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How to deal with the 3 “C’s” when they come knocking

- An overview of the dawn raid and investigative powers of the ICAC, SFC and CC (Competition Commission) and practical tips on dealing with them

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Topics

- Main investigative powers of:
 - The ICAC and the CC
- Dawn raids and how to deal with them
- Rights of a suspect and witness
- Measures to prevent the triggering of an investigation
- Main investigative powers of the SFC
- Legal Professional Privilege
- Self reporting and plea bargaining
- Case study



Common Allegations

- Corruption/Kickbacks/Secret commissions/Rebates/Referral fees (e.g. gifts, hospitality, entertainment, meals)
- Fraud and conspiracy to defraud (e.g. making untruthful claims for reimbursement, diverting business etc)
- Money Laundering
- Insider dealing/Market misconduct
- Price fixing/Share markets/Bid Rigging



Developments - AML

- Gazettal of Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 and Companies (Amendment) Bill 2017 – June 2017
- Extend customer due diligence and relevant record-keeping requirements to DNFBPs – solicitors, accountants, real estate agents, trust and company service providers (TCSPs)
- Aim to implement the amendments on 1 March 2018

Developments -AML

- Use the existing regulatory regimes applicable to the 3 sectors under the Legal Practitioners Ordinance (Cap. 159), the Professional Accountants Ordinance (Cap. 50) and the Estate Agents Ordinance (Cap. 511) respectively to enforce the statutory CDD and record-keeping requirements under the AMLO.
- The Law Society, the HKICPA and the EAA will be entrusted with statutory supervisory oversight in order to ensure compliance with the AMLO requirements by the relevant professions. Non-compliance will be handled in accordance with the existing statutory investigation, disciplinary and appeal mechanisms governing professional misconduct.

Criminal Investigations

- Innocent until proven guilty
- Standard of proof – beyond reasonable doubt
- Hearsay evidence – generally not admissible in criminal proceedings
- Statutory defence – defendant needs to show credible evidence
 - Standard of proof – on a balance of probabilities



Main Investigative powers of :

The ICAC

- **Main Empowering Ordinances**
 - **Independent Commission Against Corruption Ordinance (Cap 204)(ICACO)**
 - **Prevention of Bribery Ordinance (Cap 201)(POBO)**
 - **Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554)**
- **Interception of Communications and Surveillance Ordinance (Cap 589)(ICSO)**
- **Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525)(MLACMO)**

Main Investigative powers of the ICAC

Duties:

S.12 ICACO Duty of Commissioner on behalf of Chief Executive to:

- Receive and investigate complaints alleging corrupt practices.
- Investigate offences under ordinances (e.g. POBO etc)

Main Investigative powers of the ICAC

S13 ICACO: Authorizes Commissioner to take certain actions for the purposes of performing his functions under ICACO:

- Authorizes officer to conduct enquiry or examination.
- Authorize in writing any person to perform any of Commissioner's duties under ICACO or POBO.[e.g. accountant]

Main Investigative powers of the ICAC

- Empowers ICAC officers to gain access to all records, books and documents relating to the work of any government department.
- Same for public bodies.
- Power to take copies.
- “Document” includes: any register, book, record, tape-recording, any form of computer input or output, and any other material (whether produced mechanically, electrically, or manually or by other means whatsoever).
- Offence to resist or obstruct officers

Main Investigative powers of the ICAC

- s10 ICACO Power of Arrest
 - Arrest without warrant anyone reasonably suspects to be guilty of offences under ICACO, POBO, ECICO
 - If during investigation under POBO, ECICO if another offence disclosed and it is reasonably suspected that such other offence is connected with offence under above ordinances.
 - Or the other offence is one which is specified e.g. offences under the Theft Ordinance, perverting course of Justice, conspiracy and attempts.

