被出售的證券擁有同一種(即第三種)相關證券的情況。
22. 有關政策的用意，是允許有關人士就兩種相關的證券進行真正的對沖活動。假如兩種證券擁有相同的相關證券(該相關證券可以是第三種證券)，便會被視為是相關的。證監會同意該份用以諮詢公眾意見的《草擬規則》在這方面有欠明確。證監會已經對第3(2)(a)(ii)及(b)(ii)款作出修訂。

23. 其中一名評論者注意到有關豁免並沒有擴大至適用於對沖還未取得的持倉，並建議應將豁免範圍擴大至適用於這些活動。基於以上活動本身難以監管，而且容易被人濫用，因此證監會並不認為目前適宜將該類活動包括在豁免範圍之內。
24. 部分評論者質疑莊家怎樣可以在下一個交易日結束之前取得將有關證券歸屬於其購買人名下的權利，從而遵守第3(2)(c)款的規定。
25. 該條文建基於目前的《證券(雜項)規則》。該規則訂明有關人士可以取得有關交易所買賣基金的權利的方法。證監會認為，只要莊家在下一個交易日內取得有關權利，其取得有關權利的方法並不重要。因此，《草擬規則》並沒有訂明取得有關權利的方法。莊家可以透過借入或買入有關證券來遵守該條款的規定。同樣地，假如所出售的證券是交易所買賣基金的股份，賣方可以就該交易所買賣基金的股份發出開倉指示(creation order)。

第4款

26. 其中1名評論者表示第4款的應用範圍應擴大至包括所有賣空指示。
27. 《草擬規則》旨在促進證券借出業務。此外，證監會明白到大部分賣空指示都以證券借出安排作為擔保。因此，證監會並不認為有關豁免範圍應予以擴大。
28. 該名評論者亦提出收到書面記錄及時間蓋章的賣方須根據第4(5)款將資料包括在記錄內，而這將會超出於第171條所規定的範圍。
29. 根據第171(及172)條的規定，審計線索必須備存，以便擔保賣空可以從有關指示被輸入起加以追溯。證監會認為，在缺乏賣方需要根據第171條的規定而保留的資料或者在缺乏第4款規定的其他途徑的情況下，第4(5)款所要求的資料是必須提供的，以便審計線索不致中斷。證監會在制訂有關建議時，已諮詢過業界參與者的意見。有關參與者向證監會提供清單，列出他們通常會向主事人索取及在收到賣空指示時記錄在蓋有時間印章的盤紙上的資料。第4(5)款所要求的資料與業界人士向證監會

提供的資料相同。證監會認為該個途徑多數由中介經紀作為客戶的證券借出人或代表客戶安排證券借出所採用。其他經紀如認為該建議的豁免不能切合他們的需要，可以選擇採用《草擬規則》列出的其他建議豁免。

第5款

30. 一名評論者建議將為有關客戶提供證券借貸服務的交易商的資本、其在運作方面的勝任能力及風險管理等要求包括在內。
31. 由於《草擬規則》旨在為賣空及證券借出制訂審計線索，證監會相信將建議的要求包括在《草擬規則》之內並不恰當。然而，證監會將考慮是否有需要將有關要求包括在《證監會註冊人操守準則》之內。

其他

32. 《草擬規則》已重新命名，以便更貼切地反映規則的實質內容。

D. 生效日期

33. 《證券及期貨(賣空豁免及證券借出)規則》將於《證券及期貨條例》第VII部開始實施的日期起生效。

E. 其他事項

34. 證監會將發表經修訂的賣空指引，以在有關豁免開始生效之前，為業界參與者提供有關這些條文的應用指引。
35. 對於評論者所提出的寶貴建議及意見，證監會謹此致謝。

**Draft Securities and Futures (Short Selling Exemption and Stock Lending) Rules
Summary of comments received and SFC's response**

