

Part 2 :
Estate Agents Ordinance and Subsidiary Legislation

Part 2: Estate Agents Ordinance and Subsidiary Legislation

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THE ESTATE AGENTS ORDINANCE AND SUBSIDIARY LEGISLATION

1. The statutory regime governing estate agents is set out in:
 - EAO (Cap 511);
 - Licensing Regulation;
 - Exemption Order;
 - Practice Regulation;
 - Commission Regulation; and
 - Appeal Regulation.
2. Some of the provisions in the EAO and some of the regulations apply only to sales of residential properties. In addition, there are Practice Circulars and the Code issued by the Authority.

THE ESTATE AGENTS AUTHORITY (THE AUTHORITY)

3. The Authority is a body corporate set up under the EAO. Its principal functions under the EAO include the following:
 - to regulate and control the practice of estate agents and salespersons;
 - to take such actions as the Authority considers appropriate or necessary to promote integrity and competence amongst, or maintain or enhance the status of, estate agents and salespersons; and
 - if it thinks fit, to liaise with educational institutions and training bodies for the purposes of provision by or on behalf of such institutions or bodies of training courses which are designed to ensure competency or establish standards of conduct or which are otherwise relevant to estate agency work.

MEMBERSHIP OF THE AUTHORITY

4. The members of the Authority are appointed by the Chief Executive of Hong Kong. Membership comprises:
 - the Chairman and the Vice-Chairman, neither of whom may be individuals who do estate agency work;
 - not more than 18 Ordinary Members;
 - at least one of the Ordinary Members must be a “public officer” (i.e. a person holding an office of emolument under the Government, whether such office be permanent or temporary); and
 - the other Ordinary Members are from the following categories:
(A) individuals who do estate agency work, (B) individuals who do not do estate agency work but who have knowledge of estate agency work, and (C) individuals who are not from categories (A) or (B) but who are suitable for appointment (see the Schedule to the EAO).
5. The Authority may establish committees to carry out some of its work: Sections 8 and 9.

COMPLAINTS HANDLING

6. If there is a complaint or a submission by the Chief Executive Officer that a licensee has failed to comply with the EAO and/or its subsidiary legislation, or is not eligible to hold or continue to hold a licence, or has failed to comply with a specified condition attached to his licence, the Authority may deal with the matter itself or refer the matter to a disciplinary committee: Sections 29(1), 29(2). The Authority or the disciplinary committee having considered the case may conduct an inquiry as it thinks fit: Section 29(3).
7. Under Section 28, where the Authority has reason to believe that a licensee has not complied with, or has contravened, a requirement or other provision of the EAO or its subsidiary legislation, an investigation may be conducted by one or more employees of the Authority and/or one or more certified public accountants appointed by the Authority (“the investigator”).

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8. The licensee under investigation shall:
 - produce documents specified by the investigator, which are in the possession or under the control of the licensee;
 - give such explanation or further particulars as the investigator specifies; and
 - give the investigator all assistance as he can reasonably give.
9. On the conclusion of his investigation, the investigator will make a final report to the Authority with a recommendation as to whether the disciplinary powers under Section 30 should or should not be exercised.
10. The disciplinary powers set out in Section 30 may be exercised by the Authority or a disciplinary committee where:
 - the recommendation of the investigator that exercise of powers under Section 30 should be considered, is accepted by the Authority or by the disciplinary committee to which it was referred by the Authority; or
 - a complaint under Section 29(1) or submission made under Section 29(2) has been considered by the Authority or a disciplinary committee which is satisfied that the complaint or submission is well-founded.
11. Under Section 30(1), the Authority or the disciplinary committee may exercise the following powers:
 - admonish or reprimand the licensee concerned;
 - attach specified conditions to the licence concerned;
 - vary any condition already attached to such licence;
 - suspend such licence for a specified period not exceeding two years;
 - revoke such licence;
 - impose a fine of a specified amount not exceeding \$300,000; and
 - make such order as it thinks fit with regard to the payment of:
 - its costs regarding the proceedings;
 - costs of the investigator by whom the recommendation was made;
 - costs of the complainant; or
 - costs of the licensee concerned.

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12. The licensee under investigation must be given a reasonable opportunity of being heard. The powers in Section 30 will not be exercised against a licensee if he shows that he had taken all reasonable steps and exercised all due diligence to avoid:
 - the non-compliance or contravention which is the subject of the investigation in question, or
 - the occurrence of the matter which is the subject of the complaint or submission (as the case may be).
13. Section 34 provides that the Authority, or the disciplinary committee, conducting the inquiry under Section 29(3) has the power to:
 - take evidence on oath;
 - summon any person to attend the inquiry to give evidence or produce any document or other information relevant to the inquiry; and
 - award reasonable expenses to a witness.
14. At an inquiry conducted under Section 29, the case will usually be presented by the representative of the Authority. The licensee may appear in person or be legally represented.

STATEMENT OF PARTICULARS OF BUSINESS

15. Before carrying on estate agency business at any place under a particular business name, a licensed estate agent is required to apply for a Statement of the Particulars of Business (SPOB) for that place and name (see Section 10(1) of the Licensing Regulation). If a licensed estate agent has more than one place of business and/or operates his business under more than one name, he is required to apply for as many SPOBs as are necessary. For example, a licensed estate agent carrying on estate agency business at one place under two different business names is required to apply for two SPOBs.

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16. Under Section 14 of the Licensing Regulation, every holder of an estate agent's licence is required to:
- display the SPOB in a conspicuous position at each place at which he carries on business;
 - state clearly and conspicuously on any letter, account, receipt, pamphlet, brochure and other document issued by him or on his behalf the following:
 - the number of his licence or the relevant SPOB;
 - the business name as stated in the relevant SPOB; and
 - the place of business as stated in the relevant SPOB;
 - state clearly and conspicuously in all advertisements (pamphlets and brochures excepted) by him or on his behalf the following:
 - the number of his licence or the relevant SPOB; and
 - the business name as stated in the relevant SPOB.

IMPORTANT DEFINITIONS IN THE EAO

Licensees

17. In Section 2 of the EAO:
- an “estate agent” is defined as “a **person** who in the course of a business (whether or not he carries on that or any other business) does estate agency work”.
 - a “salesperson” is defined as “an **individual** who in the course of his employment by, or as a director of, an estate agent does estate agency work”.
18. Under Section 3 of the Interpretation and General Clauses Ordinance, a “person” includes “any body of persons corporate or unincorporated”. Thus, an “estate agent” may be a limited company or an individual. However, a “salesperson” is always an individual.

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19. Apart from this difference, the fundamental difference between an estate agent and a salesperson is: an estate agent does estate agency work “in the course of a business” while a salesperson does so “in the course of his employment by an estate agent” or as a director of an estate agent. The estate agent works on his own account while the salesperson does so as an employee or as a director. Moreover, under Section 21(1) of the EAO, a salesperson’s licence shall not be granted to a body of persons, whether corporate or unincorporated.

Estate Agency Work

20. The EAO provides that “estate agency work”¹ means any work done in the course of business for a client, being work done:
- in relation to the introduction to the client of a third person who wishes to acquire or dispose of a property, or to the negotiation for the acquisition or disposition of a property by the client; or
 - after such introduction or negotiation, in relation to the acquisition or disposition of the property by the client.

The definition may cover the following work done in the course of business for a client:

- marketing a property;
- introducing a property to a client;
- introducing to a client a third person who wishes to acquire or dispose of a property;
- arranging inspection of a property;
- obtaining and supplying to a client information about a property;
- negotiating the terms of sale or leasing; and
- drafting and arranging the signing of a SPA or a lease.

¹ As per Section 2(3) of the EAO, references to “estate agency work” are not to be construed as including references to work which relates solely to a survey, to a valuation or to a disposition by way of auction or tender, and references to “estate agent” without qualification are not to be construed as including references either to a salesperson or to an auctioneer.

LICENSING REQUIREMENTS

Obtaining a Licence Prior to Commencing Practice

21. The licensing regime for the estate agency trade came into effect on 1 January 1999, requiring any person who carries on estate agency work in Hong Kong to hold a licence, and making it an offence to do estate agency work, to hold out as an estate agent and to do other things as stipulated in Section 15 of the EAO without a licence.

