



證監會對  
《證券及期貨條例》的  
建議修訂

The offering, listing and trading of securities in Hong Kong are regulated by the Listing Rules and the Securities and Futures Ordinance (SFO). The Listing Rules are administered by Hong Kong Stock Exchange (HKEX) subject to oversight by Securities and Futures Commission (SFC) and are not statutory with no criminal sanctions. SFO is administered and enforced by SFC and is statutory with civil and criminal sanctions. In the consultation paper issued by SFC in June 2022, SFC consults the market on the proposals to amend the enforcement-related provisions of the SFO. This paper will review the amendments that are proposed by SFC.

### Amendments to Section 213 of SFO

Under the dual regime, the SFC may enforce the SFO either (a) under the civil regime by way of civil proceedings instituted in the Market Misconduct Tribunal (MMT); or (b) under the criminal regime by way of criminal prosecution in the criminal courts of Hong Kong. The choice of venue is on SFC after consultation with Department of Justice.

Since the Tiger Asia case, SFC may apply to the Court of First Instance (CFI) by way of the third way under section 213 of SFO for certain injunctions and other orders, in addition to the dual regime. Under section 213, if it appears to the SFC (not finding nor determination by MMT or the courts) that a person is in contravention of any provisions of the SFO in the manner as contemplated in section 213(1), SFC may apply to CFI for various orders. The orders that are available to SFC are specified in section 213(2) and include injunctions and declarations. Under section 213(8), CFI may, in addition or in substitution, order any person to pay damage to other person. However, if a regulated person is guilty of misconduct or is not a fit and proper person to be or to remain a regulated person under section 194 or 196 of SFO, such misconduct per se will not entitle SFC to apply for the orders under section 213 unless such conduct is also in contravention of any other provisions under SFO. Furthermore, SFC is also not given statutory powers under SFO to directly require the regulated person to take any steps to restore, compensate or otherwise protect the interests of investors or clients who may have been adversely affected by such regulated person's misconduct.

In order to give SFC more effective means to protect investors and interests of clients of regulated persons, it is proposed in the SFC consultation paper that section 213 of SFO be amended to the effect that:

- (a) SFC may apply for orders where it has exercised any of its powers under section 194 or 196 of SFO against a regulated person even such regulated person is not in contravention of any other provisions of SFO;
- (b) on application by SFC, CFI may make an order to restore the parties to any transaction to the position in which they were before the transaction was entered into against such regulated person; and
- (c) the above orders are applicable to such regulated person if he/she is a director, investment manager, custodian or sub-custodian of an open-ended fund company.

在香港發售、上市及買賣證券均須受《上市規則》及《證券及期貨條例》的規管。《上市規則》是由香港交易所（港交所）管理，並受證券及期貨事務監察委員會（證監會）監督。該等規則為非法定，亦沒有刑事制裁。而《證券及期貨條例》則由證監會管理並執行，具有法定效力及民事和刑事制裁。證監會於2022年6月發布諮詢文件，就建議修訂《證券及期貨條例》內與執法相關的條文諮詢市場意見。本文將回顧證監會所建議的修訂內容。

### 對《證券及期貨條例》第213條的修訂

在雙重法律制度下，證監會可(a)循民事途徑透過市場失當行為審裁處提起民事訴訟，或(b)循刑事途徑透過香港刑事法庭提起刑事檢控，強制執行《證券及期貨條例》。執法途徑的選擇由證監會諮詢律政司後決定。

自從Tiger Asia一案，證監會在雙重法律制度之外，可以根據《證券及期貨條例》第213條以第三種方式向原訟法庭申請若干強制令及其他命令。根據第213條，倘證監會認為（並非由市場失當行為審裁處或法庭裁斷或裁定）凡任何人以第213(1)條所述的方式違反《證券及期貨條例》任何條文，證監會可向原訟法庭申請各種命令。第213(2)條載明證監會可申請施行的命令，包括強制令及聲明。根據第213(8)條，原訟法庭可增發命令或另發命令，飭令任何人士向其他人士支付損害賠償。然而，倘如《證券及期貨條例》第194或196條所規定，受規管人士犯失當行為或並非擔任或留任受規管人士的適當人選，證監會無權就該失當行為本身申請第213條項下的命令，除非該行為亦違反《證券及期貨條例》任何其他條文。此外，《證券及期貨條例》亦不賦予證監會任何法定權力，以直接要求該受規管人士採取任何步驟，從而回復、補償或以其他方式保障可能因該受規管人士的失當行為而受到不利影響的投資者或客戶的利益。

