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**Potential Liabilities under  
Hong Kong Law in Connection with the  
Publication of a Prospectus on the Listing of a  
Company on the Stock Exchange of Hong Kong**

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# POTENTIAL LIABILITIES UNDER HONG KONG LAW IN CONNECTION WITH THE PUBLICATION OF A PROSPECTUS ON THE LISTING OF A COMPANY ON THE STOCK EXCHANGE OF HONG KONG

## I. INTRODUCTION

The following discusses the potential liabilities which the directors of a company listing on the Stock Exchange of Hong Kong Ltd. (the “**HKSE**”) and others may face in connection with any untrue statement contained in, or any material omission from, a prospectus issued in relation to the listing.

Potential liabilities arise under:

- the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32 of the Laws of Hong Kong) (“**C(WUMP)O**”);
- the Securities and Futures Ordinance (Cap. 571 of the Laws of Hong Kong) (the “**SFO**”); and
- common law.

It is important to note that liability, as described in this memorandum, may also arise in respect of documents other than the prospectus, such as financial promotions and advertisements. Liability may also arise in respect of oral presentations made by or on behalf of a company.

This memorandum relates to the laws of Hong Kong and the requirements of the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Ltd. (the “**Listing Rules**”) and does not deal with the laws or regulatory requirements of any other jurisdiction. It does not constitute a comprehensive guide to potential liabilities and should not be relied on as a substitute for specific advice in relation to any particular transaction.

## II. CONTENTS REQUIREMENTS OF A PROSPECTUS

A prospectus is required to comply with C(WUMP)O and the Listing Rules. The detailed contents requirements for a prospectus are contained principally in the Third Schedule to C(WUMP)O and in Part A of Appendix 1 to the Listing Rules.

In addition to the specific requirements of the Listing Rules and C(WUMP)O, the Listing Rules provide for an overriding duty of disclosure. Main Board Listing Rule 11.07 requires a prospectus to contain: “such particulars and information which, according to the particular nature of the issuer and the securities for which listing is sought, is necessary to enable an investor to make an informed assessment of the activities, assets and liabilities, financial position, management and prospects of the issuer and of its profits and losses and of the rights attaching to such securities.” C(WUMP)O contains a similar overriding disclosure requirement which is discussed further below in relation to Sections 38 and 342 of C(WUMP)O.

One of the specific requirements of the Listing Rules is that a prospectus must contain a responsibility statement in the following form: “This document, for which the directors of the issuer collectively and individually accept full responsibility, includes particulars given in compliance with the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited for the purpose of giving information with regard to the issuer. The directors, having made all reasonable enquiries, confirm that to the best of their knowledge and belief the information contained in this document is accurate and complete in all material respects and not misleading or deceptive, and there are no other matters the omission of which would make any statement herein or this document misleading”.<sup>1</sup>

The directors of an issuer will also be required to sign individual responsibility letters accepting responsibility for the prospectus and related documents. Such acceptance of responsibility may give rise to personal liability for directors in the event of an inaccuracy in, or omission from, the prospectus.

If at any time after the issue of the prospectus and before dealings in the company’s securities commence, the issuer becomes aware that:

- i. there has been a significant change affecting any matter contained in the prospectus; or
- ii. a significant new matter has arisen, the inclusion of information in respect of which would have been required to be in the prospectus if it had arisen before the prospectus was issued,

the company may be required to publish a supplementary prospectus and the directors must inform the company and the sponsor forthwith of any such change or new matter of which they become aware.

### **III. HONG KONG COMPANIES (WINDING UP AND MISCELLANEOUS PROVISIONS) ORDINANCE**

The provisions relating to prospectus liability in relation to Hong Kong incorporated and overseas incorporated companies are set out in Parts II and XII, respectively, of C(WUMP)O.

#### **1 CIVIL LIABILITY**

##### **1.1 Sections 40 and 342E: Civil Liability for Misstatements in Prospectus**

Section 40 of C(WUMP)O sets out the following list of persons who are liable to pay compensation to all persons who subscribe for shares on the faith of a prospectus for the loss they have sustained by reason of any untrue statement (being a statement

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<sup>1</sup> Appendix 1 to the Listing Rules at paragraph 2 of Part A.

which is misleading in the form and context in which it is included or a material omission<sup>2</sup>) (“**untrue statement**”) in a prospectus:

- the directors of the company at the time of issue of the prospectus;
- persons who are named in the prospectus as directors or as having agreed to become directors and who have authorized themselves to be so named;
- a promoter of the company; and
- any person who has authorized the issue of the prospectus.

