

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.

SECURITIES AND FUTURES
(UNSOLICITED CALLS - EXCLUSION) RULES

SECURITIES AND FUTURES (UNSOLICITED CALLS - EXCLUSION) RULES

(Made by the Securities and Futures Commission
under section 384(1) of the Securities and
Futures Ordinance (of 2001))

1. Commencement

These Rules shall come into operation on the day appointed for the commencement of Part VII of the Securities and Futures Ordinance (of 2001).

2. Interpretation

In these Rules, unless the context otherwise requires -

"permissible communication" () means a
communication referred to in section 3;

"recipient" () means a person to whom a communication is
made or, in the case of a permissible communication, a
person who reads or hears the communication;

[based on Article 6(e) of the FSMA 2000 (Financial Promotion) Order 2001]

the expressions "call" () and "unsolicited call" () have the respective meanings assigned to them in section 169(7) of the Ordinance.

3. Excluded unsolicited calls

(1) For the purposes of section 169(3)(d) of the Ordinance, section 169 of the Ordinance does not apply to any unsolicited call that is a permissible communication.

[based on Article 16(a) of the FSMA 2000 (Financial Promotion) Order 2001]

(2) For the purposes of these Rules, a permissible communication is any communication not made in the course of -

(a) a visit in person;

(b) a telephone conversation; or

(c) any other interactive dialogue in the course of which statements and responses to them are exchanged immediately.

[based on Article 8(1)&(2) of the FSMA 2000 (Financial Promotion) Order 2001]

(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 details of the recipient's identity);
- (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;
- (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.

[based on Article 7(5) of the FSMA 2000 (Financial Promotion) Order 2001]

Chairman,
Securities and Futures
Commission

2001

Explanatory Note

These Rules are made by the Securities and Futures Commission under section 384(1) of the Securities and Futures Ordinance (of 2001) for the purposes of section 169(3)(d) of the Ordinance. They exclude from the application of section 169 of the Ordinance (which prohibits the negotiation of certain agreements by intermediaries during unsolicited calls) any unsolicited call that is a permissible communication as defined in section 3 of the Rules.