

BRIEFING

KEY ISSUES IN GETTING AN SFC LICENSE FOR ALTERNATIVE FUND MANAGERS

One of the first challenges facing potential alternative fund managers (ie hedge fund, private equity and real estate fund managers) when setting up their new fund management business in HK is getting the appropriate SFC license. This article will examine the key issues often faced by potential alternative fund managers when getting an SFC license and the main requirements for getting an SFC license.

GETTING THE RIGHT LICENSE

There are 10 types of SFC licenses each covering a different type of “regulated activity”. The first question often asked by potential fund managers is whether or not they need to get a license for one or more of these. Whereas the differences between some of these regulated activities are conceptually and practically easily distinguishable, some are differentiated by subtle nuances and may, at first, appear overlapping.

The most relevant types of licenses concerning alternative fund managers are Type 1 (Dealing in Securities), Type 4 (Advising on Securities) and Type 9 (Asset Management) licenses. Whether the fund manager needs one or more of these depend on the exact nature of the business and activities the fund manager intends to undertake in Hong Kong.

Although prima facie a fund manager managing a fund from Hong Kong would require at least a Type 9 license, the Hong Kong Securities and Futures Ordinance and its subsidiary legislations, regulations and guidelines do provide a number of important exemptions which may apply to the fund manager. One example is the “private company” exemption – the definition of “securities” excludes shares in a company which is a private company” within the meaning of section 29 of the Hong Kong Companies Ordinance. Activities which constitute “asset management” which require a license involve the management of a portfolio of “securities” and hence, if the portfolio managed by the fund manager consists only of shares in “private companies” as defined then it may be arguable that the fund manager may not require a license for such activities on the basis of the exemption noted above. Whereas this exemption would not apply to hedge funds trading listed stocks (because such listed stocks would not fall within the exemption of being shares in a “private company”), this argument

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may apply to some private equity fund managers whose portfolio consists only of investments in “private companies”. Similarly it may be arguable that managing a portfolio of physical real estate assets may fall outside of the ambit of “managing a portfolio of securities” on the basis that such portfolio of physical real estate assets is not portfolio of securities or any one of the categories of financial assets or instruments in relation to which the activity of “asset management” is regulated.

If the portfolio which the fund manager manages does consist of securities or any one of the other types of financial assets or instruments in relation to which the activity of asset management is regulated, and that no other exemption applies, then it should be safe to conclude that the fund manager would need a Type 9 license. However, a question is often raised as to whether the activity of managing a portfolio of securities undertaken by the fund manager is actually conducted in Hong Kong. In a typical hedge fund where its trader places trades on a frequent basis at a desk in Hong Kong on a discretionary basis, it is clear that such activities amount to Type 9 asset management activities conducted in Hong Kong. However, less clear is the case of a private equity styled fund where investment decisions are less frequently made and, when made, is made by a committee (eg an investment committee) which may be composed of members some of whom may be resident in Hong Kong and some of whom may be resident outside of Hong Kong. This type of arrangement begs the question as to whether investment decisions are actually made in Hong Kong and, therefore, whether it triggers any licensing requirements in Hong Kong. The answer to this question depends on a number of factors including, for example, whether the Hong Kong based personnel of the investment decision making body individually or collectively has the veto power, whether such investment decision making body is constituted by the offshore fund entity or the Hong Kong based fund manager, amongst many other factors. The conclusion of such analysis may well be that investment decisions are made outside of Hong Kong (ie no Type 9 activities are conducted in Hong Kong), and that the Hong Kong based personnel is conducting advisory activities only (hence Type 4 regulated activities). This would mean that the license which may be required is the Type 4 license and not the Type 9 license.

