

Circular

Circular No. 17-03 (CR)

Guidelines on Sale of Uncompleted Properties Situated Outside Hong Kong (“UPOH”):

Due Diligence on Vendor and UPOH

- Obtain a report(s) issued by a professional person, financial institution and/or government authority confirming:
 - (a) that the vendor is in existence and legally entitled to develop and sell the UPOH;
 - (b) the vendor’s source of funds/financial arrangement with regard to the completion of the UPOH; and
 - (c) the key information of the development of which the UPOH form part.

Legal Opinion on Material Information

- Obtain a legal opinion on whether there is any form of restriction(s) for foreign purchasers to purchase, resell, lease or mortgage the UPOH according to the laws of the place where the UPOH are situated, and if so, the nature of such restriction(s).

Advertisements and Promotional Materials

- Obtain the vendor’s express endorsement in writing of the accuracy and completeness of the information contained in advertisements and promotional materials.

Sales Documents for Purchasers

- Provide the following documents to purchasers before they enter into any agreement or make any payment in relation to the purchase of the UPOH (whichever is the earlier):
 - (a) a copy of the due diligence report(s) regarding the vendor and the UPOH;
 - (b) a copy of the legal opinion on the material information;
 - (c) a written warning statement; and
 - (d) a sales information sheet.

Taxation

- Advise purchasers of the need to seek independent professional advice on the types and amounts of taxes or levies that they may be liable to pay in respect of their own case.

Payment and Financing Arrangements

- Provide information on payment arrangements based solely on the information provided by the vendor.
- Do not make any assurance on mortgage terms.

Sale of Uncompleted Properties Situated Outside Hong Kong

In recent years, there has been a rising trend of people in Hong Kong buying properties outside Hong Kong. The regulatory regime and taxation system concerning purchase of properties may differ from one place to another, and purchasing properties outside Hong Kong often involves complicated issues. Unlike properties in completed developments where property inspection may be feasible, purchasing uncompleted properties¹ situated outside Hong Kong (“UPOH”) often carries additional risks because purchasers do not have the opportunity to inspect these properties before they enter into an agreement for sale and purchase with the vendor or in certain cases even upon the payment of the balance of purchase price.

Considering that some UPOH offered for sale in Hong Kong are handled by licensees and that their conduct in the sale of these properties may raise concerns to the community, in a bid to enhance the professionalism of the estate agency trade, the Estate Agents Authority (“EAA”) issues this Circular to set out guidelines for licensees on the appropriate practice and measures to be adopted when handling the sale of UPOH. This Circular shall take effect on 1 April 2018.

¹ For the purpose of this Circular, “uncompleted properties” include properties under construction or not yet constructed; and properties in an uncompleted building or development, whether the uncompleted works relate to the properties, the building and/or the development.

General

(2) According to the Estate Agents (Exemption from Licensing) Order, if a person² engages in estate agency work 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, he shall be exempted from the requirement for obtaining an estate agent's licence or a salesperson's licence from the EAA.

(3) Hence, carrying out estate agency work exclusively in relation to properties outside Hong Kong is not regulated by the EAA. However, if a person does estate agency work in relation to properties both in Hong Kong and outside Hong Kong, he is required to hold a licence issued by the EAA.

(4) Licensees are reminded that when they participate in the sale of properties outside Hong Kong³, they are required to observe and comply with the relevant provisions in the Estate Agents Ordinance and its subsidiary legislation, the Code of Ethics and all applicable guidelines issued by the EAA.

(5) Licensees are further reminded that, pursuant to paragraphs 3.3.1 of the Code of Ethics, they shall provide services to their clients with honesty, fidelity and integrity. Moreover, pursuant to paragraph 3.5.1 of the Code of Ethics, licensees shall, in fulfilling their duties, exercise due care and due diligence.

(6) Licensees should be vigilant that the sale and purchase of properties outside Hong Kong is subject to the laws of the place where

² "person" includes both an individual and a company

³ regardless of whether they are only engaged in estate agency work relating to properties outside Hong Kong or to properties both within and outside Hong Kong

the properties are situated and may carry additional risks not associated with property transactions in Hong Kong. The legal process, tax system and financing requirements may be very different from those in Hong Kong and there may also be restrictions for foreign purchasers to buy, resell or lease these properties.

