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

SFC
證監會

Consultation Conclusions on the Draft Securities and Futures (Keeping of Records) Rules

《證券及期貨(備存紀錄)規則》草擬本的諮詢總結

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INTRODUCTION

1. On 15 February 2002, the Securities and Futures Commission ("Commission" or "SFC") released a Consultation Document ("Consultation Document") on the draft Securities and Futures (Keeping of Records) Rules ("Rules").

2. The Consultation Document contained detailed requirements prescribing the record keeping obligations of intermediaries licensed or registered for different types of regulated activities and their associated entities.

3. The consultation period lasted until 15 March 2002.

4. A summary of comments received on the Rules ("Summary of Comments") is attached as Appendix 1.

5. Taking into account the submissions received and following discussions with commentators, several revisions to the Rules were considered appropriate.

6. These revisions have been adopted by the Commission and effected in the revised draft Rules ("Revised Draft Rules") which are attached as Appendix 2. As the Revised Draft Rules remain subject to deliberation of the Legislative Council, they may not be in the final form. They are issued primarily to demonstrate how we have revised the Rules in response to the market comments and not for the purpose of another round of consultation.

7. The Commission would like to thank those who have provided their comments on the Rules.

8. The purpose of this report is to provide interested persons with an analysis of the main comments raised during the consultation process and the rationale for the Commission's conclusions. This report should be read in conjunction with the Consultation Document, the Rules, the Summary of Comments and the Revised Draft Rules.

PUBLIC CONSULTATION

A. Background

9. The Rules were prepared to ensure that intermediaries and their associated entities maintain comprehensive records in sufficient detail relating to their businesses and client transactions in order to ensure proper accounting of their business operations and their clients' assets.

10. The Rules require all intermediaries and their associated entities to comply with certain general record keeping obligations. The Rules impose additional specific requirements on intermediaries on the basis of the type of regulated activities in which they are engaged.

11. From a policy perspective, the Rules are intended primarily to:

- apply to all intermediaries and their associated entities with additional specific requirements for intermediaries engaged in certain regulated activities; and,

- rationalize the existing requirements found in three different ordinances (i.e., section 83 and Division 5 Part XA of the Securities Ordinance, section 45 of the Commodities Trading Ordinance, and section 3 of the Leveraged Foreign Exchange Trading (Books, Contract Notes and Conduct of Business) Rules).

B. Consultation Process

12. In addition to the public announcement inviting comments, the Consultation Document was distributed to all registered persons and various professional bodies. The Consultation Document was also published on the SFC website.

13. Sessions were held with industry participants and their legal advisors during and after the consultation period to discuss their comments.

14. 15 submissions were received from practitioners including fund management firms, international brokerage firms, legal firms, industry representative bodies and professional associations. One of the submissions consisted of a survey of its members conducted by the Hong Kong Securities Institute.

15. The overall tone of the comments was positive. Commentators generally acknowledged the need for and welcomed the Rules. Comments varied considerably in range and depth, with some focusing on broad principles and others on points of detail and clarification.

CONSULTATION CONCLUSIONS

Records Demonstrating Compliance with Systems of Control. (Sections 3(b)(ix) and 4(b)(v)).

16. Under the Rules, intermediaries and associated entities are required to maintain sufficient records to demonstrate compliance with its systems of control and all applicable provisions and rules under the Securities and Futures Ordinance.

17. Several commentators expressed concern with the breadth of this general obligation and requested further guidance on the details of what records need to be maintained under sections 3(b)(ix) and 4(b)(v).

18. In response, we agree that the existing requirement may be too broad and therefore, have revised these sections to limit the obligation to keeping records sufficient:

(a) to demonstrate compliance with certain provisions of the Securities and Futures (Client Money) Rules and of the Securities and Futures (Client Securities) Rules and with its systems of control in place to ensure such compliance; and,

(b) to determine compliance with the Securities and Futures (Financial Resources) Rules (for licensed corporation only).

Advising on Securities or Futures Contracts and on Corporate Finance. (Sections 7 and 8)

19. Many market participants expressed concern that the additional record retention requirements with respect to advising on securities or futures contracts and on corporate finance could be too broad or otherwise should be included as a code of conduct requirement rather than in these Rules.

20. After careful consideration, we agree that these additional requirements should be more appropriately established in the Code of Conduct for Persons Registered with the SFC ("Code of Conduct") and the Corporate Finance Adviser Code of Conduct. Accordingly we have deleted both sections 7 and 8 in their entirety from the Rules.

Record Retention Period. (Section 12)

21. The prescribed retention period for retaining records is not less than either 7 years or 2 years based on the nature of the records. (Section 12)

22. Several commentators asked for specific clarification as to whether the 2-year retention period under section 12(2)(a) also applied to tape recordings of transactions (i.e., buy/sell orders from clients) in light of a separate 3-month retention period prescribed under the Code of Conduct. Others raised the more general issue of whether the time periods under section 12 applied when more specific retention periods are provided for in other sublegislations under the Ordinance.

23. Our intent is for the retention of tape recordings of telephone conversations to continue to be governed by the period specified in the Code of Conduct. Accordingly, we have revised the definition of "record" to exclude such tape recordings.

24. Furthermore, where there is a more specific retention period prescribed under any other sublegislation, these more specific retention periods shall override any general period provided for in the Rules. Accordingly, we have added a specific subsection to clarify this point as well as deleted the requirements relating to retention of contract notes and statement of accounts (section 12(2)(b) through (d) and schedules 1-1(b)(ii) and 2-1(a)(ii)) as those documents are separately covered under the Securities and Futures (Contract Notes, Statements of Accounts and Receipts) Rules.

Penalty. (Section 14)

25. Breach without Reasonable Excuse. Concern was expressed by several commentators regarding the nature and level of penalty applicable for a breach of the Rules without reasonable excuse. Some commentators felt that the Rules were generally broad and administrative in nature and imposing criminal penalties for a breach appeared unduly harsh and that having a criminal penalty provision for breach with intent to defraud was sufficient.

26. We are mindful of these concerns and have accordingly revised the penalty provision in section 14(a)(i) and (ii) by deleting the imprisonment penalty as well as lowered the level of applicable fine so that a breach without reasonable excuse will be subject to a fine at level 4 only (i.e. currently up to $25,000).

27. Failure to Report Non-Compliance. We have also revised section 14 to include, as a basis for penalty, failure to report non-compliance with the Rules as required under section 13 without reasonable excuse or with intent to defraud.

Technical Changes

28. Several format changes were made to various provisions in response to market comments that the Rules contained duplicative or overlapping provisions. For example, we have deleted schedule 2 in its entirety and consolidated the applicable requirements into section 4 of the Rules. Additionally, certain items in the schedule 1 have also been deleted and consolidated into section 9 of the Rules. Generally, duplicative provisions or references have been removed throughout the Rules.

