

HKEx and SFC Disciplinary Actions in March 2022

In March 2022, the Stock Exchange of Hong Kong Limited (the **HKEx**) announced the results of its disciplinary action against former directors of a Chapter 21-listed investment company for misuse of the company's funds, while the Securities and Futures Commission (the **SFC**) published the outcomes of four disciplinary actions. The SFC enforcement actions were instituted against former directors of DBA Telecommunications (Asia) Holdings Limited, Emperor Securities Limited and Emperor Futures Limited, Wonderful Sky Financial Group Holdings Limited and against Mr Kim Bum Suk.

HKEx's Disciplinary Action Against Six Former Directors of National Investments Fund Limited

On 17 March 2022, the HKEx sanctioned six former directors of National Investments Fund Limited (**NIFL**), an investment company listed under Chapter 21 of the HKEx's Main Board Listing Rules. The HKEx publicly censured and imposed prejudice to investors' interests statements against Mr Wong, the company's former Chairman and executive director, and Mr Liu, a former independent non-executive director of NIFL, for their role in the misuse of the company's funds. The HKEx also censured two other former executive directors and two former independent non-executive directors of the company for breach of their duties as directors under HKEx Listing Rule 3.08. Three of these individuals were also directed to attend directors' training. The HKEx's Statement of Disciplinary Action is available [here](#).

Misuse of Company Funds and Breach of HKEx Directors' Duties

As a Chapter 21-listed company, NIFL's primary investment objective is achieving short to medium term (one to five years) capital appreciation by investing in listed and unlisted companies, mainly in Hong Kong and the PRC. The company's board is responsible for approving investment decisions, formulating the company's investment objectives and policies, and supervising the company's investment manager which undertook all investment and management duties subject to the investment policies devised by the board.

NIFL recorded a loss in each of the years 2011 to 2018, with the exception of 2012, and incurred net operating cash outflows from 2012 to 2018 (except 2013), and net investing cash outflows from 2011 to 2017. The company's cash and bank balance dropped from HK\$59 million in 2011 to just HK\$0.1 million in 2018. Between 2011 and 2015, NIFL spent over HK\$61 million acquiring luxury assets, including a HK\$24.5 million yacht, a HK\$20 million diamond, cars worth HK\$8.48 million, furniture, paintings, a club membership and a diamond ring. The acquisitions were made at a time when the company's financial position was significantly deteriorating and were not in line with the company's investment objectives. The acquisitions of the luxury assets were approved by Mr Wong, the company's Chairman and sole substantial shareholder from 2010 to 2018, without convening a board meeting. He also approved the monthly financial updates sent by the company's chief financial officer to its directors. He submitted that these investments were needed for meeting investors, as alternate investment opportunities and to enhance the company's image and reputation.

The company disposed of the yacht in 2014 and the diamond in 2018 incurring losses of HK\$4.5 million and HK\$4 million, respectively. In 2019, NIFL announced a connected transaction involving a disposal of luxury assets to Mr Wong who had resigned a few days prior to the announcement. The company claimed that the disposal was made in settlement of a loan it owed to Mr Wong and it booked a loss of almost HK\$6.2 million in respect of the assets/purported investments. Mr Liu failed to respond to the Listing Division's enquiries and inform the HKEx in writing of his up-to-date contact details.

The other directors approved NIFL's monthly announcements of its net assets value per share required under HKEx Listing Rule 21.12(3). Their approval was given by written resolution following their receipt of monthly financial updates from the chief financial officer which set out, among others, the value of non-current assets, a breakdown of individual asset items, payments made and the total value of other tangible assets.

Directors' Breaches of HKEx Listing Rule Requirements

HKEx Listing Rule 3.08 requires listed company directors to fulfil fiduciary duties and duties of skill, care and diligence to a standard at least commensurate with the standard established by Hong Kong law. They are also required to act honestly and in good faith in the interests of the company as a whole, act for proper purpose, be answerable to the company for the application or misapplication of its assets, and apply the degree of skill, care and diligence as may reasonably be expected of a person of his knowledge and experience and holding his office within the company. Directors also undertake, in their undertaking to the HKEx (as set out at Appendix 5B to the HKEx Listing Rules), to comply to the best of their ability with the HKEx Listing Rules, cooperate with any investigation conducted by the HKEx, and update their contact details in a timely manner.

