



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

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

《證券及期貨(雜項條文)規則》草擬本 諮詢文件總結

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Introduction

1. On 2 July 2002, the Securities and Futures Commission (“SFC”) published a Consultation Document on the Draft Securities and Futures (Miscellaneous) Rules (the “draft Rules”). The consultation period ended on 26 July 2002.
2. The draft Rules contain a range of provisions which do not readily fit into other subsidiary legislation made under the Securities and Futures Ordinance (“SFO”). 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. *This document should be read in conjunction with the Consultation Document.*
3. A total of 11 submissions were received from industry practitioners, legal professionals and other interested parties. All the submissions have been published on the SFC’s website.

Summary of consultation comments and the SFC’s responses

4. With the exception of sections 4 and 7, the commentators have not objected to the rules and the submissions essentially focused on detail points and clarification. As a result, save for sections 4 and 7, no fundamental changes to the draft Rules will be made. A summary of the consultation comments on the draft Rules and the SFC’s responses are set out in the Annex.

Sections 3,5 and 6

5. Sections 3, 5 and 6 were formerly in the draft Securities and Futures (Licensed Persons and Registered Institutions) Rules that were exhibited for consultation in November 2001 - but have now been largely subsumed by the new draft Securities and Futures (Licensing and Registration) (Information) Rules. These sections have already been amended to reflect comments received during the consultation that the Commission accepted. The consultation conclusions paper on the Licensed Persons and Registered Institutions Rules sets out the comments received and the Commission’s responses. As there has already been public consultation, further comments were not sought on these provisions.

Section 4

6. Section 4 of the draft Rules requires intermediaries to maintain a complaints register and to make this register available for inspection by its clients or an interested member of the investing public during office hours. Several respondents expressed concern about various aspects of the proposal and the SFC has decided not to include these provisions in rules. Instead, as suggested by a few respondents, the SFC will consider placing the requirement to maintain a complaints register in the Code of Conduct. The initial view of the SFC is that the register should be made available for inspection by regulatory authorities but not members of the public.

Section 7

7. Section 179 gives a person, who the SFC has authorized, the power to inquire into suspected crimes or misconduct in a corporation that is or was listed. In the course of such an inquiry, the authorized person can require an “auditor” to produce documents in the nature of audit working papers and require the “auditor” to explain documents that have been produced. The SFC proposed to widen the category of persons considered to be auditors for the purpose of section 179 to cover:
 - former auditors;
 - auditors appointed under foreign legislation; and
 - people employed or engaged by an auditor for the purposes of an audit, whether or not they are "auditors" themselves.
8. The Hong Kong Society of Accountants (HKSA) was in favor of amending the definition of “auditor” for the purposes of the SFO by reference to the term “practice unit” which is used in the Professional Accountants Ordinance (Cap. 50). However, they considered that junior employees and consultants should not be asked to produce or explain documents because the documents were the property of the practice unit. The HKSA also took the view that junior employees and consultants were not originally intended to be the subject of s.179.
9. While not agreeing with all the HKSA’s technical submissions, the SFC notes the sensitivities of the Society to what they understand to be the original intention of s.179. The SFC will withdraw those parts of the rules that would extend the definition of auditor to all employees and consultants. But, the SFC notes that the submissions of the Law Society and Institute of Company Secretaries broadly support the ability of the SFC to obtain documents and explanations from these persons. The SFC will keep in view the need for future amendments in the light of operational experience of the Ordinance and the Rules.
10. The SFC will retain parts of the definition which apply to past or present Hong Kong registered auditors and foreign auditors. We note that the Law Society and HKSA queried the SFC’s power to enforce the power to request a foreign auditor to produce documents or explain them. This will depend on the circumstances. We feel that the power is important given the high number of foreign incorporated companies in Hong Kong. It will also assist the SFC to have recourse to its international cooperation arrangements where it cannot rely on its own powers to request a foreign auditor to produce or explain documents.
11. The SFC would like to thank the respondents for their valuable suggestions and comments in response to the Consultation Document.