Main Investigative powers of the ICAC

- s10B ICACO Search Warrants – Magistrate
- s10C ICACO Power of Search & Seizure
- S17 POBO further powers of search
 - Ex parte application to court for search warrant
 - Empowers officers to enter a premises or place, by force if necessary, and search the same

Main Investigative powers of the ICAC

- Commissioner's discretion – by warrant direct officers to enter and search if making the application would seriously impede an investigation
- Offence to obstruct or resist
- S16 POBO may apply to any public servant for assistance in the exercise of powers or discharge of duties under POBO
- Offence if neglects or fails to render assistance

Main Investigative powers of the ICAC

- S13 and s14 POBO give Commissioner extensive powers to compulsorily acquire information.
 - S13 applies to 3rd parties and suspects with leave [permission] of Court (e.g. accounts, books or documents)
 - S.14 applies to suspects and 3rd parties (furnishing a statutory declaration or statement in writing of assets, possessions or financial transactions)
 - Powers can only be used to investigate POBO offences
 - Use in Court proceedings of information s 20(a) POBO

Main Investigative powers of the ICAC

- ICSO
 - Intercept Communications
 - Emails
 - Instant messages
 - Smartphones chats
 - Covert Surveillance
 - Type 1 surveillance – highly intrusive, non Type 2 surveillance
 - Type 2 surveillance - covert surveillance that is carried out with the use of listening device or an optical surveillance device
 - Depending on the type, need to apply and obtain judge's or executive authorization

- Commissioner on Interception of Communications and Surveillance

Main Investigative powers of the ICAC

- ICSO
 - covert surveillance means any surveillance carried out with the use of any surveillance device if the surveillance is carried out in circumstances where the subject of the surveillance is entitled to a reasonable expectation of privacy, that it is carried out in a manner calculated to ensure that the subject is unaware that the surveillance is or may be taking place, and that it is likely to result in the obtaining of any private information about the subject.
- Commissioner on Interception of Communications and Surveillance

Main Investigative powers of the ICAC

➤ MLACMO

- Mutual legal assistance on criminal matters with other countries e.g. Australia, Canada, UK, USA etc
- Upon request:
 - (i) obtain production orders (e.g. against a bank to produce account documentation);
 - (ii) execute search warrants (e.g. against businesses providing secretarial services for companies and trusts);
 - (iii) take oral evidence of witnesses (including the production of documents) before a magistrate;
 - (iv) restrain corrupt proceeds, and enforce external confiscation orders;
 - (v) transfer persons, including prisoners, to assist in a criminal matter outside Hong Kong (e.g. to give evidence at the corruption trial).

Main Investigative powers of the ICAC

➤ MLACMO

- In corruption cases, officers from the ICAC will be nominated under the Ordinance by the Secretary for Justice to facilitate the assistance requested (e.g. to apply to Court for and execute a search warrant).

Main Investigative powers of the ICAC

- ICAC and Supreme People's Procuratorate – Mutual case assistance scheme
 - Under the scheme, ICAC can interview witnesses across the border with the assistance of Mainland's procuratorates
 - ICAC will also assist the procuratorate to interview witnesses in HK

Main Investigative powers of the ICAC

- Other methods of investigation (voluntary):
 - Ask + Invitation
 - Interviews
 - Written statements
 - Video recording
 - Letters – Personal data issues
 - Visits

Developments – Competition law

- 2 cases brought to the Competition Tribunal on allegations of bid-rigging, price fixing and market sharing – serious anti-competitive conducts
- Over 100 complaints are currently subject to “in-depth investigation phase”.
- The HK Government will provide dedicated funding of about HK\$200M to help cover the CC’s litigation work (current reserve of CC at around HK\$50M)

Main Investigative powers of :

The CC

- Investigative process
 - Conduct found out – complaints etc
 - Preliminary review – consider whether to investigate
 - Initial Assessment phase – determine whether there is sufficient evidence for “reasonable cause to suspect a contravention” and whether the matter warrants further investigation
 - May request information using voluntary means
 - Contact parties by phone or writing
 - Meeting and interviewing relevant persons
 - Review of publicly available information
 - Conduct surveys

Main Investigative powers of the CC

- Investigative process
 - Outcome of initial assessment phase:
 - No further action
 - Commence investigation phase
 - Alternative course – refer to another agency
 - Voluntary commitment – s.60 of CO

Main Investigative powers of the CC

- Investigation phase
 - Reasonable cause to suspect contravention and the matter warrants further investigation
 - Onsite inspections
 - May compel production of documents and information, request for interviews
 - S41 notice to provide docs and answer questions
 - S42 notice to answer questions
 - S48 apply to Judge of CFI for a warrant to search any premises
 - Can use force to enter
 - Can require person's in the premises to produce documents
 - Can seize computers
 - Offences if fail to comply with warrant or obstruct the execution of the warrant

