TAKEOVERS AND MERGERS PANEL

Panel Decision

Disciplinary Proceedings in relation to dealings in the shares of Tack Hsin Holdings Limited pursuant to section 12.1 of the Introduction to the Hong Kong Code on Takeovers and Mergers ("**Code**")[1]

Tack Hsin Holdings Limited ("**Tack Hsin**")

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1. The Panel met on Tuesday, 5 March 2002, to consider disciplinary proceedings against Asia Financial (Assets Management) Limited ("**AFAM**") and Mr. Anthony Wong Man Shek ("**Mr. Wong**") collectively referred to as the "**Parties**" pursuant to section 12 of the Introduction to the Code.

Salient Facts

2. AFAM is an investment management company registered with the Securities and Futures Commission ("**SFC**") as an investment adviser and commodity trading adviser. The shareholders of AFAM are Asia Financial Holdings Limited ("**AFH**") (70.29%) and Mr. Wong (29.71%). AFH is an investment holding company listed on The Stock Exchange of Hong Kong Limited. The principal activities of its subsidiaries comprise the provision of banking, insurance and investment services.
3. AFAM acquired Tack Hsin Shares for seven Investment Companies whose funds were managed by AFAM on a fully discretionary basis (collectively referred to as the "**Investment Companies**"). The Investment Companies are:

   - Asia Dynamic Hedge Fund Limited
   - Asian Warrants Hedge Fund Limited
   - Controlled-Risk Asian Equity Derivatives Fund Limited ("**Controlled-Risk**")
   - Diamond Diversified I Trading Company II ("**Diamond Diversified**")
   - Glenwyne V Limited
   - Global Dynamic Fund Limited
   - Global Diversified Trading Limited

4. Mr. Wong was the Chief Executive and a director of AFAM. He made the investment decisions during the relevant period. He is registered as an investment adviser director and commodity dealer with the SFC. The other directors of AFAM during the relevant period were the Honourable Bernard Chan and Mr. Lo King Yan, Philip

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[1] The word "**Code**" used in this decision means the Code effective immediately prior to 19 October 2001.

("**Mr. Lo**"). Mr. Lo is registered with the SFC as an investment adviser director, commodity dealer and securities dealing director.

5. From August 2000 to 31 January 2001, the aggregate number of shares held in Tack Hsin by the Investment Companies increased from 57,016,000 (representing 19.0% of the total issued share capital of Tack Hsin) to 105,200,000 (representing **35.06%** of the total issued share capital of Tack Hsin). AFAM went on to make further acquisitions of Tack Hsin Shares on behalf of the Investment Companies so that by 31 March 2001, the total aggregate shareholding of the Investment Companies in Tack Hsin amounted to **41.94%** of the total issued share capital of Tack Hsin. The shares were acquired at prices between HK$1.04 and HK$1.87 per share.

6. AFAM is no longer the investment manager of or investment adviser to any of the Investment Companies, such arrangements having been terminated between 5 April 2001 and 1 October 2001. During the course of the meeting, the Panel was informed by Mr. Lo that Controlled-Risk had disposed of all its shares in Tack Hsin. Other than this disposal, the Panel is not aware of any disposals of Tack Hsin Shares by the Investment Companies since the Executive commenced enquiries.

7. On 30 January 2002, the Executive commenced disciplinary proceedings against AFAM and Mr. Wong pursuant to section 12 of the Introduction to the Code. On the same date, the Executive circulated a paper setting out its case ("**Panel Paper**") to AFAM and Mr. Wong inviting them to make submissions.

The Executive's case

8. The Executive takes the view that the Investment Companies under the management of AFAM are presumed to be acting in concert with AFAM under class (4) of the definition of "*Acting in concert*" in the Code.

   The definition provides that :

   > *"Without prejudice to the general application of this definition, persons falling within each of the following classes will be presumed to be acting in concert with others in the same class unless the contrary is established*:-
   >
   > *(4)* "*fund manager (including an exempt fund manager) with any investment company, mutual fund, unit trust or other person, whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts;"*

9. On that basis, the total shareholding in Tack Hsin held by the concert party exceeded 35% in January 2001 thereby triggering a mandatory general offer obligation under Rule 26 of the Code. At that time the trigger threshold was 35% under the pre-19 October 2001 version of the Code.