#	Section Reference	Area Commented	Market Comments	SFC's Responses
1.	Rule 4	Complaints Register	<p>CASH Financial Services Group Limited</p> <p>We agree the intermediaries should maintain a complaint register but disagree to make it available for inspection by its clients and especially member of the investing public.</p> <p>We are concerned about the usefulness of opening up the complaint register. It is natural that an intermediary with a large client base will have more complaints than those smaller counterparts. Similarly, an intermediary targeting the retail market will have more complaints than those targeting the institutional market. Disclosure of such information may mislead the clients and the investing public instead of guiding them.</p> <p>We are also concerned about the type of information to be maintained in the complaint register and accessible by the clients and the investing public. As it is not clearly set out the in the draft rule, it is extremely undesirable if any personal data of clients or any confidential information of the intermediary be disclosed.</p> <p>All in all, we believe the disclosure of disciplinary record of an intermediary of the past 5 years as set out in the Draft Securities and Futures (License Persons and Registered Institutions) Rules is adequate for the client and investing public to assess the soundness of the intermediary. Public access to the complaint register is indeed unnecessary and will do more harm than good.</p>	<p>We note the concerns, in particular, the data privacy and client confidentiality issues. Having considered all the submissions received, the SFC has decided to delete the requirements of Rule 4 from the draft Rules. Instead, as suggested by a few respondents, the SFC will consider placing the requirement to maintain a complaint register (and making it available for inspection by regulatory authorities but not members of the public) in the Code of Conduct.</p>
2.	Rule 4	Complaints Register	<p>The HK Association of Online Brokers</p> <p>In most of the cases, complaints from clients are minor oral queries/disputes unrelated to the “misconducts” of the intermediary or its officers. It is not clear whether these</p>	<p>We note the concerns, in particular, the data privacy and client confidentiality issues. Having considered all the submissions received, the SFC has decided to</p>

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			<p>intermediary or its officers. It is not clear whether these would fall into the definition of “complaints”. Recording such complaints may not be practical and will increase the administration burden for licensed intermediaries.</p> <p>The SFC stated in the Consultation Paper that Complaints Register is introduced in the interests of investor protection and transparency would help to ensure that client complaints are being addressed. However, we do not consider making the Complaints Register available for inspection by the public an effective means of investor protection because only limited information (such as date, name of complainant, brief description of the complaint) can be obtained from the Complaints Register. Also, some complaints may finally be proved to be unfounded. It is therefore unreasonable for the intermediaries to make available Complaints Register for public inspection. Complaints Register should be restricted to intermediaries’ complaint handling and management review purposes. We would suggest that the Complaints Register be made available for inspection by the relevant regulatory authorities instead of by “any person”.</p> <p>We agree that transparency would help to ensure client complaints will be properly addressed. However, the intermediaries should not be obliged to make the Complaints Register available for inspection by all members of the public. Normally client complaints will be followed up by designated officer of the intermediaries and written reply will be directly provided to complainants on resolution. If clients’ complaints are not satisfactorily resolved, the clients will lodge their complaints to the SFC. For those intermediaries/officers who have breached the SFC rules and regulations, they will be dealt with by the</p>	<p>all the submissions received, the SFC has decided to delete the requirements of Rule 4 from the draft Rules. Instead, as suggested, the SFC will consider placing the requirement to maintain a complaint register (and making it available for inspection by regulatory authorities but not members of the public) in the Code of Conduct.</p> <p>As to the definition of “complaints” for the purposes of the register, we agree with some respondents that they should be limited to written complaints not resolved with the complainant within two business days. This pragmatic approach would allay compliance concerns expressed by practitioners.</p>

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			<p>SFC under any prescribed rules and any resultant sanctions will be made known to the public accordingly.</p> <p>Complaints Register (or related documents) may contain personal details of clients and other parties involved in the complaints. Releasing such information without the consent from the parties involved may contravene the Hong Kong Personal Data (Privacy) Ordinance. The SFC should clarify whether releasing broker's Complaints Register for inspection by the public comply with any applicable laws.</p> <p>The SFC should provide comparison on what are the regulatory requirements of other jurisdictions on complaints issue and advise whether the said proposal is at par with similar standard of other markets.</p> <p>The draft appears to give impression of over-regulation. We sincerely hope the SFC will re-consider its proposals.</p>	
3.	Rule 4	Complaints Register	<p>The Hong Kong Association of Banks</p> <p>We believe that the primary role of the SFC is to ensure that intermediaries have effective arrangements to handle customer complaints. The Supervisory Policy Manual of the Hong Kong Monetary Authority (with which registered institutions are also required to comply) requires authorised institutions to keep a register of customer complaints for inspection by the HKMA. The proposed SFC's requirement of the complaints register to be made available to the public at large without charge appears excessive and might raise not only compliance issues for registered institutions (in terms of the confidentially requirements under the HKMA Guideline) but also privacy</p>	<p>We note the concerns, in particular, the data privacy and client confidentiality issues. Having considered all the submissions received, the SFC has decided to delete the requirements of Rule 4 from the draft Rules. Instead, as suggested by several respondents, the SFC will consider placing the requirement to maintain a complaint register (and making it available for inspection by regulatory authorities but not members of the public) in the Code of Conduct.</p> <p>As to the definition of "complaints" for the purposes of the register, we agree with a few respondents that they</p>

