

# 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:
  - The Estate Agents Ordinance (EAO) (Cap 511);
  - The Estate Agents (Determination of Commission Disputes) Regulation (“Commission Regulation”);
  - The Estate Agents (Exemption from Licensing) Order (“Exemption Order”);
  - The Estate Agents (Licensing) Regulation (“Licensing Regulation”);
  - The Estate Agents (Registration of Determination and Appeal) Regulation (“Appeal Regulation”);
  - The Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation (“Practice Regulation”).
2. Some of the provisions in the EAO and some of the regulations apply only to sales of residential properties. Besides, there are Practice Circulars and the Code of Ethics issued by the Estate Agents Authority (“the 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 purpose 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 category (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, 9(1) and (3).

## **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”).
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, and there is a finding 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.
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:
    - non-compliance or contravention of the provisions of the EAO which is the subject of the investigation in question, or
    - 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; and
  - award expenses to a witness.
14. An inquiry is usually presented by an officer of the Authority. The licensee may appear in person or be legally represented.

## **PARTICULARS OF BUSINESS**

15. Before carrying on an estate agency business, a licensed estate agent must apply to the Authority for a Statement of Particulars of Business (SPOB). Section 10(1) of the Licensing Regulation provides that each SPOB is issued in respect of (i) one place of business and (ii) one business name only. If a licensed estate agent has more than one place of business and/or business name, he should apply for as many SPOBs as are necessary.
16. Under Section 14 of the Licensing Regulation, every holder of an estate agent's licence should:
- display the SPOB in a conspicuous position at each place at which he carries on business;
  - where he carries on business at any place under different business names, also display at that place a SPOB for each business name used;

- 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;
- l state in all advertisements (pamphlets and brochures excepted) by him or on his behalf:
  - l the number of his licence or the relevant SPOB; and
  - l 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.
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, it is provided that a salesperson’s licence shall not be granted to a body of persons, whether corporate or unincorporated.

### *The work of licensees*

20. The EAO provides that “estate agency work” 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:

- the marketing of 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 viewing and 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 sale and purchase agreement (SPA) or a lease.

## 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 conduct estate agency work without a licence.
22. There are three types of licences:
  - Salesperson's Licence;
  - Estate Agent's Licence (Individual);
  - Estate Agent's Licence (Company).
23. The differences between an Estate Agent's Licence (Individual) and a Salesperson's Licence are:
  - a person holding an Estate Agent's Licence (Individual) may perform estate agency work as:
    - a sole proprietor; or
    - a partner of a partnership of an estate agency business; or
    - a director of a company holding an Estate Agent's Licence (Company); or
    - an employee of a holder of an Estate Agent's Licence (Individual) or Estate Agent's Licence (Company);
  - 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 (Individual);
  - an individual holding a Salesperson's Licence may only perform estate agency work as an employee of a holder of an Estate Agent's Licence (Individual) or Estate Agent's Licence (Company).

### *Requirements for obtaining a licence*

Sections 19, 20 and 21 of 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 entrant must:
- (1) be at least 18 years of age; and
  - (2) fulfil the "fit and proper" requirement. Factors to be considered include:
    - (i) whether he is an undischarged bankrupt or has made a composition or scheme of arrangement with his creditors within the last five years immediately before the Authority considers the matter;
    - (ii) whether he is a mentally disordered person or a patient within the meaning of Section 2 of the Mental Health Ordinance;
    - (iii) whether he has been convicted of any offence involving fraud, corruption or dishonest acts;
    - (iv) whether he has any conviction under the EAO in respect of which he has been sentenced to imprisonment;
    - (v) whether he is a director or officer of a company which is for the time being disqualified under the EAO from holding an Estate Agent's Licence (Company), 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 (Individual). The sole proprietorship must have an SPOB for each of its places of business under a particular business name.

*Partnerships*

- 26.
- (1) At least one partner of a partnership must have an Estate Agent's Licence (Individual).
  - (2) Each partner who is engaged in the estate agency work of the partnership must have an Estate Agent's Licence (Individual) for an individual partner or an Estate Agent's Licence (Company) for a corporate partner.
  - (3) Partners who are not engaged in the estate agency work of the partnership are not required to be licensed (the Exemption Order).
  - (4) All partners of the partnership have to fulfil the "fit and proper" requirement (same as the "fit and proper" requirement for company directors in paragraph 27(3)).
  - (5) The partnership must have an SPOB for each of its places of business under a

particular business name.

## *Companies*

27.