10. The Executive considers that AFAM is the principal member of the concert group. Further, the Executive takes the view that Mr. Wong is also a principal member of the concert group. Mr. Wong advised the Executive that he took all of the decisions in

respect of the acquisition of Tack Hsin Shares by AFAM acting as a discretionary fund manager on behalf of the Investment Companies during the relevant period.

AFAM's submissions

11. AFAM was represented at the meeting on 5 March 2002 by Mr. Lo, a director of AFAM, together with AFAM's legal adviser. In its written and oral submissions to the Panel, AFAM did not challenge the Executive's allegation that a breach of Rule 26.1 of the Code had occurred, although it argued that the breach was technical in nature. Also in its written submission, AFAM contended that Diamond Diversified had not granted AFAM control over the voting rights of securities acquired on its behalf and consequently it should be excluded from the concert party.

12. AFAM emphasised most strongly that Mr. Wong was solely responsible for the acquisitions of the Tack Hsin Shares on behalf of the Investment Companies and kept other members of the board in ignorance of his activities. It was also stated by Mr. Lo during the course of the meeting that Mr. Wong had misreported the composition of the underlying portfolio of Controlled-Risk (an "in house" fund) to the Asia Financial Group and documents were produced to this effect.[2]

13. However, given that at all relevant times, Mr. Wong was acting in his capacity as a director of AFAM, AFAM accepted that the breach could be attributed to AFAM by the actions of Mr. Wong.

Mr. Wong's submissions

14. Mr. Wong had been invited to attend the meeting but had declined to do so. He was represented by his legal adviser who did not wish to add anything to the written submissions in either his opening or closing submissions on his behalf and addressed only such limited questions posed to him by members of the Panel as he was able to answer. Mr. Wong's adviser had indicated that he was attending as an observer on Mr. Wong's behalf and had no instructions beyond the assertion made in the written submission prepared and submitted by Mr. Wong's solicitor on Mr. Wong's behalf, that Mr. Wong made no admission whatsoever.

15. Mr. Wong has made no attempt to rebut the presumption (under Class (4) of the definitions of "Acting in concert" set out in the Definitions section of the Code) that AFAM was acting in concert with the Investment Companies nor has he addressed the allegation that Rule 26.1 of the Code has been breached. Mr. Wong in the submissions made on his behalf did not question any of the evidence set out in the Panel Paper or attempt any form of rebuttal of the Executive's case against him.

Decision on breach

16. The issue before the Panel was to decide whether AFAM and/or Mr. Wong had breached Rule 26.1 of the Code as alleged by the Executive and, if a breach had occurred, to determine what sanctions to impose.

[2] Please also see paragraph 44.

17. After considering the written and oral representations of the Executive, AFAM and Mr. Wong and the answers to questions posed by Panel members during the course of the meeting, the Panel found that AFAM has breached the mandatory offer provisions of Rule 26.1 of the Code. The Panel also found that Mr. Wong was the party principally responsible for causing that breach to occur.

18. The Panel did not reach a decision as to sanctions as it believed that as a result of information that came to light during the course of the meeting, it needed further information from AFAM and Mr. Wong before forming a view on sanctions. In this regard, the Panel required the Parties and the Executive to provide the information set out below:

AFAM was required to provide:

(i) Full details of the unwinding of the position of Controlled-Risk including but not limited to a comprehensive explanation of how the position was unwound, who purchased the Tack Hsin Shares in question and who provided the finance for such purchase.

(ii) In order to enable the Panel to understand the extent of the alleged misreporting by Mr. Wong and AFAM to the Asia Financial Group in respect of investment holdings, full details of :

(a) the actual positions in the underlying funds at the time that AFAM ceased to manage those funds;

(b) the positions that those funds reported to their administrators or to the investors in the funds;

(c) the reports provided to the Asia Financial Group by Mr. Wong and/or AFAM.