29. These technical revisions have no substantive effect on the Rules and are intended simply to make the Rules more streamlined and user-friendly.

EFFECTIVE DATE AND TRANSITIONAL ARRANGEMENTS

30. The Securities and Futures (Keeping of Records) Rules, will become effective on the day appointed for the commencement of Part VI of the Securities and Futures Ordinance.

Appendix 1

Draft Securities and Futures (Keeping of Records) Rules (the "Rules")
Summary of comments received and SFC's response

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
General Comments				
1.	-	Scope of the Rules	[HKSA, HKSI, Linklaters, Nomura] The Rules are too broad and vague. This may cause ambiguity as to what detailed records are to be kept by the intermediaries and their associated entities. Auditors would also have difficulty in ascertaining whether there are sufficient internal controls in place in respect of record keeping. This is of concern, particularly given that a breach of the Rules, without a reasonable excuse, is a criminal offence.	The Rules are intended to ensure that intermediaries and, where applicable associated entities, keep proper and sufficient records to explain their financial positions and business transactions and to account for their client assets. We acknowledge that some of the requirements are not specific as to the exact types of records required to be kept. This is unavoidable where the circumstances of each case may be different as trading records to be kept by firms of different size and complexity or nature of operations (e.g. online and traditional brokers) must necessarily be different. This is no different from the record keeping requirements in the existing Securities Ordinance, Commodities Trading Ordinance and Leveraged Foreign Exchange Trading (Books, Contract Notes and Conduct of Business) Rules. Nevertheless, we are mindful of the concerns on the level of penalty imposed on a breach without a reasonable excuse and have revised the penalty provision in section 14(a)(i) and (ii) by deleting the imprisonment penalty so that a breach without reasonable excuse will be subject to a fine only. Please refer to our response to comment 38 for details.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
2.	-	Scope of the Rules	[HKSI] It is concerned that daily transaction records of registered investment advisers' non-regulated activities (e.g. MPF and Insurance schemes) will also be subject to the record keeping requirements.	It is not the intention of the Commission to capture unregulated activities under the Rules. We have further clarified this in the Revised Draft Rules.
3.	-	Definition of "record"	[HKSA] The term "records" is not defined and appears to be used in different senses in different contexts under section 3 and Schedule 1 of the Rules, sometimes generically and sometimes more specifically.	"Record" which is used in the Rules as a noun, has the meaning assigned to it in Part 1 of Schedule 1 to the Securities and Futures Ordinance, except that it does not include recording of a telephone conversation.
4.	-	General	[RMIL] The respondent commended the intention to make statutory provision for record keeping in support of good governance in the securities and futures industry.	That is indeed the intention of the Commission.
5.	-	General	[HKID] The respondent supported - • the extension of the Rules to all intermediaries and associated entities for the protection of investors; and • the setting of common record requirements to all regulated activities. The requirements are sufficiently detailed to allow intermediaries to maintain in order to explain their business operations and account for their clients' assets.	Comments noted and acknowledged.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
Specific Comments				
6.	3(b)	General record keeping requirements for intermediaries	[Linklaters] There appears to be overlap between the records required to comply with section 3(b) and those set out in Schedule 1. In many cases, it is unclear whether the records set out in Schedule 1 are sufficient to satisfy section 3(b) as well, or whether section 3(b) is intended to impose additional requirements.	Agree. We have amended the Rules accordingly.
7.	3(b)		[Linklaters] Certain of the provisions of section 3(b) are qualified by the words "where applicable". It is not clear why this qualifies particular provisions and not all of them. It was suggested that the words "where applicable" are moved to the beginning of section 3(b) after the word "sufficient".	We agree with the comment and have amended the Rules accordingly to clarify the requirement for both records in section 3(b) of the exposure draft of the Rules (now section 3(a) of the Revised Draft Rules) and those set out in the Schedule (to the extent that they are not required under section 3(a)).
8.	3(b)(iv)	An intermediary must keep such accounting, trading and other records as are sufficient to – (iv) (where applicable) show separately particulars of each transaction entered into by it or on its behalf to implement any such order or instruction, including particulars identifying with whom and on whose behalf it has entered into such transaction;	[HKSA, Linklaters] Section 3(b)(iv) appears to require an intermediary to keep information on the underlying client. This requirement is broader than the current Client Identity Rule, which only covers Hong Kong products. It should be made clear that this provision is not intended to extend the requirements of the Client Identity Rule. It was suggested that the words "on whose behalf" be replaced by "for which account".	This is not our intention, as we merely require information on the client as the accountholder. We have replaced the words "on whose behalf" by "for which account" in the Revised Draft Rules as suggested.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
9.	3(b)(v) & 3(b)(vi)	An intermediary must keep such accounting, trading and other records as are sufficient to – (v) (where applicable) enable such transactions to be traced through its accounting, trading, settlement and stock holding systems; (vi) account for all client assets that it receives or holds;	[Linklaters] Cash and many securities are fungible and not possible to identify specific cash and securities as belonging to specific transactions or as belonging to specific clients. Also, transactions are often aggregated and executed as one larger transaction. Under section 3(b)(v) and (vi), it should be sufficient to be able to trace that consolidated transaction.	The regulatory intention is that sufficient records must be kept so that all transactions including the movement of client assets, client money may be tracked and retraced if necessary. The fact that intermediaries may often pool their clients' assets for execution purposes does not affect the intermediary's obligation to maintain proper records so that the movement of client assets and the transaction flow can be traced.
10.	3(b)(vii)	An intermediary must keep such accounting, trading and other records as are sufficient to – (vii) enable all movements of such client assets to be traced through its accounting and, where applicable, stock holding systems;	[Linklaters] Question on whether the reference to stock holding systems in Section 3(b)(vii) is to the intermediary's systems (if any), and not third party clearing systems.	The reference is to the intermediary's own systems.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
11.	3(b)(viii)	An intermediary must keep such accounting, trading and other records as are sufficient to – (viii) reconcile each month any differences during that month in its balances or positions with external parties, including – (A) recognized exchange companies; (B) clearing houses; (C) other intermediaries; (D) custodians; and (E) banks, and show how such differences were resolved; and	[Commentator has reserved anonymity] The respondent agreed that all intermediaries should undertake on a monthly basis, a process of reconciling information as to client assets recorded in its systems against information from external parties. However, it is often difficult to actually reconcile differences each month, especially in the fund management industry where the fact that holdings in client portfolios are often of a long term nature (e.g. arising from corporate actions in the underlying stocks, suspension of stocks or the underlying companies going into reconstruction or liquidation.) It believed that the obligation should be to maintain a procedure to perform monthly reconciliations, recording items which do not reconcile and having a proper process of following up on the differences and escalating reports to senior management. It also suggested that the Commission to consider introducing a materiality threshold so that items which do not reconcile but are under that threshold for some period of time can be written off.	The Rules only require intermediaries to keep records as are sufficient to reconcile any differences and show how such differences were resolved. There is no specific timeline for resolving such differences. It is inappropriate for the Commission to introduce any materiality threshold for writing off unreconciled items as this should be considered on a case by case basis after taking into consideration the nature and reasons for the differences and all other circumstances.
12.	3(b)(ix)	An intermediary must keep such accounting, trading and other records as are sufficient to – (ix) demonstrate compliance with its systems of control and all applicable provisions in the Ordinance and any Rules made under the Ordinance;	[HKSA, JFAM, Linklaters] The requirements are not realistic. [Linklaters] It recommended to delete section 3(b)(ix), as there is already an obligation to report non-compliance, and such a general requirement is better found in Codes or Guidelines, such as the SFC's Management, Supervision and Internal Control Guidelines ("MSICG").	Having considered the comments made, the Commission has narrowed the scope of the requirement in what becomes section 3(a)(vi) of the Revised Draft Rules to the following extent: (1) to demonstrate compliance with sections 4, 5, 6, 8(4), 10 and 11 of the Securities and Futures (Client Money) Rules and sections 4(4), 5, 10(1) and 12 of the Securities and Futures (Client Securities) Rules