22. There are two types of licences:
 - salesperson's licence;
 - estate agent's licence.

23. The differences between an estate agent's licence and a salesperson's licence are:
 - A person holding an estate agent's licence may perform estate agency work without restriction; he may do so as:
 - a sole proprietor;
 - a member of a partnership carrying on estate agency business;
 - a director of a company holding an estate agent's licence; or
 - a salesperson of another licensed estate agent.
 - Section 38 of the EAO requires each office of an estate agency business to be under the effective and separate control of a manager who must be a holder of an estate agent's licence;
 - An individual holding a salesperson's licence may only perform estate agency work for a licensed estate agent.

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Requirements for Obtaining a Licence

The EAO set out the licensing requirements for:

Individuals

24. To apply for an estate agent's licence or a salesperson's licence, a new entrant² must:
- (1) be at least 18 years of age; and
 - (2) be considered a "fit and proper" person to hold a licence. Factors to be considered include:
 - (i) whether he is an undischarged bankrupt;
 - (ii) whether he has made a composition or scheme of arrangement with his creditors in the last five years immediately before the Authority considers the matter;
 - (iii) whether he is a mentally disordered person or a patient within the meaning of Section 2 of the Mental Health Ordinance;
 - (iv) whether he has been convicted of any offence³; and
 - (vi) whether he is a director or officer of a company which is for the time being disqualified under the EAO for holding an estate agent's licence, or whether he was a director or officer of that company at the date when the company was so disqualified;
 - (3) fulfil the educational requirement i.e. have completed an educational qualification of Form 5 level or its equivalent; and
 - (4) fulfil the examination requirement i.e. have passed the Qualifying Examination for Estate Agents (in the case of an Estate Agent's Licence) and the Qualifying Examination for Salespersons (in the case of a Salesperson's Licence) within 12 months immediately prior to the date of application for the relevant licence.

Sole Proprietors

25. A sole proprietor of an estate agency business must have an estate agent's licence. The sole proprietorship must apply for an SPOB for each place of business under a particular business name.

² A "new entrant" is an individual who has never obtained a licence. Individuals having obtained a licence may be subject to certain exemptions (which is not within the scope of this guide) set out in Section 7 of the Licensing Regulation.

³ The relevant EAO provisions require the Authority to consider (a) conviction of offences (other than an offence under the EAO) involving dishonesty, fraud and corruption and (b) conviction of offences under the EAO for which the person has been sentenced to imprisonment, whether suspended or not. In addition to these two types of offences, the Authority also considers all other types of conviction.

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Partnerships

26. (1) At least one member of the partnership is a licensed estate agent.
- (2) Each member who is engaged in the partnership business as an estate agent must be a licensed estate agent.
- (3) Members who are not engaged in the partnership business as an estate agent are not required to be licensed if these members are not an “unfit person”⁴.
- (4) A member who is a licensed estate agent must apply for an SPOB for each place of business under a particular business name.

Companies

27. (1) A company means a company within the meaning of the CO (Cap. 32) or a body corporate incorporated under any other ordinance or outside Hong Kong.
- (2) At least one director of the company must be a licensed estate agent.
- (3) Each director who is engaged in the estate agency business of the company must be a licensed estate agent. Directors who are not engaged in the estate agency business of the company are not required to be licensed.
- (4) There must be a licensed estate agent who is in effective control of the company's estate agency business.
- (5) Each of the company's directors must be considered "fit and proper". Factors to be considered include:
- (i) where the director is an individual, whether he is an undischarged bankrupt;
 - (ii) where the director is a company, whether it is in liquidation or is the subject of a winding-up order, or there is a receiver appointed in relation to it;
 - (iii) whether the director has made a composition or scheme of arrangement with his/its creditors in the last five years before the company's application for a licence;
 - (iv) whether the director is a mentally disordered person or a patient within the meaning of Section 2 of the Mental Health Ordinance;
 - (v) whether the director has been convicted of any offence (other than an offence under the EAO), being a conviction as regards which it was necessary to find that the director acted fraudulently, corruptly or dishonestly;

⁴ See Section 3 of the Exemption Order and paragraph 29 of Part 2 of this guide.

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- (vi) whether the director has been convicted of an offence under the EAO in respect of which he has been sentenced to imprisonment, whether the sentence is suspended or not; and
 - (vii) whether the director is a director or officer of a company for the time being disqualified under the EAO from holding an estate agent's licence, or whether the director was a director or officer of that company at the date when the company was so disqualified.
- (6) The company itself must also be considered “fit and proper” for holding an estate agent’s licence. Factors to be considered include:
- (i) whether the company is in liquidation or is the subject of a winding-up order, or there is a receiver appointed to it, or it has entered into a composition or scheme of arrangement with its creditors within the last five years before the Authority considers the matter; and
 - (ii) whether the company has been convicted of any offence under the EAO.
- (7) The company must apply for an SPOB for each place of business under a particular business name.

Exemptions

28. Section 2 of the Exemption Order provides that a person who does estate agency work is exempted from the requirement to obtain an estate agent’s licence or a salesperson’s licence if he:
- does so exclusively in relation to properties outside Hong Kong; and
 - states in all his letters, accounts, receipts, pamphlets, brochures and other documents and in any advertisement that he is not licensed to deal with any property situated in Hong Kong.
29. Section 3 of the Exemption Order provides that any person who is a member of a partnership carrying on an estate agency business is exempted from the requirement to obtain an estate agent’s licence if:
- he is not engaged in the partnership business as an estate agent;
 - he is not an unfit person; and
 - at least one other member of that partnership is a licensed estate agent. An “unfit person” means a person who:
 - in the case of an individual, is an undischarged bankrupt;

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- in the case of a company, is in liquidation or is the subject of a winding-up order, or in relation to whom there is a receiver appointed;
- has, within the five years immediately prior to the day on which the Authority considers, or where appropriate, begins to consider whether he is an unfit person, made a composition or scheme of arrangement with his/its creditors;
- is a director or officer of a company which is for the time being disqualified under the EAO for holding a licence, or was a director or other officer of that company at the date when the company was so disqualified;
- is a mentally disordered person, or a patient, within the meaning of Section 2 of the Mental Health Ordinance;
- has been convicted, whether in Hong Kong or elsewhere, of any offence (other than an offence under the EAO), as regards which conviction it was necessary to find that the person acted fraudulently, corruptly or dishonestly; or
- has been convicted of an offence under the EAO in respect of which he has been sentenced to imprisonment, whether the sentence is suspended or not.

THE LICENCE

Application for a Licence

30. An application for a licence must be made in the prescribed form and manner as set out under the Licensing Regulation. The relevant forms for the various types of licences are:
- Application for the Grant of Estate Agent's Licence (Individual) (Form 2)
 - Application for the Grant of Estate Agent's Licence (Company)/Statement of Particulars of Business (Form 3)
 - Application for the Grant of Salesperson's Licence (Form 4)
 - Application for the Grant of Statement of Particulars of Business (Form 8)
 - Application for Replacement of Licence/Statement of Particulars of Business (Form 10)
 - Application for Renewal of Estate Agent's Licence (Individual) (Form 11)
 - Application for Renewal of Estate Agent's Licence (Company)/Statement of Particulars of Business (Form 12)

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- Application for Renewal of Salesperson's Licence (Form 13); and
- Application for Renewal of Statement of Particulars of Business (Form 14)

In addition to the above prescribed forms, applicants are also required to complete the relevant supplementary forms to provide additional information in connection with the application.

31. Form 2 and Form 4 each consists of two parts, and require the applicant to:

- provide his personal particulars; and
- answer questions relating to factors to be considered in determining whether the applicant is "fit and proper" to hold a licence and to make a declaration that the information provided is full, complete and true to the best of his knowledge and belief.

32. Section A of Form 3 has to be completed by a representative of the company applying for a licence. This representative must be a licensed estate agent and in effective control of the company's estate agency business.

Section B has to be completed and signed by each individual director who does not hold an estate agent's licence.

Section C must be completed and signed by each corporate director who does not hold an estate agent's licence.

