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Exploring the Role of a Responsible Officer

Introduction

In this Q&A, senior partner Nick Gall explores the roles, responsibilities and potential liabilities of an SFC-approved Responsible Officer.

Q) What is a Responsible Officer?

A) A Responsible Officer is an individual who is approved by the Securities and Futures Commission (SFC) under section 126(1) of the Securities and Futures Ordinance (the “SFO”) as a Responsible Officer of a licensed corporation. The regime was introduced by the SFC to implement a stronger management accountability principle.

Q) How many Responsible Officers is a licensed corporation required to have?

A) Not less than 2 individuals, at least one of whom must be an executive director (see below), must be approved as responsible officers for each type of regulated activity conducted by the licensed corporation. The requirement of 2 responsible officers was confirmed in *Re Uni-Alpha Securities Ltd and Another* (unreported, HCMP 714/2006, 27 June 2006), in which one of the two officers had resigned leaving only one responsible officer, necessitating a cessation of business.

In addition, no licensed corporation may carry out any regulated activity unless every executive director of the corporation (i.e. each director who participates and is involved in the day-to-day management of the corporation) is approved as a responsible officer.

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Q) What are the requirements of the role of Responsible Officer?

A) The starting point is that only licensed representatives can be Responsible Officers. Therefore, all the usual licensing requirements to be a licensed representative apply. The SFC's Guidelines on Competence include, for example, that it is necessary to satisfy the SFC that the person:

- a) is fit and proper (which has regard to his financial status, educational or other qualifications or experience, his ability to carry on the regulated activity competently, honestly and fairly and his reputation, character, reliability and financial integrity);
- b) has a good understanding of the regulatory framework, including the laws, regulations and associated codes governing his intended industry sectors;
- c) is aware of the ethical standards expected of an individual licensee; and
- d) is knowledgeable of the financial products that he deals in or advises upon and the markets in which he provide services.

In addition to the general requirements of a licensed representative, the SFC states that a Responsible Officer has to fulfil four basic elements which relate to:

- a) academic / industry qualification;
- b) industry experience;
- c) management experience; and
- d) regulatory knowledge.

Accordingly, the experience and qualifications requirements for Responsible Officers are significantly more onerous than for licensed representatives.

Q) Can a person be the Responsible Officer for a number of licensed corporations?

A) The SFC has stated that they are unlikely to be satisfied that a person will be fit and proper to be licensed to act for more than one licensed corporation, unless the licensed corporations are in the same corporate group or owned by the same controlling shareholders. Similarly, there will be conflict of interest concerns if a Responsible Officer also acts as a director of, or an external consultant or compliance advisor to, other licensed corporations.

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Q) Can the SFC exercise its disciplinary powers against a Responsible Officer?

A) Under Part IX of the SFO, the SFC may exercise its disciplinary powers to sanction a regulated person if the person is, or was at any time, guilty of misconduct or is considered not fit and proper to be or to remain the same type of regulated person. For these purposes, the term “regulated person” includes a Responsible Officer. 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 (including the Responsible Officer), then that person is also guilty of misconduct (section 193(2) of the SFO).

The SFC has stated that whether they are to discipline a regulated person depends on the specific facts of each case and that they will take into account the individual’s apparent or actual authority in relation to the particular business and operations, his or her level of responsibility within the licensed corporation concerned, any supervisory duties he or she may perform, and the level of control or knowledge he or she may have concerning any failure by the corporation or persons under his supervision to follow the SFC’s Code of Conduct.

The SFC can impose disciplinary sanctions of a civil nature, for example, licence revocation or suspension, pecuniary fine and reprimand. In addition to these, senior management of licensed corporations (including Responsible Officers) should also be aware of potential criminal liability in certain circumstances.

Q) Can a Responsible Officer rely solely upon the licensed corporation’s compliance function in respect of the corporation’s compliance with applicable regulatory standards?

A) The SFC has said that, *“The RO of a licensed corporation is a person who bears primary responsibility for compliance with all applicable regulatory standards and that where there is a failure in respect of compliance, there is little room for blame shifting.”* This was said before the Hong Kong’s Security and Futures Appeals Tribunal (SFAT) which, in August 2015, affirmed the decision of the SFC to revoke the approval of a Responsible Officer at Ping An of China Securities (Hong Kong). The Tribunal found that the Responsible Officer was involved in serious compliance control deficiencies at Ping An, during periods both when a compliance officer was employed in the organisation and a period when the organisation was without a compliance officer and the Responsible Officer had assumed responsibility. The SFAT said that that when disciplinary action for compliance failures are directed at the Responsible Officer, *“it is not possible for the RO to shift responsibility either upwards towards more senior management or downwards towards employees who do not stand in the same position or level of the RO.”*

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Q) Can a Responsible Officer be held responsible for the implementation of appropriate anti-money laundering (AML) systems and controls?

A) In short, yes. The SFC has said that the Responsible Officer bears primary responsibility for compliance with all applicable regulatory standards. This is highlighted in a relatively recent matter in which the SFC sanctioned Guosen Securities (HK) Brokerage Company Limited (Guosen) over its failures to comply with AML regulatory requirements when handling third party fund deposits. The SFC found that Guosen's breaches were attributable to its (former) Responsible Officer's failure to discharge his duties as a Responsible Officer and as a member of Guosen's senior management. The SFC determined that as the Responsible Officer was the most senior person overseeing Guosen's retail brokerage business during the relevant time, he failed to ensure that Guosen had:

- i) put in place effective policies to scrutinise and approve third party deposits received by retail clients;
- ii) implemented adequate systems and controls to identify and monitor third party deposits made into its bank sub-accounts;
- iii) communicated and enforced its internal AML/CFT policies effectively; and
- iv) put in place proper procedures for reporting suspicious transactions.

The SFC also found that the Responsible Officer had failed to supervise staff members diligently to ensure that they adhered to Guosen's AML/CFT policies. He was prohibited from re-entering the industry for 10 months from 17 April 2019 to 16 February 2020.

Q) How vigilant must a Responsible Officer be regarding the accuracy of information that is submitted to the SFC?

A) As in all cases when any information is provided to the SFC (indeed, to any regulator), it is imperative that the information being provided is accurate and not misleading. This is the case irrespective of the circumstances for which the information is required by the SFC, for example, in any licensing application or pursuant to any request during the course of an investigation by the SFC. An example of an extreme case where a Responsible Officer failed to comply with his obligations in this regard was when, in June 2017, the Eastern Magistrates' Court convicted QMIS Securities Limited (QMIS) and its former Responsible Officer of making false or misleading representations when submitting licensing information to the SFC. The background to this was that on 3 January 2014, QMIS submitted to the SFC a form concerning the cessation of an employee's status as an SFC-licensed representative. In the form, "job rotation" was given as the reason for the staff member to cease to be an SFC-licensed representative. The Responsible Officer declared that all information provided in the form was complete, true and correct. However, the employee had in fact been terminated due to his misappropriation of client money. QMIS and the Responsible Officer were fined and ordered to pay the SFC's investigation costs.

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