



**SECURITIES AND  
FUTURES COMMISSION**  
證券及期貨事務監察委員會

## **Consultation Paper on Proposed Amendments to Enforcement-related Provisions of the Securities and Futures Ordinance**

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**June 2022**

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## Personal information collection statement

1. This Personal Information Collection Statement (**PICS**) is made in accordance with the guidelines issued by the Privacy Commissioner for Personal Data. The PICS sets out the purposes for which your Personal Data<sup>1</sup> will be used following collection, what you are agreeing to with respect to the SFC's use of your Personal Data and your rights under the Personal Data (Privacy) Ordinance (Cap. 486) (**PDPO**).

### Purpose of collection

2. The Personal Data provided in your submission to the SFC in response to this consultation paper may be used by the SFC for one or more of the following purposes:
  - (a) to administer the relevant provisions<sup>2</sup> and codes and guidelines published pursuant to the powers vested in the SFC;
  - (b) in performing the SFC's statutory functions under the relevant provisions;
  - (c) for research and statistical purposes; or
  - (d) for other purposes permitted by law.

### Transfer of personal data

3. Personal Data may be disclosed by the SFC to members of the public in Hong Kong and elsewhere as part of the public consultation on this consultation paper. The names of persons who submit comments on this consultation paper, together with the whole or any part of their submissions, may be disclosed to members of the public. This will be done by publishing this information on the SFC's website and in documents to be published by the SFC during the consultation period or at its conclusion.

### Access to data

4. You have the right to request access to and correction of your Personal Data in accordance with the provisions of the PDPO. Your right of access includes the right to obtain a copy of your Personal Data provided in your submission on this consultation paper. The SFC has the right to charge a reasonable fee for processing any data access request.

### Retention

5. Personal Data provided to the SFC in response to this consultation paper will be retained for such period as may be necessary for the proper discharge of the SFC's functions.

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<sup>1</sup> Personal Data means personal data as defined in the Personal Data (Privacy) Ordinance.

<sup>2</sup> The term "relevant provisions" is defined in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571) and refers to the provisions of that Ordinance together with certain provisions in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), the Companies Ordinance (Cap. 622) and the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615).



## Enquiries

6. Any enquiries regarding the Personal Data provided in your submission on this consultation paper, or requests for access to Personal Data or correction of Personal Data, should be addressed in writing to:

Data Privacy Officer  
Securities and Futures Commission  
54/F, One Island East  
18 Westlands Road, Quarry Bay  
Hong Kong

7. A copy of the Privacy Policy Statement adopted by the SFC is available upon request.

## Executive summary

### Introduction

1. The primary objective of the proposed amendments to the Securities and Futures Ordinance (Cap. 571) (**SFO**) discussed in this consultation paper is to enable the SFC to better protect the interests of the investing public and uphold the reputation of Hong Kong's financial markets through more effective enforcement action.
2. We invite comments on the proposed amendments by no later than 12 August 2022. A consultation conclusions paper will be published after careful consideration of all comments received during the consultation period.
3. Subject to the feedback received, an amendment bill will be introduced into the Legislative Council to proceed with the legislative process.

### Proposed amendments to the SFO

4. In this consultation paper, the SFC proposes that amendments be made to some provisions of the SFO and sets out the reasons for them:
  - (a) Part 1 – the SFC proposes that section 213 of the SFO (*Injunctions and other orders*) be amended to provide a cause of action to enable the SFC to apply to the Court of First Instance (**CFI**) for injunctions and other orders under section 213 of the SFO after having exercised any of its powers under section 194 or 196 of the SFO against a regulated person;
  - (b) Part 2 – the SFC proposes that the exemption to section 103(1) of the SFO (*Offence to issue advertisements, invitations or documents relating to investments in certain cases*) set out in section 103(3)(k) be amended so that the ambit of the exemption would accord with the original intended purposes, and that consequential amendments be made to section 103(3)(j); and
  - (c) Part 3 – the SFC proposes that the scope of the insider dealing provisions of the SFO be broadened to cover: (i) insider dealing perpetrated in Hong Kong with respect to securities listed on overseas stock markets<sup>3</sup> or their derivatives; and (ii) insider dealing perpetrated outside of Hong Kong, if it involves any securities listed on a recognised stock market<sup>4</sup>, ie, a stock market operated by The Stock Exchange of Hong Kong Limited, or their derivatives.

