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 – Securities Borrowing and Lending) Rules

《證券及期貨(披露權益－證券借貸)規則》草擬本諮詢總結

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INTRODUCTION

1. On 19th December 2001, the Securities and Futures Commission ("SFC") issued a consultation paper ("the Consultation Paper") to solicit comments on the draft Securities and Futures (Disclosure of Interests – Securities Borrowing and Lending) Rules (the "draft Rules").

2. The draft Rules are concerned with establishing a simplified disclosure regime for disclosure of securities borrowing and lending by persons who are most active in the SBL industry in place of the disclosure obligations that may arise when a person lends or borrows shares in a listed corporation under Part XV of the Securities and Futures Ordinance (5 of 2002) ("SFO").

3. The consultation exercise ended on 26th January 2002 but the SFC has subsequently conducted extensive further consultation with the persons who submitted comments on the draft Rules and industry representative and has made major changes to the draft Rules in response to these submissions.

4. The purpose of this document is to provide interested persons with an analysis of the comments raised during the consultation exercise and the rationale for the SFC's conclusions. It is advisable to read this document in conjunction with the Consultation Paper itself.

PUBLIC CONSULTATION

Consultation process

5. In addition to the public announcement inviting comments, the Consultation Paper was distributed to various interested parties and professional bodies. The Consultation Paper and the draft Rules were posted on the website of the SFC and distributed to all registrants through FinNet..

6. A total of five submissions were received from -

   (a) Linklaters & Alliance for a group of seven financial institutions
   (b) The Northern Trust Company
   (c) State Street Bank and Trust Company
   (d) The Hong Kong Association of Banks
   (e) HSBC

7. Most comments were supportive of the proposed subsidiary legislation but they called for a widening of the exemptions provided in the draft Rules in a number of respects. A summary of the comments received is set out in the Appendix.

8. In the light of the comments received the SFC has subsequently conducted extensive further consultation with the persons who submitted comments on the draft rules and also with The Pan Asian Securities Lending Association Ltd. ("PALSA").

Consultation Conclusion

9. Having regard to these submissions the SFC proposes to enlarge further the simplified disclosure regime for approved lending agents, the exemption for substantial shareholders and the exclusion for regulated persons in certain circumstances –

- "approved lending agents" – persons approved by the Commission (generally custodians) who will merely have to disclose changes in the percentage level of their "lending pool". The revised proposals encompass all stages of the stock borrowing and lending process in which approved lending agents are involved.

- substantial shareholders, who lend through an approved lending agent that uses a specified form of agreement when lending the shares, will be exempt from making disclosures of changes in the nature of their interests that result from the lending and return of shares. This represents significant enlargement of the exemption set out in the draft rules exposed for consultation, which was confined to "institutional investors" who lent shares.

- "regulated persons" – interests in shares borrowed by local brokers and overseas brokers in approved jurisdictions that merely act as a conduit (i.e. regulated persons who borrow and on-lend the shares within 5 business days) are to be disregarded. The draft Rules have been amended to clarify that interests will be disregarded if the shares are passed to a corporation in the same group as the regulated person – provided they are used for a "prescribed purpose" (i.e. on-lent, or returned,) to a person outside the group within the period of 5 business days.

10. Approved lending agents and regulated persons taking advantage of the simplified disclosure regime will still have to keep records of the shares borrowed/lent and returned.

11. These changes to the draft Rules extend and simplify the exemptions with a view to facilitating market development and enhancing liquidity, whilst maintaining adequate transparency in the disclosure regime to protect the interests of investors. The draft Rules have also been further refined to better reflect the policy intention and to improve drafting.