Section 40 applies to Hong Kong companies and, by virtue of Section 342E, to overseas companies.

An expert is only liable in respect of an untrue statement made by him as an expert and is not otherwise regarded as having authorized the prospectus.<sup>3</sup>

As regards the position of IPO sponsors, the SFC considers that they are within the category of persons who “authorize the issue” of a prospectus and are thus are potentially subject to civil and criminal liability for prospectus misstatements under Sections 40 and 40A of C(WUMP)O respectively.<sup>4</sup>

#### Scope of the offence

“Persons who subscribe for any shares or debentures on the faith of a prospectus” are defined<sup>5</sup> to include: (a) persons who subscribe for or purchase shares or debentures pursuant to an offer in a prospectus; (b) persons who by means of an agent acquire shares or debentures pursuant to an offer in a prospectus; and (c) persons who acquire shares or debentures pursuant to arrangements between: (i) the issuer or vendor of the shares or debentures; and (ii) intermediaries appointed for the purposes of an offer. Section 40 thus applies to prospectuses making an offer for subscription or an offer for sale. The section also applies whether persons subscribe or purchase directly or whether they instruct an agent or intermediary to apply for shares on their behalf.

The class of persons who can claim compensation under Section 40 is however limited to persons who acquire in the primary

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<sup>2</sup> Definition of “untrue statement” in Section 41A (Sections 343(2A) and (2B) for overseas companies).

<sup>3</sup> Section 40(1) Companies Ordinance.

<sup>4</sup> SFC’s Supplemental Consultation Conclusions on the Regulation of IPO Sponsors – Prospectus Liability (22 August 2014) at paragraph 12.

<sup>5</sup> Section 40(7) and the Twenty-second Schedule to C(WUMP)O.

market. The SFC proposed in 2005<sup>6</sup> to extend the class of persons who may claim compensation for a misstatement in a prospectus to subsequent purchasers who buy in the secondary market. However its consultation conclusions<sup>7</sup> noted concerns expressed by respondents to the consultation and it was decided that the proposal would not be adopted. Secondary market purchasers who suffer loss as a result of an untrue statement in a prospectus are therefore not currently entitled to seek compensation under Section 40 of C(WUMP)O.

### Defences

A person will not be liable under Section 40 if he can prove any of the following:

- (1) that, having consented to become a director of the company, he withdrew his consent before the prospectus was issued, and it was issued without his authority or consent; or
- (2) the prospectus was issued without his knowledge or consent, and upon becoming aware of its issue, he promptly gave reasonable public notice that the prospectus had been issued without his knowledge or consent; or
- (3) after the issue of the prospectus, but before the allotment of shares, he withdrew his consent to the prospectus upon becoming aware of the untrue statement and gave reasonable public notice of his withdrawal of consent and the reasons for it; or
- (4) that:
  - (i) in respect of every untrue statement not purporting to be made on the authority of an expert or a public official document or statement, he had reasonable grounds for believing, and did believe up to the time of allotment, that the statement was true; and
  - (ii) in respect of every untrue statement by an expert, he had reasonable grounds to believe, and did believe up to the time the prospectus was issued that the person making the statement was competent to make it, and that expert had given consent to the issue of the prospectus containing his statement and had not withdrawn such consent before delivery of

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<sup>6</sup> SFC's Consultation Paper on Possible Reforms to the Prospectus Regime in C(WUMP)O (August 2005) at paragraph 17.

<sup>7</sup> SFC's Consultation Conclusions on Possible Reforms to the Prospectus Regime in C(WUMP)O (September 2006) at paragraphs 38 to 41.

the prospectus for registration, or, to the defendant's knowledge, before allotment; and

- (iii) in respect of every untrue statement which purports to be a statement of an official person or which is a statement contained in a copy of or extract from a public official document, the untrue statement was a correct and fair representation of the official statement or a copy of or extract from the document.