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			<p>concern insofar as the identity of the complainants is concerned. Furthermore, whilst the consultation paper refers to clients or interested members of the investing public, there is no equivalent qualification in the Rules themselves. We suggest that the right of access be appropriately curtailed.</p> <p>The registers kept by authorised institutions as required under the HKMA's Supervisory Policy Manual would include complaints concerning regulated activities under the new Securities and Futures Ordinance. For the sake of consistency, we suggest that it would be preferable for the SFC's requirement of a complaints register to be incorporated in the SFC's Code of Conduct rather than the Rules.</p> <p>The requirement that the complaint has to be recorded within 3 business days does not seem reasonable. We believe that it should be sufficient to require the complaint to be recorded in the register within a reasonable time.</p> <p>The HKMA Guideline does not require record keeping of complaints that can be resolved by the close of business on the next business day of receipt. Consideration might be given to providing a similar exemption in the SFC requirement.</p> <p>The requirement that the register should be indexed by name may also be too restrictive since banks may adopt different approaches to this. Provided that suitable records are kept, this requirement should be removed.</p> <p>A registered institution often carries out regulated activities through different group entities. It is more practical for a</p>	<p>should be limited to written complaints not resolved with the complainant within two business days. This pragmatic approach would allay compliance concerns expressed by practitioners. Further, in view that the register would not be made public, it should be sufficient to require complaints to be recorded within a reasonable time.</p>

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			<p>registered institution to keep one central register instead of separate registers for separate entities. We suggest that the requirement be amended to permit the complaints register to be kept centrally at the principal place of business or a designated place of the business of one of the group entities.</p>	
4.	Rule 4	Complaints Register	<p>The Hong Kong Institute of Company Secretaries</p> <p>HKICS considers that section 4 of the draft Rules to be a positive measure in protecting the interests of investors.</p> <p>Given that subsection 5 entitles “any person” to inspect the register required to be kept by an intermediary, a potential client of an intermediary may so inspect <u>before</u> he decides to become a client of that intermediary. Time is therefore of essence. We recommend that the timeframe within which the duty imposed on an intermediary to record in the register the complaint received under subsection (2) be shortened from the proposed 3 business days to 24 hours.</p>	<p>The requirement to maintain a public complaint register imposed by section 4 of the draft Rules have been opposed by most of the respondents. Having noted their concerns, in particular, the data privacy and client confidentiality issues, the SFC has decided to delete the requirements of Rule 4 from the draft Rules. Instead, as suggested by a few respondents, the SFC will consider placing the requirement to maintain a complaint register (and making it available for inspection by regulatory authorities but not members of the public) in the Code of Conduct.</p> <p>As to the time frame for recording complaints, in view that the register would not be made public, it should be sufficient to require complaints to be recorded within a reasonable time.</p>

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5.	Rule 4	Complaints Register	<p>The Hongkong & Shanghai Banking Corporation Group</p> <p>While we agree with the principle that intermediaries should maintain a register of complaints, we are of the view that this requirement should not be set out in subsidiary legislation. We believe it would be more appropriate for this requirement to be included in the SFC's Code of Conduct for Registered Persons.</p> <p>We also have concerns with the following propositions as set out in Section 4 of the draft rules:</p> <p>1. we are concerned with the proposal that the register should be made available to the public for the following reasons:</p> <ul style="list-style-type: none"> - Clients may not wish their identity to be disclosed to the public while they may wish to make complaints. Making the complaints register available to the public may discourage clients from making complaints. - Some complaints may be frivolous, vexatious or immaterial. While they may have to be recorded in the register, it is of no benefit to the complainant or the intermediary for such information to be made available to the public. If a complaint becomes the subject of subsequent litigation, it is not in the interest of the complainant or intermediary for information on the complaint to be made available to the public. - A complaints register available to the public may 	<p>We note the concerns, in particular, the data privacy and client confidentiality issues. Having considered all the submissions received, the SFC has decided to delete the requirements of Rule 4 from the draft Rules. Instead, as suggested, the SFC will consider placing the requirement to maintain a complaint register (and making it available for inspection by regulatory authorities but not members of the public) in the Code of Conduct. Further, in view that the register would not be made public, it should be sufficient to require complaints to be recorded within a reasonable time.</p>