Dawn raids and how to deal with them

- What is a dawn raid?
 - Unannounced – law enforcement agencies or regulators
 - 24/7/365 - More likely
 - Weekday
 - Early hours (before 9 am)
 - Offices; private and personal residences; warehouses
 - Execute search warrant (sometimes requested by client)
 - People
 - 2 to 10 people
 - Can be more – up to few teams of people
 - Multiple locations and simultaneous execution

Dawn raids and how to deal with them

- Multiple and return visits
- Possible use of devices and equipment if computer/hard drive cloning/imaging is required
- Logistical arrangements and casual demands
- Length of execution – as long as it takes – can be until midnight or beyond
- Can station people to guard

Dawn raids and how to deal with them

- Tips
 - Have a dawn raid plan and familiarise it
 - Reception/Guest relations (frontline)/facilities/IT/corporate communications
 - When they arrive: handle properly
 - Stay calm, be polite, robust and cooperative
 - Do not obstruct
 - Know what to check
 - Check and take copies of the search warrant and official's IDs
 - Count the number of officials
 - Arrange shadowing
 - Where to put officials
 - Put them in an empty meeting room

Dawn raids and how to deal with them

- Who to contact
 - Contact legal and responsible personnel
 - Identify legal professional privileged (LPP) materials
- Ask them if they will wait for outside lawyers arrival before they start
 - CC: no requirement to wait for legal advisers to arrive but they will wait a reasonable time if there is no in house lawyer and external lawyers have been contacted to attend the office under search (Investigations Guideline of CC)
- Train IT staff
 - Granting access
 - Securing data
- Corporate communications: have internal and external messages ready to go

Dawn raids and how to deal with them

- Tips
 - Do not issue security passes
 - Do not offer information
 - Do not destroy documents
 - Ask questions and seek clarifications
 - Allegations? Scope of investigations?

Rights of a suspect and witness

- Right to silence
 - ICAC - Yes
 - May be abrogated by Ordinance
 - SFC – No. Compelled to answer
 - CC – No. Compelled to answer. May need to verify answers with statutory declaration. S43 CO
- Suspect
 - Cautioned statement
 - If arrested, need to read them their rights e.g. confidential legal advice (Basic Law rights)
- Witness (not arrested)
 - No obligation to notify the rights
- Witness may become suspect
- Witness (not only suspect) also entitles to confidential legal advice – article 35, Basic Law
- Cooperate? Can be prosecution's witness
 - Testifying against the company?

Rights of a suspect and witness

- Written statements admissible as evidence
 - Offence if a person wilfully makes a written statement that he knows to be false or does not believe to be true s33 of Crimes Ordinance
 - Offence if a person knowingly misleads an ICAC officer by giving false information or by making a false statement s13B ICACO
- CO
 - Offences
 - S52 – Failure to comply with a requirement or prohibition imposed by the Commission
 - S53 – destroying, falsifying or concealing documents that have been required to be produced.
 - S54 – obstruction of search
 - S55 – providing false or misleading documents or information

Measures to prevent the triggering of an investigation

- **Ethics and Code of Conduct**
 - External – comply with the law e.g. POBO
 - Internal – Code of Ethics or Conduct
- Wider scope – general business integrity principles
 - Many companies have “zero tolerance” policy
 - Rejects corruption or bribery
 - Does not tolerate conflict of interest
 - Protects company’s assets
 - Protects confidential information
 - Anti-money laundering
 - Insider information
 - Anti-trust/competition
- Compliance - save a lot of trouble and suspicion

Measures to prevent the triggering of an investigation

➤ Corporate governance

- the system of rules, practices and processes by which a company is directed and controlled.
- Balancing the interests of a company's many stakeholders, such as shareholders, management, customers, suppliers, financiers, government and the community.
- Good corporate governance
 - Accountable
 - Fair
 - Transparent
 - Procedures for dealing with conflict of interest
 - Supervision, control and checks-and-balances

Measures to prevent the triggering of an investigation

- **Self reporting and plea bargaining**
 - No formal plea bargaining regime in HK
 - But can have informal plea bargaining discussions with the DOJ
 - Immunity and prosecution's witness
 - Mitigating factor

Measures to prevent the triggering of an investigation

- CC: Remedial goals:
 - Swift end to illegal conduct
 - Undo any harm caused
 - Encourage effective compliance
 - Deterrence
 - Consistency
 - proportionality
- CC: Leniency policy – for individuals and corporations
 - S80 of CO: CC may make a leniency agreement with a person that it will not bring or continue proceedings in the Competition Tribunal for a pecuniary penalty in exchange for the person's cooperation in an investigation or in proceedings under the CO.

