



Jeffrey Mak Law Firm
麥振興律師事務所
www.jmaklegal.com

Financial Services Regulatory Update 金融服务监管资讯

2017.7.21

SFC's New Proactive Approach in relation to Listing Matters

香港证监会针对证券上市事宜采取新的积极主动策略

In respect of new listing applications in Hong Kong, the Securities and Futures Commission (SFC) has recently strengthened the scrutiny of the IPO suitability requirements. A similar and more guided approach will be applied to both new listing applications and applications for listing of new securities by existing listed corporations, according to the inaugurated July 2017 issue of the *SFC Regulatory Bulletin: Listed Corporations*.

In response to the recent happenings where many companies have inflated valuations due to unusually sharp increase in their share prices, the SFC is now adopting a proactive approach to policing listing matters that fall within the scope of the Securities and Futures (Stock Market Listing) Rules (SMLR) or the Securities and Futures Ordinance (SFO).

The new "real-time" approach is one under which the SFC will conduct direct discussions with the applicant or its advisers in respect of matters provided under s6(2) and s8 of the SMLR (which cover, for instance, serious non-compliance, market misconduct and non-disclosure cases). This connotes a departure from the previous practice under the dual filing system, where the SFC mostly raised comments via the Stock Exchange. Going forward, the SFC may raise objection to any listing application based on one or more of the grounds set out in section 6(2) of the SMLR. If the SFC is of the view that it is more likely than not, given the known facts and circumstances, that an objection would be raised on such grounds, it will promptly issue a "letter of mindedness to object" (LOM) directly to the applicant, setting out substantive concerns of the SFC along. If the applicant's reply to the SFC fails to address the SFC's concerns, the application will cease upon the SFC issuing a Final

Decision Notice (FDN), which is subject to review by the Securities and Futures Appeals Tribunal.

This "early intervention" or "front-loaded" approach is partly a product of the SFC's concern about market misconduct that takes places either at the IPO stage or at any time after listing, including schemes designed to artificially inflate or deflate share prices as well as other forms of price manipulation, money laundering, rigged shareholder votes, the use of misleading financial statements, and accounting fraud.



As a result of the SFC's direct interaction with the market, those listed companies affected by its decision will be expected to "be in a position to challenge our views to our face and to pursue statutory rights of appeal over any final decisions we make", said Mr. Ashley Alder, the Chief Executive Officer of the SFC who delivered a speech entitled "A new approach to regulation for changing markets" on July 13, 2017.

It is believed that the change of SFC's role will allow the SFO to be used far more expansively than is the case now, and will facilitate the transparency, efficiency and fairness of SFC's decisions.

More significantly, the SFC may at its discretion raise objection to listing applications as follow-on equity offering based on one or more of the grounds set out in s6(2) of the SMLR, or act in a more drastic manner by directing Stock Exchange to suspend trading in a listed company's shares under s8 of the SMLR, such as in the case of misappropriation of funds, failure to make an accurate and complete disclosure, or if there may not be an open market in the trading of the securities concerned.

In response to the SFC's proactive stance, Alder was reported in the May 2017 issue of *Regulatory & Compliance* to have said that there has been immediate behavioral change. He stated that IPO placings has become more balanced and some have been withdrawn because the directors become aware that the IPO placings did not reach the required standards. Although this did not solve the problem overnight, there has been a clear improvement in market conduct.



证券与期货事务监察委员会（证监会）近期已经加强审查企业首次公开发行的上市申请是否满足相关要求。从证监会本月发布的首份《证监会监管通讯：上市公司》可见，类似的审查方法适用于企业的首次上市申请以及上市企业的后续债券发行申请。

近来，多家企业由于股价异常攀升而令公司估值过度膨胀。对此，证监会积极采取更为积极的方式，以监管《证券与期货条例》以及《证券与期货(在证券市场上市)规则》规定下的上市事宜。