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
			Alternatively, it suggested that section 3(b)(ix) be re-drafted, to either require the intermediary to ensure that its "systems and controls" are in documentary form (along the lines of the requirements in the SFC's Management, Supervision and Internal Control Guidelines) or to require the intermediary to keep a record of any material breaches in complying with its systems of control, and any material breaches of the Ordinances and Rules made thereunder. [HKSA] Given the fact that any non-compliance with the Rules may give rise to criminal sanctions, it is important that the SFC provides further guidance on their expectation as to the records and documents that should be kept. Alternatively, the SFC may specify what they consider to be the key and important "system of control" and provisions in the Securities and Futures Ordinance, and narrow the application of this section to those areas. [HKSbA, HKID] It was suggested to substitute "demonstrate compliance with its systems of control" by "to comply" or "demonstrate compliance with the documentary requirements of its system".	(2) to demonstrate that it had systems of control in place to ensure such compliance; and (3) enable it readily to establish whether the Securities and Futures (Financial Resources Rules) have been complied with. In this connection, we plan to provide guidelines on the minimum levels of controls for the safeguarding of client money and client securities in due course. The obligation to report non-compliance is a separate requirement altogether. Please also refer to our response to comment 38 on penalty for non-compliance.
13.	3(d)	An intermediary must – (d) make entries in those records in accordance with generally accepted accounting principles.	[Linklaters] The requirement should be limited to financial statements. Also, there is no indication of which GAAP should be followed.	Yes, this is limited to accounting records and financial statements. Consistent with the Securities and Futures (Financial Resources) Rules and the Securities and Futures (Accounts and Audit) Rules, we will not prescribe which GAAP our intermediaries may follow.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
14.	4(b)(i)	An associated entity of an intermediary must keep such accounting and other records as are sufficient to – (i) account for all client assets of any intermediary with which it is in a controlling entity relationship that it receives or holds;	[Linklaters] The qualification "with which it is in a controlling entity relationship" that it receives or holds is unnecessary as the definition of "associated entity" in the Bill specifically refers to an entity being in a controlling entity relationship.	We agree with the comment and have amended the Rules accordingly.
15.	4(b)(v)	An associated entity of an intermediary must – (v) demonstrate compliance with its systems of control and all applicable provisions in the Ordinance and any Rules made under the Ordinance;	Similar comments on section 3(b)(ix) also apply in respect of associated entities in section 4(b)(v).	Consistent with our response to comment 12 above, the Commission has revised this provision (which becomes section 4(a)(v) of the Revised Draft Rules) to narrow the scope to demonstrate: (1) compliance with sections 4, 5, 6, 8(4), 10 and 11 of the Securities and Futures (Client Money) Rules and sections 4(4), 5, 10(1) and 12 of the Securities and Futures (Client Securities) Rules; and (2) that it had systems of control in place to ensure such compliance.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
16.	7	An intermediary licensed or exempt for advising on securities or advising on futures contracts must keep such records as are sufficient to explain the basis for any views disseminated, or recommendations made, by it to another person (directly or indirectly) regarding any specific securities or specific futures contracts.	[HKSA, HKSI, Linklaters] The requirement is too board and generic which would appear to apply, for example, to the situation where an analyst is interviewed on the radio and comments on the prospects of a particular company. This may even technically cover oral and casual communications with clients or other persons that are not intended to solicit or to advise such persons to trade. [HKSA] It seems more appropriate to require an intermediary to keep sufficient records to explain the basis for their views or recommendations, if and only if the intermediary knows or has reason to believe that those other persons will rely on their views or recommendations to deal. [Linklaters] Where research reports are prepared on a global basis and sent to investors through an intermediary in Hong Kong this Rule will be impossible to comply with. The commentator suggested that in view of the criminal sanctions attached to the Rules, this Rule should be limited to matters such as keeping copies of research reports and is more appropriately dealt with in Codes and Guidelines. Alternatively, they suggested that section 7 be limited in scope to a person licensed or exempt for advising on securities or futures contracts who makes a recommendation to persons other than professional investors for remuneration, or who gives advice to persons other than professional investors to	The Commission takes note of the comments and has carefully re-considered the issue. As the policy intention is to ensure that sufficient records are kept by advisers to demonstrate compliance with the general principles (e.g. suitability of advice, due diligence and care) under the Code of Conduct, we agree that the corresponding record keeping requirement should be addressed in the Code of Conduct. The Rules have been revised accordingly by deleting the clause in question from the Rules altogether.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
			whom he has assumed an advisory responsibility. [HKSbA, HKSA] The basis of a certain view may be the result of a combination of various sources.	
17.	7		[HSBC, ISD, JFAM] The requirement should only apply to investment advisers but not for fund managers or licensed professionals (dealers and dealer representatives) who provide advice to their clients incidental to their dealing business.	No longer relevant as the provision has been removed from the Revised Draft Rules. Please refer to our responses to comment 16 above.
18.	7		[HKSI] Administration of such a requirement is too burdensome unless the recommendation is supported by a published report by the analyst. Recommendation to different clients can be different because of different client requirements and the need to document such is quite impossible especially when these are mostly in verbal form.	Same as above
19.	7		[HKSbA] Views or recommendations may be made in a face to face meeting, telephone conversation outside the office, or by way of electronic mails. This is not clear what records must then be kept.	Same as above
20.	7		[Nomura] It appears unreasonable to keep copies of all research reports issued in 7 years together with all fundamental data relied on by the analyst.	Same as above