Renewal of Licence

33. A licence is only valid within the period stipulated in it.

Section 13 of the Licensing Regulation provides that an application for the renewal of a licence shall be made not more than three months and not less than one month prior to the expiration of the licence.

Suspension or Revocation of Licence

34. Section 27 of the EAO provides that the Authority may suspend or revoke a licence in any of the following cases:

- an estate agent's licence where notice under Section 40(1) is received that the estate agent has ceased to be engaged in estate agency work;
- a salesperson's licence where notice under Section 40(1) is received that the licensee has ceased to be engaged in estate agency work, and the Authority considers that the relevant licensee is no longer a "fit and proper" person to hold a salesperson's licence;

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- any licensee who, in the opinion of the Authority has been generally doing estate agency work in a manner contrary to public interest, so that to permit him to continue to do so would be contrary to public interest;
 - any licensee who is not eligible to hold or continue to hold the licence under Section 19, 20 or 21;
 - any licensee who has failed to pay any fee, charge or penalty charged or imposed under the Ordinance within the prescribed period;
 - any licensee who has failed to comply with any of the conditions attached to the licence; and
 - any licensee who has contravened or failed to comply with any requirements or other provisions of the EAO or its subsidiary legislation.
35. If the Authority proposes to suspend or revoke a licence it must give the licensee written notice of the proposal and the reasons for it. The licensee has 21 days to make representations to the Authority. Pending consideration of any such representations, the licence cannot be suspended or revoked. Where a licence is suspended or revoked, the Authority must, within 21 days, inform the licensee giving reasons for its decision, and publish notice of the decision in the Government Gazette.

DUTIES OF ESTATE AGENTS

The Supply of Information

36. Section 45 of the EAO requires that as from 1 November 1999 an agent shall enter into a prescribed form of estate agency agreement with his client in respect of residential properties.
37. Section 36(1)(a) refers to the duties and liabilities of a licensed estate agent who has entered into a prescribed form of estate agency agreement with his client for residential properties. The licensed estate agent shall:
- (1) whilst he acts for a vendor⁵, have, in his possession or under his control, information prescribed in:
 - Property Information Form (Form 1) (for sale and purchase); or
 - Leasing Information Form (Form 2) (for leasing);

⁵ According to Section 2 of the EAO, "vendor" means any person by whom a property is or is to be disposed of, and includes a prospective landlord.

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- (2) be reasonably satisfied with regard to the accuracy of this information;
 - (3) supply this information to the persons specified in Form 1 or Form 2;
 - (4) comply with the prescribed requirements when supplying information to those to whom the EAO requires it to be supplied;
 - (5) inform a vendor-client of each offer received, until the client expressly instructs him not to do so or until any requirement under the estate agency agreement requiring him to do so no longer applies to him, whichever is the earlier;
 - (6) disclose to a client full particulars of any pecuniary or other beneficial interest the agent has in the property concerned, together with particulars of any benefit, including any commission or any interest of any kind whatever in the property, whether monetary or otherwise, which will accrue to him should the property be disposed of; and
 - (7) when acting for both the vendor and the purchaser⁶, inform them of this fact, and provide, when requested by any party, any information provided by that party to the other party regarding the property concerned, unless he has been expressly instructed by the other client not to do so.
38. Where a licensee (not being a licensed estate agent to which the above paragraph 37 applies) employed by an estate agent in the course of his employment or appointment as a salesperson (i.e. an individual who in the course of his employment by, or as a director of, an estate agent does estate agency work) does estate agency work in relation to a particular residential property, he should comply with the requirements in paragraphs 37(5), (6) and (7).
39. Where a manager appointed under Section 38(1) (but not one who is a sole proprietor or a partner: see Section 38(2)) acts in relation to a particular residential property, he should comply with the requirements in paragraph 37 as if he were the licensed estate agent who entered into the relevant estate agency agreement.
40. Where a licensed estate agent fails to comply with the requirements in paragraph 37, and the client suffers loss or damage, the failure shall constitute a cause of action enabling the innocent party to sue for damages or any other relief.

It shall be a defence for the licensee to show that he had taken all reasonable steps and exercised all due diligence to avoid the failure.

⁶ According to Section 2 of the EAO, "purchaser" means any person to whom a property is or is to be disposed of, and includes a prospective tenant.

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41. When action is taken as regards the accuracy of the information prescribed in the Property Information Form/Leasing Information Form, the licensee shall be regarded to have taken all reasonable steps and exercised all due diligence to avoid the failure if:
- he relied on information obtained from a source prescribed by the Property Information Form/Leasing Information Form; and
 - it was reasonable for him to have relied on such information; and
 - he had taken all steps reasonably open to him to avoid the failure.

Regulation of Accounts

42. The Authority may, with the approval of the Secretary, make regulations relating to accounts for compliance by licensed estate agents: Section 37 (applicable to residential properties).

Effective Control of Estate Agency Offices

43. Section 38 provides that:
- a licensed estate agent shall ensure that the business at each of his offices is under the effective and separate control of a manager appointed by him; and
 - that the manager shall be an individual and a holder of an estate agent's licence;
 - a licensed estate agent may appoint himself to manage his sole office, or one of his offices; and
 - a manager may control the business of one office only.

Prohibited Employment

44. A licensed estate agent may not employ, as a salesperson, any person who for the time being is not the holder of an estate agent's or salesperson's licence: Section 39.

Breach of this requirement will constitute a cause of action if any person suffers loss or damage by reason of such breach.

Breach of Section 39 is also a criminal offence: see Section 55(2)(b) of the EAO.

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Notification of Certain Events

45. Section 40 requires written notification of certain information to the Authority such as:
- where a licensee has ceased to be engaged in estate agency work, within 31 days of the cessation;
 - where a licensed estate agent has employed or terminated the employment of a salesperson, within 31 days of the event;
 - where a licensed estate agent has appointed or terminated the appointment of a manager (appointed under Section 38), within 31 days of the event;
 - where a person has been appointed as, or ceased to hold the appointment of, a director of a company which is a licensed estate agent, within 31 days of the event; and
 - where a licensed estate agent has become or ceased to be a partner in a partnership which does, or proposes to do, estate agency work, within 31 days of the event.

Director's Liability

46. Where a person by whom an offence under the EAO has been committed is a company, and it is proved that the offence was committed with the consent or connivance of:
- a director; or
 - other officer concerned in the management of the company; or
 - any person purporting to act as such director or officer,

then the director or other officer or the person, as the case may be, shall be guilty of the like offence: Section 42.

Liability for Monies Received

47. An estate agent is liable to repay to a client, any monies received by or on behalf of that agent for or on account of that client, as monies received in the course of his business as an estate agent: Section 43(1).
48. A salesperson receiving money in the course of his estate agency work, and for or on account of a client, must pay such monies forthwith to his estate agent employer, or into a trust account maintained by that agent pursuant to the Practice Regulation: Section 43(2).

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49. These monies may be used only for making:

- payments to the client concerned; or
- other payments in accordance with the client's prior written instructions.

Advertising

50. Section 2 of the EAO defines an "advertisement" as including "every form of advertisement, whether to the public or not".

51. Licensed estate agents who advertise their clients' residential properties should comply with the relevant requirements under the Practice Regulation.

Section 9 of the Practice Regulation provides that a licensed estate agent:

- (1) shall not issue an advertisement relating to his estate agency business which includes any false or misleading statement in a material particular;
- (2) shall obtain a vendor's written consent before issuing any advertisement in respect of the vendor's residential property;
- (3) shall not advertise a residential property at a price or rental or on terms different from that instructed by the client;
- (4) shall not issue an advertisement in respect of a residential property to be sublet without stating in the advertisement that the property is to be sublet; and
- (5) shall remove all advertisements issued by him as soon as is practicable after the residential property concerned is no longer available for sale or purchase or leasing, or the relevant estate agency agreement is terminated, whichever is the earlier.

A licensed estate agent who acts as a sub-listing agent shall comply with Sections 9(3), (4) and (5) of the Practice Regulation.

52. Licensed estate agents should also comply with Section 14(1)(c) of the Licensing Regulation which requires every holder of an estate agent's licence to state clearly and conspicuously in all his advertisements (other than pamphlets and brochures):

- the number of his licence or the relevant SPOB; and
- the business name as stated in the SPOB.

