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

Consultation Conclusions on the Draft Securities and Futures (Client Securities) Rules

《證券及期貨(客戶證券)規則》草擬本的諮詢總結

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目錄

引言

1. 證券及期貨事務監察委員會(“證監會”)在 2001 年 4 月 12 日發表《證券及期貨 (客戶證券)規則》草擬本(“《草擬規則》”)諮詢文件(“《諮詢文件》”)。

2. 《草擬規則》載有詳細規定，要求中介人及其有聯繫實體(統稱“商號”)，必須將其收到的客戶證券分開存放及持有，藉以規管客戶證券的收取及持有，從而保障投資大眾的權益。

3. 諮詢期於 2001 年 5 月 24 日結束。

4. 附件 1 載有就《草擬規則》所收到的意見的摘要(“《意見摘要》”)。

5. 本會在考慮過所收到的意見書及與評論者進行討論後，認爲適宜對《草擬規則》作出若干修訂。

6. 該等修訂已獲證監會通過成爲經修訂的該規則草擬本現列載於附件 2。由於經修訂的該規則草擬本仍須待立法會審議通過，所以目前的版本可能並非最終版本。發出該修訂規則的目的，主要是說明我們爲回應市場人士意見而作出的修訂，而並非要進行另一輪諮詢。

7. 本諮詢總結旨在爲對《諮詢文件》感興趣的人士，分析在諮詢過程中所提出的主要意見，以及解釋證監會在作出有關總結時的理據。本總結報告應與《證券及期貨條例》(“該條例”)、《諮詢文件》、《意見摘要》及經修訂的該規則草擬本一併閱讀。

公開諮詢

A. 背景

8. 《草擬規則》的制訂是爲了確保中介人或其有聯繫實體將所收到或持有的客戶證券適當地分開存放，以及證券抵押品只可以在若干訂明的情況下再作質押。

9. 從政策角度而言，《草擬規則》旨在：

(a) 將有關規定的適用範圍擴展至所有中介人及其有聯繫實體，因爲目前《證券條例》所載的相關規定，只適用於證券交易商及證券保證金融資人；及

(b) 就提取客戶證券及證券抵押品作出規定，舉例說，必須依照客戶的特定指示或一般授權而進行。

B. 諮詢過程

10. 除了發出公告邀請公眾提交意見外，證監會還將《諮詢文件》派發予所有註冊人及多個專業團體。《諮詢文件》亦同時載於證監會網站。

11. 證監會在諮詢期內曾與有關行業組織、業內人士及其法律顧問舉行多次會議，就他們的意見進行磋商。

12. 我們從包括基金管理公司、國際經紀行、律師行、業界代表組織及專業組織在內的業內人士，收到了 15 份意見書。

13. 有關意見的整體評語都是正面的。評論者對《草擬規則》普遍表示歡迎。我們所收到的意見不論在廣度及深度方面均有很大差別。有部分評論者將焦點放在大原則之上，而其他則針對各項細節及要求作出澄清。

14. 在考慮過所收到的意見書及在與評論者進行討論後，本會認爲適宜對《草擬規則》的原文作出輕微修改。

諮詢總結

15. 除了若干輕微的修訂外，證監會對於原先載於《諮詢文件》的《草擬規則》作出以下修改：

澄清適用範圍

16. 若干評論者要求我們澄清《草擬規則》對於中介人的聯屬人士並非藉著有關中介人所從事的受規管活動而取得的證券，以及對於純粹因爲有權操作客戶帳戶而持有客戶證券的中介人的適用範圍。

17. 《草擬規則》已修改爲訂明：

(a) 《草擬規則》只適用於 -

(i) 在中介人進行其獲發牌或註冊進行的受規管活動的過程中，由該中介人在香港收取或持有或代該中介人在香港收取或持有的客戶證券及證券抵押品；及

(ii) 就進行該受規管活動而言，由該中介人的有聯繫實體在香港收取或持有或代該實體在香港收取或持有的客戶證券及證券抵押品；以及

(b) 《草擬規則》並不適用於中介人或其有聯繫實體純粹由於管控客戶帳戶而以有關客戶的名義在該帳戶"持有"的客戶證券。

客戶授權

18. 《草擬規則》規定中介人及其有聯繫實體必須按照《草擬規則》的規定或根據客戶的授權或指示處理客戶證券。《草擬規則》對"客戶授權"作出了定義。客戶授權必須以書面發出，其有效期不得超逾 12 個月，並且可以書面或其他方式延續。很多評論者關注到在行政上很難取得客戶就延續授權而給予的肯定確認。

19. 我們對這方面的關注表示理解，並對《草擬規則》作出相應修訂，以允許有關授權可以透過由中介人或其有聯繫實體在到期前發出提示通知，及在客戶沒有提出反對的情形下，在到期後發出續期確認書的方式加以延續。有關授權可以此方式延續最多 12 個月，而其條款細則將維持與原來授權的一樣。經修訂的《草擬規則》並允許中介人或其有聯繫實體在延續授權時，將有效期設定在 12 個月之內，而這樣應該可以減輕續期所帶來的行政負擔。

適用於專業投資者的豁免

20. 一位評論者要求豁免專業投資者客戶遵守《草擬規則》，而部分評論者則要求若客戶爲專業投資者，則有關的延續授權規定應予以放寬。

21. 我們認爲專業投資者的證券應如散戶投資者的證券一樣受到同等的保護。然而，我們接受專業投資者給予的授權可能未必需要遵守有關的續期規定。因此，我們放寬有關規定，使有關的客戶授權可以毋須指定有效期，或其有效期可以超過 12 個月。