“前置式”监管，顾名思义，是指证监会就《证券与期货(在证券市场上市)规则》（下称“规则”）第 6 条第 2 款以及第 8 条所规定的事宜（包括例如不符合《上市规则》或者相关法律的要求，市场不法行为以及未按要求进行披露的情形）直接与申请人或申请人的顾问进行商讨。在此之前，上市申请适用“双重存档”，证监会依据《规则》针对上市申请所提出的问题或意见通过香港联交所传达给上市申请人。根据新监管举措，证监会将有权依《规则》第 6 条第 2 款所规定的一条或数条理由，就任何类型的上市申请发出驳回意见书。如果根据案件的已知事实或情形，证监会认为应依据上述理由提出驳回申请上市的意见，其会向申请人发出一封《驳回申请意向书》，并在该意向书中说明实质性理由。对于申请人的回复无法打消证监会疑虑的，证监会向前者发出《终局决定意见书》。除非上市申请人要求证券与期货事务上诉审裁处对该终局决定意见进行审查，上市申请将被终止。

证监会使用这种“初期干预”或称为“前置式”监管的做法，是出于对市场上不法行为的监管考虑（既有可能出现在首次公开发行阶段或在上市之后出现）。此类行为包括人为造成股价异常波动的安排计划或其他形式的价格操纵，洗钱，控股股东进行投票，以及使用陈述失实的财务报告或会计造假。

证监会行政总裁欧达礼于 2017 年 7 月 13 日发表的一份关于《市场变化下的新监管方式》的演讲中提到，依据新做法，证监会将就特定问题直接与市场人士进行交流，而相关上市企业能够直接与证监会就后者的意见进行商讨，并对于后者做出的最终意见享有法定上诉权。

相信证监会的角色转变有助于《证券与期货条例》得到更为广泛的适用，并有利于促进证监会意见书的公平，高效与透明。

值得注意的是，证监会有权在其认为适当的情况之下，依据《规则》第 6 条第 2 款所规定的一条或数条理由，就上市企业的后续股权发行事宜发出驳回意见书，或依第 8 条采取更为严厉的做法，即要求联交所暂停该上市企业的股票交易。根据以往案例，证监会行使暂停上市企业股票交易的情形包括：（1）该上市企业涉及挪用发行而来的资金，或在发行阶段未完整准确地披露公司重大信息；（2）该企业的拟上市证券被认为没有公开有序的交易市场。

Regulatory & Compliance 2017 年 5 月的期刊报道欧达礼称市场对于证监会的新监管方式已经迅速做出了回应。在数起首次公开发行配售的案例中，董事意识到相关企业无法达到配售的标准并自动中止配售计划。他承认虽然证监

会此举无法即时解决存在的问题，但是市场行为已经得到明显的改善。

HKEX Published Results of its Latest Review of Listed Issuers' Financial Reports

香港交易所刊发最新审阅上市发行人财务报告的结果

The Exchange recently completed 2017's Financial Statements Review Programme (the "FSRP"), a report detailing compliance with the disclosure requirements of the Listing Rules, accounting standards and relevant disclosure requirements of the new Companies Ordinance. The FSRP found, with the exception of three cases, that there were no significant breaches of the requirements that would "render the financial statements misleading, require their restatement or warrant disciplinary action".

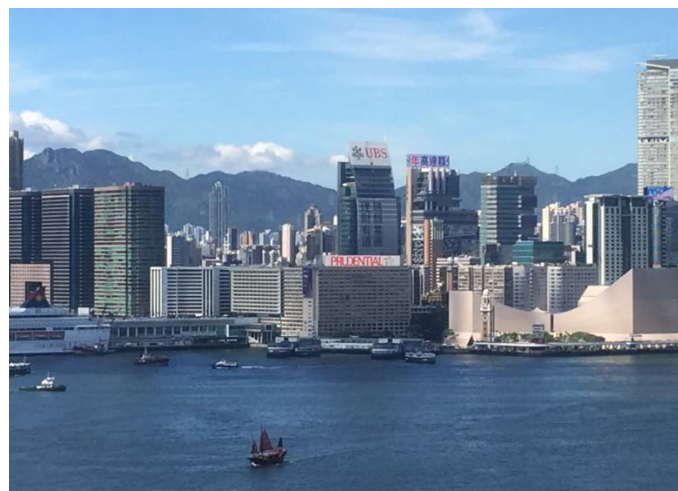
The report focused on a number of key areas in financial disclosures where there is room for improvement:

