Bills Committee on Securities and Futures (Amendment) Bill 2013

Follow-up actions arising from the discussion at the meetings on 28 October, 12 November, 22 November and 20 December 2013

Purpose

This paper sets out the Administration's response to Members' questions raised at the meetings on 28 October, 12 November, 22 November and 20 December 2013.

Proposed Part IIIA of the Securities and Futures Ordinance (Cap. 571) ("SFO")

Division 5 – Systematically Important Participants ("SIP")
Section 101V – Application to Court of First Instance

Subsections (a) and (b) of section 101V(3)

2. The proposed section 101V(3) is modelled on section 185(1) of the SFO. The difference between subsections (a) and (b) of section 101V(3) can be illustrated by the case of Re *Chan Chin Yuen* [2008] 1 HKLRD 488, a decision on section 185(1). In this case, the Securities and Futures Commission ("SFC") issued a notice to Mr Chan Chin Yuen ("Chan") on 17 May 2007 requiring Chan to attend an interview on 29 May 2007. Chan deliberately did not attend the interview as scheduled. On 6 September 2007, the Court of First Instance ("CFI"), upon application by the SFC, made an order pursuant to section 185(1)(a) requiring Chan to attend an interview on 2 October 2007. However, Chan ignored the court order. As a result, the CFI had to make another order under section 185(1)(b) ordering Chan be committed to prison for his contempt in failing to attend an interview, contrary to the court order dated 6 September 2007. A copy of the judgment by Reyes J is at **Annex A**.

3. Accordingly, in appropriate cases, the court will have to exercise the powers under both limbs to compel compliance with the SFC's notices.

4. The subsections of section 101V(3) need to be read and understood conjunctively. If, under subsection (a), the Court is satisfied

that there is no reasonable excuse, the person can be ordered to comply and, under subsection (b), upon finding that the failure was without reasonable excuse, the person may also be punished as if guilty of contempt of court. The decisions illustrate that the Court will often exercise its discretion to punish after the person has failed to comply with an order under subsection (a), but the power is not so constrained and the person could be ordered to comply and punished for contempt at the same time.

Amendments to Part VIII of the SFO

New Division 3A – Monetary Authority ("MA")'s Powers of Investigation
Section 184B – Conduct of investigations

Rights and protections afforded to persons under investigation ("PUI") and past experience

5. In an investigation conducted by the SFC to assist an overseas regulator, a notice to produce records or documents issued to a PUI or a person providing assistance will include –

- the identity of the overseas regulator;
- the reasons for the investigation (e.g. insider dealing, market manipulation, etc);
- the relevant overseas legislation; and
- equivalent type of misconduct/provisions under the SFO.

6. A sample notice to produce records or documents issued to a person providing assistance is at **Annex B**.

7. The SFO contains provisions which ensure that the SFC's investigations can be fairly conducted without prejudicing the legal rights and protection afforded to PUIs. Further details are set out in paragraphs 8 – 11 below.

(a) Self-incrimination

8. Section 187 of the SFO provides that, before the PUI answers a question, if he claims that his answer might tend to incriminate him, then

the question and his answer will not be admissible in evidence against him in criminal proceedings except for certain specified offences expressly set out in section 187(2) (perjury, etc).

(b) Legal professional privilege ("LPP")

9. The common law right to LPP is expressly preserved in section 380(4) of the SFO.

10. In a compelled interview under section 183, the SFC investigators will only ask questions that are relevant to matters under investigation. The person is also entitled to attend the interview with his lawyer and to confer with his lawyer during the interview. There is no question of the SFC interfering or prejudicing in any way with a person's right to keep confidential all legitimately privileged communications. In relation to request for documents to be produced, LPP is frequently claimed and there are protocols in place to protect claims of LPP.

11. The protocols concern procedures in which parties are permitted to ringfence communication that is subject to LPP before the material can be inspected by the investigators. These procedures operate well; disputes can be referred to a court but, in the SFC's experience, this has never happened.

(c) Secrecy or other legal obligations under a foreign law

12. A person may refuse to produce documents to the SFC if the person has a reasonable excuse not to do so. The question of whether an obligation of secrecy or confidentiality under a foreign law is a reasonable excuse under Hong Kong law is a matter for Hong Kong's courts to determine on a case-by-case basis. There is relevant case law dealing with obligations to produce documents to Courts under a subpoena where claims of secrecy or confidentiality under foreign law have been held not to be a reasonable excuse. The Court will generally embark on a balancing exercise to determine whether there is a reasonable excuse or not. (See: *Brannigan v. Davison* [1997] AC 238 (PC) at 251D-G; *Bank of Valletta PLC v. National Crime Authority* (1999) 164 ALR 45 at §§35-60, affirmed in (1999) 90 FCR 565 at §§9-10; *Australian Securities and Investments Commission v. Albarran* (2008) 169 FCR 448, §§78-83)

Section 184C – Investigation reports

Exercise of powers by the SFC on publication of investigation reports

13. The SFC published its investigation reports twice, both in 1998 and pursuant to section 33(10) of the repealed Securities and Futures Commission Ordinance, the predecessor of section 183(6) of the SFO. The SFC has not published any investigation report after the enactment of the SFO. The SFC's general position is that it will not publish an investigation report in respect of any investigation in which enforcement proceedings are or may be pending nor will the SFC publish such a report in relation to a closed case in which there is no evidence to justify any such action. There would need to be very strong overriding reasons of public interest to publish such a report, especially given the obvious prejudice that would be suffered by persons named in a report and the fact that publication would destroy the confidentiality of information, including commercially confidential data, contained in the report. Any decision to publish would need to be made in light of a full procedural fairness process involving all parties who may be adversely affected by the publication.

