

Comparison of the legal structure and sanctions/penalties between enforcement bodies in Hong Kong and the US

In response to the Hon. Mrs. Regina IP's concerns set forth at item 2 of the List of Follow-up Actions from the Panel on Financial Affairs Meeting on 2 February 2009, submitted is a chart comparing the legal structure of the SFC and the sanctions/penalties it is authorized to impose to the structures and powers of the primary securities regulatory and enforcement bodies in the United States: the Securities and Exchange Commission ("SEC"), FINRA (the Financial Industry Regulatory Authority), and the Office of the New York State Attorney General.

In most basic summary, the comparison shows that: 1) unlike the SEC and the New York State Attorney General, the SFC cannot take civil action for market misconduct other than to seek injunctions because the Market Misconduct Tribunal is not accessible to the SFC; 2) unlike the SEC, FINRA, and the New York State Attorney General, the SFC cannot obtain compensation orders or effect compensation for victims of contraventions; and 3) the SFC is able to take summary criminal action for market misconduct, unlike the SEC. Otherwise, the various powers and available remedies are basically consistent with one another.

	Hong Kong – Securities and Futures Commission	U.S. – Securities and Exchange Commission	U.S. – FINRA (Financial Industry Regulatory Authority)	U.S. – New York State Attorney General
<u>Jurisdiction</u>	administrative, civil, and criminal	administrative and civil	administrative	civil and criminal
<u>Subject Persons</u>	Administrative <ul style="list-style-type: none"> • licensees (individuals and corporations) • responsible officers of licensed companies • unlicensed persons who manage corporate licensees • bank securities/futures departments ("Registered Institutions") • staff and senior management working in Registered Institutions 	Administrative <ul style="list-style-type: none"> • Regulated Entities (such as securities broker-dealers, investment advisers, national securities exchanges, and persons associated or seeking to become associated with such Regulated Entities) • persons associated with penny stock offerings • registered public accounting firms • officers and directors of public companies 	Administrative <ul style="list-style-type: none"> • all securities broker-dealers doing business in the U.S. and all persons associated or seeking to become associated with such broker-dealers 	Administrative None

	Hong Kong – Securities and Futures Commission	U.S. – Securities and Exchange Commission	U.S. – FINRA (Financial Industry Regulatory Authority)	U.S. – New York State Attorney General
	<ul style="list-style-type: none"> persons involved in the management of Registered Institutions <p>Civil & Criminal all persons subject to the laws of Hong Kong</p>	<ul style="list-style-type: none"> lawyers, accountants, and other professionals practicing before the SEC all persons subject to the laws of the United States (with respect to permanent cease and desist orders and orders requiring accounting and disgorgement only) <p>Civil all persons subject to the laws of the United States</p>	<p>Civil & Criminal None</p>	<p>Civil & Criminal all persons involved in the offer and sale of securities in or from the State of New York</p>
<u>Sanctions & Remedies</u>	<p>Administrative</p> <ul style="list-style-type: none"> full or partial revocation or suspension of a license a banning order (banning a person from applying to be licensed) a fine of up to HK\$ 10 million or 3 times the amount of profit gained or loss avoided a public or private reprimand issue a Restriction Notice to licensed corporations 	<p>Administrative</p> <p>Regulated Entities, Associated Persons, Persons Associated with Penny Stock Offerings:</p> <ul style="list-style-type: none"> censure limitation on activities, functions, or operations (including undertakings) suspension for a period not exceeding 12 months revocation of registration (for Regulated Entities) or permanent bar 	<p>Administrative</p> <ul style="list-style-type: none"> censure suspension, expulsion, or permanent bar from association monetary fines or “any other fitting sanction” including, but not limited to: <ul style="list-style-type: none"> - disgorgement of improperly gained money - conditions or limitations upon future activities or association (including restrictions on lines of business) 	<p>Administrative</p> <p>None</p>

	Hong Kong – Securities and Futures Commission	U.S. – Securities and Exchange Commission	U.S. – FINRA (Financial Industry Regulatory Authority)	U.S. – New York State Attorney General
	<ul style="list-style-type: none"> - imposing a prohibition or restriction on the carrying on of business - prohibiting or imposing limitations on the disposition or dealing with any relevant property OR - requiring the maintenance of a sufficient amount of freely disposable property to ensure it will be able to meet its liabilities with respect to its licensed business 	<ul style="list-style-type: none"> • monetary penalties • orders of accounting and disgorgement • temporary and permanent cease and desist orders (temporary cease and desist orders only available against Regulated Entities, Associated Persons, or registered public accounting firms) <p>Other Persons:</p> <ul style="list-style-type: none"> • permanent cease and desist orders and • orders of accounting and disgorgement. <p>Officers and Directors of Public Companies:</p> <ul style="list-style-type: none"> • In addition to the sanctions above under Other Persons, officers and directors of public companies are subject to bars from service in such capacities. 	<ul style="list-style-type: none"> - requalification by examination (for individuals) - undertakings (including agreement to undertake corrective measures, hiring of independent consultants to undertake reviews of systems and procedures, and hiring of consultants to administer distribution of fines and disgorgement to harmed investors) 	