Item No.	Section Reference	Details of the Rules	Respondent's Comments	SFC's Response
1.	general comment	N.A.	<p><i>Wocom:</i> The short selling exemptions have been extended to all market makers. This should be accompanied by tighter scrutiny of market makers' role in providing liquidity. Examples were given as to market makers not fully complying with their market making obligations.</p>	<p>The proposed exemptions extend the scope of the current exemptions to all categories of market makers. The SFC believes that these exemptions facilitate the performance of market makers' market making functions and provide them with incentive to act as market makers.</p> <p>The SFC has requested HKEx to review market making obligations and market makers' performance to ensure that they fulfil the obligations.</p> <p>The Exchange has disciplinary power to penalize market makers who do not comply with their market making obligations.</p>
2.	general comment	N.A.	<p><i>Respondent A:</i> It is a market practice that the related short selling transactions by the underwriters would be reported to the Exchange as cross trades. This practice, however, may have technically breached the requirements of the SEHK Rules which require short sales in Designated Securities to be automatically struck through the AMS and to be made at or above the best current ask price. (n.b. the references in the submission to sections 3 and 15 should correctly be references to Regulation 3 and 15 of the 11th Schedule of the SEHK Rules).</p>	<p>If the short selling transactions have technically breached the SEHK Rules, the appropriate avenue to address this is in the SEHK Rules rather than in the draft Rules. The SFC will follow up with the SEHK.</p>
3.	2	Clause 2 sets out the definitions used in the draft Rules	<p><i>SHK:</i> The definitions for "blanket assurance" and "hold" should be removed from the draft Rules and left to the interpretation of business professionals or case law.</p>	<p>The SFC believes that it would be inappropriate to omit the definitions. Although securities practitioners should be familiar with these terms, there are few or no case laws on the exact meaning of them. The SFC believes that it is desirable to have the definitions to provide clarity to industry participants, especially where non-compliance with the provisions is a criminal offence.</p>

Item No.	Section Reference	Details of the Rules	Respondent's Comments	SFC's Response
4.			<p><i>SHK:</i> Most of the definitions in the current Stock Lending Rules have been incorporated into the draft Rules. But the definition of “documentary record” has been removed.</p>	<p>The observation is correct. However, the reference to “documentary record” in the current Stock Lending Rules is replaced by “in the form of a document” in the draft Rules and the term “document” is defined in Schedule 1 of the SFO.</p>
5.	3	<p>Clause 3 sets out the exemptions from the naked short selling prohibition under section 170 of the Ordinance for market makers</p>	<p><i>Linklaters:</i> The short selling exemptions are of limited use unless equivalent exemptions from the tick rule are also introduced. In addition, corresponding exemptions should be included in the SEHK Rules to permit exchange participants to conduct the types of naked short selling permitted by the draft Rules.</p>	<p>The SFC is working with HKEx to introduce corresponding exemptions under the SEHK Rules as well as relevant tick rule exemptions. The exemptions under the SEHK Rules are intended to be implemented at around the same time as those in the draft Rules.</p>
6.			<p><i>Wocom:</i> By virtue of the definition of ‘short selling order’, market makers can already hedge their positions. If this is not sufficient, the short selling exemptions should be extended to all SEHK and HKFE participants irrespective of whether they are market makers.</p>	<p>The provisions relating to ‘short selling orders’ are in relation to ‘covered’ short sales whilst section 170 (and the current exemptions) are in respect of naked short sales.</p> <p>The SFC takes the view that market makers have a need to be able to do naked short sales when they are performing market making functions. The SFC will consider reviewing the corresponding monitoring system and risk management measures to see whether it is appropriate to extend the exemptions to proprietary transactions of SEHK and HKFE participants in future.</p>
7.			<p><i>SHK:</i> Exemptions given under the draft Rules should be replaced by the granting of some kinds of special permits, founded on a set of criteria and based on an objective assessment of the capability of the persons who can meet statutory requirements on capitalization, operational control, risk management</p>	<p>The exemptions apply only to different categories of market makers recognized by the Exchanges. The Exchanges apply strict eligibility criteria which are approved by the SFC. These criteria, in general, relate to risk management, capital, operational control, expertise etc. Therefore although not specified in any legislation, the suggestion is already catered for in practice.</p>

