

Our Ref : G16/1C

13 January 2003

The Chief Executive
All authorized institutions

Dear Sir / Madam,

Calls in Relation to Securities or Futures Products and Services

You will be aware that under the current regulatory regime for securities dealers and the new regime introduced by the Securities and Futures Ordinance (SFO) there are certain prohibitions on unsolicited calls by intermediaries. A "call" in this context is defined in section 174(7) of the SFO as meaning "a visit in person, or a communication by any means, whether mechanically, electronically, magnetically, optically, manually or by any other medium...". This letter serves to provide specific guidance on the restrictions on unsolicited calls (cold calls) in relation to securities and futures contracts.

While the terminology in this letter is adopted from the SFO, the same principles apply to authorized institutions (AIs) that are exempt dealers, as required by the HKMA in the guideline entitled "Supervision of Exempt Dealers" issued in December 1995. Exempt dealer AIs or AIs that intend to apply for registration with the Securities and Futures Commission (SFC) under the new regime which is targeted to commence on 1 April 2003 should take prompt action to ensure that adequate procedures are in place and provide proper training to all relevant staff in order to achieve compliance with the requirements set out in this letter.

Section 174 of the SFO and the Securities and Futures (Unsolicited Calls - Exclusion) Rules

Section 174 of the SFO prohibits intermediaries and their representatives from making or offering to make with another person an agreement to sell or purchase any securities or futures contract, or an agreement the purpose or effect of which is to provide to the other person a profit, income or other returns from or calculated by reference to changes in the value of any securities or futures contract¹, or inducing or attempting to induce another person to enter into such an agreement, through the use of unsolicited calls. The prohibition does not apply, among other situations, where that other person is an existing client of the intermediary.

It should be noted that "existing client", in relation to an AI, refers to a person -

- who has entered into a client contract (containing terms for the provision of services which constitutes a **regulated activity** under the SFO²) with the AI within the preceding 3 years, and remains a party to the client contract when the call is made; or
- for whom the AI has provided a service, the provision of which constitutes a **regulated activity**, within the preceding 3 years when the call is made.

In this connection, unsolicited calls to general banking customers who do not fall within the definition of "existing client" (e.g. mere depositors or customers utilizing general banking services only) with the AI concerned are not permitted.

In accordance with the Securities and Futures (Unsolicited Calls - Exclusion) Rules, section 174 of the SFO does not apply to any unsolicited call that is a "permissible communication". 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.

You may refer to section 174 of the SFO and the Securities and Futures (Unsolicited Calls - Exclusion) Rules for other situations where the prohibition on unsolicited calls does not apply.

Distribution of standard promotional materials

Where standard promotional materials are distributed to the general public not in the course of a visit in person or any other interactive dialogue, the act in itself can be interpreted as a "permissible communication". This interpretation is derived from the definition of "permissible communication" (as quoted above) under the Securities and Futures (Unsolicited Calls - Exclusion) Rules, and the fact that such communication does not require the recipient to respond immediately to it³.

By the same token, section 174 of the SFO does not apply to the sending of standard promotional materials together with statements of account to general banking customers.

Specific guidance on the making of calls

In order to achieve compliance with the statutory restrictions, AIs are required to observe the following principles when making calls in relation to securities or futures products and services⁴:

- a. In the making of any telephone call or face-to-face contact with another person, the staff of an AI are not permitted to take any initiative to promote securities or futures products and services unless and until -
 - it has been established that the person concerned is an "existing client" as defined in section 174 of the SFO and set out above; or
 - where the person concerned is not an "existing client", that person takes the initiative to indicate his interest in taking up the relevant products or services of the AI.
- b. An AI should ensure that only relevant individuals⁵ (including deemed relevant individuals) are involved in the promotion or explanation of the products and services in relation to securities or futures.
- c. When a person who is not an "existing client" of a regulated activity raises a question⁶ on or indicates interest in the securities or futures products and services of the AI, staff who are not relevant individuals should always refer the person to a relevant individual for information and discussion on such products or services.

- d. As indicated above, distribution to the general public of standard promotional materials in relation to securities or futures products and services is not in itself prohibited. AIs should however be cautious that in the process of distribution, the responsible staff do not enter into any interactive dialogue with the recipient on the contents of the materials. This covers the case where e.g. a teller hands over a promotional leaflet to a depositor over the counter. The promotional materials should include a clear indication of how an interested person may approach the AI (e.g. visit a branch or call a designated enquiry hotline which should be operated by a relevant individual).
- e. Events for the introduction or promotion of an AI's securities or futures products and services (e.g. seminars and talks) that are open to the general public or customers are not prohibited unless at such occasions, the AI's staff approach or attempt to approach the attendees for the purpose of their opening securities or futures trading accounts, or dealing in a particular product (i.e. take the initiative to promote the relevant products or services).

Should you have any questions relating to this letter, please contact Mr. Samuel Leung at 2878-1541 or Miss Alice Lee at 2878-1603.

Yours faithfully,

D T R Carse
Deputy Chief Executive

¹ One typical example is an agreement on equity-linked deposit.

² "Regulated activity", in relation to an AI, means dealing in securities, dealing in futures contracts, advising on securities, advising on futures contracts, advising on corporate finance, providing automated trading services, or asset management.

³ According to the Securities and Futures (Unsolicited Calls - Exclusion) Rules, the fact that the communication does not require the recipient to respond immediately to it is one of the factors indicating a "permissible communication".

⁴ These principles do not apply when the call is made on a person who is a solicitor or professional accountant acting in his professional capacity, or is a person licensed with the SFC, registered institution, money lender or professional investor (as defined in Schedule 1 to the SFO).

⁵ "Relevant individual" is defined in the Banking (Amendment) Ordinance 2002.

⁶ AI staff who are not relevant individuals may nevertheless provide information on the prevailing market price of securities to any member of the public.

c.c. SFC (Attn: Mrs Alexa Lam)
FSTB (Attn: Ms Vivian Lau)