With fund managers (especially first time fund managers) continuing to face headwinds on capital raising, we see fund managers often take the route of initially managing client’s money on a managed account basis, with a view of forming a blind pool fund after gaining some traction with investors. The question we see often being asked in these arrangements is what kind of licensing requirements would these types of activities trigger. The answer to this question would depend on, amongst other things, the extent of the discretion to which the fund manager has over the investment decision concerning the client’s assets. In the case of hedge fund managers it is often the case that they would have complete discretion over the



client's assets and therefore this issue is less problematic. However, in the case of private equity styled fund managers, often the fund manager has less than complete and total discretion – ie the client may have some degree of say over the investment decisions concerning their assets. The more the fund manager moves away from having complete and total management discretion, the more likely that licensing requirements other than just Type 9 license may be triggered. In such a case, the most likely license which may be needed are the Type 4 and Type 1 licenses depending on, amongst other factors, the nature of services provided to the client, extent of advisory work undertaken, the fee arrangement with the client, the way investment opportunities are originated and the nature of the relationship the licensed entity has with both the sell and buy side of a transaction, etc.

LICENSING REQUIREMENTS AND PROCESS

If a fund manager's proposed activities fall within the definition of one of the regulated activities, then it needs to obtain an SFC license. It needs to incorporate a Hong Kong company (the Applicant Company), which will need to appoint at least two individuals as responsible officers (ROs). ROs are licensed representatives of the Applicant Company who actively participate in or directly supervise the regulated activity to be conducted by the Applicant Company. At least one RO must be an executive director of the corporate entity that actively participates in, or is responsible for directly supervising, the conduct of the regulated activity for which they are licensed. At least one RO must be resident in Hong Kong.

There are a number of requirements relating to both the Applicant Company and its proposed licensed representatives, such as requirements related to being fit and proper, and being competent. For example, the proposed ROs must possess a minimum of 3 years relevant industry experience over the 6 years immediately prior to the date of application and possess a minimum of 2 years of proven management skill and experience.

A licensed corporation is also subject to capital requirements, the amount of which varies depending on the type of license and the conditions to which the license may be subject. For a Type 9 licensed corporation, that does not hold client assets, there is a minimum liquid capital requirement of HK\$100,000. Other capital requirements apply to different types of licenses subjected to different conditions imposed. To apply for an SFC license, the applicant must fill in a number of prescribed SFC forms which elicits information about the Applicant Company, the proposed licensed representatives (and ROs) and also the substantial shareholders of the Applicant Company. The Applicant Company needs to provide a detailed business plan, a compliance manual as well as drafts of client agreement. The application process typically takes up to 15 weeks from the time the SFC accepts the applicant's submission documents.

GOING FORWARD

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There are currently proposals to:

- introduce 2 new types of regulated activities, namely:

*Type 11: Dealing in and/or advising on OTC derivatives transactions; and
Type 12: Providing clearing and settlement services in respect of OTC derivatives transactions*

- expand the scope of the current:

*Type 7 regulated activity (Providing automated trading services) (RA 7); and
Type 9 regulated activity (asset management) (RA 9)*

The definition of “*OTC derivatives transactions*” is yet to be finalised by the SFC. However, it is likely to be based on the current definition of “structured products” in the SFO which would therefore cover the commonly traded equity derivatives, FX derivatives, interest rate swaps /options, non-deliverable forwards and credit derivatives.

Current and future fund managers are likely to be most impacted by the new Type 11 and the expanded Type 7 and 9.

If, as part of the fund manager’s business, the fund manager deals in or advises on OTC derivatives, then the fund manager will need a Type 11 license unless one of the carve-outs applies to the fund manager. For example, if fund manager is licensed for Type 1 and / or Type 4 regulated activity, it may be exempted from licensing for the new Type 11 license.

Currently, Type 9 regulated activities does not include OTC derivatives products. Therefore, existing fund managers who manage a portfolio of OTC derivatives products do not currently require a Type 9 license. However, going forward, the definition of Type 9 regulated activity will be expanded to include OTC derivatives products. Existing fund managers who are not currently licensed for Type 9 regulated activities because they manage only OTC derivatives products may need to apply for a Type 9 license. These fund managers will need to take into account of the competency and management experience of the ROs in managing OTC derivatives when applying for a new Type 9 license.

