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Application No. 5 of 2010

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IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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IN THE MATTER of a Decision
made by the Securities and Futures
Commission pursuant to s 194 &
198 of the Securities and Futures
Ordinance, Cap 571,

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IN THE MATTER of s 217 of the
Securities and Futures Ordinance

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BETWEEN

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SHAM PIK YAN, WINDA

Applicant

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and

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SECURITIES AND FUTURES COMMISSION

Respondent

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Before: Chairman, Hon John Saunders J,

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Members, Ms Cynthia Y S Tang, and Mr Joseph Y W Pang

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Date of Hearing: 16 December 2010

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Date of Decision: 18 February 2011

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DECISION

Background:

1. On 16 December 2010, we heard an application for review of a Notice of Final Decision (NFD) made by the SFC in respect of Ms Sham. That decision, dated 12 May 2010, found that Ms Sham had concealed from her then employer, DBS Vickers (Hong Kong) Ltd (DBS Vickers) that she had maintained and operated a personal trading account with another licensed corporation/registered institution.

2. Included in the Notice of Proposed Disciplinary Action, dated 17 December 2009, were two further allegations involving an alleged conflicts of interest and the circumvention of trading limits. The NFD recorded that the SFC, following the consideration of submissions made on Ms Sham's behalf, had determined not to pursue those allegations.

3. Now, Ms Sham comes to this Tribunal seeking a review of the finding made against her that she had concealed the fact that she had maintained and operated a personal trading account elsewhere than with her employer. The penalty imposed of 7 months suspension is also challenged.

The facts:

4. The facts which we now set out are not in dispute.

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5. Ms Sham was born in Hong Kong, but her tertiary education was in Australia where she graduated with a degree of Bachelor of Commerce in December 1993. After graduation she returned to Hong Kong and on 3 January 1994, opened a bank account with the Shanghai Commercial Bank Ltd, (SCBL). At that stage the account was an ordinary bank account with no facility to enable securities trading.

6. On 30 January 1997, Ms Sham opened a securities account at SCBL. That account authorised SCBL to act as her agent in transactions in securities, and conferred a discretion upon SCBL to select which stockbroker or nominee might be engaged in implementing orders. The mandate authorised SCBL to give orders or instructions to any stockbroker in Ms Sham's name, or SCBL's name, as SCBL thought fit. The mandate further authorised SCBL to engage any stockbroker in relation to orders.

7. On 22 June 1998, Ms Sham began work as a dealer's representative with Fortis Wealth Management Hong Kong. She remained with that company until 20 July 2000.

8. On 26 July 2000, Ms Sham became a dealer's representative with DBS Vickers. In April 2003, the Securities and Futures Ordinance, Cap 571, was enacted and shortly thereafter, through DBS Vickers, Ms Sham became a licensed person licensed to carry on type 1 and 2 regulated activities.

9. In January 2007, Ms Sham ceased to be a dealer's representative and became remisier, handling her own customers trading in securities. She did not have a basic salary but was paid on the basis of

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50% of the commission charged by DBS Vickers on her customers trading. She employed a subordinate to assist her. She remained employed at DBS Vickers until 26 September 2009.

10. On 29 July 2003, Ms Sham completed a Personal Customer Information sheet with SCBL in which she stated that she was in full employment, and had been for a period of 5 years, as a marketing executive with Feung Ning Industries Ltd, a company engaged in cotton dyeing and manufacturing. She gave the office address of that company, in Cheung Sha Wan, but did not give an office telephone number. The information sheet contained her home telephone number and her mobile phone number. Although accepting that her employment at that time at DBS Vickers was a full-time job, Ms Sham said that there was not a fixed starting or finishing time.

11. The Personal Customer Information sheet did not disclose her employment with DBS Vickers.

12. On 19 August 2003, following a discussion with her, SCBL offered banking facilities to Ms Sham, which she accepted. The facility entitled Ms Sham to advances up to \$5 million for securities trading. The facility letter contained the following statement:

“You will exclusively utilise our service for purchasing and selling shares or stocks.”

13. On 24 January 2007, Ms Sham, at the request of DBS Vickers’ Compliance, Legal & Secretariat Department made a declaration that she had NOT

“Opened an account(s) with outside broker firm(s)”

Ms Sham did not inform DBS Vickers of the securities trading account that was part of her bank account at SCBL.

14. On 31 December 2008, the total value of Hong Kong equity securities held by Ms Sham in her securities trading account at SCBL was \$13.8 million. During that month the total value of the 21 transactions undertaken, both sales and purchases, through the account, was in excess of \$15 million.

