

GIR INSIGHT

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2021



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Contents

Cross-border overviews

Forensic Accounting in Cross-border Investigations.....1

Colum Bancroft, Edward Boyle and Takahiro Yamada

AlixPartners

Strengthening Supply Chains amid Trade Wars 11

Frances McLeod, Drew Costello and Weng Yee Ng

Forensic Risk Alliance

The Long Arm of Law Enforcement..... 27

Kyle Wombolt and Jeremy Birch

Herbert Smith Freehills

Country articles

Australia: An Increasingly Global Approach42

Dennis Miralis and Phillip Gibson

Nyman Gibson Miralis

Australia: Handling Internal Investigations58

Natalie Caton, Jonathon Ellis and Gowri Kangeson

DLA Piper

China: A New Normal amid Rising Trade Tensions71

Dora W Wang, Michael Lowell, Peter Witherington and Jessica Tian

Reed Smith

Hong Kong: Email Fraud and the Con Game in Business.....83

Maria Sit, Hadrian Ho, Fei Kwok and Natasha Shum

Dechert

Contents

India..... 97
Aditya Vikram Bhat and Prerak Ved
AZB & Partners

Singapore: Handling Financial Services Investigations..... 109
Joy Tan and Koh Swee Yen
WongPartnership LLP

Preface

Welcome to the *Asia-Pacific Investigations Review 2021*, a *Global Investigations Review* special report. *Global Investigations Review* is the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing, telling them all they need to know about everything that matters.

Throughout the year, the *GIR* editorial team delivers daily news, surveys and features; organises the liveliest events (*GIR Live*), covid-19 allowing; and provides our readers with innovative tools and know-how products. In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than the exigencies of journalism allow.

The *Asia-Pacific Investigations Review 2021*, which you are reading, is part of that series. It contains insight and thought leadership from 25 pre-eminent practitioners from the region. Across nine chapters and 130 pages, it provides a blend of invaluable retrospective, handy primer and crystal ball. All our contributors are vetted for their standing and knowledge before being invited to take part.

Together, these contributors capture and interpret the most substantial recent international investigations developments from the past year, complete with footnotes and relevant statistics. Elsewhere, they focus on a particular topic so you can get up to speed quickly.

This edition covers Australia, China, Hong Kong, India and Singapore in detail; has a pair of overviews pertinent to 2020 (how to reorient supply chains safely and on the particular dangers that these strange times may make manifest); and a third on the evidence-gathering powers of enforcers who want material located outside their jurisdiction.

Among the gems that a close reading will yield is a chart showing the correlation between stock market drops and the discovery of fraud; a review of what foreign courts have said on China's blocking statute; a full taxonomy of Australia's enforcement agencies and how they have reacted to a governmental edict to internationalise; signs that Australia's enforcers are shifting on internal investigation interview notes – they may expect to see copies in the future; the effect of US–China trade tension on enforcers in both countries (they are much more on edge); a helpful road map for responding to email fraud; and much, much more.

If you have any suggestions for future editions, or want to take part in this annual project, we would love to hear from you.

Please write to insight@globalinvestigationsreview.com.

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August 2020

Singapore: Handling Financial Services Investigations

Joy Tan and Koh Swee Yen

WongPartnership LLP

In summary

This article details the various regulatory bodies in Singapore that are empowered to undertake financial services investigations, along with the approach taken and tools used by them to ensure compliance and effective enforcement.

Discussion points

- Singapore's main regulatory bodies for financial regulation and prosecution
- Roles of these regulatory bodies in driving compliance and enforcement
- Tools encouraging voluntary disclosure and self-reporting
- Range of enforcement actions imposed by regulatory bodies
- Considerations for internal investigations
- Singapore's role in international cooperation and enforcement for cross-border investigations

Referenced in this article

- Accounting and Corporate Regulatory Authority (ACRA)
- Commercial Affairs Department (CAD)
- Competition and Consumer Commission of Singapore (CCCS)
- Criminal Procedure Code (CPC)
- Financial Advisers Act (FAA)
- Monetary Authority of Singapore (MAS)
- *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] 136 FCR 357
- *Re RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch)
- Securities and Futures Act (SFA)
- Singapore Exchange Ltd (SGX)
- Singapore Exchange Regulation Pte Ltd (SGX RegCo)
- *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia-Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367
- *The Director of Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006.

In just over four decades, Singapore has established itself as the pre-eminent financial centre for the Asia-Pacific region. Home to over 700 financial institutions (FIs) across the full spectrum of asset classes, Singapore offers a pro-business environment that allows for well-managed risk-taking and innovation, underpinned by high standards of financial regulation and strict supervision. Particularly in the wake of recent scandals affecting the industry that have had far-reaching consequences, Singapore's robust but practical regulatory approach is integral in ensuring that it continues to thrive as a stable, sustainable business and financial hub.

