

GIBSON DUNN



Global Financial Regulatory Update

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## Recent SFC Disciplinary Action Reinforces Enforcement Focus on Statutory Secrecy in Hong Kong

This disciplinary action serves as a timely reminder regarding the importance of compliance with the Statutory Secrecy Prohibition and as an example of the SFC's willingness to take decisive action against individuals who breach this provision.

On May 28, 2024, the Hong Kong Securities and Futures Commission (**SFC**) suspended Mr. Wong Ka Ching (**Wong**), the former responsible officer (**RO**) of China On Securities Limited (**China On**), for four years.<sup>[1]</sup> The SFC's disciplinary action against Wong follows the SFC's investigation into China On over its failures as placing agent in a share placement which took place in 2019. This resulted in a public reprimand and the imposition of a HK\$ 6 million fine on China On.<sup>[2]</sup>

However, while Wong's suspension is at least partially the result of the SFC's conclusion that China On's failures as a placing agent were attributable to Wong as an RO and member of senior management, the SFC also concluded that Wong acted contrary to section 378 of the Securities and Futures Ordinance (**SFO**) (the **Statutory Secrecy Prohibition**) by disclosing confidential information regarding the SFC's investigation to a purported consultant of China On.<sup>[3]</sup> This disciplinary action serves as a timely reminder regarding the importance of compliance with the Statutory Secrecy Prohibition and as an example of the SFC's willingness to take decisive action against individuals who breach this provision.

## I. Summary of the Disciplinary Action

By way of background, China On acted as the placing agent in late 2019 for the then-majority shareholder (**Vendor**) of Hon Corporation Limited (**Hon Corp**) for the procurement of placees to subscribe for shares representing up to 45% of Hon Corp's total issued share capital (**Shares**) (the **Share Placement**). China On and the Vendor agreed that the total placing price for the Shares would be HK\$57.24 million (i.e. HK\$0.265 per share.)

Following an investigation, the SFC found that China On had failed to a) act within the scope of the Vendor's authority, and b) adequately safeguard the Vendor's assets in the course of identifying potential placees for the Share Placement. The SFC found that China On's failures in this regard occurred with Wong's consent or connivance, or were attributable to neglect on Wong's part as an RO and a member of the senior management of China On. The SFC also found that Wong acted negligently or recklessly in handling the Placement, and failed to ensure that China On adhered to appropriate standards of conduct.

However, the SFC also found that Wong had breached the Statutory Secrecy Prohibition by disclosing information about the SFC's investigation to a '*dubious consultant*', referred to by the SFC only as "X".

In its Statement of Disciplinary Action, the SFC noted that Wong had alleged that he had been heavily reliant on X for China On's compliance and operational matters, and had granted X full access to China On's front office, back office and accounting systems for this purpose. This was despite the fact that X had no formal agreement with China On and was not a licensed representative or member of senior management of China On. Further, Wong admitted to the SFC that he did not know anything about X's background or qualifications other than that X had apparently represented to him that he had been licensed by the SFC. According to Wong, X also insisted that his remuneration for his work for China On be paid in cash or through third parties, and switched his phone number and WeChat every one to three months so to avoid detection by regulators.

Despite this, the SFC found that Wong had provided copies of the SFC's letters and investigation notices to China On to X, and had sought advice and assistance from X in responding to the SFC's investigation of this matter. Wong did this even though the SFC's letters and investigation notices include (as a matter of course) prominent warnings to recipients about the consequences of breaching the Statutory Secrecy Prohibition by disclosing this correspondence to others. The SFC concluded that as a result of this, Wong had contravened the Statutory Secrecy Prohibition under section 378(7) of the SFO.

The SFC also concluded that Wong had procured, or at least allowed, China On to represent to the SFC that X had no relationship with China On or its management, and that he had had no involvement in the Share Placement. This was information that was false or misleading in a material particular. As such, its provision to the SFC in the course of the SFC's investigation was contrary to the requirements under section 384(1) of the SFO.

## II. The Statutory Secrecy Prohibition

By way of reminder, the Statutory Secrecy Prohibition is the legal requirement that a person to whom the Statutory Secrecy Prohibition applies must not (unless an exception applies):

1. disclose any matter coming to their knowledge –
  - a. by virtue of the person's appointment under certain specified provisions of the SFO and other related ordinances (**Relevant Provisions**);[\[4\]](#)
  - b. in performing any function or exercising any power under any of the Relevant Provisions;
  - c. in carrying into effect or doing anything required or authorized under any of the Relevant Provisions; or
  - d. in the course of assisting a person who falls within (b) or (c);
2. communicate any such matter referred to in 1) to any other person; and
3. allow any person to have access to any information or document in their possession as a result of 1)a), b), c) or d).

In addition, where information is disclosed under 1)b) or c) above to any person, that person and anyone who receives such information directly or indirectly from him will also be bound by the Statutory Secrecy Prohibition.

Importantly, the persons to whom the Statutory Secrecy Prohibition applies includes not only the SFC and its staff, but also any person assisting the SFC in performing its functions. In an investigations context, the latter category includes any person assisting the SFC in relation to its investigative functions, including by providing a record, document or information required to be produced to the SFC under sections 179 or 181, or providing information and/or attending an interview with the SFC under section 183 of the SFO.

In practice, what this means is that individuals who are the subject of an investigation by the SFC, or who are otherwise assisting the SFC in its investigations (e.g. by cooperating with SFC notices or other requests) must not disclose any information regarding the SFC's investigation to any person unless an exception to the Statutory Secrecy Prohibition applies.