1. **Providing management commentary that is useful for investors** — such information should be "clear, understandable and entity-specific".
2. **Rigorous assessment on impairment of assets** — It is the responsibility of directors and senior management to perform proper analysis and exercise judgement to assess the reasonableness of key assumptions applied in impairment testing, and they should not rely solely on professional valuers or other experts.
3. **Disclosure of judgements and assumptions in determining control or significant influence** — issuers should disclose "significant judgements and assumptions" made when determining the degree of influence they have over another entity.
4. **Impact of applying key HK Financial Report Standards (HKFRSs) in issue but not yet effective** — issuers should consult professional advisers regarding key HKFRSs, as they are expected to disclose more entity-specific information in their financial statements about their application. Furthermore, issuers should keep up to date on new International Financial Reporting Standards (IFRS). The implementation of new standards may require a significant review and assessment of existing contracts and financial instruments.
5. **Segment reporting** — issuers should

ensure that the segment information disclosed in their financial statements are consistent with the segment information in the Management Discussion and Analysis.

6. **New auditors' reporting** — any significant audit matters disclosures made by auditors in the audit report should be "on the basis that those matters are already disclosed by the issuers".

For a financial report to be effective tool of communication, the information provided should be "relevant, material and entity-specific". Furthermore, issuers should remove irrelevant and immaterial disclosures. The HKEX recommends that directors and other responsible persons take note of and keep up to date on the issues discussed in the report and further changes to the Listing Rules.



Aside from financial reporting, issuers should also remain aware of the increasing importance of non-financial performance disclosure, which consist of environmental, social and governance ("ESG") reporting. It is paramount for listed companies to disclose such information to stakeholders in order to build trust and accountability, and ensure that stakeholders have sufficient information vis-à-vis their investment. Domestically, ESG reporting is incorporated in the Main Board Listing Rules (Appendix 27) and the Growth Enterprise Market ("GEM") Rules (Appendix 20). According to Main Board Rule 13.91, there are two levels of disclosure obligations: comply or explain provisions, and recommended disclosures. Issuers are obliged to state whether they have complied with the provisions, and, should they opt not to disclose on certain provisions, their reasoning for not doing so.

Moreover, it is recommended that issuers seek to also comply with international ESG standards to ensure that they provide investors and shareholders

with sufficient and comprehensive disclosures. The most commonly used ESG report standards are the GRI Guidelines. When preparing their ESG report, issuers should look at both Appendix 27 and the GRI Guidelines in conjunction to provide stakeholders with the optimal degree of disclosure. In fact, companies which primarily use the GRI Guidelines as their standard for ESG reporting are well placed to meet the disclosure requirements of the HKEX, as both standards are very similar. Doing so will stand issuers in good stead in the eyes of stakeholders and the HKEX by ensuring a high level of transparency and trust.

联交所近期完成了 2017 年度《财务报表评审项目》（FSRP）。该报告详细说明企业的财务报表需要符合《上市规则》的披露要求、会计准则以及新《公司条例》的相关披露要求。FSRP 透露，在三起案件中，财务报表内容严重违反相关要求，导致“财务报表被认定为虚假表示，或被要求重新申报，或（相关人员）被责令承担纪律处分”。

