

Summary of comments received on Draft Securities and Futures (Unsolicited Calls – Exclusion) Rules

	Section reference	Details of the Rules	Market comments	SFC's response
1.	-	Scope of the draft Rules	<p>The draft Rules only make reference to excluding certain classes of calls from the general prohibition on unsolicited calls. Even though the SFC has the necessary rule-making powers under clause 169(3)(a), (b) & (c) of the Bill, the draft Rules do not attempt to exclude:</p> <p>(a) calls made regarding certain types of agreement;</p> <p>(b) calls made by persons belonging to certain prescribed classes;</p> <p>(c) calls made on persons belonging to certain prescribed classes (such as professional investors).</p>	<p>Clause 169(2) already exempts calls made on -</p> <ul style="list-style-type: none"> - a solicitor or a professional accountant acting in his professional capacity; - a licensed person; - a registered institution; - a money lender; - a professional investor; and - an existing client. <p>The SFC does not perceive any immediate need to prescribe rules under clause 169(3)(a), (b) or (c).</p>
2.	-	As above	<p>In addition, the following areas may also be addressed in the draft Rules:</p> <p>(a) the territorial scope of the unsolicited calls regime, in particular, calls made on recipients who are outside Hong Kong;</p>	<p>Clause 169 applies to calls made by intermediaries and their representatives whether in Hong Kong or elsewhere. Calls made to persons in or outside Hong Kong are equally covered.</p>

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			<p>(b) calls made by persons who are acting as “mere conduits” for information wholly devised by another person, e.g. internet service providers; and</p> <p>(c) calls made on particular classes of recipients, for example, to expand the exemption for the “professional investors” class referred to in clause 169(2)(a)(i) of the Bill to introduce an exemption for “sophisticated investors”, being persons who are sufficiently experienced in matters relating to investments to understand the risks involved in the offer or making of, an agreement during, or as a consequence of, an unsolicited call.</p>	<p>Clause 169 does not apply to “mere conduits”. Pure internet service providers are not included. However such persons should review clauses 114 and 114A and Part 2 of Schedule 6 of the Bill to consider whether they engage in any activity for which they are required to be authorised.</p> <p>The SFC has worked closely with an informal working group in assessing its stance towards “professional investors” and it is proposed to issue for consultation in the first quarter of 2002, draft Rules made for the purposes of paragraph (i) of the definition of “professional investor”. The effect of the proposed Securities and Futures (Professional Investor) Rules will be that additional classes of persons are regarded as professional investors for the purposes of, amongst other provisions, clause 169.</p>
3.	-	As above	There is a concern on whether there is an intention to provide an exemption from the prohibition on unsolicited calls in respect to a customer of a licensed or exempt dealer (whether existing and/or new) where such customer consents generally to receiving such calls.	Under clause 169(2)(a), an intermediary (which includes licensed or exempt dealers) does not breach the prohibition in clause 169(1) by reason only of calling a person who is his existing client. That term is defined broadly in clause 169(7) to include a person who has entered into a client agreement with the intermediary during a period of 3 years immediately preceding the call and that

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				agreement still subsists, or the intermediary has provided a service in a regulated activity to that person within the same period. Therefore, any such person who wishes to receive calls may enter into a client agreement with the intermediary or may initiate a call himself. In such cases, the prohibition would not be contravened.
4.	3 (1)	Under clause 169(3)(d) of the Bill, clause 169(1) of the Bill does not apply to any unsolicited call that is a permissible communication.	The two terms "call" and "communication" were used interchangeably throughout the draft Rules (for example, section 3(1) as opposed to section 3(3)). There is no definition of the term "communication", it may be simpler to replace all occurrences of the word "communication" in the draft Rules by the word "call". This is unless the word "communication" has a particular meaning to be applied, in which case it may be helpful to provide an explanation in section 2 of the draft Rules.	We do not agree that the terms "call" and "communication" are used interchangeably. Clause 169 of the Bill uses the term "call", which is defined in subclause (7) as including a visit in person. In contrast, the draft Rules deal with a class of calls which are described as "permissible communications" and that term is defined in section 2 and 3(2) of the draft Rules to exclude a visit in person. The term "communication" is not defined either in clause 169 of the Bill or in the draft Rules because it bears its ordinary meaning.

