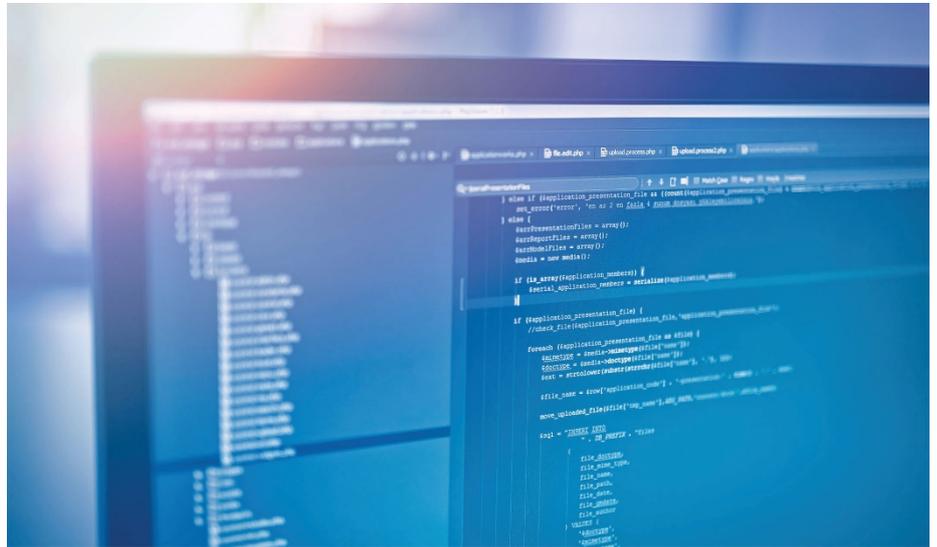


BRIEFING

THE MARKETING OF INVESTMENTS IN
THAILAND - UNDERSTANDING
THE REGULATORS
NOVEMBER 2018

● THIS BRIEFING CONSIDERS THE RISK OF VIOLATIONS OF LICENSING LAWS BY SECURITIES BUSINESS OPERATORS AND ADVERTISING AGENCIES IN THE THAI MARKET.



The digital economy has made businesses borderless, and a combination of economic development and increased internet usage in Thailand has led many overseas businesses to seek access to this market and its eager consumers. Investment and wealth management is one area in which the Thai public is particularly receptive to lucrative opportunities, and advertising agencies are proving to be one of the most convenient and cost-effective routes to market.

“SECURITIES BUSINESS OPERATORS WITHOUT A TSEC LICENCE MUST ENSURE THAT THEIR MARKETING IS NOT ACCESSIBLE IN THAILAND.”

Nevertheless, the investment sector remains an area subject to robust regulation and scrutiny by Thailand’s Securities and Exchange Commission (the “TSEC”). The TSEC’s vigilant approach to the regulation of “securities businesses” in the capital markets has implications not only on securities business operators but also on advertising agencies whose activities may be viewed as providing assistance to businesses under the supervision of the TSEC.

Securities business operators without a TSEC licence must ensure that their marketing is not accessible in Thailand, whether such marketing takes place through business activities, the internet or any other means. Also, advertising agencies engaged by securities business operators to market their products or services in Thailand should take measures to set a distance between their advertising business and their clients’ securities business. This will enable them to avoid any unintended violation of the Securities and Exchange Act B.E. 2535 (1992) (the “SEA”) arising from a perceived complicity in the infringements of the licensing laws by their clients.

“THE RISE OF THE INTERNET HAS LED TO A SURGE IN ONLINE ADVERTISING, WHICH NOW SERVES AS A KEY GATEWAY TO POTENTIAL INVESTORS...”

Advertising agencies’ role in capital markets

The rise of the internet has led to a surge in online advertising, which now serves as the key gateway to potential investors worldwide. This is supported by the increasing ease with which funds can be transferred internationally.

In the context of financial and investment services, online advertising has opened doors to a much wider pool of investors. In the same vein, investors themselves are now exposed to a more diverse range of investment products to choose from.

With tools such as placement targeting and interest-based advertisement, advertising agencies enable brokers and financial advisors to reach the right groups of investors with tailored investment products. Indeed, by simply placing advertisements online, brokers and financial advisors established and licensed outside Thailand are able to reach Thai investors without having to physically set up an office in the jurisdiction.

However, even if they are based outside Thailand, both financial service providers and the advertising agencies who promote them could still be subject to the TSEC’s regime if deemed to be operating a “securities business”. Whether the placement of an advertisement constitutes the operation of a “securities business” is a matter governed by the SEA.

Definition of “securities” and “securities business”

The SEA defines “securities” as including: treasury bills; bonds; bills; shares; debentures; investment units which are instruments or evidence representing rights to the property of a mutual fund; certificates representing rights to purchase shares; certificates representing rights to purchase debentures; certificates representing rights to purchase investment units; and any other instruments the TSEC may specify.

