



# Asia-Pacific Perspectives on Enforcement, Market Abuse and Market Misconduct

June 14, 2017



**Baker  
McKenzie.**

**FIA**





## Agenda

1. Introduction
2. Singapore
3. Australia
4. Hong Kong
5. Japan
6. Thailand
7. Questions



**Baker  
McKenzie.**

**FIA**



## 2. Singapore

# Singapore: Key Topics

- A. Overview and Extension of Market Misconduct Regime to Derivatives Contracts
- B. Enforcement Trends
- C. Concluding Remarks





A

Overview and Extension of Market Misconduct  
Regime to Derivatives Contracts

# The Singapore regulatory landscape

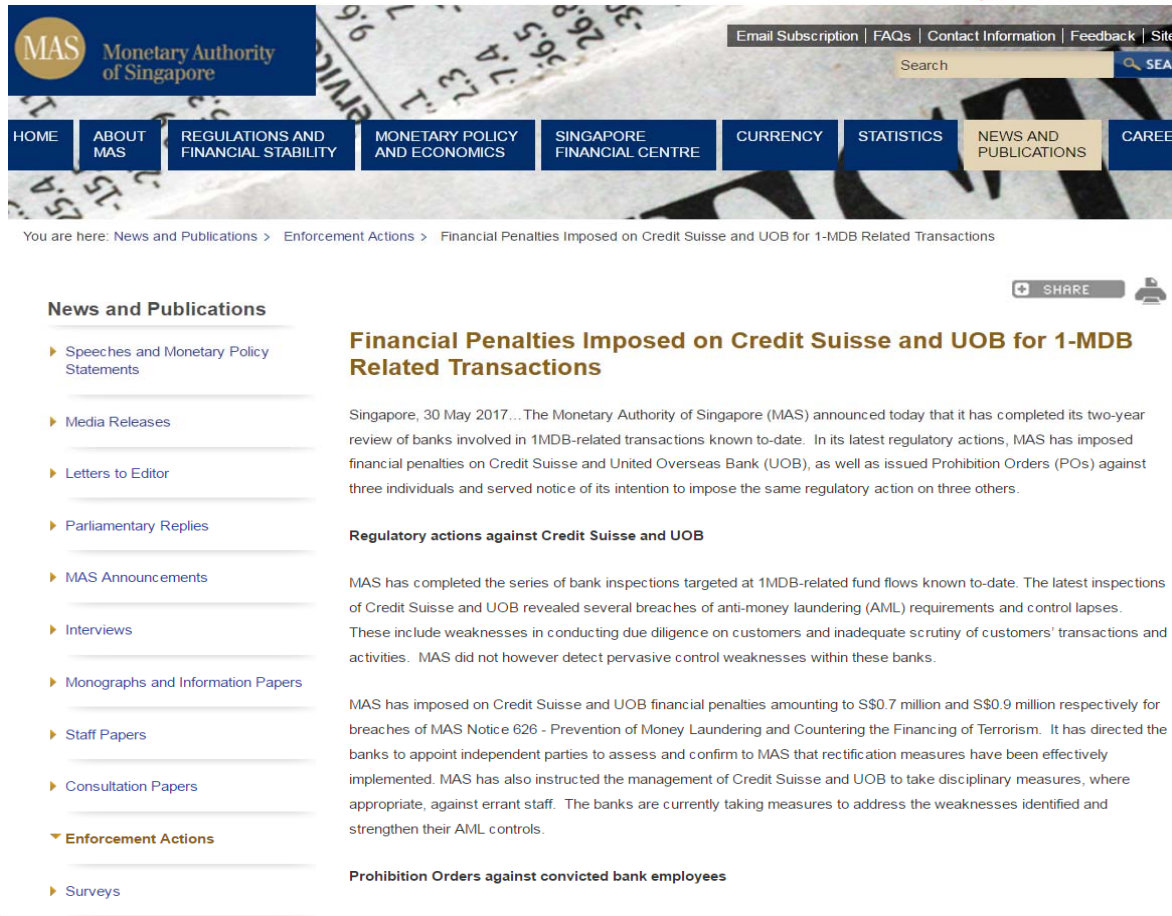
## Regulators and authorities

- Monetary Authority of Singapore (**MAS**)
- International Enterprise Singapore (***IE Singapore***)
- Singapore Exchange (**SGX**) (SGX-DT, SGX-DC)
  - Market Surveillance
  - Risk Management
- Commercial Affairs Department of the Singapore Police Force (**CAD**)



# MAS Enforcement

## Scope of MAS Jurisdiction



The screenshot shows the MAS website header with the logo and navigation menu. The main content area features a sidebar with 'News and Publications' categories and a main article titled 'Financial Penalties Imposed on Credit Suisse and UOB for 1-MDB Related Transactions'. The article text discusses MAS's two-year review of banks involved in 1MDB-related transactions and the imposition of financial penalties on Credit Suisse and UOB.

**News and Publications**

- ▶ Speeches and Monetary Policy Statements
- ▶ Media Releases
- ▶ Letters to Editor
- ▶ Parliamentary Replies
- ▶ MAS Announcements
- ▶ Interviews
- ▶ Monographs and Information Papers
- ▶ Staff Papers
- ▶ Consultation Papers
- ▼ **Enforcement Actions**
- ▶ Surveys

### Financial Penalties Imposed on Credit Suisse and UOB for 1-MDB Related Transactions

Singapore, 30 May 2017... The Monetary Authority of Singapore (MAS) announced today that it has completed its two-year review of banks involved in 1MDB-related transactions known to-date. In its latest regulatory actions, MAS has imposed financial penalties on Credit Suisse and United Overseas Bank (UOB), as well as issued Prohibition Orders (POs) against three individuals and served notice of its intention to impose the same regulatory action on three others.

#### Regulatory actions against Credit Suisse and UOB

MAS has completed the series of bank inspections targeted at 1MDB-related fund flows known to-date. The latest inspections of Credit Suisse and UOB revealed several breaches of anti-money laundering (AML) requirements and control lapses. These include weaknesses in conducting due diligence on customers and inadequate scrutiny of customers' transactions and activities. MAS did not however detect pervasive control weaknesses within these banks.

MAS has imposed on Credit Suisse and UOB financial penalties amounting to S\$0.7 million and S\$0.9 million respectively for breaches of MAS Notice 626 - Prevention of Money Laundering and Countering the Financing of Terrorism. It has directed the banks to appoint independent parties to assess and confirm to MAS that rectification measures have been effectively implemented. MAS has also instructed the management of Credit Suisse and UOB to take disciplinary measures, where appropriate, against errant staff. The banks are currently taking measures to address the weaknesses identified and strengthen their AML controls.

#### Prohibition Orders against convicted bank employees

# Regulation of markets –

- “securities markets” and “futures markets” to be extended to include “derivatives contracts”

Insider  
Trading

Market  
Misconduct



# Insider trading

## Division 3 of Part XII of the Securities and Futures Act

### Connected Persons

e.g. director, secretary, employee, receiver, judicial manager, liquidator, trustee administering compromise or arrangement

- possesses material and non-public information
- know or ought reasonably to know
- presumption of knowledge

- must not subscribe/ purchase/sell securities or procure another person to do so
- listed securities: must not communicate information to another person

### Insiders

- possesses material and non-public information
- knowledge

- must not subscribe/ purchase/sell securities or procure another person to do so
- listed securities: must not communicate information to another person

# Insider trading

- may apply to acts occurring within Singapore and outside Singapore
- may apply to both unlisted and listed securities
- applies to securities of corporations, securities of business trust and units in collective investment scheme, futures contract (where underlying is a share/stock or share/stock index)
- criminal/civil liability
- filing of misconduct report

## SFA Amendments

- insider trading regime will apply to securities, CIS units and *securities-based derivatives contracts* (i.e. derivatives contracts where underlying thing is a security or securities index)
- insider trading regime will apply to activity in an organised market (and not just a securities market)

