

Updating Your Study Manual

Instructions for Inserting Version 1.2, 2003

The followings serve as the instructions for updating **Topic 7: Market Misconduct and Offences** of Study Manual 2 for the Licensing Examination for Securities and Futures Intermediaries. Please be reminded that only the updated sections are provided for downloading. You may replace the relevant sections with this updated version for the study manual you possess.

Instructions:

1. Download and print out the following pages.
 2. **Remove** pages 7-5 to 7-6 and **Insert** new pages 7-5 to 7-6.
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- 1.9 The SFC has the power under section 388 to *prosecute minor cases summarily in a magistrate's court* subject to the overriding power of the Secretary of Justice to prosecute.

Transitional arrangements

- 1.10 Insider dealing that has taken place in whole or in part before the implementation of the SFO (**discovered after** 1 April 2003) will be handled under the Securities (Insider Dealing) Ordinance and before the Insider Dealing Tribunal, which will be preserved to hear such cases.

Market Misconduct Tribunal

- 1.11 The MMT will be chaired by a judge and have two lay members, independent of the SFC, who are not public officers, all of whom will be appointed by the Chief Executive of the HKSAR, who may remove any of them at any time.
- 1.12 The MMT can compel and receive evidence relevant to the hearings. The MMT will issue a report at the end of the hearings containing its determinations and any order imposing civil sanctions. The report will be made public, unless the proceedings were conducted in private, and in this case the Financial Secretary will decide whether to publish the report if he considers it in the public interest to do so. The findings of the MMT may be subject to judicial review and appeal to the Court of Appeal.
- 1.13 An important distinction between civil proceedings before the MMT and criminal prosecutions before the court is the standard of evidence required. The MMT applies a lower standard of proof, which can be summarised in non-legal terms as the 'balance of probabilities' test; whereas in criminal prosecutions, the higher 'beyond reasonable doubt' test is applied.

Sanctions

MMT sanctions

- 1.14 Under the SFO, the MMT may impose a range of civil sanctions, including:
- ordering disgorgement of profits plus compound interest;
 - ordering payment of costs of the MMT and/or SFC investigation expenses;
 - issuing a 'disqualification' order to disqualify a director from being a director of any listed company for a period of up to five years;

- issuing a ‘cold shoulder’ order (i.e. a person is denied access to market facilities) for a period of up to five years;
 - issuing a ‘cease and desist’ order (i.e. an order not to breach any of the market misconduct provisions in the SFO again); and
 - referring a person found to have engaged in market misconduct to a body of which that person is a member for disciplinary action by that body.
- 1.15 The aim of the sanctions listed above is to enable the MMT to deal appropriately and flexibly with those engaged in market misconduct.
- 1.16 Under this civil system model, where the civil standard of proof is adopted, there are better prospects of securing a finding of market misconduct having been committed. The recourse to MMT allows action to be taken where previously the higher criminal burden of proof could not be satisfied.

Criminal sanctions

- 1.17 The criminal sanctions have been set at a maximum of:
- 10 years’ imprisonment and/or HK\$10 million fine on indictment and conviction; and/or
 - three years’ imprisonment and/or HK\$1 million fine on summary conviction.

In addition, any of the MMT sanctions listed above may be imposed.

Private civil actions and ensuing liability

- 1.18 These are provided for under section 281 (Part XIII) and section 305 (Part XV) and include:
- the right of the affected person to sue for financial loss — available even if there are no MMT hearings, criminal actions or convictions involving the target person;
 - the right to use MMT evidence in bringing such an action;
 - injunctions as an available remedy; and
 - any reliefs or impositions under common law.