(iii) A comprehensive statement of the fees earned by AFAM from the funds, from which funds they came and precisely how they were apportioned.

(iv) A copy of the last two years' audited accounts and the latest management accounts of AFAM.

(v) Full details of any dividend distributions made by AFAM since its establishment.

(vi) Full clarification of Mr. Wong's relationship with AFAM International Inc.

Mr. Wong was required to provide:

(vii) Full details of his relationship with the Glanville Group of companies, in particular, Glanville Pacific Management Limited and Glanville Asset Management Inc. (members of the Glanville "Group" of companies appear to be promoters and managers of certain of the Investment Companies and to have resumed control of the investment activities of certain of the Investment Companies when these were relinquished by AFAM. Mr. Wong was at the

time of the meeting on 5 March 2002 prominently referred to on the Glanville web site).

(viii) Full clarification of Mr. Wong' s relationship with AFAM International Inc.

The Executive was required to provide:

(ix) The results of a company search on the Glanville Pacific Management Limited.

19. The Panel required this information to be provided by 12 March 2002 with a view to reconvening on 14 March 2002 to consider this information together with submissions, written and oral, in respect of sanctions before reaching a decision on sanctions.

20. The Panel advised the Parties and the Executive that it was minded, but had not yet reached a decision, to consider the question of a compensation order, and in that regard, advised the Parties and the Executive that it would like to hear argument on the exact date on which the breach took place.

21. The Panel wished it to be drawn to Mr. Wong' s attention that he was invited to the meeting, and if he chose not to attend then the Panel would be entitled to draw an adverse inference, in particular having regard to General Principle 10.

Reasons

22. The Executive' s case against AFAM is founded on a presumption in the definition of "Acting in Concert" set out in the definitions section of the Code. Here it is clearly provided that various classes of person "*will be presumed to be acting in concert with others of the same class unless the contrary is established.*" Class 4 of this definition refers to "*a fund manager (including an exempt fund manager) with any investment company, mutual fund, unit trust or other person, whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts".*

23. AFAM provided discretionary management services for the Investment Companies and under the terms of the definition is presumed to be acting in concert with them unless the contrary is established. AFAM did not dispute this presumption other than in respect of one of the Investment Companies, namely Diamond Diversified. Other than in this regard no evidence or arguments were offered by AFAM or Mr. Wong to rebut this presumption. Neither AFAM nor Mr. Wong disputed the facts set out in the Panel Paper as regards the acquisition of Tack Hsin Shares by AFAM on behalf of the Investment Companies.

24. Rule 26 of the Code set out the circumstances in which a mandatory offer is required. Paragraph 1(b) of Rule 26 provides as follows:

> ***"26.1*** *When mandatory offer required*
>
> *Subject to the granting of a waiver by the Executive, when …*

> (b) *two or more persons are acting in concert, and they collectively hold less than 35% of the voting rights of a company, and any one or more of them acquires voting rights and such acquisition has the effect of increasing their collective holding of voting rights to 35% or more of the voting rights of the company;*"

25. By 31 January 2001 the Investment Companies held 105,200,000 shares of Tack Hsin representing 35.06% of the issued share capital and voting rights of Tack Hsin, thereby giving rise to a mandatory offer requirement under the provisions of Rule 26(1)(b) of the Code. AFAM on behalf of various of the Investment Companies acquired further shares in Tack Hsin increasing the total shareholding of the Investment Companies in Tack Hsin to 125,852,000 shares at 31 March 2001, equivalent to 41.94% of Tack Hsin's issued share capital and voting rights.

26. In light of the above and in the absence of a general offer, the Panel found, having considered the submissions written and oral of the Parties and the Executive, that AFAM had breached the provisions of Rule 26.1(b) of the Code.

27. The composition of the concert party has been questioned in AFAM's submission which contends that AFAM should be presumed to be acting in concert with only six rather than seven of the Investment Companies: a contention not accepted by the Executive. However, even if the company in question, Diamond Diversified, were to be excluded from the concert party presumption the Tack Hsin Shares and voting rights held by the remaining six Investment Companies would still have exceeded in aggregate 35% of the voting rights of Tack Hsin, with the relevant date on which the mandatory offer obligation was triggered being no later than 28 February 2001 rather than 31 January 2001.

