HONG KONG EXTENDS INSIDER DEALING REGIME'S TERRITORIAL REACH TO COVER OFFSHORE SECURITIES & DEALING

Hong Kong's insider dealing regime will be expanded to cover offshore insider dealing in Hong Kong-listed securities and onshore insider dealing in securities listed offshore, and their derivatives, according to the SFC's Consultation Conclusions on Proposed Amendments to Enforcement-related Provisions of the Securities and Futures Ordinance published on 8 August 2023. However, the SFC has put on hold its proposals to:

- narrow the scope of the professionals' exemption under section 103(3)(k) of the Securities and Futures Ordinance (the **SFO**); and

- allow the SFC to seek court restoration orders against SFC-regulated persons requiring them to compensate investors for losses resulting from the regulated person's contravention of SFC non-statutory codes and guidelines.

The shelving of these two proposals will no doubt be welcomed by the Hong Kong market. In the event, the issues around implementation of the proposals proved complex, leading the SFC to opt not to proceed with them for the time being. For details of the June 2022 consultation paper's[1] original proposals, please see Charltons' July 2022 newsletter.

The SFC will therefore proceed only with the amendments related to the widely supported changes to the insider dealing provisions in Parts XIII (civil) and XIV (criminal) of the SFO. The changes are subject to the legislative process, and interested parties will be able to review the amendments during that process. The SFC also said that it will continue to monitor market developments, and will consider introducing further investor protection measures, such as greater disciplinary powers for the SFC, if this proves necessary.

Consultation Conclusions on Proposed Amendments to Enforcement-related Provisions of the Securities and Futures Ordinance

Expansion of Territorial Scope of SFO's Insider Dealing Regime

Currently, the SFO's civil and criminal insider dealing regimes apply only to dealings in securities listed on a recognised stock market, that is the Hong Kong stock market operated by the Hong Kong Stock Exchange (the **HKEX**), and their derivatives. The SFO does not catch insider dealing conducted in Hong Kong in securities listed outside Hong Kong or their derivatives, nor does it explicitly cover insider dealing conducted outside Hong Kong in Hong Kong-listed securities or their derivatives. This legislative loophole has thwarted SFC attempts to bring offshore insider dealers to justice: some 60% of SFC insider dealing cases between 2017 and 2021 involved offshore insider dealing in Hong Kong-listed securities beyond the SFC's regulatory reach.[2]

Most respondents to the consultation supported the SFC's proposed expansion of the insider dealing provisions' territorial reach to cover:

- insider dealing perpetrated in Hong Kong with respect to overseas-listed securities or their derivatives; and
- insider dealing perpetrated outside of Hong Kong with respect to Hong Kong-listed securities or their derivatives.

SFO Amendments Extending Territorial Reach of Insider Dealing Regime

The insider dealing regime's territorial extension will be effected by:

- revising the definition of "listed" in sections 245(2) and 285(2) SFO to include overseas-listed securities and their derivatives as well as HKEX-listed securities;
- adding a new section covering:
    - acts of insider dealing involving HKEX-listed securities or their derivatives, wherever they occur; and
    - insider dealing in overseas listed securities or their derivatives if one or more of the insider dealing acts occur in Hong Kong;
- stipulating that insider dealing in overseas-listed securities will only be an SFO offence if the conduct is also unlawful in the jurisdiction of the securities' listing;
- extending the off-market dealings defence in section 271(5) SFO to insider dealing in overseas-listed securities or their derivatives; and
- repealing sections 270(2) and 291(7) SFO which prohibit insider dealing in securities dual-listed in Hong Kong and overseas, or their derivatives, since these sections will be redundant on the extension of insider dealing to securities listed overseas.

The amended provisions mean that the insider dealing provisions will apply to over-the-counter transactions in overseas-listed debt securities in the same way that they currently apply to over-the-counter transactions in Hong Kong-listed debt securities.[3]

In response to a question raised during the consultation, the SFC noted that breaches of the revised insider dealing provisions regarding insider dealing in overseas-listed securities will need to be reported to the SFC under the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission. SFC-regulated intermediaries will need to submit a report to the SFC when they become aware of any suspected breach and should use their best endeavours to obtain the necessary data to include in their report to the SFC.