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<sup>3</sup> The term “overseas stock markets” is intended to refer to any stock markets outside Hong Kong—similar in usage to the term “relevant overseas market” in sections 245 and 285 of the SFO.

<sup>4</sup> As defined in Part 1 of Schedule 1 to the SFO.

## Part 1 – Amendments to section 213 of the SFO to expand the basis on which the SFC may apply for remedial and other orders against a regulated person

### Introduction

5. The purpose of the proposed amendments to section 213 of the SFO is to provide a cause of action to enable the SFC to apply to the CFI for injunctions and other orders under section 213 after having exercised any of its powers under section 194 or 196<sup>5</sup> of the SFO against a regulated person; in particular, to seek orders to restore the parties to any transaction to the position in which they were before the transaction was entered into (similar to an order under section 213(2)(b)) and pay damages to any other persons (section 213(8)).

### Background

#### *Section 213 and its application*

6. Section 213(1) of the SFO currently enables the SFC to apply to the CFI for various orders to provide remedies for persons affected by contraventions by another person of:
- (a) any of the relevant provisions<sup>6</sup>;
  - (b) any notice or requirement given or made under or pursuant to any of the relevant provisions;
  - (c) any of the terms and conditions of any licence or registration under the SFO; and
  - (d) any other condition imposed under or pursuant to any provision of the SFO.
7. These orders, which are set out in section 213(2), include:
- (a) an order restraining or prohibiting a breach of the relevant provisions;
  - (b) an order requiring a person to take such steps as the CFI may direct, including steps to restore the parties to any transaction to the position in which they were before the transaction was entered into;
  - (c) an order restraining or prohibiting a person from dealing in a specified property;
  - (d) an order appointing an administrator;
  - (e) an order declaring that a contract is void or voidable; and

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<sup>5</sup> Under section 194 (in respect of licensed persons) and section 196 (in respect of registered institutions) of the SFO, the SFC may exercise a number of powers against a regulated person, including suspending or revoking licences or registration, imposing fines, issuing reprimands and other powers, in cases where the regulated person is or was guilty of misconduct or the SFC is of the opinion that the regulated person is not a fit and proper person to be or to remain the same type of regulated person.

<sup>6</sup> The term “relevant provisions” is defined in section 1 of Part 1 of Schedule 1 to the SFO and includes the SFO and its subsidiary legislation (when read together with the definition of “Ordinance” in section 3 of the Interpretation and General Clauses Ordinance (Cap.1)).

- (f) an order directing a person to do or refrain from doing any act to ensure compliance with any other court order made.
8. Section 213(8) of the SFO further sets out that the CFI may, in addition to or in substitution for an order made against a person under section 213(1) or 213(3A)<sup>7</sup>, make an order requiring the person to pay damages to any other person.

### **Limitations of section 213**

9. The SFC cannot apply for the orders under section 213 of the SFO when a regulated person has been found guilty of misconduct or not to be a fit and proper person to remain a regulated person under section 194 or 196, respectively, *unless* the conduct which gave rise to the finding also constituted a contravention of one of the relevant provisions, requirements or conditions described in paragraph 6. This means that a breach of the SFC's codes and guidelines (eg, the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission) by a regulated person, however serious, cannot currently give rise to a cause of action under section 213 if it does not fall within any of the circumstances outlined in paragraph 6.
10. Furthermore, whilst the SFC has a range of disciplinary powers under sections 194 and 196 of the SFO against a regulated person who is guilty of misconduct, or the SFC is of the opinion that the person is not fit and proper to be or to remain a regulated person, sections 194 and 196 do not give the SFC any statutory powers to directly require the regulated person to take any steps to restore, compensate or otherwise protect the interests of investors or clients who may have been adversely affected by the regulated person's conduct.