The main regulatory bodies in Singapore empowered to undertake financial services investigations and prosecutions are broadly as follows:

- The Monetary Authority of Singapore (MAS), which acts as the central bank of Singapore. It regulates and supervises the financial services sector, including administering the Securities and Futures Act (SFA), the Financial Advisers Act (FAA), and the Singapore Code on Takeovers and Mergers, as well as enforcement of the civil penalty regime for market misconduct. MAS officers have the power to compel disclosure of the names of persons behind any acquisition or disposal of securities, to inspect and order production of company books, and to examine witnesses.¹
- The Singapore Exchange Ltd (SGX), which plays a dual role as both market regulator and commercial entity. It manages the day-to-day regulation of listed companies,² monitors ongoing compliance with listing requirements and provides support on regulatory issues to listed companies. SGX also investigates suspected infractions and complaints, and is empowered to take remedial and disciplinary action against defaulting listed companies and their directors and officers. The regulatory functions of SGX are carried out by an independent regulatory subsidiary, the Singapore Exchange Regulation Pte Ltd (SGX RegCo), which has a separate board of directors to make more explicit the segregation of the SGX RegCo's regulatory functions from SGX's commercial and operating activities.³
- The Singapore Police Force, which has investigative powers pursuant to Part IV of the Criminal Procedure Code (CPC). By written order, the police may summon any person in Singapore to assist in investigations, failing which they may apply to court for a warrant to secure his or her attendance.⁴ The police have additional powers to issue orders for the production of relevant documents or evidence⁵ and may conduct a search or apply for a search warrant to retrieve such documents or evidence.⁶ Investigations of financial crimes are generally conducted by the Commercial Affairs Department (CAD), a highly specialised division of the Singapore Police Force that investigates a wide spectrum of commercial and financial crimes. Where corruption is involved, investigations will be conducted by the Corrupt Practices Investigations Bureau, an independent agency that reports directly to

1 Under Part IX of the SFA.

2 Including banks and financial institutions listed on the Singapore Exchange.

3 www.sgx.com/wps/wcm/connect/sgx_en/home/highlights/news_releases/singapore_exchange_regulation_appoints_tan_cheng_han_chairman.

4 Section 21 of the CPC.

5 Section 20 of the CPC.

6 Sections 24 and 25 of the CPC.

the Prime Minister's Office. Prosecutions of financial crime are generally conducted by the Financial Crime and Technology Division of the Attorney-General's Chambers.

- The Competition and Consumer Commission of Singapore (CCCS), which promotes competition in the markets by eliminating or controlling practices that potentially hinder competition in Singapore. The CCCS enforces the Competition Act (CA) and takes action against anticompetitive agreements, corporate abuse of dominance in the marketplace and mergers that substantially lessen competition. CCCS officers have wide powers of investigation that include compelling production of specified documents or information and entering premises to carry out inspections, either with or without a warrant.⁷

In 2015, MAS and CAD announced a collaboration to undertake joint investigations into market misconduct offences such as insider trading and market manipulation under Part XII of the SFA. Under this arrangement, both agencies will collaborate from the outset, drawing significant synergies from MAS's role as financial regulator and CAD's financial crime investigation and intelligence capabilities. Further, MAS officers would be gazetted with the same criminal powers of investigation as CAD officers, including powers of search and seizure and the power to order FIs to monitor customer accounts. The SFA also provides for the transfer of information between MAS and CAD. The decision on whether to pursue civil penalty action or criminal prosecution will be made jointly when investigations are concluded.⁸ Joint MAS–CAD investigations have since been the norm for complex and high-profile investigations in Singapore, including the largest market manipulation case in Singapore's history, which saw a multibillion-dollar penny stock crash, and the breaches of money laundering regulations arising from the 1 Malaysia Development Berhad-related fund-flows through Singapore.

In March 2018, MAS and CAD announced that they would be extending the scope of their joint investigations arrangement to cover all offences under the SFA and the FAA, allowing for the consolidation of investigative resources and further improvement of the effectiveness of market misconduct investigations. This arrangement has since resulted in several successful convictions of market misconduct, with imposed penalties ranging from imprisonment terms and prohibition orders. On 2 June 2020, MAS and CAD launched a joint investigation into a well-known publicly listed Singapore company and its directors for suspected false and misleading statements, breaches of disclosure requirements under the SFA, and non-compliance with accounting standards under the Companies Act.⁹ This investigation commenced following a prior review of the company's affairs, conducted jointly by the Accounting and Corporate Regulatory Authority, MAS and SGX, and demonstrates the increasing trend by Singapore regulators to combine efforts in complex financial fraud cases.

7 For more, see the CCCS Guidelines on the Powers of Investigation in Competition Cases 2016; <https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-powers-of-investigation-in-competition-cases-2016.pdf>.

8 MAS: MAS and CAD to jointly investigate market misconduct offences, <https://www.mas.gov.sg/news/media-releases/2015/mas-and-cad-to-jointly-investigate-market-misconduct-offences>.

9 <https://www.mas.gov.sg/news/media-releases/2020/cad-mas-and-acra-commence-joint-investigation-into-hyflux>.

In handling financial services investigations, both internal and external, it is thus more critical than ever to understand the interplay between regulatory agencies, to deal with the issue of whether to self-report or cooperate with investigations, and the application of legal professional privilege.

Self-reporting

There has been a general shift in Singapore's legislative and regulatory framework from a merits-based approach to a disclosure-based regime.¹⁰ For companies listed on the Singapore Exchange, Rule 703 of the Listing Manual (LM) imposes the obligation to make timely disclosure of any information it has concerning itself or any of its subsidiaries or associated companies that is either 'necessary to avoid the establishment of a false market in [its] securities,' or 'that would be likely to materially affect the price or value of its securities.' Non-compliance is a criminal offence if the company withholds disclosure intentionally or recklessly.¹¹ Directors can also be prosecuted in their personal capacity for the acts of their company,¹² provided it can be proved that the non-compliance was committed with their 'consent or connivance,' or is attributable to their neglect.

