

GUIDELINE ON REGULATION OF ADVERTISING MATERIAL FOR DEPOSITS ISSUED OVER THE INTERNET

Upon the commencement of the Banking (Amendment) Ordinance 2001, the Monetary Authority has issued a guideline on the regulation of advertising material for deposits issued over the Internet under section 92(6) of the Banking Ordinance on 24 May 2002. The new guideline specifies the factors the Monetary Authority would take into account in determining whether advertising material for deposits issued over the Internet or other technological means is targeted at members of the public in Hong Kong. This article explains such key factors and the Monetary Authority's approach to the enforcement of section 92 of the Banking Ordinance.

Introduction

The Banking (Amendment) Ordinance 2001 has commenced effect on 24 May 2002. One of the effects is that advertisements, invitations and documents (advertising material) issued through new technological means, in particular the Internet, will now be covered by section 92(1) of the Banking Ordinance (the Ordinance). This section does not prohibit advertising material in respect of deposits to be placed outside Hong Kong. However, such material has to comply with the disclosure requirements specified in the Fifth Schedule¹ of the Ordinance. Like regulators in other major financial centres, it is also the HKMA's policy to regulate only Internet advertising material for offshore deposits which is targeted at members of the public in Hong Kong.

Pursuant to section 92(6) of the Ordinance, the Monetary Authority (MA) has issued a guideline (the Guideline) on 24 May 2002 to set out the factors he will consider whether advertising material is targeted at members of the public in Hong Kong and therefore section 92(1) applies. A copy of the Guideline can be found on the HKMA's website (www.info.gov.hk/hkma/eng/bank/spma/attach/TM-E-2.pdf). This article provides a summary of the content of the Guideline as well as the approach the HKMA will adopt to enforce section 92.

Categories of Factors in the Guideline

In determining whether advertising material issued through the Internet is targeted at Hong Kong, the MA will consider factors in the following categories:

- (a) factors relating to the way in which the advertising material is promoted or the web site on which the material is posted;
- (b) factors relating to the content of the advertising material or the site; and
- (c) factors relating to precautionary steps implemented by the advertiser.

The above are similar to the factors used by the international regulatory community (including the US, the UK and France) in determining whether a financial service promoted or offered over the Internet is "targeted" at local residents. It should be noted that these factors are neither exhaustive nor conclusive. The absence or presence of any factor may not necessarily lead the MA to consider that particular Internet advertising material is targeted at Hong Kong. The MA will judge each case on its merits and take into account the particular circumstances and all relevant facts.

¹ Advertising material complying with the Fifth Schedule of the Ordinance shall include, among other information, a prominent warning to the effect that the deposit-taker is not an authorized institution and is therefore not subject to the supervision of the Monetary Authority. The objective is to ensure that material facts are available in the advertising material to enable prospective depositors in Hong Kong to make their own judgement about placing a deposit with the deposit-taker.

Examples of Factors in the Guideline

The Guideline also provides certain examples of the factors under each of the above categories to enhance understanding of the way in which HKMA will consider the relevant cases. These examples are summarised below.

Factors related to promotion of advertising material or site

The MA will consider whether the advertising material is targeted, via “push” techniques, at a group or groups of people whom the advertiser knows, or should reasonably know, reside in Hong Kong. “Push” techniques include spamming, broadcasting or directing information to a particular person or group of people through, for instance, e-mails. The MA will also take into account whether any news group, bulletin board, chat room or similar facility associated with the site has been used to promote the deposit-taking service in Hong Kong.

In the case of advertising material hosted on a site, the MA will consider factors such as whether the site has been listed in the Hong Kong section of a search engine, whether the site has been advertised in Hong Kong through other channels (e.g., advertising agencies, periodicals or broadcasting), and whether a third-party site targeting at Hong Kong has established hyperlinks to the advertising site.

Factors related to content of advertising material or site

The MA will consider whether the content gives an impression that the deposit-taking service is targeted at Hong Kong. A clear disclaimer stating that deposits will not be taken from members of the public in Hong Kong is certainly a relevant factor.² However, the way that the disclaimer is presented is important in determining

the relevance of the disclaimer, e.g., whether the disclaimer is viewed with or before the advertising material and is visible using the same web page format as for the rest of the site.

The MA will also consider whether the content of the advertising material is written in a manner that seems targeted at Hong Kong. The relevant factors include:

- (a) whether the Chinese language is used in the advertising material;
- (b) the use of name or domain name which may give the impression that the advertiser is established in Hong Kong;
- (c) the acceptance of Hong Kong dollar deposits³;
- (d) whether it has been arranged that some parties in Hong Kong should handle enquiries related to the deposit-taking service; and
- (e) the specific relevance of the content to potential Hong Kong depositors e.g., request for Hong Kong identity card numbers.

Factors related to precautions implemented by advertiser

The MA will consider whether reasonable precautions have been taken by the advertiser to avoid taking deposits from members of the public in Hong Kong. Reasonable precautions may include:

- (a) a process (e.g., a pre-registration process with the issuing of passwords) to avoid the Internet advertising material from being made available or accessible to persons in Hong Kong; and


² However, a disclaimer that simply states in general terms that no deposit is intended to be taken from those jurisdictions where it is not authorized or permitted without specification of the excluded jurisdictions will not be considered by the MA as sufficient.

³ It should be noted that acceptance of deposits in currencies other than Hong Kong dollars will not necessarily lead the MA to the view that the advertising material is not targeted at Hong Kong, as it is not uncommon for persons in Hong Kong to place deposits in foreign currencies.

- (b) a system in place to avoid taking deposits from persons residing in Hong Kong (e.g., to reject any depositor with a correspondence address in Hong Kong).

Enforcement of section 92 of the Banking Ordinance

Given the global nature of the Internet, there is a need for the MA to consider a practicable strategy for enforcing section 92 on Internet advertising material hosted overseas but targeted at Hong Kong. Under these circumstances, the MA would first seek assistance from the relevant overseas supervisory authorities to help in the enforcement. If the overseas authorities are unable to assist for any reason, the MA will consider issuing a press release informing the public of Hong Kong of the non-compliance and advising them to take extra care in placing deposits with the deposit-taker concerned. The MA may also consider taking such refusal to co-operate into account when considering the adequacy of home supervision in connection with any future application from an entity based in such jurisdiction for authorization in Hong Kong.

It should be stressed that section 92 does not provide for a mechanism for the MA to approve the issue of advertising material to solicit deposits from members of the public in Hong Kong. The onus is on the relevant persons to comply with the requirements in that section. In case of doubt, potential advertisers or any other persons who are unsure about their position under section 92 should consider seeking their own legal advice to ensure compliance with the applicable law. 

- Prepared by the Banking Development Department