### **Proposal**

11. To give the SFC more effective means to protect investors and the interests of clients of regulated persons, and to close the gap explained in paragraphs 9 and 10, it is proposed that section 213(1) be amended to introduce an additional ground under a new paragraph (c) for the SFC to apply for orders under section 213 where it has exercised any of its powers under section 194(1), 194(2), 196(1) or 196(2) against a regulated person.
12. It is also proposed that section 213(2) be amended to introduce an additional order that may be made by the CFI to restore the parties to any transaction to the position in which they were before the transaction was entered into, where the SFC has exercised any of its powers under section 194 or 196 in respect of the regulated person.
13. Furthermore, in line with previous revisions to section 213 to ensure that the grounds for seeking additional orders in respect of open-ended fund companies (**OFC**) were consistent with those set out in section 213(1), we also propose to make a consequential amendment to section 213(3A) to add an additional ground to enable the SFC to apply for orders under section 213 where it has exercised any of its powers under section

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<sup>7</sup> Section 213(3A) provides that the CFI may also make orders set out in section 213(3C) where an open-ended fund company or a director, an investment manager, a custodian or a sub-custodian of an open-ended fund company commits any of the contraventions referred to in section 213(1)(a)(i) of the SFO. The CFI may exercise the power under section 213(3A) irrespective of whether or not the SFC has applied for an order specified in section 213(2).



194(1), 194(2), 196(1) or 196(2) against a regulated person who is a director, investment manager, custodian or a sub-custodian of an OFC.

14. Pursuant to the existing section 213(8) of the SFO, where the CFI has the power to make an order against a person under section 213(1) or (3A), it may, in addition to or in substitution for such an order, make an order requiring the person to pay damages to another person. Once the SFC's proposed amendments to section 213(1), (2) and (3A) have been implemented, section 213(8) would, without any further amendments, also enable the CFI to make an order against a regulated person to pay damages where the SFC has exercised any of its disciplinary powers against the regulated person.
15. Consequential amendments are also proposed to be made to section 213(7) so that an order may be made under subsection (1), irrespective of whether or not the person against whom the order is made intends to engage again, or to continue to engage, in any matters which gave rise to the SFC's exercise of a disciplinary power referred to in the new section 213(1)(c). This is modelled upon the existing section 213(7)(a), which applies to matters referred to in section 213(1)(a)(i) to (v). In addition, a definition of "regulated person" is proposed to be added to section 213(11) which would have the meaning given to it by section 194(7) or 196(8) of the SFO (as applicable).

## Questions

Question 1:	Do you agree with: (i) the proposal to amend section 213 of the SFO to expand the basis on which the SFC may apply to the CFI for remedial and other orders after having exercised any of its powers under section 194 or 196 of the SFO against a regulated person, and; (ii) the proposed consequential amendments to section 213(1), (2), (7) and (11)? Please explain your view.
Question 2:	Do you have any comments on the proposed consequential amendments to section 213(3A) in respect of OFCs? Please explain your view.

## Part 2 – Amendments to exemptions in section 103 of the SFO

### Introduction

16. Section 103(1) of the SFO prohibits the issue of advertisements and other documents containing prescribed content unless the issue has been authorised by the SFC under section 105 of the SFO. Section 103(1) is subject to a number of exemptions as provided for in subsections (2), (3) and (5) to (9).
17. The Court of Final Appeal (**CFA**) has given a wider construction to one of the exemptions to section 103(1), namely the professional investor (**PI**) exemption under section 103(3)(k), than was intended by the underlying policy. As a result, potential problems may arise in enforcing this provision to protect retail investors. The proposed amendments aim to address the issue by clarifying the meaning of the PI exemption so that it accords with the original intended purpose.