Item No.	Section Reference	Details of the Rules	Respondent's Comments	SFC's Response
			competence, the ability to secure or otherwise provide an assurance of the "presently exercisable and unconditional" right to vest shares to the buyer, or the borrower.	In addition, these market makers are either SFC registrants or persons whom the SFC has "regulatory reach" over ¹ . Also, Exchange Participants (SFC registrants) who execute the market making transactions on behalf of these persons (who are not directly regulated by the SFC) are held responsible for the transactions.
8.	3(1)(a)	Clause 3(1)(a) sets out the exemptions from section 170 for to HKMA appointed market makers. This provision repeats the current exemption under Rule 17 of the Securities (Miscellaneous) Rules.	<i>SHK:</i> In the case when Monetary Authority-appointed market maker elects to effect a "naked sales" through a dealer, it is not clear whether the dealer must comply with the requirements of subsection 170(1) of the SFO and the provisions of the draft Rules.	The provision repeats the existing exemption which has been in place since 1999. HKMA appointed market makers generally execute their trades on the exchange through their brokerage arm. For the purposes of greater clarity, clause 3(1) has been amended by adding a new subsection which will exempt agents acting for HKMA appointed market makers from the provisions of section 170(1) as long as the agent has reasonable grounds to believe that his principle is effecting the short sale in its capacity as a HKMA appointed market maker
9.			<i>SHK:</i> HKMA has relinquished its role to act as an arranger for the debts issued under the respective note issuance programmes of the MTRC, the HKAA, the HKMC and the KCRC. A deletion of the reference to "... arranged by the Hong Kong Monetary Authority" in the definition of the term "specified instruments" is suggested.	Agreed. The clause is amended to delete the reference.
10.	3(2)	Clause 3(2) sets out the types of transactions which constitute 'jobbing business' for the purpose of the draft Rules.	<i>Linklaters:</i> It appears that only Securities Market Makers and Futures Market Makers are able to rely on the exemptions. However, other parties, such as offshore affiliates who hedge the position and use the relevant market maker merely to execute the	The exemptions are intended to be available to any person who is registered with the SEHK or HKFE to perform market making or liquidity providing activities. These will include persons who may not be exchange participants but whom the relevant Exchange recognizes as performing market making or liquidity providing activities, e.g., Designated Specialists ²

¹ For example, designated specialists are regulated by their local regulator who has in place an MOU with the SFC. If there is any misconduct or impropriety by the Designated Specialist, the SFC can request the local regulator to take appropriate action. In addition, the Designated Specialists registration with the SEHK can be withdrawn.

² These are overseas specialists who are clients of an Exchange Participant who is a registered market maker. Under the SEHK Rules, an Exchange Participant may allow such a person, who is its client, to register with the SEHK to perform market making functions. They are required to be regulated by their local