HOW WE CAN HELP

We regularly assist our clients to determine the most appropriate SFC license which they should apply and provide assistance in the application process. Besides some of the key licensing issues identified above, the potential fund manager should also take into consideration a

multitude of other tax, legal and regulatory issues when deciding on the mode of its business operation in Hong Kong, the fund structure it will use and the way it will market the funds in Hong Kong. For further details on how we can assist you, please contact us at: info@altquest.com.hk

This material is for general information only and is not intended to provide legal advice.

簡報

另類基金經理申請證監會牌照的關鍵要素

潛在另類基金經理(即對沖基金、私募基金及不動產基金經理)在香港設立新的基金管理業務時面對的首項挑戰是怎樣向證監會申請合適的牌照。這篇文章將會審視潛在另類基金經理申請證監會牌照時會面對的關鍵要素及申請證監會牌照的主要要求。

申請合適牌照

證監會一共有 **10** 類關於不同「受規管活動」的牌照。潛在基金經理常問的第一個問題是有沒有需要申請一個或多個牌照。受規管活動當中有些是概念上及實務上比較容易區分的，有些則與其他受規管活動的差距甚微，驟眼看來似乎是重覆。

與另類基金經理最相關的是第 **1** 類(證券交易)、第 **4** 類(就證券提供意見)及第 **9** 類(提供資產管理)牌照。基金經理需要申請一項或多項的牌照則須視乎基金經理擬在香港經營的業務性質及活動而定。

儘管表面而言，基金經理在香港管理基金均需要至少申請第 **9** 類牌照，但香港的《證券及期貨條例》及其附屬法例、法規及指引均提供了相當多能夠適用於基金經理的豁免。其中一個例子是「私人公司」豁免 — 「證券」的定義不包括根據香港《公司條例》第 **29** 條定義的私人公司股票。需要申請牌照的「資產管理」活動包括管理「股票」的投資組合，但如果基金經理管理的投資組合中只包含如上述定義的「私人公司」的股票，則基金經理可據此為理由而毋須申請牌照。上述豁免不適用於投資上市公司股票的對沖基金(因為上市公司股票不符合「私人公司」股票的定義)。這項理據僅適用於投資組合中只有「私人公司」的私募股權基金經理。同樣地，因為不動產資產的投資組合不算股票投資組合或任何受規管的「資產管理」活動中的財務資產或工具，所以管理實質的不動產資產的投資組合亦可能超出「管理股票的投資組合」的範圍。

如果基金經理管理的投資組合中包括股票或受規管資產管理活動的任何其他財務資產或工具，而又未能援引其他可適用的豁免，那麼該等基金經理以穩妥為目的便有需要申請第 **9** 類牌照。另一個常見問題是到底基金經理管理一個股票的投資組合是否在香港進行。一個

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典型的對沖基金交易商以全權委託的形式在香港的服務台經常交易是明顯在香港進行第 9 類資產管理活動。但是，私募基金的運作便不是那麼清晰，因為相關的投資決定並非經常需要作出，而投資決定是由委員會(例如:投資委員會)發出的，但委員會的成員可能包括了居住在香港及外地的人士。此等安排會導致投資決定是否在香港作出的疑問，繼而產生有沒有需要在香港申請牌照的問題。這個問題需要考慮多項因素，例如：投資委員會中香港的成員個別或集體地就投資決定是否有否決權；或者是，投資委員會是由海外基金機構或是香港基金經理構成。上述分析的結論可能是投資決定是由香港以外的地方作出的(所以沒有在香港進行第 9 類資產管理活動)，而香港的工作人員只是進行提供意見的活動(第 4 類受規管活動)。所以，需要申請的其實是第 4 類牌照而並非第 9 類牌照。

當基金經理(特別是首次當基金經理)持續面對籌集資本的不利因素，基金經理通常採取首先以管理帳管理客戶資產，等待與投資者產生一定的索引力之後成立一個不說明投資目標的項目基金。我們經常被問及此等安排需要申請什麼牌照。回答此問題的時候，我們需要知道基金經理對於客戶資產的投資決定控制程度，及其他相關資料才可答覆。倘若是對沖基金經理，他們一般會全權控制客戶的資產，所以問題不大。但是，一般私募基金的基金經理沒有獲得客戶的全權委託管理資產權 — 例如：客戶可能有一定程度的投資資產決定權。基金經理愈少全權管理資產的權利，愈有可能需要申請第 9 類牌照以外的牌照。在此等情況下，視乎提供予客戶的服務性質、提供意見的程度、收取客戶費用的安排、組織投資策略、持牌機構對於交易買賣雙方的關係性質及其他相關因素，可能需要申請第 4 及第 1 類牌照。