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
21.	8	In addition to the requirements of section 3, an intermediary licensed or exempt for advising on corporate finance must keep such records as are sufficient to show separately and explain any work it has performed in providing corporate finance advice to its clients.	[Linklaters] We consider that matters referred in section 8 would more appropriately be addressed in the Code of Conduct.	The Commission agrees with the comments and has deleted the provision from the Rules accordingly.
22.	9	Additional requirements for providing securities margin financing and financing accommodation and effecting margined transactions	[Linklaters] As a general comment, the requirements appear to overlap with the general rules.	We agree with the comment and have amended the Rules accordingly.
23.	9(1)	This section applies to – (a) an intermediary licensed for providing securities margin financing; (b) an intermediary which provides other forms of financial accommodation; and (c) an intermediary which effects margined transactions with or on behalf of its clients.	[Linklaters] The requirements of section 9 should be limited to those persons licensed to provide securities margin financing and should not be extended to the entities referred to in section 9(1)(b) and (c). If section 9(1)(c) is to remain, it should be limited to an intermediary which effects margined transactions with its clients. The words "or on behalf of" in section 9(1)(c) and (2)(c) should be removed.	We need section 9(1)(b) to cover intermediaries financing IPOs for clients and section 9(1)(c) to cover intermediaries entering into futures and forex contracts with or on behalf of their clients or engaging in securities borrowing and lending business with their clients. We do not agree to remove the words "or on behalf". However, we have added the words "where applicable" in the preamble to section 9(2).
24.	9(2)(a)	In addition to the requirements of section 3, a person referred to in subsection (1) must keep such records as are sufficient to show – (a) all securities deposited with any person under an arrangement that confers on the person referred to in subsection (1) a collateral interest in the securities;	[Linklaters] There is no definition in the Rules or the Bill of "collateral interest".	"Collateral interest" is used in the definition of "securities collateral" in Part 1 of Schedule 1 to the Securities and Futures Ordinance. So, we do not perceive any need to define this for the purpose of these Rules.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
25.	9(2)(c)	In addition to the requirements of section 3, a person referred to in subsection (1) must keep such records as are sufficient to show – (c) particulars of clients to whom it makes available securities margin financing, financial accommodation or with whom or on whose behalf it effects margined transactions, including particulars in respect of each client showing – (i) the market value and margin value of each description of securities collateral; and (ii) the total market value and margin value of securities collateral.	[Linklaters] There is no definition of market value.	We have used "market value" in many other pieces of subsidiary legislation, both existing and those to be made under the Securities and Futures Ordinance. We do not perceive any need to define this for the purposes of these Rules.
26.	10	Additional requirements for carrying on asset management	[Linklaters] The requirement appears to overlap with the general rules under section 3.	We disagree. The provision requires fund managers to keep specific records of their clients' investment portfolio, in particular, any commitments and contingent liabilities which are not covered under the general rules.
27.	11	Forms in which records are to be kept.	[Commentator has reserved anonymity] Guidelines should be issued to clarify any specific requirements which may be expected of keeping records in electronic form.	As a general principal, records kept in electronic form should be readily convertible into written form. Intermediaries are also expected to have all necessary procedures to guard against damage, falsification, and destruction of these records. The Commission has no immediate intention to issue any specific requirements in this respect.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
28.	11		[Nomura] Clarification as to whether data can be stored as part of system record or documents which have been scanned rather than retaining the original paper document. If so, this should be stated clearly in the Rules.	Yes, if they are capable of being readily converted into written form. The Commission does not perceive any need for further clarification.
29.	12	Record retention period	[JFAM] The commentator suggested that for non-trade related items such as contracts with clients, a shorter retention period should be specified after the account is closed. 3 years is suggested to be appropriate period.	The Commission considers that no differentiation should be made to trade or non-trade related items so long as they are all documents or records necessary to explain the business operations of an intermediary.
30.	12(1)	All records referred to in these Rules, except those referred to in subsection (2), must be retained for a period of not less than 7 years.	[Linklaters] Given the broad nature of the Rules it appears that current record retention policies could be extended. For example, under clause 166(8) of the Securities and Futures Bill, documentary assurances for short sales only need to be kept for 1 year and therefore there appears to be a conflict between the Rules and the Bill.	We note the anomaly and have revised the Rules so that the general retention requirements in the Rules will be subject to any specific retention requirements in the Securities and Futures Ordinance or any subsidiary legislation made under the Ordinance. See section 10(3) of the Revised Draft Rules.
31.	12(2)(a)	The following records must be retained for a period of not less than 2 years - (a) records documenting the orders and instructions referred to in section 3(b)(iii);	[BNP, HKID, Linklaters] The SFC is asked to clarify whether records documenting the orders and instructions include tape recording records which are required to be kept for 3 months under current Code of Conduct.	The intention is to leave the requirement for telephone recording to the Code of Conduct. The Rules have been revised accordingly to exclude the same from the definition of "record" in clause 2.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
32.	12(2)(a)		[Linklaters] It is unclear why only the records referred to in section 3(b)(iii) are permitted to be kept for 2 years.	We consider that it will be sufficient so long as the details of transactions executed are properly recorded and maintained for 7 years. This is in line with the principal behind the 2 years retention requirement for contract notes and statements of accounts as stipulated under the Securities and Futures (Contract Notes, Statements of Account and Receipts) Rules.
33.	12(2)(b) & (c)	The following records must be retained for a period of not less than 2 years - (b) each contract note made out to the intermediary as principal; (c) each contract note created by the intermediary as agent; and	[Nomura] The Rule should provide that the retention for a contract note for 2 years is based on the fact that it is not the only record of the transaction retained by the intermediary.	The comment is no longer relevant as this provision has been removed given that the requirement has already been set out in the Securities and Futures (Contract Notes, Statement of Account and Receipt) Rules.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
34.	13	Reporting of non-compliance with these Rules	[HKSbA] The commentator raised objection claiming that the requirement in effect is a mandatory form of self-incrimination. There is also no requirement for reporting breaches of any rule in the Ordinance.	Section 151(2)(d) of the Securities and Futures Ordinance empowers the Commission to make rules to require a person who becomes aware that he does not comply with any specified provision of the Rules that applies to him to notify the Commission within a specified timeframe. Section 151(7) of the Securities and Futures Ordinance further states that a person is not excused from complying with such notification requirement only on the ground that to do so might tend to incriminate the person. Section 166 of the Securities and Futures Ordinance which restricts the use of incriminating evidence in proceeding should allay the commentators' concerns on self-incrimination. Please also refer to our response to comment 38 below.
35.	13		[HKSbA, Linklaters, Nomura] The commentators question whether it is really necessary or appropriate for breaches of the reporting requirement (unless committed with intent to defraud) to give rise to criminal sanctions.	Please refer to our response to comment 38 below.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
36.	13	An intermediary or an associated entity of an intermediary which becomes aware that it is not in compliance with any provision of Part II shall, within 1 business day thereafter, notify the Commission by notice in writing of that fact.	[Commentor has reserved anonymity] The requirement to report non-compliance to the Commission within one business day may be too onerous and the Commission is requested to consider a more flexible and reasonable reporting time frame such as three days. [Linklaters] The deadline of one business day is too prescriptive, particularly for international organizations that require a thorough internal investigation before notifying the regulators of potential non-compliance. [HKSA] One business day may not be sufficient for an intermediary to perform a proper internal review to ascertain the facts. The requirement seems especially onerous given that any non-compliance with the Rules may give rise to criminal sanctions.	For the purpose of investor protection, the Commission needs to know as soon as possible that a breach has happened in order to evaluate the implications. After receiving the notification, the Commission and the intermediary can confer as to the reasons for the breach as well as a more detailed timetable for a full report. One business day for reporting non-compliance has been universally applied to other subsidiary legislations made under the Securities and Futures Ordinance, such as the Client Money Rules, Client Securities Rules and Contract Notes, Statements of Account and Receipts Rules. Please also refer to our response to comment 38 above.