(7) Licensees are reminded that they must not make any representation that may mislead purchasers⁴ when they promote the sale of UPOH.

(8) Estate agency companies⁵ engaged in the sale of UPOH in a development must also take all reasonable steps to ensure that their staff to be involved in promotional activities for the development is familiar with the information about the development and all relevant guidelines issued by the EAA prior to their conducting such activities.

Specifics

Due Diligence on the Vendor and UPOH

(9) In order to have a sufficient understanding of the background of the vendor and the UPOH, licensees must perform **due diligence** on (a) the vendor; and (b) the UPOH before they participate in the sale or the promotional activities for such properties.

(10) To comply with paragraph (9) above, licensees are required to obtain a report(s) (“**due diligence report(s)**”) issued by a professional person (e.g. practising lawyer, accountant or surveyor), financial institution (e.g. bank, finance company) and/or government authority (e.g.

⁴ For the purposes of this Circular, the term “purchaser” or “purchasers” includes, where applicable, prospective purchasers.

⁵ The term “estate agency company” or “estate agency companies” refers to those firms or companies which are licensed estate agents under the Estate Agents Ordinance.

government department, consulate, notary office) in the place where the UPOH are situated or the vendor operates or is incorporated (as the case may be) confirming:

Regarding the vendor:

- (a) that the vendor is in existence and legally entitled to develop and sell the UPOH;
- (b) the source of funds/financial arrangement of the vendor with regard to the completion of the UPOH; and

Regarding the UPOH:

- (c) the following key information of the development of which the UPOH form part:
 - (i) address;
 - (ii) location;
 - (iii) tenure;
 - (iv) development permit or approval issued by the relevant authority;
 - (v) current ownership;
 - (vi) subsisting encumbrances (e.g. undischarged mortgages, outstanding claims or litigation) ;
 - (vii) restrictions on alienation (if any).

And the due diligence report(s) mentioned in this paragraph must be issued in either Chinese or English (together with translation in either Chinese or English if the report(s) is/are issued in other languages), and the licensee concerned is also required to, upon the EAA's request, produce evidence that he has obtained the aforesaid due diligence report(s).

Legal Opinion on Material Information

(11) As transaction for UPOH is subject to the regulatory regime of the place where the property is situated, for the better understanding of the purchasers as to their position as a foreign buyer, it would be necessary for licensees to ascertain whether there are restrictions on foreign ownership before they participate in the sale or the promotional activities for the UPOH.

(12) For the purpose mentioned in paragraph (11) above, licensees are required to obtain, with regard to the UPOH offered for sale, a written opinion (“**legal opinion**”) issued by a lawyer practising in the place where the UPOH are situated on:

- (a) whether there is any form of restriction(s) for foreign purchasers to purchase, resell, lease or mortgage such properties according to the laws and regulations of the place where the UPOH are situated ; and
- (b) if so, the nature of such restriction(s).

And the legal opinion mentioned in this paragraph must be issued in either Chinese or English (together with translation in either Chinese or English if the legal opinion is issued in other languages), and the licensee concerned is also required to, upon the EAA’s request, produce evidence that he has obtained the aforesaid legal opinion.

Advertisements and Promotional Materials Prepared or Distributed by Licensees

(13) When preparing advertisements or promotional materials to promote UPOH, licensees must take all reasonable steps to verify the

accuracy of the information contained in such advertisements or materials, and before issuance, obtain the vendor's express endorsement in writing of the accuracy and completeness of the information contained therein.

(14) Licensees must also state clearly or ensure that it is stated clearly the following in the advertisements or promotional materials prepared or distributed by them:

- (a) the development permit or approval numbers, and name of the relevant authority which issued the permit or approval;
- (b) whether or not purchasers are acquiring an interest in the land, the building to be erected thereon, and/or a right to use and occupy the properties in the building; and
- (c) a prominent statement to the following effect:

“Purchasing uncompleted properties situated outside Hong Kong is complicated and contains risk. You should review all relevant information and documents carefully before making a purchase decision. If in doubt, please seek independent professional advice before making a purchase decision”.

(15) Licensees must not include in advertisements or promotional materials prepared or distributed by them words which give the impression that purchasing UPOH is “safe”, “low-risk” or “risk-free”, or able to obtain “fast”, “easy”, or “high” yields or returns with little or no risk.