Self-reporting is required under the broader anti-money laundering and counter-financing of terrorism framework by way of the CPC and the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA). Materially, section 39 of the CDSA imposes an obligation on individuals to file a suspicious transaction report with CAD as soon as is reasonably practicable when they know (or have reasonable grounds to suspect) that any property represents the proceeds of, was used in connection with or is intended to be used in connection with any act that may constitute criminal conduct,¹³ and the information on which the knowledge (or suspicion) is based came to their attention during the course of their trade, profession, business or employment. Failure to comply would attract criminal penalties. Individuals who disclose possible offences are given statutory protection, such as immunity against certain civil proceedings, and anonymity.¹⁴

Self-reporting is also required of FIs and payment services providers under mandatory notices issued by MAS.¹⁵ For example, FIs are required to report to MAS misconduct committed by any of its representatives, including criminal conduct, inappropriate advice or inadequate disclosure of information to clients, failures to satisfy fit and proper criteria, non-compliance

10 Speech by Tharman Shanmugaratnam at the OECD Asian Corporate Governance Roundtable (27 June 2007), <https://www.mas.gov.sg/news/speeches/2007/speech-by-mr-tharman-and-second-minister-for-finance-at-the-oecd2007>.

11 Section 203 of the SFA. Although negligent non-disclosure is not a criminal offence under section 203(3) of the SFA, civil liability can still arise.

12 Section 331 of the SFA.

13 That is, committing a serious offence, as defined in the Second Schedule to the CDSA, which includes corporate fraud offences such as criminal breach of trust and forgery as well as corruption.

14 Sections 39(6), 40 and 40A of the CDSA.

15 These notices are issued by MAS pursuant to section 101 of the SFA, and section 102 of the Payment Services Act (PSA), which came into force on 28 January 2020. Contravention is a criminal offence: section 101(3) of the SFA; section 102(5) of the PSA.

with regulatory requirements, and serious breaches of internal policy or codes of conduct.¹⁶ FIs are also required to undertake internal investigations into their representatives' conduct and to submit an annual nil return where there has been no instance of reportable misconduct in the course of the financial year. A failure to comply would attract criminal penalties.¹⁷ FIs that are licensed financial advisers are required to report suspicious activities and incidents of fraud that may be material to the soundness, safety or reputation of the licensed financial adviser.¹⁸ In line with the industry's current focus on technology risk management, FIs must immediately report serious IT security breaches and system malfunctions, and within 14 days, submit a root cause and impact analysis report to MAS.¹⁹ Recently, MAS published a consultation paper to seek feedback on proposed revisions to misconduct reporting requirements and mandatory reference checks.²⁰ While these changes have not taken effect, they are reflective of MAS's commitment to fine-tuning and improving self-reporting standards.

In the realm of competition law, section 66 of the CA was amended in 2005 to enable individuals to disclose self-incriminating documents or information when seeking leniency from the CCCS.²¹ This revision, intended to facilitate the CCCS's investigation work, clarifies that, although self-incriminating information can still be used as evidence against the person disclosing the information in civil and criminal prosecutions for ancillary offences under the CA, it cannot be used as evidence to prove any other criminal offences. To encourage self-reporting, the CCCS maintains a leniency programme for companies coming forward with information on cartel activity cases, where total immunity or a substantial reduction in financial penalties may be granted.²²

Internal investigations

FIs may be prompted to launch internal investigations when faced with complaints from employees or customers, concerns raised by independent directors or their audit committee, or pursuant to incidents of employee misconduct, suspicious transactions, fraud or technology breaches, in connection with the self-reporting requirements referenced above. Additionally, in cases involving certain types of misconduct by their representatives, MAS expects FIs to

16 Notice SFA04-N11, Notice FAA-N14.

17 Notice FAA-N14.

18 Notice FAA-N17.

19 Notice CMG-N02.

20 <https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Consultation-Papers/Consultation-Paper-on-Revisions-to-Misconduct-Reporting-Requirements-and-Proposals-to-Mandate-Reference-Checks-for-Representatives.pdf>.

21 Second Reading Speech by Lim Hng Kiang on the Competition (Amendment) Bill 2005, http://www.nas.gov.sg/archivesonline/data/pdfdoc/20051121_1001.pdf. The amended section 66 was deemed a more comprehensive formulation based on section 153 of the Securities and Futures Act, and aligned with the common law and other legislation such as the Media Development Authority of Singapore Act and the Gas Act.

22 CCS Guidelines on lenient treatment for undertakings coming forward with information on cartel activity cases 2016, <https://www.ccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-lenient-treatment-for-undertakings-coming-forward-with-information-on-cartel-activity-2016.pdf>.

conduct an internal investigation and keep proper records of, among other things, interviews with relevant parties, documentary evidence of the alleged misconduct, and the investigator's assessment and recommendation.²³

Typical internal investigations involve conducting interviews with relevant employees, management and directors, collection and forensic review of documents, emails, telephone records and electronic device transmissions, and tracing of the proceeds of fraud. External third parties, such as lawyers, accountants, forensic investigators and computer experts, are often asked to assist in the investigations.

From the FI's perspective, it is important to keep in mind its legal disclosure obligations during the course of the investigations (eg, under the LM or to its directors and shareholders) as well as its reporting obligations under law (eg, under the CPC or the CDSA).