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			<p>attract the attention of the mass media which may use information in such registers to sensationalise news stories, which again would be of no benefit to the complainant, the intermediary or the investing public.</p> <p>2. The requirement that an index of names be maintained in the register is confusing. It is unclear as to whether this should be an index of the names of the complainants. We do not believe that maintaining such an index is unnecessary as complaints can be recorded in chronological order when they have occurred. We recommend that the requirement to keep an index be removed.</p> <p>3. the requirement that the complaint has to be recorded within 3 business days may be impractical. We believe that as long as the complaint is recorded in the register within a reasonable time, that should be sufficient to protect the interest of the complainant.</p>	
6.	Rule 4	Complaints Register	<p>HSBC Broking Securities (Asia) Limited</p> <p>While we agree with the principle that intermediaries should maintain a register of complaints, we are of the view that this requirement should not be mandated by law. We believe that it is more appropriate for this requirement to be set out in the SFC's Code of Conduct for Registered Persons. Handling of complaints should be viewed as a conduct issue relevant to the fitness and properness of the registered person rather than a subject for legislation.</p> <p>We would like the Commission to clearly define</p>	<p>We note the concerns, in particular, the data privacy and client confidentiality issues. Having considered all the submissions received, the SFC has decided to delete the requirements of Rule 4 from the draft Rules. Instead, as suggested, the SFC will consider placing the requirement to maintain a complaint register (and making it available for inspection by regulatory authorities but not members of the public) in the Code of Conduct.</p>

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			<p>“complaints” for the purpose of the Rules. Many client’s grievances are arguably related to conduct of the registered person but are not caused by any negligence of the registered person but instead caused by the market condition. For example, there are instances where clients complain about the execution price that is not within the control of the registered person. It is not clear whether verbal complaints must also be included in the register. We would like to propose that verbal complaints be excluded from the Rules. Where complaints are not reduced in writing, it is not always clear whether a client’s grievances amount to a complaint, especially in a retail securities business where many of the clients’ “complaints” are not directly related to the registered person’s conduct or service while some of them are also without merit. We do not see any benefit to the complainant, the intermediary or the investing public for including verbal complaints in a register which does not justify the resulting administrative cost.</p> <p>We also have concerns with the following propositions as set out in Section 4 of the Draft Rules.</p> <ol style="list-style-type: none"> 1. We are concerned with the proposal that the complaints register should be made available to the public for the reasons that:- <ol style="list-style-type: none"> i. Clients may not wish for their identifies and their account information to be disclosed to the public. Making the complaints register available to the public may discourage clients from making complaints. The Commission should consider the potential conflict between the purpose of a public complaints register and 	

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			<p>data protection laws;</p> <ul style="list-style-type: none"> ii. Some complaints may be frivolous, vexatious or immaterial. While they should be recorded in the register, it is of no benefit to the complainant or the intermediary for such information to be made available to the public. If a complaint becomes the subject of a subsequent litigation, it is not in the interest of the complainant or the intermediary for information regarding the complaint to be made public; iii. A complaints register available to the public may attract the attention of the mass media which may use information in such registers to sensationalize news stories, which again would be of no benefit to the complainant, the intermediary or the investing public; and iv. The administrative cost of keeping a complaints register available to the public "without charge" far outweighs the benefit of such public register. This right is subject to abuse by unscrupulous people including the intermediary's clients. <p>2. The requirement to keep an index under section 4(4) is superfluous as the law should not mandate how a complaints register is to be kept as long as there is a general requirement that the records of complaints can be readily located.</p> <p>3. The Commission should specify a time period</p>	

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			<p>whereby a complaint needs to remain in the register.</p> <p>4. There is no definition of “complaint”. This is subjective concept, as what once person may regard as a complaint another may not. Also there is no materiality test. For example, it is common practice for institutional clients to challenge the execution price for orders. In general, this would not be regarded as a “complaint”.</p> <p>5. Except in relation to registered institutions, there is no indication that the requirement only relates to complaints received in the course of carrying on regulated activities. What does “concerning the conduct of the intermediary etc” mean? Often complaints/disputes are of a commercial nature rather than related to a breach of conduct of business rule or other specific rules and regulations. It seems unfair that commercial disputes should be required to be disclosed as complaints when there has been no regulatory misconduct.</p> <p>6. What is meant by “or communicated to”? It seems to us that it adds nothing to the word “received”.</p> <p>7. When does the duty to record the complaint arise? When is the intermediary taken to receive the complaint?</p> <p>8. Personal details of clients should not be disclosed in the complaints register due to issues of client confidentiality. Also, it is likely clients will not want their complaints being subject to public disclosure.</p>	