### Background

#### *Section 103 and its application*

18. Section 103 appears under Part IV “Offers of Investments” of the SFO. Division 2 of Part IV, which contains section 103, bears the sub-heading “Regulation of offers of investments, etc”.
19. Section 103(1) provides that a person commits an offence if he issues or has in his possession for the purposes of issue, whether in Hong Kong or elsewhere, an advertisement, invitation or document (collectively referred to as “**advertisements**” for ease of reference) which to his knowledge is or contains an invitation to the public<sup>8</sup>:
  - (a) to enter into or offer to enter into –
    - (i) an agreement to acquire, dispose of, subscribe for or underwrite securities; or
    - (ii) a regulated investment agreement or an agreement to acquire, dispose of, subscribe for or underwrite any other structured product; or
  - (b) to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme,unless the issue is authorised by the SFC under section 105(1) of the SFO.
20. Section 103(1) regulates the *issue* or possession for the purposes of issue of advertisements which contain the prescribed content. It should be noted that it is *not* an offence to launch or sell investment products (eg, securities) which have not been authorised by the SFC. Therefore, it is evident that Part IV and section 103(1) of the SFO were designed to regulate the advertising of these products as distinct from the sale of them.

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<sup>8</sup> “Public” is defined in section 1 of Part 1 of Schedule 1 to the SFO as “the public of Hong Kong, and includes any class of that public”.

21. “**Issue**” is defined in section 102(1) of the SFO as follows:

**issue** (發出), in relation to any material (including any advertisement, invitation or document), includes publishing, circulating, distributing or otherwise disseminating the material or the contents thereof, whether:

- (a) by any visit in person;
- (b) in a newspaper, magazine, journal or other publication;
- (c) by the display of posters or notices;
- (d) by means of circulars, brochures, pamphlets or handbills;
- (e) by an exhibition of photographs or cinematograph films;
- (f) by way of sound or television broadcasting;
- (g) by any information system or other electronic device; or
- (h) by any other means, whether mechanically, electronically, magnetically, optically, manually or by any other medium, or by way of production or transmission of light, image or sound or any other medium,

and also includes causing or authorising the material to be issued.

### ***PI exemption***

22. Section 103(3) provides that section 103(1) does not apply to the issue, or the possession for the purposes of issue:

- (k) of any advertisement, invitation or document made in respect of securities or structured products, or interests in any collective investment scheme, that are or are intended to be disposed of only to professional investors.

23. The term “professional investor” is defined in section 1 of Part 1 of Schedule 1 to the SFO and includes specified categories of institutional investors. It is extended by section 3 of the Securities and Futures (Professional Investor) Rules (Cap. 571D) to include, amongst other persons, individuals having a portfolio of not less than HK\$8 million or its equivalent in foreign currency. The purpose of the exemption is clear: PIs—as opposed to retail investors—do not require the statutory protection under section 103(1), and thus issues of advertisements of investment products intended only for PIs are exempted from the SFC’s pre-vetting requirement.

### ***The CFA’s interpretation of section 103(3)(k)***

24. In proceedings instituted by the SFC against a licensed corporation and its chief executive officer for breach of section 103(1) of the SFO, the defendants had issued advertisements of a collective investment scheme to the public, including by way of posting on the licensed corporation’s website. The advertisements had not been authorised by the SFC. The defendants relied on the PI exemption in section 103(3)(k), arguing that whilst the advertisements were issued to the general public, the fund was

intended to be sold and had been sold only to PIs, even though this intention was not clearly stated in the advertisements.

25. The Magistrate agreed that the PI exemption applied and acquitted the defendants. The Magistrate's ruling was overturned on appeal to the CFI, which held that for section 103(3)(k) to apply, it must be apparent from the advertisement itself that it is "made in respect of" and therefore confined to PIs to the exclusion of other members of the investing public. On the defendants' appeal to the CFA<sup>9</sup>, the CFA agreed with the Magistrate that section 103(3)(k) applied, and held that the PI exemption applies to any advertisement having some connection or relation to investment products that are or are intended to be disposed of only to PIs. The CFA considered that the words "*that are or are intended to be disposed of*" in section 103(3)(k) provide the substance of the exemption.

