

SFC lays first criminal charges



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Recently the Securities and Futures Commission (the *SFC*) has laid criminal charges for the first time in respect of alleged insider dealing activities. This has marked a new era of more aggressive enforcement actions by the regulator.

First criminal charge of insider dealing

Under section 291 of the Securities and Futures Ordinance (the *Ordinance*), a person commits the offence of insider dealing when he deals in the listed securities of a listed corporation while in possession of information specific about the corporation, its shareholder or officer. The alleged insider dealing activities concerned dealings in the shares of Egana Jewellery & Pearls Limited (*Egana*). The SFC alleges that Mr Ma, by reason of his position in the bank, was involved in advising Egana on a proposed privatisation and knew about it before the announcement to the market. The SFC further alleges that Mr Ma and his associates traded in Egana shares prior to the announcement. Upon conviction by indictment, Mr Ma and his associates are liable to a maximum term of 10 years imprisonment and a maximum fine of HK\$10 million.

Insider Dealing Tribunal – power to fine invalid

Before the Ordinance came into effect in 2003 those suspected of insider dealing activities were brought before the Insider Dealing Tribunal. The maximum penalty that could be levied by the Insider Dealing Tribunal was three times the profit made or loss avoided and a ban on directorship for 5 years. The power to fine has been the subject of a landmark ruling by the Court of Final Appeal (CFA).

The CFA held that the power to impose a penalty for wrongful conduct made the proceedings before the Tribunal criminal in nature, and thus in violation of the Bill of Rights. The direct use of evidence obtained compulsorily, during

investigation, in subsequent proceedings before the Tribunal also violated the protection against the privilege against self-incrimination and the right to silence.

First jail term for manipulator

The court has for the first time imposed an immediate prison sentence for the offence of market manipulation. The message to the market is that the threat of jail for such misconduct is not an idle one.

New approach to misconduct

The SFC has recently for the first time suspended disciplinary sanctions on the basis that the infringing firm undertook to allow its systems and controls to be reviewed independently. This new approach is applauded by the market as a genuine effort by the regulators to improve the compliance culture of the market and encourage self regulation.

Powers to audio record

The court has held that the power of the SFC to record an interview is not limited to written means, that the power extends to audio recording and that audio recording is “*minimum reasonably necessary*” to the interviewing process.

Conclusion

During times when the market is volatile, it is difficult for the regulators to identify suspicious trading activities. Ultimately the effective means to prevent crime and misconduct is through the implementation of adequate and effective internal controls and systems. The SFC has indicated that surprise reviews or audits are more meaningful tests on the internal controls and systems. A compliant culture in the market is crucial to the success of Hong Kong staying as one of the leading international finance centres.

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