# Market misconduct

## Division 1 of Part XII of the Securities and Futures Act

197 False trading and market rigging transactions

198 Securities market manipulation

199 False or misleading statements, etc.

200 Fraudulently inducing persons to deal in securities

201 Employment of manipulative and deceptive devices

202 Dissemination of information about illegal transactions

SFA Amendments:  
201A Bucketing

SFA Amendments:  
201B Manipulation of price of derivatives and cornering

### After SFA amendments:

- the market conduct regime will apply to all derivatives contracts
- bucketing and manipulation of price and cornering provisions will also apply to derivatives

# Market misconduct

- may apply to acts occurring within and outside of Singapore
- includes securities of corporation, business trusts etc.
- similar offences in relation to futures contracts, leveraged foreign exchange contracts
- criminal/civil liability
- filing of misconduct report

## SFA Amendments

- market misconduct regime will also apply to derivatives contracts
  - *Secondary rights, interests and options*
  - *Forward contracts*
  - *Futures contracts*
  - *Securities-based derivatives contracts*
  - *Exchange-traded derivatives*
  - *OTC derivatives*
- bucketing and manipulation of price provisions will apply to derivatives (previously applied to futures contracts and leveraged FX contracts)

**B**

Enforcement trends

# Hot areas of enforcement

- False trading, market rigging etc.
- Manipulation and fraud
- Disruptive trading practices (e.g. spoofing) – first spoofing case in Singapore
- AML/ CFT breaches and publicised enforcement actions, particularly following IMDB-probe



# False trading and market rigging etc.

Sections 197 (1), 197(2), 201(b) of SFA

**False trading (Feb 2017):** Civil penalties of S\$100,000 ordered against individuals who engaged in false trading, cross trades and wash trades

- Two individuals engaged in false trading, cross trades and wash trades of shares which did not represent the genuine market demand and supply for such shares.
  - Chionh - 52 cross trades and 6 wash trades
  - Kiew – 52 cross trades and used a trading account belonging to Lee
- Artificially raised share price (11% to 146%) from the previous traded price
- MAS commenced civil penalty actions in the State Courts of Singapore
  - Chionh – s197(1), false or misleading appearance of active trading and s197(2) (manipulation of market price without change in beneficial ownership) – S\$100,000
  - Kiew – s197(1), 201(b) (act which operates as fraud or deception) - S\$100,000
  - Lee – s201(b) – S\$50,000

# Manipulation and fraud

## Section 201(b) SFA – fraud and deceptive conduct

**Manipulation and fraud (May 2017):** MAS appealing court ordered civil penalties to seek higher penalties for couple who made unauthorised stock trading

- Wang (undischarged bankrupt) carried out trades using Foo's and another persons' trading accounts with DMG and UOB Kay Hian
- Courts ordered civil penalties of S\$75,000 (Wang) and S\$50,000 for Foo
- MAS issued a warning letter to the second accountholder who permitted Wang to use his trading account, recognising his full cooperation
- **MAS is seeking S\$200,000** for Wang, and **S\$100,000** for Foo.



# Disruptive trading practices (e.g. spoofing)

## Sections 201(a), (b) - Employment of a device or scheme to defraud CFD providers

**Spoofing (April 2017):** First conviction of market misconduct under the joint investigations arrangement with the Commercial Affairs Department

- Tey, remisier at DBS Vickers Securities – transacted in CFDs offered by IG Asia and CMC Markets where the underlying securities were listed on SGX
- “Spoofing” was employed. This involved entering false orders in the underlying securities, to temporarily change the prices of the securities and thereby the prices of the corresponding CFDs.
- The offender then executed CFD trades at prices which were beneficial to him but were detrimental to the two CFD providers. After executing the CFD trades, the offender removed the false orders for the underlying securities and made a total profit of \$30,239.
- Pleaded guilty to 8 out of 23 charges under sections 201(a) and (b) of the SFA
- Tey was sentenced to **a total of 16 weeks’ imprisonment**

# AML/CFT in the news

Today Online, Mar 13, 2017

MAS shuts down Falcon bank over 1MDB fund flows

1MDB probe: MAS seeks lifetime trading ban on two ex-bankers

The Straits Times, Oct 12, 2016

The Business Times, Jul 22, 2016

**MAS raps DBS, StanChart, UBS over 1MDB fund flows**

THE Monetary Authority of Singapore (MAS) has criticised DBS, Standard Chartered Singapore, and UBS Singapore for "control failings" linked to flows from Malaysia's embattled state...

**MAS to shut down BSI Singapore for anti-money laundering breaches**

MAS says it's a stark reminder to financial institutions of their responsibilities; 6 people referred to prosecutor for criminal offence assessment

The Business Times, May 25, 2016

The Straits Times, August 2, 2016

**New MAS units launched to combat illicit activities**

**MAS to step up inspections, take tougher actions against finance firms in the wake of 1MDB scandal**

The Straits Times, July 25, 2016



*"The price for keeping our financial centre clean is unstinting vigilance"*

*Ravi Menon, managing director of Monetary Authority of Singapore*

A two-year scrutiny by Singapore's central bank into 1MDB fund flows involving FIs has resulted in a bumper period for penalties and even more severe, two closures.



### Stung by 1MDB saga

#### Eight banks fined a total S\$29.1m

##### BSI Bank

- ordered to shut down 11-year operations here in May 2016 for "worst case of control lapses and gross misconduct" in the financial sector
- fined S\$13.3m for 41 breaches

##### Falcon Private Bank

- directed to close 8-year operations here in Oct 2016 for "serious failures" and "improper conduct" of senior management
- fined S\$4.3m for 14 breaches

##### DBS Bank

- fined S\$1m for 10 breaches

##### UBS Bank

- fined S\$1.3m for 13 breaches

##### Standard Chartered Bank

- fined S\$5.2m for 28 breaches

##### Coutts & Co Ltd

- fined S\$2.4m for 24 breaches

##### Credit Suisse

- fined S\$700,000 for 7 breaches

##### UOB

- fined S\$900,000 for 9 breaches

In addition:

##### Raffles Money Change

- Last Oct, MAS said it has passed on 1MDB-related transactions processed by the money changer to CAD for follow-up investigation.

#### Barred from Singapore's securities industry

##### 4 Prohibition Orders (PO) and 3 PO notices of intention:

- Goldman Sachs' ex star banker Tim Leissner – 10 years
- Ex-Falcon Singapore branch manager Jens Fred Sturzenegger – lifetime
- Ex-BSI private banker Yak Yew Chee – lifetime
- Ex-BSI private banker Yvonne Seah – 15 years

##### Notice of intention to issue PO to:

- Former Maybank Kim-Eng Securities remisier Kelvin Ang – 6 years
- NRA Capital CEO Kevin Scully – 3 years
- NRA former research head Lee Chee Waiy – 6 years

# Importance of Risk Culture and Internal Controls

## 2016 - 2017: Probe related to 1MDB breaches

- **BSI Bank:**
  - MAS cited *“ineffective governance led to a **poor risk culture**, which prioritised questionable customer demands ahead of compliance with anti-money laundering regulations and the bank’s own internal controls”*
  - Wilful acts of Zmisconduct by staff in:
    - making material misrepresentations to auditors
    - abetting improper valuations of assets; and
    - taking instructions from persons other than customers’ authorised representatives on matters relating to customers’ accounts
- **Falcon Bank:**
  - *Failed to guard against conflicts of interest when managing the account of a customer who was associated with the bank’s former Board Chairman Mohamed Ahmed Badawy Al-Husseiny. The former Chairman misled and influenced the Singapore Branch into processing the customer’s unusually large transactions despite multiple red flags.*
  - *The improper conduct of the **Singapore Branch Manager and certain senior managers** at the Head Office had impaired the effectiveness of the Singapore Branch’s compliance function in discharging its responsibilities. Their interference was wrongful and egregious in nature, and contributed to substantial breaches of AML regulations.*
  - ***A persistent and severe lack of understanding of MAS’ AML requirements and expectations***

C

Concluding remarks

# Engaging the Industry on Regulatory Compliance

Emphasis on the importance of regulator-industry partnerships

## Recent developments

- In Sept 2016, the SGX released a **Trade Surveillance Handbook** to help brokerages deter market misconduct
- SGX released a **Members Surveillance Dashboard**
- **Anti-Money Laundering and Countering the Financing of Terrorism Industry Partnership (ACIP)** chaired by MAS/CAD involving ABS, panel of banks

### **CAD and MAS Partner Industry Stakeholders to Fight Financial Crimes**



Singapore, 24 April 2017... The Monetary Authority of Singapore (MAS) and the Commercial Affairs Department (CAD) of the Singapore Police Force today announced the launch of a government-industry partnership to strengthen Singapore's capabilities in the fight against money laundering and terrorism financing (ML/TF).