An expert who has consented under Section 38C to the inclusion of his statement in a prospectus will not be liable under Section 40 if he proves that he:

- a. withdrew his consent in writing before delivery of a copy of the prospectus for registration;
- b. on becoming aware of an untrue statement after delivery of a copy of the prospectus for registration, withdrew his consent in writing and gave reasonable public notice of the withdrawal and of the reason therefore; or
- c. was competent to make the statement and had reasonable grounds to believe and did believe up to the time of the allotment of shares or debentures, that the statement was true.

## 2 CRIMINAL LIABILITY

### 2.1 Sections 40A and 342F: Criminal Liability for Misstatements in Prospectus

Under Section 40A (Section 342F for overseas companies), any person who has authorized the issue of a prospectus containing any untrue statement (as defined above) may be liable to imprisonment and a fine, unless he proves either that the statement was immaterial or that he had reasonable grounds to believe and did up to the time of the issue of the prospectus believe that the statement was true.

The directors of a company who have approved the issue of a prospectus will most likely be regarded as having authorized it. As noted in respect of Section 40 above, there is however considerable uncertainty as to who will be regarded as having "authorized the issue of a prospectus". However, an expert who has consented to the inclusion of his report in a prospectus is not regarded as having authorized it.<sup>8</sup>

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<sup>8</sup> Section 40A(2) Companies Ordinance.

## **2.2 Sections 38 and 342 of C(WUMP)O: Non-compliance with Prospectus Requirements**

Section 38 and, in respect of overseas companies, Section 342 specify certain requirements for prospectuses including that they must contain the information specified in Part I of the 3<sup>rd</sup> Schedule to C(WUMP)O and the reports specified in Part II of that schedule and must be issued in English and Chinese. The information required to be included in a prospectus by Part I of the 3<sup>rd</sup> Schedule includes “*sufficient particulars and information to enable a reasonable person to form as a result thereof a valid and justifiable opinion of the shares or debentures and the financial condition and profitability of the company at the time of the issue of the prospectus taking into account the nature of the shares or debentures being offered and the nature of the company, and the nature of the persons likely to consider acquiring them*”.

The issue of a prospectus that does not comply with Section 38 or Section 342 may result in the issuer and every person who is *knowingly a party to the issue of the prospectus* being liable to a fine. A person will have a defence if he is able to prove that he was not cognizant of the matter not disclosed or that the non-compliance arose from an honest mistake of fact on his part. A court may also excuse a person from liability if, in the opinion of the court, the non-compliance was in respect of matters which were immaterial or the non-compliance should reasonably be excused.

Sections 38 and 342 do not however apply to the issue of prospectus or application form, in respect of a right issue.

## **IV. THE SECURITIES AND FUTURES ORDINANCE**

### **1 CIVIL LIABILITY**

#### **1.1 Section 108(1): Civil Liability for Inducing Others to Invest Money in Certain Cases**

Section 108(1) of the SFO imposes liability on a person who makes any fraudulent, reckless or negligent misrepresentation which induces another person, *inter alia*, to deal in securities, structured product (which includes the acquisition, disposal, subscription or underwriting of securities), or to acquire or participate in, or offer to acquire an interest in or participate in a collective investment scheme, to pay compensation for any pecuniary loss sustained by the other person as a result of reliance on the misrepresentation. Any director of a company making any such misrepresentation is also presumed to have made the misrepresentation unless he can prove that he did not authorize the

making of the misrepresentation (Section 108(2) of the SFO).

The terms “fraudulent misrepresentation”, “reckless misrepresentation” and “negligent misrepresentation” are defined in Section 108(7) as follows:

“fraudulent misrepresentation” means:

- i. any statement which at the time when it is made, is to the knowledge of its maker false, misleading or deceptive;
- ii. promise which, at the time when it is made, its maker has no intention of fulfilling, or is to the knowledge of its maker not capable of being fulfilled;
- iii. any forecast which, at the time when it is made, is to the knowledge of its maker not justified on the facts then known to him; or
- iv. any statement or forecast from which, at the time when it is made, its maker intentionally omits a material fact, with the result that:
  - (A) in the case of a statement, the statement is rendered false, misleading or deceptive: or
  - (B) in the case of a forecast, the forecast is rendered misleading or deceptive.