37.	13		[HKSA, Linklaters, Nomura] It would be more appropriate to require an intermediary or associated entity to report only material non-compliance.	Materiality of a breach needs to be assessed in view of the circumstances and it is not desirable to set a rigid rule in the law. It is in the interest of investor protection to have the regulator informed of all non-compliance irrespective of the reason therefor. The Commission needs to know as soon as possible that a breach has happened in order to evaluate the implications.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
38.	14	Penalties	[HKSbA, HKSA] Any criminal punishment imposed under section 14(a) is far too excessive if these are technical breaches. [Linklaters] The concerns about the rather broad and open-ended nature of the Rules stems from the fact that any breach of them, without reasonable excuse, is a criminal offence. The Group does not agree that criminal sanctions should attach to the Rules. Linklaters has no objection to imposing criminal sanctions on a person who fails to comply with the record-keeping requirements with intent to defraud. This is set out in section 14(b), but it is not believed that this sub-Rule is necessary, because an offence for record-keeping violations with intent to defraud is already set out in clause147(4) of the Bill. Although clause 147(6) also enables the SFC to provide for a breach of the Rules, committed with intent to defraud, to be a criminal offence, we consider that clause 147(4) is sufficiently wide, and that it is unnecessary to create an additional criminal offence pursuant to the Rules.	It should be noted that whether a breach results in a prosecution depends upon the circumstances of the particular case and the application of the Prosecution Guidelines laid down by the Department of Justice. However, the Commission is also mindful of the concerns and has revised the Rules by deleting the imprisonment penalty so that a breach without reasonable excuse will be subject to a fine only. The penalty level has also been lowered to a fine at level 4 for a breach without reasonable excuse. The level 4 penalty is currently up to $25,000. It should also be noted that section 151(4) of the Securities and Futures Ordinance is concerned with matters affecting the content of records which are kept in compliance with these Rules, not with whether those records are in fact kept.
39.	14		[HKSA] The SFC should provide further clarification on what constitutes "reasonable excuse" for the purposes of the Rules.	"Reasonable excuse" is a concept commonly used in the Laws of the Hong Kong SAR. It is used frequently in the Securities and Futures Ordinance (and in current securities law e.g. section 33(12) of the Securities and Futures Commission Ordinance Cap.24). It will be for the courts to decide what is reasonable in each case.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
40.	Schedule 1- 1(a)	Records to be kept by intermediaries	[Commentator has reserved anonymity] Clarify why there is no record keeping requirements on monies paid by intermediaries.	The Rules have been revised accordingly to capture monies paid by intermediaries.
41.	Schedule 1- 1(a)(iv)	An intermediary must keep records showing particulars of – (iv) all financial accommodation (including securities margin financing) made available to, and all margined transactions effected with or on behalf of, each of its clients, including particulars of …..	[Linklaters] Clarification may be required on the meaning of "made available to" and "or on behalf of". Where an intermediary in Hong Kong is merely acting as an arranger or introducing broker, it should not be required to (and may not have the information to be able to) keep the records set out in paragraph 1(a)(iv).	We have replaced "made available to" with "provided to" and add the words "where applicable" in the preamble to the section such that arrangers and introducing brokers who are not providing the actual financing will not be subject to the requirement.
42.	Schedule 1- 1(a)(x)	An intermediary must keep records showing particulars of – (x) all other accounts held by it; and	[JFAM] Clarification on what constitutes "other accounts". [Linklaters] There is no indication in the Rules or the Bill as to what constitutes "an account" under paragraph 1(a)(x).	Other accounts may include any accounts other than those opened with banks, e.g. accounts with overseas brokers, clearing houses etc.
43.	Schedule 1-1(a)(xi)	An intermediary must keep records showing particulars of – (xi) all off-balance sheet transactions or positions;	[Linklaters] It is unclear in paragraph 1(a)(xi) what records would be required to be kept. To the extent it is those under GAAP, this will already be covered by the requirement in section 3(d) to make entries in accordance with GAAP.	The requirement is intended to cover records showing particulars of the off-balance sheet transactions instead of the corresponding accounting treatment as required under the GAAP.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
44.	Schedule 1(b)	An intermediary must keep copies of certain records	[Instinet] Suggest to include that copies can be kept in electronic form since nowadays companies are operating in an electronic/paperless environment.	This issue has already been catered for in section 11(1)(b), stating that records include those in a form to be readily accessible and readily convertible into written form. If records maintained in electronic form are capable of being 'readily convertible' into written form, then records kept in such manner is in compliance with the Rules.
45.	Schedule 1- 1(b)(i)	An intermediary must keep copies of all – (i) contracts (including client agreements and discretionary account agreements), order forms, confirmations, statements, registers, records, memoranda and correspondence created or received by it in the course of the business for which it is licensed or exempt under the Ordinance;	[JFAM, Nomura, HKSA] The coverage appears to be too wide. There are various suggestions to narrow the scope. [Linklaters] It is unclear what is meant by "memoranda and correspondence"; this should be limited to memoranda and correspondence between an intermediary and its client, that confirm an order or provide a recommendation to a client for which the intermediary assumes an advisory responsibility.	The Commission takes note of the comments and has deleted "order forms, confirmations, statements, registers, records, memoranda and correspondence" as we consider that these are sufficiently covered under section 3, general record keeping requirement.
46.	Schedule 1-1(b)(ii)	An intermediary must keep copies of all – (ii) contract notes, statements of account and receipts required to be created by it under the Securities and Futures (Contract Notes, Statements of Account and Receipts) Rules (L.N. of 2002);	[Linklaters] The requirement under paragraph 1(b)(ii) was already stipulated in the Securities and Futures (Contract Notes, Statements of Account and Receipt) Rules.	The provision has been deleted in the Revised Draft Rules.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
47.	Schedule 1-1(b)(iv)	An intermediary must keep copies of all – (iv) documents showing particulars of clients who are professional investors and evidencing compliance with the Securities and Futures (Professional Investors) Rules (L.N. of 2002).	[Linklaters] The requirement under paragraph 1(b)(iv) should either be in the Code of Conduct or within the Securities and Futures (Professional Investor) Rules.	The policy intention is to require an intermediary to keep records of its clients who are professional investors such that it can readily establish whether or not these clients do so qualify. The Rules have been amended to clarify our intention.
48.	Schedule 2	Records to be kept by Associated Entities	[Linklaters] Comments on equivalent provisions of Schedule 1 apply equally.	See our response to comments 45 to 46 above.
49.	Schedule 2		[ISD] The definition of associated entity may include remisers who are dealing with registered dealers. In true operational sense, the remisers are not different from sales executives at the dealer. But given the legal identity, remisers may be required to maintain duplicate set of records in order to satisfy the rule. Clarification may be needed to avoid unnecessary duplication of work.	Under Part 1 of Schedule 1 to the Securities and Futures Ordinance, "associated entity" means a company that receives or holds in Hong Kong client assets of the intermediary. The case of a remiser as described will therefore not fall under the definition of "associated entity" and hence the requirement would not be applicable. If the remiser is acting in the capacity of an arranger or introducing broker, it may be required to be licensed with the Commission instead. Above all, we have defined the word "keep" in relation to a record, to include "cause to be kept" in order to allow any other entity to keep records on behalf an intermediary or associated entity in order to avoid any possible duplication.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
Other comments				
50.	-		[Nomura] It is noted that the Rules extend to associated entities. It is not clear how the Commission would expect to enforce the Rules against those entities. The respondent has concern that burden will be placed on intermediaries to enforce rules against associated entities simply because the intermediary is the only entity over which the Commission might have jurisdiction.	This should not be a concern as the Commission has inspection power over associated entities pursuant to section 180 of the Securities and Futures Ordinance. Moreover, penalties for any contravention of the Rules are imposed directly on associated entities under section 14 (now section 12 of the Revised Draft Rules).
51.	-		[Nomura] The respondent also suggested that the Commission confirm that nothing in the Rules is meant to change the rights of privileged that exist or could exist in respect of any document.	Section 380(4) of the Securities and Futures Ordinance provides that nothing in the Ordinance (which includes any rules made under the Ordinance) affects any claims, rights or entitlements which would, apart from the Ordinance, arise on the ground of legal professional privilege.
52.	-		[RMIL] It is recommended that the record keeping function of intermediaries and associated entities be subject to an independent audit, as is the case with financial accounts.	We agree with the principle and therefore under the Securities and Futures (Accounts and Audit) Rules, auditors of a licensed corporation are required to give opinion as to whether the corporation or its associated entity has complied with these Rules.