Measures to prevent the triggering of an investigation

- Cartel leniency policy
 - In the public interest that leniency should be accorded to an undertaking which is willing to terminate its participation in cartel conduct, report that conduct to CC and cooperate, at that undertaking's own cost, in the bringing of proceedings against other parties to the cartel.
 - Incentive for a cartel member to stop the cartel conduct and report the cartel to CC
 - Available only for the first cartel member who reports and meet all the requirements for receiving leniency
 - The only way to apply for leniency under the Cartel Leniency Policy is to call the Leniency Hotline

Developments – the SFC

- Investigating 15 financial firms for failing in their duties as listing sponsors
- Investigating 136 corporate frauds, 28 cases classified as very serious
 - Inflated revenue; or
 - Inflated transaction value of the firms when they applied to list.
- “Cracking down on corporate fraud and failed IPO sponsors will continue to be the focus of the enforcement of the SFC to safeguard the reputation of the HK market” – Tom Atkinson, Executive Director of Enforcement, SFC

Developments – the SFC

- Real-time supervision; Front-loaded regulation
- SFC and HK Police signed MoU on 25 Aug 2017 to strengthen co-operation in combating financial crime
 - Referral of cases – HKP and SFC may refer cases to each other if each believes that the other party may be in a better position to handle the case or the case falls within the functions of that party.
 - Joint investigations – if the case falls within the functions of both parties, HKP and SFC may agree to commence a joint investigation by setting up a joint investigation task force.

Developments – the SFC

- Early involvement of the DOJ
 - If a joint investigation or a parallel investigation by each party on the same subject matter, the parties will consider whether to consult the DOJ at an early stage on whether one party should continue with the criminal investigation or each party should focus on particular suspected crimes.
- Exchange and use of information
 - Can exchange information and assist the other party in discharging its functions.

Developments – the SFC

- Investigative Assistance
 - SFC does not have power of arrest. If SFC has reasonable grounds to believe that a person has committed an offence under laws administered by SFC and SFC has obtained a warrant to arrest from the Court, SFC may request the HKP for help to arrest the person.
 - If SFC has reason to believe that there will be credible threat to the safety of SFC officers when they execute a search warrant, HKP will, if authorised by the search warrant, render reasonable assistance to the SFC in the search operation.

1. The investigative power of SFC

- SS.182, 183 and 184, SFO
- Power to investigate, where it has reasonable cause to believe:
 - an offence under the relevant provisions may have been committed;
 - a person may have engaged in defalcation, fraud, misfeasance or other misconduct in connection with various conduct involving the financial products and activities the SFC regulates;
 - market misconduct may have taken place and etc.





1. The investigative power of SFC

- S.182(1): SFC may appoint one or more other people to investigate
- S.182(3): SFC must give an ‘investigation direction’ to its investigators
- S.182(4): investigators must produce a copy of the investigation direction to a person before imposing any requirement upon that person

1. The investigative power of SFC

- S.183: an investigator may require:
 - production of any specified record or document;
 - provision of an explanation or further particulars of any produced document;
 - attendance at an interview to answer any question relating to the matters under investigation;
 - provision of any reasonable assistance in connection with the investigation, including answering any written question the investigator asks

2. Challenge of SFC's investigatory power

a. Challenging the mode of interview - "A" v The Securities and Futures Commission and Another [2008] 1 HKLRD 591

Background

- Investigation being conducted on possible insider dealing
- At the interview, the SFC sought to have the interview audio recorded. The Applicant opposed
- The Applicant brought judicial review, contending that the SFC had no power to insist on the audio recording of s.183(1)(c) interviews



2. Challenge of SFC's investigatory power

a. Challenging the mode of interview - "A" v The Securities and Futures Commission and Another [2008] 1 HKLRD 591

Held

- A "commonsense construction approach" should be adopted: Bennion in *Statutory Interpretation* (4th ed., 2002) at p.473
- Where a statute (such as the SFO) confers upon any person power to do or enforce any act, "all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act...": s.40(1) of the Interpretation and General Clauses Ordinance (Cap 1)
- Power to record an interview by audio means is reasonably incidental and necessary to the power under s.183(1)(c) to compel a person under investigation to answer questions

