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The Investigative Powers of the SFC

The SFC and Its Scope of Power

The Securities and Futures Commission (SFC) is an independent non-governmental statutory body whose authority is to regulate Hong Kong's financial markets. The Securities and Futures Ordinance (SFO) came into operation in April 2003 and it contains civil and criminal provisions for dealing with financial misconduct.

Pursuant to section 182 of the SFO, the SFC may conduct investigation into any matter relating to:

- (i) any offences under the SFO;
- (ii) defalcation, fraud or misconduct in connection with dealing in or managing an investment in securities, futures contract or leveraged foreign exchange contract;
- (iii) market misconduct;
- (iv) breach of a disclosure requirement under the SFO; and
- (v) any dealing or investment management activities which are not in the public interest.

By way of example, specific criminal offences that the SFC may be involved in investigating include false trading, insider dealing and price rigging.

SFC Investigative Powers

The SFC has extensive power of investigation. Under section 183 of the SFO, the SFC has the power to require by notice a person under investigation or a person whom the investigator has reasonable cause to believe has in his possession any record or document relevant to an investigation, to attend an interview with an SFC officer to answer questions. This written notice has often been referred to as a "section 183 notice". A person who, without reasonable excuse fails to comply with section 183 notice or to answer a question raised by the SFC officer, commits an offence punishable by a fine and imprisonment.

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Other powers under section 183 include:

- producing to the investigator any record or document in his possession as is specified which is or may be relevant to the investigation;
- if required by the investigator, giving the same an explanation or further particulars in respect of any record or document so produced; and
- giving the investigator all reasonable assistance in the investigation.

In March 2020, the Hong Kong Court confirmed that the SFC has the power to seize digital devices (such as mobile phones and computers) when executing a search warrant and to subsequently require the provision of the applicable login names and passwords pursuant to a section 183 notice.

Right to Silence and Other things to Be Aware of Whilst Under Investigation:

When invited by the SFC to attend an interview, it is important that the interviewee is aware of the privilege against self-incrimination under section 187 of the SFO. The SFO states that privilege against self-incrimination is not an excuse to not answering a question where the SFC officer requests information and, therefore, there is no right, on the grounds of self-incrimination, to not answer the SFC officer. However, the interviewee can still claim privilege against self-incrimination during the interview, but this claim only prevents the relevant answer from being used against the person in a criminal proceeding - it is not a right to remain silent.

Under section 378 of the SFO, there is a duty of confidentiality on the recipient of a section 183 notice such that the secrecy of the investigation is preserved. Whilst disclosure to a certain person is permitted with consent or in certain limited circumstances, for example, communicating the matter to a lawyer for the purpose of obtaining legal advice, a breach of this secrecy provision is a criminal offence punishable by a fine and imprisonment.

Conclusion

Understanding the role of the SFC and its wide powers of investigation under the SFO in both civil and criminal contexts is crucial for listed companies, licensed / registered institutions, and licensed persons.

Contact



Nick Dealy

Partner

+852 3405 7656

ndealy@gallhk.com