法定所有權的徹底轉移

22. 有評論者問及《證券及期貨(客戶證券)規則》是否適用於股份回購交易，以及證券抵押品是否包括法定所有權徹底轉移的證券。我們認爲，證券抵押品一般不應包括所有權徹底轉移的證券。因此，我們在第 3(3)條加入規定，訂明涉及回購交易的客戶證券並不受《證券及期貨(客戶證券)規則》所規限。

其他修訂

23. 其他修訂包括：

(a) 闡明我們的用意是將客戶指示視爲一項特別指示，商號可以據此就特定數量的客戶證券或證券抵押品以某些方式行事；

(b) 規定客戶必須事先給予書面指示，才可以取回其證券或證券抵押品(以便提供更可靠的審計線索)；及

(c) 訂明客戶不得發出常設授權，藉以將其證券或證券抵押品轉撥予中介人、其有聯繫實體或它們的任何關聯公司在香港的帳戶，或使以上任何人士有權享有或使用有關的客戶證券或證券抵押品，但根據《草擬規則》的規定而進行者不在此限。

24. 基於市場人士提出的意見，我們對《草擬規則》作出了修訂，使其適用於在香港聯合交易所有限公司買賣及上市的證券。

生效日期及過渡性安排

25. 《證券及期貨(客戶證券)規則》將於該條例第 VI 部的指定生效日期起實施。

Draft Securities and Futures (Client Securities) Rules
Summary of comments received and SFC's response

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
General Comments				
1.	-	Law Society of Hong Kong	The Draft Rules use various terms which are defined in the Securities & Futures Ordinance (the "Ordinance"), such as "client securities". For convenience, it would be helpful if the defined terms were set out in the Explanatory Notes or in an Introduction or Annex to the Rules.	This is not considered necessary; subsidiary legislation should always be read in conjunction with the primary legislation. It is not necessary to define terms already defined in Part 1 of Schedule 1 to the Ordinance.
2.	-	JF Asset Management Ltd	The general comment on the Draft Rules is that they are drafted with a focus on the stock broking industry. It is suggested that the SFC should provide clarification regarding the application of the Rules to the asset management industry in Hong Kong. For example, where a fund manager does not normally hold client securities albeit that it has discretion from clients to operate their accounts and instruct clients' custodians for settlement purposes.	We propose to post answers to frequently asked questions to our website in due course. This is consistent with what we are currently doing when we introduce the revised financial resources rules and the Code of Conduct etc. The new clause 3(2) now makes it clear that these Rules do not apply to situations such as this one.
3.	-	Linklaters & Alliance	It is questioned whether the Rules should apply in respect of securities held for professional investors as this type of investors should not require the same protection as retail investors. For example, in the United Kingdom, both under the existing rules and the rules to be made under the Financial Services & Markets Act, market counterparties and other non-private customers can opt-out of the client money rules (and often do so). Also, the more detailed requirements of the custody rules can be disapplied in respect of assets held for market counterparties.	We are of the view that the same principle should apply to protection of client securities, whether the clients are professional investors or otherwise. However, we agree that professional investors should be able to waive the annual renewal requirement for client's authority. It should be noted that the Rules only apply to clients and not to market counterparties and hence some of the concerns raised by the commentator are not relevant.

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
4.	-	Anonymity	It is noted that the Rules apply to licensed corporations but not sole proprietors and partnerships conducting regulated activities. There should be a system or policy in place upon the Bill becoming effective to subject sole proprietors and partnerships to the Rules during the transitional period for the migration to the new licensing regime.	Sections 27, 30 and 53(4) of Part III to Schedule 10 to the Ordinance already provide for partnerships and sole proprietorships to be treated as licensed corporations during the transition period, and that the provisions of the Ordinance shall apply to them.
5.	-	Law Society of Hong Kong, Linklaters & Alliance	"Securities collateral" is defined to cover securities provided as security for the provision of financial accommodation, or to facilitate such provision. It has been assumed that this definition is not intended to apply to transactions such as equity repos, where a person might receive cash from a licensed corporation against the delivery of securities with a future obligation to purchase equivalent securities from the licensed corporation. In this case, the securities are sold outright to the licensed corporation, rather than being provided by way of collateral. Nor should securities be treated as client securities or as securities collateral where: (i) securities are delivered to a licensed corporation pursuant to a stock loan, against payment of cash collateral; or (ii) securities are transferred to a licensed corporation pursuant to an equity swap; or (iii) securities are provided to a licensed corporation under an ISDA Credit Support Annex (English law), which provides for outright transfer.	Our view is that securities collateral should not ordinarily include securities that are the subject of an outright transfer. On this basis, we have disapplied client securities and securities collateral that are the subject of a repurchase transaction from the Rules (see the new clause 3(3)) to address the specific concern raised, based on similar US regulations.

