



消費者委員會 CONSUMER COUNCIL

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來函編號 YOUR REF. G6/123/4C (03) Pt.4. & Pt. 5

本函編號 OUR REF.

31 March 2003

Secretary for Financial Services and the Treasury  
 Financial Services Branch  
 Financial Services and The Treasury Bureau  
 18th Floor, Admiralty Centre Tower 1  
 18 Harcourt Road  
 Hong Kong

(Attn: Miss Au King-Chi)

*Dear Kong-chi:*

**Consultation on proposed amendments to the  
 Companies Ordinance to facilitate offers of shares and debentures**

Thank you for your letters of 10 March and 19 March 2003 inviting the Council to provide views on the captioned consultation, enclosing draft legislative proposals to streamline the procedures for registration and issue of prospectuses.

The Council welcomes the proposals by the Financial Services and the Treasury Bureau and the Securities and Futures Commission (SFC) for additional safeguards to ensure investors' interests will not be compromised by measures that are being introduced to improve the prospectus issuing regime, in particular through:

- regulating the content and the manner in which 'awareness' advertisements are issued;
- requiring the issuer of a programme prospectus to make arrangements for the prospectus to be readily available to investors and potential investors; and
- clarifying the application of section 40 of the Companies Ordinance (prospectus liabilities provisions) by making clear that the same investor protection should be accorded to investors, whether or not they acquire the shares or debentures by instructing intermediaries who apply on their behalf.

The Council also welcomes the proposed amendment to the definition of an untrue statement to

- include 'a material omission' in a prospectus and that this would be subject to civil and criminal liabilities; and

- that the same civil and criminal liabilities for untrue statements applicable to a full prospectus would also apply to 'awareness advertisements'.

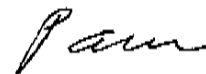
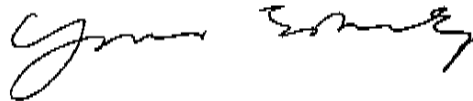
Having regard to the difficulties that might arise in interpreting what material omission means, the Council suggests that clarification of this important concept could be made through the publication of guidelines.

As an example, guidelines are being proposed by the Office of the Telecommunications Authority (TA) informing telecommunications licensees of their obligation not to engage in misleading or deceptive conduct under Section 7M of the *Telecommunications Ordinance*. One of the issues in misleading or deceptive conduct in the proposed guidelines is 'silence or omission'. The Council has made a detailed submission on this issue, based on its experience through consumer complaints which it has received. A copy of the Council's submission to the TA is attached for information. The Council's submission suggested, amongst other things, that the TA's guideline should:

- specifically indicate to industry what information should be provided to consumers in order to avoid being at risk in engaging in misleading or deceptive conduct through omission or silence; and that
- because markets and marketing conduct change over time, as new products and the schemes to promote them are introduced, the guideline should attempt to mirror the dynamism of the market by being continually updated with references to contemporary experience.

The Council suggests that a similar guideline should be produced by the SFC for the guidance of industry as to their obligations, and the manner in which the SFC will administer the provisions, based on the SFC's experience in regulating the sector.

Should you have any queries concerning the above please feel free to contact either Ron Cameron on 2856 8523 or Vera Tam on 2856 8543.



Mrs. CHAN WONG Shui  
Chief Executive

c.c. SFC (Mr. Ashley Alder)

**Consumer Council's Response to the Consultation on  
Guidelines on Misleading or Deceptive Conduct under  
Section 7M of the Telecommunications Ordinance (Cap 106)**

**Introduction:**

1. The Consumer Council welcomes this opportunity by the Office of the Telecommunications Authority (OFTA) to provide comments on the proposed guidelines that are aimed at providing a guide as to when conduct may fall within the misleading or deceptive conduct prohibition contained in section 7M of the Telecommunications Ordinance (Cap106).
2. The Council supports the policy that the provisions regarding misleading conduct should apply to all licensees, including class licensees, and that licensees are also liable for conduct of management, employees; servants, agents and subcontractors; and that a 'reasonable person' test on whether the conduct is misleading should be applied.
3. With regard to the specific detail of the guideline, there are several issues the Council would like raise for consideration.

**General Requirements**

4. Section 3 of the guidelines 'Conduct of Concern' notes some general principles that should be applied, such as honesty; substantiating claims; clear description of products and services and full cost of the products, in addition to specific forms of conduct that may come under consideration by OFTA within the regulatory framework of section 7M. The Council supports the application of these principles.