Depending on the seriousness and nature of the matter, the individuals being interviewed or whose conduct is being investigated may retain their own lawyers. If there are reasonable grounds to suspect that the investigations may lead to prosecutions or civil action, it is advisable to consider retaining lawyers at an earlier stage so that the statements given during the internal investigations may be considered with the benefit of legal advice.

Care must be taken that there is no breach of banking secrecy under section 47 of the Banking Act or of personal data under the Personal Data Protection Act 2012 in the course of the investigation. One way to address the issue is to implement appropriate anonymising of any customer or personal information before it is referred to by the FI concerned.

A key question arises as to the extent to which legal professional privilege²⁴ can be maintained during internal investigations in Singapore. In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia-Pacific Breweries (Singapore) Pte Ltd (Skandinaviska)*,²⁵ the company Asia-Pacific Breweries (Singapore) (APBS) was informed by CAD that its finance manager had used bank accounts fraudulently opened in its name to borrow money for his personal use. The board of directors constituted a special committee comprising external auditors and lawyers to investigate and review the company's internal control systems and procedures. Although draft reports were prepared by the external auditors, a final report was never issued. The Court of Appeal was then faced with the issue of whether the draft reports submitted by the auditors to APBS were protected by legal professional privilege.

Legal advice privilege

The Court of Appeal accepted that applying the English position at law, communications to and from a third party were not protected by legal advice privilege and the auditors would not be regarded as agents of communication for the purposes of legal advice privilege. The Court, however, strongly endorsed the decision of the Australian Federal Court in *Pratt Holdings Pty*

23 Notice SFA04-N11, Notice FAA-N14.

24 Legal professional privilege covers both legal advice privilege (all confidential communications between a client and his or her lawyer) and litigation privilege (all communications between a client and his or her lawyer and other third parties that were made for the predominant purpose of litigation).

25 [2007] 2 SLR(R) 367.

Ltd v Commissioner of Taxation,²⁶ which suggested a broader and more flexible approach that was ‘principled, logically coherent and yet practical’. In *Pratt Holdings*, communications from third parties were accorded legal advice privilege by focusing on the nature of the function the third party performed, rather than the nature of the third party’s legal relationship with the party that engaged it. Such an approach accords with modern commercial reality, with parties often engaging the assistance of third-party experts who are not lawyers, and is particularly apposite in cases of large commercial fraud where the victims need expert advice, not only to protect themselves from future fraud, but also to determine the rights and liabilities in connection with the fraud. It would appear to follow from this that legal advice privilege applied to any such legal advice embedded in, or that formed an integral part of, the draft reports, even though the draft reports were drafted by the third-party auditors and forwarded directly to APBS by those auditors. The Court of Appeal, however, did not decide on whether the draft auditors’ report was subject to legal advice privilege, as this issue was not argued by APBS’s counsel.

In this regard, it should be noted that, although the English case *Re RBS Rights Issue Litigation*²⁷ reaffirmed the English position that communications to and from a third party were not protected by legal advice privilege (as opposed to adopting the more flexible approach set out in *Pratt Holdings*), the English Court of Appeal has since indicated in *The Director of Serious Fraud Office v Eurasian Natural Resources Corporation Ltd (SFO v ENRC 2)* that it would have, as a matter of principle, been in favour of departing from such a narrow approach. To elaborate, *In Re RBS Rights Issue Litigation*, the key issue that arose was whether legal advice privilege would cover the notes of interview with current and former employees of a corporation as part of an investigation by both in-house and external lawyers. The English High Court held that although the interview notes recorded direct communications with the corporation’s lawyers, they comprised information gathering from current or former employees preparatory to and for the purpose of enabling the corporation, through its directors or other persons authorised to do so on its behalf, to seek and receive legal advice. As such, legal advice privilege could not be claimed by employees or ex-employees of the corporation (ie, the client), who had merely been authorised to speak to the client’s lawyers to provide information with regard to the investigation, as opposed to being authorised to seek and receive legal advice. In contrast, the English Court of Appeal in *SFO v ENRC 2* has since held that, had it been open to do so, it would have departed from the position that employees do not fall under the definition of a ‘client’ and are not protected by legal professional privilege. The Court of Appeal accepted the evolving nature of large corporations; where legal advice is often sought, and corporations may therefore require their employees with relevant first-hand knowledge to obtain such advice from lawyers under the protection of legal advice privilege. That said, the Court of Appeal eventually held that this was a matter for the English Supreme Court to decide and made no finding of the same.

It remains to be seen whether the courts would choose to adopt the more conservative approach in subsequent cases concerning legal advice privilege with third parties. However, given the fact that the Court of Appeal had, in *Skandinaviska*, strongly endorsed the broader

26 [2004] 136 FCR 357.

27 [2016] EWHC 3161 (Ch).

and more flexible approach set out in *Pratt Holdings*, it is possible that the Singapore courts would, in determining whether legal advice privilege exists, choose to focus on the nature of the function the third party performed, rather than the nature of the legal relationship between the parties.

Litigation privilege

The Court of Appeal in *Skandinaviska* found that as the dominant purpose of the draft reports at the time they were created was in aid of litigation, litigation privilege applied to them. This decision was influenced by the fact that APBS had appointed external auditors and a legal adviser to discover and quantify the financial impact of the fraud and to determine APBS's potential liability with regard to the foreign banks. As litigation was imminent²⁸ and 'foremost in the mind' of APBS, such communications were, therefore, protected by litigation privilege.