28. The Panel has asked to hear argument on the exact date on which the breach occurred and the price at which a general offer should have been made before reaching a decision on sanctions.

29. The Panel accepts on the evidence placed before it that Mr. Wong was the author of AFAM's investment decisions. Mr. Wong has offered no evidence to rebut the Executive's submissions or AFAM's submissions which concur in identifying him as the party upon whose instructions and under whose supervision the acquisitions in question were made. Mr. Wong in his submission has confined himself to making no admission. He has not attempted to rebut the allegations or dispute or deny the evidence. He has also chosen not to attend the Panel meeting.

30. The Panel believes that on the basis of the evidence presented that Mr. Wong was the party who as the Chief Executive undertook the day-to-day management of AFAM and made the investment decisions regarding the acquisitions of shares in Tack Hsin, and in the absence of any rebuttal or refutation of that evidence, Mr. Wong cannot escape responsibility for the breach because the actions that caused it were effected through a company, AFAM, when he in reality determined all the relevant actions of that company.

31. The Panel has, therefore, concluded that Mr. Wong was the party principally responsible for causing AFAM to breach Rule 26.1(b) of the Code.

Decision on sanctions

32. The Panel met again on 14 March 2002 to consider the information that had been provided by the Parties and the Executive in response to enquiries raised by the Panel on 5 March 2002 together with any further submissions of the Parties and the Executive with a view to determining sanctions in accordance with its powers under section 12 of the Introduction to the Code.

33. After carefully considering the written and oral representations of the Executive, AFAM and Mr. Wong and the answers to questions posed by Panel members during the course of the meeting, the Panel delivered its decision on sanctions.

Sanctions against Mr. Wong

34. In respect of Mr. Wong, the Panel pursuant to section 12.2(e) of the Introduction to the Code, hereby requires all registered and exempt dealers, investment advisers, dealers representatives and investment representatives within the meaning of the Securities Ordinance (Cap. 333) not, without the prior consent of the Executive in writing, to act or continue to act directly or indirectly in their capacity as registered and exempt dealers, investment advisers, dealers representatives and investment representatives for Mr. Wong and any private companies controlled by him for a period of five years commencing on 3 April 2002 and ending on 2 April 2007 (a "**cold-shoulder order**"). A copy of the cold-shoulder order is set out in **Appendix 1**.

35. The Panel also publicly censures Mr. Wong pursuant to section 12.2(c) of the Introduction to the Code. Finally, pursuant to section 12.2(d) of the Introduction to the Code, the Panel will report Mr. Wong' s conduct to the SFC.

Reasons

36. In reaching its decision as to sanctions in respect of Mr. Wong, the Panel paid particular regard to Mr. Wong' s overall role in causing AFAM to breach Rule 26 of the Code and to the standards of behaviour and integrity that might reasonably be expected of a registered person engaged in the management of funds on behalf of third parties.

37. The Panel also carefully considered the specific arguments advanced in mitigation on Mr. Wong' s behalf.

- *Compliance responsibilities*

38. Mr. Wong was the Chief Executive and a director of AFAM, which is registered with the SFC as an investment adviser and commodity trading adviser. Mr. Wong is registered as an investment adviser director and commodity dealer with the SFC.

39. As the Chief Executive and one of two directors of AFAM registered with the SFC, Mr. Wong had a clear and evident responsibility for the proper management of AFAM both as regards matters of commercial integrity and regulatory compliance.

40. Mr. Wong chose to take upon himself the role of compliance officer and necessarily the obligations that attach themselves to such a role in a registered entity. The Panel did not have any evidence presented to it that Mr. Wong had made any effort whatsoever to acquaint himself with the relevant rules and regulations in regard to the

activities in which he and AFAM were to engage. He professed himself ignorant of the provisions of the Code in his interview with the Executive at the commencement of its investigation and, in his submission of mitigation, it is confirmed that he was "*unaware of the mandatory general offer provisions of the Takeovers Code at the time of the accumulation of the Tack Hsin Shares*".