“reckless misrepresentation” means:

- i. any statement which at the time when it is made, is false, misleading or deceptive and is made recklessly;
- ii. any promise which, at the time when it is made, is not capable of being fulfilled and is made recklessly;
- iii. any forecast which, at the time when it is made, is not justified on the facts then known to its maker and is made recklessly; or
- iv. any statement or forecast from which, at the time when it is made, its maker recklessly omits a material fact, with the result that:
  - (A) in the case of a statement, the statement is rendered false, misleading or deceptive: or
  - (B) in the case of a forecast, the forecast is rendered misleading or deceptive.

“negligent misrepresentation” means:

- i. any statement which at the time when it is made, is false, misleading or deceptive and is made without reasonable care having been taken to ensure its accuracy;
- ii. any promise which, at the time when it is made, is not capable of being fulfilled and is made without reasonable care having been taken to ensure that it can be fulfilled;
- iii. any forecast which, at the time when it is made, is not justified on the facts then known to its maker and is made without reasonable care having been taken to ensure the accuracy of those facts; or
- iv. any statement or forecast from which, at the time when it is made, its maker negligently omits a material fact, with the result that:
  - (A) in the case of a statement, the statement is rendered false, misleading or deceptive: or
  - (B) in the case of a forecast, the forecast is rendered misleading or deceptive.

## **1.2 Section 213: SFC Application to Court of First Instance for Orders or Injunctions for Contravention of SFO**

Section 213 of the SFO grants the SFC the power to apply to the Court of First Instance for a broad range of declaratory orders and injunctions for:

- i. contraventions of (A) any relevant provisions, (B) any notice or requirement given or made under or pursuant to any relevant provisions, (C) any terms and conditions of any license or registration under the SFO, or (D) any other condition imposed under or pursuant to any provision of the SFO;
- ii. aiding, abetting or otherwise assisting, counseling or procuring a person to commit any such contravention;
- iii. inducing, whether by threats, promises or otherwise, a person to commit any contravention;
- iv. directly or indirectly being knowingly involved in, or a party to, any such contravention;
- v. attempting, or conspiring with others, to commit any such

contravention; and

- vi. instances where it appears, whether or not during the course or as a result of the exercise of any power under Part VIII of the SFO, to the SFC that any of the matters referred to above has occurred, is occurring or may occur.

All provisions of the SFO and of C(WUMP)O prospectus regime (as set out in Parts II and XII of the C(WUMP)O) are within the definition of “relevant provisions”.

The Court of First Instance may impose one or more of the orders and injunctions as specified below:

- i. orders restraining or prohibiting the offending conduct;
- ii. orders restraining or prohibiting a person from acquiring, disposing of, or otherwise dealing in any property;
- iii. orders appointing an administrator to a person’s property;
- iv. orders the relevant person to take such steps to restore the parties to any transaction to the position in which they were before the transaction was entered into;
- v. orders declaring a contract relating to, any securities, structured product, futures contract, leveraged foreign exchange, exchange contract, or an interest in any securities, structured product, futures contract, leveraged foreign exchange contract or collective investment scheme, to be void or voidable;
- vi. an order directing a person to do or refrain from doing any act; and
- vii. any ancillary order that the Court of First Instance considers necessary.

The SFC’s approach to Section 213, which consists of using Section 213 as a tool to punish market misconduct without reliance on the market misconduct regime, can be illustrated in two court cases. In the Hontex and Tiger Asia cases, the SFC applied to the court under Section 213 seeking orders for violations of relevant “market misconduct” provisions of the SFO without having obtained a prior ruling by either a criminal court or the MMT finding a violation of the SFO. No prior rulings finding violations of the SFO had been made because the SFC had not referred the matters to the Financial Secretary for civil proceedings before the MMT under Part XIII of the SFO or to the Secretary for Justice for criminal prosecution on indictment under Part XIV of

the SFO before commencing the Section 213 actions. Nonetheless, the Court of Appeal in the Tiger Asia case found that the SFC *could* obtain a final order under Section 213 otherwise than on the basis of a prior finding of market misconduct by the MMT or a criminal court.<sup>9</sup> Thus, a court may find a contravention of relevant provisions of the SFO independently from a determination made in other prior proceedings under Parts XIII or XIV of the SFO and, accordingly, under Section 213 that court may grant an order or injunction on the basis of that finding.