Amendments to Division 4 – Miscellaneous

Section 186 – Commission's assistance to regulators outside Hong Kong; and section 186A – MA's assistance to regulators outside Hong Kong

Level of MA officer making decisions on the provisions of assistance to overseas regulators

14. As a matter of principle, decisions on whether to provide assistance to overseas regulators under section 186A will be made by a sufficiently senior officer of the MA, who will likely be an officer at the Executive Director level or above.

Assistance to overseas regulators in the interests of the investing public or in the public interest, etc.

15. Under section 186(3) and the proposed section 186A(7) of the SFO, the SFC and the MA are able to give investigatory assistance to an overseas counterpart if –

(a) it is desirable or expedient that the assistance should be given in the interests of the investing public or in the public interest; or

(b) the assistance will enable or assist the recipient of the assistance to perform the recipient's functions and it is not contrary to the interests of the investing public or to the public interest that the assistance should be given.

16. Generally speaking, giving assistance to overseas regulators to combat cross-border financial crimes and misconduct is both in the interests of the investing public and in the public interest especially given the international character of Hong Kong's market and Hong Kong's position as an international financial centre. The fact that the assistance may adversely affect the interests of a local company and its investors is not a relevant consideration in providing the assistance if it is not contrary to the interests of the investing public or to the public interest.

Reciprocal assistance

17. Under section 186(4) and the proposed section 186A(8) of the SFO, before deciding whether to give the investigatory assistance, the SFC and the MA must take into account whether the overseas counterpart –

(a) will pay the costs and expenses incurred; and

(b) is able and willing to give reciprocal assistance in response to a comparable request for assistance from Hong Kong.

18. In other words, if the overseas counterpart is not willing to pay reasonable costs and expenses incurred in the provision of investigatory assistance, or if the overseas counterpart is not able or willing to provide reciprocal assistance to the SFC and the MA, the SFC and the MA may refuse to give the requested assistance. It is a common practice for international regulators to take into account reciprocity before giving assistance (e.g. section 169(4)(a) of the United Kingdom Financial Services and Markets Act 2000) but it is not a common practice to make it a mandatory pre-condition.

Operation of subsections (7) and (8) of section 186A together

19. Regarding the operation of subsections (7) and (8) of section 186A together, when making a decision to provide assistance to an overseas entity, the MA must consider subsections (7) and (8) at the same time. Subsection (7) sets out the conditions, if satisfied, the MA may give the assistance. Subsection (8) sets out the considerations that the MA must take into account when deciding whether assistance should be given.

International or bilateral cooperation arrangements and publication of the names of overseas regulators

20. According to section 186(5) and the proposed section 186A(5), the overseas requesting authority must –

(a) perform functions similar to the functions of the SFC or the MA or regulate, supervise or investigate banking, insurance or other financial services; and

(b) is subject to adequate secrecy obligations.

21. The above requirements can be satisfied if the overseas requesting authority is a member of the International Organisation of Securities Commissions ("IOSCO") Multilateral Memorandum of Understanding ("MMoU") or has bilateral arrangements with the SFC or the MA in relation to investigatory assistance. However, this is not a legal prerequisite. The SFC and the MA may also give investigatory assistance to an overseas requesting authority that has no formal agreement with the SFC and the MA as long as all the requirements set out in section 186 and the proposed section 186A are fully satisfied. It is important to retain this flexibility, because it usually takes time to enter into a formal agreement whereas it is desirable to be able to offer investigatory assistance in a timely and efficient manner.

22. Under section 186(5), whenever the SFC receives a request for investigatory assistance from a qualifying overseas regulator, the SFC may give the requested assistance if it is of the opinion that the conditions in section 186(3) of the SFO are satisfied. The proposed section 186A follows the said provisions. These conditions are considered on a case-by-case basis. The assessment of who is a qualifying overseas regulator may be made by the SFC prior to the receipt of a request and can be relied on for subsequent requests. There are now 100 signatories to the IOSCO MMoU. The full list of signatories is at **Annex C**.

These 100 signatories include regulators from major financial markets, namely, Australia, Mainland China, France, Germany, India, Japan, Korea, Malaysia, Singapore, the United Kingdom and the United States. As a member of the IOSCO, the SFC has gazetted the names of all 99 signatories to the IOSCO MMoU other than Hong Kong. Where the SFC has not yet entered into a Memorandum of Understanding ("MoU") with a requesting regulator, the SFC may nevertheless give the requested assistance upon being satisfied that the conditions in section 186(3) and the criteria in section 186(5) of the SFO are met, and then gazette the name of this new entity.