- (1) A company means a company within the meaning of the Companies Ordinance (Cap. 32) or a body corporate incorporated under any other ordinance or outside Hong Kong.
- (2) At least one director of the company must have an Estate Agent's Licence (Individual) or Estate Agent's Licence (Company). There must be an individual director or a corporate director who is a holder of an Estate Agent's Licence in effective control of the company's estate agency business. Each director who is engaged in the estate agency business of the company must be a holder of an Estate Agent's Licence (Individual)/Estate Agent's Licence (Company). Directors who are not engaged in estate agency work are not required to be licensed.
- (3) Each of the company's directors, whether individual director or corporate director, have to fulfil the "fit and proper" requirement. Factors to be considered include:
  - (i) whether the director (where the director is an individual) is an undischarged bankrupt or has made a composition or scheme of arrangement with his creditors within the last five years immediately before the Authority considers the matter;
  - (ii) whether the director (where the director is an individual) is a mentally disordered person or a patient within the meaning of Section 2 of the Mental Health Ordinance;
  - (iii) whether the director (whether the director is an individual or a corporate) has been convicted of any offence involving fraud, corruption or dishonest acts;
  - (iv) whether the director (where the director is an individual) has any conviction under the EAO in respect of which he has been sentenced to imprisonment;
  - (v) whether the director (whether the director is an individual or a corporate) is a director or officer of a company for the time being disqualified under the EAO from holding an Estate Agent's Licence (Company), or whether he was a director or officer of that company at the date when the company was so disqualified;
  - (vi) whether the director (where the director is a corporate) is in liquidation or has entered into a composition or scheme of arrangement with its creditors within the last five years immediately before the Authority considers the matter.
- (4) The company itself also has to fulfil the "fit and proper" requirement. Factors to be considered include:
  - (i) whether the company is in liquidation 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;
  - (ii) whether the company has been convicted of any offence under the EAO.

- (5) The company must have a SPOB for each of its places 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 does not fulfil the "fit and proper" requirement (same as the "fit and proper" requirement for company directors in paragraph 27(3)).

## **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)
- Application for Renewal of Salesperson's Licence (Form 13); and

- Application for Renewal of Statement of Particulars of Business (Form 14).

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 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.

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

Section C must be completed and signed by each corporate director which does not hold a valid estate agent’s licence.

#### *Renewal of licence*

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

Under Section 13 of the Licensing Regulation, 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 or within such shorter period prior to the expiration of the licence as the Authority may in writing permit.

#### *Suspension or revocation of licence*

34. Under Section 27 of the EAO, 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;
- 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 or is not entitled to be granted the licence under Section 18;
- any licensee who has failed to pay any fee, charge or penalty charged or imposed under the EAO 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 provides that an agent shall enter into a prescribed form of estate agency agreement with his client from 1 November 1999 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 vendor (which includes a landlord), have, in his possession or under his control, information prescribed in:
    - Property Information Form Form 1 (for sale and purchase); or
    - Property Information Form Form 2 (for leasing);
  - (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 purchaser, 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.

The fact that the licensee had taken all reasonable steps and exercised all due diligence to avoid the failure will be a defence.

41. When action is taken as regards the accuracy of the information prescribed in the Property Information Forms, 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 Forms; 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 for Transport and Housing (“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.

#### *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).
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. Practitioners 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 Section 9(3), (4) and (5) of the Practice Regulation.

52. Practitioners 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**

### *Requirements 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:
  - a prescribed estate agency agreement (in Form 3, 4 , 5, or 6) has been properly executed; 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 provisional or preliminary agreement for sale and purchase (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 agent 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
  - 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:
- 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 in Part 1 of Form 1 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;
  - 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. Practitioners 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”: Section 55(1) and (2).
66. The offences include:
- where any individual or company carries on the business of doing estate agency work without an estate agent's licence: Section 55(1)(a): Penalty 1 in the following schedule;
  - where an individual acts as a salesperson for any licensed estate agent without a licence, or accepts employment or 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 or a salesperson's licence: Section 55(1)(c),(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 specific record or document, 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, 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, fails to maintain confidentiality in respect of matters and information produced for the purposes of an investigation under Section 28: Section 55(1)(f): Penalty 2 in the following schedule;
  - where a person who is not a licensed estate agent but who purports to accept or act pursuant to an appointment of manager under Section 38: 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: 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: 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: 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;
- 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: 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 as the client instructs: 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 Practice Regulation: 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 Practice Regulation: Section 55(2)(d): Penalty 3 in the following schedule.

67. The range of penalties includes:

<b>Schedule</b>		
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

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 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;
  - attachment by the Authority of a condition to a licence under Section 17;
  - suspension or revocation by the Authority of a licence under Section 27; or
  - 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.

When there is an appeal, the chairman of the panel should 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. The decision of such a tribunal is final.

