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**Insider Dealing under  
the Securities and Futures Ordinance**

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# INSIDER DEALING UNDER THE SECURITIES AND FUTURES ORDINANCE

## INTRODUCTION

The Securities and Futures Ordinance (“SFO”) which came into effect on 1 April 2003 establishes dual civil and criminal regimes (under Parts XIII and XIV respectively) in respect of all types of market misconduct. “Market misconduct” as regulated under Parts XIII and XIV comprises 6 offences: insider dealing, false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false and misleading information inducing transactions and stock market manipulation.

The Market Misconduct Tribunal (“MMT”) extends to all types of market misconduct and the criminal regime covers all forms of market misconduct (including insider dealing) and 3 other offences under Part XIV.

The purpose of this memorandum is to provide an overview of the provisions of the SFO as they relate to Insider Dealing only.

## WHAT IS INSIDER DEALING?

In broad terms insider dealing takes place where a person buys or sells shares in a listed company when he has inside information - that is, knowledge of certain facts about that company which the public does not have and which, if known to the public, would have an impact on the price of that company’s shares.

Sections 270 and 291 of the SFO set out seven occasions on which insider dealing in relation to a listed corporation occurs. They are as follows:

**a. Person with inside information deals in shares of a corporation with which he is connected - Sections 270(1)(a) and 291(1)(a)**

Insider dealing in relation to a listed corporation occurs when a person connected with the corporation has information which he knows is inside information in relation to that corporation and:

- deals in the corporation's listed securities or their derivatives or in those of a related corporation; or
- counsels or procures another person to deal in such listed securities or derivatives, knowing or having reasonable cause to believe that the other person will deal in them.

**b. Take-over offer - bidder deals in shares of target - Sections 270(1)(b) and 291(2)**

Insider dealing in relation to a listed corporation also occurs when a person who is contemplating or has contemplated making a take-over offer for the corporation and knows that the information that the offer is contemplated or is no longer contemplated is inside information:

- deals in the corporation's listed securities or their derivatives or in those of a

related corporation otherwise than for the purpose of the take-over; or

- counsels or procures another person to deal in such listed securities or derivatives otherwise than for the purpose of the take-over.

This provision is designed to stop, for instance, a director of a company which is about to launch a take-over bid from telling his friends to buy shares in the intended target in order to make a profit when the price of those shares inevitably rises. It does not stop the director of the bidder from buying shares in the target (or indeed counselling or procuring others to do so) in a “dawn raid” where the sole purpose of such purchases is to facilitate the take-over itself.

The provision is also designed to catch, say, a director of the bidder who sells short in the target when he knows (but the public does not) that the bidder is not going to increase its offer price at the end of the initial offer period but instead is to let the offer lapse.

“Take-over offer” is defined in Schedule 1 to the SFO.

**c. Person connected with a corporation leaks inside information about that corporation - Sections 270(1)(c) and 291(3)**

Insider dealing in relation to a listed corporation also occurs when a person connected with a listed corporation has information which he knows is inside information in relation to the corporation and discloses the information, directly or indirectly, to another person, knowing or having reasonable cause to believe that the other person will use the information to deal, or counsel or procure another person to deal, in the corporation's listed securities or their derivatives or in those of a related corporation.

The sub-section is designed to cover the person who deliberately leaks confidential information with a view to someone (whether it be the person to whom he has leaked the information or some other person) using that information to make a favourable deal on the Exchange.

**d. Bidder leaks take-over information - Sections 270(1)(d) and 291(4)**

Insider dealing also occurs when a person who is contemplating or has contemplated making a take-over offer for a listed corporation and knows that the information that the offer is contemplated or no longer contemplated is inside information discloses the information, directly or indirectly, to another person knowing or having reasonable cause to believe that the other person will use the information to deal, or to counsel or procure another person to deal in the corporation's listed securities or their derivatives or in those of a related corporation.

This applies where a person who is contemplating or has contemplated a take-over offer for another corporation leaks to another person information to the effect that he is contemplating such an offer or is no longer contemplating such an offer with a view to that other person using the information to deal in the target's securities or to counsel or procure another to deal in them.