2. Challenge of SFC's investigatory power

a. Challenging the mode of interview - "A" v The Securities and Futures Commission and Another [2008] 1 HKLRD 591

Reasoning

- Likewise in *Jaffe v Bradshaw* (1998) 16 CRNZ 122: the Court examined whether the Serious Fraud Office Act 1990, which did not specify whether interviews could be videotaped, permitted the videotaping of interviews
- considerable advantages to both interviewer and interviewee in having an accurate and reliable videotape recording of what each has said
- any potential prejudice to an interviewee under the Act did not counter-balance the use of video as an accurate and effective means of recording an interview

2. Challenge of SFC's investigatory power

b. Challenging the power to request documents – *Securities and Futures Commission v Ernst & Young* [2015] 5 HKLRD 293

Background

- In 2010 Standard Water Limited (“**SW**”), a company carrying on business in the PRC, engaged EY for the purpose of its intended IPO and listing of its shares on the Stock Exchange of Hong Kong
- EY in turn engaged its affiliate, Ernst & Young Hua Ming LLP (“**HM**”), a PRC entity, to conduct the field work for the audit

2. Challenge of SFC's investigatory power

b. Challenging the power to request documents – Securities and Futures Commission v Ernst & Young [2015] 5 HKLRD 293

Background

- EY subsequently resigned as reporting accountant and independent auditor with immediate effect, citing “inconsistencies in documentation” as the reason in its letter to the Company
- SFC issued 9 notices to EY under s.183 of the SFO (“**Notices**”), requiring EY to produce audit working papers but EY refused
- SFC sought an inquiry under s.185 of SFO into the EY's said failures and a court order compelling EY to comply with the Notices

2. Challenge of SFC's investigatory power

b. Challenging the power to request documents – Securities and Futures Commission v Ernst & Young [2015] 5 HKLRD 293

Relationship between EY and HM

- The Court held that HM (and its staff) acted as the agent of EY under an agency of entrustment under PRC laws, in carrying out the audit field work
- HM had a duty to produce to EY all books and documents in its hands relating to the audit field work, even though they are created by HM (or its staff)



2. Challenge of SFC's investigatory power

- b. Challenging the power to request documents – *Securities and Futures Commission v Ernst & Young* [2015] 5 HKLRD 293

Held

- EY argued that it would be prohibited under various laws to produce the documents - the State Secrets Law, the Anti-Competition Law and the CPA Law were inapplicable

2. Challenge of SFC's investigatory power

b. Challenging the power to request documents – *Securities and Futures Commission v Ernst & Young* [2015] 5 HKLRD 293

Held

- EY failed to adduce evidence that the audit working papers contain State secrets or commercial secrets
- EY failed to adduce evidence to prove that the preservation of the audit working papers and other relevant documents is of value to the State and society or which should be kept confidential, so the Archives Law was held inapplicable

2. Challenge of SFC's investigatory power

b. Challenging the power to request documents – Securities and Futures Commission v Ernst & Young [2015] 5 HKLRD 293

- The Court was not satisfied that EY would be at a real risk of being subject to criminal, administrative or civil liabilities if compelled by a Court Order to produce the audit working papers and other information to the SFC
- No prohibition under PRC laws to produce the documents to the SFC
- Therefore, EY was ordered to produce to SFC accounting records and audit papers relating to its work as reporting accountants and auditor for SW

2. Challenge of SFC's investigatory power

c. Challenging the power to request interview – *Koon Wing Yee v The Securities and Futures Commission* [2007] HKEC 1942

Background

- D received a notice requiring him to attend an interview by an Investigator of the SFC, and to answer questions relating to the matters under investigation
- D applied for and was granted leave to bring judicial review proceedings in respect of the issue of notice and the requirement to answer questions
- D argued the SFC's powers infringed:
 - his right to silence
 - his right to a fair trial because the answers might be used against him in proceedings conducted by MMT

2. Challenge of SFC's investigatory power

c. Challenging the power to request interview – Koon Wing Yee v The Securities and Futures Commission [2007] HKEC 1942