Amendments Aligning Mens Rea for Insider Dealing Occurring Through Disclosure

The SFC will take the opportunity to align the two different formulations of the *mens rea* element for insider dealing taking place through disclosure of inside information. The *mens rea* element for sections 270(2)(b) and 291(7)(b) SFO that apply to securities dual-listed on the HKEX and offshore, and their derivatives, is met if the person disclosing the inside information knows or has reasonable cause to believe that the other person to whom the information is disclosed, "*or some other person*", will deal in the listed securities or their derivatives. On the other hand, the *mens rea* element for the other sub-sections of sections 270 and 291 applicable to Hong Kong-listed securities and their derivatives, is met if the person disclosing the inside information knows or has reasonable cause to believe that the person to whom the information is disclosed, sometimes called the "tippee", will deal in the listed securities or their derivatives. The formulation of the mens rea element that applies to securities listed only on the HKEX is therefore narrower as it does not cover the insider contemplating that "*some other person*" will deal. The SFC will therefore align the two formulations by adopting the broader formulation in sections 270(2)(b) and 291(7)(b).

Proposed Extension of Section 213 SFO Put on Hold

Proposal to Allow SFC to Seek Restoration Orders after Exercise of Section 194 or 196 SFO

The SFC proposed amending section 213 SFO to allow the SFC to apply to the Court of First Instance (**CFI**) to grant one or more orders under section 213, if the SFC has exercised its powers under sections 194 or 196 against a regulated person.

Regulated persons are SFC-licensed corporations, their responsible officers, licensed representatives and persons involved in their management, and SFC-registered institutions, their executive officers, registered individuals and persons involved in the management of the regulated activity(ies) for which they are registered. Sections 194 and 196 SFO, in respect of licensed persons and registered institutions, respectively, allow the SFC to sanction a regulated person, including by revoking or suspending their licence, issuing reprimands, imposing a fine of up to the greater of HK$10 million and three times the profit gained or loss avoided, where the regulated person is guilty of "misconduct", or the SFC considers the regulated person is not a fit and proper person to be or to remain the same type of regulated person.

Section 213 SFO currently allows the SFC to apply to the CFI for the grant of any of the orders specified in section 213(2) against a person who has breached, among others, any of the "relevant provisions", which include the provisions of the SFO and the prospectus regime under Parts II and XII of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (**CWUMPO**). The court can grant any of the orders listed in section 213(2), which include injunctions to restrain or prohibit conduct in breach of any relevant provisions, and so-called "restoration orders", which require the "wrongdoer" to restore their counterparties to the transaction to the position they were in before the transaction was entered into. Restoration orders have been used, for example in insider dealer cases, to require insider dealers to compensate investors who sold their shares to them at a value below the true value of the shares (i.e. their value had the inside information known to the insiders been factored into the price). Insider dealers have been ordered to put selling shareholders back to their pre-sale position by buying back the shares at their actual value or paying investors the difference between the price paid by the insider dealer and the shares' actual value. Restoration orders are effectively used to compensate investors for their notional financial loss resulting from the person's misconduct.

Currently, however, the SFC cannot apply to the court for orders under section 213 where a regulated person:

- has committed "misconduct" (defined to include a breach of the SFO or of the prospectus provisions of Parts II and XII of CWUMPO); or

- is considered to not be a fit and proper person to be or to remain SFC-licensed or -registered (which is typically the case where a regulated person breaches a provision of the SFC's various codes (such as the Code of Conduct for Persons Licensed by or Registered with the SFC) and guidelines.

