

For information
on 24 October 2002

Paper No. 40/02

**Subcommittee on Draft Subsidiary Legislation to be made
under the Securities and Futures Ordinance**

Securities and Futures (Unsolicited Calls – Exclusion) Rules

Introduction

When considering the draft Securities and Futures (Unsolicited Calls – Exclusion) Rules on 29 April 2002. Members asked us –

- (a) to review the definition on “Monetary Authority guideline” in clause 2 of the draft Rules to clarify that the guideline refers to the guideline in force at the material time;
- (b) to amend clause 3(1) to the effect that section 174 of Securities and Futures Ordinance will not apply to any agreement to sell or purchase securities of a corporation to or from a person who is already the holder of securities of that corporation; and
- (c) to review clauses 3(3) and (4) to clarify that the purpose of subclause (4) is to provide some indications of “interactive dialogue” referred to in subclause (3)(c).

Follow up action taken

2. We have accordingly amended the definition of “Monetary Authority guideline” to put beyond doubt that the guideline refers to the guideline in force at the material time. The revised definition reads as follows –

“Monetary Authority guideline” means the Guideline of the Monetary Authority issued in November 1995 and published in the Gazette under section 7(3) of the Banking Ordinance (Cap. 155) as G.N. 4679 of 1995 on 17 November 1995, as amended and published under that section from time to time.

3. In addition, clause 3 has now been amended in response to Members' comments in paragraph 1(b) and (c) above. The amendments which we have made to the original draft considered by Members are marked up in the **Annex** for easy reference.

Securities and Futures Commission
Financial Services and the Treasury Bureau
17 October 2002

REVISED DRAFT

SECURITIES AND FUTURES (UNSOLICITED CALLS – EXCLUSION) RULES

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3. Excluded unsolicited calls

(1) For the purposes of section 174(3)(a) of the Ordinance, section 174 of the Ordinance does not apply to any agreement –

(a) _____ to sell securities of a corporation to; or

(b) _____ to purchase securities of a corporation from,¹

a person who is already the holder of securities of that corporation.

(2) For the purposes of section 174(3)(d) of the Ordinance, section 174 of the Ordinance does not apply to any unsolicited call that is -

(a) a permissible communication; or

(b) made by a registered institution -

(i) in relation to a leveraged foreign exchange contract; and

(ii) which complies with the requirements under the Monetary Authority guideline that apply to a registered institution.

¹ Amendment made in response to the comment made by some Members at the LegCo Subcommittee meeting on 29 April 2002, to the effect that section 174 of the Securities and Futures Ordinance shall not apply to “any agreement to sell or purchase securities of a corporation to or from a person who is already the holder of securities of that corporation”.

(3) ²For the purposes of subsection 2(a), a permissible communication is any communication that is not made in the course of any of the following acts –

- (a) a visit in person;
- (b) a telephone conversation;
- (c) any other interactive dialogue in the course of which statements and responses to them are exchanged immediately.

(4) ²In deciding whether or not a communication is made in the course of the act referred to in subsection (3)(c), the court shall have regard to the following factors the presence of any of which indicates~~Without limiting the generality of subsection (3), 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.

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² Amendment made in response to the comment made by some Members at the LegCo Subcommittee on 29 April 2002, to make clear that the purpose of clause 3(4) is to provide some indications of the “interactive dialogue” referred to in clause 3(3)(c).