Source: <http://www.mas.gov.sg/News-and-Publications/Media-Releases/2017/CAD-and-MAS-Partner-Industry-Stakeholders-to-Fight-Financial-Crimes.aspx>

# Concluding remarks: Singapore perspective

## Key Takeaways

- Publicised enforcement actions bad for business, reputational risk
- Risk revocation of licences, lifetime bans
- Emphasis on **culture, policies and processes** in place and understanding the MAS' requirements and expectations
- Commit to strong internal policies, continuous training, keep updated with latest developments
- Encourage reporting – never look the other way!
- Engage with external auditors / regulators on what can be improved



# 3. Australia





# Australia: Key Topics

- A. ASIC Regulatory Priorities 2016-2017
- B. Recent Regulatory Action
- C. Enforcement Trends
- D. Looking Forward



A

## ASIC Regulatory Priorities

# ASIC Regulatory Priorities 2016-2017



Cyber resilience and technology disruption



Firm culture and conduct



Handling of confidential information and managing conflicts of interest in research and corporate advisory



**B**

## Recent Regulatory Action

# Bank Bill Swap Rate Investigation

## UK

- Investigation into the London Interbank Offered Rate (LIBOR) revealed manipulation of rates by a number of the major global financial institutions.

## Australia

- The Libor scandal sparked concern as to whether the same exposure to manipulation existed in the Australian market.

## Proposed regulation

- From March 2016, ASIC commenced civil penalty proceedings against three of Australia's big four banks over potential rigging of the Bank Bill Swap Rate (BBSW).
- In December 2016, the Australian Financial Markets Association (AFMA) announced it would transfer administration of the BBSW to ASX from 1 January 2017.

# Insider trading

- ASIC continues to focus its enforcement activity on insider trading.
- Oliver Curtis
  - On 19 December 2016, the NSW Court of Criminal Appeal dismissed appeal.
  - Oliver Curtis convicted for conspiring to commit insider trading alongside John Hartman.
  - The agreement involved Curtis trading in CFDs based on inside information provided by Hartman as to Orion Asset Management Limited's trading intentions.
- Hochtief Aktiengesellschaft
  - On 8 December 2016, Federal Court ordered German construction company to pay a pecuniary penalty of \$400,000 plus \$50,000 for ASIC's legal costs after being found guilty of engaging in insider trading.

C

Enforcement trends

# Information gathering and Use of MOUs

- ASIC have extensive information gathering powers, including power to:
  - require the production of documents;
  - inspect documents;
  - require disclosure of information;
  - compel assistance with an investigation; and
  - apply for a search warrant;
- ASIC use their information gathering powers to build a case around organisations.
- Increased use of MOUs with offshore regulators (both into and out of Australia).





# Parliamentary Investigations

- In Australia, the Senate has become very active in relation to the regulation of financial institutions.
- In a senate inquiry, financial institutions are subject to questioning by a committee made up of politicians, industry bodies and representatives of regulators.
- No legal representation is allowed in such parliamentary investigations.
- For instance, in April this year the Senate Economics Committee Inquiry into consumer protection in the banking, insurance and finance sector was held.
- The inquiry aimed to identify any failures in the enforcement of current laws and regulatory framework, analyse the impact of misconduct in the sector on victims and consumers and the impact on consumer outcomes of executive and non-executive remuneration, fee-for-no-service or recurring fee structures and incentive-based commission structures.



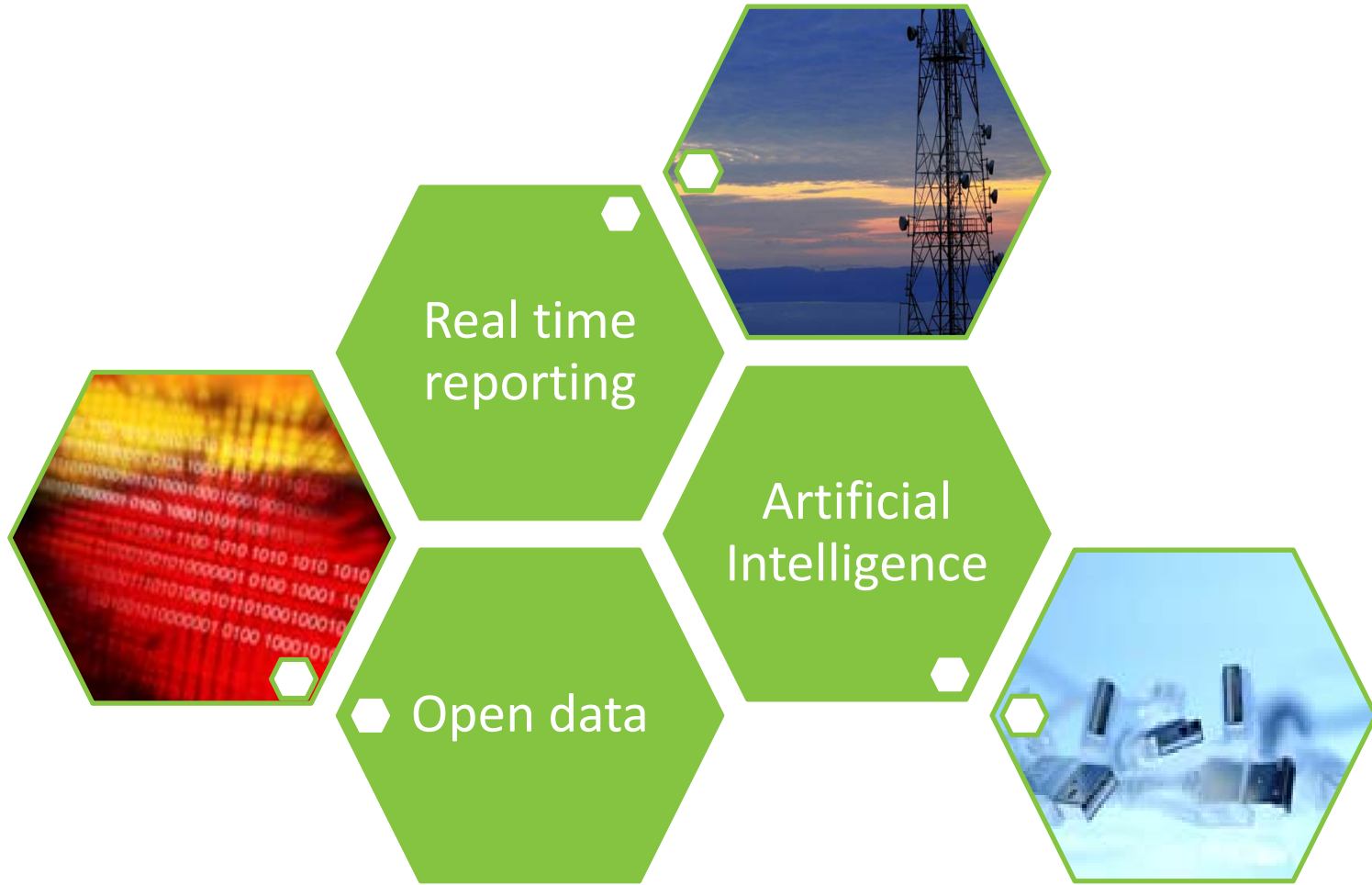
D

Looking forward

# ASIC's proposed product intervention power

- Federal government will release new laws giving ASIC the power to ban a product for up to 18 months if the product is creating a risk of “significant consumer detriment”.
- The product intervention power will apply to insurance and investment products, margin loans and derivatives.
- Regulating OTC contracts for difference products have been high on ASIC's priority list. We have seen ASIC conduct systematic reviews of such products, aimed at protecting consumers from products likely to result in poor consumer outcomes.
- ASIC are calling on lawmakers to extend the power to “problematic remuneration arrangements” and allow the regulator to have the option to extend intervention beyond 18 months.