41. Mr. Wong made no attempt to hire a compliance officer despite recommendations to that effect made in the Asia Financial Group internal audit report dated December 1998 and repeated in the AFAM internal audit report dated 22 December 2000 (copies of both these reports were provided to the Panel by AFAM).The internal audit report dated 22 December 2000 makes specific reference to the relevant requirements of the "*Fund Manager Code of Conduct*" and states:

    "*As stipulated in the Fund Manager Code of Conduct (Code), a fund manager should maintain an effective compliance function, including a Designated Compliance Officer independent of other functions, within the firm to ensure the compliance with its own internal policies and procedures, and with all applicable legal and regulatory requirements, including the Code. Sufficiently detailed compliance procedures should also be in place to give assurance to the management that compliance with all applicable requirements is in existence at all times*."

42. Mr. Wong's response to the reports was to recognise their findings but to do nothing (having concluded that the size of the operations did not warrant such a separate function).

43. The Panel has, therefore, found that Mr. Wong's admitted ignorance of the Code, far from serving to mitigate his culpability, serves only to reinforce the conclusion that Mr. Wong, despite his registered status, was seemingly indifferent to the proper discharge of the compliance obligations of AFAM. He must bear responsibility accordingly.

- *Misreporting of positions in Tack Hsin Shares*

44. The Panel were advised by Mr. Lo during the course of the meeting on 5 March that the records provided to AFH Group in respect of its underlying portfolio were seriously misleading. Copies of these records were provided to the Panel, the Parties and the Executive. Controlled-Risk is an Investment Company which was at the relevant time owned as to more than 99% by the AFH Group and the balance by Mr. Lo.

45. The records indicated that the majority of Controlled-Risk's assets were in cash (approximately 95% at 31 July 2001). In reality, the vast majority of Controlled-Risk's assets was invested in a single illiquid company namely Tack Hsin.

46. AFAM was the manager of Controlled-Risk and the records in question were signed by Mr. Wong in his capacity as Chief Executive of AFAM. Copies of these records were made available to Mr. Wong's legal adviser at the Panel meeting of 5 March. Mr. Wong has chosen not to comment on these records or on Mr. Lo's allegations or to attempt any rebuttal of either the records or the allegations. The Panel feels entitled to draw its own conclusion accordingly.

47. The Panel has, accordingly, found that Mr. Wong, certainly insofar as regards the management of the assets of Controlled-Risk, would seem to have quite deliberately sought to conceal his acquisitions of shares in Tack Hsin. The Panel requested AFAM to contact the other six Investment Companies to determine if there are any other examples of misreporting. At the meeting on 14 March 2002, AFAM informed the Panel that no additional information had been received in this regard by AFAM.

- *Financial gain*

48. In Mr. Wong's submission of mitigation, it was argued that he "*had not acted in concert with any separate individuals for any personal purposes or to achieve any personal gain*". The Panel is not persuaded that Mr. Wong did not achieve personal gain as a result of the acquisition by AFAM of shares in Tack Hsin on behalf of the Investment Companies.

49. Mr. Wong is the owner of 29.71% of the issued share capital of AFAM. Under the terms of the separate investment management agreements with the Investment Companies, AFAM received incentive fees calculated as a percentage of the increase in valuation of the underlying portfolios managed by AFAM.

50. As at 31 March 2001, the Investment Companies held 125,852,000 Tack Hsin Shares representing approximately 41.9% of Tack Hsin's issued share capital. Three of the Investment Companies had more than 50% of their funds under management by AFAM invested in Tack Hsin Shares. This included one Investment Company whose entire portfolio consisted of Tack Hsin Shares. Of the remaining four Investment Companies, their investments in Tack Hsin Shares as at 31 March 2001 ranged between 11.85% and 41.7% of their funds under management by AFAM.