The HKEx Listing Committee found that Mr Wong breached his fiduciary duties and duties of skill, care and diligence under HKEx Listing Rule 3.08 in approving NIFL's acquisition of luxury assets. He failed to address, or did not care about, their suitability, necessity and benefits to NIFL as a whole, with regard to at least its business nature, its investment objectives and policies, the utilisation of the assets by its employees, the company's financial performance at the material time, the estimated market value of the ring and the paintings, and the benefit the company would derive from the assets. He also breached his undertaking to comply with the HKEx Listing Rules to the best of his ability.

Although the other directors claimed that they were not involved in the acquisition of the various luxury items, they were found to have breached their fiduciary and directors' duties under HKEx Listing Rule 3.08 in failing to take an active interest in NIFL's affairs and to follow up on untoward matters coming to their attention in relation to NIFL's purchase of luxury assets given the company's financial situation. They also breached their undertakings to comply with the HKEx Listing Rules to the best of their ability.

Mr Liu also breached his undertaking to cooperate in any HKEx investigation by failing to respond to the Listing Division's enquiry letter and reminder. He also breached his undertaking to inform the HKEx of his updated contact details.

Given the failures of Mr Wong and Mr Liu to discharge their responsibilities under the HKEx Listing Rules, the HKEx issued a public statement that, had they remained on the company's board, their retention of office would have been prejudicial to the interests of investors.

SFC Obtains Court Order to Disqualify Former Directors of DBA Telecommunications (Asia) Holdings Limited

On 9 March 2022, the SFC obtained disqualification orders from the Court of First Instance (the **CFI**) against DBA Telecommunications (Asia) Holdings Limited's (**DBA**) former executive director, Mr Chan Wai Chuen, and its former independent non-executive director, Mr Yun Lok Ming. The CFI granted the disqualification orders under section 214 of the Securities and Futures Ordinance (the **SFO**). Section 214 allows the SFC to petition the CFI for various types of order specified in the section where the SFC considers that a listed company's business or affairs have been conducted in a manner:

- oppressive to its members or any part of its members;
- involving defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members;
- resulting in its members or any part of its members not being given all the information with respect to its business or affairs that they might reasonably expect; or
- unfairly prejudicial to its members or any part of its members.

The CFI's judgment is available [here](#).

Misstatement of Listed Company's Financial Position

DBA had been listed on the Main Board of the HKEx since May 2006 and was primarily engaged in the manufacture and sale of telecommunications equipment and in payment services for public utilities, such as pre-paid phone cards.

The SFC found that DBA's financial statements for the years ended 31 December 2010 to 2012 significantly misstated its financial position, presenting it as much more favourable than was in fact the case. On 28 March 2013, DBA published its results announcement for the year ended 31 December 2012 on the HKEx website including an express statement that *"These financial statements also comply with the applicable disclosure provisions of the"* HKEx Listing Rules. Read in the light of Listing Rule 13.49 and Appendix 16 of the HKEx Listing Rules, the announcement was found to impliedly represent that the financial statements disclosed had been *"agreed with the auditors"* of the company. This was not true. The company subsequently issued a clarification announcement admitting that the consolidated financial statement set out in the results announcement had not been audited or agreed to by its auditors. The company's board knew that the auditors had not agreed the financial statements at the time the company announced its results. The auditors had made clear that the financial statements purportedly disclosed in the results announcement were not agreed and that further audit procedures had to be carried out before they could complete their audit work.

The announcement breached the requirements of the HKEx Listing Rules, and its provision of information that was false or misleading in a material particular to the SFC also amounted to a criminal offence under section 384 of the SFO. DBA made no attempt to correct or clarify the situation. Mr Chan, who was involved in the publication and preparation process and knew that the financial statements were not agreed by the auditors, was convicted and fined HK\$60,000.

Trading in the company's shares was suspended in June 2013 and DBA was delisted on 30 November 2020.

On 9 March 2022, the Court of First Instance ordered the disqualification of Mr Chan for 6 years and of Mr Yun for 18 months. They were disqualified after admitting that they failed to exercise the degree of skill and care that may reasonably be expected of a person with their knowledge and expertise and had breached the duties they owed to DBA. Mr Chan was found to have acted in a grossly incompetent or negligent manner since the company's financial position was seriously misrepresented; the misstatements resulted in prejudice to the company's shareholders and the investing public; fraud was involved; and the misstatements lasted for at least three years (from 2010 till 2012). He was found responsible for the company's business or affairs having been conducted in the manner described under section 214(b)-(d) of the SFO.