# “RegTech”



## 4. Hong Kong

# Hong Kong: Key Topics

- A. Overview of Market Misconduct Regime:
  - Regulatory Landscape
  - Offences & Proceedings
  
- B. Enforcement Trends:
  - SFC Specialised Teams
  - Recent Enforcement Cases
  
- C. Key Takeaways



A

## Overview of Market Misconduct Regime

# Market Misconduct – Regulatory Landscape

## Overview

### Key Regulator:

- Securities and Futures Commission (SFC)

### Key Legislation:

- Securities and Futures Ordinance (**SFO**)



# Regulatory Developments

## Overview

- In 2003, SFO introduced specific regulatory initiatives dealing with market misconduct:
  - increased the SFC's powers under Parts XIII and XIV
  - introduced dual civil and criminal regimes to deal with market misconduct offences
  - established the Market Misconduct Tribunal (**MMT**)

# Market Misconduct – Regulatory Landscape

## Overview

- May 2011: The definition of "securities" in Schedule 1 to the SFO was amended to include:
  - structured products (not in the form of securities), in respect of which any offer document requires SFC authorization under Section 103(1) SFO; and
  - structured products listed on HKEx
- As a result, all the regulatory requirements of the SFO that apply to securities (e.g., licensing and conduct requirements) now also apply to structured products

# Market Misconduct – Regulatory Landscape

## Offences and Proceedings

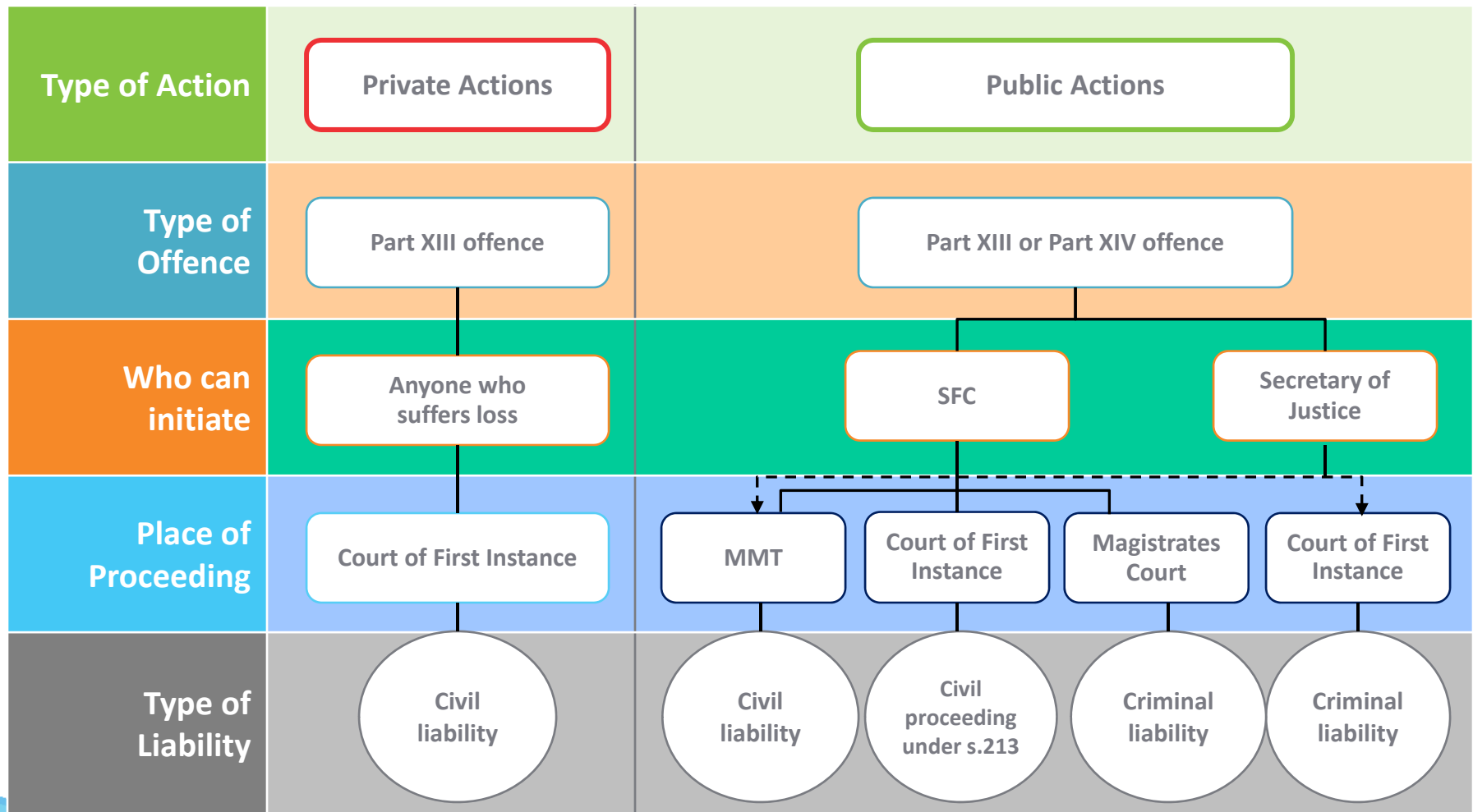
### Offences under the SFO

- **Civil and Criminal:** Six market misconduct offences that may trigger civil or criminal liability (no “double jeopardy”)
- **Criminal only:** Three offences that are subject only to criminal liability

### Proceedings under the SFO

- **Civil Proceedings**  
Public Actions – Market Misconduct Tribunal (MMT and s.213 SFO)  
Private Actions – Individual right of action for damages
- **Criminal Proceedings**  
Public Actions – Magistrates Court, Court of First Instance
- **Disciplinary Proceedings**  
Liability of officers, civil & criminal liability and disciplinary proceedings

# Market Misconduct – Offences and Proceedings



# Market Misconduct – Public Action

## Parts XIII and XIV of the SFO

### Six offences: Both civil and criminal liability

Insider Dealing (s.270 and s.291 SFO)	False Trading (s.274 and s.295 SFO)	Price Rigging (s.275 and s.296 SFO)	Disclosure of Information about Prohibited Transactions s.276 and s.297 SFO)	Disclosure of False or Misleading Information Inducing Transactions (s.277 and s.298 SFO)	Stock Market Manipulation (s.278 and s.299 SFO)
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# Market Misconduct – Public Action

## Part XIII of the SFO

### Three offences: Criminal liability only

Use of fraudulent or deceptive devices in transactions in securities, futures contracts or leveraged foreign exchange trading  
(s.300 SFO)

Disclosure of false or misleading information inducing others to enter leveraged foreign exchange contracts  
(s.301 SFO)

Falsely representing dealings in futures contracts on behalf of others  
(s.302 SFO)

# Market Misconduct – Public Action

## S. 213 of the SFO

### Court of First Instance

SFC may initiate proceedings in HK courts to obtain a broad range of protective and remedial orders

Purpose: to protect the collective interests of persons dealing in the market who have been injured by market misconduct

Goes beyond insider dealing and market misconduct – covers breaches of SFO and other securities laws, licensing T&Cs, Companies and AML legislation

# Market Misconduct – Public Action

## Liability of Officers of a Corporation under SFO

### Duty of Officers

To take reasonable measures to ensure that proper safeguards exist to prevent the corporation perpetrating any market misconduct. (279 SFO )

### Civil liability

Anyone who suffers financial loss due to market misconduct or a Part XIV offence can bring a civil action for damages. S. 258: An officer of a corporation which perpetrated market misconduct can be taken to have committed the market misconduct himself.