Item No.	Section Reference	Details of the Rules	Respondent's Comments	SFC's Response
			trade, would also be able to rely on the exemption.	or issuers of structured products under Chapter 15A of the SEHK Listing Rules ³ . The clause has been amended to better reflect the intention that the exemptions are available to any person whom the SEHK or the HKFE recognizes as performing market making or liquidity providing activities.
11.	3(2)(a)	Where a Securities Market Makers short sells a listed security to hedge the risks of another listed security, where both securities are related is exempt from section 170. Securities Market Maker is defined in Clause 2.	<i>Respondent A:</i> Clarification was sought as to whether the exemption under Clause 3(2) would apply to an issuer of derivative warrants who will carry out the hedging and liquidity providing activities through the "Securities Market Maker". The exemptions would not be meaningful if the principal is not exempt from the requirements of section 170(1) of the SFO.	The exemptions are intended to apply to, amongst other persons, issuers of structured products. As issuers are not exchange participants, the clause has been amended to better reflect the intention that the exemptions are available to any person whom the SEHK recognizes as performing market making or liquidity providing activities.
12.	3(2)(a)		<i>Respondent A:</i> Clarification was sought as to the definition of "component" and whether hedging a stock options position or warrant position with a single stock is permitted.	The exemptions are intended to enable hedging a position in a listed security ("B") by short selling another listed security ("A") if either (1) A is an underlying stock of B or vice versa (Clause 3(2)(a)(i)) or (2) both A and B share the same underlying security (Clause 3(2)(a)(ii)). Clause 3(2)(a) has been revised to better reflect this. So, a market maker will be able to short sell the underlying securities of an option or a warrant to hedge a position he has acquired in an option or warrant over that security.
13.			<i>Linklaters:</i> The current drafting of the hedging sections under Rule 3 ("... a component of that other security") would not include an underlying of that other security. It is suggested that it should include an underlying of that other security.	The intention has always been to allow hedging by another security which has the same underlyings as the security being hedged. This was not clearly reflected in the draft Rules. Amendments have been made to Clause 3(2)(a) to clarify this.

securities regulator who must have a MOU with the SFC and SFC approval of the Designated Specialist is also required. These Designated Specialists are required to fulfil the market making obligations under the SEHK Rules.

³ Issuers of products (like ELIs and derivative warrants) under Chapter 15A of the SEHK Listing Rules are required to appoint an exchange participant to act as its liquidity provider. Liquidity providing is performed, similar to market making obligations, by responding to quote requests or providing continuous quotes. The positions that are built up in the course of providing liquidity may be either the issuer's positions or the positions of an affiliate of the issuer. Hence, the exemptions have also been drafted to apply to such persons. It should be noted that the liquidity provider is required to report the liquidity providing transactions daily to the Exchange.

Item No.	Section Reference	Details of the Rules	Respondent's Comments	SFC's Response
14.	3(2)(a) and (b)	These provisions enable Securities Market Makers and Futures Market Makers to short sell securities to hedge against risks of market making positions which they have acquired.	<i>Linklaters:</i> The current drafting of the hedging sections does not permit pre-hedging. Pre-hedging should be permitted ⁴ .	The purpose of the exemptions is to extend the current exemptions which are only available to stock options and stock futures market makers (under Rule 17 of the Securities (Miscellaneous) Rules) to all categories of market makers. Under the current rules, pre-hedging is not permitted. The SFC does not intend to widen the scope of the exemptions, at this time, to pre-hedging. This is because pre-hedging will be difficult to monitor and may be subject to abuse. E.g. where the market maker takes a directional view on a security and short sells the security. Subsequently, if the position is not favourable, he can acquire a position in a derivative of the security and claim that the prior short sale is for the purpose of pre-hedging the position in the derivative product.
15.			<i>Linklaters:</i> Clarification was sought as to the evidence which the SFC would require to show that the short sale was for the purpose of hedging.	Under corresponding exemptions in the SEHK Rules, it is intended that special indicators will be required when the market making orders are input into AMS/3. This will enable identification of the market making transactions claiming the exemption. In addition, the SEHK is in the process of developing a monitoring and/reporting system for monitoring these exemptions - This may include filing of reports for complicated transactions. Market making transactions and positions should be clearly set out/ reflected in the market making books of the market maker which should be separate from the other trading or proprietary trading books. The market making books would be the primary source of evidence.
16.	3(2)(c)	This provision enables short sales to be made by Securities Market Makers in performing market making	<i>Linklaters:</i> Confirmation was sought as to whether a Securities Market Maker who has submitted a redemption application on an exchange traded fund has	Where a Securities Market Maker short sells shares of an exchange traded fund, he will satisfy the requirement under section 3(2)(c) if he places a creation order for the exchange traded fund shares by the end of the next trading day. If the

⁴ It should be noted that the hedging exemptions for stock options and stock futures market makers were introduced in 2001. During the course of drafting the 2001 exemptions, Messrs. Linklaters (then also representing by and large the same group of financial intermediaries) were consulted on the draft exemptions, which include the pre-hedging limitation. No comments were made then about the limitation.

