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

Consultation Conclusions on the Draft Securities and Futures (Leveraged Foreign Exchange Trading – Exemption) Rules

《證券及期貨(槓桿式外匯交易 — 豁免)規則》草擬本諮詢總結

Hong Kong
July 2002

香港
2002 年 7 月

引言

1. 證券及期貨事務監察委員會("證監會")在 2002 年 6 月 5 日發表《證券及期貨(槓桿式外匯交易－豁免)規則》草擬本諮詢文件("諮詢文件")。諮詢期於 2002 年 6 月 26 日結束。

2. 就"槓杆式外匯交易"一詞在《證券及期貨條例》附表 5 第 2 部的定義而言，《草擬規則》訂明由屬於三種合資格類別的人士所作出的若干作爲，將會被剔除在該詞的定義的範圍以外。該三種類別爲：

   - 經營任何形式的槓桿式外匯交易業務的法團，但其主要業務並非槓桿式外匯即期交易，或該等交易的平均本金金額不少於 780 萬元，以及該法團或其唯一的控股法團或合夥具有合資格信貸評級；

   - 就買賣或轉讓已經上市或擬上市的貨幣權證而作出某項作爲的持牌人，及透過該持牌人進行此等交易的該持牌人的客戶；及

   - 上述貨幣權證的發行人，及與該發行人屬同一公司集團的法團，而該發行人或法團正透過持牌人進行上述交易，或在公司集團的成員之間買賣或轉讓該等貨幣權證。

3. 第一種合資格類別與現時《槓桿式外匯買賣(豁免)規則》根據《槓桿式外匯買賣條例》所訂明的合資格類別相同，而其餘的兩種合資格類別則屬於政策新猷，其目的在於清除技術上的不必要障礙，從而促進上市貨幣權證市場的發展，同時無損對投資者的保障。

諮詢過程

4. 證監會在 2002 年 6 月 5 日發表有關這次諮詢的新聞稿。諮詢文件及《草擬規則》亦載於證監會網站及透過金融服務網絡傳送給所有持牌商號。

5. 我們收到了兩份分別由安理國際律師事務所及年利達律師事務所提交的意見書，並已將有關意見書登載於證監會網站內。此外，亦有兩位市場從業員非正式地對《草擬規則》提出意見。

諮詢總結

6. 安理國際律師事務所對加入兩個新的合資格類別表示支持，而年利達律師事務所則對《草擬規則》的具體條文提出意見。附件(英文本)載有兩家律師事務所的意見的摘要及證監會的回應。另外兩位市場從業員認爲，《草擬規則》所規定的豁免已顧及市場人士對於上市貨幣權證方面的關注。

7. 由於在諮詢過程中所收到的意見都是正面的，因此證監會認爲無需對《草擬規則》作出重大修改。

結語

8. 對於安理國際律師事務所、年利達律師事務所及有關市場從業員就諮詢文件發表意見，證監會謹此致謝。

(0206174/dc)

Attachment

Summary of comments received on the Draft
Securities and Futures (Leveraged Foreign Exchange Trading - Exemption) Rules

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
1	Rule 3 (Exemption under paragraph (xiii) of the definition of "leveraged foreign exchange trading" in Part 2 of Schedule 5 to the SF Ordinance)	This Rule prescribes, for the purposes of the SF Ordinance, "foreign exchange trading" and "leveraged foreign exchange trading" do not include any act performed for or in connection with a contract or arrangement or a proposed contract or arrangement by any person belonging to the three classes specified in Rules 4, 5 and 6.	[Linklaters] The classes referred to in this Rule should be alternatives, therefore, we suggest that the word "or" appears at the end of (a) and (b).	We will add the word "or" to Rule 3 to ensure further clarity. (Please note that the reference to section 174(1) of the SF Ordinance on cold calling activities has been removed. There is no policy change. This carve-out is not necessary as the draft Rules should not affect the operation of section 174(1) of the SF Ordinance.)
2	Rule 4 (Qualifying class 1)	Qualifying class 1 refers to corporations whose principal business is not in leveraged foreign exchange spot transactions or the average principal amount in such transactions is not less than $7.8 million, and the corporations or their sole holding corporations or partnerships have a qualifying credit rating.	[Linklaters] According to paragraph 7 of the Consultation Paper, the exemption applies if the corporation's principal business is not in leveraged foreign exchange spot transactions provided the average principal amount of each transaction meets a threshold test and there is a qualifying credit rating. However, Rule 4 states that a corporation must meet the qualifying credit rating and either its principal business is not in leveraged foreign exchange spot transactions or the average principal amount of each transaction meets a threshold test. We assume that the position in the Rules is the one to be followed.	Yes, this qualifying class refers to corporations whose principal business is not in leveraged foreign exchange spot transactions or the average principal amount in such transactions is not less than $7.8 million, and the corporations or their sole holding corporations or partnerships have a qualifying credit rating.