Item No.	Section No.	Details of the Rules	Respondent's Comments	SFC's Response
53.	-		[Nomura] Clarification as to whether e-mail constitutes an official record. The volume of e-mail in 7 years is enormous and difficult to store or to vet each email in order to work out what was or was not needed for retention purposes. It is also concerned about breach of the guideline on work place surveillance of the Privacy Commissioner. [Linklaters, Nomura] Clarification as to whether documents should be retained even if they are no longer required other than to comply with this Rule. There may be a conflict between the Rules and the prohibitions on keeping personal data for longer than necessary, under the Personal Data (Privacy) Ordinance.	"Record" includes an email. Whether the rules require a particular email to be kept will depend upon the content and sender/recipient of the email. The question of data privacy will be clarified in our Frequently Ask Questions which will be posted on SFC's website.

List of Respondents

Date received	Respondent
11 March 2002	Hong Kong Stockbrokers Association Ltd ("HKSbA")
12 March 2002	Records Management International Ltd ("RMIL")
13 March 2002	Instinet Pacific Limited ("Instinet")
15 March 2002	HSBC Broking Securities (Asia) Limited ("HSBC")
15 March 2002	Hong Kong Securities Institute ("HKSI")
15 March 2002	The Institute of Securities Dealers Ltd ("ISD")
15 March 2002	- (Commentator has reserved anonymity)
15 March 2002	Linklaters ("Linklaters") representing • Deutsche Securities Asia Ltd • Goldman Sachs (Asia) L.L.C. • J.P Morgan • Merrill Lynch (Asia Pacific) Ltd • Morgan Stanley Dean Witter Asia Ltd • Salomon Smith Barney Hong Kong Ltd • UBS Warburg
15 March 2002	JF Asset Management Ltd ("JFAM")
18 March 2002	Nomura International (Hong Kong) Ltd ("Nomura")
16 March 2002	The Hong Kong Institute of Directors ("HKID")
18 March 2002	- (Commentator has reserved anonymity)
21 March 2002	BNP Paribas Peregrine ("BNP")
28 March 2002	HK Society of Accountants ("HKSA")
Respondent with no specific comments on the Rules	
6 May 2002	Hong Kong Bar Association

Derivation Table of Provisions of the Securities and Futures Bill / Ordinance referred to in the exposure draft of the Rules and the summary of comments.

Clause/Schedule in the Securities and Futures Bill	**Section/Schedule in the Securities and Futures Ordinance**
147(2)(d)	151(2)(d)
147(4)	151(4)
147(6)	151(6)
- (New)	151(7)
- (New)	166
166(8)	171(8)
173	180
368(4)	380(4)
Schedule 1, Part 1	Schedule 1, Part 1
Schedule 6, Part 2	Schedule 5, Part 2

REVISED DRAFT

SECURITIES AND FUTURES (KEEPING OF RECORDS) RULES

CONTENTS

SECURITIES AND FUTURES (KEEPING OF RECORDS) RULES

(Made by the Securities and Futures Commission under section 151 of the Securities and Futures Ordinance (5 of 2002))

PART 1

PRELIMINARY

1. Commencement

These Rules shall come into operation on the day on which Part VI of the Securities and Futures Ordinance (5 of 2002) comes into operation.