The Court of Appeal's decision in the Tiger Asia case was upheld by the Court of Final Appeal. The presiding judges agreed unanimously that:

- the existence of criminal and MMT procedures does not preclude the possibility of a third avenue to determine whether there was a contravention of the SFO;
- the remedies provided under section 213 serve a different purpose from those provided under criminal or MMT processes; and
- in an action under section 213 (which is a civil proceeding and not a criminal proceeding), the SFC does not serve as prosecutor but as representative of the interests of persons who have suffered loss from the alleged market misconduct.

Section 213 as now interpreted by the courts creates a third procedure which the SFC can use to punish market misconduct which is not mutually exclusive with the criminal market misconduct regime, meaning that an alleged wrongdoer could potentially face both civil and criminal proceedings – a civil proceeding under Section 213 *and* a criminal prosecution under Part XIV of the SFO. Furthermore, a court proceeding under Section 213 does not offer an alleged wrongdoer the same structure and protections as offered under the market misconduct regime, as mentioned above.

Section 213 extends the reach of the SFC and strengthens its ability to combat cross-border market misconduct. In both the Hontex and the Tiger Asia cases, the alleged wrongdoers were located outside the reach of the criminal jurisdiction of the Hong Kong courts. The court's decision in the Tiger Asia case did not limit Section 213's application to overseas wrongdoers. The Court of Final Appeal's decision confirmed that Section 213 was

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<sup>9</sup> The defendant, Tiger Asia argued that the Court of First Instance did not have jurisdiction under Section 213 to make findings of a contravention of the SFO without a prior criminal conviction or determination by the MMT.

intended to increase the SFC's ability to protect investors and provide remedies for contraventions of market misconduct provisions.

Recently, *Qunxing Paper* has further demonstrated the use of restorative orders under section 213 of the SFO against listed companies and their senior management to compensate the public investors.

### **1.3 Section 277: Disclosure of False or Misleading Information Inducing Transactions**

Section 277 of the SFO further imposes civil liability where, in Hong Kong or elsewhere, a person discloses, circulates or disseminates, or authorizes or is concerned in the disclosure, circulation or dissemination of, information that is, *inter alia*, likely to: (a) induce another person to subscribe for securities in Hong Kong; (b) induce the sale or purchase in Hong Kong of securities by another person; or (c) to maintain, increase, reduce or stabilise the price of securities, in Hong Kong, if:

- i. the information is false or misleading as to a material fact or through the omission of a material fact ("**False Information**"); and
- ii. the person knows that, or is reckless or, negligent as to whether, the information is False Information.

This provision is broad in its scope. While it must be the case that the information is likely to induce a dealing in securities or have an effect on the price of securities, it is not necessary for the information to in fact have such an effect. It is sufficient if the information is likely to have such an effect. Section 277 also applies to a person "concerned in the disclosure, circulation or dissemination of information".

An offence under Section 277 constitutes "market misconduct" in respect of which proceedings may be instituted before the Market Misconduct Tribunal ("MMT"). At the end of any proceedings, the MMT may under Section 257(1) impose one or more of 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.

#### **1.4 Section 281: Civil Liability for Civil Market Misconduct**

Any person who has engaged or participated in market misconduct under Section 277 (above) could also be liable under Section 281 SFO to pay compensation by way of damages to any person for any pecuniary loss sustained as a result of that market misconduct if it is fair, just and reasonable that such person should be so liable. Section 277 creates a private right of civil action in favour of a person who has suffered financial loss as a result of any civil market misconduct offence.

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

- i. he has perpetrated any market misconduct;
- ii. the market misconduct was perpetrated by a corporation of which he is an officer<sup>10</sup> with his consent or connivance; or
- iii. 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.

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<sup>10</sup> An officer, for the purposes of the SFO, is a director, manager or secretary of a company or any other person involved in its management (Schedule 1 SFO).

