

立法會
Legislative Council

LC Paper No. LS12/07-08

**Paper for the House Committee Meeting
on 9 November 2007**

**Further Report by Legal Service Division on
Securities and Futures (Contracts Limits and Reportable Positions)
(Amendment) (No.2) Rules 2007 (L.N. 198)
gazetted on 26 October 2007**

Section 4 of the Securities and Futures (Contracts Limits and Reportable Positions) Rules (Cap. 571 sub. leg. Y) (“the principal Rules”) prohibits a person (except an authorized person) from holding or controlling a futures contract or a stock options contract in excess of the prescribed limit set out in Schedules 1 and 2 to the principal Rules. The above Rules amend section 4 of the principal Rules to empower the Securities and Futures Commission (“SFC”) to authorize an exchange participant or his affiliate to hold or control a specified contract in excess of the prescribed limit up to the specified percentage if SFC is satisfied that there is a relevant business need for the excess. The terms “relevant business need”, “specified contract” and “specified percentage” are defined in the new section 4(10). “Relevant business need” means a business need that requires an exchange participant or his affiliate to engage in hedging activities to facilitate the provision of services to his clients. “Specified contract” and “specified percentage” are defined to mean respectively a futures contract or stock options contract and the percentage specified by SFC by notice published in the Gazette. The new section 4(11) provides that such notice is not subsidiary legislation.

2. In the report of the Legal Service Division (“LSD”) for the House Committee meeting on 2 November 2007 (LC Paper No. LS7/07-08), it was reported that LSD was seeking clarification from SFC on why the notice referred to in the definitions of “specified contract” and “specified percentage” is not subsidiary legislation and on certain drafting matters, and that LSD would make a further report upon receipt of SFC’s reply.

3. SFC has since given its reply in its letters of 1 November and 6 November 2007, which are attached at Annexes I and II respectively. Members may wish to note that the letter of 5 November 2007 from the Law Drafting Division of the Department of Justice (“DoJ’s letter”) mentioned in SFC’s letter of 6 November 2007 has not been attached to this report as it is stated in DoJ’s letter that DoJ’s comments are for the reference of SFC only. SFC’s reply is set out below:

- (a) Nature of notice referred to in the definitions of “specified contract” and “specified percentage”

Although SFC’s original proposal which went to consultation on the draft amendment rules was to specify the percentage in the rules themselves

(which was set at 50%), the proposal has been revised as SFC considers that it is necessary to allow for a degree of flexibility whilst still providing greater certainty for the market. According to SFC, to provide in the new section 4(11) of the principal Rules that the notice referred to in the definitions of “specified contract” and “specified percentage” is not subsidiary legislation is consistent with the policy adopted in the Securities and Futures Ordinance (“SFO”) and its subsidiary legislation, which contain provisions similar to the new section 4(11). To illustrate this point, SFC has given examples of these provisions in its letter of 1 November 2007. These provisions are described below:

(i) Section 20(3) of SFO

Section 20(1) of SFO provides that no transaction may be conducted on a recognized stock market other than dealings in securities, and other financial products which are approved by SFC by notice published in the Gazette either generally or in a particular case. A similar provision that applies to transactions on a recognized futures market is provided in section 20(2). Section 20(3) provides that a notice under section 20(1) and (2) is not subsidiary legislation.

(ii) Sections 24(7) and 41(7) of SFO

Sections 24(1) and 41(1) of SFO respectively require the rules of a recognized exchange company and of a recognized clearing house to be approved by SFC before the rules can take effect. Under sections 24(7) and 41(7), SFC may by notice published in the Gazette declare a class of rules which are not required to be so approved. Such notice is not subsidiary legislation as provided in sections 24(8) and 41(8).

(iii) Section 175(8A) of SFO

Under section 175(1) of SFO, an intermediary or representative for certain regulated activities shall not communicate an offer to acquire or dispose of any securities of, or issued by, a body unless the offer complies with the requirements specified in the section. Section 175(5)(aa)(ii) provides that section 175 does not apply to an offer specified by SFC, by notice published in the Gazette, as an offer to which section 175 does not apply. Section 175(8A) provides that a notice published under section 175(5)(aa)(ii) is not subsidiary legislation.

(iv) Sections 324 and 402 of SFO

Section 324 of SFO empowers SFC to specify by notice published in the Gazette the form of a notification required to be given under that section. Section 402 provides that SFC may, by notice published in the Gazette, specify any form in respect of any other document required to be lodged, filed or submitted with or to SFC for the purposes of SFO. Sections 324(8) and 402(7) provide that such notice is not subsidiary legislation.