23. Following the guidance and standards by the Basel Committee on Banking Supervision ("BCBS"), the MA has entered into a MoU or other formal arrangement with each of the regulators as set out at **Annex D** for general prudential supervisory cooperation purposes in respect of regulation of banks. It is envisaged that the MA could enhance the existing MoUs to cater for supervisory cooperation in respect of the regulation of the OTC derivative market under the new framework. It is also envisaged that the MA could enter into new MoUs with other regulators specialising in regulation of the OTC derivative market.

Regulation of sovereign wealth funds ("SWFs") under the OTC derivative regulatory regime

24. In line with the regulatory regime in other jurisdictions, central banks, governments and government bodies charged with the management of public debt and the maintenance of market stability will be exempted from mandatory reporting and clearing obligations. Transactions carried out by SWFs as entities in Hong Kong are generally subject to the mandatory reporting and clearing obligations, which is generally the case in other jurisdictions.

25. All entities including SWFs that are not carved out from the obligations under the OTC derivative regulatory regime would be covered under the mechanism between the SFC/the MA and overseas regulators regarding assistance for overseas regulators or information sharing. There is no intention to grant special treatment to SWFs.

Amendments to Part IX of the SFO
New Division 4 – Disciplinary Action by the MA

Rationale for the $10 million cap first adopted in the SFO

26. In drafting the SFO, the Administration had had regard to the approach in comparable jurisdictions. The rationale for the $10 million cap has been set out in paragraphs 7.10 - 7.12 of the "*Consultation Document on the Securities and Futures Bill*" published in April 2000-

> *"7.10 … Clause 180 places a cap on the amount that the SFC may fine, i.e., the higher of $10 million or three times the profit made or loss avoided as a result of the misconduct. These figures set the maximum level. Most fines imposed by the SFC are expected to fall below this maximum.*
>
> *7.11 The link to the profit or loss is considered appropriate as a means to relate the level of the fine to the gravity of the misconduct in respect of which it is imposed. It is also intended that the maximum fine must be set high enough to have a deterrent effect adequate for the protection of investors. At the same time, it is recognized that some instances of improper conduct may not lead to a profit being made or loss avoided. Consequently, there is an alternative maximum of $10 million, which is expected to be adequate to cover most instances of improper conduct.*
>
> *7.12 In granting the SFC the power to fine and fixing maximum fines, we have had regard to the approach in comparable jurisdictions.*
>
> *(a) In the US, both the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") have the power to impose disciplinary fines. The SEC may impose fines of up to US$100,000 on a natural person and US$500,000 on a corporation if the contravention concerned involves fraud, recklessness or a significant risk of substantial loss to others. Fines may also be imposed for each disciplinary contravention and, in certain instances, each day that a contravention continues could constitute a*

separate violation for purposes of calculating the total amount of fines. The CFTC may impose fines of up to US$100,000 or up to three times the monetary gain for each contravention.

(b) In the UK, it is proposed to give the Financial Services Authority the power to impose disciplinary fines under the Financial Services and Markets Bill. However, there is currently no proposal to cap the amount that the Financial Services Authority may fine. "

27. The SEC[1] and the CFTC[2] have since adjusted upwards their maximum limits and the UK Financial Conduct Authority does not have any maximum limit on fine. There has been no similar adjustment to the maximum fine in Hong Kong.

Past cases of fines exceeding $10 million

28. The SFC has imposed a total fine of more than $10 million on four licenced entities in the past. The fines in these cases exceeded $10 million because these cases involved multiple and separate acts of misconduct.

29. The SFC has not imposed a total fine of more than $10 million on any individual so far.

Comparison with other penalties under the SFO

30. There are six types of market misconduct offences (insider dealing, false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false or misleading information inducing transaction, and stock market manipulation) under Part XIV of the SFO.

31. Section 303(1) of the SFO provides that a person who commits an offence under Part XIV is liable –

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1 In 2000, the SEC could impose fines of up to US$100,000 on a natural person and US$500,000 on a corporation if the contravention concerned involves fraud, recklessness or a significant risk of substantial loss to others. Since March 2013, the fines have been increased to US$160,000 for natural persons and US$775,000 for corporations.

2 In 2000, the CFTC could impose fines of up to US$100,000 or up to three times the monetary gain for each contravention. Now the CFTC can impose a fine of up to US$140,000 or up to three times the monetary gain for each contravention.

(a) on conviction on indictment to a fine of $10,000,000 and to imprisonment for 10 years; or

(b) on summary conviction to a fine of $1,000,000 and to imprisonment for 3 years.

32. Under the proposed section 303(2)(c) of the SFO, we propose to empower the criminal court to make a disgorgement order, ordering the person to pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by the person as a result of the market misconduct in question. This will enable criminal courts to make disgorgement orders similar to the Market Misconduct Tribunal for the purpose or recouping illegal gains and loss avoided from committing market misconduct offences.

Amendments to Part XVI of the SFO

New Division 1A – Secrecy, etc. Relating to MA's Functions under Specified Provisions
Section 381C – Disclosure if MA considers condition satisfied

MA's disclosure to entities in Hong Kong

33. As participants of the OTC derivative market are primarily institutional investors, it does not appear to be necessary to include the Equal Opportunities Commission and the Consumer Council under this section.

MA's disclosure to overseas regulators

34. Regarding data sharing or authorities' access to OTC derivative transactions data stored in trade repository, there are already guidelines and standards provided by international regulatory bodies, such as the Financial Stability Board and the IOSCO. We will monitor the discussion and see if it is necessary to enter into an agreement for exchange of information or data sharing.