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			<p>9. The Consultation Paper says the requirement to open the register up for inspection is to enable “clients or an interested member of the investing public” to inspect the register. However, Section 4 states that “any person” may inspect the register. This could include members of the press. If the register is to be open to inspection, it should only be available to clients and potential clients.</p> <p>We strongly recommend that the Commission reconsider the need to set out administrative matter in handling complaints in subsidiary legislation. We understand that the purpose of the Rules with regard to complaints register is to enable the public to have full knowledge of the conduct of the registered person. However, as disciplinary record and registration status of a registered period is already fully disclosed to the public, a complaints register available to the public does not serve any added benefit and is in conflict with the right of privacy of the clients.</p>	
7.	Rule 4	Complaints Register	<p>Linklaters on behalf of 6 financial institutions</p> <p>As a general comment the Group does not believe there are any investor protection benefits in requiring intermediaries to maintain a complaints register and open it for public inspection. The Group believes that rather than requiring a complaints register to be available for public inspection, the SFC should issue guidelines on complaints handling procedures similar to the provisions in the Code of Conduct for Registered Persons. In addition, any investor that is dissatisfied with the way in which an intermediary dealt with a complaint could report that intermediary to the SFC. If the SFC regarded the complaint as sufficiently serious it would then be able to</p>	<p>We note the comments, and having considered all the submissions received, the SFC has decided to delete the requirements of Rule 4 from the draft Rules. Instead, as suggested, the SFC will consider placing the requirement to maintain a complaint register (and making it available for inspection by regulatory authorities but not members of the public) in the Code of Conduct.</p> <p>As to the definition of “complaints” for the purposes of the register, we agree with some respondents that they should be limited to written complaints not</p>

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			<p>investigate the intermediary. The SFC has sufficient powers to issue public reprimands etc if it believes the investing public should be made aware of an intermediary's misconduct.</p> <p>The Group is not aware of any other jurisdictions that require a complaints register to be open for public inspection.</p> <p>The requirement to maintain the complaints register raises a number of issues as set out below.</p> <ol style="list-style-type: none"> 1. An intermediary is required to keep a register of all complaints received by or communicated to the intermediary. This does not appear to be limited to complaints received from clients. The fact that a person has complained does not mean that the complaint is justified or even factually correct. However, the complaints register is likely to give the impression that all complaints are justified. Does an intermediary have to enter a complaint that it believes is factually incorrect? Can an intermediary set out its response to such complaint in the register? If a complaint is satisfactorily resolved within 3 business days does it still have to be entered in the register? Can a complaint be removed once resolved? 2. It is not clear what level of detail should be included in the register. Is it necessary to include updates on the progress of the complaint, and how the complaint was resolved? 3. How long should a complaint be maintained in the 	<p>resolved with the complainant within two business days. This pragmatic approach would allay compliance concerns expressed by practitioners. Further, in view that the register would not be made public, it should be sufficient to require complaints to be recorded within a reasonable time. The SFC will likely consult the industry on other details should it decide to incorporate the requirement to maintain such a non-public complaints register in the Code of Conduct.</p>

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			<p>register?</p> <p>4. There is no definition of “complaint”. This is a subjective concept, as what one person may regard as a complaint another may not. Also there is no materiality test. For example it is common practice for institutional clients to challenge the execution price for orders. In general, this would not be regarded as a “complaint”.</p> <p>5. Except in relation to registered institutions, there is no indication that the requirement only relates to complaints received in the course of carrying on regulated activities. What does “concerning the conduct of the intermediary etc” mean? Often complaints/disputes are of a commercial nature rather than relate to a breach of conduct of business rules or other specific rules and regulations. It seems unfair that commercial disputes should be required to be disclosed as complaints where there has been no regulatory misconduct.</p> <p>6. What is meant by “or communicated to”? It seems to us that it adds nothing to the word received.</p> <p>7. When does the duty to record the complaint arise? When is the intermediary taken to receive the complaint?</p>	
8.	Rule 4	Complaints Register	<p>The Institute of Securities Dealers Ltd</p> <p>Some of our members have expressed concern over the content of this section, fearing that the proposed register may be misused. We strongly believe that intermediaries</p>	<p>We note the concerns, in particular, the data privacy and client confidentiality issues. Having considered all the submissions received, the SFC has decided to</p>