2. Interpretation

In these Rules, unless the context otherwise requires –

"asset management" ( ) has the meaning assigned to it by Part 2 of Schedule 5 to the Ordinance;

"dealing in futures contracts" ( ) has the meaning assigned to it by Part 2 of Schedule 5 to the Ordinance;

"dealing in securities" ( ) has the meaning assigned to it by Part 2 of Schedule 5 to the Ordinance;

"keep" ( ), in relation to a record, includes cause to be kept;

"margined transaction" ( ) means a contract entered into in Hong Kong by an intermediary with or on behalf of a client of the intermediary in the conduct of regulated activity for which the intermediary is licensed or registered –

(a) other than a market contract, for the purchase, sale, exchange or other dealing in securities, including a transaction under a securities borrowing and lending agreement;

(b) other than a market contract, for the purchase, sale, exchange or other dealing in a futures contract; or

(c) that is a leveraged foreign exchange contract,

which requires the client to –

(d) pay a margin to the intermediary; or

(e) provide security to the intermediary to meet the client's obligations,

other than under an arrangement where financial accommodation is provided to the client by the intermediary;

"margin value" ( ), in relation to each description of securities collateral, means the maximum amount of money which a client of an intermediary is generally permitted to borrow (or otherwise secure other forms of financial accommodation) from the intermediary against that particular description of securities collateral;

"marked to market" ( ) means the method or procedure of adjusting the valuation of open positions to reflect current market values;

"record" ( ) has the same meaning as in Part 1 of Schedule 1 to the Ordinance except that the definition of that expression shall exclude any recording of any telephone conversation;

"systems of control" ( ), in relation to an intermediary or an associated entity of the intermediary, means the internal controls and trading, accounting, settlement and stock holding systems it has implemented to ensure its compliance with the Ordinance and any Rules made under the Ordinance.

PART 2

KEEPING OF RECORDS

Division 1 – General rules

3. General record keeping requirements for intermediaries

An intermediary shall, in relation to the businesses which constitute regulated activities for which it is licensed or registered –

(a) keep such accounting, trading and other records as are sufficient, where applicable, to –

(i) explain, and reflect the financial position and operation of, such businesses;

(ii) enable profit and loss accounts and balance sheets which give a true and fair view of its financial affairs to be prepared from time to time;

(iii) account for all client assets that it receives or holds;

(iv) enable all movements of such client assets to be traced through its accounting and, where applicable, stock holding systems;

(v) reconcile each month any differences during that month in its balances or positions with any of its associated entities and other parties, including –

(A) recognized exchange companies;

(B) clearing houses;

(C) other intermediaries;

(D) custodians; and

(E) banks,

and show how such differences were resolved;

(vi) demonstrate –

(A) compliance with sections 4, 5, 6, 8(4), 10 and 11 of the Securities and Futures (Client Money) Rules (L.N. of 2002);

(B) compliance with sections 4(4), 5, 10(1) and 12 of the Securities and Futures (Client Securities) Rules (L.N. of 2002);

(C) that it had systems of control in place to ensure compliance with the provisions referred to in sub-subparagraphs (A) and (B); and

(vii) enable it readily to establish whether it has complied with the Securities and Futures (Financial Resources) Rules (L.N. of 2002);

(b) keep, where applicable, the records specified in the Schedule (to the extent that such records are not required to be kept under paragraph (a));

(c) keep the records referred to in paragraphs (a) and (b) in such manner as will enable an audit to be conveniently and properly carried out; and

(d) make entries in the records referred to in paragraphs (a) and (b) in accordance with generally accepted accounting principles.

4. Record keeping requirements for associated entities

An associated entity of an intermediary shall, in respect of client assets of the intermediary that it receives or holds –

(a) keep such accounting and other records as are sufficient, where applicable, to –

(i) account for the client assets;

(ii) enable all movements of the client assets to be traced through its accounting and, where applicable, stock holding systems;

(iii) show separately and account for all receipts, payments, deliveries and other uses or applications of the client assets effected by it, or on its behalf, and on whose behalf such receipts, payments, deliveries or other uses or applications of the client assets have been effected;

(iv) reconcile each month any differences during that month in its balances or positions with the intermediary and other parties, including –

(A) recognized exchange companies;

(B) clearing houses;

(C) other intermediaries;

(D) custodians; and

(E) banks,

and show how such differences were resolved; and

(v) demonstrate –

(A) compliance with sections 4, 5, 6, 8(4), 10 and 11 of the Securities and Futures (Client Money) Rules (L.N. of 2002);

(B) compliance with sections 4(4), 5, 10(1) and 12 of the Securities and Futures (Client Securities) Rules (L.N. of 2002);

(C) that it had systems of control in place to ensure compliance with the provisions referred to in sub-subparagraphs (A) and (B);

(b) keep the following records (to the extent that such records are not required to be kept under paragraph (a)), where applicable –

(i) contracts entered into by it;

(ii) in respect of clients of the intermediary who are professional investors, in relation to whom the associated entity receives or holds the client assets –

(A) documents showing particulars sufficient to establish that those clients are professional investors;

(B) any notification or agreement referred to in section 3(2) of the Securities and Futures (Contract Notes, Statements of Account and Receipts) Rules (L.N. of 2002);

(iii) documents evidencing any authority given to it by a client of the intermediary, including any standing authority referred to in the Securities and Futures (Client Securities) Rules (L.N. of 2002) or the Securities and Futures (Client Money) Rules (L.N. of 2002) and any renewal of such authority;

(iv) documents evidencing any direction given to it by a client of the intermediary as referred to in the Securities and Futures (Client Securities) Rules (L.N. of 2002) or the Securities and Futures (Client Money) Rules (L.N. of 2002);

(c) keep the records referred to in paragraphs (a) and (b) in such manner as will enable an audit in respect of the client assets to be conveniently and properly carried out; and

(d) make entries in the records referred to in paragraph (a) in accordance with generally accepted accounting principles.

Division 2 – Particular rules for intermediaries

5. Additional requirements for dealing in securities

In addition to the requirements of section 3, an intermediary licensed or registered for dealing in securities shall keep such records as are sufficient to show separately particulars of all underwriting and sub-underwriting transactions entered into by it, including particulars showing when it entered into such transactions.