SUMMARY OF COMMENTS AND SFC'S RESPONSES

12. A summary of the comments received are set out in the Appendix.

Draft Securities and Futures (Disclosure of Interests – Stock Borrowing and Lending) Rules
Summary of Comments Received and SFC's Response

	Section reference	Details of Exposure Draft of the Rules	Respondent's comments	SFC's response
1.	2	"qualifying shares" means shares in which an institutional investor is interested and which an approved lending agent ("ALA") has authority to lend as agent for an institutional investor;	[Linklaters & Alliance] The definition of "qualifying shares" refers to shares which are "given to" an ALA (and Rule 7(1)(b) refers to shares being "returned" to the ALA). It is unclear whether the Rules as drafted are intended to cover the situation where an ALA has responsibility for lending out client securities but the shares are held by a third party custodian (and the borrower would therefore return equivalent shares to the custodian).	The definition of "qualifying shares" has been amended so that it covers the situation where an ALA has authority, as agent for the ultimate lender, to lend shares held by a third party.
2.	2	Definition of "qualifying shares".	[Hong Kong Association of Banks] "Qualifying shares" refer to those shares which an ALA has authority to lend as agent. It is increasingly common that ALAs are asked to contract as principal with both lender and borrower. The SBL rules should clarify as to whether an ALA would be liable to disclose in these circumstances.	If an ALA acquires shares from the ultimate lender as principal the transaction is one of borrowing shares – not lending them as agent for the ultimate lender. Under the existing S(DI)O there is no exemption for borrowing shares. Under the draft SBL Rules the exemption for borrowing is limited to the 5 business day "conduit exemption" for regulated persons. (The "conduit exemption" is now in clause 7 of the revised draft Rules)
3.	3	**"**In the following circumstances an institutional investor who – (a) is interested in shares held by an ALA; and	[Northern Trust] We are concerned that the implementation of the proposed disclosure requirements for	The class of persons entitled to qualify for the exemption has been expanded from "institutional investors" to include all substantial shareholders.

	Section reference	Details of Exposure Draft of the Rules	Respondent's comments	SFC's response
		(b) complies with the conditions set out in subsection (4) will not be under a duty of disclosure under section 304(1)(d) of the SFO- (i) where the ALA lends qualifying shares under the terms of a relevant agreement; or (ii) where shares to which paragraph (i) applied are returned in accordance with the terms of the relevant agreement"	substantial shareholders may result in a further reduction of liquidity in the Hong Kong securities lending market. Clients who are the beneficial owner and ultimate lender may find the additional monitoring and reporting requirements to be too onerous, and the risk of non-compliance, which carries criminal liability, is too great relative to the returns.	(Clause 3 (1)of the draft Rules exposed for consultation is now clause 3(1) and (2) of the revised draft Rules)
4.	3	As above	[State Street] We request that you consider broadening the definition of "institutional investors". Additional disclosure requirements for lenders are likely to result in lenders ceasing lending activities or limitations and restrictions being placed on lending mandates in order to remain under the 5% threshold which will have an adverse effect on liquidity of securities.	The class of persons entitled to qualify for the exemption has been expanded from "institutional investors" to include all substantial shareholders.
5.	3	As above	[Linklaters & Alliance] In our view, the definition of "institutional investor" is unduly narrow and excludes various categories of investors which regularly make securities available from their	The class of persons entitled to qualify for the exemption has been expanded to include all substantial shareholders.

	Section reference	Details of Exposure Draft of the Rules	Respondent's comments	SFC's response
			investment portfolio for lending, simply to enhance their investment returns. Consideration should be given to treating any "professional investor" as eligible for the stock lending exemptions in the SBL Rules. At least the definition of "institutional investor" should be expanded to include: • all banks and insurance companies • all offshore funds and pension schemes falling within the definition of "professional investor" • governments, central banks and multilateral agencies.	
6.	3	As above	[Hong Kong Association of Banks] The disclosure of interests in shares will impose an onerous administrative burden on custodians. Given that the lender is already under a duty of disclosure at 5%, it is suggested that when holding shares purely in the capacity of custodian or bare trustee the ALAs should be totally exempted.	Custodians having no discretion in dealing with shares are exempted in these circumstances – see s.323(1)(b) and (3). However, ALAs have a discretion in the manner in which they deal in shares and therefore have a discloseable interest. The circumstances in which ALAs have to make disclosures, and the details that must be disclosed have been minimized under the draft Rules. As lenders who lend through ALAs have been relieved of their duty of disclosure the underlying assumption of the comments is no longer relevant.
7.	3(4)	Requirement for disclosure when shares become qualified	[Linklaters & Alliance]	Clause 3(4) of the draft Rules exposed for consultation is now clause 5 of the revised