Held

- At the time at which D would be interviewed D would not face any criminal charge in relation to the matters on which he was to be interviewed
- Neither had any proceedings been instituted in MMT against D
- Article 5 or 14 of the Bill of Rights applied where the subject of the notice was, at the time of receipt of the notice, facing either criminal or Insider Dealing Tribunal proceedings



2. Challenge of SFC's investigatory power

c. Challenging the power to request interview – *Koon Wing Yee v The Securities and Futures Commission* [2007]

HKEC 1942

- If it should transpire that D was brought before MMT the issue as to the use of his answers in that forum will arise for consideration and must be considered then
- Application dismissed
- CFI's decision was subsequently affirmed by the CA and the CFA

Investigatory Assistance to Foreign Regulators

a. Cross-border cooperative arrangements

- Multilateral Memorandum of Understanding (“**MMOU**”) formulated by International Organization of Securities Commissions (“**IOSCO**”)
- Signatories: Financial Conduct Authority (UK), Securities and Exchange Commission (US), Securities and Investments Commission (Australia), Securities and Futures Commission (Hong Kong), etc.
- Signatories obliged to provide assistance to one another through the provision of information, including information and evidence from third parties



Investigatory Assistance to Foreign Regulators

b. Legislative Framework – s.186 of SFO

- Commission's assistance to regulators outside HK
- S.186(3): Conditions of granting assistance
 - desirable or expedient that the assistance be given in the interest of the investing public or in the public interest; or
 - assistance will enable or assist the requesting body or person to perform their functions and it is not contrary to the interest of the investing public or in the public interest
- S186(5): Name of such body or person published in the Gazette as soon as reasonably practicable



Investigatory Assistance to Foreign Regulators

b. Legislative Framework – s.186 of SFO

- S.186(1): SFC may exercise any of its information gathering powers under s 179,181, 182 or 183 in order to assist a non-Hong Kong regulator
 - S.179: Power to require production of records and documents concerning listed corporations, etc.
 - S.181: Information relating to transactions
 - S.182: Investigations by Commission
 - S.183: Conduct of investigations
- The matter must be a matter that is similar to one of the matters that the SFC may investigate under ss.179 or 182

Investigatory Assistance to Foreign Regulators

b. Legislative Framework – s.186 of SFO

- S.186(6): Privilege against self-incrimination
- Can claim privilege against self-incrimination before giving explanation or statement
- such explanation or statement cannot be given to the non-Hong Kong body for use against that person in criminal proceedings
- Used in other purposes: allowed
 - criminal proceedings against another person
 - civil or administrative proceedings against any person
- SFC would seek from appropriate undertakings as to the use of the information in criminal proceedings against the person

Investigatory Assistance to Foreign Regulators

- July 2017 – SFC entered into a supervisory MoU with the UK Financial Conduct Authority (FCA).
- Covers entities operating on a cross-border basis in HK and the UK
- Scope
 - Supervisory co-operation
 - Cross border on-site visits
 - Execution of requests of assistance
 - Permissible uses of non-public information
 - Enhancing existing information sharing arrangements

Avoiding Investigation by the SFC

a. Self-reporting

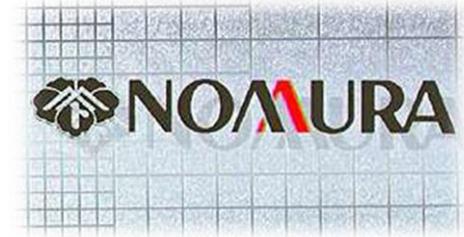
- Paragraph 12.5 of the Code of Conduct for Persons Licensed by and Registered with the SFC:

a licensed or registered person is required to report to the SFC immediately upon *“any material breach, infringement of or non-compliance with any law, rules, regulations and codes administered or issued by the SFC...or where it suspects any such breach, infringement or non-compliance...by itself or persons it employs or appoints to conduct business with clients or other licensed or registered persons”*



Avoiding Investigation by the SFC

a. Self-reporting



- Nomura International (Hong Kong) Limited Incident
 - 11 June 2013: the SFC was notified by Nomura Hong Kong that a trader on secondment from Japan had incurred a US\$3.3 million trading loss and had been repatriated to Japan on 5 June 2013 (**11 June Report**)
 - Nomura Hong Kong also informed the SFC that a review of the trader's activities was being undertaken and it would update the SFC further should any issues be identified