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			<p>should be encouraged to maintain complaints registers, but only on a voluntary basis.</p> <p>However, should the SFC insist on going ahead with the introduction, we shall be grateful if you will take into consideration of the following comments and recommendations in drafting the final version of the rules:-</p> <ol style="list-style-type: none"> <li data-bbox="667 571 1366 877">1. We believe that complaints which are resolved amicably between the intermediary and client through immediate settlement should not be required to be registered. Very often, intermediaries may choose to settle a disputed transaction even though the intermediary or its employees are not at fault. A quick out-of-pocket settlement is often seen by intermediaries as a preferred alternative to a protracted dispute although subsequent investigation will find to be in favour of the intermediary. <p>Requirement to enter these complaints in the register would rob intermediaries the option of quick settlement while denying clients quick satisfaction.</p>	<p>delete the requirements of Rule 4 from the draft Rules. Instead, as suggested by several respondents, the SFC will consider placing the requirement to maintain a complaint register (and making it available for inspection by regulatory authorities but not members of the public) in the Code of Conduct.</p> <p>As to the definition of “complaints” for the purposes of the register, we agree that they should be limited to written complaints not resolved with the complainant within two business days. This pragmatic approach would allay compliance concerns expressed by practitioners.</p>
	Rules 4(1) & 4(2)	Keeping a register of complaints and duty to record complaints in the register	<ol style="list-style-type: none"> <li data-bbox="667 1037 1366 1161">2. Should only be applicable to formal written complaints to avoid any ambiguity and confusion over what constitute a complaint. A prescribed form may be introduced specifically for this purpose. 	
	Rule 4(5)	Inspection of complaints register by any	<ol style="list-style-type: none"> <li data-bbox="667 1286 1366 1374">3. We strongly object to the complaints register being made available to the public for inspection. We fear that this provision can be easily exploited by 	

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		person	individuals to cause havoc and inconvenience to the daily operation of our members' firms and suspect that there may also be privacy issue at stake. We therefore believe that the register should only be made available to SFC when the firm is under specific investigation.	
9.	Rule 4	Complaints Register	<p>The Law Society of Hong Kong</p> <p>The committee has 2 material concerns with the proposals contained in section 4 of the draft rules being:</p> <ol style="list-style-type: none"> 1. the absence of a definition of “complaint”; and 2. the proposal to make the register of complaints available for public inspection. <p>What is a “complaint”?</p> <p>Neither the consultation paper nor the draft rules provide any definition or guidance on what constitutes a “complaint”. While allegations of fraud, dishonesty or other improper conduct would (and should) constitute a complaint, the committee is of the view the following would not (or should not) constitute complaints (or if they are complaints, should not be regarded as being of sufficient seriousness to merit recording in a register):</p> <ol style="list-style-type: none"> 1. dissatisfaction with advice given, trade execution and other services provided not involving any allegation of fraud, dishonesty, breach of applicable laws or regulations; 2. complaints relating to inadvertent errors or omissions 	<p>We note the concerns, in particular, the data privacy and client confidentiality issues. Having considered all the submissions received, the SFC has decided to delete the requirements of Rule 4 from the draft Rules. Instead, as suggested by several respondents, the SFC will consider placing the requirement to maintain a complaint register (and making it available for inspection by regulatory authorities but not members of the public) in the Code of Conduct.</p> <p>As to the definition of “complaints” for the purposes of the register, we take the view that a broad approach should be adopted and that any allegation that investor interests have been prejudiced, or that the fitness and properness of an intermediary is in doubt, should be considered a complaint. However, we agree with some respondents that they should be limited to written complaints not resolved with the complainant within two business days. This pragmatic approach would allay compliance concerns expressed by practitioners.</p>

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			<p>not involving fraud, dishonesty or breach of applicable laws or regulations which are promptly investigated and, if required, rectified;</p> <p>3. complaints of a frivolous or vexatious nature.</p> <p>It is submitted that if the definition of “complaint” is to include the items referred to in (1)-(3) above, the register would provide not only a misleading impression of a licensed person’s business propriety but also be unduly burdensome to maintain.</p> <p>The committee has considered whether this issue could be clarified by stating that a “complaint” for the purposes of section 4 is a complaint made in writing so as to exclude minor oral complaints. This test would be unsatisfactory because:</p> <p>1. not all serious complaints are necessarily made in writing in the first instance; and</p> <p>2. the use of the internet and email as convenient and efficient delivery channels and means of communication would suggest that many complaints which fall within the items of concern described in (1) – (3) above could be conveyed by email (i.e. in writing) as easily as orally.</p> <p>A complaint register should not be open to inspection</p> <p>The committee submits that it is neither appropriate nor</p>	