**e. Recipient of inside information from a person connected with a corporation deals in shares of that corporation - Sections 271(1)(e) and 291(5)**

Insider dealing in relation to a listed corporation also occurs when a person has information which he knows is inside information in relation to a listed corporation which he received, directly or indirectly, from a person whom he knows is connected

with the corporation and whom he knows or has reasonable cause to believe held the information as a result of being so connected:

- deals in the corporation's listed securities or their derivatives or in those of a related corporation; or
- counsels or procures another person to deal in such listed securities or derivatives.

This catches the recipient of the leaked information who uses it either by dealing himself or by counselling or procuring someone else to deal. (The person who actually leaks the information would be caught by Sections 270(1)(c) and 291(3).)

**f. Recipient of inside information about a take-over deals in shares of the target - Sections 270(1)(f) and 291(6)**

Insider dealing also occurs when a person has received, directly or indirectly, from a person whom he knows or has reasonable cause to believe is contemplating or no longer contemplating making a take-over offer for the listed corporation, information to that effect which he knows is inside information in relation to the corporation and:

- deals in the corporation's listed securities or their derivatives or in those of a related corporation; or
- counsels or procures another person to deal in such listed securities or derivatives.

**g. Person with inside information seeks to facilitate a dealing on an overseas market - Sections 270(2) and 291(7)**

Insider dealing also occurs when a person who knowingly has inside information in relation to a listed corporation in any of the circumstances set out above (i.e. in sub-section 270(1) and sub-sections 291(1)-(6)) and:

- counsels or procures another person to deal in the corporation's listed securities or their derivatives or in those of a related corporation, knowing or having reasonable cause to believe that the other person will deal in such listed securities or derivatives outside Hong Kong on an overseas stock market; or
- discloses the inside information to another person knowing or having reasonable cause to believe that he or some other person will use the inside information to deal or counsel or procure another person to deal in the corporation's listed securities or their derivatives or in those of a related corporation outside Hong Kong on an overseas stock market.

## **DEFINITIONS**

**i. “Securities”**

“Securities” is widely defined to mean:

- a. shares, stocks, debentures, loan stocks, funds, bonds or notes of, or issued by, or which it is reasonably foreseeable will be issued by, a body, whether incorporated or unincorporated, or a government or municipal government authority;

- b. rights, options or interests (whether described as units or otherwise) in, or in respect of, any of the foregoing;
- c. certificates of interest or participation in, temporary or interim certificates for, receipts for, or warrants to subscribe for or purchase, any of the foregoing;
- d. interests, rights or property, whether in the form of an instrument or otherwise, commonly known as securities; or
- e. interests, rights or property, whether or not in the form of an instrument, which the Financial Secretary has specified by notice in the Gazette is to be regarded as a “security”.

ii. **“Listed securities”**

Securities listed on the Hong Kong Stock Exchange at the time of the dealing in question. The definition of ‘listed securities’ include:

- issued unlisted securities provided that, at the time of the insider dealing, it is reasonably foreseeable that they will be listed and they are subsequently in fact listed; and
- unissued securities provided that, at the time of the insider dealing, it is reasonably foreseeable that they will be issued and listed and they are subsequently in fact issued and listed.

This is intended to catch “grey market” dealings prior to a secondary issue of securities. As insider dealing can only occur in relation to a ‘listed corporation’, insider dealing in an IPO grey market is not covered. The market manipulation provisions may however apply to such trading to the extent that it affects post listing prices and trading.

Securities are treated as listed notwithstanding that dealings in them may have been suspended.

iii. **“Corporation”**

The definition of “corporation” includes the large number of companies which are listed in Hong Kong but incorporated abroad.

iv. **“a person connected with a corporation”**

A “person connected with a corporation” is someone who is on the inside track who has access to information about a corporation by reason of his relationship with it. He is commonly called an “insider”.

