

Issue 18

Investigatory Powers of Securities and Futures Commission (I)

证监会的调查权力(一)

Introduction(序言)

The Securities and Futures Commission (“SFC”) (证券及期货事务监察委员会) is a statutory body responsible for regulating the securities and futures markets in Hong Kong. Their powers of inquiry (查问), inspection (检验), surveillance (监视) and investigation (调查) 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 (证券及期货条例) (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 条的调查性质)

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 (证监会认为证券及期货条例的有关规定被触犯);
- b) it appears to the SFC that a person may have connections with defalcation, fraud, misfeasance or other misconduct in the following (证监会认为该人仕在以下活动曾有亏空、欺诈、失职或其他不当行为):
 - (i) dealing in any securities or futures contract or trading in any leveraged foreign exchange contract(任何证券、期货合约或任何杠杆式外汇合约的交易或处理);
 - (ii) the management of investment in any securities, futures contract or leveraged foreign exchange contract (证券期货合约或杠杆式外汇合约投资的管理);
 - (iii) offering or making any leveraged foreign exchange contract or collective investment scheme(提供或成立任何杠杆式外汇合约或集体投资计划);

(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 (就配发证券、收购或处置或投资于证券、期货合约、杠杆式外汇合约、集体投资计划或其有关利益提供意见);

(v) any securities margin financing transaction (任何涉及证券保证金融资的交易);

c) it appears to the SFC that a market misconduct has taken place (证监会认为市场失当行为发生); (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)提及活动不合乎公众利益);

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(证监会认为属下持牌人或注册机构曾犯失当行为或不适宜再继续持牌或注册); 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 (协助金管局执行所管辖金融机构或人员之失当行为调查).

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 (证监会认为投资广告、邀约或集体投资计划的内容未符合规定); 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) (证监会决定就类似上述(a)至(f)的事情，协助海外监管机构进行调查).

Steps of investigation(证监会调查步骤)

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”) (市场失当行为审裁处) 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 (在调查员要求的合理时间及地点, 向该调查员交出与该项调查有关的指定记录或文件);

(ii) to attend before an interview at a time and place reasonably required by the investigator to answer any question (在调查员要求的合理时间及地点, 会见该调查员, 并回答提出的问题); and

(iii) to give the investigator all assistance throughout the investigation which the person is reasonably able to give (向调查员提供在调查期间之其他合理协助).

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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