

G.N. 1994

SB-2 “LEVERAGED FOREIGN EXCHANGE TRADING—
CONDUCT OF UNSOLICITED CALLS”

A Guideline issued by the Monetary Authority
under section 7(3) of the Banking Ordinance

Purpose

To set out the HKMA’s approach to supervising AIs’ conduct in relation to the making of unsolicited calls in connection with leveraged foreign exchange trading as well as the appraisal of customers in this regard

Classification

A statutory guideline issued by the MA under the Banking Ordinance, §7(3)

Previous guidelines superseded

Guideline 7.4.1 “Guideline on Leveraged Foreign Exchange Trading Issued under section 7(3) of the Banking Ordinance (Cap. 155)” dated 16.11.95; Guideline 7.5 “Leveraged Foreign Exchange Trading Conduct for Unsolicited Calls and Appraisal of Customers” dated 22.03.96

Application

To all AIs

Structure

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1. Introduction

1.1 Terminology

1.1.1 In this module:—

- “call” means 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;
- “corporation”, “licensed corporation”, “related corporation” and “specified stock exchange” have the meanings as set out in Schedule 1 to the Securities and Futures Ordinance (SFO);
- “leveraged foreign exchange contract” has the meaning as set out in Schedule 5 to the SFO;
- “LFET” refers to leveraged foreign exchange trading, which has the meaning assigned to it by Part 2 of Schedule 5 of the SFO. In broad terms, it means: (i) the act of entering into or offering to enter into, or inducing or attempting to induce a person to enter into or to offer to enter into, a leveraged foreign

exchange contract; (ii) the act of providing any financial accommodation to facilitate foreign exchange trading or to facilitate an act referred to in (i); or (iii) the act of entering into or offering to enter into, or inducing or attempting to induce a person to enter into, an arrangement with another person, on a discretionary basis or otherwise, to enter into a contract to facilitate an act referred to in (i) or (ii). It includes, but is not confined to, margin trading;

- “margin trading” means any transaction between an AI and a counterparty for the purchase or sale of foreign currencies, where the counterparty is required to put up only a small proportion of the value of the contract with the AI and top up such “margin” throughout the life of the contract if the exchange rate between the subject currencies moves against him, and with final settlement being made by reference to differences in rates rather than actual delivery;
- “RI” means an AI that is a registered institution under the SFO;
- “SFC” means the Securities and Futures Commission; and
- “unsolicited call” means any call made otherwise than at the express invitation of the person called upon. For the purposes of this definition, the provision by a person of his contact details, including an address, telephone or facsimile number, or electronic mail address, does not by itself constitute an express invitation to call that person.

1.1.2 The explanations of legal terms given above are for general reference only. For a complete and definitive statement of the legal terms, direct reference should be made to the SFO. Legal advice should be sought where precise interpretation is required.

1.2 Statutory exemption from the Securities and Futures Ordinance

1.2.1 AIs are not subject to the registration regime set out in the SFO for Type 3 regulated activity (LFET) and the rules in respect of such activity made by the SFC under that Ordinance. This acknowledges that AIs are subject to their own supervisory regime set out in the Banking Ordinance.

1.2.2 Nevertheless, some of the provisions of the SFO, e.g. §§300¹ and 301², are of general application to all persons. AIs, particularly those which are already involved in LFET, should therefore familiarise themselves with these provisions of the Ordinance.

1.3 Unsolicited calls

1.3.1 Notwithstanding the general exemption that applies to AIs, §174 of the SFO, with limited exceptions, prohibits the making of certain agreements in relation to leveraged foreign exchange contracts by a RI during unsolicited calls³.

1.3.2 According to the Securities and Futures (Unsolicited Calls—Exclusion) Rules, §174 of the SFO does not apply to any unsolicited call that is either:—

- a permissible communication (as defined in the Rules); or
- made by a RI in relation to a leveraged foreign exchange contract in compliance with applicable requirements under the “Monetary Authority guideline”.

1.3.3 This statutory guideline is the “Monetary Authority guideline” referred to in the Securities and Futures (Unsolicited Calls—Exclusion) Rules.

1.3.4 Although §174 of the SFO and the Securities and Futures (Unsolicited Calls—Exclusion) Rules do not apply to an AI that is not a RI, the HKMA expects all AIs that make unsolicited calls in relation to leveraged foreign exchange contracts to observe the specific requirements set out in section 2 of this guideline.

1.4 Distribution of standard promotional materials

1.4.1 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 under the Securities and Futures (Unsolicited Calls—Exclusion) Rules, and the fact that such communication does not require the recipient to respond immediately to it⁴.