### ***Outcome following the CFA's judgment***

26. Following the CFA's judgment, the position is that unauthorised advertisements of investment products which may not be suitable for retail investors may be issued to the general public even though the products are intended for sale only to PIs. As a result, retail investors may be exposed to unauthorised offers or solicitations to invest in risky or complex products which are unsuitable for them, which is precisely the situation the statutory regime was designed to safeguard against.
27. In addition, although liability under section 103(1) would crystallise at the time when an advertisement is issued, in practical terms, enforcement action needs to wait until the sale of a product has taken place in order to determine to whom it has been sold and whether the section 103(3)(k) exemption applies. Furthermore, a mere intention to sell investment products only to PIs would suffice for an exemption from the authorisation regime under section 103(1). This makes the regime extremely difficult, if not impossible, to enforce, and contradicts the purposes of Part IV and section 103(1) as mentioned in paragraph 20 above.

### **Proposal**

28. The SFC therefore seeks an amendment to section 103(3)(k) to restore the PI exemption to the original point in time when the advertising materials are issued, by exempting from the authorisation requirement those advertisements which are issued *only to PIs*. Therefore, following the proposed amendments, unauthorised advertisements of investment products which are or are intended to be sold only to PIs may only be issued to PIs who have been identified as such in advance by an intermediary through its know-your-client and related procedures, regardless of whether or not such an intention has been stated on the advertisements. To better protect the interests of the investing public, advertisements of investment products which are or are intended to be sold only to PIs should not be issued to the general public without the SFC's authorisation.
29. As section 103(3)(j), which provides for an exemption in relation to investment products sold or intended to be sold only to persons outside Hong Kong, is phrased in terms which are identical to the PI exemption, the SFC considers that for good order, this provision should be amended in identical terms for consistency and to avoid confusion.

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<sup>9</sup> *SFC v (1) Pacific Sun Advisors Limited and (2) Mantel, Andrew Pieter*, FACC 11 of 2014 dated 20 March 2015.

## Question

Question 3:	Do you agree with the proposal to amend the exemption set out in section 103(3)(k) and the consequential amendments to section 103(3)(j)? Please explain your view.
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## Part 3 – Amendments to the insider dealing provisions of the SFO

### Introduction

30. The SFO has established parallel and mirroring civil and criminal regimes in respect of insider dealing under Division 4 of Part XIII and Division 2 of Part XIV, respectively. Both regimes apply to insider dealing with respect to: (a) securities listed on a recognised stock market or their derivatives (**Hong Kong-listed securities or their derivatives**) and; (b) securities *dually-listed* in Hong Kong and another jurisdiction<sup>10</sup> or their derivatives.
31. The current civil and criminal regimes do not apply to market misconduct or the offence of insider dealing perpetrated in Hong Kong with respect to securities listed on overseas stock markets<sup>11</sup> or their derivatives (**overseas-listed securities or their derivatives**), nor do they *expressly* apply to any acts constituting insider dealing perpetrated outside Hong Kong in respect of Hong Kong-listed securities or their derivatives.
32. Given the increasing interconnectivity of global financial markets, it is important to ensure that the SFC has the powers to tackle cross-border securities crimes and market misconduct in order to preserve the integrity and reputation of Hong Kong's financial industry and markets.
33. The SFC therefore proposes that the scope of the insider dealing provisions of the SFO be broadened to cover:
  - (a) insider dealing perpetrated in Hong Kong with respect to overseas-listed securities or their derivatives; and
  - (b) insider dealing perpetrated outside of Hong Kong, if it involves any Hong Kong-listed securities or their derivatives.

### Background

#### ***Inability to tackle insider dealing in Hong Kong in respect of overseas-listed securities or their derivatives***

34. Section 270 (civil liability) and section 291 (criminal liability) of the SFO prohibit insider dealing with respect to the "**listed securities**" of a listed corporation or their derivatives. Both "listed corporation" and "listed securities" are defined in section 245 (for Part XIII) and section 285 (for Part XIV) by reference to a corporation whose securities are "**listed**". The term "listed" is further defined to mean listed on a recognised stock market, ie, a stock market operated by The Stock Exchange of Hong Kong Limited. Currently, the scope of the market misconduct of insider dealing in section 270(1) and of the insider dealing offence in section 291 are extended by section 270(2) and section 291(7), respectively, to cover securities dually-listed in Hong Kong and another jurisdiction or their derivatives.

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<sup>10</sup> See sections 270(2) and 291(7) of the SFO.