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			<p>desirable for a complaint register to be made publicly available for the reason that disclosure of a client's identity and specifics regarding a complaint to public inspection would conflict with:</p> <ol style="list-style-type: none"> 1. the Personal Data (Privacy) Ordinance (where relevant); 2. duties of confidentiality (where relevant); and 3. in the context of complaints which are related to investigations made by regulatory authorities to which a requirement of secrecy is attached (including, but not limited to certain investigations made by the SFC under the Securities & Futures Ordinance) disclosure would breach such statutory requirements. <p>The Committee is also of the view that the knowledge that a complaint will be publicly disclosed will:</p> <ol style="list-style-type: none"> 1. act as a strong incentive to the licensed person to take an aggressive view on what does or does not constitute a "complaint"; 2. act as a strong incentive to licensed persons to deal with client complaints in a defensive and aggressive manner rather than a conciliatory manner. In this context, it should be noted that there is nothing in the draft rules to prevent the licensed corporation from including statements regarding its view on whether the complaint is justified and the way in which the complaint is resolved should it choose to do so. If the register is to be made publicly available, then this 	

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			<p>is, of course, entirely appropriate but, again, there will be a very strong incentive for licensed persons to reflect their own views on the merits of any complaint (where it is possible to do so). Put differently, a licensed person's willingness to admit wrong doing either by itself or its employees is likely to be eroded by public disclosure of complaints;</p> <p>3. act as a disincentive to some customers to make formal complaints because they may not wish to have their own identities and information about their business dealings (relating to the complaints) publicly disclosed; and</p> <p>4. act as an incentive for some customers to threaten to make complaints requiring public disclosure as a means of embarrassing a licensed person.</p> <p>The introduction of a broad definition of "complaint" would increase the committee's concerns raised in (2), (3) and (4).</p> <p>In summary, the committee is of the view that there are several very good reasons why a complaint register should not be made publicly available. The committee is unable to think of any reason in favour of public disclosure.</p>	
10.	Rule 4	Complaints Register	<p>Lloyds TSB Pacific Limited</p> <p>In our view it is wholly inappropriate to require intermediaries to keep a public register of complaints received. Our grounds for objection are:-</p> <p>1. The register will contain information on the client</p>	<p>We note the concerns, in particular, the data privacy and client confidentiality issues. Having considered all the submissions received, the SFC has decided to delete the requirements of Rule 4 from the draft Rules. Instead, as suggested by several respondents,</p>

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			<p>which should be treated as confidential. We would be breaching our duties of confidentiality by including such information in a register which was open to the public.</p> <ol style="list-style-type: none"> 2. Having a public register could cause breaches of the Personal (Data) Privacy Ordinance. 3. The public register might contain confidential information about the intermediary's business. 4. Complaints may involve or contemplate legal actions and it would be improper to have relevant information available to the public. 5. Information on complaints could be exploited by competitors of the intermediary, for example by contacting complainants and offering them better service. 6. Having to maintain a public complaints register will increase the costs of doing business. For Hong Kong to succeed in an increasingly competitive international environment, we need to find ways of reducing costs. 7. It is not recognised international practice for complaint registers to be made public. It is right to insist that intermediaries have proper complaint handling procedures including the maintenance of proper records for the regulator to inspect where necessary. This, for example, is how the Hong Kong Monetary Authority regulates complaints and we suggest that you read their recently updated guidelines on this subject. 	<p>the SFC will consider placing the requirement to maintain a complaint register (and making it available for inspection by regulatory authorities but not members of the public) in the Code of Conduct.</p> <p>As to the definition of "complaints" for the purposes of the register, we agree with some respondents that they should be limited to written complaints not resolved with the complainant within two business days. This pragmatic approach would allay compliance concerns expressed by practitioners.</p>

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			<p>8. You seek to justify having a public register on the grounds of investor protection and transparency. Investor protection is the SFC's responsibility and you would fulfil your obligations in connection with complaints by laying down complaints handling rules and having monitoring procedures in place. Transparency will also be covered through such rules which could include a requirement for intermediaries to notify all clients of their complaint handling procedures.</p>	
11.	Rule 7	Definition of "auditor" for s 179 SFO - generally	<p>Hong Kong Society of Accountants</p> <p>An "auditor" usually would be the engagement partner or engagement director of a corporate practice. This might cause problems as the documents sought to be produced under s 179 will not be the property of an engagement partner or director, their employees or consultants. Suggests using the definition of "practice unit" instead taken from s 2 of the Professional Accountants Ordinance (PAO). Notes that this definition is used in recent amendments to the Gambling Amendment Regulation 2002. Section 2 of the PAO defines a "practice unit" as:</p> <p>"(a) a firm of-</p> <p>(i) certified public accountants; or</p> <p>(ii) public accountants; or</p> <p>(iii) certified public accountants and public accountants, practising accountancy pursuant to this Ordinance;</p> <p>(b) a certified public accountant or public accountant practising accountancy on his own account pursuant to this Ordinance; or</p> <p>(c) a corporate practice;"</p>	<p>Our goal in making the rules has been to further define "auditor" to ensure that we can have the correct person on an audit engagement team explain documents. An engagement partner/director will usually have delegated most of the work on an audit and will not be the best person to explain the document. Further, very few auditors in HK are corporations. So, we have sought to include everyone who might be useful to explain documents to be sought from an audit engagement team in the definition of auditor, including practice unit employees and consultants (eg valuers). We accept that documents sought may be the property of the practice unit, but that is not the key question. Section 179 would only require that they are in the possession (ie "custody, control or power") of the person from whom we seek them we may demand them. Similarly, who professionally accepts responsibility for an audit opinion on listed companies accounts is not material to who is best placed to explain documents with a view to establishing the facts in an inquiry.</p>