The SFC therefore proposed in the Consultation Paper to:

- introduce an additional ground under a new section 213(1)(c) to allow the SFC to apply to the CFI for the grant of any 213(2) orders where the SFC has exercised its powers under section 194 or 196 against a regulated person;

- enable the CFI to order a regulated person to restore the parties to a transaction to their pre-transaction positions, where the SFC had exercised its powers under section 194 or 196 against the person by adding a further order under section 213(2);

- allow the CFI to order a regulated person to pay damages under section 213(8) where the SFC has exercised its disciplinary powers under section 194 or 196;

- make consequential amendments to section 213(7) to allow the court to make an order under section 213(1), irrespective of whether the person against whom the order is made will engage again, or continue to engage in, the conduct that resulted in the SFC's exercise of its new disciplinary powers under new section 213(1)(c); and

- add a definition of "regulated person" to section 213(11) which would be the same as the current definition in sections 194(7) and 196(8) SFO.

If implemented, the proposed section 213 amendments would have allowed the SFC to apply to the CFI for an order to compensate investors for losses where the SFC takes disciplinary action under section 194 or 196 against a regulated person for breach of any of the SFC's codes or guidelines.

Respondents' Concerns re. Proposed Section 213 Amendments

Respondents to the consultation raised a number of concerns across five main themes regarding the proposed section 213 amendments.

Legal and jurisprudence concerns

Respondents questioned whether it is right from a jurisprudential standpoint to allow the SFC to seek legal remedies in the form of court orders for breaches of codes and guidelines that do not have the force of law and whose formulation was not subjected to the same scrutiny as legislation. Some respondents commented on the significant legal and regulatory uncertainty that the proposed amendments would create for regulated persons. Others cited the explicit statement in section 399(6) SFO that failure to comply with SFC codes and guidelines does not create a right of action, which they argued demonstrates the legislative intent that breaches of regulatory guidance should be treated differently to breaches of statute.

SFC's response

The SFC commented that the proposed section 213 amendments would not fundamentally alter the status of the SFC's codes and guidelines or the nature of the available grounds for granting orders under section 213. It added that the current law allows the SFC to seek section 213 orders for breaches of licensing conditions that do not have the force of law. It nevertheless acknowledged that had it proceeded with the section 213 amendments, consequential amendments would have been required to section 399(6) to align it with section 213 and avoid inconsistencies between the two provisions.

Implementation and Practical Issues arising from Perceived Conflation of the Disciplinary Regime and section 213 SFO

Respondents' Concerns

Many respondents commented on implementation issues and concerns around an SFC disciplinary decision becoming a possible ground for the SFC commencing section 213 proceedings. A key concern was that the CFI can review the merits of the SFC's disciplinary decisions in discharging its duties under section 213.

Respondents raised the risk of parallel proceedings and contradictory outcomes. Some suggested clarifying in the amendments how the CFI review would interact with the role of the Securities and Futures Appeals Tribunal (**SFAT**) and the Court of Appeal in disciplinary proceedings. One suggestion was that the SFC should not be able to start section 213 proceedings until the regulated person's appeal process to the SFAT or Court of Appeal has been exhausted. Some respondents also suggested adding to section 213(4) a non-exhaustive list of the factors to be taken into account by the CFI in determining whether an order is desirable and not prejudicial, including any disciplinary action already taken by the SFC such as significant fines or licence suspensions.

SFC's response

The SFC acknowledged that the proposed section 213 amendments, if implemented, would have established a new link between the disciplinary regime and section 213, which currently operate independently. It noted the requirement for the CFI to ensure that any order made under the section is "desirable" and "will not unfairly prejudice any person" and the potential need for the CFI to review the merits of the underlying disciplinary decision. It had contemplated the potential for contradictory outcomes arising from parallel proceedings under section 213 and SFAT proceedings reviewing disciplinary decisions. It noted that, as suggested by respondents, it had envisaged dealing with this administratively by commencing section 213 proceedings only after the appeal process under the disciplinary regime has been exhausted. Nonetheless, the SFC agreed that this proposal should undergo further deliberation in light of other concerns raised by respondents to the consultation.