Avoiding Investigation by the SFC

a. Self-reporting

- Nomura International (Hong Kong) Limited Incident
 - At the time the 11 June Report was made, Nomura Hong Kong was already aware that the trader had made false entries in Nomura Hong Kong's risk management system to conceal the real risk exposure of his trades and had provided false information to Nomura Hong Kong
 - These facts were not disclosed to the SFC in the 11 June Report
 - 17 July 2013: Nomura Hong Kong informed the SFC that the trader had engaged in inappropriate conduct

Avoiding Investigation by the SFC

a. Self-reporting

- Nomura International (Hong Kong) Limited Incident
 - SFC's view:
 - rejected Nomura HK's argument that it needed to conclude its investigation in order to finalize its report and determine whether the matter was reportable to the SFC
 - delay in reporting to the SFC was a breach of paragraph 12.5 of the Code of Conduct (that further time was needed for internal investigation or legal advice was irrelevant)
 - SFC reprimanded and imposed a HKD4.5 million fine on Nomura HK under s.194 of the SFO

Avoiding Investigation by the SFC

b. Engaging in Unusual Activities - Market surveillance by the SFC

- Paragraph 5.2 of the “Memorandum of Understanding between Securities and Futures Commission and Hong Kong Exchange and Clearing Limited on Matters Relating to SFC Oversight, Supervision of Exchange Participants and Market Surveillance”:

“the SFC shall institute appropriate surveillance programs for monitoring and enforcing compliance with statutory, financial resources and other requirements and ensuring that market participants put in place proper systems of internal control and risk management”



Avoiding Investigation by the SFC

b. Engaging in Unusual Activities - Market surveillance by the SFC

- Paragraph 5.3:

“the SFC shall be responsible for monitoring market activities to detect potential breaches of laws, and infringements of the codes, rules and regulations that it administers relating to the securities and futures markets and for conducting investigations of such breaches and infringements, including those detected by it through daily surveillance and those referred by HKEx, other agencies and complaints from the public.”

- Abnormal/ Unusual Trading activity
 - e.g. share price fluctuation

Disclosure/ Announcements Leading to Investigation

a. Disclosure of Interest

- Part XV of the SFO “Disclosure of Interests”:
 - **Substantial shareholders** - individuals and corporations who are interested in 5% or more of any class of voting shares in a listed corporation, must disclose their interests, and short positions, in voting shares of the listed corporation
 - **Directors and chief executives of a listed corporation** must disclose their interests, and short positions, in any shares in a listed corporation (or any of its associated corporations) and their interests in any debentures of the listed corporation (or any of its associated corporations)



Disclosure/ Announcements Leading to Investigation

b. Announcement (e.g. annual results, inside information and etc.)

Inside information:

- Part XIVA: impose a general obligation of disclosure of price sensitive, or “inside” information by listed corporations
- s.307B(1) of the SFO: must disclose “as soon as reasonably practicable” unless the information falls within any of the Safe Harbors as provided in the SFO

Legal professional privilege

- Litigation Privilege
 - Protects documents and communications from disclosure if they are brought into existence for the sole or dominant purpose of actual or contemplated litigation (including communications between a client and 3rd parties)
- Legal Advice Privilege
 - Protects documents and communications made in confidence between a lawyer in his/her professional capacity and his/her client for the purpose of giving or seeking legal advice

Legal professional privilege

- Basic Law article 35: confidential legal advice
- ICACO s18: Preservation of LPP
- POBO s15: preserves LPP in relation to any privileged information, communication, book, documentation or other article.
- ICSO s62: any information that is subject to LPP is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization
- ICSO s31: prohibits the carrying out of interception or covert surveillance in a lawyer's office, residence and other relevant premises unless exceptional circumstances exist. Examples of relevant premises include interview rooms of courts, prisons, police stations and other places of detention where lawyers regularly provide legal advice to their clients.