### Criminal liability

If a Part XIV offence was aided, abetted etc by an officer of the corporation, both officer and corporation can be guilty of criminal conduct (s.390 SFO)

### Disciplinary Proceedings

Any regulated person guilty of misconduct or not fit and proper is subject to a wide range of disciplinary procedures (Part IX SFO)



# Market Misconduct – Private Action

## Civil liability – Right of Private Action

Private right of civil action in favour of anyone who has suffered financial loss as a result of market misconduct or any offence under Part XIV

Perpetrator is liable to pay damages, unless it is fair, just and reasonable that he should not (s.281 and s.305 SFO)

Not necessary to obtain a finding of market misconduct by the MMT or a criminal conviction under Part XIV before bringing civil proceedings

**B**

Enforcement trends

# Hot Areas of Enforcement

- Corporate Fraud
- Corporate Misfeasance
- Insider Dealing and Market Manipulation
- Intermediary Misconduct
- Responsibility of Senior Management
- AML/CTF Breaches



# SFC Specialised Teams

- **Corporate Fraud and Corporate Misfeasance Teams:** targets corporate fraud and the misuse of powers by the senior management of listed companies
- **Insider Dealing and Market Manipulation Team:** investigates market misconduct and related offences, comprises experts in market analysis and investigation
- **Intermediary Misconduct Team:** focuses on regulated entities' misconduct and practices such as short selling, mishandling of client orders and assets, and investment bank malpractice



# Recent Enforcement Cases

## Insider Dealing

- **Feb 2017:** SFC obtains court orders to freeze assets in insider dealing investigation. Proceeding brought under s. 213 SFO: Court granted interim order prohibiting X from removing assets valued at \$25,899,750 from Hong Kong and issued consent order requiring Y and Z to pay into the court \$12,949,875, which is equivalent to the suspected profit
- **Mar 2017:** MMT sanctions X and his mother for insider dealing in shares of a listed company (including ordering disgorgement of the losses avoided by selling the shares (\$2,425,174), **not to deal in SFC regulated financial products for a certain time** and paying the SFC's costs)

# Recent Enforcement Cases

## Market Manipulation

**Dec 2016:** SFC issues Restriction Notices under s.204 and s.205 SFO to two brokers to freeze a client account linked to suspected account hacking and market manipulation

- Brokers prohibited from dealing with certain assets held in a client account which the SFC suspected were the proceeds of market manipulation and/or fraud conducted in conjunction with unauthorized internet trades in hacked securities accounts at other firms
- The investigation is continuing

# Recent Enforcement Cases

## Disclosure of False or Misleading Information Inducing Transactions

**Dec 2016:** MMT finds Greencool's former chairman and senior executives culpable of market misconduct by disclosing false or misleading information inducing transactions

- SFC alleged that G, Z and H were involved in grossly overstating the company's NAV in its annual reports and results announcements as a result of the overstatement of bank deposits and the non-disclosure of bank loans
- SFC also commenced parallel proceedings under s.213 SFO against G and obtained an injunction to freeze over a total of 107,290,000 shares valued at \$1.2 billion

# Recent Enforcement Cases

## Late Disclosure of Inside Information

- **Apr 2017:** MMT sanctions Mayer Holdings Limited and its current and former senior management for late disclosure of inside information
- **Feb 2017:** MMT sanctions Yorkey Optical, its CEO and Financial Controller for late disclosure of inside information
- **Nov 2016:** MMT fines AcrossAsia Limited, its former chairman and CEO a sum of \$2 million for late disclosure of inside information



# Recent Enforcement Cases

## AML Contraventions

- **Apr 2017:** HK Monetary Authority reprimands and fines the Hong Kong branch of a private bank \$7 million
- **Mar/Apr 2017:** SFC reprimands and fines four Licensed Corporations for AML contraventions relating to third party payments/ deposits within the past three months:
  - \$3 million - Apr 2017
  - \$4.5 million - Apr 2017
  - \$2.6 million - **Mar** 2017
  - \$3 million - Mar 2017

C

Key takeaways

# Key Takeaways

## Hong Kong Perspective

- Shift in enforcement emphasis towards senior executives and their roles in listcos, as well as banks and brokers
- Increasing reliance on s.213 to combat market misconduct and obtain “restorative justice”, particularly where traders are located overseas
- Increased collaboration with local regulators (HKMA), DoJ and HK Police Force to target securities fraud, insider dealing and market manipulation
- Increased regulatory collaboration between SFC and Mainland regulator CSRC to target cross-jurisdictional market manipulation investigations

## 5. Japan

# Japan: Key Topics

- A. The Japanese Regulatory Landscape
- B. Administrative Monetary Penalty System
- C. “Terror” of Recommendation by SESC
- D. Recent Cases of Finance Trial



# The Japan regulatory landscape

## Regulators and authorities

- [Administrative]
  - Securities Exchange Surveillance Commission (**SESC**)
  - SESC is a part of the Financial Services Agency (**FSA**)
- [Self Regulatory Organisation]
  - Japan Exchange Regulation (**JER**) - Japan Exchange Group
  - Japan Securities Dealers Association (**JSDA**)
- [Criminal]
  - Tokyo Prosecutors Office (**TPO**)

