

Consultation Document

The Draft Securities and Futures (Unsolicited Calls - Exclusion) Rules (the “draft Rules”)

Introduction

1. Unlike sections 73 and 74 the Securities Ordinance and section 60A of the Commodities Trading Ordinance which essentially limit “call” to a visit in person and a communication by telephone, clause 169 of the Securities and Futures Bill defines “call” to mean a visit in person, or a communication by any means, whether mechanically, electronically, magnetically, optically, manually or by any other medium, or by way of production or transmission of light, image or sound or any other medium.
2. Clause 169 then gives the SFC the necessary rule-making power under sub-clause (3)(d) to exclude classes of calls by way of subsidiary legislation. The basis for this approach is that, consistent with modern securities legislation such as the UK Financial Services and Markets Act, effective regulation depends upon the regulator having the flexibility to quickly address changing market practices and global conditions, by amending the rules rather than the primary legislation.

Background

3. Many public comments have been received, expressing concern over this definition being too wide and suggesting that the prohibition should only apply in respect of personal visits and telephone calls.
4. The cold-calling prohibition is designed to protect the interests of the investing public and to curtail improper selling techniques by intermediaries. The reason for not agreeing to limit the prohibition to personal visits and telephone calls is that other means of communication may be used also to pressure a person into investing. We must not focus on the current state of technology and the legislation must allow for and anticipate developments that would facilitate new ways of exerting unacceptable pressure. In the circumstances, we have deliberately defined “call” to be all encompassing and rely on the rule-making power in sub-clause (3)(d) to carve out types of calls which we believe do not exert unacceptable pressure and therefore should be permitted.
5. There are controls already built into the legislative system, whereby any rules made by the SFC must be subject to negative vetting by the Legislative Council. In addition, the SFC now releases the draft Rules for public consultation.

6. The SFC has used the FinNet communication network to send copies of this consultation document to registered dealers that have lodged their Financial Resources Rules returns electronically with the SFC via FinNet. In addition, copies of the consultation document are available free of charge at the SFC's office and can also be found on the SFC's Internet website at <http://www.hksfc.org.hk>.
7. The public is invited to submit comments before close of business on 19 November 2001 by sending them by fax to 2523-4598 or by mail or e-mail to the following address:

SFC Unsolicited Calls – Exclusion Rules
12/F, Edinburgh Tower
The Landmark
15 Queen's Road Central
Hong Kong

or:

unsolicited_calls_exclusion_rules@hksfc.org.hk

It should be stressed that the draft Rules must be read in conjunction with the Securities and Futures Bill itself.

8. To better ensure that our proposed Rules appropriately balance investor protection and general market practice, the SFC has formulated the draft Rules after consulting selected brokerage and lawyer firms. We wish to acknowledge and thank them for their invaluable input.

Policy Directions

9. A copy of the draft Rules is attached for reference. In short, the draft Rules exclude any unsolicited call that is a permissible communication where permissible communication is defined as any communication not made in the course of –
 - (i) a visit in person;
 - (ii) a telephone conversation; or
 - (iii) any other interactive dialogue in the course of which statements and responses to them are exchanged immediately,and give various examples to indicate when a communication is regarded as a permissible communication.

10. The draft Rules are modelled on the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001.