In light of this decision, it appears that FIs may be able to maintain legal professional privilege over investigation reports, statements and drafts that are created during internal investigations if there is a reasonable prospect of litigation, and if the advice is sought for the main purpose of litigation or contemplated litigation. The benefit of this is significant: various statutes recognise that powers of investigation that require disclosure of documents and information do not extend to any communications protected by legal professional privilege.²⁹ The Singapore High Court in *Yap Sing Yee v MCST No. 1267*³⁰ also held that statutes will not be regarded to have revoked legal advice privilege unless this is expressly provided for or abrogated by necessary implication.

In 2012, the Evidence (Amendment) Bill was passed, extending legal professional privilege to communications with in-house counsel made for the dominant purpose of seeking legal advice.³¹ The Singapore Court of Appeal in *ARX v Comptroller of Income Tax* [2016] 5 SLR 590³² has also since clarified that such privilege will extend to communications that existed prior to the Evidence (Amendment) Bill. There are, however, exceptions to the claim of privilege over documents and information. Section 128(2) of the Evidence Act (EA) expressly provides that legal advice privilege will not apply to 'any communications made in furtherance of any illegal purpose' and 'any fact observed by any advocate or solicitor in the course of his [or her] employment as such showing that any crime or fraud has been committed since the commencement of his [or her] employment'. In *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd*,³³ it was held that despite the literal wording of section 131 of the EA, which suggests

28 In the recent decision of the Singapore High Court in *Comptroller of Income Tax v ARW and another* [2017] SGHC 16, the Court noted at [37] that where there is a high probability or likelihood of litigation, litigation is likely to be made out to be dominant purpose since a party would be expected to take steps to prepare for the probable and the likely.

29 See, for instance, section 66(3) of the Competition Act and sections 30(9)(a), 34(5) of the CDSA.

30 [2011] 2 SLR 998.

31 Evidence (Amendment) Act 2012, No. 4 of 2012.

32 [2016] 5 SLR 590.

33 [2010] 1 SLR 833.

that litigation privilege is an absolute privilege, it is similarly subject to common law ‘fraud and crime’ exceptions. Where these exceptions apply, legal professional privilege can no longer be successfully sustained.

To not inadvertently waive privilege, particularly under circumstances where the reports from internal investigations are required to be submitted to the regulators, mandate letters and strict communication protocols should be implemented at the commencement of any investigation. Should the investigation include a cross-border element, it is critical to establish at the outset the extent to which legal professional privilege may be effective given that not all jurisdictions recognise legal professional privilege, and even for those that do, there are differences in what types of communications are regarded as being as privileged. For example, as it appears that the English courts have taken a narrower approach in relation to establishing the identity of a client,³⁴ and accordingly, the extent of privilege, corporations should be cognisant of this throughout the investigations and ensure that their actions and directions fall within the extent of such privilege.

Cooperation

FIs and their directors, officers and employees in Singapore are obliged to cooperate with regulatory investigations by the aforementioned authorities – the failure to attend police interviews, produce a document or electronic record, or give information to a public servant when one is legally bound to, or the giving of false statements, are offences under Chapters X and XI of the Penal Code. Further, the failure to appear before MAS and to render all reasonable assistance in connection with investigations, and the failure to produce accounts for inspection, are offences under Part IX of the SFA.

FIs under investigation would be entitled to rely on legal professional privilege and the privilege against self-incrimination. However, in many instances, they may choose to waive privilege and turn over privileged material to regulators, on the basis that full cooperation would be favourably regarded, particularly in instances where regulators may have the discretion to proceed via a civil penalty or via criminal prosecution. Such a waiver of privilege in relation to the regulators may give rise to the question of whether the waiver may be limited, and whether privilege may still be maintained in other contexts. For instance, in relation to third parties, the UK Court of Appeal has held that a litigant who made clear that waiver was being made only for certain limited purposes was nevertheless able to maintain privilege under circumstances outside those purposes.³⁵ The Singapore High Court considered this decision in making the ruling that as a particular document had been disclosed only for the purposes of a specific application and that legal privilege had not otherwise been waived, any waiver of legal

34 The English Court of Appeal in *SFO v ENRC 2* recently affirmed the High Court’s decision decided that the legal advice privilege did not protect communications from a corporation’s employees to its investigating external counsel for the purposes of enabling the corporation to obtain legal advice regarding a potential investigation by the Serious Fraud Office; this decision was made on the basis that the definition of ‘client’ did not include such employees.

35 See, eg, *Berezovsky v Hine & Ors* [2011] EWCA Civ 1089.

privilege was limited to the specific purpose of the application.³⁶ It remains to be seen to what extent Singapore courts will follow this line of reasoning in other contexts, although it would be prudent to seek to expressly limit waiver in any event.

The Criminal Justice Reform Act 2018 introduced deferred prosecution agreements (DPAs) into the CPC.³⁷ Although the viability and usefulness of DPAs has yet to be tested in the Singapore investigations scene, it is clear that the DPA is intended to incentivise and encourage a higher level of cooperation with the authorities, which would hopefully assist in a decrease in commission of future offences.