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		when shares become qualified shares or cease to become qualifying shares (i.e. when there is change in the size of the lending pool).	A difficulty with treating a fluctuation in the size of the lending pool as a change in nature of an interest is that the events resulting in a change in the size of the lending pool will normally also involve an increase or decrease in the size of the interest of the end-lender or ALA (e.g. because shares which were subject to lending authority have been sold). It seems that separate disclosures may therefore need to be made to comply with: • the provisions of the SFO relating to interests in shares and • the Securities and Futures (Disclosure of Interest – Stock Borrowing and Lending) Rules. From the point of view of the ALA, it would be more satisfactory if shares becoming or ceasing to be qualifying or designated shares was not treated as a change in the nature of the interest, but the Rules simply required that, whenever a disclosure is made in respect of fluctuations in the amount of an interest that includes an interest held by an ALA that disclosure should also indicate the amount currently available for lending. An alternative approach would be to require the ALA to make a disclosure of a change in nature of interest when the amount of shares available for lending crosses, up or down, the 5% threshold (irrespective of whether this would also trigger a disclosure in respect of	consultation is now clause 5 of the revised draft Rules. The disclosure regime for ALAs has been simplified so that the provisions of the SFO relating to interests in qualifying shares received, held, or lent by an ALA will not apply. The only disclosure obligations that an ALA will have in respect of qualifying shares arise under the draft Rules where the ALA is required to disclose merely fluctuations in the size of the shares that it has authority to lend (i.e. the size of the lending pool) when the pool reaches 5% and passes through a whole percentage level thereafter e.g. 6%, 7% etc. We believe such disclosures are important to maintain the integrity of the disclosure system and market transparency.

	Section reference	Details of Exposure Draft of the Rules	Respondent's comments	SFC's response
			the amount of its interest) but not to require other fluctuations to be disclosed. In the case of an ALA, which would only lend out stock in response to market demand, there can be little or no justification for needing to disclose relatively small fluctuations in the size of its lending pool.	
8.	4(3)	"Where an interest in shares is used for a purpose, other than a prescribed purpose, by the regulated person, or by a related corporation of the regulated person, within the period of 5 business days specified in subsection (1) the regulated person shall be taken to have acquired that interest, or come to have that short position, (as the case may be) for the purposes of Divisions 2 to 5 of the SFO on the day that it is used for that purpose."	[Linklaters & Alliance] We assume that Section 4(3) would not be interpreted as having the effect of disapplying the exemption because the securities are used for short selling (i.e. a purpose other than a "prescribed purpose") by the related corporation during the 5 day period.	If the shares are used for a purpose other than a prescribed purpose disclosure must be made. The object of the SBL exemption is to establish a simplified disclosure regime for borrowing and lending – not an exemption for all transactions using borrowed stock. (Clause 4(3) of the draft Rules exposed for consultation is now clause 7(3) of the revised draft Rules)
9.	5	Where - (a) an ALA lends an interest in shares to which section 3(1)(i) or (2)(i) applies; or (b) an interest in shares to which paragraph (a) applies is returned in the circumstances set out in section 3(1)(ii) or	[Linklaters & Alliance] While we have no objection to Section 5 as drafted, in our view it should not be interpreted as meaning that Clause 312 of the Bill (now s.321 of the SFO) applies whenever an agent lends out stock in circumstances where the SBL Rules do not exempt such lending from disclosure. We would be grateful for the SFC's confirmation on this	Strictly, a loan of stock under an SBL agreement represents the disposal of an interest in shares lent and the immediate acquisition of another interest (the right of recall) such that the percentage level of his interest in shares of the listed corporation does not change. Given that there is a disposal and an acquisition, section 321 of the SFO does apply to SBL transactions not effected through an ALA.