Capacity to Act

(16) When promoting the sale of UPOH, licensees must, at the first opportunity after they have successfully established contact with a

purchaser, inform the purchaser in writing of the following:

- (a) whether their estate agency company acts: (i) only for the vendor; or (ii) only for the purchaser; or (iii) for both the vendor and the purchaser; and (iv) in the cases of (i) and (ii) above, whether or not their estate agency company may act for both the purchaser and the vendor subsequently; and
- (b) whether their estate agency company and the licensee concerned are also licensed to carry out estate agency work in the place where the UPOH is situated.

(17) Licensees must act in an impartial and just manner to all parties involved in a transaction regardless of their capacity.

Sales Documents for Purchasers

(18) Licensees must provide purchasers with the following documents before they enter into any agreement in connection with the purchase (e.g. booking form, reservation form, agreement for sale and purchase) or make any payment in relation to the purchase of UPOH (whichever is the earlier):

- (a) a copy of the due diligence report(s) regarding the vendor and the UPOH mentioned in paragraph (10) above;
- (b) a copy of the legal opinion mentioned in paragraph (12) above;
- (c) a written warning statement mentioned in paragraph (20) below; and
- (d) a sales information sheet related to the UPOH prepared or

approved by the vendor with information as set out in the **Annex**.

(19) In the event that the due diligence report(s) and/or legal opinion mentioned in paragraph (18) above is/are issued by a person(s) acting for the vendor in the sale, licensees must draw the purchasers' attention to such fact and advise the purchasers to consider seeking independent legal and/or professional advice related to the matters mentioned in the due diligence report(s) and/or legal opinion.

Written Warning Statement

(20) Licensees are required to provide a separate written warning statement to the purchasers before they enter into any agreement in connection with the purchase or make any payment in relation to the purchase of UPOH (whichever is the earlier), that the purchasers should:

- (a) conduct due diligence on the vendor and the UPOH themselves;
- (b) review all relevant sales documents (including the due diligence report(s); legal opinion and sales information sheet mentioned in paragraph (18) above) carefully;
- (c) pay attention that risks are involved in purchasing UPOH as the transaction is subject to the laws and to any change in policies and regulation of the place where the properties are situated;
- (d) consider appointing an independent lawyer to protect their interests at all stages of the purchase and seek his assistance to explain the terms and conditions of any agreement in connection with the purchase (e.g. booking form, reservation

form, agreement for sale and purchase) before entering into such agreement; and

- (e) consider seeking independent professional advice on the types and amounts of taxes or levies that they may be liable to pay as foreign purchasers in relation to the purchase, resale, lease or holding of the properties, if any, in respect of their own case to protect their interests.

(21) The licensee concerned, in order to protect his own interests in the case of disputes, is advised to obtain a written acknowledgement from the purchasers that, before they enter into any agreement or make any payment in relation to the purchase of the UPOH, they fully understand the contents of the warning statement, the due diligence report(s), the legal opinion and the sales information sheet.

Taxation

(22) Licensees are reminded that foreign taxation systems are complicated. Moreover, the reasons for purchasing properties may not be the same for all foreign purchasers and the relevant taxes which apply to each of them may differ due to their own circumstances. As such, licensees should advise the purchasers of the need to seek independent professional advice on the types and amounts of taxes or levies that they may be liable to pay in respect of their own case.

Payment and Financing Arrangements

(23) Licensees may only provide information to purchasers on payment arrangements (e.g. payment schedules and amounts) and the details (e.g. payment to be made to which party and in what currency) based solely on the information provided by the vendor.

(24) If a financing arrangement is desired or purchasers request for such information, licensees must advise purchasers to check with banks, finance companies or the vendor concerned (if financing schemes are provided by the vendor concerned to purchasers) directly on whether they will be able to obtain the needed mortgage loan to purchase the UPOH. Licensees must not guarantee, assure, or otherwise state to the purchasers that they will be able to obtain the desired financing or at the desired terms.

(25) If licensees request a purchaser to make any payment of moneys in relation to the purchase of UPOH, they must, before the purchaser makes any such payment, inform the purchaser in writing to whom the payment will go, its purpose, and whether it is refundable.