Fairness and Proportionality Concerns

Respondents' Concerns

There were concerns that the proposed section 213 amendments would result in all forms of SFC disciplinary action potentially triggering an action under section 213, which could be disproportionate to the severity of the misconduct in question. Some respondents suggested that the SFC should specify the types of misconduct that could give rise to a section 213 application.

Another area of potential difficulty highlighted by respondents was the court's lack of familiarity with the large volume of SFC non-statutory requirements under its codes and guidelines. Concerns related to this potentially leading the CFI to rely heavily on the SFC's interpretation of the codes and guidelines, potentially resulting in unfair decisions.

Some respondents commented on the potential extension of the statutory limitation period that could result from the implementation of the amendments. The statutory limitation period currently starts from the date of the loss or breach. However, if the SFC applied for a section 213 order after taking disciplinary action under section 194 or 196, the start of the limitation period would be delayed until the date of the decision. Respondents considered that this could significantly increase regulated persons' potential liability.

Respondents also noted that the proposal could result in regulated persons being fined and then subjected to a compensatory order under section 213 in relation to the same misconduct. They therefore suggested that any penalty imposed under section 194 or 196 should: (i) be suspended until the conclusion of the section 213 proceedings; and (ii) take into account any order for compensation made under section 213 when determining whether to impose a fine and the amount of that fine.

SFC's response

The SFC acknowledged concerns about the need for certainty on the circumstances in which the SFC can seek section 213 orders. It also expressed confidence in the courts' independence and competence in dealing with novel legal and factual issues.

The SFC acknowledged that the extension of the statutory limitation period would be a natural (albeit unintended) consequence of the proposed amendments and would require detailed consideration of the practical implications of the amendments.

The SFC commented that while the imposition of disciplinary fines and section 213 orders (e.g. compensatory orders) based on the same misconduct may lead to a heavy financial burden on the regulated person, the disciplinary fines and compensatory orders serve different purposes. Disciplinary fines aim to deter future non-compliance, while compensatory orders aim to restore aggrieved parties to the position they would have been in had the misconduct not taken place. Both serve to protect investors' interests, especially when they have suffered financial loss due to regulated persons' misconduct.

Hong Kong's Competitiveness as an International Financial Centre

Respondents' Concerns

Many respondents commented that the lack of predictability about the total financial impact of an enforcement action and the potential for large compensation orders and disciplinary sanctions, could discourage regulated persons from undertaking some types of high-risk regulated activities, such as sponsoring IPOs and selling complex investment products, and could lead businesses and talent to leave Hong Kong. Both potential outcomes could adversely affect Hong Kong's financial markets.

SFC's Response

The SFC disagreed that the proposal would harm Hong Kong's competitiveness and status as an international financial centre. It sees an effective regulatory regime and its enforcement as essential to maintaining local and international investor interest, and strives to achieve a balance between providing proportionate investor protection and ensuring a business environment that avoids unnecessary regulatory barriers to innovation and competition.

Current Laws Already Provide Adequate Legal Protections for Investors

Respondents' Concerns

Some respondents commented that Hong Kong's existing laws already provide adequate legal remedies for investors and questioned the need for further amendments to the SFO. Examples given of the existing legal regimes that function well in safeguarding investors' interests included Part IX of the SFO, consumer protection laws and the option of civil litigation, alongside the Financial Dispute Resolution Scheme and regulated persons' own complaint handling procedures.

SFC's Response

The SFC disagreed that the current laws adequately protect retail investors by ensuring that they are fairly compensated for financial losses resulting from regulated persons' misconduct. It argued that retail investors' limited financial resources and the lack of a class action mechanism in Hong Kong mean that retail investors rarely litigate in the courts. In cases involving multiple regulated persons perpetrating similar misconduct in relation to the same types of financial investments, the SFC considered it more suitable for the SFC to obtain compensation on investors' behalf. Ultimately, the SFC agreed that the proposed amendment to the SFO would have a far-reaching effect on the industry and therefore decided that it requires further deliberation to take into account stakeholders' comments.