Section 381F – Disclosure of information to overseas persons with similar functions

Protection of personal data privacy in the disclosure of information to overseas persons under section 381F

35. The proposed section 381F concerns the disclosure of information collected by way of reporting obligation. To comply with the reporting obligation, a reporting entity is required to become a member of the trade repository operated by the MA ("HKTR") and to sign an agreement with the MA. The HKTR explicitly requires that no personal information should be reported. In any case, if a reporting institution is entering into a reportable transaction with an individual as the counterparty, it is advisable that the reporting entity should seek consent from the individual if any personal information would be reported to the HKTR in order to fulfil its reporting obligation. However, we do not anticipate that an individual will enter into such transaction in his own capacity as the legal and operational requirements required for OTC derivative transactions are quite complex and technical.

36. In compliance with the Personal Data (Privacy) Ordinance (Cap. 486), the HKTR sets out the policies and practices of the HKTR with regard to personal data to be collected from the private individual in a personal information collection statement ("PIC"). The PIC will be available at HKTR's website.

International standards on data sharing among overseas regulators and trade repositories

37. In August 2013, the Committee on Payment and Settlement Systems-IOSCO published a final report on authorities' access to trade repository ("TR") data. The report provides guidance to TRs and authorities on the principles that should guide authorities' access to data held in TRs. It is noted that TRs with centralised electronic record of OTC derivative transaction data play a key role in increasing the transparency in the OTC derivative markets by improving the availability of data to authorities and the public in a manner that supports the proper handling and use of the data. For a range of authorities and international financial institutions, it is essential that they are able to access the data needed to fulfil their respective mandates while maintaining the confidentiality of the data pursuant to the laws of relevant jurisdictions.

38. The International Swaps and Derivatives Association ("ISDA") has developed various protocols to facilitate market participants in implementing and complying with regulatory requirements on OTC derivatives. There are three ISDA Protocols relevant to reporting requirements on OTC derivatives, namely (a) the ISDA August 2012 DF Protocol, (b) the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolutions and Disclosure Protocol and (c) the ISDA 2013 Reporting Protocol. An ISDA protocol is a multilateral contractual amendment mechanism which allows for various standardized amendments to be deemed to be made to the relevant agreements covered by that protocol (Protocol Covered Agreements) between two adhering parties. The fundamental benefit to an adhering party to a protocol is that it eliminates the necessity for costly and time-consuming bilateral negotiations.

Agreements with overseas regulators in relation to the MA's disclosure of information to these persons under section 381F

39. As mentioned in paragraph 23, the MA has entered into MoUs or other formal arrangements with various overseas regulators following the guidance and standards by the BCBS. As for specific agreements for regulatory cooperation and information sharing in respect of the OTC derivative market, the MA has started discussions with the European Securities and Markets Authority and the CFTC in the US. It is anticipated that the MA will enter into MoUs of this nature with other regulators in major financial centres.

Publication of the names of overseas persons

40. The purpose of publishing the names of overseas persons under section 381F(4) is to enhance transparency. Section 381F(2) already sets out the conditions or requirements under which disclosure may be allowed and therefore provides the safeguard for such disclosure. The international regulatory community is working together to ensure smooth and effective access to trade repository data to enhance transparency. If the disclosure mechanism is subject to negative vetting, it may create uncertainty in terms of mutual access to trade repository data and jeopardise the cooperative arrangement the MA seeks from other jurisdictions. The MA is not aware that a similar requirement exists in other jurisdictions.

Section 407 – Savings, transitional, consequential and related provisions, etc.

Drafting issue in the numbering of the new subsection

41. The number of the new subsection (i.e subsection (6)) to be added to section 407 of SFO under clause 49 is in order. A new subsection (5) is already added to section 407 under section 347 of the Companies Ordinance (Ord. No. 28 of 2012).

Amendments to Schedule 5 to the SFO

Proposed Part 2A section 1(i)

Considerations in determining market misconduct acts associated with advising acts through the media

42. Journalists and public commentators who publish financial research and recommendations in the media are not required to be licensed by the SFC. This is to balance the interests of investors against the freedom of the press and the rights of journalists to express their views in the media. However, they are still subject to market misconduct and criminal provisions in the SFO, including sections 277 and 298 regarding disclosure of false or misleading information inducing transaction.

43. In order to determine whether an article or a publication has contravened sections 277 or 298, the SFC has to prove that –

(a) the article or publication contains information that is false or misleading as to a material fact or through the omission of a material fact. Minor inaccuracies will not suffice;

(b) the writer knew that, or has been reckless or negligent[3] as to whether the information is false or misleading as to a material fact or through the omission of a material fact; and

(c) the information is likely to induce another person to trade in securities.

[3] Negligence applies to section 277 only.

44. There are special defences under the SFO for broadcasters who: (a) did not devise the information; (b) did not know the information was false or misleading as to a material fact; or (c) could not reasonably be expected to prevent the broadcast even though they knew the information was false or misleading.