Under sections 247 and 287 of the SFO, an individual is connected with a corporation if:

- a. he is a director or employee of that corporation or a related corporation;
- b. he is a substantial shareholder (i.e. has an interest in 5% or more of the issued voting share capital) in the corporation or a related corporation\*;
- c. his position may reasonably be expected to give him access to inside information concerning the corporation by reason of:

- i. a professional or business relationship existing between himself (or his employer or a corporation of which he is a director or a firm of which he is a partner) and that corporation, a related corporation or an officer or substantial shareholder in either corporation; or
- ii. his being a director, employee or partner of a substantial shareholder of the corporation or a related corporation; or
- d. he has access to inside information by virtue of being connected (within the meaning of a, b or c above) with another corporation where that information relates to a transaction (actual or contemplated) involving both corporations or involving one of them and the listed securities of the other or their derivatives, or to the fact that such transaction is no longer contemplated; or
- e. he was connected with the corporation within the meaning of a, b, c or d above at any time within 6 months preceding any relevant dealing.

\* The definition of substantial shareholder refers to a holder of an interest of 5% or more of the company's issued voting share capital

A corporation is connected with another corporation if any of its directors or employees are so connected. A director is defined to include shadow directors, that is, persons in accordance with whose instructions the directors of the corporation are accustomed or obliged to act.

Under sections 248 and 288, any public officer or member or employee of certain bodies who in his capacity as such obtains inside information about a corporation will be deemed to be connected with that corporation.

v. **“Inside information”**

“Inside information”<sup>1</sup> in relation to a corporation means specific information about:

- a. the corporation;
- b. a shareholder or officer of the corporation; or
- c. the listed securities of the corporation or their derivatives,

which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but which would, if it were generally known to them, be likely to materially affect the price of the listed securities.

Inside information could include information about changes in a corporation's shareholders or officers and about rights attaching to listed securities and derivatives over those securities.

- i. Determining whether information is “specific”:

***In Firstone International Holdings Ltd, Chinese Estates Holdings Ltd, Gilbert Holdings Ltd<sup>2</sup>, the IDT has adopted the following test:***

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<sup>1</sup> s.245(1) Securities and Futures Ordinance, Cap 571

<sup>2</sup> Decisions are available at <http://www.idt.gov.hk/english/welcome.html>. There are no decisions of the High Court

*“We have... .. directed ourselves that information concerning a company’s affairs is sufficiently specific if it carries with it such particulars as to a transaction, the event or matter or proposed transaction, event or matter, so as to allow that transaction, event or matter, to be identified and its nature to be coherently described and understood.”*

- “Specific information” is contrasted with mere rumour, vague hopes and worries, and with unsubstantiated conjecture.
- It does not need to be precise. In Chinese Estates, the Tribunal said:
  - *“Information is not rendered general, as opposed to specific, merely because the information is broad and allows room, even substantial room, for particulars.”*

ii. “Inside information” must be information:

*“which would if it were generally know to [the wider investing public to] be likely to materially affect the price of the listed securities” [s 245(1)]*

- The information must be price sensitive. It is not sufficient that the information should simply affect the price of the securities.
- The effect must be material. In Chinese Estates:
  - *“Thus information that would be likely to cause a mere fluctuation or a slight change in price would not be sufficient; there must be the likelihood of change of significant degree in any given circumstances that amount to a material change.”*

vi. **“Dealing in securities”**

Under section 249 of the SFO a person deals, whether he acts as principal or agent. Agreeing to deal and buying or selling the right to deal will also be dealings under the SFO.

vii. **“related corporation”**

For the purposes of the SFO:

- a. Two or more corporations are regarded as related corporations of each other if one of them is:
  - 1. the holding company of the other;
  - 2. a subsidiary of the other; and
  - 3. a subsidiary of the holding company of the other;
- b. when an individual:
  - 1. controls the composition of the board of directors of one or more

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in which this test has been challenged.



corporations;

2. controls more than half of the voting power at general meetings of one or more corporations; or
3. holds more than half of the issued share capital (excluding any part which carries no right to participate beyond a specified amount on a distribution of either profits or capital) of one or more corporations,

each of the corporations referred to in paragraphs 1 to 3, and each of their subsidiaries, are regarded as related corporations of each other.

