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## 如何面對「法」力無邊的證監會調查？

## HANDLING INVESTIGATION BY THE “ALMIGHTY” SFC

ONC Lawyers  
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# Handling Investigation by the “Almighty” SFC

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# Speaker

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# Some Features of the SFC's Powers

# Wide scope of investigation: s.182(1) of the Securities and Futures Ordinance, Cap. 571

- Any offence
- Any wrongdoing in connection with dealing in securities, management of investment in securities...
- Market misconduct
- Any activity not in the public interest
- Inquiries as to misconduct or whether being fit and proper
- And so on



# Power to demand information and documents (before investigation)

- Wide power to demand documents concerning listed corporations, even overriding confidentiality obligations: s.179;
- Supervision of intermediaries – power to enter premises and conduct compliance audits: s.180
- Power to require information relating to transactions: s.181
- Information obtained can be shared by other government bodies
- Empowered to publish investigation reports

# Power to conduct interview – No right to silence

*Koon Wing Yee v The Securities and Futures Commission 1*  
HCAL 7/2007

- SFC’s investigation, possible market misconduct
- Notice requiring Koon to attend an SFC interview
- Koon sought to quash that notice on that basis that it breached his “right to silence”
- Court’s decision:
  - Criminal proceedings premature
  - In subsequent criminal proceedings, compelled answers generally inadmissible
  - Thus, SFC can compel an individual to give self-incriminating evidence at interview



# Strict obligation to cooperate

- Failure to comply:  
a fine of \$200,000/ 1 year imprisonment or level 5 fine/ 6 months, notwithstanding provision of information might tend to incriminate
- Providing misleading information:  
a fine of \$1,000,000/ 2 years imprisonment or level 6 fine/ 6 months
- Intending to defraud the SFC:  
a fine of \$1,000,000/ 7 years imprisonment or level 6 fine/ 6 months

# Strict obligation as to secrecy (s.378)

- Must preserve AND aid in preserving secrecy regarding any matter coming to his knowledge in the course of assisting investigation; must not communicate with any one else; and must not allow any person to have access to his documents
- Fine \$1,000,000/ 2 years imprisonment or fine at level 6/ 6 months imprisonment

# Use of dawn raids

- Warrant to enter and search premises (possibly multiple premises at the same time)
- Legal representation unlikely available
- Removal of documents and devices containing information outside the scope of warrant
- Questioning people unprepared for the questions

# Use of interim orders

- Freezing \$2.66 m in bank accounts of defendant in connection with suspected Pyramid and Ponzi scheme
- Prohibiting defendant from removing assets in relation to suspected insider dealing
- Restraining defendant company from holding out as carrying on regulated activities whilst unlicensed and suspending its website
- Freezing shares allegedly held for the benefit of a former chairman suspected of overstating the company's financial accounts
- Freezing assets of a listco and its subsidiary suspected of exaggerating its turnover in its prospectus for IPO
- Freezing the assets of defendant of a securities company suspected of misappropriating clients' monies



# s. 182 (1) Investigation – Conduct of an interview

Person under investigation vs.  
person assisting investigation: no  
meaningful distinction; status can  
change any time



# S.183(1)

## Notice addressed to individual

- produce documents
- offer explanation or further particulars
- attend interviews
- give all assistance
- verify the above by statutory declaration
- if unable to comply due to lack of knowledge or loss of documents etc., may be required to make a statutory declaration

# Preparing for the interview

- Scope of the alleged offence/misconduct
- Duration in which the alleged offence/misconduct was committed
- Possible involvement of accomplices
- Law and evidence





# Conduct of interview

- English or Chinese?
- Video taped, audio recorded or in writing? Depends.
- Right to silence? No
- Leading questions? Yes
- Objections to improper questions? Yes
- Clarify questions? Yes
- Cross-examination? No
- Pre-examination of SFC's evidence/documents? No
- Claim privilege? As and when appropriate
- Breaks in interview? As and when appropriate
- Written supplemental answers? yes

# Incriminating evidence

- Not admissible in evidence against the speaker in criminal proceedings; must claim privilege before answering
- not applicable to offences of non-compliance, provision of misleading information etc. perjury and so on
- blanket claim usually not allowed
- Admissible in proceedings against others
- Disciplinary action often relies upon admissions made during the SFC interviews