15. On 31 January 2009, the total value of the Hong Kong equity securities in the account was \$12.7 million. During that month the total value of the 11 transactions undertaken, both sales and purchases, was in excess of \$3.9 million.

16. On 28 February 2009, the total value of Hong Kong equity securities in the account was \$12.3 million. During that month the total value of the 19 transactions undertaken, both sales and purchases, was in excess of \$13.3 million.

17. On 31 March 2009, the total value of Hong Kong equity securities in the account was \$10.2 million. During that month the total value of the 17 transactions undertaken, both sales and purchases, was in excess of \$11.3 million.

18. On 30 April 2009, the total value of Hong Kong equity securities in the account was \$10.5 million. During that month total value

of the 15 transactions undertaken, both sales and purchases, was in excess of \$13.6 million.

19. Over a five-month period, Ms Sham had undertaken a total of 83 sales or purchases of Hong Kong equity securities to a value in excess of \$57.1 million. At no stage at all during that period did Ms Sham inform her employer, DBS Vickers, of her trading activities in Hong Kong equity securities through her securities account with SCBL.

20. In May 2009, after the SFC had made enquiry with DBS Vickers, Ms Sham informed the Head of Compliance at DBS Vickers, when questioned about certain share trading activity on her part, about the SCBL account. Ms Sham said that she was told by the Head of Compliance to cancel the account with SCBL, and not to use the account in future. Ms Sham duly cancelled the account.

21. On 17 August 2009, Ms Sham was interviewed by the SFC in respect of her trading activity in the SCBL account, and on 26 September 2009, she resigned from DBS Vickers. On 11 November 2009, Ms Sham began employment as a dealer's representative with BOCOM International Securities Ltd.

The DBS Vickers manuals:

22. DBS Vickers, at all relevant times, maintained a formal Compliance Manual, a copy of which was received by Ms Sham on 12 February 2009. In acknowledging receipt of the Compliance Manual Ms Sham confirmed that she was fully aware of the roles, responsibilities and

potential legal obligations as stipulated in the Securities and Futures Ordinance, and the relevant codes and guidelines.

23. Section 4 of the Compliance Manual dealt with the “Personal Investment Policy”. The section contained the following provisions:

“4.1 Objectives

Directors, staff members (including permanent, temporary and contract staff) and remisers of DBSVHK (“DBS personnel”) may always make investments for their personal or related accounts as long as these transactions are in compliance with this Personal Investment Policy and all relevant legislation in Hong Kong and in any country in which a personal transaction is effected. All such investment decisions must be based solely upon publicly available information and purely for investment purposes only.

The reputation of DBSVHK and their personnel for straight-forward, above-board practices and integrity is a priceless asset, and all DBS personnel have the duty and obligation to support and maintain it when conducting their personal or related accounts transactions.

4.2 Personal Transaction Defined

“Personal Transactions” are transactions for their personal and related accounts in all forms of stock, notes, bonds, debentures, and other evidences of indebtedness, including senior debt, subordinated debt, commercial paper, investment contracts, commodity contracts, fixtures and all derivative instruments such as options, warrants and stock index futures (generally called “Financial Products”). As Financial Products vary from day to day, please consult Compliance, Legal and Secretariat for clearance of necessary.”

4.7 Requirements for Personal Transactions

4.7.1 Reporting Requirements

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Upon receipt of Personal Investment Policy, all staff and remisier are required to make the following declarations:-

- whether they have related accounts maintained with DBSBHK; and
- whether they are shareholder of any company registered with the Securities and Futures Commission, or elsewhere.

Staff and remisier must complete the “Declaration of Personal Investment Policy” (Appendix A) if they declared that they have related accounts maintained with DBSVHK and/or they are shareholder of any company registered with Securities and Futures Commission, or elsewhere.

In addition, staff and remisier, who have opened accounts with outside brokers, must report to the Compliance, Legal and Secretariat by completing the “Declaration of Securities/Futures Trading Account with Outside Firm” (Appendix A). The relevant staff and remisier must provide a copy of the contract note to the Compliance, Legal in Secretariat immediately for all transactions done through the account with outside brokers.

4.7.2 Account(s) with Outside Broker(s)

All staff and remisier are prohibited to open any securities, futures and options trading account with outside broker(s) for products available within the respective companies. Any exception would subject to prior approval from the CEO.