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
6.	-	Albert Pun	The Commission's policy that the Client Securities Rules would not apply to overseas securities is welcomed. In addition to that, if an intermediary has an overseas associated company which is a licensed broker-dealer and has overseas clients trading in Hong Kong securities, it is not clear whether this overseas broker-dealer is also subject to the Client Securities Rules. This should not be necessary as the overseas broker-dealer would be subject to its own client asset rules and it would retain a separate Hong Kong custodian for the securities held.	Noted. The Rules only apply to client assets received or held by licensed corporations and registered institutions. They should not apply to the overseas associated company in question.
7.	-	Albert Pun	Both section 81A of the Securities Ordinance and the draft Rules have failed to recognize the different nature upon which an intermediary holds client securities (i.e. securities of cash clients that have been fully paid) and securities collateral (i.e. securities of margin clients that have been pledged to an intermediary as collateral for a loan or credit facilities line). For client securities, the intermediary is by nature a bailee or custodian for cash clients, and terms of their holding should commensurate with a bailor-bailee relationship. Considering that custody of client securities involves a bailor-bailee relationship, it is reasonable to require the sort of client authority as defined in the client securities rules before they can be handled by an intermediary in those specified ways. For securities collateral, the relationship between margin clients and an intermediary is that of debtor-creditor relationship with the latter holding the securities collateral to secure repayment of the loan.	The suggested approach is based on the banking model; this is not considered suitable for the broking business. Given that the vast majority of brokers either deposit securities collateral at CCASS or pledge them with banks for financing, they should not have problems complying with the draft Rules. It is supported by the fact that no other commentators have made the same suggestion.

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
			Both section 81A and the draft Rules are formulated on the basis that all client securities should be held on bailor-bailee basis. This is not in line with international commercial practice. In fact, intermediaries are like banks which hold monies for clients. A bank's relationship with customers is one of debtor-creditor. As such, banks have flexibility in handling customers' monies but will be subject to a duty to repay customers upon demand. In this regard, banking regulators subject banks to a high standard of capital adequacy ratio to ensure that they are in a position to honour their obligations when required. Likewise, intermediaries should be regulated on a similar basis.	We will consider this separately in due course.
Specific Comments				
8.	2	Lloyds TSB Pacific Ltd	Under the "client's authority" definition (now deleted), the authority may be renewed "in writing or otherwise". It should be made clear that negative acceptance on the part of the client for renewal of the client's authority is permitted. This would be consistent with the Code of Conduct for Persons Registered with the SFC. On the other hand, some consider that allowing authority to be renewed otherwise than in writing will be likely to give rise to disputes between the brokers and the clients as to the fact or precise extent of the renewal of authority.	To address the market's concern, we have revised the draft Rules in the new clause 4 by allowing for either a renewal of that authority by the client affirmatively in writing or through a process whereby the intermediary or associated entity issues a pre-expiry reminder and a post-expiry confirmation, unless objected to by the client.

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
9.		Anonymity	The comment is made in respect of the "client's authority" definition (which has now been deleted). In view of the increasing popularity of on-line trading, it is recommended to include other electronic means of communication (e.g. e-mail) for such an authority. In addition, it is not clear if an authority signed by a client stating that it will remain valid unless otherwise instructed will meet the requirement of para. (c). If not, this will impose heavy administrative burden on the industry. It is, therefore, recommended that the said provisions be modified to allow more flexibility.	An authority in writing can be made in an electronic form provided compliance with the Electronic Transactions Ordinance. The example given by the commentator is not acceptable. Please see out response to comment 8. Administrative burden should have been substantially reduced by our allowing renewal in accordance with section 4(3). It is important for investor protection to remind investors of such authority on a yearly basis.
10.	2	Law Society of Hong Kong, Linklaters & Alliance	There is a definition of "segregated account", which means an account designated as a trust account or a client account, which again appears confusing. This has now been deleted. Again, it may be helpful to spell out what is intended to be achieved: i.e. that the financial institution with which the segregated account is opened should treat the intermediary or associated entity as a trustee in respect of the account, and not apply any rights of consolidation or set-off, in respect of assets in that account for liabilities of the intermediary/associated entity to the financial institution.	The new clause 5(1)(a) and 5(2)(a) clarify the nature of the account and the requirement for separate accounts to be maintained for client securities and securities collateral.
11.	3(a) (now the new clause 3(1)(a))	Lloyds TSB Pacific Ltd	Clause 3(a) (now the new clause 3(1)(a)) only applies to securities which are either listed in a recognized stock market or are collective investment schemes, and are received or held in Hong Kong. We feel that the rules: (a) should apply to all securities (as defined in the Securities Ordinance); and (b) should apply to securities received or held by the intermediary whether in Hong Kong or elsewhere.	Para. 13 of the Consultative Document explains why we have opted for restricted application. We do not intend to expand the scope except in relation to securities traded on the SEHK (please see point 13). The Code of Conduct already requires licensed corporations to ensure that client assets are accounted for properly and promptly and are adequately safeguarded.

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
			An intermediary should have the same duties of care in respect of all securities held for a client in connection with the firm's business in Hong Kong.	
12.		Lim Wah Sai	Presumably only the SEHK is currently the only recognized market under the Ordinance.	This is correct, recognized stock market is so defined in Schedule 1 of the Securities and Futures Ordinance.
13.		Anonymity	Clarification is required as to how the SFC intends for the draft Rules to apply to securities admitted to trading on the Stock Exchange only (but not listed).	The scope has been amended to cover securities traded or listed on the SEHK given that such securities are capable of being maintained with CCASS in the same way as securities listed on the SEHK.
14.	4 (now the new clause 5)	Hong Kong Trustees Association	Trustee companies in Hong Kong have been holding securities on behalf of their clients and trust funds for a number of years and the draft Rules would cause some substantial difficulties with regard to existing trust companies who provide custody services to a wide range of SFC registered intermediaries which may be in the forms of Mandatory Provident Funds, authorized collective investment schemes and other types of direct custody arrangements.	The draft Rules are no different from the existing provisions in the SO which do not allow dealers to deposit client securities in safe custody with trust companies. Hence, this is not expected to suddenly cause substantial difficulties. We wish to clarify that the draft Rules do not apply to trust companies providing custody services to Mandatory Provident Funds and authorized collective investment schemes. The trust companies are only accountable to these Funds and schemes and not to any licensed corporation.
15.		Lim Wah Sai	The existing rules permit the dealer to deposit client securities collateral under its name with an authorized institution (i.e. the bank). Clarification is sought as to whether the expansive definitions of client "securities" and "securities collateral" may include implicitly money.	No, this does not include money. Please see definitions of "client collateral", "client securities" and "client securities and collateral" and "other collateral" in Schedule 1 to the Ordinance.
16.		Albert Pun	Securities collateral refers to shares deposited under a share pledge. However, some financing arrangements involve an outright transfer of securities to the creditor to hold the same as the legal owner pending full repayment of the loan.	We take the view that securities collateral should not ordinarily include securities that are subject of an outright legal transfer of ownership.