# Administrative Monetary Penalty (“AMP”) System (by SESC) – Target of AMP

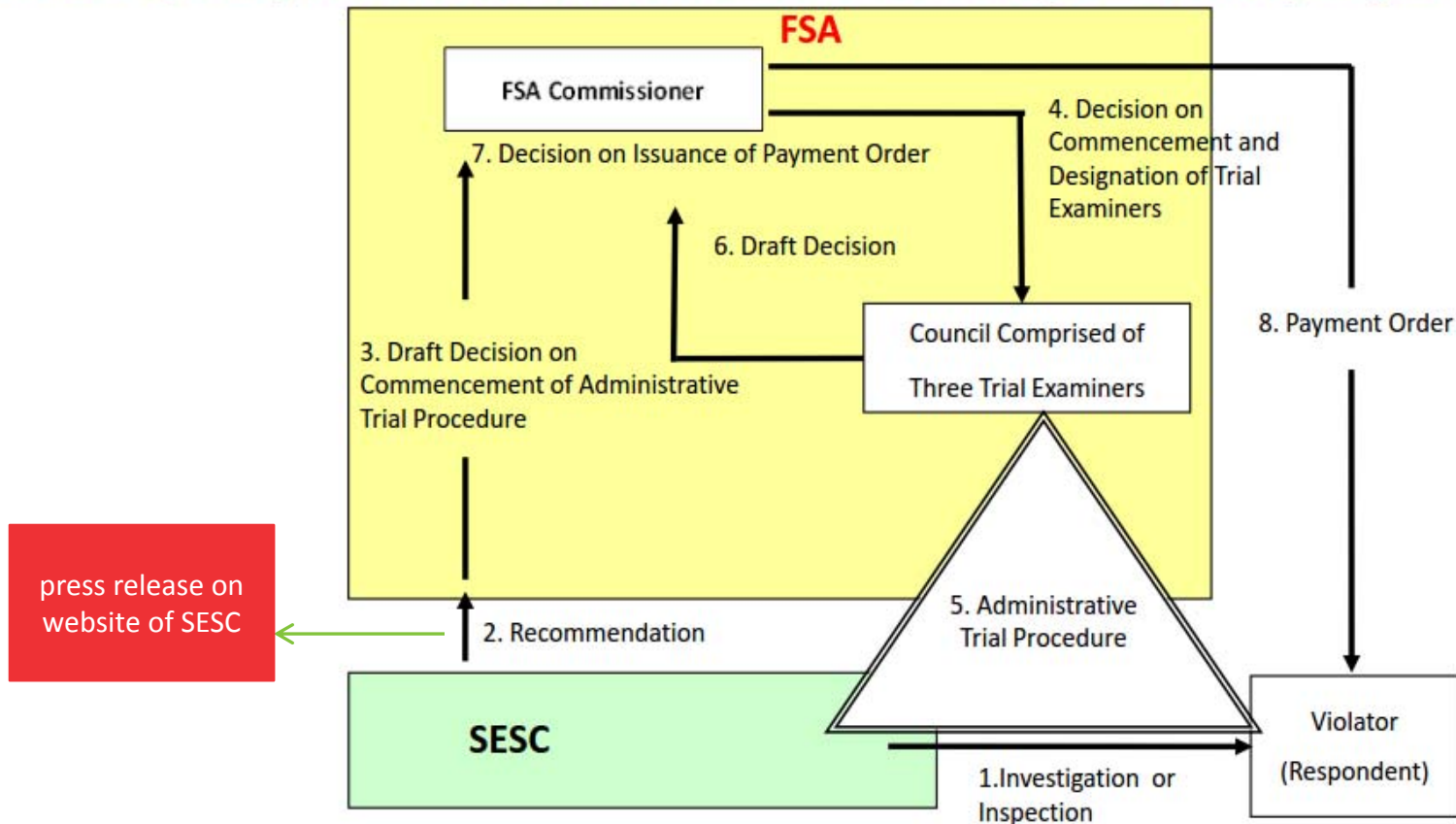
False Disclosure

Market Misconduct

1. insider trading, 2. market manipulation, 3. fraudulent trading

\*from <http://www.fsa.go.jp/sesc/english/aboutsesc/all.pdf>

## Concept of Administrative Monetary Penalty System



\* After receiving a recommendation from the SESC, the FSA commences an administrative trial procedure by trial examiners. Upon receiving decision by the trial examiners, the Commissioner of the FSA decides whether to order payment of an administrative monetary penalty.

<Casebook on Administrative Monetary Penalties under the FIEA>

To enhance transparency of the market surveillance administration and encourage self-discipline of market participants, the SESC publishes the Casebooks on Administrative Monetary Penalties under the FIEA (market misconduct and disclosure violations) each year.



\*from <http://www.fsa.go.jp/sesc/english/aboutsesc/all.pdf>

## Breakdown of Criminal and Administrative Cases

(number of cases)

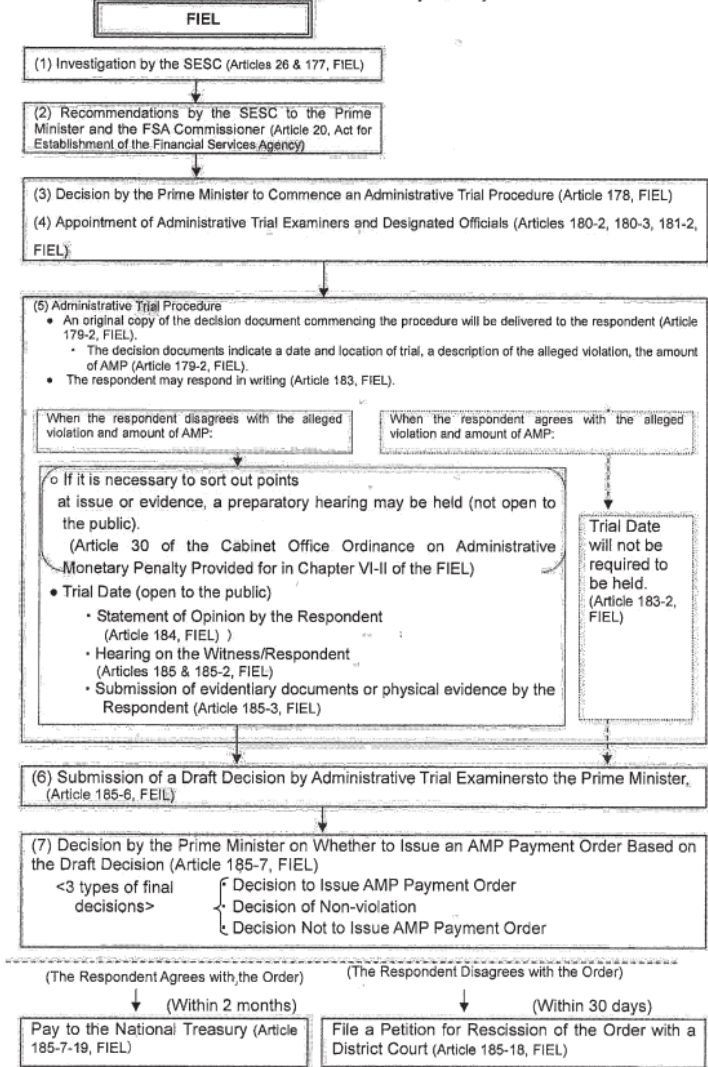
Fiscal Year Category	2011	2012	2013	2014	2015*1	Total*2
Number of Filed Criminal Charges	15	7	3	6	7	180
• Disclosure Containing False Statements	4	0	0	2	2	40
• Spreading of Rumors, Use of Fraudulent Means	4	1	1	1	2	26
• Market Manipulation	1	0	1	2	1	26
• Insider Trading	6	2	1	1	2	77
• Others	0	4	0	0	0	11
Recommendations to Issue Orders to Pay Administrative Monetary Penalties	29	41	51	50	25	365
• Disclosure Containing False Statements	11	9	9	8	4	92
• Market Manipulation	3	13	9	11	7	55
• Insider Trading	15	19	32	31	14	217
• Use of Fraudulent Means	0	0	1	0	0	1

Notes:

\*1 Fiscal 2015 figures are for the period from April 1, 2015 to December 31, 2015.

\*2 These total figures are for the entire period from the inauguration of the SESC to December 31, 2015

Attachment (English Translation for Reference Purposes Only)  
Flow of Process for AMP Payment System



\*Prime Minister's related authority is delegated to the FSA Commissioner (Article 194-7, FIEL)  
\*FIEL: Financial Instruments & Exchange Law

# Insider trading

- May apply to acts occurring within Japan and outside Japan
- May apply to listed securities only
- Basically applies to listed stocks and listed J-Reits



# Market Manipulation

- Under Financial Instruments and Exchange Act, the requirement of “a purpose (intent) to induce other investors” is necessary.
- But, now SESC is trying to establish new understanding that “an act to move stock price” presumes “a purpose (intent) to induce other investors”
- May apply to acts occurring within Japan and outside Japan



# False Disclosure

Toshiba Corporation case

Based on SESC's "recommendation", On 24 Dec 2015 FSA ordered Toshiba to pay JPY 7,373,500,000 (金73億7,350万円).

[http://www.fsa.go.jp/en/newsletter/weekly2016/177.html#25\\_7](http://www.fsa.go.jp/en/newsletter/weekly2016/177.html#25_7)

SESC tried to persuade Tokyo Prosecutors Office to indict Toshiba, but TPO did not.

## “Terror” of Recommendation by SESC

- SESC suddenly makes a public release on its website mentioning that SESC has made “recommendation” to Prime Minister and Commissioner of FSA to impose AMP to “Violator”
- SESC uses the word of “Violation” and “Violator”
- Such “Violator” is not given due process. That is, sometimes no hearing, no interview is made for such “Violator”
- <http://www.fsa.go.jp/sesc/english/news/reco/20131101-1.htm> [Case of Wedgewood Holdings] Pursuant to the Financial Instruments and Exchange Act, the amount of the administrative monetary penalty applicable to the above violation is 4,096,050,000 yen.