<sup>11</sup> This term is intended to refer to any stock markets outside Hong Kong—similar in usage to the term 'relevant overseas market' in sections 245 and 285 of the SFO.

35. It follows that these provisions do not apply to insider dealing with respect to overseas-listed securities or their derivatives, even where the acts set out in section 270(1) or 291 have taken place in Hong Kong. This limited coverage is at odds with the global trend of market convergence and fails to recognise that insider dealing perpetrated in Hong Kong with respect to overseas-listed securities or their derivatives would eventually damage the reputation of Hong Kong's financial markets and its status as an international financial centre. It is therefore essential that the SFC has the ability to take action against securities crimes and market misconduct perpetrated locally, even though such crimes and market misconduct may only directly affect markets outside of Hong Kong.
36. As a result of this statutory gap, the SFC has only been able to deal with suspected insider dealing of overseas-listed securities or their derivatives by providing intelligence to securities regulators in the relevant jurisdictions. However, this is often not a good solution for serious cases of insider dealing in overseas-listed securities or their derivatives, where most of the evidence required to substantiate the misconduct is available in Hong Kong. It is in our interest as an international financial centre to deliver a strong deterrent message by punishing this misconduct here.

### **Case examples and analyses**

37. In a case in point<sup>12</sup>, four defendants in Hong Kong, including two practising solicitors, dealt in the shares of a company listed elsewhere outside Hong Kong based on inside information acquired in Hong Kong. Since the corporation concerned was not listed on a recognised stock market in Hong Kong, the insider dealing provisions in section 270 or 291 of the SFO were not applicable. As a result of this limitation, the SFC resorted to seeking civil remedies under section 213 of the SFO and ultimately succeeded in obtaining a court order against the defendants in civil proceedings brought under section 213 by establishing that there had been contraventions of section 300 of the SFO.
38. However, this way of dealing with insider dealing does not fully address the mischief involved as there is an important conceptual difference between the nature of the conduct prohibited in section 300 and that prohibited in sections 270 and 291. Section 300 is designed to cover acts of fraud or deception involving transactions between specific persons rather than fraud that deceives, and conduct that misleads, the market as a whole, threatening the integrity of financial markets<sup>13</sup>. The statutory purpose of the prohibition on insider dealing is to prevent the particular mischief of taking advantage of price-sensitive information to make gains by stealing a march on the rest of the market<sup>14</sup>. For this reason, section 300 was not included in the market misconduct regime in Part XIII of the SFO when the SFO was drafted.
39. This conceptual difference affects the nature of the relief which can be sought and the calculation of the amounts payable by the wrongdoers. In the case described above, one of the defendants, being a fiduciary, defrauded or deceived her principals, ie, her employer (a law firm) and its client (a bank), by misusing inside information so that the defendants (including herself) would profit from securities trading. The restoration order granted by the Court in the section 213 proceedings brought by the SFC based on a contravention of section 300 was only to return the profits from the illicit trades to the

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<sup>12</sup> *Securities and Futures Commission v Young Bik Fung & Ors* [2019] HKC 254.

<sup>13</sup> See Page 17 of the [meeting transcript](#) of the Bills Committee meeting held on 8 May 2001.

<sup>14</sup> *SFC v Yiu Hoi Ying Charles, Wong Nam Marian and MMT* [2018] HKCFA 44.



bank, being one of the victims of their fraud or deception. By contrast, the restoration order which could have been sought based on a contravention of section 270 or 291, had this been available, would be calculated on the basis of restoring aggrieved investors affected by the illicit trades to the position they were in before they entered into the relevant transactions. This case shows that where overseas-listed securities or their derivatives are concerned, the SFC can only deal with the fraud committed against the principals of the defendants, but not the mischief of insider dealing against the wider market.