Past cases of market misconduct acts associated with advising acts through the media

45. We are not aware of any case heard before the Market Misconduct Tribunal concerning market misconduct acts associated with advising acts through the media. Having said that, the SFC had taken disciplinary actions against licensed commentators before. For example, in April 2013, the SFC suspended the license of a columnist, who was licensed by the SFC, for 30 months and fined him $500,000. The columnist had put himself in a conflict of interest position by trading in the stocks that were the subject of his column. From March 2009 to March 2010, he made a profit on numerous occasions by selling part or all of the stocks in a concealed securities account in his wife's name, after making positive comments or favourable recommendations in his column on the same day or within three business days after its publication.

New Schedule 11 to the SFO

Division 2 – Corporations and Individuals
Section 33 – Deemed licensing of corporations

Drafting of the Chinese text of section 33(4)

46. We have proposed a Committee Stage Amendment to section 33(4) of the proposed Schedule 11 to the SFO. The Chinese text of section 33(4) will be amended accordingly.

Financial Services and the Treasury Bureau
Hong Kong Monetary Authority
Securities and Futures Commission
13 February 2014

Annex A
HCMP 1155/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 1155 OF 2007

IN THE MATTER OF an application under Section 185(1) of the Securities and Futures Ordinance, Cap. 571, Laws of Hong Kong

and

IN THE MATTER of CHAN CHIN YUEN

and

IN THE MATTER OF an application by Leung Ching Yee (in her capacity as an investigator directed by the Securities and Futures Commission under Section 182(1) of the Securities and Futures Ordinance, Cap. 571) against Chan Chin Yuen for an order of Committal

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Before: Hon Reyes J in Court

Date of Hearing: 31 October 2007

Date of Judgment: 31 October 2007

J U D G M E N T

I. INTRODUCTION

1. This is an application to commit Mr Chan Chin Yuen to prison for contempt in disobeying my Order dated 6 September 2007.

II. BACKGROUND

2. The initial background to this case has been set out in my previous Judgment dated 6 September 2007.

3. In that Judgment I found that Mr Chan had disobeyed a Notice dated 17 May 2007 issued under Securities and Futures Ordinance (Cap. 571) (SFO) s.183 requiring Mr Chan to attend an interview at the SFC. The interview was to assist Ms Leung Ching Yee, an SFC investigator, in her investigation of possible acts of false trading, price rigging and stock market manipulation relating to the shares of Asia Standard Hotel Group Ltd.

4. I exercised my power under SFO s.185 to make an Order compelling Mr Chan to attend an interview with Ms Leung at SFC's premises at 10 am on 2 October 2007.

5. Attempts were made to serve Mr Chan personally with a copy of my Order at his residential and business addresses. These were unsuccessful.

6. The attempts were followed up by letters from the SFC to Mr Chan which were inserted into the mail boxes at his residential and business addresses on 11 September 2007.

7. The letters set out the contents of my Order and pointed out that Mr Chan was expected to attend an interview on 2 October 2007. The letters stated the consequences of breaching my Order. The letters also requested Mr Chan to make an appointment with the SFC so that my Order could be served on him personally.

8. Telephone messages were left for Mr Chan and his wife to the effect that Ms Leung was seeking to serve my Order on Mr Chan personally.

9. There was no response from Mr Chan.

10. On 17 September 2007, upon the SFC's application, Master Roy Yu directed that personal service of my Order be dispensed with.

11. Master Yu ordered that instead service should be effected by the following means:-

(1) sending a copy of my Order by post to Mr Chan at his residential address;

(2) inserting a letter containing a copy of my Order in the mail boxes of Mr Chan's residential and business addresses; and

(3) leaving a copy of my Order at Mr Chan's business address.

12. Substituted service was effected on 18 September 2007 by all the means directed by Master Yu.

13. On 19 September 2007, the appointment letter that had been inserted into the mail box of Mr Chan's business address the week before

was returned to the SFC by the post office. The letter was endorsed "No such person" in Chinese.

14. Mr Chan in fact left Hong Kong on 27 September 2007. He did not return until 7 October 2007. He did not attend the interview on 2 October.

15. On 8 October 2007 Ms Leung applied for Mr Chan to be committed to prison for contempt in failing to comply with my Order of 6 September 2007.

16. I granted leave to apply for committal on 9 October 2007. I directed that service of all documents relating to the committal be by the methods set out in Master Yu's Order. On the basis that there was evidence that Mr Chan was seeking to evade service, I also directed that personal service of the committal papers be dispensed with.

17. Substituted service of the committal documents (including copies of the Notice of Motion dated 12 October 2007 for today's hearing) was effected on 12 and 18 October 2007 by the means enumerated in Master Yu's Order.

18. On 22 October 2007 an envelope which had been left at Mr Chan's business address was returned by the post office with the words "No such person" marked on it in Chinese.

19. In response to inquiries by the SFC, staff at Mr Chan's business address acknowledged that Mr Chan was their boss but they did not know where he was.

20. Mr Chan left Hong Kong on 27 October 2007. He has not yet returned. He has not appeared before me today.

III. DISCUSSION

21. The SFC has not had any direct communication with Mr Chan since its telephone conversation with him on 4 June 2007 mentioned in my previous Judgment (at §7).

22. This is despite numerous attempts to contact Mr Chan both personally and by letters sent or left at his residential and business addresses.