### *Appeal tribunal proceedings*

71. A tribunal appointed under Section 32 may:

- determine its own procedure;
- receive and consider any material even though such material would not be admissible in civil or criminal proceedings; and
- determine the manner in which such material is to be received;
- require any person to attend before it to give evidence and produce documents;
- administer oaths and affirmations;
- 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;
- award expenses to a witness incurred for his attendance;
- adjourn any proceedings; and
- make such order as it thinks fit with regard to the payment of costs of the tribunal.

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.

## **DISPUTES ABOUT COMMISSION**

### *Jurisdiction*

73. A dispute over agency commission between an estate agent and his client may be referred to the Authority for a binding decision.

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 is in respect of the amount of the commission or fee payable or the manner in which it is to be calculated or payable;
- the parties so agree; and
- the prescribed estate agency agreement (Forms 3,4,5 and 6) has been executed.

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.

#### *Procedure*

76. The procedure is as follows:
- 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.
  - The Authority will appoint one of its legally qualified officers as an adjudicator to determine the dispute.
  - 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.
  - 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 then 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 has been issued by the Authority for the purpose of providing guidance and directions to practitioners in the conduct of estate agency work.
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 Home Ownership Scheme (HOS)*

A flat under the HOS or the Tenants Purchase Scheme (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 Housing Ordinance (HO). A practitioner 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*

Practitioners 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.”

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 practitioners 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 after they have been agreed. This is not a proper practice. The Authority has issued a Practice Circular (03-02) advising practitioners against this practice. Therefore, any practitioner 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*

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 Certificate of Compliance. A practitioner 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.”

*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 practitioner 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 practitioner 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

practitioner 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 practitioner 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 will 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.

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 practitioner 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 practitioner 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 practitioner 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 practitioner to avoid accepting an appointment involving a property in which he has a beneficial interest. Thus a practitioner 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.

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

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 the 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.

### *Listings 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:
  - 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 for 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 for 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 seeks 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 SPA or a lease and prepare a written inventory thereof.

*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 clients' money and keeping of accounts and records*

100. The following accounts regulations are contained 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;
- (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.

*Provisional or preliminary agreement for sale and purchase (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 seeks 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.

### *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: Section 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**

### *Guidelines for the sale of uncompleted property under the Consent Scheme*

105. The Lands Department Consent Scheme, generally known as the Consent Scheme, was introduced by the Government in 1961. It applies where there is an express provision in the government grant of a property, whether residential or non-residential, requiring the developer to obtain the consent of the Director of Lands to the sale (and entering into agreement for the sale) of any unit in the development before the compliance of the conditions in the government grant (which includes completion of the development). In giving such consent the Director of Lands will impose a set of conditions which will seek to protect purchasers' interest by ensuring that the sales proceeds are used for completion of

the development and that a fair form of agreement for the sale and purchase be used for sale of the units.

106. Some of the conditions for obtaining consent are:

- the government lease must have at least 10 years to run and all land premium has been fully paid;
- to ensure the developer will be able to pay all construction costs to complete the development, the land must be free from all financial encumbrances other than a building mortgage which is used to finance and secure construction costs;
- The formal SPA must be in the standard form approved by the Director of Lands which contains fair terms to a purchaser. The deed of mutual covenant must comply with the Guidelines issued by the Legal Advisory and Conveyancing Office of the Lands Department which strikes a fair balance between the developer and the owners;
- The solicitor handling the sale of units in the development must make a statutory declaration to verify certain facts and to undertake that he will hold all purchase money as a stakeholder, and will release it only for payment of construction costs and in accordance with the terms of the approved SPA;
- In regard to public sales, there are detailed provisions governing disclosure of information and conduct of sale, some of which are as follows:
  - a sales brochure containing specified information shall be made available to prospective purchasers not less than seven working days before the commencement of registration for ballot;
  - price list(s) of units offered for sale in the ballot must be made available to the public at the developer's sales office(s) not later than seven working days before the commencement of registration for the ballot;
  - in any advertisement for the sale of units, the developer must specify the net number of units exclusively available for sale to the public as well as the number of units which have been reserved for sale to private purchasers;
  - the developer must not offer for sale less than the number of units which have been advertised for sale on each occasion and must not withdraw any units from such sale;
  - the sale of the units shall be conducted by personal registration;
  - no registration shall be transferable;
  - the developer will provide a suitable venue(s) of sufficient size for registration and sales to accommodate all prospective purchasers;
  - certain conditions relating to registration and balloting can be relaxed for luxury properties.