With such an option available, companies are encouraged to cooperate with the public prosecutor and, in exchange of amnesty being granted, agree to fulfil certain requirements and specific conditions. A key condition that may be imposed in a DPA would be to require the company to cooperate in any investigation relating to the alleged offence, resulting in increased cooperation and a decrease in commission of the alleged offences. In addition, a company may agree to pay a financial penalty, compensate victims of the alleged offence, implement a robust compliance programme, or make changes to an existing compliance programme that will reduce the risk of a recurrence of any conduct prohibited by the DPA.

In terms of the level of cooperation that may be required to enter into an ideal DPA, companies may take guidance from *SFO v Rolls-Royce Plc*. The UK's Serious Fraud Office (SFO) had entered into a DPA with Rolls-Royce and agreed to grant Rolls-Royce amnesty for criminal conduct involving bribery and corruption, in exchange for several terms and conditions (such as a financial penalty and the requirement for Rolls-Royce to cooperate fully and honestly with the SFO in relation to any prosecution brought by the SFO in respect of the alleged offences). Crucially, the SFO observed that its decision to offer the DPA to Rolls-Royce was heavily influenced by the fact that Rolls-Royce had fully cooperated with the SFO during its investigations and opened its doors, providing the SFO with copies of key documents and access to all relevant emails. Rolls-Royce had also waived legal professional privilege in respect of certain documents or communications, which was viewed as a key indicator of whether a company was genuinely cooperating and deserving of a DPA.

Enforcement

In terms of enforcement, corporate entities can be subject to criminal and civil liability for their employees' misconduct. A company may be held liable for its employee's conduct if the latter is considered the 'directing mind and will' of the company. Further, depending on the nature of market misconduct,³⁸ companies can be held liable under the SFA for market misconduct

³⁶ See, *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597.

³⁷ With effect from 31 October 2018.

³⁸ For example, a company could be liable for insider trading pursuant to sections 218 and 219 of the SFA read with section 226(1) of the SFA, although it has a defence under section 226(2) of the SFA.

committed by employees if the market misconduct was committed with the companies' consent or connivance,³⁹ or attributable to the companies' negligence in failing to prevent or detect the employees' market misconduct.⁴⁰

In addition to commencing criminal and civil penalty enforcement actions in instances of misconduct,⁴¹ MAS has also used its wider enforcement and regulatory powers in more innovative ways. For instance, when the London Inter-bank Offered Rate (LIBOR) rate-fixing probe arising out of the global financial crisis was initiated worldwide, MAS was among the first regulators in Asia to request that banks in Singapore conduct an internal review of their rate-setting processes, mainly in relation to the Singapore Interbank Offered Rate (SIBOR) and Singapore Swap Offer Rate (SOR), and to report their findings.⁴²

Investigations commenced in July 2012. In September 2012, MAS extended the scope of the review to non-deliverable forwards, a form of foreign exchange (FX) derivative. Targeted FIs were asked to complete their internal investigations and submit their reports to MAS within a stated time.

In June 2013, MAS issued a statement setting out the banks' obligations in respect of the reviews of rate-setting processes, ordering banks to ring-fence as much as S\$12 billion at zero interest pending steps to improve internal controls – instead of commencing traditional enforcement action focused on fines and punishment, as was the approach taken by many other regulatory bodies in response to the LIBOR scandal. The onus was placed on banks to enhance controls around rate setting, to further review and immediately report any irregularities uncovered and to take appropriate disciplinary action against the staff involved. Certain FIs took disciplinary action against defaulting employees, and separate civil actions for wrongful termination were commenced by several employees against the banks concerned.

MAS's response to the LIBOR scandal illustrated an innovative, robust, but pro-business enforcement approach in the area of financial rate manipulation. MAS has been working with the Singapore Foreign Exchange Markets Committee to revamp the SIBOR-setting process and to more robustly regulate activities related to the setting of SIBOR, SOR and FX rates. This attitude should rightly inform the approach of FIs to internal investigations, and their communications with MAS.

39 Section 236B of the SFA; see also MAS: Explanatory Brief on amendments to the SFA 2008, <https://www.mas.gov.sg/news/speeches/2008/explanatory-brief-sfa-amendment-bill-2008-and-faa-amendment-bill-2008> and MAS: Explanatory Brief on amendments to the SFA 2012, <https://www.mas.gov.sg/news/speeches/2012/explanatory-brief>.

40 Section 236C of the SFA.

41 Recently, MAS imposed a civil penalty, for the first time, for breaches relating to disclosure requirements under Part VII of the SFA. The civil penalty had been imposed on an individual for providing false information vis-à-vis his shareholding (<https://www.mas.gov.sg/regulation/enforcement/enforcement-actions/first-civil-penalty-enforcement-action-for-failure-to-disclose-shareholding-interests>).

42 The SIBOR and SOR are key benchmark rates, typically linked to mortgage loans in Singapore. Like their London counterpart, the SIBOR is set by banks submitting rates at which they anticipate borrowing from other banks, which are then ranked by the Association of Banks in Singapore. The top and bottom 25 per cent are trimmed off, and the average of the remaining quotes forms the daily SIBOR rate. The SOR is set the same way, except that it represents the average cost of funds used by local banks for commercial lending.

MAS is also seeking to use creative methods to increase its efficiency regarding its enforcement approach. In 2019, it announced the adoption of a new intelligent tool, which would assist its enforcement officers in triaging cases for investigation⁴³ by automating the computation of key metrics used for key analysis and, crucially, predicting the likelihood that an expert will opine that market manipulation has occurred. This provides analysis and predictions during early stages of investigations, which in turn assists MAS in reaching its findings expeditiously.