## **WHAT IS NOT INSIDER DEALING?**

### ***Defences***

Under sections 271 and 292 of the SFO a person will have a defence if he can establish that he is within one of the categories set out below:

1. the dealing, counselling or procuring was made:
  - a. for the sole purpose of acquiring qualifying shares as a director or intending director of a corporation;
  - b. in good faith in performance of an underwriting agreement for the listed securities or derivatives in question; or
  - c. in good faith as a liquidator, receiver or trustee in bankruptcy.
2. in the case of a corporation:
  - a. there were effective arrangements in place (commonly called a “Chinese wall”) to ring-fence any inside information in the possession of any of its directors and employees; and
  - b. each person who took the decision for the corporation to deal, counsel or procure a dealing in the listed securities or derivatives in question did not have the inside information at that time and had not received advice from those in possession of such information.
3. the purpose for which a person dealt in or counselled or procured another to deal in the listed securities or their derivatives or disclosed information did not include the purpose of securing or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using the inside information.
4. the person dealt or counselled or procured another to deal in a corporation's listed securities or their derivatives:
  - a. as agent;
  - b. he did not select or advise on the selection of such listed securities or derivatives; and
  - c. he did not know that the person for whom he acted was connected with that corporation or had the inside information.

5. the dealing was off-market in Hong Kong and:
  - a. where a person dealt in listed securities or their derivatives, he and the other party entered into the dealing directly with each other and at the time of the dealing, the other party knew, or ought reasonably to have known, of the inside information; or
  - b. where a person counselled or procured another person to deal in listed securities or their derivatives, he counselled or procured the other party to enter into the dealing directly with him and at that time the other party knew, or ought reasonably to have known, of the inside information.
6. the person dealt in listed securities or their derivatives but did not counsel or procure the other party to deal and at the time of the dealing the other party knew, or ought reasonably to have known, that he was a person connected with the corporation.

This defence operates on the assumption that people who transact with someone they know or should know is a company insider, should be on notice that the other party may be insider dealing and so make adequate inquiries with the insider before dealing with them and maybe negotiate terms as to the disclosure of inside information.

7. the person counselled or procured another to deal in listed securities or their derivatives and establishes that:
  - a. the other person did not counsel or procure the other party to the dealing to deal in the listed securities or derivatives; and
  - b. at the time he counselled or procured the other person to deal, the other party to the dealing knew, or ought reasonably to have known, that the other person was a person connected with the corporation.

This gives a defence to a person who counsels or procures a person to deal in the same circumstances as a defence is available to a person who deals under 6 above. It is really a logical extension of the defence under paragraph 6. It would, for example, protect a merchant bank who introduced a prospective purchaser to a substantial shareholder of a listed corporation who the bank thought might want to tender to divest their shareholding and advised the shareholder on the sale.

8. the person dealt or counselled or procured another to deal in a corporation's listed securities or their derivatives and:
  - a. he acted in connection with any dealing which was under consideration or was the subject of negotiation, or in the course of series of such dealings and with a view to facilitating the accomplishment of the dealing or the series of dealing; and
  - b. the inside information was market information arising directly out of his involvement in the dealing or the series of dealings.

“Market Information” is defined to include facts such as:

- that there has or is to be (or that there has not been or is not to be) a dealing in listed securities or their derivatives or that any such dealing is under consideration or negotiation;
- the quantity and price (or price range) of the listed securities or their derivatives; and

- the identity of the persons involved.

This gives a defence to a person who trades with knowledge of his own trading intentions or activities and also to those who simply execute or facilitate a trade on his behalf. This defence caters for the situation in which a person, whose trading activities might be price-sensitive information (e.g. a substantial shareholder and therefore a connected person, increases his stake in a listed company). Without such an explicit defence a person dealing with 'insider' information about their own trading activities is technically insider dealing even though the Hong Kong authorities did not taken action against such conduct under the previous legislation.

9. the dealing in question was subject to the rules of a recognised clearing house and was entered into by the clearing house with a clearing participant for the purposes of the clearing and settlement of a market transaction.

Sections 272 and 293 provide a further defence where a trustee or personal representative dealt in or counselled or procured a dealing in listed securities or their derivatives on advice obtained in good faith from an appropriate person who did not appear to him to be a person who would have been involved in insider dealing if he himself had dealt in the listed securities or their derivatives.

Sections 273 and 294 provide a defence where a person dealt in listed securities or their derivatives in the exercise of a right to subscribe for or otherwise acquire such securities or their derivatives which was granted to him or was derived from securities held by him at a time when he was not aware of any inside information.