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
17.		Anonymity	The time limit for treating client securities or securities collateral as specified in the draft Rules is "as soon as practicable" after any securities or securities collateral are/is received. To avoid inadvertent contravention of these requirements, the SFC should consider setting out its expectation of the timing of compliance and specifying any particular scenario to illustrate such expectation where necessary.	When it is desirable to require deposits into segregated accounts to be made within 1 business day of the date of receipt, this may not always be possible, as the result of normal business operations and temporary lags that occur between the time when a security is required to be deposited and the time that it is so deposited. On balance, we maintain the view that we should retain the same flexibility as in section 81A of the Securities Ordinance by requiring compliance as soon as practicable.
18.	5 (now the new clause 6)	Anonymity	This provides that an intermediary may withdraw client securities or securities collateral in accordance with the client's authority except where this would be unconscionable in the sense used in the Unconscionable Contracts Ordinance ("UCO") in clause 5(c)(ii) (now the new clause 6(1)(c)(iii)). As it is difficult for market practitioners to determine as to what would be unconscionable in the sense as used in the UCO, it is suggested that the Rules clarify this by highlighting any particular sections in the Ordinance, which should be taken into account by market practitioners. Clause 5(c) (now the new clause 6(1)(c)(ii) and (iii)) provides that client's authority is required in respect of the withdrawal by the intermediary of client securities or securities collateral received by the intermediary. The SFC should clarify as to whether an intermediary who acts as a custodian for client securities would be required to seek renewal of this authority annually.	Although the UCO is merely 8 sections long, we now specifically refer to section 6 of the UCO (which sets out the criteria that a court will look at when determining if a contract is unconscionable). The draft Rules are clear that all intermediaries, including those acting as custodians for client securities, are required to seek renewal of this authority annually.
19.		Lloyds TSB Pacific Ltd	It is not clear whether clause 5(c)(ii) (now the new clause 6(1)(c)(iii)) is necessary as the statutory provisions of the UCO are likely to apply whether or not this is explicitly stated in the Draft Rules.	We concur that the UCO is likely to apply in most circumstances but wish to ensure that if a client's authority were not given as part of a contract for some reason, the disciplines of the UCO would still apply to it. In any event, it should be a useful reminder to intermediaries and associated entities of the existence of the UCO and so prevent inadvertent breach of its provisions.

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
20.		Law Society of Hong Kong, Linklaters & Alliance	This provides for the circumstances in which client securities may be withdrawn from a segregated account. If an intermediary is acting as a discretionary investment manager for the client, including providing custody of the client's portfolio, it appears that the intermediary can only transfer securities to settle sales from the client's portfolio if it obtains written authority every 12 months (in addition to the annual renewal required in respect of its discretionary authority by the SFC Code of Conduct). There is no exemption in respect of professional investors, although the need for annual renewal of discretionary authority under the Code of Conduct is disapplied in respect of professional investors.	Where the intermediary is to sell client securities under clause 5(1)(a) (now the new clause 6(1)(a)), it will not need to obtain written authority every 12 months. We have added the new clause 6(2) to make allowance for sales transactions generated internally in case of an asset manager. The Revised Draft Rules waive the annual renewal for professional investors.
21.		Albert Pun	Client authority defined in clause 1 is more restrictive than actual practice. It should not be necessary to restrict client's authority in the proposed manner with respect to their instructions to withdraw securities. There is not any inherent conflict or client detriment in the matter. Moreover, clause 5(c)(i) and (ii) (now the new clause 6(1)(c)(ii) and (iii)) already prohibits unconscionable withdrawals or withdrawal involving a transfer of the securities to an intermediary's employee or officer. Also, client's standing authority to withdraw their shares should not be restricted in the defined manner. It seems to serve little purpose and is unduly cumbersome on clients.	The client authority defined in the old clause 1 is not substantially different from that provided under section 81, 81A or 121AB of the Securities Ordinance. Hence, we do not agree that this is a more stringent requirement. The above notwithstanding, we now allow negative acceptance of renewal of authority and waive annual renewal by professional investors (now the new clause 4).