SGX has, since the start of 2018, issued a series of compliance orders that signal a stricter and more interventionist approach to the enforcement of rules governing Singapore-listed companies, including in relation to companies' individual executives. This included issuing compliance notices requiring the cessation of employment of two top executives of a SGX-listed company,⁴⁴ and barring them from holding executive posts for three years for breach of Rule 210(5) of the Listing Rules,⁴⁵ and requiring a company to convene another extraordinary general meeting for delisting plan approval together with an updated delisting circular.⁴⁶

Since 2019, SGX has also armed itself with greater supervisory powers for the purpose of monitoring risky and troubled listed companies via their audit function. In this regard, SGX has indicated that it will be taking a proactive stance in helping companies manage the scope of their audit and the key audit matters they need to disclose. Such supervisory powers include requiring a company's special auditor to report directly or even exclusively to SGX where appropriate, and possibly the power to require the appointment of a second auditor (on top of the company's existing statutory auditor) in exceptional circumstances. In addition, SGX has also indicated that it will be taking a more active role in protecting investor interests through greater enforcement protection and whistleblower protection. In 2020, this approach was expanded to include the issuance of a Best Practice Guide for Singapore lawyers in relation to submissions made to the SGX.⁴⁷

43 Project Apollo, detailed in MAS's Enforcement Report for July 2017 to December 2018 (<https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Monographs-and-Information-Papers/MAS-Enforcement-Report.pdf>).

44 SGX's notice of compliance dated 2 April 2018 to Midas Holdings Limited; <https://www.businesstimes.com.sg/companies-markets/sgx-calls-for-immediate-resignation-of-midas-holdings-executives>.

45 Rule 201(5) requires directors and executives to have the appropriate experience and expertise to manage a company's business.

46 Vard Holdings; <https://www.businesstimes.com.sg/companies-markets/sgx-orders-var-d-to-hold-new-egm>.

47 The SGX RegCo has also recognised that, besides SGX-listed companies and their senior managers, each member of the market community has a role to play in ensuring a well-governed market and the protection of investors' interests. In that regard, to guide Singapore lawyers in upholding the legal framework of the corporate finance market and its applicable regulations, the SGX RegCo teamed up with the Law Society of Singapore to issue a best practices guide for submissions made to SGX RegCo by Singapore lawyers on behalf of listed companies. The guide sets out the SGX RegCo's expectations for Singapore lawyers in the course of regulatory submissions and seeks to ensure that the conduct of Singapore lawyers fulfils the statutory, common law, and ethical standards and duties expected of them, which include, among other things, a duty to report suspicious transactions. The guide is available online at: <https://api2.sgx.com/sites/default/files/2020-06/SGX%20RegCo%20-%20LawSoc%20Best%20Practices%20Guide%20for%20Singapore%20Lawyers.pdf>.

These recent moves signal SGX's intention to not only strengthen individual accountability of senior managers, but also demonstrates its enhanced interventionist approach to maintain best practices, identify earlier warning signs and assist high-risk companies before they are in actual breach of the applicable rules.

International cooperation

Singapore has adopted various international conventions into its domestic law, for example, the CDSA, the Terrorism (Suppression of Financing) Act, the Extradition Act and the Extradition (Commonwealth Countries) Declaration, the United Nations Act, and the Mutual Assistance in Criminal Matters Act, which facilitate the provision and obtaining, by Singapore, of international assistance in criminal matters, including the provision and obtaining of evidence, making arrangements for parties to give evidence or assist in criminal investigations and in the recovery, forfeiture or confiscation of property.

Singapore is also party to the Treaty on Mutual Legal Assistance in Criminal Matters among like-minded ASEAN member countries, which provides a process through which countries in the region can request and give assistance to each other in the collection of evidence for criminal investigations and prosecutions.

The regulatory authorities in Singapore also work with other foreign regulatory bodies on initiatives. MAS is a signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, in connection with which MAS is empowered under the SFA to provide assistance to its foreign counterparts in foreign investigative and enforcement actions. For instance, under section 172(1) of the SFA, MAS may, in relation to a request by a foreign regulatory authority for assistance, transmit such information in its possession or order any party to furnish MAS with that information. MAS may also order any person to furnish such information directly to the foreign regulatory authority where there is an ongoing investigation or enforcement by the foreign authority.⁴⁸

Conclusions and outlook

The financial services industry is experiencing a period of unprecedented regulatory investigation from different agencies worldwide. To maintain its edge as a financial hub, the Singapore regulatory authorities have adopted a flexible, robust approach to financial investigations, balancing international cooperation between states and working more closely with foreign authorities to maintain a practical, solutions-oriented attitude toward enforcement and self-regulation. This balance should also shape the approach of all FIs undertaking internal and external regulatory investigations, either wholly or partially in Singapore.

⁴⁸ Section 172(1)(c) read with section 172(2) of the SFA.



Joy Tan
WongPartnership LLP

Joy Tan is the joint head of the commercial and corporate disputes practice, the corporate governance and compliance practice and the financial services regulatory practice. Her main practice areas are banking, corporate and commercial dispute resolution, and contentious investigations. She also regularly advises on corporate governance and financial services regulatory matters under the Companies Act, Securities and Futures Act and other regulatory statutes, including in relation to corporate fraud, anti-money laundering issues and market misconduct.