It is not necessary for there to have been a finding of market misconduct by the MMT 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. The courts are able to impose injunctions in addition to, or in substitution for, damages.

### **1.5 Section 391: Civil Liability for False or Misleading Public Communications concerning Securities**

Section 391 of the SFO provides that a person will be liable to pay damages to any other person for any pecuniary loss sustained where the person:

- i. is responsible for a relevant communication, being made or issued to the public, or to a group of persons comprising the public (including the shareholders of a listed company or the holders of listed securities);
- ii. the relevant communication concerns securities or futures contracts, or may affect the price of securities or the price for dealings in future contracts;
- iii. the relevant communication contains information which is false or misleading in a material particular; and
- iv. the person knows that, or is reckless or negligent as to whether the relevant communication is false or misleading in a material particular.

A “relevant communication” is defined as any communication, including any announcement, disclosure and statement, and any combination thereof. Persons regarded as “responsible” for a relevant communication include any person who “in a material manner participated in, or approved, the making or issuing of” the communication.

Breach of Section 391 renders the person liable to pay damages to any other person for pecuniary loss suffered as a result of his acting, or refraining from acting in a manner in which he would otherwise have acted, in reliance the relevant communication. A person is liable only if it is fair, just and reasonable that he should be liable and there is no right of action under Section 391 if Section 40 of the C(WUMP)O or Section 108 of the SFO (described above) applies.

## 2 CRIMINAL LIABILITY

### 2.1 Section 107: Offence to Fraudulently or Recklessly Induce others to Invest Money

Section 107 imposes criminal liability on a person who makes any fraudulent or reckless misrepresentation (as defined in the section) for the purpose of inducing another person, *inter alia* to deal in securities (which includes the acquisition, disposal, subscription or underwriting of securities).

Any person found guilty of an offence under Section 107 SFO is liable to a maximum fine of HK\$1 million and up to seven years' imprisonment.

### 2.2 Section 298: Offence of False or Misleading Information Inducing Transactions

Section 298 imposes criminal liability in virtually the same circumstances as Section 277 (described above) except that a person will be liable only if he knows that, or is reckless as to whether, the information disclosed is false or misleading as to a material fact or through the omission of a material fact. Negligence is not sufficient to incur criminal liability.

The maximum penalties on conviction under Section 298 are a fine of up to HK\$10 million and imprisonment for up to 10 years.

### 2.3 Section 305: Civil Liability for Criminal Market Misconduct

Any person found to have contravened Section 298 SFO could also be liable to pay compensation by way of damages to any person for any pecuniary loss sustained as a result of that contravention if it is fair, just and reasonable that such person should be so liable (Section 305 SFO). Section 305 creates a private right of civil action in favour of anyone who has suffered financial loss as a result of any criminal offence under Part XIV SFO.

### 2.4 Section 384 SFO: Provision of False or Misleading Information

Section 384 SFO imposes criminal liability on any person who intentionally or recklessly provides any information which is false or misleading in a material particular in filing with the SFC or the HKSE a prospectus, other listing document or any public disclosure materials disseminated under the Hong Kong Listing Rules. Copies of applications to list on the HKSE and all on-going disclosure materials are filed with the SFC under the "dual filing" regime. Rule 5 of the Securities and Futures (Stock Market) Listing Rules (the "SFSMLR") requires listing applications to be filed with the SFC. Listed companies are also

required to file with the SFC any public disclosure that they disseminate under the Listing Rules, including announcements, circulars, statements and other documents by Rule 7 of the SFSMLR. In practice, listing applications and on-going public disclosures are filed with the SFC by the HKSE, the listing applicant having authorized it to do so in its listing application form (Form A1).

An offence under Section 384, carries maximum penalties of 2 years' imprisonment and a fine of HK\$1 million.

## **2.5 Section 300: Offence Involving Fraudulent or Deceptive Devices**

Under Section 300, it is an offence for a person in a transaction involving securities (including an offer or invitation, however expressed) to:

- i. employ any device, scheme or artifice with intent to defraud or deceive; or
- ii. engage in any act, practice, course of business which is fraudulent or deceptive, or would operate as a fraud or deception.

An offence under Section 300 is punishable by a fine of up to HK\$10 million and imprisonment for up to 10 years (Section 303 SFO).