Mr Yun was an independent non-executive director of the company and a member of its audit committee. As a member of the company's audit committee, he was fully aware that the financial statements had not been agreed by the company's auditors. Although, he was not responsible for the publication of the results announcement, he permitted or allowed the company to continue to perpetrate the misrepresentation for almost three months, and failed to cause the company to timely correct or clarify the same between 28 March 2013 and 18 June 2013. He was found to have failed to exercise the degree of skill and care that may reasonably be expected of a person with his knowledge and experience and holding his office or functions within the company and to have breached his fiduciary duties owed to the company. He was found to be responsible for the company's business or affairs having been conducted in the manner described under section 214(b)-(d) of the SFO.

SFC Reprimands and Fines Emperor Securities Limited and Emperor Futures Limited for Breaches of Anti-money Laundering Regulatory Requirements

On 16 March 2022, the SFC reprimanded and fined Emperor Securities Limited (**ESL**) and Emperor Futures Limited (**EFL**) (together, **Emperor**) HK\$5.4 million for failures in complying with anti-money laundering and counter-terrorist financing (**AML/CTF**) regulatory requirements. The action was brought by the SFC under section 194 of the SFO. The SFC found that Emperor had failed to implement adequate and effective policies and procedures to mitigate any risk of money laundering and terrorist financing associated with third party deposits and payments. The SFC's Statement of Disciplinary Action is available [here](#).

The SFC's Findings of Breach of AML/CTF Requirements

The SFC's investigation found that Emperor failed to take all reasonable measures to ensure that proper safeguards existed to mitigate the risks of money laundering and terrorist financing associated with third party deposits and payments between 1 December 2016 and 10 December 2017. In particular, Emperor failed to:

- implement adequate and effective policies and procedures for handling third party fund transfers; and
- conduct appropriate enquiries before approving third party fund transfers.

During the relevant period, ESL processed and approved 732 third party fund transfers (in an aggregate amount of around HK\$1.05 billion) and EFL processed and approved 32 third party fund transfers (amounting in aggregate to around HK\$17.6 million), in each case without conducting sufficient due diligence to validate the relationship between the clients and third parties, and/or the reason for the third-party fund transfers. The transfers involved unverified relationships and/or situations that might have given rise to suspicion under the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (the **AMLO**) and the Guideline on Anti-Money Laundering and Counter-Terrorist Financing (the **AML Guideline**).

The transfers were all made to or from third parties whose relationships with the clients were unverified or difficult to verify, including transfers to spouses and relatives, directors, shareholders, business partners and money lenders, and to friends or colleagues.

The transfers raised red flags because they had no apparent economic or lawful purpose and were outside the ordinary range of services normally requested by clients. The SFC noted that:

- i. the reasons for 25% of the transfers were not provided in the third-party fund transfer request forms and were therefore unknown;
- ii. the reasons for 40% of the transfers were stated to be loan, loan repayment, fund allocation, and business development/arrangement, which were not supported by any relevant documents that could meaningfully explain whether the transfers had any apparent economic or lawful purpose, and why the clients had to use their securities accounts for conducting those transfers to/from the third parties; and
- iii. the reasons for 26% of the transfers were stated to be not being in Hong Kong, not having a Hong Kong bank account, payment of living expenses, and not convenient to get around or handle financial matters, which were not satisfactory explanations for the third-party fund transfers, and/or were out of the ordinary range of services normally requested by a client.

Other examples of unusual transfers involved frequent transfers to or from the same third party. There was also a case of HK\$160 million being transferred among three clients on the same day, from Company A to Client B, and then from Client B to Company C. However, the corporate documents of Company A and Company C provided no information on the transfers, on the alleged relationship, or failed to provide a reason for the transfers. Emperor made no enquiry as to why the transfer from Company A to Company C had to be routed via Client B's account.

Emperor adopted a box-ticking approach and routinely processed third party fund transfers in reliance on the information provided by the clients, without properly scrutinising whether the transfers were reasonable. Emperor's procedures and controls were not effective in enabling their staff to detect red flags and ensure that suspicious transactions were properly monitored and reported to the Joint Financial Intelligence Unit.