THE ESTATE AGENCY AGREEMENT

The Requirement for Making the Agreement

53. Section 45 of the EAO applies to residential properties only.
54. Section 45(1) provides that in respect of estate agency work performed by an agent, the agent will only have a right or other cause of action for damages or other relief or remedy against the client if:
- the requirement of executing a prescribed estate agency agreement (in Form 3, 4, 5 or 6) under the EAO has been complied with; and
 - the agent was a licensed estate agent at the time when the estate agency agreement was entered into.
55. Therefore, a licensed estate agent cannot recover commission in respect of a residential property unless the prescribed form of estate agency agreement has been executed. This is so even if the client has signed a tripartite PASP under which the vendor and purchaser have agreed to pay commission to the estate agent.

In *Easy Property Co. Ltd v Hau King Kuen* [2004] 1 HKLRD 155, the agent was a party to the provisional agreement, but had not signed the prescribed estate agency agreement with the vendor. The court held that the agent had no right or other cause of action against the vendor as no estate agency agreement has been executed.

Contents of the Agreement

56. The Practice Regulation prescribes the relevant forms for estate agency agreements and property information for residential properties:
- Form 1: Property Information Form
For use in the sale and purchase of residential properties in Hong Kong
 - Form 2: Leasing Information Form
For use in the leasing of residential properties in Hong Kong
 - Form 3: Estate Agency Agreement for Sale of Residential Properties in Hong Kong
For use between an estate agent and a vendor
 - Form 4: Estate Agency Agreement for Purchase of Residential Properties in Hong Kong
For use between an estate agent and a purchaser

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- Form 5: Estate Agency Agreement for Leasing of Residential Properties in Hong Kong
For use between an estate agent and a landlord
 - Form 6: Estate Agency Agreement for Leasing of Residential Properties in Hong Kong
For use between an estate agent and a tenant
57. Section 3 of the Practice Regulation provides that the Form should be:
- completed in accordance with the directions and instructions as specified in the Form; and
 - accompanied by such documents as are specified in the Form; and
 - if the completed Form is required to be provided to a person, so provided in the manner specified in the Form.
58. A licensed estate agent supplying a Form shall obtain the information required in the Form as soon as is practicable and ensure the accuracy of the information obtained and of any other information included in the Form.
59. No prescribed forms are required to be used in the following cases:
- the sale and purchase or the leasing of a car parking space on its own only;
 - the leasing of a residential property which is not a self-contained unit (which means an independent dwelling with separate cooking facilities and bathroom with or without lavatory); and
 - subject to Section 7(1) of the Practice Regulation, a first sale of an undivided share in land in which a residential property forms part.
60. Section 7(1) of the Practice Regulation provides that a licensed estate agent shall not enter into an agreement (not being an estate agency agreement) with the vendor in a first sale of an undivided share in land in which a residential property forms part, unless the agreement states that:
- the agent shall obtain the information in Part 1 of Form 1
 - in accordance with the provisions of that Form, or
 - from the vendor where the agent is unable to obtain the information after taking all reasonable steps and exercising all due diligence to do so;
 - the vendor shall supply the agent with information in Part 2 of Form 1 unless the property is a unit in an uncompleted building;

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- whether the agent is also permitted to act for the purchaser; and
- if the agent also acts for the purchaser, he shall disclose in writing any pecuniary or other beneficial interest he has in the property in the agreement, or when such interest subsequently arises.

Vendor's Statement

61. Part 2 of Form 1 comprises a "Vendor's Statement", which requires the vendor to answer questions and supply information on certain matters relating to the property, namely:
- structural additions or alterations,
 - repairs or improvements, and
 - particulars of any tenancy (if the property is sold subject to an existing tenancy).
62. Licensees should advise a vendor to provide the required information and sign the Vendor's Statement. However, if the vendor decides not to provide the Vendor's Statement, it should be made clear by ticking the appropriate box at the end of the Vendor's Statement.

Statutory Notices

63. The Practice Regulation prescribes the following notices for the matters referred to in Section 40 of the EAO:
- Form 8: Notice of Cessation of Engagement in Estate Agency Work by a Licensee;
 - Form 9: Notice of Employment/Cessation of Employment of a Person as a Salesperson of a Licensed Estate Agent;
 - Form 10: Notice of Appointment/Termination of Appointment of a Person as a Manager of a Licensed Estate Agent;
 - Form 11: Notice of Appointment/Cessation of Appointment of a Person as a Director of a Licensed Estate Agent; and
 - Form 12: Notice of Becoming/Ceasing to be a Member of a Partnership in Estate Agency Business.

OFFENCES AND PENALTIES

64. There are a number of offences specified in the EAO which may be committed by any person (Section 55(1)), or by a licensee (Section 55(2)).
65. These offences are committed if the acts are done “without reasonable excuse”: Sections 55(1) and (2).
66. The offences include:
- where any individual or company carries on or advertises, notifies or states that he carries on or is willing to carry on the business of doing estate agency work or holds himself out to the public as being ready to undertake estate agency work without an estate agent's licence: Section 55(1)(a): Penalty 1 in the following schedule;
 - where an individual, not being a holder of a licence, acts as a salesperson for any licensed estate agent, or holds himself out to the public as being a salesperson, or accepts employment or an appointment as a salesperson from, or acts as a salesperson for, a person who does not hold an estate agent's licence: Section 55(1)(b): Penalty 2 in the following schedule;
 - where a person makes any statement, or furnishes any information, which is false and misleading in a material particular, in connection with any application for the grant or renewal of an estate agent's licence: Section 55(1)(c): Penalty 4 in the following schedule;
 - where a person makes any statement, or furnishes any information, which is false and misleading in a material particular, in connection with any application for the grant or renewal of a salesperson's licence: Section 55(1)(d): Penalty 4 in the following schedule;
 - where, when required under Section 28(5) to produce to an investigator of the Authority (appointed under Section 28(1)), a person fails to produce any record or document specified by the investigator which is in his possession or under his control, or to give the investigator an explanation or further particulars in respect of a record or other document produced as the investigator specifies, or to give assistance to the investigator: Section 55(1)(e): Penalty 2 in the following schedule;
 - where the investigator, the Authority, and any person who assists the investigator or the Authority in the performance of a function under Section 28(5), fails to maintain confidentiality in respect of all matters and information produced for the purposes of an investigation under Section 28(9): Section 55(1)(f): Penalty 2 in the following schedule;

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- where a person who is not a licensed estate agent but who purports to accept or act pursuant to an appointment as manager under Section 38(1)(a): Section 55(1)(g): Penalty 3 in the following schedule;
- where a person who makes any statement or furnishes any information, which is false or misleading in a material particular, in purported compliance with Section 28(5): Section 55(1)(h)(i): Penalty 2 in the following schedule;
- where a person who makes any statement or furnishes any information, which is false or misleading in a material particular, in purported compliance with any requirement imposed on him for the purposes of an inquiry conducted by the Authority or a disciplinary committee under Section 29: Section 55(1)(h)(ii): Penalty 2 in the following schedule;
- where a person, who is being given an opportunity of being heard under Section 30(2) before any disciplinary power is exercised by the Authority or the disciplinary committee, makes any statement or furnishes any information, which is false or misleading in a material particular: Section 55(1)(h)(iii): Penalty 2 in the following schedule;
- where a person makes any statement or furnishes any information, which is false or misleading in a material particular, in purported compliance with any requirement imposed on him for the purposes of proceedings conducted by an appeal tribunal under Section 32: Section 55(1)(h)(iv): Penalty 2 in the following schedule;
- where a person makes any statement or furnishes any information, which is false or misleading in a material particular, in purported compliance with any requirement imposed on him for the purposes of the proceedings of a determination by the Authority of any dispute as regards commission under Section 49: Section 55(1)(h)(v): Penalty 2 in the following schedule;
- where a person who, when summoned or required to attend as a witness or to produce a document or other thing or to answer any questions put to him under any provision of the EAO, refuses or fails to do so: Section 55(1)(i): Penalty 2 in the following schedule;
- where a person obstructs the Authority or any person in the exercise or performance of any of its or his functions: Section 55(1)(j): Penalty 2 in the following schedule;
- where a person, otherwise than in performing a function under the EAO, obliterates, defaces or otherwise alters any existing entry in the register of licensees maintained by the Authority or makes a new entry therein: Section 55(1)(k): Penalty 2 in the following schedule;
- where a licensed estate agent, for or in connection with an estate agency business, uses any name other than that specified in his licence: Section 55(2)(a): Penalty 5 in the following schedule;