该报告着眼于财务披露的关键领域。在以下方面，尚有改善空间：

1. **为投资者提供有建设性的管理建议：**管理建议应当围绕企业具体情况而做出，并且结构清晰，意思明了。
2. **对资产减值进行严格审查：**董事及高管负有合理分析与判断的义务，以确保资产减值测评中采用的关键假定的合理性。另外，董事与高管不应完全依赖专业估价师以及其他专业人员的意见。
3. **重要假定与判断的披露：**在确定发行人是否对其它实体拥有支配性地位或重大影响的问题上，发行人应该明确披露其所做的重要假定与判断意见。
4. **采用已发布但尚未生效的主要财务报告标准（HKFRSs）所带来的影响：**鉴于发行人将需要于财务报告中提供披露更多与发行人实际情况相关的信息，发行人应就主要财务报告标准（HKFRSs）咨询专业顾问。另外，发行人应留意新的国际财务报告标准（IFRS）。实施新标准可能需要对已订立的合同以及金融工具进行重大审议及评估。
5. **分部汇报：**发行人应当从“管理者的视角”披露分部信息，并确保财务报表中的分部信息在披露方

式以及手段上与管理层讨论与分析（MD&A）的信息一致。

6. **新审计报告：**审计报告中，核数师对某一重大审计事项进行披露的标准是“该事项已经由发行人做出披露”

财务报告应该作为发行人与投资者之间的一个有效交流工具。报告内容需具备相关性，重大性，且应针对有关实体而做出。对于不相关或没有重大意义的事项，建议发行人不用披露。联交所建议董事以及相关负责人士记录报告中提及的问题，并保持关注《上市规则》的最新变化。

除财务报告之外，发行人还需要注意企业非财务方面的信息披露（即环境，社会责任与管治报告）（ESG）变得日益重要。上市企业需要向相关利益人士披露上述信息并保证后者有充分的信息做出投资决策，这对提高企业的认可度以及责任感非常重要。ESG 报告规定在主板规则（附录 27）以及创业板上市规则（附录 20）中。主板上市规则 13.91 规定两个层面的披露义务：“遵守或解释”型披露以及“建议型披露”规定。发行人有义务说明其是否已经遵守了相关披露要求，且如果选择不遵守某些披露规定条款，需要说明原因。

另外，建议发行人主动比照国际 ESG 标准，以保证报告中向投资者以及股东披露的内容全面完整。最为常见的 ESG 报告标准是 GRI 指引。在准备 ESG 报告时，发行人应该依照附录 27 并结合 GRI 指引做出披露，为相关利益人士提供最优程度的信息。实际上，由于 GRI 指引与联交所的附录 27 在内容规定方面非常接近，因此企业如果选择 GRI 指引作为 ESG 报告披露的标准，其在很大程度上已经同时满足了联交所的披露要求。企业若遵循上述建议做法进行操作，有助于保证其信息的高度透明化并为其赢得信赖。这在联交所以及相关利益人士看来是非常有用的。

SFC and AMF sign MoU on France-Hong Kong Mutual Recognition of Funds

香港证监会与法国金融市场管理局就法国与香港基金互认安排签订备忘录

The Securities and Futures Commission (SFC) and the Autorité des Marchés Financiers (AMF) have on July 10, 2017 signed a Memorandum of Understanding (MoU) on France-Hong Kong Mutual Recognition of Funds, which will allow eligible Hong Kong public funds and French UCITS funds to be

distributed to retail investors in each other's market through a streamlined authorization process.

The MoU is the first agreement between Hong Kong and a member of the European Union which establishes the regulatory framework for distribution of eligible Hong Kong and French funds, which currently include general equity funds, bond funds and mixed funds.

Mr Ashley Alder, the SFC's Chief Executive Officer commented that this new cooperation framework opens up the opportunity for Hong Kong funds to be sold in one of the leading markets in the European Union.

证券与期货事务监察委员会（证监会）与法国金融市场管理局在 2017 年 7 月 10 日签署了一份关于法国与香港基金互认安排的谅解备忘录（备忘录），允许合格的香港公募基金和法国的 UCITS 基金透过简化的审核程序，在对方市场向零售投资者进行销售。

备忘录是香港与欧盟成员国之间就销售合格的香港及法国基金（目前包括一般股票基金、债券基金及混合基金）建立监管框架的首份协议。

证监会行政总裁欧达礼先生表示，新的合作框架为香港基金开拓机遇，令它们可于一个在欧盟占领导地位的市场发售。

Information in this update is for reference only and should not be relied on as legal advice. 本资讯内容仅供参考不应作为法律意见。