#### *Guidelines for private sales*

107. Sales by a developer may be public sales or private sales. Formerly there were restrictions on the number of units which could be sold by private sale, but the Lands Department removed all such restrictions on 3 December 2002, and a developer can sell any number of units in a development by private sale. It should be noted, however, that in a private sale a developer is also required to provide prospective private purchasers with sales brochures before the private sale takes place. In regard to private sales, the Real Estate Developers Association of Hong Kong (REDA), an association of developers, has issued

guidelines to its members. The guidelines do not, however, apply to sales to investors and staff. Those guidelines that may affect practitioners are reproduced in paragraphs 108-113.

108. Provision of sales brochures and other essential information

- sales brochures should be made available to prospective purchasers at least 24 hours before the private sale;
- sales brochures should contain essential information in respect of the property offered for sale, including but not limited to the following:
  - floor area and floor plan;
  - prominent fittings and finishes;
  - location plan drawn to scale;
  - disposition plan;
  - salient conditions of the government lease;
  - salient provisions of the draft deed of mutual covenant;
  - obligations for slope maintenance, if any;
  - anticipated completion date;
  - management fee details;
- a copy of the draft deed of mutual covenant (DMC) and the government lease should be provided at the sales office for free inspection by prospective purchasers;
- an enquiry counter should be set up at the sales office and a hotline be made available to provide information relating to the property being offered for sale;
- leaflets on useful information for flat purchasers published by the Consumer Council and/or the Estate Agents Authority should be made available at the sales office;
- reasonable steps should be taken to inform purchasers of subsequent material changes with regard to the information provided in the sales brochures.

109. Provision of price list

- the price list and the list of units on offer should be made available at the sales office to prospective purchasers and also through estate agents (if engaged);
- the price list of the flats to be offered in the first launch (which should not be less than 20 flats or 20% of the number of flats on offer in the first batch, whichever is higher) should be provided at least 24 hours before such flats are put up for sale;
- for subsequent batches, an up-to-date price list should be made available and be posted at the sales office immediately prior to the time when such flats are put up for sale.

110. Announcement of sales performance

Member developers are free to decide whether or not to make public the results of their sales. If they choose to publicise them, any information provided must be as accurate as possible. In the announcement of sales results, the definition of a “sale” is to refer to the signing of a PASP.

111. Conduct of sale

Member developers should ensure that their sales activities are conducted in an orderly manner.

112. Engagement of estate agency

- member developers should specify in their promotional materials the name of any estate agency engaged by them;
- clear instructions on sales arrangements must be provided to the engaged estate agency;
- appropriate action should be taken against any estate agent (if an estate agency is engaged) who is found to have adopted unprofessional sales practices.

113. Monitoring

Random checks on compliance with these Guidelines by member developers will be conducted by the REDA Secretariat.

*Practice Circulars Issued by the Authority to Estate Agents on First Sales*

114. The Authority issues Practice Circulars from time to time on matters that practitioners should pay attention to in first sales of residential properties. Practice Circular 06-05 (CR) states that:

(1) *Price Lists*

Where the practitioner has been given a price list by the developer, he should provide the same to prospective purchasers without any charge, restriction, or conditions. Also, practitioners should not prepare price lists with other prices without the developer's instruction.

(2) *Deposits*

In the case of the Consent Scheme, if the agent is so authorised by the developer, the sum of money should be same as the preliminary deposit payable to the developer referred to in the Government's consent letter in respect of the development concerned.

(3) *Authorisation for advertising*

Unless the practitioner is authorised by the developer in writing, he should not issue any advertisements in respect of a development.

(4) *Accuracy of advertisements*

If the practitioner is authorised by the developer to issue an advertisement in respect of a development, he should ensure that any key features mentioned, such as the location plan, floor area and floor plan, fittings and finishes, anticipated completion date, management and details of amenities/facilities, are correctly described in the advertisement.

(5) *Representations by agents*

If authorised by the developer, the practitioner may, on behalf of the developer, make written and/or oral representations in respect of a development.

- (6) *Publication of sales information*  
Practitioners should not publicise information on the sales figures or performance of a development on behalf of the developer, unless they have verified the same by taking all reasonable steps and exercising all due diligence.
- (7) *Obtaining potential purchasers' identity cards*  
Practitioners must not keep their purchaser clients' identity cards unless they have been given authority to do so by these clients.
- (8) *Number of agents at sales sites*  
Estate agency companies should comply with the maximum number of estate agents who may be sent and stationed at the sales site at a particular time as may be specified by the developer.
- (9) *Maintaining order at sales sites*  
Practitioners should comply with the rules and regulations as may be set by the developer for maintaining order at a sales site.
- (10) *Compliance with laws, rules and regulations when conducting sales activities in the vicinity of sales sites*  
Practitioners should comply with laws, rules and regulations (such as the Road Traffic Ordinance, by-laws of the Mass Transit Railway Corporation/Kowloon Canton Railway Corporation, etc.) when conducting sales activities in the vicinity of a sales site.