Record Keeping

(26) Licensees are required to keep documents and records as evidence of their compliance with the requirements of this Circular, and shall, upon EAA's request, produce such evidence to substantiate the aforesaid.

Warning on Potential Collective Investment Scheme

(27) Licensees should be aware that the sale of properties (e.g. student hostels and hotel rooms) may, depending on the terms and investment arrangement of such properties, constitute a sale of interests in a collective investment scheme (“**CIS**”)⁶ which is governed by the Securities and Futures Ordinance (“**SFO**”). The promotion and offering to

⁶ In brief, a CIS, as defined under the SFO, means an arrangement in respect of any property under which the participants do not have day-to-day control over the management of the property, the property is managed as a whole by or on behalf of the person operating the arrangement, and/or the contributions of the participants and the profits or income from which payments are made to them are pooled, and the purpose of the arrangement is for participants to receive profits, income or other returns from the acquisition or management of the property. For the definition of a CIS, please refer to Schedule 1 to the SFO.

the Hong Kong public to acquire an interest or participate in a CIS (e.g. the advertisements and distribution of promotional materials) without prior authorisation by the Securities and Futures Commission (“SFC”) constitute an offence under section 103 of the SFO unless an exemption under the SFO applies. It is also an offence under section 114 of the SFO to carry on a business of promoting interests in a CIS without a licence from the SFC. Licensees are therefore reminded not to engage in activities which may involve an unauthorised CIS in contravention of the SFO when promoting the sale of UPOH.

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Licensees who fail to comply with the above guidelines may be disciplined by the EAA. Estate agency companies and their management may also be disciplined for failing to establish a proper system to manage their business.

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Holders of Statements of Particulars of Business
 should bring this Circular to the attention of all staff
 engaged in estate agency work

Sales Information on Uncompleted Properties Situated Outside Hong Kong (“UPOH”)

1. Basic Information on the development

- (a) Address (e.g. name of street and number)
- (b) Location
- (c) Tenure
- (d) Current Owner
- (e) Vendor (if different from owner)
- (f) Development permit or approval number(s)

2. Property Details

- (a) Description
- (b) Area
- (c) Tenure
- (d) Estimated handover date
- (e) Final handover deadline
- (f) A copy of the approved floor plan

3. Payments

- (a) Purchase price
 - (i) Payment schedules and amounts
 - (ii) Payment to whom and the capacity of recipient(s)
 - (iii) Whether there is any stakeholder arrangement for the payments, and if so, details of the arrangement
- (b) Fees and expenses incidental to the purchase of the property
 - (i) Types (e.g. stamp duties, solicitor fees, agency fees)

4. Cooling-off Period

- (a) Whether there is any cooling-off period, and if so, length of the period;
- (b) Whether any funds paid are refundable during the cooling-off period, and if so, the amount of such refund.

5. Defect Liability Warranty Period

- (a) Whether there is any defect liability warranty period during which the vendor is liable to make good any defect in the property;
- (b) And if so, length of the warranty period.

6. Financial Incentives

- (a) Whether any financial incentives (e.g. guarantees on rental yield) is offered in connection with the purchase of the property;
- (b) And if so, the following information:
 - (i) by whom;
 - (ii) when (e.g. upon completion of purchase) and how (e.g. discount on the price) will the incentives be honored; and
 - (iii) whether the incentives to be offered will be incorporated into any agreement (e.g. agreement for sale and purchase).

7. Legal & Interpretation Service

- (a) Whether there is any arrangement in place on engaging a foreign lawyer and (if necessary) interpreter to explain the terms and conditions of purchase and attend to purchasers' enquiries prior to the execution of the agreement for sale and purchase;
- (b) And if so, whether the foreign lawyer acts for (a) the vendor only; (b) the purchasers only; or (c) both parties.

8. Governing Law & Dispute Resolution Venue

- (a) Governing law of the transaction
- (b) Venue(s) to seek recourse in the event of dispute with the vendor

9. Documents Attached

- (a) Due diligence report(s) on the vendor and the UPOH issued on [date] [as mentioned in paragraph (10)]
- (b) Legal opinion on material information issued on [date] [as mentioned in paragraph (12)]
- (c) Warning statement [as mentioned in paragraph (20)]