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
22.	6	Anonymity	There are some concerns with the drafting of the first paragraph of clause 6 (now the new clause 6(3)). It may be better for it to read as follows: "With the client's agreement, an intermediary may...". Also, the wording as currently drafted in the consultation document raises some doubts on the operation of the bank's lien and right of sale, which is usually set out in the client documentation entered into between a bank and the client. Such documentation usually provides for the bank to have the right to dispose of any of the client's assets which the client has placed with the bank, in settlement of a liability due from the client to the bank.	The elaboration in clause 6 (now the new clause 6(3)) is intended to identify more precisely the link between a client's authority and the securities or securities collateral of that client to which the authority relates. However, we have adjusted the definition of "agreement in writing" to enable the clause to read more naturally without changing the substance. The clause should not have the suggested effect as any client's assets deposited with the bank in another capacity will not be subject to these Rules in the first place.
23.		Albert Pun	Considering that an intermediary's enforcement right takes many forms including lien, consolidation and set off, foreclosure, power of sale and so on, it would be helpful if the Commission can clarify whether the word "disposal" in this clause means "handling" generally or it means "selling" in specific. In case of the latter, it would be too restrictive in view of actual commercial practice and would need to be amended to allow for the legitimate exercise of other enforcement rights.	The regulatory intent is primarily to mean "selling" though it would automatically allow any act that amounts to less than outright sale since disposal is a broad term.

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
24.	7	Albert Pun	It should not be necessary to limit client's standing authority to a maximum of 12 months and require them to renew their authority annually. But for those margin clients who no longer use the margin line extended and have no outstanding margin loans, it may be reasonable to require an annual authorization from them before an intermediary can handle their securities. So, the proposed renewal should only be confined to margin clients with no outstanding indebtedness with the intermediary.	We believe that the new clause 4 already makes the renewal requirement much easier to comply with.
25.		Hong Kong Trustees Association	Clause 7(2) contains the opening words "with the client's authority of the client from whom…". Perhaps, this should read "with the authority of the client from whom…"	We have revised the draft Rules as suggested with consequential changes to the previously defined term "client's authority" to which reference was necessary in the original formulation of clause 7(2) and elsewhere.
26.		Law Society of Hong Kong, Linklaters & Alliance	To utilise client securities or securities collateral in the way set out in clause 7 it is necessary to obtain written authority from the client, which requires annual renewal. SFC should consider an exemption in respect of persons who are professional investors for the purposes of the Securities and Futures Ordinance and/or the SFC Code of Conduct. The same comment applies in respect of clauses 8 and 9.	We have waived annual renewal by professional investors in the new clause 4.
27.	8	Marcus Hung	Re-pledging of securities collateral can be dangerous even with client's authority. A broker should only be allowed to exercise his right under the client's authority to deposit the client's securities with a bank as collateral for funding purpose when that client owes him money. This would help retail investors to restore confidence on brokerage firms so as to enable the latter to improve their competitiveness with banks.	This of course is ideal for investor protection but may not be practical as advised by the industry as it is administratively burdensome and costly to track movement of collateral on a client-by-client basis and to effect frequent transfer securities to and from banks. We recognize the need to address this in the long-term and plan to address this separately in due course.

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
28.	9	Anonymity	With regard to clauses 8 and 9 , the use of client securities as collateral has given rise to tracing difficulties in the liquidations of both CA Pacific Securities Ltd and Forluxe Securities Ltd. Requirements as to the keeping of records should be imposed in respect of the use of client securities as collateral so that it is clear whose securities are being used at any particular time.	There is a fundamental problem in accounting for securities collateral on a client-by-client basis when all the securities collateral is allowed to be pooled (please see point 27 above).
29.	11 (the new clause 12)	Anonymity	Clause 11 (now the new clause 12) requires that non-compliance with any of the provisions of Part II or clause 10(1) must be notified to the SFC within 1 business day. This deadline is quite short and it may be difficult for market practitioners to comply within such a short period of time. It is suggested to extend to 3 business days. In addition, for registered institutions, it would be preferable for such entities to notify their lead regulator, the Hong Kong Monetary Authority.	We have kept the 1-day notice period because non-compliance may seriously undermine investor protection. We will be sharing relevant information with the HKMA under our Memorandum of Understanding.
30.		Albert Pun	Since non-compliance with rules may amount to an offence, the criminalisation of non-reporting of an offence must be very carefully scrutinized. That seems repugnant to the common law practice of privilege against self-discrimination. Such arrangement is very unusual in international practice. When endorsed by legislature, it is very important that such arrangement is carefully orchestrated to ensure that the criminalisation of non-reporting of an offence is just, fair and appropriate for the circumstances.	This has been subject to considerable amount of scrutiny at the Ordinance level. The concern should be adequately addressed by section 166 of the Ordinance on use of incriminating evidence in proceedings.

Item no.	Clause no.	Respondent	Respondent's comments	SFC's response
31.	12 (now the new clause 13)	Anonymity	There are concerns as to the meaning of the words "reasonable excuse". It is unclear as to what type of situations would be covered by the concept of "reasonable excuse" which are executed but there are problems with verification. For example, a situation may arise where a client has opened an account with the bank and placed securities with the bank as custodian. If the client becomes involved in litigation as a result of which a court order is issued on the bank requiring that the bank transfers to his creditors the securities which it holds as a custodian, the bank will be faced with a situation where a transfer of shares pursuant to the court order will be in breach of clause 6 of the draft Rules. Clause 12(1)(a) (now the new clause 13(1)(a)) should be expanded to include protection for any intermediary or associated entity which is merely complying with any legal or regulatory requirements in transferring, disposing of, or withdrawal of client securities. In addition, it would be preferable for there to be some explanatory note on what constitutes "reasonable excuse".	"Reasonable excuse" is a concept commonly used in the laws of Hong Kong. It is used frequently in the Ordinance (and in current securities law e.g. section 33(12) of the SFC Ordinance Cap.24). It will be for the courts to decide what is reasonable in each case. The example given obviously amounts to a reasonable excuse and it should not be necessary to state the obvious as suggested.
32.		Anonymity	It is as a matter of general principle not desirable that the criminal offences and penalties should be created by rules themselves which are made by the SFC and only subject to negative vetting. It is also unclear what the status of the Rules is, for example, as regards the legal effect of any pledge or deposit of client securities as collateral in breach of the Rules.	This has already been provided for in the Ordinance. In addition, the Legislative Council will be vetting the rules once gazetted. It is also worthy of note that section 73(2), LFETO already allows the Commission to specify offences in rules made under the LFETO.