Item No.	Section Reference	Details of the Rules	Respondent's Comments	SFC's Response
		obligations provided that they acquire the securities that are sold by the end of the next trading day.	acquired the right to vest the securities in the purchaser of them from the time the redemption application is submitted, and therefore satisfies the test in Clause 3(2)(c).	Securities Market Makers short sells the underlying shares of an exchange traded fund, the requirement will be fulfilled if he places a redemption order for the underlying shares by the end of the next trading day.
17.			Calvin Lee: Request to clarify what constitutes "the Securities Market Maker acquires the right to vest the security in the purchaser of them before the end of the trading day following the day of the sale"	The Securities Market Maker should acquire the securities he sold by the end of the next trading day. For example, he can do so by buying back the securities, borrowing them, or in the case of where the security that was sold is an exchange traded fund, placing a creation order for them.
18.	4	Clause 4 sets out the circumstances in which the reporting requirements for 'short selling orders' in section 171 of the Ordinance do not apply.	Linklaters: It appears that Clause 4 provides an alternative means of complying with the reporting requirements under Section 171 of the SFO but as drafted it appears to be mandatory to follow one of the routes set out in the Rule.	Clause 4 has been amended to make it clear that only persons who comply with sub-sections (2) to (8) need not comply with the corresponding requirements in section 171(1), (3) and(5).
19.			<i>Linklaters:</i> The scope of Clause 4 is rather narrow as it only applies to short selling orders that are by virtue of a stock borrowing and lending arrangement. This differentiation would result in an obligation on sellers/broker to ascertain the type of short selling order they are placing/receiving and is impractical when the intention of the draft Rules is to provide a relaxed regime. The application of section 4 should be extended to all categories of short selling orders.	Under the Commission's rule-making power in sections 397 and 398 of the SFO, exemptions can only be made so as to apply to "a specified transaction of class of transactions entered into by any specified person or class of persons". As the suggestion to extend section 4 of the draft Rules to all categories of short selling orders would, in effect, negate the application of section 171, such suggestion is likely to be ultra vires. As 2 other alternatives are provided in the Clause 4, a seller may choose to use obtain a tape recording of the oral assurance. In such case, he will not need to ascertain this information. A majority of short selling orders are covered by stock lending arrangements. The SFC's intention is to facilitate the stock lending business, as such, the exemptions are only made available to short sales by virtue of stock lending transactions.
20.	4(2)(b),	Provisions relating to where	<i>Linklaters:</i>	The SFC believes that ideally the arrangement should be set

