Global Financial Services Regulatory Guide - Hong Kong SAR

4. How do the licensing requirements apply to cross-border business in your jurisdiction?

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# How do the licensing requirements apply to cross-border business in your jurisdiction?

Dealings with customers or counterparties in Hong Kong by a firm from outside of Hong Kong may be subject to Hong Kong laws and regulations, which may include the application of Hong Kong licensing/authorization requirements. The overseas firm will also need to consider Hong Kong marketing regulations.

The SFO requires any person that carries out a business in an RA in Hong Kong to be licensed by the SFC. The AMLO contains similar provisions regarding regulated VA activities. They are generally understood to apply to an activity conducted in Hong Kong, or where there is otherwise a sufficient nexus to Hong Kong.

The SFO and the AMLO also extend the licensing requirements to situations where the carrying out of the business in an activity that may be an RA or a regulated VA activity by a person is conducted from outside Hong Kong but there is active marketing of such services to the Hong Kong public. Therefore, even if no nexus with Hong Kong can be established, the second line of inquiry regarding the marketing activities by an overseas person will nevertheless need to be considered as it can separately trigger the licensing requirements.  
  
While any analysis will depend on the relevant facts and circumstances of each case, the key question is whether an overseas person has actively marketed its SFC-regulated services to the Hong Kong public. Examples of this may include frequently calling upon Hong Kong investors and marketing the services (including offering products), running a mass media program targeting the investing public in Hong Kong, and conducting internet activities specifically targeting Hong Kong investors. A particularly important consideration is whether the relevant services are sought out by the customers on their own initiative and the intermediary has acted passively in response to the request by the customers. Note, however, that these factors are not definitive and any cross-border activities targeted at Hong Kong persons must be structured with care to ensure compliance with the licensing requirements.

In certain circumstances, the SFC may grant a temporary license to a corporation or individual who is regulated by a relevant overseas regulatory body in order to carry out an RA in Hong Kong, which is equivalent to that being carried out principally outside Hong Kong, for a short period of time. Temporary licenses are not valid for more than three months, and the same entity or person will not be granted temporary licenses for more than six months within any two-year period. One of the key considerations in granting a temporary license is whether the overseas regulator concerned performs a function similar to the functions of the SFC and is empowered to investigate and, where applicable, to take disciplinary action for the conduct of the applicant in Hong Kong. There is also the potential for itinerant professionals to obtain a representative license to perform RAs for short periods of time, subject to conditions determined by the SFC (e.g., that they shall not carry on activities in Hong Kong for more than 30 days in each calendar year, or shall at all times be accompanied by another SFC-licensed person in carrying on any RAs in Hong Kong).

The authorization and approval requirements for authorized institutions and local representative offices under the BO and the stored value facility licensing requirements under the PSSVFO generally apply only if the relevant activities are carried out in Hong Kong. For example, the receipt and holding of deposits outside Hong Kong would not normally constitute carrying out a deposit-taking business in Hong Kong. On the other hand, the money broker approval requirement does not necessarily require that the money broker carry out business in Hong Kong  ̶  it is sufficient if the money broking service is provided from outside Hong Kong to persons in Hong Kong. Cross-border marketing activities in Hong Kong may be subject to restrictions under the BO or the PSSVFO. By way of example, there are mandatory disclosure requirements for invitations to place offshore deposits with a non-authorized institution that targets the Hong Kong public. There are also strict prohibitions on non-authorized institutions representing themselves (expressly or impliedly) as conducting business as an authorized institution in Hong Kong. This includes restrictions on the use of the word "bank" and derivatives thereof (e.g., banking) by persons other than HKMA-licensed banks or recognized central banks.

All financial institutions that are regulated and licensed in Hong Kong must comply with the AMLO in applying anti-money laundering and counter-financing of terrorism (AML/CFT) requirements; in the case of licensed money lenders, with equivalent AML/CFT guidelines issued by the CR. The Hong Kong regulators have each issued guidance setting out their expectations regarding how the AMLO applies to specific business activities.

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