Legal professional privilege

- S17(3) POBO: Chambers of counsel [Barrister] or the office of a solicitor are not subject to entry and search or any warrant issued except in the course of investigating a POBO offence alleged or suspected to have been committed by that counsel or solicitor.
- CO s58: does not affect any claims, rights or entitlement that would arise on the ground of LPP

Refusing Production of Documents - Legal Professional Privilege

- SFO S.380(4): “nothing in this Ordinance affects any claims, rights or entitlements which would, apart from this Ordinance, arise on the ground of legal professional privilege”

Refusing Production of Documents - Legal Professional Privilege

The Case of Lehman Brothers (“LB”)

- 24 Sept 2008: SFC announced its decision to commence investigation into allegations that Lehman Brothers-related retail structured notes may have been misrepresented to Hong Kong investors in the selling process
- June 2009: SFC applied to the High Court for an order directing LB to comply with an SFC Notice to produce all documents relating to assessments of Minibonds by an Internal LB committee called the New Product Review Committee
- Liquidators of LB objected the production of 17 documents in their entirety on the ground that those documents were the subject of a claim of LPP



Refusing Production of Documents - Legal Professional Privilege

The Case of Lehman Brothers (“LB”)

- The SFC brought the application to vindicate the request for disclosure and compel the production of the documents
- After reviewing the documents in question in chambers, the Court held that certain section of seven documents were not subject to valid claims of privilege and should be produced to the SFC
- The SFC commented: *“the SFC respects valid claims of legal professional privilege. However, the SFC will not hesitate to challenge claims that it considers do not have a valid foundation”*

Refusing Production of Documents - Legal Professional Privilege

Citic Pacific Ltd v Secretary for Justice [2012] 2 HKLRD 701

Background

- Citic was criticized for its delay in publishing profit warning, which led to the SFC commencing investigation against it, requiring production of all the records of Citic relevant to the SFC investigation
- Citic surrendered the documents and later argued that amongst them six were privileged and their surrender was subject to a limited waiver of privilege, namely that the surrender was for the single purpose of the SFC's investigation

Refusing Production of Documents - Legal Professional Privilege

***Citic Pacific Ltd v Secretary for Justice* [2012] 2 HKLRD 701**

Background

- The police subsequently commenced criminal investigations into Citic's affairs as the SFC passed the six documents to the Department of Justice for the purpose of seeking legal advice
- Citic demanded the return of the six documents
- Citic's claims were rejected by the CFI

Refusing Production of Documents - Legal Professional Privilege

Citic Pacific Ltd v Secretary for Justice [2012] 2 HKLRD 701

On appeal, it was HELD

- Privilege was not lost where privileged information came into the hands of prosecuting authorities through inadvertence or mistake
- The determination of whether there has been a full or partial waiver requires consideration of all the circumstances of the alleged waiver
- Given that legal professional privilege is a constitutionally guaranteed right in Hong Kong, a waiver is not to be lightly inferred

Refusing Production of Documents - Legal Professional Privilege

Citic Pacific Ltd v Secretary for Justice [2012] 2 HKLRD 701

- There was a partial waiver of privilege in favour of the SFC for the sole purpose of its investigation
- Such purpose would include seeking legal advice and for this purpose, it was permissible for the SFC to deliver the documents to the Secretary for Justice
- For all other purposes, privilege was retained by Citic

Refusing Production of Documents - Legal Professional Privilege

Citic Pacific Ltd v Secretary for Justice [2012] 2 HKLRD 701

Commentary

- When Citic surrendered the documents to the SFC, their solicitors had not provided any specific terms in writing as to the limitation of waiver of privilege
- It was not until a month or so later that Citic provided written clarification of what it considered the terms of limitation to have been
- In order to avoid any misunderstanding or trouble, it is important to clearly specify in writing that any waiver of privilege is restricted to the purpose of the investigation only at the time the documents are surrendered



Case study

- It is financial year end time and you have been busy dealing with external auditors who have been in the office for a few days already. At 9 am Monday a team of ICAC officers arrive at the reception with a search warrant. Half an hour later, a team of SFC investigators arrive with a search warrant.
 - Would they wait for external lawyers?
 - What should you do if they ask to:
 - Take away documents?
 - Take away a laptop?
 - Image a hard drive?
 - Image a server?
 - Use your photocopiers?

Case study

- Use the toilets?
- Search a room or desk that is locked?
- Search a room that is outside the boundary of the office that is not covered by the search warrant?
- Take away a personal smartphone of a staff?
- Take photos or video recording?
- How to identify or differentiate LPP materials:
 - Emails
 - Messages
 - Documents
 - Audio recordings
- What if they ask questions on site or ask to interview staff on site?
- Would instant messages on smartphones be captured?



Q & A



THE END

THANK YOU!

Important:

The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case.

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