## “Terror” of Recommendation by SESC (2)

- Japanese financial institutions (including securities companies) are very “diligent”.
- In many cases, soon after the fact that the recommendation is made by SESC, is published, securities companies close the Violator’s accounts and investors withdraw their assets from Violator (in the case of Violator is an asset management company)



# Recent Recommendation [Wedge Holdings]

## 1. Contents of the Recommendation

Pursuant to Article 20(1) of the Act for Establishment of the Financial Services Agency (the “FSA”), on November 1, 2013, the Securities and Exchange Surveillance Commission made a recommendation to the Prime Minister and the Commissioner of the FSA that an administrative monetary penalty payment order be issued in regard to a fraudulent scheme involving the securities of Wedge Holdings CO., LTD. (“Wedge”). This recommendation is based on the findings of the investigation into the use of fraudulent means, whereby the following violations of laws and ordinances were identified.

## 2. Summary of the Findings regarding [Violations of the Laws and Ordinances](#)

The person to be named in the Administrative Monetary Penalty Payment Order was in a position to control Asia Partnership Fund Group (“APF Group”) as a director and in other capacities of its member companies. APF Group was comprised of companies including Wedge, Showa Holdings CO., LTD and A.P.F. Hospitality CO., LTD (“Hospitality”) which had its headquarter in Thailand and had invested in a company owning a resort hotel as its business.

For the purpose of pumping up the prices of the securities of Wedge held by Showa Holdings CO., LTD and his family companies, the person to be named in the Administrative Monetary Penalty Payment Order did the following: (i) on March 4, 2010, he directed Wedge to make a disclosure on the Timely Disclosure network (“TDnet”) that contained false information that stated, with respect to the subscription by Wedge of the convertible debentures issued by Hospitality, Wedge would expect an acquisition of Hospitality shares through exercising the conversion rights of the convertible debentures as well as the increase in investment profits such as interest income; (ii) from March 5 to 12, 2010, he disguised the payment on the convertible debentures by rotating funds less than its payment amount, 800 million yen, among APF Group companies including Wedge and Hospitality; and (iii) on March 9, 2010, he directed Wedge to make a disclosure on TDnet of false information that stated that it would expect an increase in investment profits such as interest income, as well as giving a related earnings estimate. These disclosures did not reflect material circumstances which would give rises to doubt about the asset value of the convertible debentures. In fact, relating to the subscription of the convertible debenture issued by Hospitality, Wedge could not expect the acquisition of Hospitality shares by exercising the conversion rights. Nor could it expect the increase in investment profits such as interest income to be paid by Hospitality, the debts of which exceeded its assets. The convertible debenture did not have the asset value of 800 million yen. Furthermore, Hospitality, due to its corporate form, was prohibited from issuing convertible debentures under the Civil and Commercial Code of Thailand. Consequently it could not obtain an issuance approval by Securities and Exchange Commission Thailand. The payment to be made for the convertible debentures was disguised by rotating funds less than its payment amount, 800 million yen, within APF Group.

Through this series of acts, he pumped up the prices of the securities of Wedge and, therefore, influenced the price of the securities for the purpose of causing a fluctuation of quotations on securities.

His act was recognized as “trading by fraudulent means” conducted “in violation of the provision of Article 158” and “affecting the price of securities” as stipulated under Article 173(1) of the Financial Instruments and Exchange Act.



## Truth of Finance Trial (a part of AMP System)

- No burden of proof is specified.
- Trial Judges (Examiners) may use any hear-say evidence.
- In the history of AMP system (since 2005), we have only 2 wins.
- cf: As to the criminal cases in Japan, guilty ratio is more than 99.9%.
- No discovery. SESC are allowed not to present evidence, which can prove “innocence” (not guilty) of Violator.
- Tenure of Judges is 2 years.
- Judges are “actual” judges in Japan. But, recently judges who are experts in juvenile court are transferred to the finance trial. They have little knowledge and no experience of financial transaction.

## Recent Cases – Higher Amount of AMP

- Sometimes AMP (Administrative Monetary Penalty) contains criminal nature.
- April 11, 2017: FSA ordered an individual to pay administrative monetary penalty of JPY 4,096,050,000 (about USD 40 million).
- December 5, 2014: SESC recommended AMP of JPY 430,740,000 (about USD 4 million) against Hong Kong fund manager. Finance Trial is on-going.
- <http://www.fsa.go.jp/sesc/english/news/reco/20141205-1.htm> [Areion]
- You can appeal to Tokyo District court, but after paying AMP.

# Recent Trends

Theoretical:

Material Violation: Criminal

Minor Violation: AMP

Criminal : Individual or  
Individual + Company

Actual:

Criminal : where SESC/TPO has sufficient evidence

AMP : where SESC does not have sufficient evidence

AMP: main target

- 1) Insider – Financial Institution
- 2) Market Manipulation  
– Individual or Small Company
- 3) False Disclosure – Large Company



## 6. Thailand

Market  
Misconduct

Insider  
Trading



# Market Misconduct

## The Derivative Act

### Section 92: Price Manipulation

Prohibit trading in **derivatives transaction** or offering to trade in derivatives transaction, purchasing or selling or offering to purchase or sell **underlying goods or variable** that will or likely to maintain/manipulate pricing of **exchange traded-derivatives contracts**.

## The SEC Act

### Section 244/3: Price Manipulation

No person shall take any of the following actions:

- (1) placing a trading order or trading **securities** in such a way that misleads other persons regarding the price or volume of the securities trading;
- (2) placing a securities trading order or trading securities on a continued basis with an intent to cause the price or the volume of such securities trading to be inconsistent with the normal market condition.

# Market Misconduct (cont.)

The Derivative Act	The SEC Act
<p>Section 94: Market Dumping/Cornering</p> <p>Prohibit cornering, dumping, controlling or taking any other actions, in connection with <u>underlying goods</u> of <u>exchange-traded derivatives contracts</u> which results in a significant increase or decrease in the amount of goods to be delivered under such derivatives contracts.</p>	N/A



# Market Misconduct (cont.)

The Derivative Act	The SEC Act
<p>Section 95: False/Misleading Information Dissemination</p> <p>Prohibit making or disseminating any false or materially misleading statement/promise in connection with <b><u>derivatives transaction, goods or variable</u></b> and such act:</p> <ul style="list-style-type: none"><li>- has induced or is likely to induce other persons to trade in <b><u>exchanged-traded</u></b> derivatives; or</li><li>- has or is likely to have the effect of raising, lowering, or maintaining the price of any <b><u>exchanged-traded</u></b> derivatives.</li></ul>	<p>Section 240</p> <p>No person shall inform, disseminate, or certify any statement or information that is false or materially misleading about financial condition, business operation, the price of <b><u>securities</u></b> or any other information related to a securities issuing company in such a manner that is likely to have an effect on the price of securities or the decision making on <b><u>securities investment</u></b>.</p>



# Market Misconduct (cont.)

## The Derivative Act

### Section 96: Distorting Forecast

Prohibit making any forecast regarding derivatives contract/underlying by distorting the fact or information and such act:

- has induced or is likely to induce other persons to trade in **exchanged-traded** derivatives; or
- has or is likely to have the effect of raising, lowering, or maintaining the price of any **exchanged-traded** derivatives.

## The SEC Act

### Section 241:

No person shall analyse or forecast the financial condition, the business operation, the price of **securities** or any other information related to a securities issuing company by using information known to be false or incomplete which may mislead materially the making of such analysis or forecast, or omit to consider the accuracy of such information, or by distorting the information used in the making of the analysis or the forecast, and disclosing or giving an opinion on the analysis or the forecast to the public in such a manner that is likely to have an effect on the price of securities or decision making on securities investment.