Upon receipt of the Statement of Account, in relation to the account opened with outside broker, from the relevant staff and remisier, Compliance, Legal and Secretariat would review it and then be kept in the Staff Transaction File for records.

It is the staff’s and remisier’s responsibility to submit a duplicate monthly statement of his/her approved outside broker account to Compliance, Legal and Secretariat in a

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timely manner. Staff and remisier should submit a duplicate statement within 2 weeks after month end.”
(sic)

24. DBS Vickers also maintained a Sales Manual. Paragraph 3.11 of that manual provides as follows:

“Staff Accounts

All staff are prohibited from opening any securities, futures and options trading accounts with outside broker(s) for products available within the Company. Any exceptions would be subject to prior approval from the CEO. For details, please refer to the Personal Investment Policy under the Compliance Manual.”

The SFC’s Code of Conduct:

25. As part of its regulatory function, the SFC, in May 2006, published a “Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission”. That Code, to which Ms Sham was subject, contains the following section in relation to dealings by a licensed or registered person:

“12.2 Employee dealings

- (a) A licensed or registered person should have a policy which has been communicated to its employees in writing on whether employees are permitted to deal or trade for their own accounts in securities, futures contracts or leveraged foreign exchange contracts....
- (b) In the event that employees of a licensed or registered person are permitted to deal or trade for their own accounts in securities, futures contracts or leveraged foreign exchange contract:

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- (i) the written policy should specify the conditions on which employees may deal for their own accounts;
- (ii) employees should be required to identify all related accounts and report them to senior management...
- (iii) employees should generally be required to deal through the licensed or registered person or its affiliates;
- (iv) if the licensed or registered person provides services in securities or futures contracts.....and its employees are permitted to deal through another dealer, in those securities or futures contracts, the licensed or registered person and employee should arrange for duplicate trade confirmations and statements of account to be provided to senior management of the licensed or registered person;
- (v) any transactions for employees' accounts and related accounts should be separately recorded and clearly identified in the records of the licensed or registered person; and
- (vi) transactions of employees' accounts and related accounts should be reported to and actively monitored by senior management of the licensed or registered person....who should maintain procedures to detect irregularities and to ensure that the handling by the licensed or registered person of these transactions or orders is not prejudicial to the interests of the licensed or registered person's other clients.
- (c) A licensed or registered person should not knowingly deal in securities or futures contracts for another licence or registered person's employee unless it has received a written consent from that licensed or registered person."

Ms Sham's evidence:

26. In her witness statement Ms Sham explained her failure to disclose to SCBL the fact of her employment with DBS Vickers, when completing the Personal Customer Information Sheet. She said that she

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believed that the request for the information was “routine” and that consequently “she did not take the matter seriously”. She said that when she dealt with SCBL she was always recognised as the daughter of her father and working with him was true because Feung Ning was a “family business”. She said that she did not read the terms and conditions of the banking facility offered to her by SCBL in detail because she had “confidence and trust on SCBL”.

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27. Ms Sham acknowledged her personal trading in securities in the SCBL account and said that she also maintained a security trading account with DBS Vickers, through which she also invested in securities. In respect of the SCBL securities trading account she said:

“Owing to the fact that the SCBL account was a bank account through which I had dealings with SCBL including a banking facility offered to me and the said account was opened long before I joined DBS Vickers, I have not in my mind nor had I been told by DBS Vickers nor were there being specific circulars or memorandum issued by DBS Vickers to the effect that a bank account was classified as an outside broker firm account. Therefore I thought that I needed not and I did not disclose the existence of the SCBL account to DBS Vickers.”

28. Ms Sham said that she had not paid particular attention to paragraph 12.2 of the SFC’s Code of Conduct because she understood that it did not apply to her.

29. When cross-examined about her statement in the Personal Customer Information sheet that she worked for her father’s company full-time, she asserted that she did not need to work all that time to be regarded as full-time. She was obliged to acknowledge that when questioned by the SFC and being asked to state her occupation she said nothing at all about

any duties with Feung Ning. In evidence she did not disclose any details of the extent of her involvement in the family business at the time the Personal Customer Information sheet was completed.

30. When cross-examined about her use of the bank account for securities trading Ms Sham drew a distinction between a bank account and a firm of outside brokers. Ms Sham accepted that by not telling DBS Vickers about her share trading through the bank account, they were not able to monitor that share trading. She accepted that all of the products traded through the SCBL account were products which were available to her through DBS Vickers.