發牌要求及程序

若香港成立的公司(公司申請人)擬進行的活動符合其中一項受規管活動的定義，就必須申請相關牌照。公司申請人需要委任至少兩名個別人士為負責人員。負責人員為該公司申請人的持牌代表，需活躍地參與或直接監管其所隸屬的公司申請人所經營的受規管活動。至少一名負責人員必須為法團(公司申請人)之執行董事，活躍地參與或負責直接監管申領受規管活動之行為。至少一名負責人員份必須居住香港。

公司申請人及其持牌代表受多項條件監管，如相關法人及人士需符合適合及正當並且能夠勝任的要求。例如：負責人員於申請當日前必須具備於過去 6 年中至少有 3 年相關行業經驗，及擁有至少兩年行政管理經驗及技巧。



持牌法團亦受資本要求所監管，資本要求的金額會因應所申請的牌照類別及申請其牌照類別而受到的限制而變化。就第**9**類持牌法團而言，上述持牌法團沒有持有客戶資產，則必須持有至少港幣**10**萬元正的流動資金。其他資本要求視乎申領不同牌照類別及其限制所監管。就向證監會申領牌照而言，申請者必須填寫多份證監會指定的表格，提供有關公司申請人、擬負責人員及大股東資料。公司申請人亦需要提供一份詳細商業計劃書、合規手冊以及客戶協議書草擬本。證監會收到申請者提交的文件後，需時**15**個星期完成發放牌照申請。

展望未來

監管機構就《證券及期貨條例》提出以下修訂：

- 建議新增兩類受規管活動，如下：

第**11**類受規管活動：場外衍生工具產品交易或就場外衍生工具產品提供意見；及

第**12**類受規管活動：為場外衍生工具交易提供結算代理人服務。

- 擴展現時下列受規管活動範圍：

第**7**類受規管活動：提供自動化交易服務；及

第**9**類受規管活動：提供資產管理。

證監會現在尚未就「場外衍生工具交易」之定義有定案。然而該定義之定案可能傾向基於現行《證券及期貨條例》項下「結構性產品」之定義，並將以下各項普遍交易涵蓋在其定義，包括股票衍生工具、外匯衍生工具、掉期息率/期權、不交收遠期外匯及信貸衍生工具。

現時及未來的潛在基金經理很大機會受到新增第**12**類別牌照和擴展第**7**類別及第**9**類別牌照影。

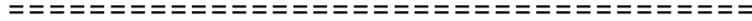
若基金經理之業務是包括進行場外衍生工具交易及就相關交易提供意見，除非豁免條件適用於該等基金經理，該等基金經理須就第**11**類受規管活動申領牌照。例如：基金經理已獲發第**1**類及/或第**4**類受規管活動牌照，則有機會毋須就第**11**類受規管活動申領牌照。



目前，第 9 類受規管活動不包括場外衍生工具產品。因此，現時負責管理場外衍生工具產品投資組合之基金經理均無需申請第 9 類牌照。然而將來，第 9 類受規管活動牌照之定義將會擴展包括場外衍生工具產品。因此，現時不獲第 9 類牌照而負責管理場外衍生工具產品的基金經理或需申請第 9 類牌照。該等基金經理就申請第 9 類牌照時，需考慮負責人員的資歷及其管理場外衍生工具產品之經驗。

我們可提供的幫助

本公司不時協助客戶決定選擇向證監會申請最合適的牌照以及在申請過程中提供協助。潛在基金經理除了應考慮上述主要發牌事宜、業務運作模式及基金結構外，亦應考慮到眾多稅務、法律及監管等問題。如需尋求任何協助，歡迎電郵至 info@altquest.com.hk 與本公司聯絡。



本文只供一般參考用途，不能被視為法律意見。

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