51. In AFAM's submission in response to the Panel's questions posed to it at the conclusion of the meeting of 5 March, AFAM calculated that the net incentive fees earned by AFAM from the holding of Tack Hsin Shares by the Investment Companies between 31 August 2000 and 31 March 2001 amounted to HK$10.5 million. This sum relates only to incentive fees and does not reflect the ongoing management fees earned from several of the Investment Companies. The amount of HK$10.5 million is the net amount after deducting marketing fees of approximately HK$3.5 million paid to third parties.

52. As a shareholder of AFAM, Mr. Wong was and remains a beneficiary of these earnings. The Panel has, therefore, found that Mr. Wong has a financial interest arising out of the acquisition of Tack Hsin Shares by AFAM on behalf of the Investment Companies.

- *Co-operation with the Executive*

53. Mr. Wong's submission of mitigation makes the point that Mr. Wong "*offered to co-operate and had co-operated with the Executive to rectify the matter as soon as possible*" and "*had seriously explored the possibility of making a general offer, which had only failed because he had faced difficulty in securing the appropriate funding for the general offer*".

54. In this regard, Mr. Wong reportedly sought to appoint a financial adviser to act on behalf of AFAM in a general offer and sought underwriters for that proposed offer. Letters were sent by Mr. Wong's legal advisers to the SFC reporting these efforts (copies of which were attached to the Panel Paper). On the face of it, these efforts would seem to substantiate Mr. Wong's claim to have explored seriously the possibility of making a general offer.

55. However, when the Panel questioned Mr. Lo as to whether he or any other member of the board of directors of AFAM had been approached by Mr. Wong in respect of either the appointment of AFAM's financial adviser or in respect of any conversations with underwriters in regard to a possible general offer by AFAM, Mr. Lo explicitly denied any knowledge of these matters whatsoever. He confirmed that no approach had been made to the board of directors of AFAM in respect of the appointment of a financial adviser or for the provision of funding for a general offer. He also confirmed that Mr. Wong acting alone was not authorised to make financial commitments on behalf of AFAM of the order required to fund a possible general offer.

56. The Panel is not persuaded that Mr. Wong's efforts represented a serious exploration of the possibility of making a general offer. He neglected to undertake even the most basic form of consultation with his fellow directors in respect of a commitment that would have been substantial at the AFAM level and substantial even at the level of AFAM's ultimate holding company, AFH.

57. The Panel has been unable to address any questions to Mr. Wong on this point as he has chosen not to appear at the Panel meetings and his adviser who attended the meetings had no instructions in this regard.

58. The finding of the Panel is, therefore, that Mr. Wong's efforts in respect of any attempt to remedy the breach were reflective of form rather than substance and in no way serve to mitigate his actions.

- *Presumption of concertedness*

59. In Mr. Wong's submission of mitigation two other substantive arguments were advanced namely he had "*only been presumed to have acted in concert with the seven investment companies as a result of his then position as their fund manager and not in his personal capacity*" and he had "*... acknowledged and accepted that he and the seven investment companies were presumed to be acting in concert under the Takeovers code and that a mandatory general offer obligation had been triggered in January 2001.*" Moreover he had "*made no attempt to rebut the aforesaid presumption*".

60. As regards the first argument, that Mr. Wong was not acting in his personal capacity but only as a fund manager, the Panel completely rejects this argument. Mr. Wong was wholly responsible for his own actions. He has not contested the evidence contained in AFAM's and the Executive's submissions that he was personally responsible for the relevant investment decisions and exerted a dominant influence over the affairs of AFAM at the relevant time. The Panel has no hesitation in these circumstances in lifting the corporate veil and placing responsibility directly on the

principal author of the breach by AFAM (a presumed concert party with the seven Investment Companies under paragraph (4) of the definition of "Acting in concert" under the Code) of Rule 26 of the Code, namely, Mr. Wong.

- *Co-operation with the Panel*

61. Mr. Wong has absented himself from both meetings of the Panel, notwithstanding the specific invitation for him to attend the meeting of 14 March referred to in paragraph 21 above. The instructions of Mr. Wong's legal adviser who attended the Panel meeting were limited to a simple non-admission of the case against Mr. Wong and the delivery of the plea of mitigation contained in Mr. Wong's original submission. Mr. Wong, through his advisers has provided as an explanation for his non-attendance only the statement that "*he is overseas*". His adviser was unable to provide the Panel with any further explanation on this point.