40. In another matter, the SFC was unable to take enforcement action against a Hong Kong licensed intermediary who dealt in the securities of an overseas-listed entity ahead of the announcement of a placing exercise when he was in possession of inside information released to him by another licensed intermediary based in Hong Kong. Although the acts relating to the offence, except for the mechanics of trading, were committed in Hong Kong and the suspect's conduct appeared to fall within section 300, the SFC did not have sufficient evidence to establish that the suspect had engaged in any fraudulent or deceptive acts in the relevant transactions, and therefore no action could be taken under section 300.
41. This case illustrates another difficulty in addressing the mischief of insider dealing in overseas-listed securities or their derivatives through section 300. The elements required to be proved under section 300 are very different from those required to establish the offence of insider dealing under section 291. Fraud and/or deception are key elements of the offence in the former, but such elements are not required to be established under the latter.

***Lack of express provisions to cover acts relating to insider dealing in Hong Kong-listed securities or their derivatives which take place outside Hong Kong***

42. In addition, the insider dealing provisions of the SFO do not *expressly* cover insider dealing with respect to Hong Kong-listed securities or their derivatives where the acts which give rise to a contravention of section 270 or 291 have taken place outside Hong Kong. In the absence of express provisions specifying the territorial scope of the existing insider dealing regimes, the SFC has to apply the common law test to determine the territorial jurisdiction in each case<sup>15</sup>.
43. It is therefore proposed that the SFO insider dealing regimes be broadened to include any act which takes place outside Hong Kong in respect of Hong Kong-listed securities or their derivatives. Expanding the coverage of the insider dealing regimes to overseas acts would enable the SFC to protect Hong Kong's markets and investors against those who attempt to conduct from outside of Hong Kong insider dealing with respect to Hong Kong-listed securities or their derivatives. Between 2017 and 2021, approximately 61% of the insider dealing cases handled by the SFC concerned insider dealing perpetrated outside Hong Kong in respect of Hong Kong-listed securities or their derivatives.

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<sup>15</sup> The test is whether a substantial measure of the activities of the crime have taken place within Hong Kong: *HKSAR v Wong Tak Keung* (2015) 18 HKCFAR 62 and *Securities and Futures Commission v Young Bik Fung And Others* [2018] 1 HKC 246.



### ***Comparison with other major common law jurisdictions***

44. By contrast, insider dealing laws in other major common law jurisdictions govern overseas conduct relating to securities of local issuers as well as local conduct relating to securities of overseas issuers. For example, Australia's insider trading provisions under the Corporations Act 2001 apply to both: (a) conduct outside Australia in relation to financial products issued by a person who carries on business in Australia or a company that is formed in Australia; and (b) conduct within Australia in relation to financial products regardless of where the issuer is formed, resides or is located, or of where the issuer carries on business.
45. Similarly, section 213 of the Securities and Futures Act of Singapore provides that insider dealing provisions under the Act apply to: (a) acts occurring within Singapore in relation to, amongst others, securities or securities-based derivatives contracts of any corporation, whether formed or carrying on business in Singapore or elsewhere; and (b) acts occurring outside Singapore in relation to, amongst others, securities or securities-based derivatives contracts of a corporation that is formed or carries on business in Singapore.
46. The insider dealing offences under the UK Criminal Justice Act 1993 also have a similar territorial scope, although the statutory formulation is different<sup>16</sup>.

### ***Comparison with other market misconduct provisions of the SFO***

47. It is noteworthy that the SFO provisions governing other market misconduct such as false trading (sections 274 and 295), price rigging (sections 275 and 296) and stock market manipulation (sections 278 and 299) adopt a comparable approach in terms of the territorial scope. These other market misconduct provisions expressly cover unlawful acts committed in Hong Kong or elsewhere which affect Hong Kong's financial markets as well as unlawful acts committed in Hong Kong which affect non-Hong Kong financial markets.
48. Therefore, it is desirable to expand the scope of the insider dealing provisions of the SFO to align them with those of other major common law jurisdictions and the other market misconduct provisions of the SFO. In particular, following the launch of Stock Connect, the proposed amendments would strengthen the SFC's regulatory powers in tackling insider dealing conducted in Hong Kong involving A-shares listed in mainland China.