List of Respondents

Date Received	Respondent
24 May 2001	Hong Kong Stockbrokers Association (HKSbA)
24 May 2001	- (commentator has reserved anonymity)
24 May 2001	Hong Kong Trustees Association
24 May 2001	JF Asset Management Ltd
24 May 2001	Albert Pun
24 May 2001	Law Society of Hong Kong
24 May 2001	Linklaters & Alliance representing (Linklaters & Alliance) - Credit Suisse First Boston (Hong Kong) Ltd - Deutsche Securities Asia Ltd - Dresdner Kleinwort Wasserstein - Goldman Sachs (Asia) L.L.C. - J.P. Morgan - Merrill Lynch (Asia Pacific) Ltd - Morgan Stanley Dean Witter Asia Ltd - Salmon Smith Barney Hong Kong Ltd - UBS Warburg
24 May 2001	Lloyds TSB Pacific Ltd
24 May 2001	Lim Wah Sai
25 May 2001	- (commentator reserved anonymity)
31 May 2001	Marcus Hung
13 June 2001	- (commentator has reserved anonymity)
26 June 2001	- (commentator reserved anonymity)
Respondent with no specific comments on the Draft Rules	
24 May 2001	Institute of Securities Dealers Ltd
31 May 2001	Prudential Assurance Company Ltd

Derivation Table

Clause/Schedule in the Securities and Futures Bill	Section/Schedule in the Securities and Futures Ordinance
Clause 27, Part 1 of Schedule 9	Section 27, Part 1 of Schedule 10
Clause 30, Part 1 of Schedule 9	Section 30, Part 1 of Schedule 10

附件 2

經修訂擬稿

《證券及期貨(客戶證券)規則》
目錄

《證券及期貨(客戶證券)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 148 條訂立)

第 I 部

導言

1. 生效日期

本規則自《證券及期貨條例》(2002 年第 5 號)第 VI 部的生效日期起實施。

2. 釋義

在本規則中，除文意另有所指外 —

"回購交易"(repurchase transaction)指一項證券的出售，而根據該項出售，賣方須按預先決定的價格及日期，從買方購回名稱與被出售的證券相同的證券，或買方須按照事先決定的價格及日期，向賣方轉售名稱與被出售的證券相同的證券；

"客戶合約"(client contract)指中介人與其客戶訂立的任何合約或安排，該合約或安排載有該中介人提供服務所據的條款，而該等服務的提供構成受規管活動；

"相連法團"(linked corporation)就中介人的有聯繫實體而言，指符合以下說明的法團 —

(a) 該有聯繫實體屬該法團的控權實體；

(b) 該法團屬該有聯繫實體的控權實體；或

(c) 某人士屬該法團的控權實體，而該人士亦屬該有聯繫

實體的控權實體；

“書面協議”(agreement in writing)指客戶合約的書面條款；

“核准保管人”(approved custodian)指獲證監會根據第 11 條核准爲適合穩妥保管中介人的客戶證券及證券抵押品的公司或海外公司；

“常設授權”(standing authority)具有第 4(1)條給予該詞的涵義；

“期貨合約交易”(dealing in futures contracts)具有本條例附表 5 第 2 部給予該詞的涵義；

“資產管理”(asset management)具有本條例附表 5 第 2 部給予該詞的涵義；

“證券交易”(dealing in securities)具有本條例附表 5 第 2 部給予該詞的涵義。

3. 適用範圍

(1) 除第(2)及(3)款另有規定外，本規則適用於符合以下說明的中介人的客戶證券及證券抵押品 —

(a) (i) 是在認可證券市場上市或交易的；或

(ii) 屬經證監會根據本條例第 104 條認可的集體投資計劃；並且

(b) 是由或代表 —

(i) 該中介人在該中介人進行獲發牌或獲註冊的受規管活動的過程中；或

(ii) 該中介人的有聯繫實體就進行該受規管活動，

在香港收取或持有的。

(2) 本規則不適用於符合以下說明的中介人的客戶證券 —

(a) 維持於以該中介人的客戶的名稱開立的帳戶的；及

(b) 只因該中介人或該中介人的有聯繫實體 —

(i) 能夠將該等客戶證券移轉給它自己的；或

(ii) 在其他方面對該等客戶證券有控制權或支配權，

以致由該中介人或有聯繫實體持有的。

(3) 本規則不適用於屬回購交易標的之中介人的客戶證券或證券抵押品。

4. 關於客戶常設授權的規定

(1) 就第 6(1)(c)、7(2)、7(3)、8(2)或 9(2)條而言，常設授權指符合以下說明的書面通知 —

(a) 由客戶給予中介人或中介人的有聯繫實體；

(b) 授權該中介人或有聯繫實體以一種或多於一種指明方式處理不時代該客戶收取或持有的客戶證券或證券抵押品；

(c) (除第(2)款另有規定外)指明該授權的不超過 12 個月的有效期；及

(d) 指明該授權可以何方式撤銷。

(2) 第(1)(c)款不適用於由中介人的屬專業投資者的客戶給予該中介人或有聯繫實體的常設授權。

(3) 在有效期屆滿前沒有被撤銷的常設授權可續期一次或多於一

次，每次續期 —

(a) (如給予該授權的該中介人的客戶不屬專業投資者)不得超過 12 個月；或

(b) (如給予該授權的該中介人的客戶屬專業投資者)時間長短不限，

但有關續期須按以下方式作出 —

(c) 給予該授權的中介人的客戶的書面要求；或

(d) 藉以下程序 —

(i) 在該授權的有效期屆滿前 14 日或之前，獲給予該授權的中介人或有聯繫實體向給予該授權的中介人的客戶發出書面通知，提醒該客戶該授權的有效期即將屆滿，並通知該客戶除非他提出反對，否則該授權會在屆滿時按該授權指明的相同條款及條件續期，而續期期間爲 —