23. Mr Chan has simply failed to respond. But he appears to continue to live at his residential address and, at least, appears to be known at his business address. None of the letters sent or left at his residential address have been returned. Letters sent to his business address have been returned marked "No such person". However, persons at the business address say they in fact know Mr Chan.

24. In my view, it is a reasonable inference from all the facts that Mr Chan is fully aware of what is going on. Far from cooperating with the SFC, he seeks instead to evade service and thereby avoid compliance with his obligation to attend an interview with Ms Leung under SFO s.183.

25. Mr Chan must have known the purpose, venue and time of the 2 October interview as a result of the substituted service of the

relevant papers (including a copy of my Order) on him. But he simply refused to turn up.

26. Consequently, neither the lack of personal service of the committal papers nor Mr Chan's absence today is any good reason to adjourn these contempt proceedings. Not to proceed today would be to allow Mr Chan to flaunt his obligations under the law.

27. Given Mr Chan's wilful obstinacy, I think that committal to prison is an appropriate remedy. I do not believe that a fine will be appropriate here. I am therefore prepared to sign a warrant for his arrest and committal.

IV. CONCLUSION

28. Mr Chan is to be committed to prison for his contempt in failing to attend an interview with Ms Leung at the SFC's offices on 2 October 2007 at 10 am contrary to my Order dated 6 September 2007.

29. This being a matter of civil contempt, the duration of Mr Chan's imprisonment is obviously in his hands. It is open to him to purge his contempt and end his confinement by attending an interview with the SFC's investigator.

30. I think that, in light of Mr Chan's uncooperative attitude, it is appropriate to make an Order that Mr Chan pay the costs of these proceedings on an indemnity basis.

31. Mr Bell (appearing for Ms Leung) has asked that the warrant for committal be addressed to "The Chief Bailiff and his assistants, the Commissioner of Correctional Services, the Commissioner of Police and each and every one of his officers in Hong Kong, and the Director of Immigration".

32. This suggestion follows the precedent of *Secretary for Justice v. Choy Bing Wing* [2005] 4 HKC 416. There a similar amendment to the usual form was made to assist in the execution of the warrant. I think that it is right for a like amendment to be made here.

33. Finally, Mr Bell applied for Ms Leung's earlier Notice of Motion dated 14 June 2007 to be amended. That amendment seeks an Order that Mr Chan also be punished for contempt in failing to attend an interview before Ms Leung on 29 May 2007. I allowed the amendment sought. But in light of the lateness of the Summons to amend the 14 June 2007 Motion (such Summons having only been taken out on 26 October 2007), I did not think that it was right to proceed today with the substantive consideration of the June 2007 Motion as amended.

(A. T. Reyes)
Judge of the Court of First Instance
High Court

Mr Adrian Bell, instructed by Securities and Futures Commission, Applicant in person

Respondent in person – absent

Annex B

[Date] Our Ref: XXXX

PRIVATE AND CONFIDENTIAL

Company name
Address

By Hand

Attention :

Dear Sirs,

Section 182(1) Investigation – Notice to produce records or documents

The Securities and Futures Commission has directed me to conduct an investigation under section 182(1) of the Securities and Futures Ordinance ("**the Ordinance**").

At the same time as you receive this letter, I will serve you with a notice under section 183(1) of the Ordinance to produce records or documents in your possession which are or may be relevant to my investigation.

You must send the records or documents to me at:

The Securities and Futures Commission
35th Floor, Cheung Kong Center
2 Queen's Road Central
Hong Kong

by [Date].

I enclose a copy of sections 182, 183, 184 and 185 of the Ordinance for your information.

If you have any questions, please contact me on [ ] or by email at [ ].

You must comply with this notice

Please note that if you do not comply with this notice to provide information and to produce records or documents you may commit an offence under section 184 of the Ordinance.

This investigation is confidential

You are a person assisting the Commission in the performance of its functions. Section 378 of the Ordinance imposes obligations of secrecy upon you. You must not disclose anything about this investigation to anyone. It is a criminal offence to fail to comply with section 378.

Our ref: XXXX

Please note, however, that you may consult a lawyer about this request without breaching your obligation of secrecy.

The Personal Data (Privacy) Ordinance

Your answers to this notice may include personal data as defined in the Personal Data (Privacy) Ordinance. This Ordinance authorizes the Commission to collect and use personal data to perform its functions as a financial regulator. In this regard, we draw your attention to the attached Personal Information Collection Statement which sets out the Commission's policies and practices with regard to any personal data you may provide to us.

Yours faithfully,

[Name of investigator]
Investigator under section 182(1) of the
Securities and Futures Ordinance

Enc. s.183(1) Notice
a copy of s.182 Direction
a copy of ss. 182 to 185 of the Ordinance
the Commission's Personal Information Collection Statement

Notice to produce records or documents
under section 183(1) of the Securities and Futures Ordinance (Cap. 571) (the "SFO")

To: Company name
Address

Attn:

Date:

The Securities and Futures Commission (the "**Commission**") has received from [name of foreign regulator] a request for assistance in relation to an investigation into suspected market manipulation by persons dealing in the shares of [name of company] during or around the period from [ ] to [ ], contravening section [*] of [the relevant foreign law].

The [name of foreign regulator] is the competent authority in [name of country] to enforce or administer the aforesaid legislations and the suspected contraventions relate to the transactions regarding any securities or other similar transactions as are regulated by the [name of foreign regulator].