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- where a licensed salesperson, for or in connection with an estate agency business, uses any name other than that specified in his licence: Section 55(2)(a): Penalty 6 in the following schedule;
- where a licensed estate agent employs or continues to employ as a salesperson any person who is not the holder of a licence, thereby failing to comply with Section 39(1): Section 55(2)(b): Penalty 5 in the following schedule;
- where a licensed estate agent fails to repay to a client monies received for or on account of the client, or fails to use the monies or any part thereof for the making of payments to the client or in accordance with the client's prior written instructions under Section 43(1) or (3): Section 55(2)(c): Penalty 2 in the following schedule;
- where a licensed estate agent fails to forthwith pay to the estate agent by whom he is employed monies received for or on account of a client of the estate agent or to an account maintained by that agent pursuant to the requirements of regulations under Section 37, thereby failing to comply with Section 43(2): Section 55(2)(d): Penalty 2 in the following schedule; and
- where a licensed salesperson fails to forthwith pay to the estate agent by whom he is employed monies received for or on account of a client of the estate agent or to an account maintained by that agent pursuant to the requirements of regulations under Section 37, thereby failing to comply with Section 43(2): Section 55(2)(d): Penalty 3 in the following schedule.

67. The range of penalties includes:

Schedule		
Penalty	(i) on conviction upon indictment	(ii) on summary conviction
1.	A fine of \$500,000 or imprisonment for 2 years or both	A fine at level 6 (\$50,001-\$100,000) or imprisonment for 6 months or both
2.	A fine of \$200,000 or imprisonment for 1 year or both	A fine at level 6 (\$50,001-\$100,000) or imprisonment for 6 months or both
3.	A fine of \$150,000 or imprisonment for 6 months or both	A fine at level 5 (\$25,001-\$50,000) or imprisonment for 3 months or both
4.	A fine at level 6 (\$50,001-100,000) or imprisonment for 1 year or both	A fine at level 5 (\$25,001-\$50,000) or imprisonment for 6 months or both
5.	A fine at level 6 (\$50,001-100,000) or imprisonment for 6 months or both	A fine at level 5 (\$25,001-\$50,000) or imprisonment for 6 months or both
6.	A fine at level 6 (\$50,001-100,000) or imprisonment for 3 months or both	A fine at level 5 (\$25,001-\$50,000) or imprisonment for 1 month or both

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68. In addition to the above penalties, the court or the magistrate may order that any person who is convicted of an offence under the EAO shall be disqualified for holding a licence for such period not exceeding five years beginning on the date of such conviction.

APPEALS

Categories of Appeal

69. A licensee may, under Section 31(1) of the EAO, within 21 days of the notice under Section 24(2), 27(3) or 30(5) or of the relevant licence, by a written notice to the Secretary appeal against:
- the refusal by the Authority to grant or renew a licence under Section 24;
 - the attachment by the Authority of a condition to a licence under Section 17;
 - the suspension or revocation by the Authority of a licence under Section 27; or
 - the exercise of a disciplinary power under Section 30 by the Authority or a disciplinary committee.

Appeal Panel and Tribunals

70. For the purpose of hearing these appeals, the Secretary appoints a panel comprising a chairman and 11 other members, none of whom shall be a public officer: Section 32(1).

When there is an appeal, the chairman of the panel shall appoint from the members a tribunal consisting of not less than three members to determine the appeal, and one of the members acts as chairman of the tribunal: Section 32(6). The decision of such a tribunal is final: Section 32(9).

Appeal Tribunal Proceedings

71. A tribunal appointed under Section 32 may:
- determine its own procedure: Section 33(1)(a);
 - receive and consider any material even though such material would not be admissible in civil or criminal proceedings: Section 33(1)(b);
 - require any person to attend before it to give evidence and produce documents: Section 33(1)(c);

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- administer oaths and affirmations: Section 33(1)(d);
- examine on oath, affirmation, or otherwise any person attending before it, and require such person attending to answer all questions put by or with the consent of the tribunal: Section 33(1)(e);
- award expenses to a witness incurred for his attendance: Section 33(1)(f);
- determine the manner in which such material is to be received: Section 33(1)(g);
- adjourn any proceedings: Section 33(1)(h); and
- make such order as it thinks fit with regard to the payment of costs of the tribunal: Section 33(1)(i).

72. Any party in these proceedings may participate in person, or through counsel, or a solicitor, or with the consent of the tribunal, through some other person: Section 33(2)(a).

DISPUTES ABOUT COMMISSION

Jurisdiction

73. A dispute over agency commission between a licensed estate agent and his client may be referred to the Authority for determination by it under section 49 of the EAO.

74. A dispute may be referred to the Authority for determination if:

- the dispute is between a licensed estate agent and his client;
- the dispute relates to the amount of the commission or other fee payable or the manner in which it is to be calculated or payable;
- the parties so agree; and
- the requirements of executing a prescribed estate agency agreement under the EAO are complied with.

75. The Authority may decline to determine the dispute if:

- the amount of the commission or other fee in dispute exceeds \$300,000; or
- it is of the opinion that for any reason the dispute should not be determined by it.

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Procedure

76. The procedure is as follows:

- (1) The parties refer the dispute to the Authority for determination:
 - by letter jointly signed by them outlining the dispute; and
 - by paying a filing fee.
- (2) The Authority will appoint one of its legally qualified officers as an adjudicator to determine the dispute.
- (3) The parties should:
 - set out their own case in writing within the prescribed time limit;
 - enclose supporting evidence; and
 - give advance notice of witnesses to be called.
- (4) No legal representation is allowed. This simplifies the hearing procedure and saves costs: see the Commission Regulation.

Fees

77. Fees payable are

- a filing fee: each party pays \$500 when submitting the joint letter to the Authority. On determination of the dispute, the filing fee is deductible from the determination fee.
- a determination fee of 10% of the total amount of the commission or other fee in dispute, subject to a minimum of \$2,000 is payable to the Authority for providing the service.

Appeals to the District Court

78. Any party may appeal to the District Court against a determination of the Authority within 14 days from the date of such determination. The decision of the District Court is final.

Determination Registrable as Judgment of District Court

79. A determination of the Authority may be registered in the District Court. On registration it becomes for all purposes a judgment of the District Court and can be enforced as such. If one party fails to comply with it, the other party may apply to the District Court for a writ of execution to enforce it.

THE CODE OF ETHICS (THE CODE)

80. The Code was promulgated by the Authority for the purpose of providing guidance and directions to licensees in the conduct of estate agency practice.
81. The Code seeks to promote the standard of services of the estate agency trade, enhance protection for consumers and encourage open, fair and honest property transactions. Non-compliance with the Code may lead to the revocation or suspension of a licensee's licence by the Authority, as the licensee may not be considered to be a "fit and proper" person to hold a licence.
82. The illustrations given below are extracted from disciplinary inquiry hearings held by the disciplinary committee.
83. Compliance with the law

Paragraph 3.1.1 of the Code states:

"Estate agents and salespersons shall refrain from activities during their practice which may infringe the law."

Illustration (1): Alienation of property under the HOS

A flat under the HOS or the TPS is subject to alienation restrictions before payment of the premium. Any party who enters into an agreement purporting to alienate such a flat in contravention of such restrictions commits an offence under the HO. A licensee who acts as agent for the parties in such a transaction may infringe the law for aiding and abetting the commission of an offence.

Illustration (2): Causing danger to road users

Licensees who intercept vehicles passing by a development site where units are on sale and endanger their own safety and the safety of others may commit an offence under the Road Traffic Ordinance, and thereby infringe the law.

84. Good understanding of related legislation and requirements

Paragraph 3.2.1 of the Code states:

"Estate agents and salespersons should be fully conversant with the EAO, its subsidiary legislation, this Code of Ethics, and other guidelines issued by the Authority from time to time and shall observe and comply with them in the course of their practice."

