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**SFC Licensing
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- Financial Services Regulatory
- Corporate and Commercial
- Restructuring and Insolvency
- Banking and Finance



**Tanner De Witt – established, independent,
Hong Kong law.**

Legislation

- Securities and Futures Ordinance (Cap 571)



Securities and Futures Ordinance

Section 114

(1) *... no person shall:*

(a) *carry on a business in a regulated activity; or*

(b) *hold himself out as carrying on a business in a regulated activity.*

(2) *Subsection (1) shall not apply to:*

(a) *a corporation licensed under section 116 or 117 for the regulated activity;*

Securities and Futures Ordinance

A person who, without reasonable excuse, contravenes subsection (1) commits an offence and is liable:

- (a) on conviction on indictment to a fine of **\$5,000,000** and to imprisonment for **7 years** and, in the case of a continuing offence, to a further fine of **\$100,000** for every day during which the offence continues;
or
- (b) on summary conviction to a fine of **\$500,000** and to imprisonment for **2 years** and, in the case of a continuing offence, to a further fine of **\$10,000** for every day during which the offence continues.

Securities and Futures Ordinance

Section 114

(3) *... no person shall:*

(a) *perform any regulated function in relation to a regulated activity carried on as a business; or*

(b) *hold himself out as performing such function.*

(4) *Subsection (3) shall not apply to:*

(a) *a licensed representative who carries on for his principal a regulated activity for which the representative is licensed;*

Securities and Futures Ordinance

A person who, without reasonable excuse, contravenes subsection (3) commits an offence and is liable:

- (a) on conviction on indictment to a fine of **\$1,000,000** and to imprisonment for **2 years** and, in the case of a continuing offence, to a further fine of **\$20,000** for every day during which the offence continues;
or
- (b) on summary conviction to a fine at level 6 and to imprisonment for **6 months** and, in the case of a continuing offence, to a further fine of **\$2,000** for every day during which the offence continues.

Types of regulated activity

- **Type 1** – dealing in securities
- **Type 2** – dealing in futures contracts
- **Type 3** – leveraged foreign exchange trading
- **Type 4** – advising in securities
- **Type 5** – advising in futures contracts
- **Type 6** – advising on corporate finance

Types of regulated activity

- **Type 7** – providing automated trading services
- **Type 8** – securities margin financing
- **Type 9** – asset management
- **Type 10** – providing credit rating services
- **Type 11** – dealing in OTC derivative products or advising on OTC derivative products
- **Type 12** – providing client clearing services for OTC derivative transactions.

A definition of “securities”

- (a) shares, stocks, debentures, loan stocks, funds, bonds or notes of, or issued by, a body, whether incorporated or unincorporated...;
- (b) rights, options or interests ... in, or in respect of, such shares, stocks, debentures, loan stocks, funds, bonds or notes;
- (c) ...
- (d) interests in any collective investment scheme;
- (e) ... etc.

“dealing in securities”

“in relation to a person, means making or offering to make an agreement with another person, or inducing or attempting to induce another person to enter into or to offer to enter into an agreement:

- (a) for or with a view to acquiring, disposing of, subscribing for or underwriting securities; or
 - (b) the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities,
- by the person, except ...”

Licensed Corporations

- Must be a **company incorporated in Hong Kong** or a **non-Hong Kong company** (ie an overseas company registered with the Companies Registry of Hong Kong).
- Applicant must satisfy the SFC that it is a **fit and proper** person to be **licensed for the regulated activity**.

A definition of “fit and proper”

In considering whether a person is “fit and proper”, the SFC looks at:

- (a) financial status or solvency;
- (b) educational or other qualifications or experience;
- (c) ability to carry on the regulated activity concerned competently, honestly and fairly;
- (d) reputation, character, reliability and financial integrity.

Responsible Officers

- Require at least **two responsible officers** for each regulated activity.
- At least one responsible officer must be **available at all times** to supervise the business.
- Same individual may be appointed as responsible officer for **more than one regulated activity**.
- At least one responsible officer must be an **executive director**.
- All executive directors must be approved as **responsible officers**.

