

Hong Kong – Use of Social Media Networks by Listed Companies or Companies dealing in Securities

The rapid explosion of social networking has changed the way many companies in Hong Kong promote their brands and distribute their products and services. Yet, along with the benefits, social media networks may expose companies to liability under securities laws in Hong Kong. The Securities & Futures Commission (“SFC”) regulates participants in the securities and futures markets, including The Stock Exchange of Hong Kong (“Exchange”), which in turn regulates companies seeking admission on the Exchange and supervises companies once they are listed. Through the administration and enforcement of a number of laws, the SFC can exercise its statutory powers of investigation and enforcement in cases of corporate misconduct, such as the dissemination of false or misleading information. In this article, we focus on the liability incurred due to unintentional marketing and advertising of financial products as well as the inadvertent disclosure of sensitive information of listed companies on social media platforms.

SFC restrictions on advertising and marketing of financial products

The SFC regulates marketing and advertising of financial products under the Securities and Futures Ordinance (“SFO”) and its subsidiary legislation. Although the issues arising from marketing financial products using social media networks are not specifically addressed, the SFC published a Guidance Note on Internet Regulation in 1999 (“Guidance Note 1999”) which regulates advertisements or documents on securities, investment arrangements and advisory services regardless of the mode of communication or delivery, if such materials are aimed at investors in Hong Kong. The SFC has supplemented the Guidance Note 1999 with additional guidance in respect of specific products including Collective Investment Schemes, Structured Products and Mutual Provident Funds. All these guidelines stipulate that marketing and advertising materials:

- require authorization from the SFC if they target Hong Kong investors;
- cannot be false, biased, misleading or deceptive;
- must be current;
- must contain an appropriate explanation of risks and an unbiased view of the product; and

- the information contained in them is displayed in a prominent place, and is legible or if contained in an audio file, it is audible.

Restrictions on advertising codified under s.103 of the SFO contain a general prohibition against the issue of advertisements, invitations or documents relating to investments, subject to a number of exceptions. A person who commits an offence under s.103 is liable on conviction to a fine of up to HKD500,000 (approximately USD64,100) and to imprisonment for a term of up to three years. In a case of a continuing offence, a person is liable to a further daily fine of up to HKD200,000 (approximately USD25,640) during the time the offence continues.

SFC restrictions on disclosure of sensitive information of listed companies

The SFC oversees the Exchange in its regulation of listing-related matters and has a statutory duty to supervise and monitor the Exchange’s performance of its listing-related functions and responsibilities. Moreover, the SFC may exercise statutory investigation and enforcement powers in a number of circumstances including where it has reason to believe that the management of a listed company has committed misconduct against its shareholders or has misled the public.



Employees increasingly blur the lines between their professional and personal lives



Listed companies and their officers may be held to account for improperly disclosing inside information under the current provisions of the SFO. It is a civil wrong and criminal offence under s.277 and s.298 respectively for a person to disclose false or misleading information about the securities and futures of a company that is likely to induce investment decisions or have a material effect on the company’s share price. A person will be liable if he knowingly disseminates, is reckless, or negligent (as in a civil claim), in disseminating information about his company that is false or misleading in a material fact or through an omission of a material fact. These provisions are

very wide and include any form of dissemination of material in any medium or forum.



A seemingly harmless update may trigger a full scale investigation



Those who suffer pecuniary loss under s.277 have a right to bring a civil action and seek damages. The courts may also impose injunctions in addition to or in substitution for damages. If a person is found to contravene s.298, he is liable to a fine of up to HKD10,000,000 (approximately USD1,282,050) and a term of imprisonment of up to 10 years. Moreover, individuals found in contravention of s.298 (such as a director or licensed officer) may be subject to suspension, disqualification and “cold-shoulder” orders from the courts.

In addition, under the current regulatory arrangement in Hong Kong, the Exchange is responsible for setting the Listing Rules, although these rules must be approved by the SFC. Listing Rule 13.09 give rise to a continuing obligation for disclosure of Price Sensitive Information (“PSI”). PSI should be disclosed to shareholders and the public promptly and in a uniform manner. It is the primary responsibility of a listed company’s directors to ensure that the company complies with all relevant requirements. The Listing Rules do not have the force of law, but the Exchange may impose sanctions including cancellation or suspension of the company’s listing, issuing reprimands, public censure and “cold-shoulder” orders to the offending company or officer.

Implications for companies using social media networks

The provisions highlighted above underscore the risks that are faced by companies (whether listed companies or financial institutions) which use social media platforms. As employees increasingly blur the lines between their professional and personal lives in media communications, a seemingly harmless status update on LinkedIn or Facebook about a project at work may inadvertently trigger a full scale SFC investigation. In light of the draconian penalties under the SFO whereby

directors may be personally liable for the actions of their employees, it is imperative that a company should establish a social media policy with clear and specific guidelines about usage of social media platforms at company level as well as at personal level.

To safeguard against violations of s.277 and s.298, a listed company updating its followers on social media networks should also do so in conjunction with the traditional forms of disclosure (e.g. announcements in newspapers) and coordinate the release of such information simultaneously across all platforms. Additionally, posts of a summary nature should be accompanied by a disclaimer, or a link to a disclaimer. If a company comments on or summarizes a press release, a link of the full text of the press release should also be included. In the event of wrongful inadvertent dissemination of information, the company should immediately issue a public corrective announcement and if necessary, request suspension in trading of its securities.

When issuing promotional material through social media outlets, companies must also keep in mind the SFC Guidelines and the SFO requirements as to what and how information should be marketed. In an informal status update or tweet, it can be easy to overlook an innocuous statement that may be construed as an inducement to invest in a company’s financial products. All employees who are authorised to use social media on behalf of the company should have training on disclosure obligations to ensure they understand these legal requirements. In particular, they should be warned not to engage in conversations on social media networks with third party users. Companies should place disclaimers on these social media platforms indicating the company’s right to remove any third party posts or content.

As for an employee’s personal use of their own social media networks, companies may consider including clauses in employment contracts which deal with the private use of social media networks and make references to policies in the employee handbook. The most common sense approach is to ask employees to “pause before posting”, “differentiate public from private” and to avoid making specific comments on financial products on their private pages on social media networks.



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