

SECURITIES AND FUTURES (INVESTOR COMPENSATION – MISCELLANEOUS) RULES

(NO. 5 OF 2002, SECTION 244(2))

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SECURITIES AND FUTURES (INVESTOR COMPENSATION – MISCELLANEOUS) RULES

(Made by the Securities and Futures Commission under section 244(2) of the Securities and Futures Ordinance (5 of 2002) after consulting the Financial Secretary

PART I PRELIMINARY

1. Commencement

These Rules shall come into operation on the day appointed for the commencement of Part XII of the Securities and Futures Ordinance (No. 5 of 2002).

2. Interpretation

In these rules, unless the context otherwise requires –

“appointed day” (指定日期) means the date appointed for the purposes of these Rules under section 13;

“associated person” (相聯者), in relation to a specified person, means –

- (a) a person employed or otherwise engaged by the specified person; or
- (b) a person ("A") who, under section 164 of the Ordinance, may receive or hold client assets of the specified person, or an employee of A;

“claimant” (申索人) means a qualifying client who makes a claim under section 3;

“default” (違責) means –

- (a) the insolvency, bankruptcy or winding up, as the case may be, of a specified person; or
- (b) any breach of trust, defalcation, fraud or misfeasance committed by a specified person or by any associated person of the specified person,

which occurs on or after the appointed day;

“qualifying client” (合資格客戶) in relation to a specified person, means a person for whom the specified person provides a service but does not include -

- (a) a licensed corporation;
- (b) an authorized financial institution;
- (c) a recognized exchange company, a recognized exchange controller, or a recognized clearing house;
- (d) a person authorized to provide automated trading services under section 95 of the Ordinance;
- (e) an insurer authorized under the Insurance Companies Ordinance (Cap. 41);
- (f) a collective investment scheme authorized under section 104 of the Ordinance;

- (g) an arrangement referred to in paragraph (iii) of the definition of "collective investment scheme" in Part 1 of Schedule 1 to the Ordinance;
- (h) a person who is authorized, licensed or exempt in a jurisdiction outside Hong Kong for any activity that in the opinion of the Commission is similar to any of the activities carried on by a person referred to in paragraphs (a) to (g);
- (i) an associate of a specified person –
 - (i) which is a corporation; or
 - (ii) who has committed a default or assisted in the commission of a default by the specified person;
- (j) the Government or a government of any place outside Hong Kong; and
- (k) a person in his capacity as a trustee or custodian of a person referred to in paragraphs (a) to (j);

"related assets" (有連繫資產) means money or other

property -

- (a) that is entrusted to or received by a specified person or an associated person of the specified person;
- (b) to which a claimant is entitled or in which he has a beneficial interest; and
- (c) which relates to the -
 - (i) purchase;
 - (ii) sale;
 - (iii) holding;
 - (iv) pledge;
 - (v) adjustment;
 - (vi) exercise; or
 - (vii) expiry,of specified securities or futures contracts;

"securities margin financing" (證券保證金融資) has the same meaning as in Part 2 of Schedule 5 to the Ordinance except that paragraph (v) of the definition of that expression does not apply;

"specified person" (指明人士) means –

- (a) an intermediary licensed or registered for dealing in securities or dealing in futures contracts;
- (b) an intermediary licensed for securities margin financing; or
- (c) an authorized financial institution which provides securities margin financing;

"specified securities or futures contracts" (指明證券或期貨合約) means any securities or futures contracts listed or traded or to be listed or traded on a recognized stock market or recognized futures market;

"Tribunal" (審裁處) means the Securities and Futures Appeals Tribunal established by section 216 of the Ordinance.

PART II **CLAIMS FOR COMPENSATION**

3. Making a claim for compensation

- (1) Any qualifying client of a specified person who suffers loss -
- (a) as a result of a default committed by -
 - (i) the specified person; or
 - (ii) an associated person of the specified person;
 - (b) in relation to -
 - (i) specified securities or futures contracts; or
 - (ii) related assets,

may make a claim against the compensation fund in respect of such loss.

(2) A claim under subsection (1) may include a claim for the costs reasonably incurred and incidental to the making and proving of the claim.

- (3) A claim under subsection (1) must be lodged with the Commission –
- (a) if a notice under section 4(1) has been published, on or before the date specified in the notice; or
 - (b) if no such notice has been published, within 6 months after the day the claimant first became aware of the default giving rise to the claim.

(4) A claim that is not lodged in accordance with subsection (3) is barred, unless the Commission determines otherwise.

4. Notice inviting claims

(1) Where the Commission has reason to believe that a specified person or any associated person of the specified person has committed a default, it may publish a notice inviting qualifying clients of the specified person named in the notice who believe they have suffered loss as a result of such default to make claims for compensation. Such a notice must be published in one or more English language newspapers and one or more Chinese language newspapers which are published daily and circulating generally in Hong Kong.

(2) A notice published under subsection (1) must specify a date, not being earlier than 3 months after publication of the notice, on or before which claims for compensation under section 3 may be made in relation to the default of a specified person or any associated person of the specified person.