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A licensee should be fully conversant with (1) the EAO and its subsidiary legislation, (2) the Code, and (3) other guidelines issued by the Authority from time to time. Such guidelines include Practice Circulars issued by the Authority.

Illustration (1): Advising a client to sign a blank agreement

A PASP is usually a legally binding agreement, and if it is not properly drawn up and completed, dispute and litigation may arise. Some licensees sometimes ask their clients to sign a PASP with some of the essential terms (e.g. the price, amount of deposit, completion date, etc) left blank, intending to fill in such terms by the licensees after they have been agreed. This is not a proper practice. The Authority has issued Practice Circulars (Nos. 03-02 (CR) and 13-06 (CR)) advising licensees against this practice. Therefore, any licensee who advises a client to sign a blank PASP may be in breach of the guidelines issued by the Authority.

85. Paragraph 3.2.2 of the Code states:

“Estate agents and salespersons should keep themselves informed of any laws, government regulations, essential facts and developments in the real estate market in order to be in a position to advise their clients in a responsible manner. They should strive to provide services and opinions based on knowledge, training, qualifications and experience in the real estate business.”

Illustration (1): Sale of village house in the New Territories

Some village houses in the New Territories are subject to alienation restrictions. For example, the Government Grant may prohibit the owner from selling the house within five years from the date of the CC. A licensee dealing with such a property should advise a client of any restriction on alienation; on default he may be in breach of this paragraph of the Code.

86. Professional knowledge and competence

Paragraph 3.3.1 of the Code states:

“Estate agents and salespersons shall, in the course of business, provide services to clients with honesty, fidelity and integrity. They should protect their clients against fraud, misrepresentation or any unethical practices in connection with real estate transactions.”

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Illustration (1): Misleading a client about his eligibility for a mortgage

Mortgage finance is indispensable for most purchasers. Some will not be familiar with the requirements of banks for the grant of mortgage loans. For example, a bank may require an applicant who is unable to produce any proof of income to supply a guarantor who can produce proof of income. A licensee who knows the requirements of banks but who dishonestly represents to such a client that he could obtain a mortgage without any proof of income or guarantor, so as to induce him to make a decision on the purchase of a property, commits a breach of this paragraph of the Code.

Illustration (2): Failure to give correct information to a landlord

The landlord has made it a requirement that his flat be let to a small family. A licensee who has been informed of the landlord's requirement but who, in his eagerness to close a deal, lies to the landlord about the size of the tenant's family, fails to act with "honesty, fidelity and integrity" and therefore commits a breach of this paragraph of the Code.

87. Ethical and moral standards during practice and responsibilities towards clients

Paragraph 3.4.1 of the Code states:

"Estate agents and salespersons, in engaging and accepting an appointment as an agent, should protect and promote the interests of their clients, carry out the instructions of their clients in accordance with the estate agency agreement and act in an impartial and just manner to all parties involved in the transaction."

Illustration (1): Transfer of business and tenancy

The transfer of an existing business together with the tenancy of the business premises is a complicated matter. It involves complex and difficult legal and practical considerations. A licensee dealing with such a transfer should advise the parties to seek their own legal advice. He should not attempt to draw up any agreement, provisional or otherwise to effect a transfer of business for signing by the parties. A licensee who draws up an agreement for transfer of business for signing by the parties or who fails to advise the parties to seek legal advice in such a case would be considered as having failed to "protect and promote" the interests of his clients.

Illustration (2): Failure to carry out a vendor's instructions

Some vendors do not wish to sell their properties to speculators or confirmors who will sub-sell the property prior to completion of the sale. A vendor gives a clear instruction to an estate agent that he would not sell his property to a confirmor. The agent nonetheless introduces to him a purchaser whom the agent knows is a property speculator who will sub-sell the property before completion and the agent prepares a PASP which allows the purchaser to sub-sell before completion. The agent fails to "carry out the instructions" of the vendor.

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88. Exercising due diligence

Paragraph 3.5.1 of the Code states:

“Estate agents and salespersons shall, in fulfilling their duties, exercise due care and due diligence.”

Illustration (1): Negative equity

In a sale and purchase transaction, if the vendor purchased the property at a price much higher than the price which the vendor is now selling and the property's mortgage has not yet been released, then it is possible that the property is in negative equity. A negative equity property refers to a property which sells for less than the outstanding mortgage. The licensee should alert the prospective purchaser to the risk of the vendor being unable to complete the sale and purchase and advise him to take appropriate steps to protect himself against this risk (such as requiring all deposits [both the initial deposit and further deposit] to be paid to and held by the vendor's or the purchaser's solicitors as stakeholders). A licensee who fails to advise his client of the risk involved and to take steps to protect his client would be considered as having failed to exercise due care and due diligence.

Illustration (2): Failure to ascertain age and saleable area of property

The age and saleable area of a property are usually of great concern to a prospective purchaser. A licensee who fails to supply correct information about the age and saleable area of a property to his purchaser client fails to exercise due care and due diligence.

89. Minimising conflict-of-interest situations

Paragraph 3.6.1 of the Code states:

“Estate agents and salespersons should avoid accepting an appointment involving a property in which they have a beneficial interest.”

Illustration: An estate agent selling/letting his own property to a client

Under common law, an agent breaches his fiduciary duty to his principal by selling or letting his own property to his principal without full disclosure to his principal the fact that the property is owned by him. This paragraph of the Code goes further than the common law rule and requires a licensee to avoid accepting an appointment involving a property in which he has a beneficial interest. Thus a licensee should avoid selling or letting to a client a property in which he has a beneficial interest, i.e. one partly or wholly owned, whether directly or indirectly, by him.

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90. Dual agency

Paragraph 3.6.2 of the Code states:

“Estate agents and salespersons shall, in the event of possible or potential conflict of interest (such as representing both the vendor and the purchaser), disclose to their clients that they are so acting. Any pecuniary or other beneficial interests in relation to the property shall be disclosed fully to all parties concerned.”

Illustration: Failure to disclose estate agent acts for both parties

Where an estate agent acts for both parties, he should disclose to his clients that he is so acting. Where the agent and his clients have entered into Form 3, 4, 5 or 6, such disclosure should be fully made in the Forms. On such a form, the agent has to state if the agency is single or dual or potentially dual. Failure to disclose to a client his dual or potentially dual agency relationship or failure to disclose pecuniary or other beneficial interests in relation to the property is a breach of this paragraph of the Code.

91. Relationship between agents and ethical standards to be observed in conducting business

Paragraph 3.7.1 of the Code states:

“Estate agents and salespersons shall not seek unfair advantage over, nor injure directly or indirectly the reputation of, nor publicly disparage the business practice of other agencies.”

Illustration: Injuring the reputation of another estate agency

A vendor gives exclusive agency to estate agent A. Estate agent B has a client who wishes to purchase the property. If, in order to induce the vendor to sell the property through his estate agency to his client, estate agent B makes remarks that are injurious or defamatory to the reputation of estate agent A, estate agent B is in breach of this paragraph of the Code.

92. Disrepute

Paragraph 3.7.2 of the Code states:

“Estate agents and salespersons should avoid any practice which may bring discredit and/or disrepute to the estate agency trade.”

Illustration: Fighting with rival agents

A licensee who fights or assaults another licensee while scrambling for customers brings discredit and disrepute to the trade. Verbal insults will likewise tarnish the image of the trade.

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93. Fair competition

Paragraph 3.7.3 states:

“Estate agents and salespersons should adhere to the principles of fair competition and refrain from restrictive business practices.”

Illustration: Refusal to return “Certificate of Availability for Sale”

An estate agent enters into a non-exclusive estate agency agreement with a vendor which contains a clause requiring the vendor to deposit with the estate agent his Certificate of Availability for Sale for the sale of his HOS property under the HOS Secondary Market Scheme for a period of six months. During the said period, another estate agent introduces a purchaser to the vendor to purchase his HOS property. The vendor is required to produce to that other estate agent the “Certificate of Availability for Sale” before he can enter into a PASP. He demands for return of the “Certificate of Availability for Sale” but the estate agent refuses to hand it over so that no other estate agent can act for the vendor, notwithstanding his appointment is not an exclusive agency. The act amounts to a breach of the principle of fair competition.