## **EFFECTS OF INSIDER DEALING AND OTHER FORMS OF MARKET MISCONDUCT**

### **THE MARKET MISCONDUCT TRIBUNAL (“MMT”)**

The MMT is chaired by a judge assisted by two members and a presenting officer appointed by the Secretary for Justice when conducting proceedings. It is inquisitorial and is entitled to direct that the SFC carry out further investigations and report its findings to the MMT.

Under the SFO the presenting officer is a lawyer whose role is to present evidence to the MMT. He should be more like a prosecuting counsel rather than a counsel assisting the tribunal and he should be independent.

There are detailed provisions in the SFO governing the composition of and procedures to be followed by the MMT.

#### ***Proceedings of the MMT***

The Financial Secretary may under section 252 institute proceedings before the MMT in respect of any suspected market misconduct following a report by the SFC or a referral from the Secretary for Justice by giving notice in writing to the MMT setting out the terms of reference for the proceedings.

The main purpose of proceedings is to determine:

- a. whether any market misconduct has taken place;

- b. the identity of every person involved in the market misconduct; and
- c. the amount of any profit gained or loss avoided as a result of the market misconduct.

The MMT may identify a person as having engaged in market misconduct if:

- a. he has perpetrated any market misconduct;
- b. the market misconduct was perpetrated by a corporation of which he is an officer with his consent or connivance; or
- c. another person engaged in market misconduct and he assisted or connived with that person in the perpetration of the market misconduct, knowing that such conduct constitutes or might constitute market misconduct.

The MMT makes its findings on the civil standard of proof. It needs therefore to be satisfied that a person has engaged in market misconduct on the balance of probabilities (rather than beyond reasonable doubt which is the criminal standard of proof).

The MMT has powers to receive any evidence, whether or not such evidence would be admissible in civil or criminal proceedings. It also has wide powers to compel the giving of evidence and to prevent the publication of information about the evidence the MMT receives. Significantly, a person is not excused from complying with a requirement of the MMT to give evidence on the ground that to do so might incriminate him (section 253(4)) and such compelled self-incriminatory evidence may be considered by the MMT.

### ***Orders of the MMT***

At the end of any proceedings the MMT may under subsection 257(1) impose the following sanctions on any person found to have committed market misconduct:

- a. a disqualification order – that a person shall not, without the leave of the Court of First Instance, be or continue to be a director, liquidator, or receiver or manager of the property or business, of a listed corporation or any other specified corporation or in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation or other specified corporation for up to 5 years;
- b. a cold shoulder order – that a person shall not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly, deal in any securities, futures contract or leveraged foreign exchange contract, or an interest in any of them or a collective investment scheme for up to 5 years;
- c. a cease and desist order – that the person must not again engage in any specified form of market misconduct;
- d. a disgorgement order – that the person pay to the Government an amount up to the amount of any profit gained or loss avoided as a result of the market misconduct;
- e. Government costs order – that the person pay to the Government its costs and expenses in relation to the proceedings and any investigation;
- f. SFC costs order – that the person pay the SFC's costs and expenses in relation to any investigation; and
- g. disciplinary referral order – that any body which may take disciplinary action against

the person as one of its members be recommended to take such action against him.

A disgorgement order may, at the discretion of the MMT, be made subject to compound interest from the date of the occurrence of the market misconduct in question (section 259). The SFC also has the ability to fine regulated persons (see “Disciplinary Proceedings” below).

When making an order, the MMT may take account of any previous convictions in Hong Kong, any previous findings of market misconduct by the MMT and any previous findings of insider dealing under the S(ID)O (s257(2)).

Failure to comply with a disqualification, cold shoulder or cease and desist order is a criminal offence under sub-sections 257(10) and 258(10) punishable by a maximum fine of \$1 million and/or up to 2 years' imprisonment.

In addition, sections 253(2) and 254(6) prescribe a penalty of a maximum fine of \$1 million and a maximum of 2 years' imprisonment for failure to comply with various requirements of the MMT or disrupting its proceedings. The conduct referred to in those sections and in sections 257(10) and 258(10) is also liable to be punished as contempt under section 261.

### ***Appeals***

Any person who is dissatisfied with a finding or determination of the MMT may appeal to the Court of Appeal but only in respect of a point of law or, with the leave of the Court of Appeal, on a question of fact (section 266).

