

Bills Committee on Securities and Futures (Amendment) Bill 2013

Information on disgorgement orders for market misconduct offences under Part V of the Amendment Bill

Purpose

This paper responds to Members' request made at the meeting of 30 September 2013 for information regarding the proposed amendments to the Securities and Futures Ordinance (Cap. 571) ("SFO") and the Organized and Serious Crimes Ordinance (Cap. 455) ("OSCO") relating to disgorgement orders for market misconduct offences under Part V of the Amendment Bill.

Rationale for the proposed amendments

Amendments to section 303 of the SFO

2. The Securities and Futures Commission ("SFC") is able to deal with six types of market misconduct (insider dealing, false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false or misleading information inducing transaction, and stock market manipulation) either by criminal prosecution or administrative proceedings at the Market Misconduct Tribunal ("MMT").

3. Section 257(d) of the SFO empowers the MMT to make an order that "*the person 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*", whereas section 303 of the SFO empowers the criminal court to impose maximum fines of HK\$10 million (on indictment) and HK\$1 million (on summary conviction).

4. Market misconduct cases involving profits gained or loss avoided of more than HK\$10 million are not totally impossible. Similar to the existing provisions for the MMT, we propose to amend section 303 of the SFO 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 commission of the market misconduct in question. This will enable criminal courts to make disgorgement orders similar to the MMT for the purpose of recouping illegal gains and loss avoided from

committing market misconduct offences.

Amendments to Schedule 2 to the OSCO

5 Confiscation of proceeds of offences is a fundamental objective in combating serious crimes as enshrined in the international anti-money laundering (“AML”) standards prescribed by the Financial Action Task Force (“FATF”). Hong Kong is obliged to implement the FATF requirements and is subject to a process of mutual evaluations by the FATF to monitor progress made in implementing the AML requirements. One of the requirements is that competent authorities should be empowered to confiscate properties and proceeds from money laundering or its predicate offences without prejudicing the rights of bona fide third parties. Insider trading and market manipulation are included in the list of designated predicate offences as prescribed by the FATF to which the confiscation regime should be applicable.

6. The OSCO is the principal legislation providing for confiscation of proceeds of offences. It empowers the court to make restraint orders, charging orders and confiscation orders over proceeds of offences. However, these orders can only be made towards proceeds of the specified offences as set out in Schedules 1 and 2 to the OSCO. The six types of market misconduct offences provided under the SFO are currently not covered under the OSCO Schedules.

7. In order to implement the international standards set by the FATF, we propose to add the six types of market misconduct offences under the SFO in Schedule 2 to the OSCO in order to bring the market misconduct offences under the confiscation regime.

Scope of disgorgement / confiscation and the upper limit on the amount recoupable by the disgorgement orders / confiscation orders

Amendments to section 303 of the SFO

8. For the amendments to the SFO, the scope of disgorgement is limited to “*an amount not exceeding the amount of any profit gained or loss avoided by the person as a result of the commission of the offence in question*”. It includes both profit gained and loss avoided. This is similar to the existing fining power of the MMT under section 257(d) of the SFO.

Amendments to Schedule 2 to the OSCO

9. For the OSCO, section 11 provides that the amount to be recovered in the defendant's case under the confiscation order shall be the amount the Court of First Instance or the District Court, as the case may be, assessed to be the value of the defendant's proceeds of any specified offence, or the value of the defendant's realizable property as at the time of the confiscation order, if such value is less than that of the proceeds.

**Financial Services and the Treasury Bureau
11 October 2013**