# Secrecy: s.378

- Equally applicable to ‘person under investigation’ and ‘person assisting’ the SFC
- Covers the fact of investigation, not facts existing independent of, or leading to the investigation
- Notification to insurers vs. preserving secrecy
- Duty not to prejudice insurers’ interest (e.g. not to make admission; not to settle without insurers’ consent)

# Secrecy: s.378

- SFC may consent to the disclosure under s. 378(7)
- Application in writing
  - information sought to be disclosed
  - the persons to whom it is proposed to be disclosed
  - the reasons for the proposed disclosure
  - SFC may attach conditions on the consent

# s.183(1) Notice addressed to company

- Conflict between company and representative of company
- Possible limitation on secrecy: informing boards, holding companies, in-house counsel, insurers and perhaps PR advisers
- Lawyer acting for company or representative of company?
- Remedial plan/action in exchange for a more lenient sanction
- Internal investigation preferably by lawyers to preserve privilege

# The role of lawyers

- Help negotiate scope of documents required
- Help determine mode of interview
- Help clarify questions
- Advise when to claim privilege
- Conduct supplementary examination of client, but never answer on client's behalf
- Contemporaneous notes
- Keep client constantly advised
- Make submission/ representation after interview
- Make settlement proposals
- Help negotiate on press release
- Appeal to Securities and Futures Appeals Tribunal or judicial review



# What investigations could lead to?

# Criminal liability

- Most prosecutions are successful
- Refer to Market Misconduct Tribunal (“**MMT**”) (usually cases where evidence not strong enough to secure conviction)
- Protection against double jeopardy: MMT proceedings not allowed after criminal proceedings in respect of the same conduct (whether pending or concluded): **s.283, s.307**. Rule not applicable to misconduct of licensed persons: liable to disciplinary action even after criminal or civil proceedings
- Accomplice officer/partner also guilty if offence committed with his assistance or even simply connivance or recklessness on his part: **s.390**



# Disciplinary sanctions: s.194

- Licensed person – licence revoked or suspended wholly or partially
- Responsible officer of a licensed corporation – approval revoked or suspended
- Public or private reprimand
- Miscellaneous prohibitions under **s.194(1)(iv)** e.g. applying to be licensed or registered
- Additionally, a fine of \$10,000,000, or 3 times the amount of profit gained or loss avoided, whichever is the greater
- ‘culminating’ effect of past conduct – both present and past conduct can be taken into account when determining the question of ‘fit and proper’

# Civil liability: s.281

- Civil standard of proof: balance of probabilities
- A person will be liable for damages to anyone who has sustained a loss as a result of his market misconduct if it is 'fair, just and reasonable' in the circumstances
- An officer of a corporation also liable if his conduct amounts to 'consent or connivance' (even though his own conduct not subject of MMT proceedings)
- An accomplice also liable if he has knowledge that the principal offender's conduct 'constitutes or might constitute market misconduct' (even though his own conduct not subject of MMT proceedings)
- Court has jurisdiction to grant injunction
- MMT findings/ reports admissible in evidence, 'unless the contrary is proved'

# Settlement with the SFC

1. Involvement of insurers
2. Disciplinary proceedings only



# Some cases concerning SFC's powers

# 1. Avoiding SFC interview:

## Chan Chin Yuen case

- s. 184: failing to attend interview: fine of \$200000, imprisonment for 1 year
- Also contempt of court
- Chan did not show up at the 1st interview
- SFC obtained a court order with penal notice compelling him to attend another scheduled interview
- Service of order by personal service failed
- Personal service was substituted by sending the order by post
- He did not show up at the 2nd interview: left HK
- SFC then applied to commit him to prison for contempt in disobeying the order to attend interview
- Arrested, released from prison subject to his undertaking to attend interview
- pay costs of the proceedings on an indemnity basis

## 2. Failing to answer questions at SFC interview:

### Chan Chin Tat case

- Chan attended the interview in the presence of 2 lawyers engaged by Chan
- refused to answer any questions: why?
- Plead not guilty, convicted after trial
- Mitigation: legal advice
- one month imprisonment

