

PART V

LICENSING AND REGISTRATION

114A. Application of section 114 in relation to
conduct or activities outside Hong Kong¹

(1) If -

- (a) a person actively markets, whether by himself or another person on his behalf and whether in Hong Kong or from a place outside Hong Kong, to the public any services that he provides; and
- (b) such services, if provided in Hong Kong, would constitute a regulated activity,

then -

- (i) the provision of such services so marketed shall be regarded for the purposes of section 114(1)(a) as carrying on a business in that regulated activity; ~~and~~

¹ At the Bills Committee meeting on 4 December 2001 when Annex 1 to Paper CSA04/01 was considered, some Members and the Legal Service Division expressed doubt as to whether the drafting of the provision could achieve our policy intention to cover also those regulated activities conducted overseas but targeting at investors in Hong Kong. We have considered the comments after the meeting and worked out with the Legal Service Division this revised version to reflect more clearly the policy intention.

- (ii) the person's marketing of such services as referred to in paragraph (a) shall be regarded for the purposes of section 114(1)(b) as holding himself out as carrying on a business in that regulated activity; and
- (iii) to the extent that the provision of such services involves the performance by a person of a function that, if performed in Hong Kong in relation to a regulated activity, would constitute a regulated function, the performance of such function by that person shall be regarded for the purposes of section 114(3)(a) as performance of that regulated function in relation to that regulated activity.

(2) If -

- (a) a person actively markets, whether by himself or another person on his behalf and whether in Hong Kong or from a place outside Hong Kong, to the public any function that he performs; and
- (b) such function, if performed in Hong Kong in relation to a regulated activity carried on as a business, would constitute a regulated function,

then -

(i) the performance of such function so marketed shall be regarded for the purposes of section 114(3)(a) as performance of that regulated function in relation to that regulated activity; and

(ii) the person's marketing of such function as referred to in paragraph (a) shall be regarded for the purposes of section 114(3)(b) as holding himself out as performing that regulated function in relation to that regulated activity.

115. Corporations to be licensed for carrying on regulated activities

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(2) The Commission shall refuse to grant a licence to carry on a regulated activity under subsection (1) unless -

(a) the applicant is -

(i) a company;

(ii) an overseas company which has complied with the provisions of Part XI of the Companies Ordinance (Cap. 32) for the registration of documents; or

(iii) a corporation (other than a company or an overseas company) -

(A) which carries on a business principally outside Hong Kong in an activity which, if carried on in Hong Kong, would constitute the regulated activity;

(B) to which section 114(1) would not apply but for the provisions of section 114A(1)(i) and (ii)²; and

² **We propose this amendment consequential to the further amendment proposed to clause 114A.**

(C) to which Part XI of the Companies Ordinance (Cap. 32) would apply if it established a place of business in Hong Kong;

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116. Grant of temporary licences to corporations for carrying on regulated activities

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(2) The Commission shall refuse to grant a licence to carry on a regulated activity under subsection (1) unless the applicant satisfies the Commission that -

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(d) the granting of the licence would not result in its ~~being having been~~³ granted licences under subsection (1) for respective licence periods that in total exceed 6 months in any period of 24 months;

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³ Minor drafting amendment in the light of the comment of a Member expressed at the Bills Committee meeting on 4 December 2001.

120. Temporary licence for representative

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(2) The Commission shall refuse to grant a licence for a regulated activity under subsection (1) unless the applicant satisfies the Commission -

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(d) that the granting of the licence would not result in ~~him having been~~his being³ granted licences under subsection (1) for respective licence periods that in total exceed 6 months in any period of 24 months; and

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128. Determination of "fit and proper"

(1) In considering whether a person is a fit and proper person for the purposes of any provision of this Part, the Commission or the Monetary Authority (as the case may be) shall, in addition to any other matter that the Commission or the Monetary Authority (as the case may be) may consider relevant, but subject to section 131, have regard to -

- (a) the financial status or solvency;
- (b) the educational or other qualifications or experience having regard to the nature of the functions which, if the application is allowed, the person will perform;
- (c) the ability to carry on the regulated activity competently, honestly and fairly; and
- (d) the reputation, character, reliability and financial integrity,

of -

- (i) where the person is an individual, the person himself;
- (ii) where the person is a corporation (other than an authorized financial institution), the corporation and any officer of the corporation; and

(iii) where the person is an authorized financial institution, the institution and any director, chief executive⁴, manager (as defined in section 2(1) of the Banking Ordinance (Cap. 155)) and executive officer of the institution.

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⁴ We briefed Members on this additional amendment to Annex 1 to Paper CSA04/01 at the Bills Committee meeting on 10 December 2001. This amendment is consequential to the amendment to the Banking Ordinance effected through the Banking (Amendment) Ordinance 2001, whereby “chief executive” is taken out from the definition of “manager”.

130B. Commission's power to give directions

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(3) If a person fails to comply with any direction under subsection (1) or (2), the Commission may, by originating summons or originating motion, make an application to the Court of First Instance in respect of the failure, and the Court may inquire into the case and -

- (a) if the Court is satisfied that there is no reasonable ground for the person not to comply with the direction, order the person to comply with the direction within the period specified by the Court; and
- (b) if the Court is satisfied that the failure was without reasonable excuse, punish the person, and any other person ~~who appears to have been~~ knowingly⁵ involved in the failure, in the same manner as if

⁵ The expression “any other person who appears to have been involved in the failure” is intended to empower the court to punish an accessory or accomplice who has been involved in the non-compliance. At the Bills Committee meeting on 10 December 2001 when clause 178 was considered, some Members commented that such an expression (which is similar to this clause) should be made clearer. We therefore propose to further amend the provision to “any other person knowingly involved in the failure” to better reflect the policy intention. A similar amendment is also proposed to clauses 178(1)(b), 204(1)(b) and 352(3)(b).

he and, where applicable, that other person had been
guilty of contempt of court.

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Financial Services Bureau
Securities and Futures Commission
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