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

# Consultation Conclusions on the draft Securities and Futures (Disclosure of Interests - Exclusions) Regulation

# 《證券及期貨(披露權益 –免除)規例》草擬本諮詢總結

Hong Kong
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## 引言

1. 證券及期貨事務監察委員會(證監會)在 2002 年 5 月 16 日發表諮詢文件(該諮詢文件)，邀請公眾人士就**《證券及期貨(披露權益 – 免除)規例》**草擬本("《草擬規例》")發表意見。

2. 《草擬規例》免除任何人在根據《證券及期貨條例》(2002 年第 5 號)(該條例)第 XV 部取得，或停止擁有某上市法團的股份的權益，或其股份權益的性質出現改變時的若干披露責任。

3. 諮詢期於 2002 年 6 月 8 日結束，但證監會事後仍繼續進一步諮詢就《草擬規例》提出意見的人士，並建議因應其收到的意見擴大《草擬規例》的適用範圍。

4. 本文件旨在爲對有關課題感興趣的人士就諮詢期內所收到的意見進行分析，以及解釋證監會在作出有關結論時的理據。在閱讀本文件時應與該諮詢文件一併閱讀。

## 公開諮詢

### 諮詢過程

5. 除了發出公告邀請公眾發表意見外，證監會還向各相關人士及專業團體分發該諮詢文件。該諮詢文件及《草擬規例》亦載於證監會網站及透過金融服務網絡傳送予所有註冊人。

6. 我們從代表以下 8 家財務機構的年利達律師事務所收到一份意見書 -
   (a) 瑞士信貸第一波士頓(香港)有限公司
   (b) 高盛(亞洲)有限責任公司
   (c) 摩根士丹利添惠亞洲有限公司
   (d) 所羅門美邦香港有限公司
   (e) 德意志證券亞洲有限公司
   (f) JP摩根
   (g) 美林集團亞太區
   (h) 瑞銀華寶

   回應者並沒有就載於《草擬規例》的豁免條文的內容提出意見。然而，年利達律師事務所卻要求本會擴大《草擬規例》所規定的豁免的涵蓋範圍。

### 諮詢總結

7. 在考慮過所收到的意見後，證監會建議就爲其客戶進行交易所買賣股票期貨合約及股票期權合約交易的中介人增設一項豁免。證監會認爲這項豁免

與目前在該條例第 323(1)(i)條下，適用於以代理人身分代客戶取得某上市法團的股份權益的中介人的豁免相若。有關豁免亦得到類似的理據支持 – 即就所有用意及目的而言，中介人不會因爲代客戶訂立期貨或期權合約而取得相關股份的經濟權益。

8. 對《草擬規例》所作的修訂將擴大豁免所涵蓋的範圍，以便將不必要的信息披露減至最低，但同時又能夠在信息披露方面維持足夠的透明度，以保障投資者的權益。證監會又對《草擬規例》作出了進一步的修訂，以便更充分地反映出本會的政策目的及改善該規例的草擬方式。

## 意見撮要及證監會的回應

9. 所收到的意見的撮要及證監會的回應載於附件。

**Appendix**

## Summary of Comments Received on Securities and Futures (Disclosure of Interests –Exclusions) Regulation

| | Section No. | Respondent's comments | SFC's response |
|---|---|---|---|
| 1. | Request for new exemption (Intermediary interest in stock option and futures.) | [ Linklaters & Alliance ]<br><br>Where a dealer buys or sells shares for its client, it is arguable that the dealer acquires an "interest" in the shares pending settlement. For the avoidance of doubt, an exemption has been introduced in Section 323(1)(i) of the FSO to exempt the dealer from any duty of disclosure in such circumstances.<br><br>However, this exemption will not apply where a dealer which is an Exchange participant is entering into transactions in Exchange-traded stock options or stock futures relating to underlying shares in a Hong Kong listed corporation. In summary, when an Exchange participant opens a position for a client, this involves two contracts, one buy and a matching sell, being entered into:<br><br>• between the Exchange participant and (by novation) the clearing house, and<br><br>• between the Exchange participant and the client.<br><br>Under the Exchange Rules, all transactions effected by an Exchange participant in options and futures will be clearly designated as either being for the account of a client or for the Exchange participant's own account. Where transactions are effected for clients, the Exchange participant has no "economic" interest in the positions created. The role of the dealer is analogous to that of an agency broker in the cash market, even though (because of the way in which the clearing system operates) the transactions are effected as back to back principal positions.<br><br>We therefore propose an exemption to enable an Exchange participant to disregard for disclosure purposes interests and | Viewed strictly, the position of an intermediary who enters into a stock futures contract or a stock options contract is different from the position of an intermediary who buys shares as agent for his client. An intermediary who enters into a stock futures contract, or a stock options contract, is (1) acting as principal rather than as agent; and (2) will hold the position until the end of the contract – up to three months, as opposed to 3 days in the case of the exemption under section 323(1)(i) of the SFO.<br><br>Nevertheless, where in reality the exchange participant is entering in the transaction solely for a client, and has no real economic interest in the underlying shares, we agree that the interest, or short position, of the exchange participant should be disregarded. In the same way that the exemption under section 323(1)(i) of the SFO is not available for contracts entered into for clients that are related corporations, we propose that the new exclusion should be similarly limited. The new provisions appear in clause 3(1)(d) of the draft Regulation. |