62. The Panel has been unable to address questions to Mr. Wong. It considers that this is a situation far removed from the level of co-operation contemplated under General Principle 10 which states "*All parties concerned with transactions subject to the Codes are required to co-operate to the fullest extent with the Executive, the Panel and the Takeovers Appeal Committee, and to provide all relevant information*".

- *Past precedent*

63. In reaching a decision on sanctions, the Panel has had regard to the level and nature of sanctions imposed in previous decisions involving a breach of Rule 26 of the Code. While such decisions are of persuasive effect they are not binding precedents. Each case has its own distinguishing features.

64. Ultimately, therefore, the Panel's decision on sanctions is determined by the particular circumstances of each case having had regard to such past decisions on sanctions as are germane.

65. Viewed as a whole the Panel considers that the actions of Mr. Wong are wholly inconsistent with the standards expected of the chief executive of a registered investment management company and a registered person. Mr. Wong's actions directly led to the breach of Rule 26 of the Code by AFAM.

- *Conclusion*

66. The Panel concluded that a severe sanction is merited having regard to the facts and the reasoning set out above.

Sanctions against AFAM

67. As regards AFAM, the Panel publicly censures AFAM pursuant to section 12.1(c) of the Introduction to the Code. The Panel also intends, pursuant to section 12.2(d) of the Introduction to the Code to report AFAM to the SFC and any other appropriate regulatory authorities.

Reasons

68. The Panel has found that Mr. Wong was the principal party responsible for causing AFAM to breach Rule 26 of the Code. In determining the sanctions appropriate to AFAM's breach, the Panel has considered in particular the submissions of mitigation made on AFAM's behalf by its legal advisers.

69. AFAM has accepted that it breached the provisions of Rule 26 of the Code and has based its arguments in mitigation largely upon the role played by Mr. Wong. A role that is generally consistent with the Panel's findings of fact with regard to Mr. Wong.

70. The Panel is of the view, however, that in assessing the level of sanctions appropriate to AFAM's breach, regard must be taken of the circumstances which allowed Mr. Wong to operate as he did and to the measures that AFAM itself took in response to the discovery of the breach.

- *Inadequacy and internal controls*

71. AFAM is an investment management company registered as an investment adviser and commodity trading adviser with the SFC. Directors actively engaged in its management are required to be registered as investment advisers with the SFC. Mr. Wong and Mr. Lo were so registered.

72. AFAM is a member of the AFH group. The ultimate holding company, AFH, owns some 70.31% of AFAM's issued share capital. AFH is the holding company for a financial services group that includes within it a bank and an insurance company. AFAM is through its name and its directors publicly associated with the AFH group.

73. The Panel believes that, as a registered investment management company and a member of a substantial financial services group, AFAM cannot simply hide behind the actions of Mr. Wong.

74. AFAM failed to put in place the most basic of internal controls regarding the activities of Mr. Wong. It relied on Mr. Wong both as the principal manager of AFAM's affairs and as its compliance officer. AFAM was equally aware of the internal audit reports referred to in paragraph 41 above and did nothing to establish an independent compliance function. As a member of a substantial financial services group, the reputational and regulatory risks of a compliance failure must have been clear to AFAM and its board, yet no action was taken to establish an independent compliance function.

75. AFAM was apparently a successful business, managing eight investment companies and recording net profits for the year ended 31 December 2000 of some HK$18.6m up from approximately HK$1.4m in 1999. In the year to 31 December 2000, AFAM's attributable profits represented approximately 10% of the profits after tax and before minority interests of the AFH group (based on AFH's consolidated accounts for the year ended 31 December 2000).

76. The Panel is of the view that having regard to the nature of AFAM's business, the size of that business and its membership of a financial services group, AFAM cannot escape responsibility for allowing the continuance of an environment in which Mr.