(v) Section 25(5) and (6) of the Securities and Futures (Investor Compensation – Levy) Rules (Cap. 571 sub. leg. AB) (“the Levy Rules”)

Under section 25 of the Levy Rules, SFC is required to publish an exemption notice in the Gazette under specified circumstances exempting a person from paying any levy under the Levy Rules in respect of a sale or purchase of securities or futures contract that takes place on or after the date specified in the exemption notice. Section 25(6) of the Levy Rules provides that an exemption notice is not subsidiary legislation.

(b) Matching of bilingual texts

(i) It is noted that while the English text of the new section 4(7)(a) and (8) refers to “the excess for which authorization is sought”, the corresponding Chinese text for these two provisions is “尋求獲授權持有或控制的該等超逾訂明上限的合約” and “尋求獲授權持有或控制數目超逾訂明上限的指明合約” respectively. Apparently, the Chinese text contains more details which are not found in the English text. It is also noted that a similar Chinese text appears in another section of the same Rules, i.e. section 4(4)(a), but its corresponding English text contains the reference to “hold or control” which does not appear in the English text of section 4(7)(a) and (8). Further, while section 4(4)(b), like the new section 4(7)(a) and (8), makes reference to “the excess”, its corresponding Chinese text refers simply to “超逾上限”.

(ii) To make the bilingual texts of section 4(7)(a) and (8) match and to make the drafting of the section consistent with that of section 4(4)(a) and (4)(b), it would appear that amendments need to be made either to the English or Chinese text of section 4(7)(a) and (8). In response to LSD’s enquiry on this matter, SFC stated in its reply of 6 November 2007 (which is at Annex II) that the matter has been considered by the Law Drafting Division of DoJ and the Law Drafting Division is of the view that there is no discrepancy in the legal meaning of the original bilingual texts of the new section 4(7)(a) and (8). SFC has also indicated that it prefers not to amend the English text for reasons set out in its reply of 6 November 2007.

4. In the light of the above, Members may wish to consider whether it is necessary to set up a subcommittee to examine the following issues:

- (a) whether the need for a degree of flexibility whilst still providing certainty for the market is a justifiable or desirable ground for SFC to change its original proposal that went to consultation under which the specified percentage for the purpose of the proposed new category of authorization would be subject to the scrutiny of the Legislative Council; and

- (b) whether it is desirable that the bilingual texts of certain provisions added by the above Rules do not match as far as possible in terms of the language used.

Encls.

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7 November 2007

LS/S/4/07-08

Mary Ahern
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Our Ref: 126/LG/5012/0100/005

Your Ref: LS/S/07-08

1 November 2007

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Hong Kong

Dear Ms Fung

**Securities and Futures (Contracts Limits and Reportable Positions)
(Amendment) (No. 2) Rules 2007 (the Amendment Rules)
(L.N. 198 of 2007)**

We refer to your letter dated 29 October 2007 and would like to clarify your questions as follow:

Nature of notice referred to in the definitions of "specified contract" and "specified percentage"

The intention is to give the SFC flexibility to change the range of "specified contracts" and to adjust the "specified percentage" in future as necessary. As mentioned the original proposal which went to consultation on the draft amendment rules was to specify the percentage in the rules itself (which was set at 50%). However, many respondents suggested removing or increasing the 50% limit as that would provide greater flexibility (and would also be more consistent with the existing authorization provisions for the "special circumstances" category authorization under subsection (5) which provides even greater flexibility with no limits set on the excess or the type of contract). While we agreed with the point about needing more flexibility, we were of the view that having no limit in the rules at all might create uncertainty. To balance these different concerns, the limit was removed from the rules and required to be gazetted instead.

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We note that there are similar devices in the SFO e.g. s 20(3) (there is little difference in effect between the words "approved" and "specified"), 24(7), 41(7), 175(8A) and provisions for specifying forms in sections 324(4) and 402(2) which are stated not to be subsidiary legislation. An example of a reference containing the word "specified" where the matter to be specified is not to be specified in subsidiary legislation can be found in section 175(5)(aa)(ii) of the SFO. In the context of subsidiary legislation, a similar approach has been adopted in the Securities and Futures (Investor Compensation - Levy) Rules vis-a-vis the publication of notices suspending and reinstating the investor compensation levy. Please see Part 5 of those rules and sections 25(5) and 25(6) in particular.