	Section reference	Details of Exposure Draft of the Rules	Respondent's comments	SFC's response
		(2)(ii), an institutional investor shall not be required, under section 312 of the SFO, to secure that its agent notifies it of the lending or the return of the interest.	point.	(Clause 5 of the draft Rules exposed for consultation is now clause 4 of the revised draft Rules)
10.	6	**6. Approved Lending agents** (1) A corporation is an ALA if it is approved by the Commission, in writing, as an ALA for the purposes of these rules. (2) An application for approval under subsection (1) shall be accompanied by - (a) such information and particulars as the Commission may reasonably require; and (b) an application fee prescribed by rules made under section 382 for the purposes of this section; (3) The Commission may, by notice in writing served on a person approved under subsection (1) withdraw its approval where the Commission is satisfied that it is appropriate to do so.	[Linklaters & Alliance] Section 6 of the Rules gives the Commission power to approve applications to become an ALA and to withdraw any approval granted where the Commission "is satisfied that it is appropriate to do so". The Commission is not required to give reasons for any refusal or withdrawal of approval. Clarification is sought on the criteria the Commission will take into account in considering applications for approval, or withdrawing its approval once given. We consider that reasons should be given for any refusal or withdrawal, and that such decisions by the Commission should be "specified decisions" for the purposes of Schedule 7 to the Bill, enabling an appeal to be made against any such decision to the Securities and Futures Appeal Tribunal.	A requirement to give reasons has been added. Furthermore, refusal of application or withdrawal of approval granted will be included as specified decisions. We are proposing to develop guidelines setting out the criteria the Commission will take into account in considering applications for approval, or withdrawing its approval once given. We envisage that there will be 2 types of corporations who satisfy the criteria (1) custodians and (2) third party lending agents in their capacities as ALAs. (Clause 6 of the draft Rules exposed for consultation is now clause 8 of the revised draft Rules)
11.	General	-	[HSBC]	Persons who were "exempt persons" are

	Section reference	Details of Exposure Draft of the Rules	Respondent's comments	SFC's response
			Can persons offering equity finance business, therefore assuming a principal (rather than agency) role in conduit activities, take advantage of the simplified disclosure regime for regulated persons.	now referred to in the Bill as "registered institutions" and, the term "regulated person" in the draft Rules covers "an intermediary licensed or registered for Type 1 regulated activity". Accordingly authorised financial institutions will normally qualify as regulated persons.
12.	General	-	[HSBC] A conduit lender (can be a bank or broker) signs up with an institutional investor and agrees an exclusive arrangement to borrow from the latter for onward lending purposes from time to time. Under the draft rule, the institutional lender can make a one-off disclosure (if any of the lines represented holding of 5% or more). Would the conduit lender need to make a similar disclosure, or can he rely on the conduit lender provision that such interests would be disregarded and no disclosure would be required?	An arrangement with an investor giving a borrower "exclusive" rights to borrow shares held from time to time by an investor does not of itself give a borrower an interest in the shares. It would be the equivalent of a "hold" in a normal SBL transaction. The "borrowing" would occur at the time that the Borrower confirmed that it would borrow a specific number of the shares or asked for certain shares to be transferred to its account. However, much would depend upon the terms of the agreement and if the terms of the agreement were such as to give the borrower an option in respect of specific shares this would create an interest in the shares - quite independently of the borrowing. Any restriction on the investor selling the shares or requirement that he hold a certain number of shares available for borrowing would be relevant in this context.
13.			[Linklaters & Alliance] We propose that the Commission should, in	Disaggregation of SBL activities carried on by ALAs goes far beyond the original concept of establishing a simplified

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			the Rules, provide an exemption from aggregation in respect of the "interest" of an ALA.	disclosure regime for SBL. The draft Rules were developed to ensure that liquidity in the SBL market was not adversely affected by the burden of disclosure obligations placed on lenders of shares. The draft Rules were not established to provide a mechanism for groups of companies to place shares with an ALA in order that they could keep below the disclosure threshold. Ultimate lenders of shares do not cease to be interested in shares that their subsidiaries place with an ALA for lending. They must still aggregate those shares. Nevertheless, we recognize that parent companies of ALAs should be entitled to take advantage of the simplified disclosure regime in respect of stock borrowing and lending and we have provided for a similar exemption in Section 5(2) of the draft Rules.