(A) 該授權述明的相等期間；

(B) 任何不超過 12 個月的指明期間(如該中介人的客戶不屬專業投資者)；或

(C) 任何期限的期間(如該中介人的客戶屬專業投資者)；及

(ii) 該客戶沒有在該授權屆滿前反對該授權續期。

(4) 凡常設授權按照第(3)(d)款續期，有關中介人或有聯繫實體(視屬何情況而定)須在該授權屆滿後的 1 星期內，將該授權續期的確認書給予該中介人的客戶。

第 II 部

對待客戶證券及證券抵押品

第 1 分部 — 一般規則

5. 登記或存放客戶證券及證券抵押品的規定

(1) 在不抵觸第 6 條的情況下，中介人或其任何有聯繫實體在收取該中介人的任何客戶證券後，須在合理切實可行範圍內盡快確保該等客戶證券 —

(a) 存放於在 —

(i) 認可財務機構；

(ii) 核准保管人；或

(iii) 另一獲發牌進行證券交易的中介人，

開立的獨立帳戶作穩妥保管，而該帳戶是指定爲信託帳戶或客戶帳戶並由該中介人或有聯繫實體爲持有該中介人的客戶證券目的而在香港開立及維持的；或

(b) 以下列人士的名稱登記 —

(i) (在該等客戶證券是代客戶收取的情況下)有關客戶；或

(ii) 該有聯繫實體。

(2) 在不抵觸第 6 條的情況下，中介人或其任何有聯繫實體在收取該中介人的任何證券抵押品後，須在合理切實可行範圍內盡快確保該等抵押品 —

(a) 存放於在 —

(i) 認可財務機構；

(ii) 核准保管人；或

(iii) 另一獲發牌進行證券交易的中介人，

開立的獨立帳戶作穩妥保管，而該帳戶是指定爲信託帳戶或客戶帳戶並由該中介人或有聯繫實體爲持有該中介人的證券抵押品目的而在香港開立及維持的；

(b) 存放於以該中介人或有聯繫實體(視屬何情況而定)的名義在 —

(i) 認可財務機構；

(ii) 核准保管人；或

(iii) 另一獲發牌進行證券交易的中介人，

開立的帳戶；或

(c) 以下列人士的名稱登記 —

(i) (在該等證券抵押品是代客戶收取的情況下)有關客戶；

(ii) 該中介人；或

(iii) 該有聯繫實體。

6. 處理客戶證券及證券抵押品

(1) 中介人或該中介人的有聯繫實體可按照以下的指示或授權，處理它收取或持有的該中介人的客戶證券或證券抵押品 —

(a) 就以下事宜發出的口頭或書面指示 —

(i) 出售該等客戶證券或證券抵押品；或

(ii) 就該項出售指令進行交收；

(b) 從第 5(1)(a)、5(2)(a)或 5(2)(b)條提述的帳戶提取該等客戶證券或證券抵押品，或處理已按照第 5(1)(b)或 5(2)(c)條登記的客戶證券或證券抵押品的書面指示；或

(c) 常設授權，但在以下情況下則除外 —

(i) (除第(2)款或第 7、8 或 9 條另有規定外)按照該項授權行事會引致該等證券或證券抵押品轉移至 —

(A) 該中介人；

(B) 該有聯繫實體；或

(C) 和該中介人有控權實體關係或以該有聯繫實體屬爲相連法團的法團，

在香港的帳戶(第 5(1)(a)、5(2)(a)或 5(2)(b)條提述的帳戶除外)，或在其他方面會引致(A)、(B)或(C)分節提述的人士享有該等客戶證券或證券抵押品的利益或使用該等客戶證券或證券抵押品；

(ii) 按照該項授權行事會引致該等證券或證券抵押品轉移至 —

(A) 該中介人；

(B) 該有聯繫實體；或

(C) 和該中介人有控權實體關係或以該有聯繫實體屬爲相連法團的法團，

的任何高級人員或僱員，除非該高級人員或僱員是有關客戶；或

(iii) 按照該項授權行事即會屬《不合情理合約條例》(第 458 章)第 6 條所指的不合情理，猶如有關的常設授權屬該條例所指的合約一樣。

(2) 凡有關的客戶證券是代某客戶收取或持有的，在不損害第(1)(a)款的原則下，獲發牌或獲註冊作資產管理的中介人如獲該客戶的書面協議，可從第 5(1)(a)條提述的帳戶提取或處理已根據第 5(1)(b)條登記的客戶證券，以代該客戶 —