| | Section No. | Respondent's comments | SFC's response |
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| | | short positions arising from transactions effected, for the account of clients, in stock options and stock futures traded on a recognized exchange company in Hong Kong. | |
| 2. | Request for new exemption (Client facilitation activities) | [ Linklaters & Alliance ]<br><br>When a dealer receives an order from a client to buy or sell Hong Kong shares, or a basket of shares, the dealer may commit to achieve a particular standard of execution (for example, no worse than the value-weighted average price for transactions in the market on the trading day). While the dealer will effect the purchases or sales as the client's agent, if this does not achieve the agreed execution price, part of the trade will be rebooked as a principal trade, to achieve that price. Similarly, a dealer may buy a block of shares from a client at an agreed price for immediate on-sale into the market, or may "go short" in order to fill an order from a client or from the market (for example, when acting as a liquidity provider in respect of structured products).<br><br>To the extent that the dealer is not acting as agent, the "agency brokerage" exemption in Section 323(1)(i) will not apply. However, we consider that an equivalent exemption from Part XV should be available in respect of interests/short positions temporarily arising in the course of effecting a transaction resulting from the instructions of a client, where the transaction is effected in the ordinary course of the dealer's business, and the interest or short position is held for no more than 3 business days and ceases on settlement of the transaction with the client. | In the circumstances outlined by Linklaters & Alliance, the dealer is not really acting as agent for a client but is acquiring an economic interest in the shares itself. We are concerned that this will unduly enlarge the "agency exemption" in s. 323(1)(i). In practice, it would not be possible to distinguish between a situation where the dealer is intending to buy/sell for a client and the situation where the dealer is buying on his own behalf. |
| 3. | Request for new exemption (IPOs-related transactions) | [ Linklaters & Alliance ]<br>In relation to Initial Public Offerings ("IPOs") and follow-on offerings Linklaters & Alliance ask for exemptions for, effectively, all transactions in which managers might be engaged. Specifically they sought an exemption from Part XV for interests/short positions of the managers of an issue of securities potentially arising as a result of activities carried out for or on behalf of the syndicate of managers, during the period of 30 days after the date of the offering. The exemption would cover : | 1. We believe that the difficulties of compliance are overstated. Managers who undertake underwriting commitments, borrowing stock and carrying out stabilising activities must know their positions. The requirement for completing a disclosure form at the end of each trading day will not be unduly onerous and we do not think that this is a sound reason for creating an exemption.<br>2. In all disclosure regimes there are certain elements of double counting but despite this it is |

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| | | • Underwriting commitments<br>• Greenshoe options (15% over-allotment option);<br>• Agreements among managers;<br>• Stock borrowing to cover over-allocations;<br>• Stabilising activities, (i.e. purchases within certain price levels fixed by the Securities and Futures (Price Stabilising ) Rules)<br>• Ancillary stabilising activities (under the draft Stabilising Rules this would include over-allotments, short selling and exercise of options to purchase shares)<br><br>In support of their request Linklaters submitted that –<br><br>1. To report the interests/short positions of the syndicate members prior to the offering taking place, and during the stabilisation period, could be very onerous.<br><br>2. There could be "double counting" among the various syndicate members, and the resulting information could be misleading.<br><br>3. Disclosures under Part XV could make it more difficult to carry out legitimate stabilising activities and undermine the maintenance of an orderly market. | not difficult for analysts to grasp the full picture. In contrast, if substantial information were not disclosed, it would be impossible to form an opinion on the full picture. The non-disclosure of transactions surrounding an IPO could therefore undermine market transparency.<br><br>3. We do not think that secrecy is a precondition for the success of stabilising action. The stabilising effect comes from the purchases and sales themselves – and the immediate market response. It is worthwhile to note that the disclosures are only made 3 business days after the day of the transaction and the Exchange publishes the following day. Hence a trade on Monday will not be made public until Friday. We do not think that disclosure of stabilising activities will undermine the maintenance of an orderly market.<br><br>The new disclosure regime under Part XV of the SFO will be reviewed at an appropriate time in the light of its actual implementation. These issues could be revisited in the light of the experience gained. |