5. Submission of claims

- (1) Subject to subsection (2), a claim made under section 3(1) must be –
- (a) lodged in the form specified by the Commission in accordance with section 402(1) of the Ordinance for the purposes of making a compensation claim under these Rules;
 - (b) completed and signed in accordance with such directions and instructions as are included in the form; and

- (c) accompanied by such documents as are specified in the form.
- (2) The Commission, in its discretion, may accept a claim lodged in a manner that does not comply with subsection (1).

PART III PROCESSING OF CLAIMS

6. Commission may require records

- (1) The Commission may require a person, by notice in writing served upon the person, to produce to the Commission originals or copies of such records as the Commission may reasonably require –
- (a) in connection with a claim for compensation made under section 3(1); or
 - (b) for the purpose of assisting –
 - (i) the Commission in the exercise of its rights of subrogation under section 243 of the Ordinance; or
 - (ii) a recognized investor compensation company in the exercise of its rights of subrogation under section 87 of the Ordinance.

(2) A notice under subsection (1) must specify the records required and the date by which the person is to furnish them to the Commission.

(3) Where –

- (a) a claimant fails to produce to the Commission records specified in a notice served upon him under subsection (1), within the period specified in the notice or such longer period as the Commission may allow in any particular case; and
- (b) the Commission is satisfied that such records are in the possession of, are available to, or can be produced by the claimant,

the Commission may determine that –

- (c) the claim for compensation made by the claimant should not be allowed; or
- (d) part only of the claim should be allowed.

(4) The Commission, in its absolute discretion, may vary a determination made under subsection (3) if the claimant subsequently produces the records specified in the notice under subsection (1).

7. Determination of loss and compensation

(1) Subject to section 6(3), the Commission must determine the amount of compensation (if any) payable to a claimant from the compensation fund on the basis of the loss that the Commission is satisfied the claimant has suffered as a result of a default committed by a specified person or any associated person of the specified person.

(2) In determining the amount of compensation payable to a claimant under subsection (1), the Commission must –

- (a) calculate the market value as at the date of the default of the specified securities or futures contracts and any related assets
 - - (i) entrusted to or received by the specified person or any associated person of the specified person; and
 - (ii) to which the claimant was entitled or in which he had a beneficial interest;
- (b) subtract from the amount calculated under paragraph (a) any amount that the Commission is satisfied was due from the claimant to the specified person; and
- (c) add to the sum that results from the operation of paragraphs (a) and (b) the amount of any costs that the Commission is satisfied were reasonably incurred by the claimant incidental to the making and proving of his claim to the Commission.

8. Notice of determination

- (1) Where the Commission makes a determination under section 6(3) or 7(1) it must issue a notice of determination to the claimant.
- (2) Where the Commission determines to disallow a claim in whole or in part, it must give its reasons in the notice of determination.
- (3) If the Commission determines that compensation should be paid to a claimant it must specify the following in the notice of determination -
 - (a) the date of the default;
 - (b) the amount of the claimant's loss as calculated under section 7;
 - (c) any relevant specified securities or futures contracts or related assets; and
 - (d) the amount of compensation payable under these Rules.
- (4) The Commission may pay the compensation in one or more installments if it determines that it is necessary or appropriate to do so.

9. Payment of compensation

- (1) Subject to subsection (2), the following amounts are to be paid out of the compensation fund -
 - (a) any compensation payable in accordance with a determination made under section 6(3) or 7(1);
 - (b) any compensation payable following a review by the Tribunal under Part XI of the Ordinance of a determination referred to in paragraph (a); and
 - (c) any costs awarded in favour of a claimant by the Tribunal following a review referred to in paragraph (b).
- (2) The total amount of compensation that may be awarded to a claimant may not exceed the maximum that is prescribed by the Securities and Futures (Investor Compensation) Rules (insert cross-reference).

PART IV **MISCELLANEOUS**

10. Financial arrangements

The Commission may arrange for such insurance, surety, guarantee or other financial arrangements as it deems appropriate to facilitate the administration of the compensation fund.

11. Provision where the money available to the compensation fund is insufficient to meet claims

(1) If, at any time, the Commission determines that the amount of money available to the compensation fund is insufficient to pay the total amount of compensation then payable to claimants, or likely to become so payable -

(a) under these Rules; and

(b) in the circumstances referred to in section 9(1)(b),

the amount in the compensation fund is to be apportioned among the claimants in such manner as the Commission may determine in its absolute discretion.

(2) In the event that any claim remains unsatisfied because the Commission has determined that an apportionment must be made under subsection (1), any amounts referred to in section 9(1) that remain unpaid are to be paid when there is sufficient money in the compensation fund.

12. Discharge of claims

Once the amount of compensation determined to be due to a claimant in accordance with these Rules has been paid, the rights of the claimant against the compensation fund in relation to that claim are absolutely discharged.

13. Appointed day

The Commission may by notice published in the Gazette appoint a date as the appointed day for the purposes of these rules.

Chairman,
Securities and Futures
Commission

2002

Explanatory Note

These Rules are made by the Securities and Futures Commission under section 244(2) of the Securities and Futures Ordinance (No. 5 of 2002). They prescribe the persons who may make a claim for compensation from the investor

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compensation fund established under section 236 of the Ordinance. They also prescribe the manner in which such a claim is to be made and how such a claim will be assessed and paid.

These Rules must be read in the light of any Order made under section 80 of the Ordinance transferring functions of the Commission under these Rules to a recognized investor compensation company.