Item No.	Section Reference	Details of the Rules	Respondent's Comments	SFC's Response
	4(3)(b)(iii) & 4(4)(b)(iii)	an arrangement is made between the agent and principal so that one party will provide the document of the assurance at the end of the trade day	Clarification was sought as to what evidence SFC will require to substantiate "an arrangement" as mentioned in Rules 4(2)(b), 4(3)(b)(iii) and 4(4)(b)(iii).	out in writing or otherwise documented. Please refer to the following comment/response for the reasons.
21.	4(4)(b)(iii)		<i>Linklaters:</i> It was queried what consequences there would be if the client did not send any documentary assurance at the end of the day.	As the requirement under section 171 is placed on the agent, the agent would not be held liable if the client did not provide a documentary assurance by the end of the day PROVIDED that the agent had made an arrangement with the client that the client would do so. Hence, (see comment/response above) it would be in the agent's interest to ensure that the arrangement he has with his client is documented.
22.			<i>Linklaters:</i> It was queried whether an e-mail message from the client is sufficient to form "a confirmation of oral assurance in the form of a document".	Yes, as long as the e-mail message contains all the information required under the assurance.
23	4(5)	Clause 4(5) sets out the information that is to be included in the document provided at the end of the trade day	<i>Linklaters:</i> If the person receiving the order makes a documentary record and timestamps it, that "document" has to include the information in Rule 4(5). This goes beyond what Section 171 requires in a documentary assurance. It should be unnecessary for the seller to provide details of the time the blanket assurance or hold has been given or a borrow has been entered into.	Under the requirements in sections 171 and 172, a chain of evidence is produced so that covered short sales can be traced backwards from input of an order (section 172) to the seller who placed the order (section 171(1)). The SFC considers that in the absence of the information that sellers are required to retain under section 171 or the other routes in Rule 4, the information required under Rule 4(5) is required so that this chain of evidence is not broken.
24.	5	Clause 5 sets out the record keeping requirements for stock lenders. This clause repeats the current Securities (Stock Lending) Rules.	<i>SHK:</i> Dealers who are involved with the provision of securities borrowing and leading to clients should meet very high capital requirements, a satisfactory level of operational competence and maintain adequate risk management. Such requirements should be included in the draft Rules.	The purpose of the draft Rules is to create a proper audit trail for short selling and stock lending, it would be inappropriate to include the suggested requirements in the draft Rules. However, the SFC will consider whether it is necessary to include the suggestions in its Code of Conduct for Registered Persons. (The Code will only apply to SFC registrants.)

List of Respondents

Dated Received	Respondent
10 June 2002	Wocom Securities Limited (“Wocom”)
10 June 2002	Calvin Lee
21 June 2002	Sun Hung Kai Securities Limited (“SHK”)
21 June 2002	Linklaters & Alliance (“Linklaters”), submitting on behalf of Credit Suisse First Boston (Hong Kong) Limited, Deutsche Securities Asia Limited, Goldman Sachs (Asia) L.L.C., Merrill Lynch (Asia Pacific) Limited, Morgan Stanley Dean Witter Asia Limited, Salomon Smith Barney Hong Kong Limited and UBS Warburg
24 June 2002	A financial institution who wished to remain anonymous (“Respondent A”)

《證券及期貨(賣空及證券借貸(雜項))規則》

(由證券及期貨事務監察委員會根據《證券及期貨條例》(2002年第5號)第397條訂立)

1. 生效日期

本規則自《證券及期貨條例》(2002年第5號)第VII部開始實施的日期起實施。

2. 釋義

在本規則中，除文意另有所指外—

“上市規則”(Listing Rules)指聯交所根據本條例第23條制訂的規則，並稱為《香港聯合交易所有限公司證券上市規則》；

“外匯基金”(Exchange Fund)指根據《外匯基金條例》(第66章)第3條成立的基金；

“外匯基金票據”(Exchange Fund Bill)指政府根據《外匯基金條例》(第66章)為外匯基金的帳戶發出的任何稱為“外匯基金票據”的文書；

“外匯基金債券”(Exchange Fund Note)指政府根據《外匯基金條例》(第66章)為外匯基金的帳戶發出的任何稱為“外匯基金債券”的文書；

“金融管理專員委任的莊家”(Monetary Authority-appointed Market Maker)指由金融管理專員就進行有關外匯基金票據、外匯基金債券或指明文書的莊家活動而在現行有效的委任書下所委任為莊家的人；

“指明文書”(specified instrument)指地鐵有限公司、機場管理局、香港按揭證券有限公司及九廣鐵路公司根據它們各別的票據發行計劃所發行的任何票據；

“持有確認”(hold)指由借出人向借用人作出的確認，表示某特定數量的特定證券在各方議定的特定限期內可供借出予借用人；

“借出人”(lender)就證券借貸協議而言，指證券借貸協議所指的證券借出人，只要有關證券是借出人以代理人身分代客戶借出，則就本規則而言，該代理人(而非其客戶)須視為借出人；