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				<p>Nevertheless, we understand that the HKSA and the auditing profession are of the view that it was not the intension of s 179 to go beyond an audit firm to its employees and consultants. We appreciate HKSA's concerns and agree to withdraw those parts of the rules which extend the definition to an auditor's junior employees and consultants. We will only further define auditor to cover professional accountants and practice units that provides, or provided, services. This would cover Hong Kong based auditors that hold practicing certificates, audit firms and corporate practices and foreign auditors (see below). The SFC will keep in view the need for future amendments in the light of operational experience of the Ordinance and the Rules.</p>
	Rule 7(a)	Definition of "auditor" for s 179 SFO – consequential change	If the amendment proposed above to adopt "practice unit" is adopted, rule 7(a) should be amended to refer to "(a) a person who was formerly a practice unit (irrespective of whether the person is still so registered)"	See above.
	Rule 7(b)	Definition of "auditor" for s 179 SFO – overseas auditors	Doubts the power to exercise investigatory powers in relation to foreign registered auditors.	The ability to enforce any investigatory requirements will depend on the circumstances (eg are the person in question and the documents in Hong Kong or not, or in the possession of a Hong Kong located audit practice) and international law and comity. However, it is useful to have the jurisdiction particularly as many companies that operate in Hong Kong are foreign incorporated and may have foreign auditors.
	Rule 7(c)	Definition of auditor for s 179 – employees and consultants	Objects to the inclusion of engagement team employees and consultants in the definition of auditor: (i) believes it won't work as they say the documents sought are the property of the practice unit"; (ii) the practice unit is the appropriate entity to explain documents and s 179(2)	See the response to 7 above.

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			appropriate entity to explain documents and s 179(2) operates to enable the SFC to question practice unit staff if “practice unit” is adopted as the definition of “auditor” for s 179; and (iii) feels the proposed rule is a change in policy in that it brings within s 179 people who weren’ t intended to be covered.	
12.	Rule 7	Definition of auditor for s 179	Hong Kong Institute of Company Secretaries Supports the provision.	Noted.
	Rule 7(b)	Definition of “auditor” for s 179 SFO – overseas auditors	Doubts the power to exercise investigatory powers in relation to foreign registered auditors.	See response to Rule 7(b) above.
13.	Rule 7	Definition of auditor for s 179 – employees and consultants	Law Society of Hong Kong There is no need to amend the definition of “auditor” for the reasons set out in the Consultation Paper because the SFC can obtain these documents and explanations of them under s 179(1)(v) “any other person”, with fewer constraints. The growing number of auditor definitions is confusing.	The policy is that in the case of auditors, s 179(1)(iv) should be invoked. S 179(1)(v) is primarily targetted to transaction counterparties of the corporation in the inquiry. It is therefore more appropriate to add to the definition of “auditor” than to rely on s 179(1)(v). The proposed definition of “auditor” in the Rules merely clarifies the scope of s 179 in its application to auditors. The SFC will keep in view the need for futures amendments in the light of operational experience of the ordinance and the Rules.

List of Respondents

Date received	Respondent
3 July 2002	CASH Financial Services Group Ltd
20 July 2002	The Hongkong & Shanghai Banking Corporation Group
22 July 2002	Lloyds TSB Pacific Ltd
26 July 2002	The Institute of Securities Dealers Ltd
26 July 2002	The Law Society of Hong Kong
26 July 2002	The HK Association of Online Brokers
26 July 2002	The Hong Kong Association of Banks
26 July 2002	The Hong Kong Institute of Company Secretaries
27 July 2002	Linklaters on behalf of 6 financial institutions
31 July 2002	Hong Kong Society of Accountants
2 August 2002	HSBC Broking Securities (Asia) Ltd