為使證監會能以更有效的方式保障投資者和受規管人士的客戶的利益，證監會在諮詢文件中建議對《證券及期貨條例》第213條作出修訂，從而具有以下作用：

- (a) 證監會在根據《證券及期貨條例》第194或196條對某受規管人士行使任何權力後，即使該受規管人士並無違反《證券及期貨條例》任何其他條文，證監會亦可申請命令；
- (b) 應證監會的申請，原訟法庭可對該受規管人士作出命令，使交易各方回復他們訂立該交易之前的狀況；及
- (c) 倘受規管人士為開放式基金型公司的董事、投資經理、保管人或次保管人，則上述命令均適用於該受規管人士。

### 對《證券及期貨條例》第103條內的豁免作出修訂

《證券及期貨條例》第103(1)條禁止任何投資產品的公開要約，除非該要約獲證監會根據《證券及期貨條例》第105條認可及批准，或根據第103(3)條獲豁免，則屬例外。根據第103(3)(k)條，第103(1)條不適用於發出或為發出而管有「就證券或結構性產品或就任何集體投

## Amendments to Exemptions under section 103 of SFO

Under section 103(1) of SFO, any public offering of investment products is prohibited unless such offering is authorised and approved by SFC under section 105 of SFO or is exempted under section 103(3). Under section 103(3)(k), section 103(1) does not apply to the issue or the possession for the purposes of issue 'of any advertisement, invitation or document made in respect of securities or structured products, or interests in any collective investment scheme, that are or are intended to be disposed of only to professional investors' (PI exemption). Professional Investors (PIs) are defined in Schedule 1 to SFO and are extended by the Securities and Futures (Professional Investors) Rules (Cap. 571D).

In Pacific Sun case, the defendants had issued advisements of certain collective investment scheme to the public by way of emails and on website. Court of Final Appeal (CFA) agreed and decided (a) that whilst the advertisements were issued to the general public, the fund was intended to be sold and had been sold only to PIs, even though the intention was not so stated in the advertisements; (b) that the PI exemption applied; and (c) that the defendants were acquitted. Following CFA's judgement, the current position is that unauthorised advertisements of investment products (which may not be suitable for retail investors) may be issued to the general public even though the investment products are intended for sale only to PIs. In consequence, retail investors may be exposed to unauthorised offers or solicitations to invest in risky or complex investment products which are not suitable for them, even though such investment products may not eventually be sold to them.

In SFC consultation paper, it is proposed that section 103(3)(k) of SFO be amended that the PI exemption will only apply to the advertisements that are issued to PIs only. Following such amendment, unauthorised advertisements of investment products which are or are intended to be sold only to PIs may only be issued to PIs who have been identified as PIs through the intermediary's KYC (Know-Your-Client) or other procedures. Similar or consequential amendment is also made to section 103(3)(j) in relation to investment products that are sold or intended to be sold only to persons outside Hong Kong (overseas offering exemption).

資計劃的權益而作出的任何廣告、邀請或文件，而該等證券、產品或權益是只轉讓予或擬只轉讓予專業投資者」(專業投資者豁免)。專業投資者的定義載於《證券及期貨條例》附表1內，延伸定義則載於《證券及期貨(專業投資者)規則》(第571D章)。

在 Pacific Sun 一案中，被告人透過電郵及在網站上向公眾發出某一集體投資計劃的廣告。終審法院同意並裁定：(a) 雖然有關廣告是向公眾發出，但有關基金擬只出售予及只曾出售予專業投資者，即使此意圖並沒有在該等廣告中指出；(b) 專業投資者豁免適用於該案；及 (c) 被告人無罪。在終審法院作出該裁決後，現時的情況是，即使投資產品不適合散戶投資者及只打算出售予專業投資者，但該等投資產品的未經認可廣告仍然可以向公眾發出。因此，散戶投資者可能會接觸到未經認可的要約或招攬，邀請他們投資不適合他們的高風險或複雜投資產品，即使該等投資產品最終可能不會出售予他們。