The SFC concluded that the current remedies available to compensate aggrieved investors are insufficient. It has no means to require regulated persons to compensate aggrieved investors for losses resulting from their breach of the SFC's codes or guidelines. Its proposed amendments to section 213 SFO had aimed to fix that. However, it conceded that the complexities and implementation issues raised by respondents to the consultation require further consideration. The SFC will therefore put the proposal on hold and give further consideration to how it can meet its policy objective of improving investors' prospects of being properly compensated for losses resulting from misconduct on the part of regulated persons.

SFC Drops Proposed Amendment to s103(3)(k) Professor Investor Exemption

Section 103(3) of the SFO prohibits advertisements and other documents being issued to the public if they invite investors to acquire securities, structured products or interests in collective investment schemes (i.e. funds), unless the advertisement or other document has been authorised by the SFC under section 105 of the SFO. A number of exemptions to the SFC authorisation requirement are provided for in subsections 103(2) and (3), and subsections 103(5) to (9).

The SFC claims that in *Pacific Sun Advisors Ltd & Anor v Securities and Futures Commission* [2015] HKCFA 27,[4] the Court of Final Appeal construed the "professional investor exemption" under section 103(3)(k) more broadly than the underlying policy had intended.

Section 103(3)(k) provides an exemption from the SFC authorisation requirement for advertisements and other documents "*that are or are intended to be disposed of only to professional investors*". Professional investors are determined for this purpose according to the definitions set out in section 1 of Part 1 of Schedule 1 to the SFO and section 3 of the Securities and Futures (Professional Investor) Rules (Cap. 571D).

Pacific Sun Advisors Ltd & Anor v Securities and Futures Commission

Pacific Sun Advisors (**Pacific Sun**) was an SFC-licensed corporation which had issued advertisements for a collective investment scheme to the public, including by posting it on its website. The SFC had not authorised the advertisements' issue under section 105 SFO.

Pacific Sun and its chief executive officer relied on the professional investor exemption under section 103(3)(k), arguing that while they had issued the advertisements to the general public, the fund was intended to be sold, and was sold, only to professional investors, although this intention was not clearly stated in the advertisements. The Magistrate agreed that the exemption applied and acquitted the defendants. On the SFC's appeal, the CFI overturned the Magistrate's ruling, holding that for section 103(3)(k) to apply, the advertisement must make clear that it is "*made in respect of*" and is therefore confined to professional investors, to the exclusion of other members of the investing public. On the defendants' appeal to the Court of Final Appeal, the court agreed with the Magistrate that the section 103(3)(k) professional investor exemption applied. It held that the professional investor exemption applies to any advertisement having some connection or relation to investment products that are or are intended to be disposed of only to professional investors. The Court of Final Appeal considered that the substance of the exemption was contained in the words "*that are or are intended to be disposed of*" in section 103(3)(k).

The SFC noted that as a consequence of the decision in the case, unauthorised advertisements of investment products can be issued to the general public despite the products being unsuitable for retail investors and being intended for sale only to professional investors. It added that although liability under section 103(1) arises at the time of an advertisement's issue, enforcement action has to wait until the sale of the product to determine whether or not it has been sold to professional investors. Additionally, a mere intention to sell an investment product only to professional investors would theoretically benefit from the exemption. The SFC considers that these factors make section 103(1) difficult to enforce. It also believes the Pacific Sun decision to be contrary to the purpose of section 103(1), which it says is to regulate the issue of investment product advertisements, rather than the sale of the investment products.