It was noted that although Emperor's policy required staff to make telephone confirmations with clients for third-party payments, there were no such requirements for third-party deposits. Further, Emperor failed to provide staff with guidance on the enquiries they should conduct when making telephone confirmations. Emperor staff admitted that they would simply reconfirm the transaction with clients without making further enquiries to verify the information.

While Emperor's policy stated that clients' requests for third-party fund transfers were subject to special approval by management, and that clients needed to provide a justifiable reason for requests, not all versions of the forms required clients to state reasons for the transfers. It was also apparent that staff and management lacked understanding since Emperor approved transfers for which no reasons were given. Even when reasons were stated in the relevant forms, Emperor's policy did not require staff to make further enquiries or require clients to provide any supporting documents to verify the reasons. As a result, Emperor approved transfers involving apparent red flags.

The SFC found that despite Emperor's policy requiring clients to provide justifiable reasons for third-party fund transfers, Emperor in fact approved some third-party transfers for which no reasons were given. In cases where reasons for the transfers were provided, Emperor staff relied on information provided by the clients without making enquiries or requiring them to provide supporting documents for verification. Further, while clients had to explain their relationship with third parties, Emperor's policy did not require them to provide documents to support their explanations.

Breaches of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance

Emperor was found to have breached the requirement to take all reasonable measures to ensure that proper safeguards exist to mitigate the risks of ML/TF associated with third party fund transfers under Section 23 of Schedule 2 to the AMLO and paragraph 2.1 of the AML Guideline. It had also breached Section 5(1) of Schedule 2 to the AMLO and paragraphs 5.1, 5.10 and 5.11 of the AML Guideline by failing to conduct appropriate scrutiny

when processing third party fund transfers and diligently monitor the activities of its clients for mitigating any possible ML/TF risks. Additionally, the SFC found that Emperor had breached General Principle 3 of the Code of Conduct by failing to have and employ effectively the resources and procedures which are needed for the proper performance of its business activities and General Principle 7 and paragraph 12.1 of the Code of Conduct by failing to comply with, and implement and maintain measures appropriate to ensuring compliance with, the requirements under the AMLO and AML Guideline.

The SFC found Emperor to be guilty of misconduct and called its fitness and properness to carry on regulated activities into question.

SFC Publicly Censures Wonderful Sky Financial Group Holdings Limited and Liu Tianni and Publicly Criticises Liu Kiki Ching Tung for Breaching the SFC Code on Share Buy-backs

On 17 March 2022, the Securities and Futures Commission of Hong Kong (**SFC**) publicly censured Wonderful Sky Financial Group Holdings Limited (**Wonderful Sky**) and Liu Tianni (**Chairman Liu**), and publicly criticised Liu Kiki Ching Tung (**Kiki Liu**) for breaching the SFC Code on Share Buy-backs with regards to a buy-back transaction in the shares of the company conducted on 27 March 2020. The SFC's Executive Statement can be found [here](#).

Background Information

The shares of Wonderful Sky had been listed on the Main Board of the HKEx since 2012. The company is an investment holding company and its subsidiaries are principally engaged in the provision of financial public relations services and the organisation and coordination of international roadshow services. Chairman Liu is the Chairman of the board, Chief Executive Officer, Executive Director, and is the controlling shareholder, together with his wife, of the company. His daughter, Kiki Liu, was a deputy general manager of the company at that time.

On 27 March 2020, Wonderful Sky bought back 42.5 million shares at HK\$0.4 per share which represented approximately 3.56% of the then issued share capital of the company. The buy-back was not conducted in the open market in the HKEx but via a block trade, a type of manual trade which is pre-arranged and privately negotiated and executed.

This kind of share buy-back is allowed under Rule 2 of the Code on Share Buy-backs which states that *"[o]ff-market share buybacks must be approved by the Executive before a repurchasing company acquires any shares pursuant to such share buy-back. Such approval will normally be conditional upon the following:*

- a. approval of the proposed off-market share buy-back by at least three-fourths of the votes cast on a poll by disinterested shareholders in attendance in person or by proxy at a general meeting of shareholders duly convened and held to consider the proposed transaction..."*

Breach of the Code on Share Buy-backs

An on-market share buy-back would not normally have implications for being unfair as all shareholders would have access to on-market trading and would therefore be provided with an equal opportunity to participate in the buy-back. In an off-market share buy-back, however, the offer to buy back shares is only available to a limited number of shareholders. The offer is therefore not available to all shareholders and hence shareholders are not treated equally. The off-market buy-back of the shares was therefore in clear breach of Rule 2 as it had not been previously approved by the Takeovers Executive.¹

The SFC publicly censured Wonderful Sky and Chairman Liu, and publicly criticised Kiki Liu on the basis that shareholders of the company were prejudiced and received unequal or unfair treatment from the company and that Chairman Liu was the main decision maker in the off-market share buy-back and Kiki Liu participated in its implementation.