The Commission is of the opinion, pursuant to section 186 of the SFO, that:

- the [name of foreign regulator] satisfies the requirements referred to in section 186(1) and (5)(a) and (b) of the SFO; and

- in accordance with section 186(3)(b) of the SFO, the assistance will enable or assist the [name of foreign regulator] to perform its functions and it is not contrary to the interest of the investing public or to the public interest that the assistance should be provided.

[Director of Enforcement], as delegate of the Commission, is of the opinion pursuant to section 182(1)(g) of the SFO, that the above matters being investigated by the [name of foreign regulator] are of nature similar to the matters described in paragraphs (a), (b)(i), (c) and (d) of section 182(1) of the SFO, in that I have reasonable cause to believe that acts tantamount to the following may have taken place during or around the period from [ ] to [ ]:

- commission of the offence of false trading, contrary to section 295 of the SFO; and/or

- dealing in securities in a manner which is not in the interest of the investing public or in the public interest.

[Director of Enforcement], as delegate of the Commission, has therefore decided, pursuant to section 186 of the SFO, to provide assistance to [name of foreign regulator] to investigate the matters mentioned above.

[Director of Enforcement] has directed me to investigate these matters and report to the Commission. A copy of the direction is attached to this notice.

Our ref: XXXX

I have reasonable cause to believe that you have in your possession records or other documents which contain or are likely to contain information relevant to my investigation under section 182 of the Ordinance.

I require you to provide me with the following records or documents:

[Requested information]

You must provide the records or documents to me at:

The Securities and Futures Commission
35th Floor, Cheung Kong Center
2 Queen's Road Central
Hong Kong

by [Date].

[Name of investigator]
Investigator under section 182(1) of the
Securities and Futures Ordinance

Annex C

Signatories to the International Organization of Securities Commissions ("IOSCO") Multilateral Memorandum of Understanding ("MMoU")

Besides the Securities and Futures Commission, signatories to the IOSCO MMoU from other jurisdictions are listed below:

Jurisdictions	**Authorities**
Albania	Albanian Financial Supervisory Authority
Andorra	Institut Nacional Andorra de Finances
Australia	Australian Securities and Investments Commission
Austria	Financial Market Authority
Bahamas, The	Securities Commission of The Bahamas
Bahrain	The Central Bank of Bahrain
Bangladesh	Bangladesh Securities and Exchange Commission
Belgium	Banking, Finance and Insurance Commission (now known as the Financial Services and Markets Authority)
Bermuda	Bermuda Monetary Authority
Bosnia and Herzegovina, Federation of	Securities Commission of the Federation of Bosnia and Herzegovina
Brazil	Securities and Exchange Commission of Brazil (CVM)
British Virgin Islands	Financial Services Commission
Bulgaria	Financial Supervision Commission

Jurisdictions	**Authorities**
Canada (Alberta)	Alberta Securities Commission
Canada (British Columbia)	British Columbia Securities Commission
Canada (Ontario)	Ontario Securities Commission
Canada (Quebec)	Autorité des marchés financiers
Cayman Islands	Cayman Islands Monetary Authority
Mainland China	China Securities Regulatory Commission
Columbia	Superintendencia Financiera de Columbia
Croatia, Republic of	Croatian Financial Services Supervisory Authority (FSSA)
Cyprus, Republic of	Cyprus Securities and Exchange Commission (CySEC)
Czech Republic	Czech National Bank
Denmark	Danish Financial Supervisory Authority
Dubai	Dubai Financial Services Authority
Egypt	Egyptian Financial Supervisory Authority
El Salvador	Superintendencia del Sistema Financiero
Estonia	Financial Supervision Authority
Finland	Financial Supervision Authority
France	Autorité des marchés financiers (AMF)
Germany	Federal Financial Supervisory Authority (BaFin)
Gibraltar	Financial Services Commission
Greece	Hellenic Capital Market Commission

Jurisdictions	**Authorities**
Guernsey	Guernsey Financial Services Commission
Hong Kong, China	Securities and Futures Commission
Hungary	Magyar Nemzeti Bank (The Central Bank of Hungary)
Iceland	Financial Supervisory Authority
India	Securities and Exchange Board of India
Indonesia	Indonesia Financial Services Authority
Ireland	Central Bank of Ireland (Formerly: Central Bank and Financial Services Authority of Ireland)
Isle of Man	Financial Supervision Commission
Israel	Israel Securities Authority
Italy	Commissione Nazionale per le Società e la Borsa
Japan	Financial Service Agency
Japan	Ministry of Agriculture, Forestry and Fisheries of Japan
Japan	Ministry of Economy, Trade and Industry of Japan
Jersey	Jersey Financial Services Commission
Jordan	Jordan Securities Commission
Kenya	Capital Markets Authority of the Republic of Kenya
Korea, Republic of	Financial Services Commission (FSC) / Financial Supervisory Service (FSS)
Labuan	Labuan Financial Services Authority
Latvia, Republic of	Financial and Capital Market Commission
Liechtenstein	Financial Market Authority