Ms Tan has represented corporations and shareholders in disputes relating to fraud, minority oppression, corporate transactions and share valuations. She also regularly advises on corporate governance and financial services regulatory matters under the Companies Act, the Securities and Futures Act and other regulatory statutes, including in relation to corporate fraud, anti-money laundering and market misconduct.

Recognised among the best in her field, Ms Tan was named as one of the top 30 corporate governance lawyers in Singapore by *Expert Guides: Best of the Best* 2018. She was also awarded 'Best in Corporate Governance' at the Euromoney Asia Women in Business Law Awards 2014, which celebrates the achievements of the best female lawyers across the region. In the 2016 edition of *Chambers Asia-Pacific – Asia Pacific's Leading Lawyers for Business*, Ms Tan is commended as an 'experienced litigator', and has been identified as a leading lawyer in the area of regulatory banking since 2015, with clients noting that 'she is extremely efficient and extremely intelligent, and I feel confident in the advice I get from her'. Ms Tan is recommended in *The Legal 500: Asia Pacific – The Client's Guide to the Asia Pacific Legal Profession* for the area of Financial Services Regulatory (2017 and 2018) in Singapore. She is also recognised as a leading lawyer for International Arbitration in *Best Lawyers* 2017 and identified as one of the 'Local Disputes Stars' in *Benchmark Asia Pacific – The Definitive Guide to the Leading Disputes Firms and Lawyers in the Region* 2014.



Koh Swee Yen
WongPartnership LLP

Koh Swee Yen is a partner in the commercial and corporate disputes and international arbitration practices. She has an active practice as counsel, with a particular focus on complex, high-value and cross-border disputes across a wide spectrum of matters from commercial, energy, international sales, trade to investment. She regularly appears before the High Court and Court of Appeal and in international arbitrations under the major institutional rules, including ICSID, ICC, ICDR, LCIA, SIAC and UNCITRAL.

Her practice encompasses a wide spectrum of matters from corporate and commercial to banking, fraud, trust, energy, international sales, trade and investment disputes. She also regularly advises on corporate governance, compliance, regulatory and risk management issues and employment matters.

Swee Yen is highly recommended for her expertise in resolving complex international disputes, and is named in various legal publications, including *The Legal 500*, *Chambers Asia-Pacific*, *Chambers Global* and *Benchmark Litigation Asia-Pacific*. Most recently, she has been listed as one of the world's leading arbitration practitioners in *Who's Who Legal: Arbitration 2020* and as a recognised expert in *Commercial Arbitration in Experts Guides 2019: The World's Finest Lawyers Chosen By Their Peers*.

Described as being 'in a league of her own', 'extremely talented', 'incredibly hard-working and persistent' with a 'very deep understanding of the law' and 'razor-sharp' in her advocacy by *Chambers Global*, sources also praise her for a 'keen sense of strategy' and 'great ability to quickly grasp her clients' perspective and understand their commercial issues'. *The Legal 500* says that Swee Yen is the 'go-to disputes lawyer in Singapore', with an 'ability to zone right in on the issues with precision and confidence', and is 'brilliant, decisive and fearless'. Clients applaud Swee Yen as someone who 'always brings her A-game to everything she does and someone you want in your corner in a life or death situation'.



WongPartnership is a market leader in Singapore, known for the provision of high-quality legal services that extend beyond the shores of Singapore with a particular focus on the Asia-Pacific region. We offer clients access to lawyers in our offices in Singapore, Beijing, Shanghai and Yangon, and in Abu Dhabi, Dubai, Jakarta, Kuala Lumpur and Manila through our associate firms.

The firm has a full-service compliance, investigations and enforcement practice across all major regulated industry sectors in Singapore, with a focus on financial services, healthcare and transport, trade regulation, and health, safety and the environment. Our teams provide compliance advice, regulatory due diligence and strategic advice on the impact of governmental regulations on businesses and corporate conduct. We are also actively involved in domestic and cross-border government-led and internal investigations into civil, criminal and regulatory misconduct, and represent corporate and individual defendants in enforcement actions, from fraud to market misconduct and insider trading to corruption and white-collar crime.

In the antitrust sector, the team has been involved in all major multi-jurisdictional cartel infringement decisions by the Competition Commission of Singapore. We have also acted in numerous investigations for cartel activity and abuse of dominance, providing customised and effective compliance training programmes.

In the corporate and financial services area, the team is active in the full range of regulatory investigations with regulators such as the Singapore Exchange, the Commercial Affairs Department, the Corrupt Practices Investigations Bureau and the Monetary Authority of Singapore. Recent enforcement matters into market-rigging, insider trading and fraud have also involved regulators from other markets and jurisdictions, including Japan, France, the British Virgin Islands, the Netherlands, the United Kingdom and the United States.

12 Marina Boulevard, Level 28
Marina Bay Financial Centre, Tower 3
Singapore 018982
Tel: +65 6416 8000
Fax: +65 6532 5711/5722

Joy Tan
joy.tan@wongpartnership.com

Koh Swee Yen
sweeyen.koh@wongpartnership.com

www.wongpartnership.com

The *Asia-Pacific Investigations Review 2021* contains insight and thought leadership from 25 pre-eminent practitioners from the region. Across nine chapters, spanning around 100 pages, it provides an invaluable retrospective and primer.

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