SFC Bans Kim Bum Suk for 27 Months

On 29 March 2022, the SFC banned Mr Kim Bum Suk (**Kim**), a former relevant individual of BNP Paribas Wealth Management and BNP Paribas (together, **BNP**), from re-entering the industry for 27 months. The ban was imposed due to Kim having knowingly circumvented BNP's internal requirements by operating his clients' accounts discretionarily without obtaining their written authorisation under the guise of pre-signed client instruction forms between March 2015 and August 2017. He also created a false appearance that the instructions originated from his clients by arranging for them to pre-sign blank client instruction forms and risk mismatch acknowledgement letters, when he was in fact operating their accounts discretionarily. He also caused the production of false call reports to BNP.

Facts and Regulatory Breaches

Kim was a relevant individual engaged by BNP from 4 December 2014 to 29 March 2018. He is not currently licensed by the SFC or registered with the HKMA. In January 2018, BNP self-reported to the Hong Kong Monetary Authority (**HKMA**) and to the SFC that a client complained about his relationship manager, Kim, due to investment losses incurred on his BNP account. The SFC conducted an investigation and found that Kim, on the basis of his client's verbal authorisation to trade on a discretionary basis on his non-discretionary account, asked his client to pre-sign blank instruction forms in order to trade discretionarily on the client's non-discretionary account for the sake of convenience. He then asked his assistant to complete the pre-signed blank documents with trade details for execution, and produce false call reports stating that he had met or contacted the client to give investment advice and/or take order instructions from the client when he had not. Kim adopted a similar practice with three other clients, asking them to pre-sign blank documents so that he could place trades for their accounts without informing them in advance.

The SFC found that Kim's claims that he had client authorisations to trade for them discretionarily through pre-signed blank instruction forms could not substitute for the authorisations required for operating discretionary accounts under paragraph 7.1 of the SFC Code of Conduct. Paragraph 7.1 of the SFC Code of Conduct provides that a registered person should not effect a transaction for a client unless, before the transaction is effected, the client has specifically authorised the transaction or given written authorisation for the registered person to effect transactions for the client without the client's specific authorisation. Kim also failed to designate his clients' accounts as discretionary accounts and obtain senior management's approval to open them as is required by paragraphs 7.1(c) and (d) of the SFC Code of Conduct. As a result, BNP and its senior management had no knowledge of his discretionary operation of these accounts which deprived BNP of the opportunity to supervise his discretionary trading activities in the client accounts contrary to the clients' best interests. Further, Kim misled BNP into believing that the order instructions given in the pre-signed blank instruction forms came from his clients, when they were made by him acting discretionarily. He also deceived BNP in causing false call reports to be produced to BNP stating that he had met with clients when he had not. Kim's deceptive and dishonest conduct breached General Principle 1 of the SFC Code of Conduct which requires registered persons to act honestly, fairly, and in the best interests of their clients and the integrity of the market, in conducting business activities.

Kim also failed to follow BNP's risk mismatch handling process which required him, before executing the transaction, to explain to the client that the relevant transaction was not suitable for the client's investment profile, and to confirm with the client that he/she had made the investment decision based on his/her own evaluation without BNP's recommendation, understood the risks involved, and wanted to proceed with the trade. Instead, Kim deceived BNP by asking clients to pre-sign risk mismatch acknowledgement letters, creating the false appearance that the clients agreed to trade in products with risks which did not match their investment profiles, contrary to General Principle 1 and paragraph 5.2 of the SFC Code of Conduct.

The SFC concluded that Kim was not fit and proper to be a regulated person since his conduct was deceptive and dishonest, and casted doubt on his character and reliability and his ability to carry on regulated activities competently and honestly.

[1] The Takeovers Executive refers to the Executive Director of the Corporate Finance Division of the SFC or any delegate of the Executive Director

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