Wong was allowed a largely unfettered remit devoid of an independent internal or group compliance function.

77. The Panel finds that AFAM has a heavy responsibility to bear for this management failure and its consequences.

- *Financial gain*

78. AFAM was a beneficiary of the acquisition by AFAM of Tack Hsin Shares on behalf of the Investment Companies. Reference to the direct earnings from the incentive fees relevant to the Tack Hsin holdings has already been made in paragraph 51 above. As at 31 January 2002, based on the latest available unaudited balance sheet of AFAM, AFAM had net assets of some HK$21.9 million. The Panel noted that a significant portion of AFAM's income had been derived from fees arising as a result of the transactions on behalf of the Investment Companies involving Tack Hsin Shares. AFAM was and remains the principal financial beneficiary of the dealings which occasioned the breach of Rule 26 of the Code.

- *Mandatory offer provisions*

79. AFAM itself has made no efforts to comply with the mandatory offer provisions of Rule 26 of the Code but retained (as at the dates of the Panel meetings) the benefit of the fees arising out of the transactions that led to that breach.

- *Subsequent action by AFAM*

80. The Panel also considered AFAM's response to the discovery of Mr. Wong's activities. The Panel was surprised to learn from Mr. Lo during the course of the meeting that neither an internal or external audit investigation had been commissioned by AFAM when it became clear that Mr. Wong had accumulated significant concentrations of shares in a relatively illiquid company on behalf of seven of AFAM's eight clients. The Panel was also concerned to learn that even when AFAM's directors had become aware of significant misreporting in respect of Controlled-Risk, AFAM had not sought to contact the other six Investment Companies which were their former clients to determine if they too were the victims of misreporting. The Panel understands that this action has only now been undertaken at the instigation of the Panel.

81. During the course of the meeting, the Panel was also informed by Mr. Lo that Controlled-Risk, which had over 80% of its assets represented by a single investment of some 29.9 million Tack Hsin Shares, had by December 2001 been able to fund the redemption of substantially all of its outstanding shares without a material loss to the holders thereof. Mr. Lo informed the Panel that he was unaware how (and if) the 29.9 million Tack Hsin Shares had been disposed of by Controlled-Risk. Controlled-Risk was largely owned, directly or indirectly by AFAM's ultimate holding company.

- *Compliance with the Code*

82. The Panel finds that AFAM was seemingly indifferent to the position of the Investment Companies previously under its management, other than Controlled-Risk, in regard to the potential financial consequences for those companies of the

concentrated position that AFAM had accumulated in Tack Hsin and which led to the breach of Rule 26 of the Code.

- *Conclusion*

83. The Panel has taken all of the above into account in reaching its decision on sanctions. It considers that AFAM contributed in no small measure to its own predicament. Its management and conduct fell far short of that which the Panel would expect of a registered investment management company and member of a substantial financial services group.

84. The Panel considers these to be serious matters that fully merit the sanctions imposed.

General observations

85. The work of the Panel is generally greatly facilitated by the efforts of the financial and other professional advisers appearing before it. Due heed is paid to their obligations to the Panel as set out in General Principle 10 of the Takeovers Code.

86. In this instance, however, the Panel would observe (and this is in no way a sanction), that it is disappointed in the manner in which Holman Fenwick & Willan, solicitors, chose to represent its client, Mr. Wong, before the Panel. This is not in any sense a reflection on the individual performance of the solicitor who attended the meeting as an observer on behalf of Mr. Wong, or on the arguments put forward on Mr. Wong's behalf, but rather on the manner in which the firm appears to have approached its duties towards the Panel.

87. The solicitor who attended the meetings was not conversant with the Code nor had he had any direct contact with Mr. Wong himself. The partner who had had such contact and presumably was conversant with the Code and who may have been able to assist the Panel in its work, chose not to attend either of the two meetings. No reason was given for his non-attendance. Whilst Holman Fenwick & Willan's attendance was characterised as being an observer only, the Panel would have expected the person most familiar with the matter to have made himself available to ensure that the Panel was assisted as fully as possible in its deliberations.