The SEA defines a “securities business” as one engaged in any of the following business activities: securities brokerage; securities dealing; investment advisory services; securities underwriting; mutual fund management; private fund management; and any other business activities as the TSEC may prescribe. The SEA further defines each of the above-listed business activities as follows:

- “Securities brokerage” means brokering or representing any person in connection with the purchase, sale or exchange of securities in the normal course of business in return for a commission, fee or other form of remuneration;
- “Securities dealing” means a purchase, sale or exchange, outside the Securities Exchange or an over-the-counter centre, of securities, for one’s own account in the normal course of business;
- “Investment advisory service” means giving advice in the normal course of business to the public, whether directly or indirectly, concerning the value of securities or the suitability of investing in those securities or the purchase or sale of any securities in consideration for a fee or other remuneration, excluding the giving of advice to the public in any manner specified in a notification of the TSEC;
- “Securities underwriting” means the underwriting of all or part of the securities from a company or owner of securities for sale to the public in consideration for a fee or other remuneration with or without conditions;
- “Mutual fund management” means the management of investments under a mutual fund project by issuing investment units of each project for sale to the public and bringing proceeds therefrom to invest in, or procure profit from

holding in, securities, derivatives, or any other property, or to invest in or procure profit by any other means; and

- "Private fund management" means the management of funds of a person or group of persons who has authorised the management of an investment to acquire a benefit from securities, whether or not investment in other assets is also made, which management is conducted as an ordinary course of business, in consideration for a fee or other remuneration, excluding the management of an investment in any manner specified in a notification of the TSEC.

Any operator of a securities business will require a licence from the TSEC. Operation of a securities business without a licence could result in a maximum penalty of five years imprisonment, a fine of THB500,000 and an additional fine of THB10,000 per day of operation without a licence.

The above definitions of "securities" and "securities business" cause uncertainty for businesses in determining whether or not they will require a licence. This uncertainty extends to advertising agencies who may be left questioning whether or not they need a licence for merely promoting their client's securities business.

The TSEC's regulatory reach

The TSEC has always taken a vigilant and rigorous approach to the regulation of securities businesses. The TSEC regularly investigates and prosecutes unlicensed business operators to counter fraud and to ensure that those eligible to give financial and investment advice, and to have access to the funds of members of the public, are qualified to do so.

The SEA does not limit the scope of its provisions to Thai operators, and the TSEC has demonstrated that it is prepared to hold overseas operators subject to the requirement to have a TSEC licence where they conduct securities business operations in Thailand. In our experience, the measures taken by the TSEC to crack down on unlicensed overseas operators include listing their names on an alert list of operators who run securities businesses without a licence, or even sending a notice to the regulator of the country where such operator is situated. The taking of such measures considerably harms the reputation and credibility of the operator.

Recently, WFW officially enquired of the TSEC as to whether the placement of advertisements by an advertising agency in Thailand for an overseas securities business, for the purposes of advertising their presence (e.g. by providing contact details), would trigger any licensing requirements under the SEA.

In response to our inquiry, the TSEC provided the following comments:

Licensing requirements for the overseas securities business

The TSEC expressed its view that the placement of advertising accessible in Thailand by website visitors would constitute the operation of a securities business and, therefore, requires a licence from the TSEC. It was emphasised that in placing such advertising, the overseas company *holds itself out to the general public* as operating a securities business in Thailand and, as such, requires a TSEC licence.

Licensing requirements for the advertising agency

The TSEC commented that an advertising agency's activity of posting advertising for an overseas securities business does not require a licence under the SEA. However,

"OPERATION OF A SECURITIES BUSINESS WITHOUT A LICENCE COULD RESULT IN A PENALTY."

the TSEC highlighted that the advertising agency could still be prosecuted if it provided assistance to an overseas company (which does not hold a TSEC licence) in its violation of licensing requirements. In such a case, the advertising agency may be prosecuted on the basis that it conspired with the overseas company in its violation of licensing requirements.

Concluding remarks:

- Overseas operators who run a securities business (as defined in the SEA) require a licence from the TSEC to do so where their marketing reaches consumers in Thailand.
- Advertising agencies that advertise in the Thai market must exercise caution where their client is a securities business operator.

“ADVERTISING AGENCIES SHOULD MAINTAIN A DISTANCE BETWEEN THEIR BUSINESS AND THE SECURITIES BUSINESSES THEY PROMOTE.”

Thanks to the internet, big data and the digital economy, the advertising industry has found itself with an array of opportunities. So too has the financial and investment services industry which is now able to break into new markets at a far lower cost. At the same time, regulators are scrambling to ensure their regulation and supervision remains effective in the face of these developments.

Against this background of heightened regulatory alert, advertising agencies should ensure that, in order to protect themselves from any unintended violation of SEA, they have suitable measures to set and maintain a distance between their business and the securities businesses they promote.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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