The argument made by Mr. Smith SC:

31. The essence of the argument made by Mr. Smith was that the securities trading account at SCBL was not a securities trading account with an “outside broker”, as that expression was not apt to cover securities trading with other registered institutions, such as banks, which are not brokers. This, he said, was Ms Sham’s belief and that belief was both reasonable and understandable.

32. Although criticising the SFC for relying upon DBS Vickers’ interpretation of the expression “outside broker”, Mr. Smith properly accepted that whether or not DBS Vickers intended the phrase to have a wider meaning was not the critical question. He submitted that Ms Sham’s state of mind must be the critical issue in deciding whether she was a fit and proper person.

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Discussion:

33. We reject the proposition that the expression “securities, futures and options trading account with outside broker”, as it was used in the DBS Vickers’ Compliance Manual, does not include a securities trading account contained within a bank account. It is correct that the bank itself does not deal directly as a broker on the stock exchange in effecting the instructions of the client, but that instead it places the client’s instructions with an outside broker for action. That is no answer to the plain status of the securities trading account as an account held otherwise than at DBS Vickers. We reject the proposition that the intervention of the bank between the stockbroker who actually undertakes securities trading removes the securities futures and options trading account with a bank from that description.

34. Mr. Beresford referred us to a number of propositions upon which he said Mr. Smith’s submission should be rejected. First, in its ordinary meaning, the word “broker” simply means a middleman in business, especially a stockbroker or an agent and generally an intermediary: see the Shorter Oxford English Dictionary. It cannot be argued that SCBL was not acting as a middleman or intermediary between Ms Sham as the purchaser and the vendor of the shares acquired by her. That there was a further intermediary, a stockbroker, does not in any way diminish the status of SCBL as a middleman or intermediary.

35. We see no reason at all why the expression “broker” should be restricted to a stockbroker who executes orders on the stock exchange.

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36. The following statement is contained in the judgement of Lord Millett NPJ in *ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue* (2007) 10 HKCFAR 417, [2008] 1 HKLRD 412 at § 118:

“(ING Baring) acted for clients in Hong Kong which wish to deal in securities listed or intended to be listed on a stock exchange whether in Hong Kong or elsewhere in Asia; but it also acted on the instructions of other members of the Barings group given on behalf of clients outside Hong Kong which wish to deal in such securities. Where (ING Baring) was authorised to deal on the relevant stock exchange, it carried out the transaction itself. Where it was not authorised to do so,, it instructed local stockbrokers to carry out the transaction or (more usually) asked the Barings subsidiary in or near the place of execution to place the order on its behalf.”

The passage demonstrates that in the context of dealing in securities listed on the various exchanges, a stockbroker is simply an intermediary between a buyer and seller of securities listed on the relevant stock exchange.

37. In s 139, and Schedule 6, the Securities and Futures Ordinance (SFO) deals with the prohibition of the use of certain titles. There is no restriction on the term “broker”. However the expression “stockbroker” is restricted to persons who are licensed or registered for type 1 regulated activity.

38. The term “broker” is not defined in the SFO, but the term “intermediary” in Schedule 1 to the SFO defines that expression as meaning a “licensed corporation or a registered institution”. The term “registered institution” connotes a bank or other authorised institution under the Banking Ordinance which is registered with the SFC for carrying out regulated activities such as dealing in securities. SCBL has been

registered with the SFC as a registered institution for dealing in securities since 23 June 2004.

39. Mr. Beresford submitted that both DBS Vickers and SCBL deal in securities. The frontline regulator for DBS Vickers is the SFC and the frontline regulator for SCBL is the Hong Kong Monetary Authority, DBS Vickers constituting a licensed person, and SCBL constituting a registered institution. We accept that this is an immaterial distinction.

40. DBS Vickers is entitled to trade directly on the Stock Exchange of Hong Kong, whereas SCBL requires an “Exchange Participant”, usually a stockbroker, to execute trades on its customer’s behalf. Although this distinction was not specifically advanced in terms by Mr. Smith, the distinction is apparently relied upon by Ms Sham when it is contended on her behalf that the term “broker” does not apply to SCBL.

41. It is a distinction without a difference. We accept the proposition that, to use Mr. Beresford’s expression, the intension of the term “broker” is not justified.