證監會在諮詢文件中建議修訂《證券及期貨條例》第103(3)(k)條，即專業投資者豁免只適用於只向專業投資者發出的廣告。在作出該修訂後，只出售予或擬只出售予專業投資者的投資產品的未經認可廣告，僅可向已獲中介人的認識你的客戶或其他程序識別為專業投資者的專業投資者發出。此外，第103(3)(j)條(有關只出售予或擬只出售予在香港以外地方的人士的投資產品)(海外發售豁免)亦作出類似或相應修訂。



## Amendments to Insider Dealing Regimes under SFO

Under the SFO, insider dealing is regulated civilly (under Division 4 of Part XIII of SFO) by civil proceedings in the MMT and criminally (under Division 2 of Part XIV of SFO) by criminal prosecution respectively. Under the current inside dealing regimes (both civil and criminal), the scope of insider dealing under SFO does not cover (a) insider dealing perpetrated in Hong Kong with respect to securities listed outside Hong Kong or their derivatives; and (b) insider dealing perpetrated outside Hong Kong in relation to securities listed in Hong Kong or their derivatives.

In *Young Bik Fung* case, the defendants had committed insider dealing in shares that were listed in Taiwan but not listed in Hong Kong. Accordingly, the insider dealing provisions in section 270 of SFO (civil regime) or section 291 of SFO (criminal regime) were not applicable. Due to this limitation, SFC resorted to commence civil proceedings under section 213 of SFO and obtained an order based on their contravention of section 300 of SFO. Section 300 of SFO is similar in term and in scope to US Rule 10b-5 proceedings.

In SFC consultation paper, it is proposed that:

- (a) listed securities will include securities listed outside Hong Kong or their derivatives; and
- (b) the territorial scope of insider dealing regimes will include (i) any acts of insider dealing involving Hong Kong-listed securities or their derivatives regardless of where they occur; and (ii) any acts of insider dealing involving overseas-listed securities or their derivatives if any one or more of such acts occur in Hong Kong.

## Way Forward

If the proposals contained in SFC consultation paper are well-received by the market, SFC will issue consultation conclusions confirming the proposals with or without amendments. Thereafter, SFC will work with the Government to prepare legislative amendments to the SFO by way of an amendment bill to be submitted to the Legislative Council for approval. Once the bill is approved by the Legislative Council, a date will be appointed for the amendments to be effective.

Our Chamber will monitor the legislative process and report back as and when necessary. **M**

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## 對《證券及期貨條例》的內幕交易制度作出修訂

根據《證券及期貨條例》，內幕交易分別在民事上根據《證券及期貨條例》第 XIII 部第 4 分部在市場失當行為審裁處以民事訴訟程序進行規管，在刑事上則根據《證券及期貨條例》第 XIV 部第 2 分部以刑事檢控進行規管。根據現行的內幕交易制度（包括民事和刑事），《證券及期貨條例》下規定的內幕交易範圍並不涵蓋（a）就在香港以外地方上市的證券或其衍生工具在香港進行的內幕交易；及（b）在香港以外地方進行涉及在香港上市的證券或其衍生工具的內幕交易。

在楊碧鳳一案中，被告人對在台灣上市但未在香港上市的股票進行了內幕交易。因此，《證券及期貨條例》第 270 條（民事制度）或《證券及期貨條例》第 291 條（刑事制度）的內幕交易條文並不適用。礙於此限制，證監會只能根據《證券及期貨條例》第 213 條尋求展開民事法律程序，並基於他們違反《證券及期貨條例》第 300 條的情況取得一項命令。《證券及期貨條例》第 300 條在措辭及涵蓋範圍上與美國規則第 10b-5 條程序相似。

證監會在諮詢文件中建議：

- (a) 上市證券將包括在香港以外地方上市的證券或其衍生工具；及
- (b) 內幕交易制度的地域涵蓋範圍將包括（i）涉及在香港上市的證券或其衍生工具的任何內幕交易作為（不論在何地發生）；及（ii）涉及在境外上市的證券或其衍生工具的任何內幕交易作為（前提是該等作為中有一項或多於一項在香港發生）。

## 未來路向

倘市場對證監會諮詢文件中作出的建議反應良好，證監會將發布諮詢總結文件，確認該等建議是否作出修訂。此後，證監會將與政府合作，通過向立法會提交修訂條例草案的方式，擬備對《證券及期貨條例》作出的立法修訂，以供批准。該草案一經立法會批准，將指定修訂生效的日期。

本會將監察有關立法進程並在必要時作出匯報。 **M**

### — 關保鈺

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