Responsible Officers

- Must satisfy the SFC that they are **fit and proper**
- As part of the fit and proper requirement, must fulfil competence criteria relating to:
 - (a) academic / industry qualification;
 - (b) relevant industry experience;
 - (c) management experience;
 - (d) local regulatory framework paper.

Managers – In – Charge

- SFC issued “*Circular to licensed corporations regarding measures for augmenting the accountability of senior management*” on 16 December 2016. Provides guidance on who should be regarded as the senior management of a licensed corporation.
- SFC’s aim: (a) clarity, (b) standardize reporting, (c) alignment of responsibilities and (d) strengthen corporate governance.

Who is Senior Management?

Includes:

- Directors of the corporation
- Responsible officers of the corporation
- Individuals called Managers-In-Charge of Core Functions (MICs)

What are the Core Functions?

- Overall management oversight
- Key business line
- Operations control and review
- Risk management
- Finance and accounting
- Information technology
- Compliance
- Anti-Money Laundering / Countering Terrorist Financing

Who should be MIC?

- Individual must be **appointed by a licensed corporation** to be principally responsible (either alone or with others) for managing any of the Core Functions.
- **At least one person** as MIC for each Core Function.
- Can have one person appointed to act as MIC for **several Core Functions**.

Who should be MIC?

A person may be in charge of **Core Function** if :

- he occupies position of **sufficient authority** to exert significant influence on conduct of that Core Function;
- he has authority to **make decisions** for that Core Function;
- has authority to **allocate resources or incur expenditure** for the department carrying on that Core Function;
- has authority to **represent particular department carrying on that Core Function** (e.g. in senior management or external meetings).

Who should be MIC?

- Individual's seniority is relevant
- MIC would normally:
 - report directly to Board or to MIC who has Overall Management Oversight function
 - be accountable for the performance or achievement of business objectives set by Board, or by MIC who has Overall Management Oversight function
- Not need necessarily be employees of Hong Kong firm
 - may be located in overseas in a Group Company
 - external parties merely providing outsourced services cannot be MICs

Who should be MIC?

- Licensed corporation must ensure any person it employs or appoints to conduct business is fit and proper and qualified to act in the capacity so employed or appointed.
- MIC of the Overall Management Oversight function and the Key Business Line function should be responsible officers in respect of the regulated activities they oversee.
- MICs for Core Functions other than these two need not be responsible officers.

Submission of management structure information

- When applying for a licence, a corporation is required to provide information about its human resources and organisation's structure.
- Information regarding MICs must be provided together with organisational chart.
- In respect of each MIC, corporation to provide:
 - (a) full name;
 - (b) identification information;
 - (c) job title;
 - (d) place of residence.

Submission of management structure information

- (e) Core Function(s) which he or she is in charge of;
- (f) job title(s) of the person(s) to whom he or she reports within the corporation, and if applicable within its corporate group.

Must notify the SFC of changes in appointment of MICs within 7 days of changes.

Legal liability of senior management

- **SI94 of SFO** – SFC may exercise disciplinary powers to sanction regulated person if the person is, guilty of misconduct or is considered not fit and proper to be a regulated person.
- Regulated person means
 - a licensed person;
 - a responsible officer; or
 - a person involved in the management of the business of a firm (regardless of whether he or she is licensed).

Legal liability of senior management

- All members or the senior management of a licensed corporation (even those not licensed) are “**regulated persons**”.
- Where a licensed corporation is (or was) guilty of misconduct as a result of the commission of any conduct occurring with the consent or connivance of, or attributable to any neglect on the part of, a person involved in the management of the business of the licensed corporation, then that person is also guilty of misconduct.

Legal liability of senior management

- **Disciplinary sanctions** SFC may impose on a “regulated person” – eg licence revocation or suspension, pecuniary fine and reprimand.
- **Section 390(1)** of the SFO – When a corporation has been found guilty of an offence under the SFO, where the offence is proved to have been aided, abetted, counselled, procured or induced by, or committed with the consent or connivance of, or attributable to any recklessness of, any officer of the corporation, then that officer is also guilty of the offence.

Still want to be senior management of a licensed corporation?

Q & A

Thank You!

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