

Investigatory Powers of Securities and Futures Commission (I)

證監會的調查權力(一)

Introduction(序言)

The Securities and Futures Commission (“SFC”) (證券及期貨事務監察委員會) is a statutory body responsible for regulating the securities and futures markets in Hong Kong. Their powers of inquiry (查問), inspection (檢驗), surveillance (監視) and investigation (調查) are the vital tools in maintaining market order, integrity and protecting investor’s interests. SFC investigatory powers are derived mainly from Sections 182, 183 and 184 of the Securities and Futures Ordinance (證券及期貨條例) (Cap 571)(“SFO”). In this issue, we will elaborate on Sections 182 and 183 which are SFC powers and procedures of investigations. We will examine Section 184 which discusses the offences in relation to the investigations in our next issue.

Nature of activities under Section 182 SFO (第 182 條的調查性質)

It was expressly stated in Section 182 SFO that the SFC could investigate, any matter in connection with the following:

- a) it appears to the SFC that an offence under any relevant provisions of SFO have been committed (證監會認為證券及期貨條例的有關規定被觸犯);
- b) it appears to the SFC that a person may have connections with defalcation, fraud, misfeasance or other misconduct in the following (證監會認為該人仕在以下活動曾有虧空、欺詐、失職或其他不當行為):
 - (i) dealing in any securities or futures contract or trading in any leveraged foreign exchange contract(任何證券、期貨合約或任何槓桿式外匯合約的交易或處理);
 - (ii) the management of investment in any securities, futures contract or leveraged foreign exchange contract (證券期貨合約或槓桿式外匯合約投資的管理);
 - (iii) offering or making any leveraged foreign exchange contract or collective investment scheme(提供或成立任何槓桿式外匯合約或集體投資計劃);

(iv) giving advice in relation to allotment of securities, giving advice on acquiring or disposing or investing in any securities, future contract, leveraged foreign exchange contract and giving advice on an interest in any securities, future contract, leveraged foreign exchange contract and collective investment scheme (就配發證券、收購或處置或投資於證券、期貨合約、槓桿式外匯合約、集體投資計劃或其有關利益提供意見);

(v) any securities margin financing transaction (任何涉及證券保證金融資的交易);

c) it appears to the SFC that a market misconduct has taken place (證監會認為市場失當行為發生); (Under the SFO, there are six types of market misconduct: Insider Dealing, False Trading, Price Rigging, Disclosure of Information About Prohibited Transactions, Disclosure of False or Misleading Information Inducing Transactions and Stock Market Manipulation);

d) it appears to the SFC that the above b)(i) to (v) is not in the public interest (以上(b)(i) 至 (v)提及活動不合乎公眾利益);

e) (i) the SFC has reason to inquire whether a licensed person or a registered institution was at any time guilty of misconduct or is not a fit and proper person and consider whether to exercise its disciplinary power accordingly(證監會認為屬下持牌人或註冊機構曾犯失當行為或不適宜再繼續持牌或註冊); and

(ii) for the purpose to assist the Hong Kong Monetary Authority (“HKMA”) and considering whether to exercise its power against any relevant individual or executive officer of a registered institution, the SFC has reason to inquire whether they are not or have ceased to be a fit an proper person (協助金管局執行所管轄金融機構或人員之失當行為調查).

f) it appears to the SFC that the conditions for issue of advertisements, invitations or documents or those to authorize a collective investment schemes under sections 104, 105 are not met (證監會認為投資廣告、邀約或集體投資計劃的內容未符合規定); and

g) where the SFC decides to provide assistance to regulators outside Hong Kong of which the nature of the intended investigation is similar to (a) to (f) (證監會決定就類似上述(a)至(f)的事情，協助海外監管機構進行調查).

Steps of investigation(證監會調查步驟)

Section 183 SFO provides the details for the conduct of an investigation. The following are briefly the procedures for an investigation:

- 1) The SFC has reasonable cause to believe that a person (“the person”) is likely to contain information relevant to an investigation under Section 182 of the SFO;
- 2) the SFC will appoint an investigator;
- 3) that person will be served with a Notice (“the Notice”) under Section 183 which is usually accompanied by a covering letter from the SFC setting out the particulars of their enquiry;

- 4) the Notice signed by the appointed investigator will set out the appointed time for the person to attend the interview at the SFC office;
- 5) the person to attend interview at the SFC office;
- 6) investigators will investigate and request the person to provide relevant documents;
- 7) investigators will conclude whether the elements of an offence were constituted and report to the SFC; and
- 8) The SFC to refer such a report to the Financial Secretary to consider the institution of proceedings before the Market Misconduct Tribunal (“MMT”) (市場失當行為審裁處) or to the Secretary for Justice (律政司) to consider the institution of criminal proceedings.

The SFC powers in an investigation are broad. Its investigators may require any person believed to have relevant information:

(i) to produce any record or document specified by the investigator within reasonable time and place required (在調查員要求的合理時間及地點，向該調查員交出與該項調查有關的指定記錄或文件);

(ii) to attend before an interview at a time and place reasonably required by the investigator to answer any question (在調查員要求的合理時間及地點，會見該調查員，並回答提出的問題); and

(iii) to give the investigator all assistance throughout the investigation which the person is reasonably able to give (向調查員提供在調查期間之其他合理協助).

We will examine the SFO offences and relevant penalties in our next issue.

Nothing shall constitute legal advice to any person by Messrs. Maurice WM Lee Solicitors (Tel: (852) 2537 5833) (Website: www.wmleehk.com)

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