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<sup>16</sup> A more prescriptive and restrictive approach is adopted. Section 62 of the UK Criminal Justice Act 1993 sets out the territorial scope of the offence of insider dealing as follows:

- (a) In the case of a person who deals in securities: (i) he must be within the UK at the time when he has done any act constituting or forming part of the dealing, or (ii) the securities are traded on a regulated market prescribed by the HM Treasury, or (iii) the professional intermediary was within the UK at the time when he has done anything by means of which the offence was committed.
- (b) In the case of a person who encourages another to deal or discloses information to another: (i) he must be within the UK at the time when he disclosed the information or encouraged the dealing, or (ii) the recipient of the information or encouragement was within the UK at the time when he received the information or encouragement.

Section 52 of the UK Criminal Justice Act 1993 sets out the insider dealing offence.

## Proposal

49. The SFC proposes that:
- (a) the definition of “listed” as defined in sections 245(2) (civil regime) and 285(2) (criminal regime) of the SFO be amended to include overseas-listed securities or their derivatives; and
  - (b) a new section be added to Part XIII and Part XIV of the SFO to expand the territorial scope of the insider dealing regimes to include: (i) any acts of insider dealing involving Hong Kong-listed securities or their derivatives regardless of where they occur; and (ii) any acts of insider dealing involving overseas-listed securities or their derivatives if any one or more of such acts occur in Hong Kong.
50. As a consequence of the proposed amendments, section 270(2) (civil regime) and section 291(7) (criminal regime) of the SFO, which currently extend the scope of insider dealing provisions to dealings in dually-listed Hong Kong securities on stock markets outside Hong Kong or their derivatives, would become redundant. The SFC proposes to repeal these provisions.
51. There is currently a discrepancy between the formulation of the mens rea element in relation to the disclosure of inside information under sections 270(2)(b) and 291(7)(b) (dually-listed securities or their derivatives) and under other sub-sections in sections 270 and 291 dealing with disclosure for solely Hong Kong-listed securities or their derivatives. The mens rea element in sections 270(2)(b) and 291(7)(b) can be met where the person with inside information knows or has reasonable cause to believe that the person to whom the inside information is disclosed, *or some other person*, may deal in the listed securities or their derivatives. The other sub-sections which concern solely Hong Kong-listed securities or their derivatives adopt a narrower formulation that requires the person making the disclosure to know or have reasonable cause to believe that *only* the person to whom the inside information is disclosed would deal in the listed securities or their derivatives. As these are essentially the same in nature and there is no apparent reason for the discrepancy, the SFC proposes to align the two formulations by adopting the formulation in sections 270(2)(b) and 291(7)(b) when implementing the amendments proposed in paragraphs 49 and 50 above. This approach would better promote the fairness, transparency and orderliness of the securities market as well as protect the investing public.
52. The SFC also proposes that a new subsection be added to section 282 (civil regime) and section 306 (criminal regime) to the effect that, in respect of the proposed expansion of the insider dealing regimes to include overseas-listed securities or their derivatives, a person suspected of perpetrating in Hong Kong insider dealing in respect of overseas-listed securities or their derivatives shall not be regarded as having engaged in insider dealing, unless his conduct would have also been unlawful had it been carried out in the relevant overseas jurisdiction. This is in line with the legal position for false trading, price rigging and stock market manipulation as stipulated in sections 282(3) and 306(3).
53. Furthermore, the SFC believes that, where appropriate, the defences available under the SFO for insider dealing should also be available for insider dealing involving overseas-listed securities or their derivatives. Accordingly, the SFC proposes that amendments be made to section 271(5) to extend the “off-market transaction” exemption

to insider dealing in respect of overseas-listed securities or their derivatives where transaction counterparties have information symmetry.

## Questions

Question 4:	Do you agree with the proposal to expand the scope of insider dealing provisions of the SFO to cover insider dealing perpetrated <i>in Hong Kong</i> with respect to <i>overseas-listed securities or their derivatives</i> ? Please explain your view.
Question 5:	Do you agree with the proposal to expand the scope of insider dealing provisions of the SFO to cover insider dealing perpetrated <i>outside of Hong Kong</i> , if it involves any <i>Hong Kong-listed securities or their derivatives</i> ? Please explain your view.



## Seeking comments

54. The SFC welcomes comments from the public and the industry on the proposals set out in this consultation paper. Please submit comments to the SFC in writing by no later than 12 August 2022.