	Section	Details of the Rules	Respondent's Comments	SFC's Responses
			[Linklaters] There is no definition in the draft Rules of "leveraged foreign exchange spot transactions".	This term is not defined in the current Leveraged Foreign Exchange (Exemption) Rules prescribed under the Leveraged foreign Exchange Trading Ordinance ("LFETO"). The SFC takes the view that in the interests of simplicity, such a definition should not be added to the Rules. The term is well understood by the market, and that this arrangement has worked well for the past 7 years.
			[Linklaters] The requirement to annually notify the SFC that a corporation satisfies the exemption conditions has become a condition of being able to rely on the exemption from the definition of leveraged foreign exchange trading (LFET). This means that if a corporation inadvertently fails to notify the SFC within 4 months after the end of its financial year, but continues to carry on LFET, it will have committed a criminal offence. This appears unduly harsh.	The SFC is of the view that the notification requirement is not unduly harsh as the corporations concerned have a four-month period to make the notification. Moreover, the SFC has a practice of issuing reminders to existing exempt corporations reminding them of the notification requirements prior to their respective annual due dates. A failure to file an annual notice is not a criminal offence under the draft Rules. The failure simply means that the exemption will no longer be available.

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
3	Rules 5 and 6 (Qualifying classes 2 and 3)	Qualifying class 2 refers to licensed persons who perform an act for or in connection with the sale, purchase or transfer of currency warrants that are listed or are to be listed, and clients of the licensed persons undertaking such transactions through the licensed persons. Qualifying class 3 refers to issuers of such currency warrants and corporations belonging to the same group of companies as the issuers who undertake the above transactions through licensed persons, or undertaking intra-group purchases, sales or transfers of such currency warrants.	[Allen & Overy] Issuers of Hong Kong listed warrants have previously been hampered in the issuing of currency warrants in the Hong Kong market due to uncertainty as to whether these types of warrants are technically caught by the current legislation, particularly in respect of any pre-listing activity in the currency warrants. By exempting any act in connection with the purchase, sale and transfer of listed currency warrants from the definition of leveraged foreign exchange trading, the current uncertainty will be removed and will give issuers of derivative warrants more flexibility to bring these products to the market. I would therefore support the addition of the two new qualifying classes relating to currency warrants. I am assuming that the new Rules are intended to cover any pre-listing grey market activity in the currency warrants as well as any post-listing activity. [Linklaters] Although the SFC has accepted in the past that there is an argument that currency warrants are "securities" and therefore do not fall within the provisions of the Leveraged Foreign Exchange Trading Ordinance, as the SFC has now specifically excluded "listed currency warrants" from the definition of LFET, this exemption should also be extended to non-listed currency warrants and currency warrants listed on exchanges other than the Hong Kong Stock Exchange.	The assumption is correct in the context. "Listed currency warrants" has been defined in Rule 2 to include a currency warrant that is listed, and not listed but is reasonably foreseeable that it will be listed within a period of 14 days from the date that the warrant is first offered for sale. While the SFC has accepted in the past that certain currency warrants may constitute "securities", the SFC does not accept that all currency warrants are necessarily "securities" and therefore do not fall within the provisions of the LFETO. It may be noted that section 2(2) of the LFETO provides that "foreign exchange trading" and "leveraged foreign exchange trading" exclude, amongst others, any act performed for or in connection with a contract or an arrangement or a proposed contract or arrangement that is a transaction

	Section	Details of the Rules	Respondent's Comments	SFC's Responses
				executed on a recognized stock exchange by or through a registered securities dealer. We do not agree that the exemption should be extended to non-listed currency warrants out of investor protection concerns. To so extend may unnecessarily enlarge the scope of exemption. As regards currency warrants listed on exchanges other than the Hong Kong Stock Exchange, it may be noted that such an exemption is already provided for in the SF Ordinance. In Schedule 5 of the SF Ordinance, the definition for foreign exchange trading excludes, among others, any act performed for or in connection with any contract or arrangement or a proposed contract or arrangement that is a transaction executed on a specified stock exchange (or futures exchange) by or through a licensed person. The exclusions proposed under the draft Rules essentially aim to supplement these exemptions and cover transactions in currency warrants that are to be listed, and transactions in listed currency warrants that are carried out during non-exchange trading hours through licensed persons.
			[Linklaters] As there are no filing requirements for qualifying classes 2 and 3, we assume this means that entities satisfying the requirements in Rules 5 and 6 would be automatically exempt.	The assumption is correct. There are no filing requirements for qualifying classes 2 and 3.

	Section Reference	Details of the Rules	Respondent's Comments	SFC's Responses
4	General	Transitional arrangements.	[Linklaters] What happens to institutions that are currently exempt under the Leveraged Foreign Exchange Trading (Exemption) Rules? We assume that they would continue to be regarded as exempt until they are required to renew the exemption, rather than have to reapply under the draft Rules.	The assumption is correct. Section 91 of Schedule 10 to the SF Ordinance provides that any document or information given or served to the SFC under any provision of an Ordinance repealed by the SF Ordinance shall be deemed to have been served under any provision in the SF Ordinance. We take the view that section 91 covers the notification requirements imposed on existing exempt institutions.

List of Respondents

Date received	Respondent
25 June 2002	Allen and Overy
28 June 2002	Linklaters (on behalf of 2 firms)