There are seven exceptions to the Statutory Secrecy Prohibition, which allow for the disclosure of information in the following circumstances:

1. Disclosure of information already made available to the public;
2. Disclosure for the purpose of any criminal proceedings in Hong Kong;
3. Disclosure for the purpose of seeking professional advice from, or giving advice by, a counsel or solicitor, or other professional adviser acting or proposing to act in a professional capacity in relation to any matter arising under any of the Relevant Provisions;
4. Disclosure in connection with court proceedings to which the person is a party;
5. Disclosure in accordance with a court order or a law or legal requirement;

6. Disclosure to the Hong Kong Deposit Protection Board for the purpose of assisting the Board to perform its functions; and
7. Disclosure by the auditors of a listed corporation to the SFC, the Hong Kong Monetary Authority or the Insurance Authority under section 381 of the SFO.<sup>[5]</sup>

A breach of the Statutory Secrecy Prohibition is a criminal offence. If convicted, the person who breached the secrecy obligation is liable for a maximum fine of HK\$1 million and imprisonment for up to two years upon indictment, and a maximum fine of HK\$100,000 and imprisonment for up to six months upon summary conviction. Further, as seen from this case, the SFC may well take into consideration breaches of the Statutory Secrecy Prohibition in imposing disciplinary action on licensed persons.

### III. The Importance of Maintaining Secrecy

The Statutory Secrecy Prohibition is one of the key distinguishing factors of the Hong Kong regulatory landscape, and is a key aspect of the SFC's investigative arsenal. The SFC has stated publicly that it views the Statutory Secrecy Obligation as a safeguard of, relevantly:

- the public interest that the SFC should not be compromised in its operations and the pursuit of its regulatory objectives by the leakage of confidential information;
- the right of all persons, whether individuals or corporations, to be presumed innocent until proven guilty; and
- the reputation of individuals and the goodwill of firms investigated by the SFC or undergoing disciplinary proceedings.<sup>[6]</sup>

Given these matters, it is unsurprising that the SFC takes breaches and/or suspected breaches of the Statutory Secrecy Prohibition very seriously. The disciplinary action taken against Wong in this case serves as an important reminder of the importance of strictly adhering to the Statutory Secrecy Prohibition and of the SFC's willingness to discipline individuals for failure to comply with the Statutory Secrecy Prohibition.

Given this, we recommend that SFC licensed firms review their policies and procedures in relation to the handling of information in relation to SFC investigations, and take care to ensure that information flows in relation to investigations comply with the Statutory Secrecy Prohibition. In particular, we recommend reviewing policies and procedures in relation to the reporting of information to parent companies and/or other offshore entities in relation to ongoing SFC investigations to protect against inadvertent breaches of the Statutory Secrecy Prohibition by individuals based in Hong Kong.

<sup>[1]</sup> "SFC suspends Wong Ka Ching for four years", published by the SFC on May 28, 2024, available at: <https://apps.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=24PR94>.

<sup>[2]</sup> "SFC reprimands and fines China On Securities Limited \$6 million for failures as share placement agent", published by the SFC on May 18, 2023, available at:

<https://apps.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=23PR50>.

[3] Section 378, Securities and Futures Ordinance, available at: [https://www.elegislation.gov.hk/hk/cap571?xid=ID\\_1438403472414\\_002](https://www.elegislation.gov.hk/hk/cap571?xid=ID_1438403472414_002).

[4] The Relevant Provisions consist of (a) the provisions of the SFO; (b) Parts II and XII of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) dealing with the performance of functions relating to prospectuses; (c) Part 5 of the Companies Ordinance (Cap 622) dealing with the buy-back by a corporation of its own shares, or a corporation giving financial assistance for the acquisition of its own shares; and (d) Part 2 (except section 6) of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap 615).

[5] Under section 378(7) of the SFO, notwithstanding the seven exceptions listed above, a person can also disclose information subjected to the Statutory Secrecy Prohibition by seeking the SFC's consent. Application for the SFC's consent should be made in writing, stating the full extent of a) the information sought to be disclosed, b) the persons to whom it is proposed to be disclosed and c) the reasons for the proposed disclosure. In particular, the SFC has clarified that the following disclosures can be assumed as permissible, and therefore not a breach of the Statutory Secrecy Prohibition, without the need to make any formal application for the SFC's consent: 1) the fact that a person is bound by the secrecy obligation; 2) the general nature of the matter which has given rise to the secrecy obligation; 3) the means by which the person came to be bound by the secrecy obligation (e.g., by virtue of receiving an investigator's notice under section 183 of the SFO); and 4) the date, time and place at which the person is required to provide information or documents to the SFC, or to attend an interview by an SFC investigator. Note that the disclosure under 4) can only be made to an individual's employer or spouse; or where the individual is a regulated person, his firm's responsible officer, executive officer, compliance officer or in-house lawyer. Where the person is a corporation, disclosure under 4) is limited to the corporation's board of directors, its holding company or indemnity insurers. See "Secrecy Provisions", published by the SFC, available at: <https://www.sfc.hk/en/Regulatory-functions/Enforcement/Secrecy-provisions>.

[6] "Secrecy Provisions", published by the SFC, available at: <https://www.sfc.hk/en/Regulatory-functions/Enforcement/Secrecy-provisions>.

**The following Gibson Dunn lawyers prepared this client alert: William Hallatt, Emily Rumble, and Jane Lu.**

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. If you wish to discuss any of the matters set out above, please

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