“借用安排”(borrow)就證券借貸協議而言，指依據證券借貸協議而作出的證券借用，不論借出人是否已將借用證券交付予借用人；

“期貨莊家”(Futures Market Maker)指根據期貨交易所公司依照本條例第23條制訂的規則，就獲准在期貨交易所公司經營的認可期貨市場買賣的期貨合

約進行莊家活動或流通量供應活動的目的，而在期貨交易所公司註冊的人；

“證券莊家”(Securities Market Maker) 指根據聯交所依照本條例第23條制訂的規則，就在聯交所經營的認可證券市場上市或獲准買賣的證券進行莊家活動或流通量供應活動的目的，而在聯交所註冊的人；或根據《上市規則》第15A章，在聯交所經營的認可證券市場上市的結構式產品的發行人；

“概括性保證”(blanket assurance) 指由借出人向借用人作出的確認，表示借出人對某個界定證券組別有足夠的整體供應，因此在各方議定的特定限期內，有關證券可供借出予借用人；

3. 本條例第170(3)(e)條不適用的交易類別

- (1) (a) 凡金融管理專員委任的莊家出售以下任何一項證券—
 - (i) 外匯基金票據；
 - (ii) 外匯基金債券；或
 - (iii) 指明文書；
- (b) 凡金融管理專員委任的莊家的代理人出售以下任何一項證券—
 - (i) 外匯基金票據；
 - (ii) 外匯基金債券；或
 - (iii) 指明文書；

而該代理人是以其代理身分行事，並且相信及有合理理由相信其當事人是就所出售的證券獲金融管理專員委任的莊家；

- (c) 凡在進行證券經銷業務時出售證券；

該項出售即屬於為本條例第170(3)(e)條的施行而訂明的交易類別。

- (2) 以下的證券出售須視為在進行證券經銷業務時所出售的證券—
 - (a) 證券莊家為對沖先前取得的另一隻上市證券(“B”)的持倉風險而出售一隻上市證券(“A”), 而—
 - (i) A為B的成分證券，反之亦然；或
 - (ii) A與B有相同的一隻證券為成分；
 - (b) 期貨莊家為對沖先前就—
 - (i) 有關證券或包括有關證券在內的證券指數所取得的期貨合約；或
 - (ii) 與所出售的證券有著其同證券成分的期貨合約，的持倉風險而出售該隻上市證券；
 - (c) 證券莊家就有關證券進行莊家活動或流通量供應活動時出售該上市證券，惟有關證券莊家必須在進行有關出售當日的下一個

交易日結束之前，取得將該證券轉歸於其購買人的名下的權利。

(3) 在本條內，“上市”指在聯交所經營的認可證券市場上市或獲准買賣。

4. 本條例第 171 條內某些規定對於若干類別的人士或在某些情況下不會生效

(1) 本條例第 171(1)條就第(4)款述明的賣空指示不會生效，而作出該賣空指示的人是以當事人身分售賣證券，並在傳達該賣空指示時，向其代理人提供口頭保證，表示有關的證券借貸協議的對手方備有該指示所關乎的證券可供借給他；但條件是該人—

- (a) (i) 以磁帶錄音形式記錄該口頭保證；
 - (ii) 與其代理人達成安排，使其代理人同意—
 - (A) 以磁帶錄音形式記錄該口頭保證；或
 - (B) 在收到賣空指示時，在蓋有時間印章的紀錄上，記錄第(5)款述明的與該指示有關的資料；或
 - (iii) 在作出該口頭保證的當日結束之前，以文件形式向該代理人提供該口頭保證的確認；及
- (b) 遵從第(6)款的適用規定。

(2) 本條例第 171(3)條就第(4)款述明的賣空指示不會生效，而作出該賣空指示的交易所參與者是以當事人身分售賣證券；但條件是—

- (a) 該交易所參與者在傳達該賣空指示前—
 - (i) 已經收到有關證券借貸協議的對手方提供的口頭保證，表示已備有該指示所關乎的證券可供借給他；及
 - (ii) 已經—
 - (A) 以磁帶錄音形式記錄該口頭保證；
 - (B) 在蓋有時間印章的紀錄上，記錄第(5)款述明的與該指示有關的資料；或
 - (C) 與該對手方達成安排，使該對手方同意—
 - (1) 以文件形式記錄第(5)款述明的與該指示有關的資料；
 - (2) 在作出該口頭保證的當日結束之前，向該交易所參與者提供該文件；及