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

2. Conduct of unsolicited calls and appraisal of customers

2.1 Selection of customers

- 2.1.1 The marketing and promotion of leveraged foreign exchange contracts by AIs through unsolicited calls should, among other things, be targeted at customers considered to be capable of understanding and bearing the potential financial risks that may arise from such contracts. AIs should take account of the fact that certain customers may not be able to fully understand the risks and obligations involved in such contracts or that these may otherwise be inappropriate for certain customers.
- 2.1.2 For such customers, there is a risk that unsolicited calls may lead them into transactions for which they are unprepared and which they would not otherwise have undertaken. AIs should therefore have policies and procedures for identifying customers whom they consider are unsuitable for unsolicited calls.
- 2.1.3 Where such customers take the initiative to approach the AI to enter into leveraged foreign exchange contracts, the AI may decide to engage in the transaction but should ensure in the normal way that adequate credit assessment of the customer is made and that there is proper explanation to the customer of the risks involved.

2.2 Marketing of leveraged foreign exchange contracts through unsolicited calls

- 2.2.1 The HKMA expects AIs to be selective in the marketing and promotion of leveraged foreign exchange contracts. As a result, for the purpose of soliciting a person to enter into a LFET transaction, an AI may:—
- call a person who has entered into a written agreement with the AI for it to provide, transact with or undertake on behalf of, that person, leveraged foreign exchange contracts;
 - call any person who, at the date of such call, has deposits in excess of \$750,000 with the AI or assets in excess of \$750,000 under management, whether on a discretionary or non-discretionary basis, by the AI or a related corporation or one or more of them;
 - call a corporation which is a related corporation of a corporate customer and meets the above deposit or asset tests;
 - call a corporation which is listed on a specified stock exchange or a related corporation of such corporation;
 - call a corporation with a paid-up share capital that is not less than the minimum expected market capitalisation of new applicants at the time of listing under the Listing Rules of the Stock Exchange of Hong Kong Limited, or a related corporation of such corporation;
 - in relation to contracts other than margin trading contracts, call any corporation;
 - call another AI or a related corporation of such AI;
 - call a licensed corporation or a related corporation of such corporation; or
 - call an insurer authorized under the Insurance Companies Ordinance (Cap. 41) or a related corporation of such insurer.
- 2.2.2 Where the call is made to a corporation, it should be made to a person who is authorized to trade on behalf of the corporation.
- 2.2.3 AIs should note the definition of “call” in para. 1.1.1 and ensure that the above requirements on marketing are observed regardless of whether a person is being approached by a telephone call or at branch premises.

2.3 Staff suitability to make unsolicited calls

- 2.3.1 AIs should have adequate internal procedures to ensure that only suitable staff are allowed to make unsolicited calls. These staff should possess the necessary knowledge of leveraged foreign exchange products and should be familiar with the AI's policies and procedures relating to the conduct of unsolicited calls, as well as the requirements provided in this guideline. Appropriate training should be provided to such staff.
- 2.3.2 The HKMA expects AIs to be able to provide on request evidence that they are capable of exercising adequate supervision of the making of unsolicited calls by the relevant staff. Such evidence should be maintained in such a way that it can be reviewed by the internal auditors or the HKMA and may include the following:—
- written policies and procedures issued by the AIs on the making of unsolicited calls;
 - information on the qualifications and experience of the relevant staff; and
 - information on the contents of the relevant training programmes.

2.4 Standards of conduct for unsolicited calls

- 2.4.1 AIs should ensure that their staff observe the following standards when making unsolicited calls:—
- unsolicited calls must not be made before 8.00 a.m. or after 9.00 p.m., unless the customer has specifically agreed that calls may be made outside this period;
 - the caller must terminate the telephone call immediately, or leave the premises immediately, if the customer makes it clear that he does not wish the call to continue;
 - the caller must take reasonable steps to ensure that the customer understands the purpose of the call and the kind of investments or investment services which the caller wishes to discuss during the call;
 - the caller must not attempt to disguise the purpose of the call or the nature of the investment agreement which the customer may enter into;
 - the caller must not make an unsolicited call on a customer with the object of discussing a subject which the customer has recently made it clear that he does not wish to discuss;
 - in relation to margin trading contracts, the caller must make a risk disclosure statement to the customer explicitly warning the customer of the risks of margin trading; and
 - where the caller provides information to enable the customer to understand the nature and risks of a transaction, it should:—
 - ensure that the information is accurate;
 - ensure that information in any economic forecast is reasonable, based on proper research and reasonable grounds; and
 - present the downside and upside of the proposal in a fair and balanced fashion.

28 March 2003

Monetary Authority

¹ §300 of the SFO relates to an offence of employing fraudulent or deceptive devices, etc. in transactions involving securities, futures contracts or LFET.

² §301 of the SFO relates to the offence of disclosure of false or misleading information inducing others to enter into a leveraged foreign exchange contract.

³ Apart from leveraged foreign exchange contracts, §174 of the SFO also prohibits the making of certain agreements relating to securities, futures contracts and securities margin financing through unsolicited calls.

⁴ 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.