PRACTICE REGULATIONS

General Duties of Estate Agents

94. Section 5 of the Practice Regulation requires the licensed estate agent not to cause a person to become his client before being informed:

- that the agent is a licensed estate agent; and
- of the number of his licence.

95. Similarly, a licensed salesperson cannot perform any estate agency work for a person before the person is informed:

- that the salesperson is a licensed salesperson; and
- of the number of his licence.

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Listing and Seeking Instructions

96. Section 8 of the Practice Regulation requires a licensee to observe the following provisions in regard to listings and seeking instructions of residential properties:

- a licensee should not supply any information to a client which is false or misleading in a material particular in relation to a residential property when seeking instructions from a client;
- a licensed estate agent should keep a record of all listings of residential properties and copies of all estate agency agreements entered into in relation to residential properties for not less than three years from the receipt of the listings or the entering into of estate agency agreements, as the case may be:
 - an officer of the Authority, authorised in writing by the Authority, shall have the right to inspect the record at any time during office hours without prior notice;
 - a licensee should answer any question and supply any information requested by the officer in relation to such inspection;
- a licensee should not pass to a sub-listing agent any information about a vendor or his residential property supplied by the vendor without the prior written consent of the vendor:
 - a sub-listing agent means a licensee who obtains an instruction from a principal agent in respect of the listing of a residential property;
- a licensee should not solicit instructions from a vendor if he knows, or ought reasonably to know, that the residential property concerned is subject to an exclusive agency granted to another licensed estate agent under an estate agency agreement, unless the licensee has drawn to the vendor's attention that he may be liable for additional commission if he enters into another estate agency agreement in respect of the property.

Use of the Estate Agency Agreement

97. Section 6 of the Practice Regulation concerns the use of estate agency agreements for residential properties and provides that:

- a licensed estate agent who acts for a vendor shall enter into an estate agency agreement with the vendor:

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- within seven working days after accepting the vendor's instruction to sell or lease the residential property concerned; or
 - prior to advertising the property for sale or lease; or
 - prior to signing an SPA or a lease of the property, whichever is the earlier.
- a licensed estate agent who acts for a purchaser shall enter into an estate agency agreement with the purchaser prior to:
 - arranging an inspection of the residential property concerned by the purchaser; or
 - signing an SPA or a lease of the property, whichever is the earlier.
 - a licensee shall, before entering into an estate agency agreement with a person who is not legally represented,
 - explain to him the different types of agency appointment in the agreement and their implications and effects on the person;
 - explain to him every term and condition in the agreement to ensure he is made aware of his rights and obligations under the agreement, and
 - recommend that the person seek legal advice if he does not understand any of the above explanations.

Property Inspection and Viewing

98. Section 10 of the Practice Regulation provides for inspection of residential properties as follows:
- a licensee shall assist in making arrangements for the inspection and viewing by a purchaser of a residential property (including a car parking space and common areas if applicable) and accompany the purchaser for such inspection and viewing unless otherwise instructed by the purchaser;
 - a licensee shall not arrange an inspection and viewing of a residential property without the prior consent of the vendor;
 - a licensee shall establish what is to be included in the sale or leasing of a residential property before the signing of an agreement for sale and purchase or a lease and prepare a written inventory thereof.

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Conduct During Negotiations

99. Under Section 11 of the Practice Regulation:

- a licensee should not claim that a purchaser has made an offer unless the offer exists;
- a licensee should ensure that information and comparables on residential property prices and rentals supplied to a client for reference or comparison do not misrepresent the value of the residential property concerned;
- a licensee should not exercise undue influence over a vendor or a purchaser for the purpose of inducing him to enter into an SPA, or a lease;
- a licensee should keep a written record of all offers in respect of a residential property;
- a licensee should present an offer to a client for acceptance as soon as is practicable after receiving it;
- Unless an SPA or a lease has been entered into in respect of the residential property concerned, a licensee should inform a client of all offers received in the order he receives them and present them in an objective and unbiased manner.

Handling of Client's Money and Keeping of Accounts and Records

100. The following accounts regulations are provided in Section 12 of the Practice Regulation:

- (1) A licensed estate agent should keep proper accounts as to monies received or held, or paid by him, for or on account for clients:
 - any officer authorised in writing by the Authority can inspect such accounts at any time during office hours without prior notice;
 - a licensee should answer any question and supply any information requested by the officer in relation to such inspection.
- (2) A licensed estate agent should, if required to do so by the Authority, furnish to the Authority a certificate issued by a certified public accountant as to whether proper accounts have been kept in accordance with (1) above;

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- (3) A licensed estate agent should issue a written receipt to a client immediately for any monies received, and retain a copy of the receipt for not less than three years after the receipt is issued;
- (4) A licensed estate agent should deposit all monies received or held for or on account of a client in a trust account maintained at an authorised institution, and retain a copy of the deposit slip for not less than three years after the deposit was made:
 - an authorised institution means a fully licensed bank, a restricted licence bank, or a deposit-taking company under the Banking Ordinance;
- (5) A licensed estate agent should not withdraw money from a trust account except in accordance with his client's instructions and by cheque or by electronic funds transfer;
- (6) A licensed estate agent who has neither received nor held money for or on account for a client during any financial year of the agent must make, and send, to the Authority a statutory declaration to that effect:
 - if required to do so by the Authority; and
 - within the period specified by the Authority;
- (7) A licensed estate agent should only release deposit money in relation to the sale and purchase or lease of a residential property in accordance with the terms of the SPA or lease concerned, or the purchaser's instructions;
- (8) Prior to releasing any deposit money under paragraph 7, a licensed estate agent should ensure that the identity of the vendor and of the owner of the residential property concerned are the same or, if they are different, that the vendor has authority to sell the property;
- (9) A licensed estate agent should return a purchaser's cheque or deposit money as soon as is practicable if the purchaser's offer to purchase or lease the residential property concerned is not accepted by the vendor or the landlord.

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PASP

101. The requirements of Section 13 of the Practice Regulation in regard to PASPs (usually refer to SPAs prepared by licensees) and leases of residential properties are as follows:

- (1) a licensee should, before a client who is not legally represented enters into an SPA or lease of a residential property, explain to the client the meaning of each clause of the agreement or lease and draw to his attention the meaning of any essential terms and provisions, and recommend that he seek legal advice if he does not understand any part of the explanation given;
- (2) a licensee should not (a) continue to market a residential property after the signing of an SPA or a lease in respect of the property and (b) be obligated to disclose any further offers to the vendor concerning the property;
- (3) to avoid fraudulent misrepresentation of identity in an SPA or a lease of a residential property, a licensee should take all practicable steps to ensure that the name of the vendor is correct. If the vendor is an individual, such steps may include collecting a copy of his Hong Kong identity card or other identification document; and
- (4) a licensee acting for the vendor of a residential property should, immediately before an SPA or a lease of the property is entered into, cause to be carried out a land search in the Land Registry in respect of the property and supply a copy of the land search to the purchaser of the property.

Commission

102. Section 14 of the Practice Regulation provides as follows:

- (1) A licensee acting as a sub-listing agent should not demand payment of any commission from the client of the principal agent;
- (2) A licensee should not recommend to a client the use of services of any other person where a pecuniary or other beneficial interest may accrue to the licensee in consequence of the recommendation, or the use of the services by the client, without first disclosing that interest to the client at the time of the recommendation;
- (3) A licensed estate agent should issue a written receipt immediately to a client for any commission paid by the client, and retain a copy of such receipt for not less than three years after it is issued. A licensed estate agent should also retain a copy of an invoice for commission for not less than three years after it is issued.

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Effective Control of Offices

103. Section 15 of the Practice Regulation requires a licensed estate agent to establish proper procedures or systems to supervise and manage his estate agency business to ensure that his employees or persons under his control comply with the provisions of the EAO.

Compliance by the Partnership

104. Under Section 16 of the Practice Regulation, where two or more licensed estate agents are members of a partnership, the following requirements of the EAO will be regarded as having been complied with by each of the members if, but only if, each requirement or provision has been complied with by at least one of the members:

- appointment of a manager for the effective control of an office: Section 38;
- notifying the Authority of
 - the employment or cessation of employment of a salesperson; and
 - the appointment or termination of appointment of a manager appointed under Section 38: Sections 40(2) and (3);
- supplying a copy of an unexecuted estate agency agreement to a client: Section 47; and
- supplying a copy of an executed estate agency agreement to a client: Section 48.