6. Additional requirements for carrying on leveraged foreign exchange trading

In addition to the requirements of section 3, a licensed corporation licensed for carrying on leveraged foreign exchange trading shall keep such records as are sufficient to show –

(a) in relation to each such transaction –

(i) particulars of its recognized counterparties; and

(ii) compliance with the Securities and Futures (Recognized Counterparty) Rules (L.N. of 2002); and

(b) for each business day –

(i) the marked to market position at the end of each business day for its own accounts and the accounts of each of its clients and recognized counterparties;

(ii) for each contract executed by it –

(A) the bid and offer prices quoted by it to the client;

(B) the price at which the contract is executed; and

(C) the bid and offer prices at the time of execution of the contract as quoted and disseminated to the public, or to subscribers, by a reputable financial information services organization; and

(iii) the interest rate differentials which are charged or paid by it for being long or short, one currency against another.

7. Additional requirements for providing securities margin financing and financial accommodation and effecting margined transactions

(1) This section applies to the following persons –

(a) a licensed corporation licensed for providing securities margin financing;

(b) an intermediary which provides other forms of financial accommodation; and

(c) an intermediary which effects margined transactions with or on behalf of its clients.

(2) In addition to the requirements of section 3, a person referred to in subsection (1) shall, where applicable, keep such records as are sufficient to show –

(a) its margin policy, lending policy and margin call policy;

(b) all securities and client collateral deposited with any person under an arrangement that confers on the person referred to in subsection (1) a collateral interest in the securities or client collateral;

(c) with whom and on whose behalf such securities or client collateral are deposited, showing separately the quantity and market value of –

(i) those securities deposited for safe custody; and

(ii) those securities and client collateral deposited as security for, or to facilitate, the provision by the person referred to in subsection (1) of financial accommodation, securities margin financing or the effecting of margined transactions;

(d) particulars of clients to whom it provides securities margin financing, financial accommodation or with whom or on whose behalf it effects margined transactions, including particulars in respect of each client showing –

(i) the market value and margin value of each description of securities collateral deposited with the person referred to in subsection (1);

(ii) the total market value and margin value of such securities collateral; and

(iii) details of margin calls made.

8. Additional requirements for carrying on asset management

In addition to the requirements of section 3, an intermediary licensed or registered for carrying on asset management which holds client assets shall keep such records as are sufficient to show, in respect of each client, particulars of the client's assets and liabilities, including any commitments and contingent liabilities.

PART 3

MISCELLANEOUS

9. Form in which records are to be kept

(1) All records required by these Rules shall be kept –

(a) in writing in the Chinese or English language; or

(b) in such a manner as to enable them to be readily accessible and readily convertible into written form in the Chinese or English language.

(2) An intermediary and each associated entity of an intermediary shall adopt all reasonably necessary procedures to –

(a) guard against falsification of any of its records; and

(b) facilitate discovery of any such falsification.

10. Record retention period

(1) Subject to subsections (2) and (3), all records referred to in these Rules shall be retained for a period of not less than 7 years.

(2) Records documenting the orders and instructions referred to in section 1(d)(i) of the Schedule shall be retained for a period of not less than 2 years.

(3) Where the Ordinance or any subsidiary legislation made under the Ordinance (other than these Rules) provides that any record shall be kept for a specified period by an intermediary or an associated entity of an intermediary, subsections (1) and (2) shall not apply to the intermediary or the associated entity in respect of that record.

11. Reporting of non-compliance with certain provisions of these Rules

If an intermediary or an associated entity of an intermediary to which Part 2 applies becomes aware that it does not comply with any provision of that Part, it shall, within one business day thereafter, give written notice of that fact to the Commission.

12. Penalties

An intermediary or an associated entity of an intermediary that contravenes section 3, 4, 5, 6, 7(2), 8, 9, 10 or 11 –

(a) without reasonable excuse, commits an offence and is liable on conviction to a fine at level 4; or

(b) with intent to defraud, commits an offence and is liable –

(i) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 7 years; or

(ii) on summary conviction to a fine of $500,000 and to imprisonment for 1 year.

SCHEDULE [ss. 3 & 10]

RECORDS TO BE KEPT BY INTERMEDIARIES

1. Records showing particulars of –

(a) all money received by it, whether or not such money –

(i) belongs to it; or

(ii) is paid into accounts kept by it or on its behalf,

including particulars of the manner in which such money was applied by the intermediary;

(b) all income received by it, whether such income relates to charges made by it for the provision of services, commissions, brokerage, remuneration, interest or otherwise;

(c) all expenses, commissions and interest incurred or paid by it;

(d) all orders or instructions concerning securities, futures contracts or leveraged foreign exchange contracts that it receives or initiates, including particulars –

(i) of each transaction entered into by it or on its behalf to implement any such order or instruction;

(ii) identifying with whom or for which account it has entered into such transaction;

(iii) that enable such transaction to be traced through its accounting, trading, settlement and stock holding systems;

(e) all disposals of client securities or client collateral initiated by it, showing in the case of each disposal –

(i) the name of the client;

(ii) when the disposal was effected;

(iii) the name of the intermediary which effected the disposal;

(iv) the charges incurred for effecting the disposal; and

(v) the proceeds of the disposal and how such proceeds were dealt with;

(f) its assets and liabilities, including commitments and contingent liabilities;

(g) all securities belonging to it, identifying –

(i) with whom such securities are deposited;

(ii) when they were deposited; and

(iii) whether they are held as security for loans or advances or for any other purpose;

(h) all securities held by it but not belonging to it, separately identifying –

(i) for whom such securities are held and with whom they are deposited;

(ii) when they were deposited;

(iii) those securities which are deposited with a third party for safe custody; and

(iv) those securities which are deposited with a third party as security for loans or advances made to it or for any other purpose;

(i) all bank accounts held by it, separately identifying segregated accounts maintained in accordance with the Securities and Futures (Client Money) Rules (L.N. of 2002);

(j) all other accounts held by it; and

(k) all off-balance sheet transactions or positions.

2. Contracts (including client agreements and discretionary account agreements) entered into by it in the course of the businesses constituting the regulated activities for which it is licensed or registered.

3. Documents evidencing –

(a) any authority given to it by a client, including any standing authority referred to in the Securities and Futures (Client Securities) Rules (L.N. of 2002) or the Securities and Futures (Client Money) Rules (L.N. of 2002) and any renewal of such authority;

(b) any direction given to it by a client as referred to in the Securities and Futures (Client Securities) Rules (L.N. of 2002) or the Securities and Futures (Client Money) Rules (L.N. of 2002).

4. In respect of clients who are professional investors –

(a) documents showing particulars sufficient to establish that those clients are professional investors;

(b) any notification or agreement referred to in section 3(2) of the Securities and Futures (Contract Notes, Statements of Account and Receipts) Rules (L.N. of 2002).

Chairman,
Securities and Futures Commission

2002

Explanatory Note

These Rules are made by the Securities and Futures Commission under section 151 of the Securities and Futures Ordinance (5 of 2002) and prescribe the records that intermediaries and their associated entities shall keep, and the manner in which they shall be kept.