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		<p>Lawyers, Accountants, and Other Professionals Practicing before the SEC:</p> <ul style="list-style-type: none"> In addition to the sanctions above under Other Persons, professionals practicing before the SEC are subject to orders barring or suspending them from such practice. <p>Refusal Orders, Stop Orders, Examinations, and Trading Suspensions:</p> <ul style="list-style-type: none"> The SEC also has administrative power to seek orders refusing to approve a registration statement for securities, to stop an already effective registration statement, and to conduct an examination to determine whether a stop order should be issued. The SEC may also seek orders for temporary trading suspensions to allow the SEC time to deploy other civil or administrative remedies. Trading suspensions of up to 10 days may be ordered without hearing. Suspensions of a longer duration require notice and a hearing. 		

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	<p>Civil</p> <p>Unlike the SEC: (a) the SFC cannot take civil action for market misconduct other than seeking injunctions (the MMT is not accessible to the SFC)¹; and (b) the SFC cannot obtain compensation orders or effect compensation for victims of contraventions.</p> <p>Injunctions and Other Orders – In instances involving contraventions of or under the SFO (and in certain instances under the Companies Ordinance) the SFC may apply to the Court of First Instance (“CFI”) for various orders including:</p> <ul style="list-style-type: none"> • injunctions (e.g. asset freezes) • damages • orders requiring a person to “take such steps as the CFI may direct” • orders to restore persons to their pre-transaction positions • orders appointing administrators over any property 	<p>Civil</p> <p>The SEC is able to take civil action for insider dealing and manipulation and to apply penalties and disgorgement to compensate victims of contraventions.</p> <ul style="list-style-type: none"> • permanent and preliminary injunctions • monetary penalties (including treble profits gained or losses avoided in insider trading cases) • disgorgement of unjust enrichment • curative disclosure (such as updated financial statements) • receivership and voting trusts to protect the interests of investors • orders to preserve documents and assets • temporary freezing assets of a public company upon a showing that the company is likely to make extraordinary payments to directors, 	<p>Civil</p> <p>None</p>	<p>Civil</p> <ul style="list-style-type: none"> • injunctions from selling or offering to sell securities and from engaging in deceptive acts and practices and false advertising directed at consumers • restitution (broader than disgorgement) • all remedies available at equity

¹ Under the Securities and Futures Ordinance (Cap. 571), where it appears to the Financial Secretary that market misconduct has taken place, either on the report of the SFC or on the referral from the Secretary for Justice, he may institute proceedings before the MMT. The MMT may impose “disqualification orders”, “cold shoulder orders”, “disgorgement orders”, “disciplinary referral orders”, etc.

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	<ul style="list-style-type: none"> • orders to void contracts relating to SFC regulated financial products • ancillary orders to give effect to those mentioned above <p>Unfair Prejudice – In instances where the affairs of a corporation that is or was listed are being conducted in a manner oppressive, prejudicial, or involving fraud or other misconduct to its members, the SFC may apply to the CFI for orders directing the corporation, its directors, or other responsible person to:</p> <ul style="list-style-type: none"> • not do certain things or requiring certain things to be done • commence legal proceedings (for a corporation) • appoint receivers and managers (except in respect to banks) • ban persons from being involved in the management of any listed company without court approval for up to 15 years 	<p>officers, or other persons associated with the company</p> <ul style="list-style-type: none"> • prohibition upon persons from participating in the offer of a penny stock • undertakings • “any equitable relief” appropriate and necessary for the benefit of investors 		

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	<ul style="list-style-type: none"> The CFI, on application of the SFC, may issue other appropriate orders to regulate the future affairs or business of a listed company or to require the buy-back of minority shareholders' shares at a fair price <p>Winding Up and Bankruptcy Orders -- Where it appears to the SFC that it is in the public interest that a corporation (excluding a bank) should be wound up or an individual declared bankrupt, the SFC may apply to the CFI for such orders.</p> <p>Intervention --SFC may intervene in any proceeding which (in essence) concerns a matter provided for in Cap. 571 or in which the SFC has an interest.</p> <p>Criminal</p> <p>Courts can order a range of fines and terms of imprisonment up to a maximum of HK\$10 million and/or 10 years imprisonment for the most serious offences punishable in the District Court.</p>	<p>Criminal</p> <p>None</p>	<p>Criminal</p> <p>None</p>	<p>Criminal</p> <p>imprisonment for a term of up to 4 years and fines</p>