## **2.6 Section 390 SFO: Liability of Officers for Offences by Corporations**

Section 390 SFO provides that where the commission of an offence under the SFO by a company is proved to have been aided, abetted, counseled, procured or induced by, or committed with the consent or connivance of, or attributable to any recklessness on the part of, an officer of the company, that person will also be guilty of an offence.

## **V. MISREPRESENTATION ORDINANCE**

Liability may arise under the Misrepresentation Ordinance where a party to a contract is induced to enter into that contract by a misrepresentation of a material fact made by the other party. If the action is successful, the party who relied on the misrepresentation will be entitled to rescind the contract. Damages may also be granted if the misrepresentation was made fraudulently or negligently. In the case of innocent misrepresentation, damages may be granted in lieu of rescission. In order to establish a claim for misrepresentation, a person will need to prove that the prospectus contained a material false

statement of fact and that the false statement induced him to subscribe for or purchase shares.

## **VI. THEFT ORDINANCE**

The directors and officers of a company may also be prosecuted for making false statements in a prospectus or other documents under the Theft Ordinance. Section 21(1) of the Theft Ordinance makes it an offence for an officer (i.e. not just directors) of a company, with intent to deceive the shareholders or creditors about the affairs of the company, to publish or agree to publish any written representation or account which to his knowledge is or may be misleading, false or deceptive in a material matter. The offence is punishable on conviction on indictment by imprisonment for up to 10 years.

## **VII. CONTRACTUAL LIABILITY**

Depending upon the circumstances, liability for breach of contract may also arise. For example, liability for breach of representation or warranty (or under any relevant indemnity) contained in the underwriting agreement.

It is to be noted that the directors will owe a duty of care to the company in relation to the confirmation by the company of the accuracy of representations and warranties in the underwriting agreement.

In the case of liability founded in contract, the only persons capable of being liable would be the parties to the relevant contract. However, in addition to the principal contract, a court might, in appropriate circumstances, imply the existence of collateral contracts to establish liability on the part of other parties connected with the transaction.

## **VIII. ACTIONS IN TORT**

An action in tort does not require the existence of a contractual relationship between the parties. The only available remedy is damages.

### **1 TORT OF DECEIT**

Directors of the issuer, experts or the persons making an offer for sale could be liable under the tort of deceit (i.e. fraud) if they are found to have signed or authorised the issue of a prospectus containing a statement which they did not honestly believe to be true with the intention that another person should act on it. The other person must have acted upon the statement and suffered loss as a result. The remedy is damages.

### **2 NEGLIGENT MISSTATEMENT**

A person may be liable for a misstatement in a prospectus made negligently in an action in tort brought by a person who has suffered loss as a result of acting on that statement. The maker of the statement may

be liable for damages if the loss was a reasonably foreseeable consequence of the negligent misstatement. In order to bring a claim, the person suffering loss needs to establish that the maker of the statement owed him a duty of care.

## **IX. THE IMPORTANCE OF VERIFICATION**

As an integral part of the listing process, verification of the prospectus is conducted in the interests of all parties who have participated in its drafting. The aim of the verification process is to seek to minimize the risk of liability arising in relation to the issue of the prospectus by ensuring that the information included in it is accurate and not misleading.

The directors of a company should participate in the verification exercise to ensure that all statements included in the prospectus and all conclusions based on such statements are true, accurate and not misleading. They must also ensure that no material facts have been omitted and that no inference can be drawn from the information in the prospectus which may be misleading. During the verification process, verification notes are prepared which aim to establish that each of the statements in the prospectus can be independently verified. The verification notes take the form of questions and answers and refer to supporting documents which identify the source of, and evidence for, each statement of fact or opinion included in the prospectus. If a statement cannot be verified, it will need to be modified or removed from the prospectus. At the conclusion of the exercise, the directors of the company will be required to sign the verification notes. The verification notes are confidential and will only be available to those who participate in the drafting of the prospectus.

Although time consuming, the verification process serves to protect the company and its directors from liability: the verification notes produced in the course of the exercise provide a valuable written record of the basis on which the directors of the company formed their reasonable belief that statements included in the prospectus were accurate.

## **JANUARY 2020**

*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.*