FIRST SALES

RPFSO

105. The RPFSO, which regulates the sale of first-hand residential properties in Hong Kong, came into effect on 29 April 2013. The objectives of the RPFSO are to create a clear, fair, balanced, practical and efficient mechanism to regulate the sales of first-hand residential properties, and to protect the interest of residential property buyers through enhancing transparency and making contravention of the mandatory requirements criminal offences.

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106. RPFSSO sets out detailed requirements in relation to sales brochures, price lists, show flats, disclosure of transaction information, advertisements, sales arrangements, and the mandatory provisions for the PASP and SPA for the sales of first-hand residential properties. It also provides for prohibitions against misrepresentation and dissemination of false or misleading information.

107. Some of the key provisions of the RPFSSO pertaining to the estate agency practice are:

- Sales Brochure: Vendors must make public the bilingual sales brochure during a period of at least seven days immediately before the sale commences. The sales brochure must be printed, examined or revised by the vendors within the previous three months.
- Price List: Vendors must make public the price list during a period of at least three days immediately before the sale commences and the price list must, among other things, set out payment terms, basis of any available discount and any gift, financial advantage or benefit in connection with a property purchase. The name(s) of estate agent(s) appointed by the vendor to act in the sale of any residential property in the development must be set out in the price list.
- Saleable Area: Only saleable area shall be used as the basis for quoting the floor area and unit price of any residential property in sales brochures, price lists and advertisements.
- Sales Arrangements: Vendors must make public during a period of at least three days immediately before the sale commences certain key information relating to logistics arrangements such as the date and time for the sale, the sales venue(s), the number of units offered for sale and the method to be used to determine the order of priority of purchases. They must not seek or accept any general expression of intent to purchase any residential property before the issuance of the price list, and must not seek or accept any specific expression of intent to purchase a particular residential property before the property is offered for sale.
- PASP and SPA: A preliminary deposit of 5% of the purchase price is payable by the purchaser on entering into the PASP. The 5% preliminary deposit will be forfeited if the purchaser does not execute the SPA within five working days after entering into the PASP.
- Disclosure of Transaction Information: Vendors must make public a register of transaction for the transaction information relating to the development on the date the sale commences.
- Advertisements: Advertisements must not contain false or misleading information. If an advertisement is published by the vendor or by another person with the consent of the vendor, the advertisement must state that fact.

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- Misrepresentation and Dissemination of False or Misleading Information: A person who makes a fraudulent misrepresentation or a reckless misrepresentation for the purpose of inducing another person to purchase any residential property commits an offence. A person who disseminates or authorises information that is likely to induce another person to purchase first-hand residential properties and if he knows that, or is reckless as to whether, the information is false or misleading as to a material fact, commits an offence.
- Electronic Database on First-hand Residential Properties: The Sales of First-hand Residential Properties Electronic Platform is a centralised electronic database of the SRPA. It contains the sales brochures, price lists, and registers of transactions of individual first-hand residential developments the sale of which is subject to the RPFSSO.

PRACTICE CIRCULARS ISSUED BY THE AUTHORITY ON FIRST SALES

108. The Authority issues practice circulars from time to time on matters that licensees should pay attention to in the first sale of residential properties. Circular No. 10-02 (CR) sets out guidelines on maintaining good order at first sale sites and Circular No. 13-04 (CR) sets out guidelines on the conduct of promotional activities and the provision of property information for the first sale of residential properties.

109. Circular No. 10-02 (CR) states that:

- estate agency companies must appoint a controller to oversee staff deployed to first sale sites;
- estate agency companies and/or the controller must compile a list of the staff deployed to first sale sites and provide the Authority with a copy of the staff list at least one day before the launch of the first sale;
- licensees must wear an Estate Agent card and/or a staff card when they are deployed to first sale sites;
- licensees must not solicit business at railway stations, including station exits and ticket barrier areas;
- licensees must not solicit business at the entrances of shopping malls or housing estates without the requisite permission from the management office of the shopping mall or housing estate;

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- licensees must not intercept vehicles or distract drivers heading for or passing by the first sale sites;
- licensees must not obstruct public places with advertising folding tables, chairs, sun shades, banners or advertising hoardings;
- licensees must not be over-aggressive when conducting promotional activities; and
- licensees must not quarrel or fight with other estate agents, salespersons or passers-by.

110. Circular No. 13-04 (CR) states the following:

(1) *Appointment of Controller*

- Estate agency companies must provide the name, licence number and contact details of the controller to the Authority as soon as possible after the appointment.
- Estate agency companies and/or controllers must ensure that the number of staff deployed to sale sites is commensurate with their ability to effectively manage the staff so deployed.

(2) *Pre-sale Briefings*

- Estate agency companies and/or controllers must, for each development, provide pre-sale briefing(s) to staff and keep proper records of such briefings.
- Only licensees who have attended such pre-sale briefing(s) may engage themselves in promotional activities for the development.

(3) *Capacity to Act*

- Licensees must, at the first opportunity after they have successfully established contact with a prospective purchaser, inform the prospective purchaser whether their estate agency company acts for the vendor and/or the purchaser.

(4) *Saleable Area*

- Licensees must use saleable area only in the provision of information on floor area and unit price.

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(5) *Sales Brochures and Price Lists*

- Licensees must provide the latest version of the sales brochures and price lists to prospective purchasers, or advise them to obtain and read the same at the vendor's office(s), the designated website of the development or the Sales of First-hand Residential Properties Electronic Platform.

(6) *Sales Arrangements*

- Licensees (whether they are appointed by the vendor as its sales agent or otherwise) must not solicit or accept (whether accompanied by a payment of money) any general expression of intent to purchase any residential property before the issuance of the price list, and must not seek or accept any specific expression of intent to purchase a particular residential property before the property is offered for sale.
- Unless appointed by the vendor as the sole sales agent for the development, licensees must inform prospective purchasers that other sales agents have also been appointed by the vendor and allotted with different flats, and their names are set out in the price list.

(7) *Provision of Property Information*

- When licensees provide information to prospective purchasers, they must do so only on the basis of the latest information contained in the sales brochure and documents provided by the vendor, and only after they have taken all reasonable steps and exercised all due diligence to verify the information.
- Licensees must remind prospective purchasers to pay attention to the dimensions of the units and that they may take measurements of show flats.
- Licensees must not make any representation that may mislead prospective purchasers.

(8) *Mortgage Plans*

- Licensees must not make any assurance on mortgage terms.

(9) *Incentives*

- Licensees must advise prospective purchasers to consult the price list for information on any gift, or financial advantages or benefit offered by the vendor (if any).
- Licensees must set out in writing any incentives that they have offered to prospective purchasers, and stipulate clearly the terms and format of the incentives so offered.

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(10) *Advertisements*

- Estate agency companies must obtain written consent of the vendor before they issue any advertisements or promotional material. They must also obtain the vendor's express endorsement in writing of the accuracy and completeness of the particulars contained in the promotional materials before issuance, and ensure that the relevant requirements in the RPFSSO are complied with.

(11) *Publication of Transaction Information*

- If licensees provide transaction information, sales figures or sales performance of a development, they must provide the same based on the information from the register of transactions of the development only; and specify the time frame of the information.

(12) *Identification Documents and Credit Cards*

- Licensees must not request prospective purchasers to provide identification documents and/or credit cards unless at the request of the vendor and any such request must be in writing and state the purposes for which the identification document/credit card will be used.
- Licensees must obtain permission from a prospective purchaser before keeping his identification document or credit card for the stated purposes.
- Licensees must obtain written approval of the prospective purchaser before any arrangement is made to use his credit card for payment.

(13) *Deposit on Entering into PASP*

- Licensees must not accept deposits from a prospective purchaser without the vendor's authorisation.

(14) *Prohibition of Loans from Licensees*

- Licensees must not offer or make loans to a prospective purchaser even if a prospective purchaser requests licensees to do so.