(b) 遵從第(6)款的適用規定。

(3) 本條例第 171(5)條就第(4)款述明的賣空指示不會生效, 而作出該賣空指示的人是以代理人身分售賣證券的人不會生效, 但條件是該人—

(a) 在傳達賣空指示前—

(i) 已經從其當事人或(如該指示是為其他人的利益作出或代其他人作出)該其他人收到口頭保證, 表示有關證券借貸協議的對手方備有該指示所關乎的證券可供借給他; 及

(ii) 已經—

(A) 以磁帶錄音形式記錄該口頭保證;

(B) 在蓋有時間印章的紀錄上, 記錄第(5)款述明的與該指示有關的資料; 或

(C) 與其當事人或該其他人(視屬何情況而定)達成安排, 使該當事人或該其他人(視屬何情況而定)同意在作出該口頭保證的當日結束之前, 以文件形式向其提供該口頭保證的確認; 及

(b) 遵從第(6)款的適用規定。

(4) 第(1)、(2)及(3)款適用於憑藉本條例附表 1 第 1 部第 1 條的“賣空指示”的定義中的(a)(i)段而構成賣空指示的賣空指示。

(5) 就第(1)(a)(ii)(B)、(2)(a)(ii)(B)及(ii)(C)(1)及(3)(a)(ii)(B)款的目的而言, 資料指—

(a) 根據證券借貸協議被借用或可供借用的證券或證券組別, 以及其數量; 及

(b) 是否曾作出概括性保證或持有確認, 或是否曾訂立借用安排, 及作出或訂立該保證、確認或借用安排的時間(視屬何情況而定)。

(6) 任何人如根據第(1)、(2)或(3)款就口頭保證、第(5)款所述明的資料或以文件形式就口頭保證作出的確認作出記錄(包括磁帶錄音或蓋有時間印章的紀錄), 必須—

(a) 保留該文件紀錄, 為期不少於紀錄、收取或收到該等保證或資料(視屬何情況而定)的日期起計的一年; 及

(b) 應證監會在該期間之內的任何時間作出的要求, 在證監會指明的時間及地點, 向證監會提供及出示該文件。

5. 借出人須根據證券借貸協議備存紀錄

- (1) 當借出人根據證券借貸協議向借用人作出概括性保證或持有確認，或訂立借用安排時，借出人必須以文件形備存記錄，並載有以下資料—
- (a) 借用人的姓名或名稱；
 - (b) 被借用或可供借用的證券或證券組別，以及其數量；及
 - (c) 曾否作出概括性保證或持有確認，或曾否訂立借用安排，及作出或訂立該保證、確認或借用安排的時間(視屬何情況而定)。
- (2) 借出人必須—
- (a) 在不抵觸第(b)段的條文下，保留第(1)款所提述的紀錄，為期不少於製備該等記錄的日期起計的一年；及
 - (b) 應證監會在該年內的任何時間作出的要求，向證監會提供任何該等紀錄的副本。
- (3) 在本條中，“證券”(securities) 指在由聯交所經營的認可證券市場上市的證券。

證券及期貨事務監察委員會主席

2002 年 月 日

註 釋

本規則由證券及期貨事務監察委員會根據《證券及期貨條例》(2002 年第 5 號)第 397 條訂立，目的在於指明就該條例第 170(3)(e)條而言，可獲豁免遵守該條例第 170(1)條的規定的交易類別，以及訂定第 171 條內某些規定不會生效的情況。本規則亦訂明借出人根據證券借貸協議須遵從的備存紀錄規定。