Under the SFO, a party who is not satisfied with certain decisions by the SFC (i.e. disciplinary action) may appeal to the Securities & Futures Appeal Tribunal (“SFAT”). Recent MMT and SFAT decisions have reiterated that:

- SFC disciplinary proceedings are civil in nature for the purposes of the Hong Kong Bill of Rights; and
- the civil standard of proof, allowing for flexibility in respect of the seriousness of the issue (a sliding standard of proof), should be used before the SFAT and in any SFC disciplinary proceedings. It is possible for the civil threshold to approach or even be identical to the criminal standard<sup>3</sup>.

### **CRIMINAL LIABILITY**

All forms of market misconduct (including insider dealing) are liable to prosecution as a criminal offence under Part XIV of the SFO.

### ***Penalties***

The maximum criminal sanctions were increased by the SFO to a maximum of 10 years' imprisonment and fines of up to \$10 million. In addition, the court may make disqualification, cold shoulder and disciplinary referral orders. Failure to comply with a disqualification or cold shoulder order is an offence liable to a maximum fine of \$1 million and up to 2 years'

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<sup>3</sup> In *Application for Review by Mr. Lee On Ming, Paul* (SFAT Application No 4/2007), it was claimed that the SFC's disciplinary process should be characterised as a criminal one and so the higher criminal burden of proof should be applied instead. SFAT disagreed. Mr. Lee has filed an appeal against the SFAT's decision and is pending to be heard.

imprisonment.

### ***No double jeopardy***

A person will not be subject to the “double jeopardy” of both civil proceedings under Part XIII and criminal proceedings under Part XIV for the same conduct. The SFO provides that a person who has been subject to criminal proceedings under Part XIV may not be subject to MMT proceedings if those proceedings are still pending or if no further criminal prosecution could be brought against that person again under Part XIV in respect of the same conduct and vice versa (sections 283 and 307).

The decision as to whether to take civil or criminal proceedings in relation to suspected market misconduct is made by the Secretary for Justice. The SFC may also institute summary criminal proceedings before a magistrate for less serious market misconduct offences, although the Secretary for Justice is able to intervene in the SFC’s conduct of any such proceedings. The decision whether to take criminal or civil proceedings is made in accordance with the Department of Justice’s Prosecution Policy which provides two criteria for the institution of criminal proceedings: that there is sufficient evidence for a criminal prosecution and that a criminal prosecution is in the public interest. If these tests are not met, suspected market misconduct will be dealt with through civil proceedings before the MMT.

### **CIVIL LIABILITY - Private right of action**

The SFO provides a private right of civil action against any person who has committed market misconduct or any offence under Part XIV in favour of anyone who has suffered a pecuniary loss as a result, unless it is fair, just and reasonable that the perpetrator should not be liable (sections 281 and 305).

A person will be taken to have committed market misconduct if:

- a. he has perpetrated any market misconduct;
- b. corporation of which he is an officer perpetrated the market misconduct with his consent or connivance; or
- c. any other person committed market misconduct and he assisted or connived with that person in the perpetration of the market misconduct, knowing that such conduct constitutes or might constitute market misconduct.

It is not necessary for there to have been a finding of market misconduct by the MMT or a criminal conviction under Part XIV before bringing civil proceedings. Findings of the MMT are however admissible in the civil proceedings as prima facie evidence that the market misconduct took place or that a person engaged in market misconduct. Further a criminal conviction constitutes conclusive evidence that the person committed the offence. The courts are able to impose injunctions in addition to or in substitution for damages.

### **TRANSACTIONS NOT VOID OR VOIDABLE**

Sections 280 and 304 provide that a transaction is not void or voidable by reason only that it constitutes market misconduct.

### **LIABILITY OF OFFICERS OF A CORPORATION**

### ***Duty of Officers***

Section 279 of the SFO imposes a duty on all officers of a corporation to take reasonable measures to ensure that proper safeguards exist to prevent the corporation from acting in a way which would result in the corporation perpetrating any market misconduct.

The definition of an “officer of a corporation” includes a director (including a shadow director and any person occupying the position of a director), manager or secretary of, or any other person involved in the management of, the corporation. The last category (i.e. any other person involved in management) could, in principle, catch supervisors and anyone else with management responsibilities.