42. The mischief against which paragraph 12.2 of the SFC’s Code of Conduct, and provisions of paragraph 4.7 DBS Vickers’ Compliance Manual is aimed at is absolutely plain. Both are designed to achieve a situation where registered employees of a licensed person do not undertake securities trading unless that securities trading is fully disclosed to the employer licensed person. When the securities trading account is maintained with the employer, in this case DBS Vickers, the employer of course has full knowledge of all transactions. Unless a licensed employee

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discloses the existence of an outside securities trading account and, pursuant to paragraph 4.7.2 of DBS Vickers' Compliance Manual, submit details of the trading it is simply impossible for the employer to monitor the employee's trading activities.

43. Unless it is able to monitor an employee's trading activities it will not be able to ensure proper compliance with the regulatory requirement, which regulatory requirement is properly aimed at ensuring that there is no conflict of interest between an employee and the client with which the employee deals, and that no advantage is being taken by an employee of inside information.

44. The proper emphasis upon which the requirements should be interpreted is the existence of the securities trading account with an entity other than the employer. That is the mischief against which the various rules are directed. The emphasis should not be on the term "broker".

45. We did not find Ms Sham to be a witness worthy of belief. Her explanation for the plainly misleading statement that she was in full-time employment with her father's firm was at best disingenuous and at worst a plain lie. We are satisfied that she deliberately concealed from SCBL the fact of her employment with DBS Vickers. The only reason for concealing that fact must have been because she intended not to disclose the existence of the account to DBS Vickers.

46. Ms Sham is an intelligent woman with a commerce degree and 10 years experience in securities trade. She must have known that by using a securities account with a bank, and not disclosing her trading

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through that account, she was achieving a situation in which she circumvented plain requirements to inform her employer of her trading activities.

47. By so doing she plainly failed to act honestly and fairly or in the best interests of her customers and the integrity of the market. That she may not have acted upon inside information, or in conflict of interest with her clients, is purely fortuitous. The situation that she had created, by using a bank securities account and failing to disclose that to her employer, under the pretence that it was not an “outside broker’s account”, gave the potential for her to act both in conflict of interest and upon inside information, without her employer being able to monitor her activities.

48. We are satisfied accordingly that the SFC was entirely justified in the interpretation of the expression “outside broker” it adopted, and in reaching its conclusion that in breach of both the SFC’s Code of Conduct, and DBS Vickers’ Compliance Manual, Ms Sham had demonstrated that she was not a fit and proper person to remain licensed.

49. The application for review against that finding is accordingly dismissed.

The application for review of penalty:

50. We have set out the extent of Ms Sham’s concealed securities trading in paragraph 19 of this decision. In any terms the trading was substantial. When that proposition was put to Ms Sham she evaded accepting the proposition by asserting that the trading was within the limit

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which she could afford. That is no answer to the proposition and a deliberate refusal to acknowledge the seriousness of the situation. This was substantial trading over a significant period of time that we are satisfied was deliberately concealed from Ms Sham’s employer.

51. We accept that during the period of her employment with DBS Vickers no complaints were made against Ms Sham. We accept too that during the period of her employment she has been a very successful trader, and that success has benefited her employer.

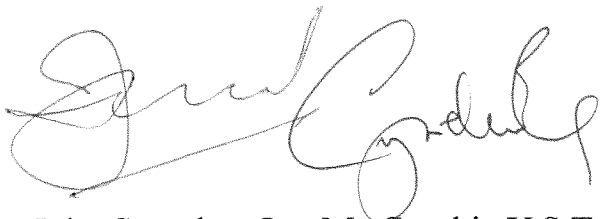
52. But it benefited her too. During what she described as a frustrating period on the market in 2008, she said she earned an average revenue for DBS Vickers of about \$980,000 per month. She did not make it clear whether or not that was the total commission she earned for DBS Vickers, or that that sum was DBS Vickers’ 50% share of the commission charged on the trading. That revenue would have provided Ms Sham with at least a monthly income of \$490,000, a very substantial income in any terms.

53. The lack of complaints against Ms Sham, and her clear record and successful trading record are sufficient to justify a lenient penalty of 7 months suspension in respect of what would otherwise have been a very serious case of a breach of plain rules.

54. We are satisfied that there is no basis upon which we can interfere with the penalty imposed.

Costs

55. There will be an order nisi, to be made absolute within 14 days, that Ms Sham must pay the costs of the SFC of the application for review, on a party and party basis.



John Saunders J
Chairman



Ms Cynthia Y S Tang
Member

Mr Joseph Y W Pang
Member

Mr. Clifford Smith SC instructed by Yam & Co for the Applicant

Mr. Roger Beresford, instructed by the Securities and Futures Commission for the Respondent

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