SFC's Proposed Amendments to Sections 103(k) and (j)

The SFC proposed in the Consultation Paper to:

- amend section 103(3)(k) SFO to apply the professional investor exemption at the time of issue of an investment advertisement. Advertisements would only be exempt from the SFC authorisation requirement, if they are issued only to professional investors. This would mean that advertisements for investment products could be issued *only to professional investors* already identified by the regulated person through its know-your-client and related procedures, whether or not that intention is stated in the advertisements, e.g. in the form of a professional investor selling restriction; and

- make the same amendments to section 103(3)(j) SFO, which provides an exemption for advertisements for investment products that are sold or intended to be sold only to persons outside Hong Kong (together, the Proposed Section 103 Amendments)

Respondents' Concerns

Over half of the respondents to the consultation paper raised concerns about the Proposed Section 103 Amendments. While they were generally supportive of the underlying objective of protecting investors, they raised concerns as to the need for the amendments and the operational difficulties and impact on business development and marketing processes that would result from the amendment.

Need for the Statutory Amendments

Many respondents commented that the Proposed Section 103 Amendments are unnecessary. There is no material risk for retail investors in being exposed to unauthorised advertisements of investment products if they cannot invest in them. They noted that the existing regulatory safeguards, such as know-your-client (KYC) requirements, suitability assessments[5] and risk disclosures, already provide sufficient protection for retail investors. Moreover, there have been no enforcement actions in relation to section 103(3)(k) SFO since the Pacific Sun judgment, which respondents suggested demonstrates that there is no material issue necessitating the SFC proposal.

Operational Difficulties and Impact on Business

Many respondents commented that the Proposed Section 103 Amendments are detached from commercial realities and will unnecessarily disrupt common marketing activities. In particular, they highlighted that professional investors are generally unwilling to provide detailed KYC information in the pre-marketing process. Thus, the proposal to require regulated persons to only issue unauthorised advertisements to professional investors identified through KYC procedures would significantly reduce regulated persons' ability to market to prospective investors. In addition, the proposal could indirectly give an unfair advantage to large financial institutions with a large client base to whom they can market products without having to conduct KYC.

Other comments included that the proposal would unduly restrict online marketing effects, which could result in sales activities being diverted to other markets.

The SFC responded that the proposal seeks to reflect the original legislative intent behind section 103, namely to protect investors at the point when advertising materials are issued. It highlighted that its concern about retail investors being exposed to investment products not intended for them is justified by the many cases of products intended for professional investors (e.g. Chapter 37 bonds[6]) being sold to retail investors in breach of suitability requirements.

Nonetheless, the SFC acknowledged that the potential benefits of this proposal need to be considered against the operational difficulties and negative impact on the online marketing of investment products. The SFC has therefore decided not to proceed with the proposal in its current form and said that it will monitor the need for the introduction of new policies over the longer term, and will consult industry players again where necessary.

The SFC reminded the industry that anyone invoking the professional investor exemption in section 103(3)(k) of the SFO must be able to demonstrate a clear intention to sell investment products only to professional investors. Therefore, the issuer of an advertisement must ensure that the advertisement clearly states that the investment product is intended for disposal only to professional investors. The SFC is considering providing further guidance to industry players on how to evidence their intention.

As the proposal to amend section 103(3)(k) has been dropped, the SFC will not proceed with the proposed amendments to section 103(3)(j) relating to investment products sold or intended to be sold only to persons outside Hong Kong.

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[1] SFC. June 2022. Consultation Paper on Proposed Amendments to Enforcement-related Provisions of the Securities and Futures Ordinance

[2] Ibid. at paragraph 43

[3]

[4] *Pacific Sun Advisors Ltd & Anor v Securities and Futures Commission* [2015] HKCFA 27

[5] SFC "Frequently Asked Questions on Compliance with Suitability Obligations by Licensed or Registered Persons" (23 December 2020), available at https://www.sfc.hk/en/faqs/intermediaries/supervision/Compliance-with-Suitability-Obligations/Compliance-with-Suitability-Obligations#759450F3651D4BBF8AAA2F39C9F2BE88

[6] SFC Circular to Licensed Corporations Distribution of bonds listed under Chapter 37 of the Main Board Listing Rules and local unlisted private placement bonds (31 March 2016), available at: https://apps.sfc.hk/edistributionWeb/gateway/EN/circular/doc?refNo=16EC18

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