## 2. Failing to answer questions at SFC interview:

### Koon Wing Yee cases

- CFA, CA, CFI
- Article 10 – “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”
- Article 11(2) – In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality – ... (g) not to be compelled to testify against himself or to confess guilt.
- CFA: IDT has power to impose penalty (3 times of the profit or loss avoided) as it involved the determination of criminal charge within Article 10 and 11. Evidence were thus inadmissible. Koon shall not be compelled to give evidence
- New regime of the SFO: IDT replaced by MMT
- 3 other challenges contesting validity of SFC power to require him to answer questions
- All dismissed: premature, hypothetical
- CA: “It is no exaggeration to say that if the SFC were to be prevented from asking questions of the applicant, its role in an investigation might be stultified”

# 3. Providing false and misleading information to SFC:

## To Shu Fai case

- To, director and chairman of Daido, a company listed in the stock exchange of Hong Kong, indirectly sold 200 million shares held in Daido
- SEHK enquired the unusual trading of Daido
- To informed Daido's company secretary: he did not know of reason, did not trade in Daido shares, did not know of any transaction that ought to be reported
- Board of Daido: announcement to SEHK
- To convicted for providing false or misleading information to SFC under s. 384 via SEHK in accordance with the dual filing scheme
- CA, CFA: dismissed To's appeal



# 3. Providing false and misleading information to SFC:

## Ha Pon Lin Emily case

- D1: Ng, stock broker
- D2: Ha, solicitor representing Ng in SFC investigation
- SFC became suspicious that Ha and Ng had invented a story and lied to cover up the suspected thefts
- SFC referred the case to ICAC
- Ha was convicted on one count of conspiracy to pervert the course of justice and sentenced to 12 months' imprisonment

# 3. Providing false and misleading information to SFC:

## PME Group Limited case

- A Hong Kong listed company
- In 2008, PME made three announcements respectively in response to the inquiries made by the SEHK in light of the substantial movement in the share price of PME.
- In each announcement, PME confirmed that it knew of no negotiations or agreements which were disclosable to the market nor were its directors aware of any price sensitive matter
- Turned out: PME was at that time taking steps to acquire 50% of another Hong Kong listed company, with a market value of about \$145 million.
- PME pleaded guilty on three counts of making false or misleading information → fined \$60,000

## 4. SFC's power to audio record interview:

“A” case

- A = Du Jun
- interview be video recorded? A rejected
- interview be audio recorded? A rejected
- Judicial review: SFC power to insist on audit recording at interview? YES
- SFC power confirmed

# 5. Breaching secrecy obligations:

## Choi Chi Ming case

- An SFC investigation found that Choi had made unsolicited calls, in contravention of section 174 of the SFO
- After Choi attended an SFC interview, he had on two occasions disclosed the contents of his interview to two colleagues
- In contravention of s. 378
- Plead guilty, fine and suspension

# 6. Validity of SFC's search warrant:

## "A" case

- A = Du Jun
- A seek to quash search warrant: too broad
  - Omitted the dates and the name of the company involved in the alleged insider dealing
- A's application dismissed

The offence has been appropriately delineated

Occupier properly informed of the scope of the warrant

Reasonable for SFC not include precise information in the warrant, given that the investigation is on-going.

# 7. SFC's power to freeze assets:

## Hontex case

- Hontex International Holdings Company Limited (“Hontex”) is alleged to have disclosed materially false or misleading information in its prospectus
- SFC obtained interim injunction to prevent the dissipation of assets pending the conclusion of the SFC's investigation
- freeze net proceeds raised from IPO: \$10 billion

# 7. SFC's power to freeze assets:

## Wong Kwong Yu case

- GOME ex-chairman
- SFC alleged that Wong and his wife, Du Juan, had organized a share repurchase by Gome to repay \$2.4 billion personal loan
- A fraud or deception in a transaction involving securities
- SFC interim injunction to prevent the dissipation of assets pending the conclusion of SFC's investigation
- largest interim assets freezing order – \$1.6 billion

# 7. SFC's power to freeze assets:

## "C" case

- C suspected to be involved in insider trading of Asia Telemedia (ATML) shares
- C sold approximately 100 million shares
- Before ATML informed the market that a winding up petition had been served on the company
- Interim injunction: \$43 million (the loss avoided by C in selling the shares)
- CA confirms SFC's power to freeze assets in suspected insider dealing cases
  - Free-standing proceedings, not contingent on there being other substantive proceedings on foot





Thank you! 

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