Please note that DoJ raised comments on this point regarding the notice referred to in the definition of "specified contract". We advised DoJ that we would prefer for the notice not to be subsidiary legislation so as to facilitate amendments to the list in future, noting that there are similar devices in the SFO and subsidiary legislation (as referred to above) which are stated not to be subsidiary legislation. To clarify the status of the notice, we proposed adding a provision clarifying that the notice is not subsidiary legislation. DoJ did not raise further comments on the point subsequently.

Chinese text

We have checked section 4(7)(a) and (8) of both the Chinese text and the English text and they are consistent in their meaning. In our view it is not necessary to make any amendment to the texts. Furthermore, the Chinese Rules have been vetted for consistency with the English text and cleared by the Law Draftsman.

Yours sincerely

Mary Ahern
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c.c.
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Our Ref: 126/LG/5012/0100/005

Your Ref: LS/S/07-08

06 November 2007

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Dear Ms Fung

**Securities and Futures (Contracts Limits and Reportable Positions)
(Amendment) (No. 2) Rules 2007 (the Amendment Rules)
(L.N. 198 of 2007)**

Thank you for your letter of 2 November, 2007. Please see our responses to your further comments as follows:

Nature of notice referred to in definitions of "specified contract" and "specified percentage"

It appears that we may have been talking at cross purposes. To clarify –

- (i) We agree that whether or not the notice referred to in the definitions of "specified contract" and "specified percentage" is subsidiary legislation will be determined in accordance with the definition provided in section 3 of the Interpretation and General Clauses Ordinance (Cap.1) ("Cap.1"), but only so far as this is not contradicted by an apparent contrary intention in another Ordinance or instrument in accordance with section 2 of Cap.1. Section 11 of the above amendment rules excludes the application of the definition provided in section 3 of Cap.1 to the notices referred to in the definitions of "specified contract" and "specified percentage" making it clear that the intention is that the notices are not to be deemed to be subsidiary legislation under the definition in section 3 of Cap.1.
- (ii) In our earlier response, we were trying to clarify why – from a policy perspective – the SFC considered it appropriate for the “specified contracts”

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and “specified percentage” to be set by way of Gazette notices rather than in the rules themselves. As mentioned, we consider that such an approach is more consistent with the existing rules. It also has the added advantage of allowing for a degree of flexibility whilst still providing greater certainty for the market.

As we pointed out in our previous correspondence, there are numerous similar devices in the SFO and subsidiary legislation which are stated not to be subsidiary legislation (e.g. s 20(3), 24(7), 41(7), 175(8A) and provisions for specifying forms in sections 324(4) and 402(2) which are stated not to be subsidiary legislation in the SFO and Part 5 of the Securities and Futures (Investor Compensation - Levy) Rules, in particular, sections 25(5) and 25(6)).

Chinese text

- (a) We note your comment that the Law Draftsman said that he had no objection to adding another element to the law drafting policy to the effect that both the Chinese and English texts should also match language-wise as far as possible. However, we also note that accuracy in legal meaning and consistency in meaning between the Chinese and English texts remain the most important concern of draftsmen of Chinese texts. In the Information Paper dated 13 March 2001 submitted by the Law Drafting Division of the Department of Justice to the LegCo Panel on Administration of Justice and Legal Services setting out the Department of Justice's "Drafting policy on bilingual legislation" it was stressed that accuracy in meaning is of paramount importance. The Law Drafting Division has considered your comment and has advised that they are of the view that there is no discrepancy in the legal meaning of the original bilingual texts of the proposed new section 4(7)(a) and (8).
- (b) The Law Drafting Division has considered the proposed amendment to the Chinese text of section 4(7)(a) and has advised that in their view the original Chinese text is more explicit in meaning than the proposed version and is easier to be understood by readers.

Please find attached a copy of the letter from the Law Drafting Division dated 5 November for your assistance.

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We have also considered whether sections 4(7)(a), (b) and (c) and (8) of the English text should be amended to match the Chinese text. We prefer not to amend the English text for the following reasons -

- (i) the extra words "holding or controlling" are superfluous in the context;
- (ii) the addition of the extra words will render the English text awkward and cumbersome;
- (iii) the original English text is clearer and more easily understood by the market;
- (iv) there is no discrepancy in the legal meaning of the original English and Chinese texts."

Yours sincerely

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Encl.

c.c.

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