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5.	3(1)	As above	The draft Rules exclude the “permissible communication” from the application of clause 169(1) of the Bill. This allows reasonable flexibility in conducting prospecting activities; mass marketing campaigns in particular.	Agreed, that was the policy intention.
6.	3 (2)	<p>"For the purposes of these Rules, a permissible communication is any communication not made in the course of :-</p> <p>(a) a visit in person;</p> <p>(b) a telephone conversation; or</p> <p>(c) any other interactive dialogue in the course of which statements and responses to them are exchanged immediately. "</p>	<p>There may be conflict in a number of cases between section 3(2) of the draft Rules, which excludes certain calls from the scope of “permissible communication”, and section 3(3) of the draft Rules, which then provides examples of indications as to what a permissible communication in fact is.</p> <p>An illustration would be a conference call (or video conference) in which the communication of one speaker is made to or directed at more than one recipient in identical terms (satisfying section 3(3)) should not be treated any differently from a non-interactive presentation made by a speaker in person (section 3(2)).</p>	We do not agree that there is room for conflict between section 3(2) and section 3(3) as the two subsections must be read together. In the example given, the communication would be made in the course of an interactive dialogue and thus be excluded under section 3(2)(c).
7.	3(2)	As above	Clarification may be needed to state whether all items (a) to (c) must apply before qualifying as a “permissible communication”.	The drafting is sufficiently clear that a communication is not permissible if it falls within any one of the items in subparagraphs (a) to (c).

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			Otherwise, under item (a) alone may encourage people to make any cold call and this may be classified as permissible communication.	
8.	3(2)	As above	Section 3(2)(a) &(c) are commonly used means for effective marketing including in the insurance industry, but the draft Rules do not accept these means as permissible communications.	The purpose of the draft Rules is to curtail pressure-selling tactics that might be utilized in the course of calls prescribed as not being permissible. We consider that such prohibitions do not prevent the effective marketing or promotion of products and services to which clause 169(1) applies, provided that such promotion does not constitute an attempt to induce another person to enter into an agreement under clause 169(1).
9.	3(2)	As above	The SFC should clarify that section 3(2)(c) does not restrict using devices with immediate responding function at the customer's choice, e.g. Short Messaging Services, Two Way Pagers, Internet Messaging Systems, etc.	Clause 169 would not apply where the intermediary provides an interactive voice response system to callers so that they can dial in and ask for information about securities/futures etc, Clause 169 does not prohibit any type of client-initiated calls at all.
10.	3 (3)	"For the purposes of these Rules, the following are regarded as among indications that a communication is a permissible communication:- (a) the communication is made to more than one recipient in identical terms (save for	It is recommended that all of items 3(3)(a) to (c) must be met to constitute a permissible communication and only item 3(3)(a) could not constitute a permissible communication.	We take the view that making subparagraphs (a) to (c) cumulative would be unduly restrictive and limiting for the industry. The intention behind section 3(3) is to provide an indication of the factors that will enable an intermediary to determine that a particular kind of communication is allowed.

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		<p>details of the recipient's identity);</p> <p>(b) the communication is made by way of a system which in the normal course constitutes or creates a record of the communication which is available to the recipient to refer to at a later time;</p> <p>(c) the communication is made by way of a system which in the normal course does not require the recipient to respond immediately to it."</p>		
11.	3(3)	As above.	<p>Constant reviews should be carried out to observe whether or not permissible communications may have exerted unacceptable pressure or nuisance to the public.</p> <p>In addition, the SFC should keep records of complaints.</p>	<p>We shall continuously keep under review any need to tighten or relax the rules.</p> <p>We agree. It is the SFC's practice to keep records of complaints made to it, and this will include complaints of the sort described.</p>