Jurisdictions	**Authorities**
Lithuania	Central Bank of the Republic of Lithuania (Formerly: Lithuanian Securities Commission)
Luxembourg	Commission de Surveillance du Secteur Financier
Macedonia, Republic of	The Securities and Exchange Commission of the Republic of Macedonia, Former Yugoslav Republic of Macedonia
Malawi	Reserve Bank of Malawi
Malaysia	Securities Commission Malaysia
Malta	Malta Financial Services Authority
Mauritius	Financial Services Commission
Mexico	National Banking and Securities Commission (CNBV)
Montenegro	Montenegro Securities Commission
Morocco	Conseil deontologique des valeurs mobilieres
Netherlands	The Netherlands Authority of the Financial Markets
New Zealand	Securities Commission (now known as the Financial Markets Authority)
Nigeria	Securities and Exchange Commission
Norway	Finanstilsynet ((The Financial Supervisory Authority of Norway)
Oman, Sultanate of	Capital Market Authority
Pakistan	The Securities and Exchange Commission
Peru	Superintendencia del Mercado de Valores
Poland	Polish Financial Supervision Authority (Formerly: Polish Securities and Exchange Commission)
Portugal	Comissão do Mercado de Valores Mobiliários

Jurisdictions	**Authorities**
Qatar	Qatar Financial Markets Authority
Republic of the Maldives	Capital Market Development Authority
Romania	Financial Supervision Authority
Saudi Arabia	The Capital Market Authority
Serbia, Republic of	Securities Commission
Singapore	Monetary Authority of Singapore
Slovakia	The National Bank of Slovakia
Slovenia	Securities Market Agency (SMA)
South Africa	Financial Services Board
Spain	National Securities Exchange Commission (CNMV)
Sri Lanka	Securities and Exchange Commission of Sri Lanka
Srpska, Republic of	Securities Commission of Republic of Srpska
Sweden	Finansinspektionen (FI, Swedish Financial Supervisory Authority)
Switzerland	Swiss Financial Market Supervisory Authority (FINMA)
Syrian Arab Republic	The Syrian Commission on Financial Markets and Securities (SCFMS)
Taiwan	Financial Supervisory Commission
Tanzania	The Capital Market and Securities Authority
Thailand	Securities and Exchange Commission
Trinidad and Tobago	Trinidad and Tobago Securities and Exchange Commission
Tunisia	(Conseil du Marché) financier

Jurisdictions	**Authorities**
Turkey	Capital Markets Board
United Arab Emirates	Securities and Commodities Authority
United Kingdom	Financial Conduct Authority
United States of America	The United States Commodity Futures Trading Commission
United States of America	The United States Securities and Exchange Commission
Uruguay	The Central Bank of Uruguay (CBU)
Vietnam	State Securities Commission of Vietnam
West Africa Monetary Union	Regional Council on Public Savings and Financial Markets

Annex D

Co-operative Arrangements with Supervisory Authorities Outside Hong Kong

To enhance the exchange of supervisory information and co-operation, the Monetary Authority ("MA") has entered into Memoranda of Understanding ("MoUs") or other formal arrangements with a number of banking supervisory authorities outside Hong Kong:

Jurisdictions	Supervisory Authorities	Types of Arrangements
Australia	Australian Prudential Regulation Authority	MoU
Belgium	Financial Services and Markets Authority	Letters on Co-operations and Sharing of Information
	National Bank of Belgium	
Canada	The Office of the Superintendent of Financial Institutions	MoU
Mainland China	China Banking Regulatory Commission	MoU
Denmark	The Danish Financial Supervisory Authority	MoU
France	Commission Bancaire	Letters on Co-operation and Sharing of Information
Germany	Bundesanstalt fur Finanzdienstleistungsaufsicht	MoU
Indonesia	Bank Indonesia	MoU

Jurisdictions	**Supervisory Authorities**	**Types of Arrangements**
Japan	Financial Services Agency	Letters on Co-operations and Sharing of Information
Liechtenstein	The Financial Market Authority Liechtenstein	MoU
Macau	Autoridade Monetaria De Macau	MoU
Mauritius	Bank of Mauritius	MoU
Pakistan	State Bank of Pakistan	MoU
Philippines	Bangko Sentral ng Pilipinas	MoU
South Africa	The South African Reserve Bank	MoU
South Korea	The Financial Supervisory Commission of Korea	MoU
Switzerland	Swiss Financial Market Supervisory Authority	MoU
Taiwan	Financial Supervisory Commission	MoU
Thailand	The Bank of Thailand	Statement of Co-operation
United Kingdom	Financial Services Authority	MoU & Side Letter
United States	New York State Banking Department The Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation and Office of Thrift Supervision	MoU Statement of Co-operation
Vietnam	State Bank of Vietnam	MoU

2. In general, the co-operative arrangements provide the formal framework under which the MA and its counterparts agree to:

a. share and exchange, to the extent permitted by law, supervisory information so as to assist in the supervision of banks that operate in both signatories' jurisdictions;
b. hold regular meetings and have informal contacts to discuss matters of common interest;
c. consult each other regarding any cross-border establishment or investment by the banks; and
d. keep the supervisory information shared confidential and to restrict the sharing, use and onward disclosure of such information in accordance with the provisions of the arrangements.

3. The MA continues to extend its bilateral co-operation with banking supervisors in other economies, and contact or hold regular meetings with other supervisory authorities to discuss matters of common interest where necessary.