(a) 將之出售；或

(b) 就出售指令進行交收。

(3) 凡有關的客戶證券或證券抵押品是代某客戶收取或持有的，在不損害第(1)及(2)款的原則下，中介人如獲該客戶的書面協議，可 —

(a) 處置；或

(b) 促使任何其有聯繫實體處置，

任何該等客戶證券或證券抵押品，以解除由該客戶或代客戶對以下人士所負的法律責任 —

(c) 該中介人；

(d) 該有聯繫實體；或

(e) 第三者。

(4) 在第(1)款中，指示指由客戶給予並符合以下說明的指示 —

(a) 關乎指明客戶證券或證券抵押品；

(b) 在該等客戶證券或證券抵押品是代中介人的某客戶收取或持有的情況下，由該客戶給予有關中介人或有聯繫實體的；

(c) 指示該中介人或有聯繫實體以特定方式處理該等客戶證券或證券抵押品；及

(d) 該指示在它關乎的客戶證券或證券抵押品已由該中介人或有聯繫實體按所指示的方式處理後失效。

第 2 分部 — 特別規則

7. 獲發牌或獲註冊進行證券交易的中介人及其有聯繫實體對待客戶證券及證券抵押品

(1) 本條適用於 —

(a) 獲發牌或獲註冊進行證券交易的中介人；及

(b) 該中介人的有聯繫實體。

(2) 本條適用的中介人或有聯繫實體如獲常設授權，可 —

(a) 依據證券借貸協議運用任何有關客戶證券或證券抵押品；

(b) 將任何有關證券抵押品存放於認可財務機構，作爲提供予該中介人的財務通融的抵押品；或

(c) 將任何有關證券抵押品存放於 —

(i) 認可結算所；或

(ii) 另一獲發牌或獲註冊進行證券交易的中介人，

作爲解除該中介人在交收上的義務和清償該中介人在交收上的法律責任的抵押品。

(3) 凡本條適用的中介人 —

(a) 在進行證券交易的過程中，向其客戶提供財務通融；及

(b) 在該中介人獲發牌或獲註冊進行的任何其他受規管活動的過程中，向該客戶提供財務通融，

則該中介人或其任何有聯繫實體如獲常設授權，可按照第(2)款運用或存放任何證券抵押品。

8. 獲發牌進行證券保證金融資的中介人及其有聯繫實體對待證券抵押品

(1) 本條適用於 —

(a) 獲發牌進行證券保證金融資的中介人；及

(b) 該中介人的有聯繫實體。

(2) 本條適用的中介人或有聯繫實體如獲常設授權，可將任何該等證券抵押品存放於 —

(a) 認可財務機構；或

(b) 獲發牌進行證券交易的中介人，

作爲提供予該中介人的財務通融的抵押品。

9. 獲發牌或獲註冊進行期貨合約交易的中介人及其有聯繫實體對待證券抵押品

(1) 本條適用於 —

(a) 獲發牌或獲註冊進行期貨合約交易的中介人；及

(b) 該中介人的有聯繫實體。

(2) 在不損害第 7(3)條的原則下，第(1)款提述的中介人或有聯繫實體如獲常設授權，可將任何有關證券抵押品存放於 —

(a) 認可結算所；或

(b) 另一獲發牌或獲註冊進行期貨合約交易的中介人，

作爲解除該中介人在交收上的義務和清償該中介人在交收上的法律責任的抵押品。

第 III 部

雜項條文

10. 對待客戶證券及證券抵押品的限制

(1) 中介人或中介人的有聯繫實體須採取合理步驟，以確保除非按第 II 部規定行事，否則該中介人的客戶證券及證券抵押品不得 —

(a) 存放；

(b) 轉讓；

(c) 借出；

(d) 質押；

(e) 再質押；或

(f) 以其他方式處理。

(2) 如有關中介人或有聯繫實體已按照第 II 部將任何客戶證券或證券抵押品借予或存放於任何人，則第(1)款並不規定該中介人或有聯繫實體須確保該等證券或證券抵押品不得由該人 —

(a) 存放；

(b) 轉讓；

(c) 借出；

(d) 質押；

(e) 再質押；或

(f) 以其他方式處理。

11. 核准穩妥保管客戶證券及證券抵押品的保管人

證監會可以書面通知並在證監會認爲適當的條件下，核准任何公司或海外公司爲適合穩妥保管中介人的客戶證券及證券抵押品。

12. 就沒有遵守本規則的某些條文作出報告

第 4(4)、5 或 10(1)條適用的中介人或中介人的有聯繫實體須在察覺本身沒有遵守該條的一個營業日內，以書面通知將此事告知證監會。

13. 罰則

(1) 任何中介人或有聯繫實體 —

(a) 無合理辯解而違反第 4(4)或 12 條，即屬犯罪，一經定罪，可處第 3 級罰款；

(b) 意圖詐騙而違反第 4(4)或 12 條，即屬犯罪，一經定罪，可處第 6 級罰款。

(2) 任何中介人或有聯繫實體 —

(a) 無合理辯解而違反第 5 或 10(1)條，即屬犯罪 —

(i) 一經循公訴程序定罪，可處罰款$200,000 及監禁 2 年；或

(ii) 一經循簡易程序定罪，可處第 6 級罰款及監禁 6 個月；

(b) 意圖詐騙而違反第 5 或 10(1)條，即屬犯罪 —

(i) 一經循公訴程序定罪，可處罰款$1,000,000 及監禁 7 年；或

(ii) 一經循簡易程序定罪，可處罰款$500,000 及監禁 1 年。

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 148 條訂立。本規則訂明中介人及其有聯繫實體對在香港收取或持有的客戶證券及證券抵押品的對待及處理方式。本規則亦就不同中介人及其各自有聯繫實體因應該中介人獲發牌或獲註冊進行的不同類別受規管活動訂定不同條文。