Under Section 258, where a corporation has been identified as having been engaged in market misconduct and the market misconduct is directly or indirectly attributable to a breach by any person as an officer of the corporation of the duty imposed on him under section 279, the MMT may make one or more of the orders detailed above in respect of that person even if that person has not been identified as having engaged in market misconduct himself.

### ***Civil Liability***

As described above, the SFO clearly provides that anyone who suffers pecuniary loss as a result of market misconduct has a right of civil action to seek compensation. As noted above, an officer of a corporation which perpetrated market misconduct is taken to have committed market misconduct himself, if the corporation perpetrated the misconduct with his consent or connivance.

### ***Criminal Liability***

Under section 390 of the SFO, where it is proved that an offence committed under Part XIV was aided, abetted, counselled, procured or induced by, or committed with the consent or connivance of, or attributable to the recklessness of, any officer of the corporation, or any person purporting to act in any such capacity, that person, as well as the corporation, is guilty of the offence and liable to be punished accordingly.

### ***Disciplinary Proceedings***

Under Part IX of the SFO, any regulated person who is guilty of misconduct or who, in the opinion of the SFC, is not a fit and proper person to be or to remain the same type of regulated person, is subject to a widened range of disciplinary procedures. ‘Misconduct’ is defined to include any contravention of the SFO or of the terms of any licence issued or registration made under it. The SFC may revoke or suspend a person's licence in respect of all or any part of the regulated activities for which he is licensed. In addition, or alternatively, the SFC may impose a fine not exceeding the greater of \$10 million or 3 times the amount of the profit gained or loss avoided by the regulated person as a result of his misconduct, or such other conduct which led to the SFC's opinion that he is not fit and proper. The SFC may also impose prohibition orders preventing an offending person from, among other things, applying to be registered or licensed under the SFO. Approvals granted to 'responsible officers' may also be suspended or revoked. Persons covered by these provisions include corporations licensed under the SFO, their responsible officers and persons involved in their management. Significantly, authorised financial institutions (now required to be registered with the SFC if carrying out certain regulated activities), their executive officers, persons involved in the management of their regulated business and individuals named in their register as carrying out a regulated activity, are also now subject to the SFC's disciplinary regime.

## **PROCEEDINGS UNDER SECTION 213 SFO**

The decision of the Court of Final Appeal in the Securities and Futures Commission v Tiger Asia Management LLC (Tiger Asia) and others confirmed the power of the courts to make final orders sought by the SFC under section 213 SFO without there having been a prior finding of insider dealing or other market misconduct by either the MMT or a criminal court.

Section 213 SFO allows the court to grant orders sought by the SFC to prevent or remedy breaches of, among others, the Securities and Futures Ordinance, including injunctions and orders requiring the person to take steps to restore the parties to a transaction to the position they were in before the transaction. Tiger Asia was a New York-based asset management company with no physical presence in Hong Kong. Tiger Asia and two of its senior officers were found to have breached the insider dealing and market manipulation provisions of the SFO in dealing in shares of two Hong Kong listed banks. The court ordered Tiger Asia and the two senior officers to pay HK\$45 million to investors affected by their insider dealing.

It is also clear from the December 2013 case of Mr. Du Jun, a former Morgan Stanley Asia managing director, that the SFC can pursue both criminal proceedings for insider dealing or other market misconduct offences and an order under section 213 SFO. Mr. Du Jun was convicted of insider dealing for which he was sentenced to six years' imprisonment and fined HK\$1.7 million. In separate section 213 proceedings in December 2013, the court granted a restoration order against Mr. Du Jun ordering him to pay HK\$23.9 million to investors affected by the insider dealing. The amount ordered to be paid was intended to restore counterparties to the insider dealing transactions to their pre-transaction positions through payment of the difference between the shares on the date of the transaction (taking into account the inside information possessed by Mr. Du Jun) and the actual transaction price.

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*This note is provided for information purposes only and does not constitute legal advice. Specific advice should be sought in relation to any particular situation. This note has been prepared based on the laws and regulations in force at the date of this note which may be subsequently amended, modified, re-enacted, restated or replaced.*