

Bills Committee on Securities and Futures (Amendment) Bill 2013
Amendments to Schedule 2 to
the Organized and Serious Crimes Ordinance

Purpose

In response to the request of the Bills Committee, this paper elaborates on the justifications for the Administration's proposal to include six types of market misconduct offences (i.e. insider dealing, false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false or misleading information inducing transactions, and stock market manipulation) under the Securities and Futures Ordinance (Cap. 571, "SFO") in the scope of offences subject to the making of restraint, charging or confiscation orders made under the Organized and Serious Crimes Ordinance (Cap. 455, "OSCO").

Recommendation of Financial Action Task Force ("FATF")

2. According to the relevant FATF's Recommendation, member jurisdictions should adopt measures, including legislative measures, to freeze or seize and confiscate, among others, proceeds from, or instrumentalities used in, money laundering or predicate offences. To this end, the FATF has designated certain categories of offences that should be subject to a member jurisdiction's domestic confiscation regime, and have asked each jurisdiction to define those offences in accordance with the relevant domestic law. "Insider trading and market manipulation" is one of the 20 categories of offences listed as FATF's designated predicate offences.

Hong Kong's Confiscation Regime

3. As Hong Kong is a member of the FATF, we are subject to FATF's mutual evaluation, from time to time, in relation to our regulatory regime against money laundering and terrorist financing. During previous evaluations, it was revealed that, while the confiscation provisions under the OSCO were available to a broad range of specified offences, the set of specified offences did not cover fully all FATF's designated predicate offences. Thus, Hong Kong has been asked to seek further enhancement to our confiscation regime in Hong Kong in

accordance with the relevant FATF's recommendation set out in paragraph 2 above by, among others, including market misconduct offences under the SFO, in the confiscation regime under the OSCO.

4. To enable us to fully meet the FATF's requirements, we propose adding the six types of market misconduct offences in Schedule 2 to the OSCO to empower the Court to make a restraint order to prohibit any person from dealing with any realisable property associated with the offences before conviction (under section 15 of the OSCO), a charging order on realisable property for securing the payment to the Government of the amount payable under a confiscation order (under section 16 of the OSCO), or a confiscation order to confiscate the proceeds of the offences when the Court has determined that the concerned person has benefitted from the relevant market misconduct offences (under section 8 of the OSCO). This arrangement is on par with that applying to other specified offences listed in either Schedule 1 or 2 to the OSCO, such as certain bribery offences under the Prevention of Bribery Ordinance (Cap. 201), certain gambling-related offences under the Gambling Ordinance (Cap. 148), certain drug trafficking offences under the Dangerous Drugs Ordinance (Cap. 134), and the relevant money laundering offence under the OSCO.

Amendments to section 303 of the SFO

5. At present, market misconduct offences can be dealt with either by criminal prosecution at the Court or civil proceedings at the Market Misconduct Tribunal ("MMT"). Where a criminal route is taken, section 303(1) of the SFO provides that the penalty for a person committing the relevant market misconduct offences is a fine up to \$10 million, apart from an imprisonment sentence, on conviction on indictment. At present, the law does not provide for any power of the Court to order 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, even if such illegal gains or crime proceeds arising from the market misconduct offences concerned may go above the maximum level of a fine permissible under section 303(1) of the SFO.

6. We therefore propose, via the Securities and Futures (Amendment) Bill 2013, empowering the Court to make an disgorgement order under the newly-added section 303(2)(d) of the SFO to order that the convicted person to pay to the Government an amount not exceeding

the amount of any profit gain or loss avoided by the person as a result of the commission of the offence in question. This is similar to the existing provisions for the MMT.

Overseas Experiences

7. As we understand it, a number of FATF member jurisdictions, including the United Kingdom, Canada, Australia, Singapore and New Zealand have based on the relevant FATF recommendations to include relevant offences relating to “insider trading and market manipulation” in the FATF’s context in their own domestic legal confiscation regime, thus enabling the confiscation of proceeds in relation to or arising from the commission of such misconduct crimes in the securities and futures markets.

Conclusion

8. The Administration’s proposal to include six types of market misconduct offences under the SFO into Schedule 2 to the OSCO is an effort to demonstrate our commitment to strengthening our financial regime and fulfilling our international obligations on anti-money laundering and counter-financing of terrorism. This is also one such area under which Hong Kong will be assessed in the next FATF’s mutual evaluation. Coupled with the proposed amendments to section 303 of the SFO, a more effective regulatory regime in relation to the proceeds of market misconduct offences will certainly help enhance further the integrity of our financial markets, and will result in a greater deterrent effect against such market misconduct, thereby reinforcing Hong Kong’s status as an international financial centre.

9. Members are invited to note the content of this paper.

**Financial Services and the Treasury Bureau
December 2013**