## Market Misconduct (cont.)

The Derivative Act	The SEC Act
<p>Section 97: Prohibited Dissemination of Statement</p> <p>Prohibiting disseminating any statement to the effect that the price of any <b><u>exchanged-traded</u></b> derivatives will or is likely to rise or fall or be maintained because there has been market misconduct in relation to certain derivatives trading.</p>	<p>N/A</p>
<p>Section 98: Extra-Territorial Effect:</p> <p>May apply to the acts on market manipulation (Section 92) and market dumping/cornering (Section 94) <b><u>within/outside</u></b> Thailand</p>	<p>N/A</p>

# Insider trading (cont.)

## The Derivatives Act

### Section 99: Insider's Prohibited Actions

No director, subcommittee member, representative, agent, employee, staff, advisor, or any person working for a derivatives exchange, derivatives clearing house, derivatives regulatory association, securities exchange, securities trading centre, securities clearing house or any supervisory authority or recipient of information from the foregoing person, who have in possession of material non-public information, shall undertake any of the following acts:

- (1) engage in **derivatives transaction**, or offer to trade in derivatives, or purchase or sell or offer to purchase or sell **goods**, in connection with such material information, for his own benefit or for the benefits of others; or
- (2) disclose such material information to another person whereby he knows or should have known that such person may take advantage of such information by engaging in **derivatives transaction**, or purchasing or selling goods.

## The SEC Act

### Section 243: Insider

It shall be presumed that the following persons have known or possessed the inside information under Section 242:

- (1) director, executive or controlling person of a securities issuing company;
- (2) employee or worker of a securities issuing company who holds a position, or is in the line of work, responsible for or capable of accessing inside information;
- (3) any person who is able to know inside information by performing duties as auditor, financial advisor, legal advisor, asset appraiser or any other person whose duties are related to inside information, including employees, workers or colleagues of the aforesaid persons who hold a position or is in the line of work involved in the performance of duties related to such inside information;
- (4) director, sub-committee member, representative of a juristic person, agent, worker, employee, advisor or operator in a governmental agency, the SEC Office, the Stock Exchange, the over-the-counter center or the Derivatives Exchange, who is in the position or the condition that can access inside information through performance of duties;
- (5) juristic person whose business is under control of the persons under (1) (2) (3) or (4).

# Insider trading

## The Derivatives Act

### Section 100: Insider Trading

No person who possesses material information as a result of the disclosure under Section 99 and knows or should have known that such information has been disclosed by the person specified in Section 99 and has not yet been made public, shall undertake any of the following acts:

- (1) engage in **derivatives transaction**, or offer to trade in derivatives, or purchase or sell or offer to purchase or sell **goods**, in connection with such material information for his own benefit or for the benefits of others; or
- (2) disclose such material information to another person whereby he knows or should have known that such person may take advantage of such information by engaging in derivatives transaction, or purchasing or selling goods.

## The SEC Act

### Section 242: Insider Trading

No person who knows or possesses inside information related to a securities issuing company shall:

- (1) purchase or sell **securities** or enter into a **derivatives contract related to securities**, either for oneself or other persons, **except** in the following cases:
  - (a) action in compliance with the law, the court's order, or the order of an agency with the legal power;
  - (b) **action in accordance with the obligations to a derivatives contract that has been made before one becomes aware of or possesses inside information related to the securities issuing company;**
  - (c) action not agreed upon or decided by oneself but assigned to an approved or registered person under the law on management of capital or investment to make a securities trading decision or enter into a derivatives contract related to such securities; or
  - (d) action not having a characteristic of taking an advantage of other persons or any characteristic as specified in the notification of the SEC.

# Insider trading (cont.)

The Derivatives Act	The SEC Act
	<p>(2) disclose inside information to other persons, either directly or indirectly and by any means, while one knows or ought reasonably to know that the receiver of such information may exploit such information for trading securities or entering into a derivatives contract related to such securities, either for the benefit of oneself or other persons, except when such action does not have the characteristics of taking an advantage of other persons or has the characteristics as specified in the notification of the SEC.</p>



# Insider trading (cont.)

## The Derivatives Act

### Section 145: Prohibited Actions of Derivatives Operator

Any director, manager, staff, agent or person appointed to work for a **derivatives business operator or derivatives clearing house** who commits any of the following acts:

- (1) dishonestly deceives such legal entity's customer by the assertion of a falsehood or the concealment of fact concerning such legal entity's duty to be performed for the benefits of its customers which should have been revealed, and by such deception, obtains its customer property or caused its customer to execute, revoke or destroy a document of entitlement; or
- (2) misappropriates such legal entity's customer property acquired in the course of business under this Act for himself or a third party; or
- (3) **dishonestly undertakes or refrains from taking any action by virtue of his position which causes damage to such entity's customer**; or
- (4) dishonestly breaches his duty by any means which causes damage to the usefulness in the nature as being a property of such entity's customer;

## The SEC Act

### Section 244/1 and 244/2: Prohibited Actions of Sec Co

No securities company that operates the business of **securities brokerage and fund management** including its officers or employees who know or possess **information** related to trading orders of **securities** or **derivatives** of any client of such securities company shall take any of the following actions, either for the benefit of oneself or other persons, in any manner that is likely to cause a disadvantage to the client:

- (1) placing, modifying, or cancelling a trading order of **securities or derivatives related to such securities** by taking advantage of doing so before completing the order of such client;
- (2) disclosing information related to the order of such client to another person even though it is known or ought reasonably to be known that such person would use such information for placing, modifying or cancelling trading orders of securities or derivatives related to such securities before the execution of the client's order is completed.

# Penalties

## Penalties under the Derivatives Act (Market Misconduct)

- Imprisonment for a term not exceeding five years or
- a fine not exceeding one million baht or not exceeding two times the benefit received or should have been received by such person as a result of such contravention, whichever is higher,
- or both.

## Penalties under the SEC Act (Market Misconduct)

- Not applicable to derivatives trading

# Penalties (cont.)

## Penalties under the Derivatives Act (Insider Trading)

- Imprisonment for a term not exceeding five years or
- Fine not exceeding one million baht or not exceeding two times the benefit received or should have been received by such person as a result of such contravention, whichever is higher,
- or both.

## Penalties under the SEC Act (Insider Trading)

- Imprisonment for a term not exceeding two years or
- Fine from five hundred thousand baht to two million baht,
- or both.
- if the offender has received or should have received a benefit from such offence, a fine not exceeding twice of the benefit shall be imposed and in any case such fine shall not be less than the minimum amount as specified under Section 296 or Section 296/1, as the case may be



# Key Takeaways

Derivatives Act mainly focuses on market misconduct and insider trading with an impact on **exchanged-traded derivatives**.

SEC Act mainly focuses on market misconduct with respect to **securities** trading only not derivatives.

SEC Act was recently amended in Dec 2016 to extend the restriction on trading with inside information to both **on and off exchange**-traded **securities linked derivatives**.

Derivatives Act has **extra-territorial effect** for certain market misconduct but not for insider trading.

# Enforcement Trend

- Only one published case on insider trading of exchange-traded derivatives made by an employee of a derivatives business operator in Thailand (the Derivatives Act, Section 145)
- No public information on enforcement of breach of market misconduct restrictions under the Derivatives Act
- No precedent case on enforcement of breach of the SEC Act with respect to trading derivatives contract with inside information yet
- Thai SEC is very active on enforcement of breach of insider trading with respect to securities trading

## 7. Questions

# Key contacts



Stephanie Magnus  
Principal  
**Singapore**  
+65 6434 2672  
stephanie.magnus  
@bakermckenzie.com



Grace Fung  
Associate  
**Hong Kong**  
+852 2846 2459  
grace.fung  
@bakermckenzie.com



Ying Yi Liew  
Associate  
**Singapore**  
+65 6434 2531  
yingyi.liew  
@bakermckenzie.com



Masato Yamanaka  
Partner  
**Tokyo**  
+81 3 6271 9482  
masato.yamanaka  
@bakermckenzie.com



Samantha Shields  
Special Counsel  
**Sydney**  
+61 2 8922 5644  
samantha.shields  
@bakermckenzie.com



Benja Supannakul  
Partner  
**Bangkok**  
+66 2636 2000 ext. 3074  
benja.supannakul  
@bakermckenzie.com

**Thank you.**