**Specific Conduct under Concern**

5. The Council notes there various forms of conduct identified in the guideline, and agrees that such illustrations will assist licensees clearly identify their obligations. With regard to those forms of conduct, the following observations and recommendations are made.

**Silence or omission**

6. Of specific interest to the Council, borne out by experience from consumer complaints, is the notion that silence or omission can be deceptive under Section 7M. This raises the question as to minimum standards of information that should be provided to consumers when licensees or their agents are marketing

services. The Council's view is that guidance on this area of deception (i.e. silence or omission) could be enhanced for the benefit of licensees and consumers alike by the indication of specific minimum requirements to meet in informing customers about the characteristics, the prices, terms and conditions of good and services on offer. For example:

*Limitations of service*

- When advertising services, licensees must specifically state any limitations to the geographic availability of the product on offer and by implication, those customers who are ineligible to receive the product, and any applicable limits on availability of the product.

*Hidden costs*

- When marketing the price of a good or service, any related costs or charges that are not discretionary, particularly with bundled products should be stated up front and as part of the total price for the good or service.

*Disclaimers*

- Any disclaimers in relation to a good or service on offer must be clearly indicated as part of an advertisement and in terms that are reasonably understandable.

*Full prior disclosure*

- Before purchasing a product, the customer must be informed of the full description of the product, all relevant pricing information, the length of the sales contract and how it can be terminated.

*Contract variations terms*

- Where there is a right to vary the term of a contract and all applicable fees and charges, the requirements in the 12 October 2001 Code of Practice for Service Contracts for the Provision of Public Mobile Radiotelephone Services CoP - 04/2001 should be observed.

**Misrepresentation.**

7. In the Council's 2001 report "Regulating Deceptive, Misleading and Unfair Practices in Consumer Transactions", a substantial number of cases were reported indicating unfair practices that would be *prima facie* actionable under the control of misleading or deceptive conduct laws that exist overseas. The Council's report recommended that a long term goal should be the enactment of a broad based law similar to that existing in other comparable advanced economies, that not only prohibited misleading or deceptive conduct generally,

but also clearly distinguished specific conduct that would be considered misleading or deceptive. Section 7M is a similar broad based law, and the Council considers that the guideline could be used to more clearly distinguish particular conduct that the TA would consider falls within the broad based definition.

8. The Council considers that noting the forms of conduct identified in the Council's report within the Telecommunications guideline would provide a clearer indication as to what would be actionable under Section 7M. The more prevalent of the unfair practices noted in the Council's report, which could be spelled out in the guideline, are as follows

- misleading indication as to price;
- accepting payment without intention to supply;
- bait & switch;
- failing to supply the goods or services at the agreed price after accepting payment;
- failing to supply the goods or services within the specified time or within a reasonable time; and
- supplying goods or services materially different from the goods or services in respect of which the payment is demanded for or accepted.

**Fine print and qualifications**

9. In the consultation paper, the TA does not mandate a particular font size for terms and conditions as what is acceptable and notes that this will depend on the context in which the terms and conditions are used. Nevertheless, the Council believes that examples of contract font size can be used in the guideline to illustrate how the industry can avoid being at risk. A similar practice has been adopted by the Estate Agent Authority in providing standard forms for use in the sale of residential properties in Hong Kong (see [www.eaa.org.hk](http://www.eaa.org.hk))

**Gifts**

10. While the guideline notes specific requirements as to prizes, the Council believes that whenever a sales promotion involves a gift, similar requirements should be placed on licensees to ensure that gifts are also subject to the prohibition on misleading or deceptive conduct.

**Nature of the guideline**

11. As noted above, the Council believes the guideline as currently drafted is a useful document to assist licensees in observing their responsibilities under Section 7M. However, markets and the marketing conduct of licensees change over time, as new products and the schemes to promote them are introduced and old products and old schemes are abandoned.
  
12. Accordingly the Council believes that the guideline should attempt to mirror the dynamism of the market by being continually updated with references to contemporary experience. In addition reference documents such as the Code of Practice for Service Contracts for the Provision of Public Mobile Radiotelephone Services should also be inserted in the guideline, as an integral part of OFTA' s body of work that serves as a guide to the industry.
  
13. In effect, the Council believes that OFTA should treat the guideline as a living document rather than a static statement of principle, revising it periodically in response to the complaints received by OFTA or the Council, and the position that OFTA has taken in relation to the complaints.

Consumer Council

February 2003