Hong Kong Capital Markets Quarterly News
香港资本市场业务季刊

Editor's Note

Welcome to the 2012 2nd Quarter issue of our Hong Kong Capital Markets Quarterly News. In this issue, we examine current topics, including:

- **the Hong Kong Securities and Futures Commission's (SFC) recent observations regarding the quality of listing applications and proposals with respect to the regulation of sponsors;**
- **the Law Reform Commission's proposals for class action reform;**
- **recent guidance letters and listing decisions published by the Hong Kong Stock Exchange (the Exchange) on a range of topics, including various disclosure obligations for new listing applicants and preparation of a competent person's report for potential mining interests; and**
- **enforcement news in relation to the Hontex case.**

We hope you find the articles interesting and helpful.

编者按

欢迎阅读本所第二季度的《香港资本市场业务季刊》。
在本期，我们讨论当前涉及香港资本市场的一些话题，包括：

- 香港证券及期货事务监察委员会（证监会）对上市申请文件质量的一些新发现及对保荐人监管的最新建议；
- 法律改革委员会对于集体法律诉讼改革的建议；
- 香港联合交易所有限公司（联交所）最近一系列题目的指引信和上市决策，包括新上市申请人的各种披露义务及就潜在矿业权益编制合资格人士的报告；以及
- 与洪良案件有关的执法新闻。

希望您喜欢本期文章，并能从中受益。

In This Issue

2 SFC Notes Poor Quality Listing Applications
4 Regulation of Sponsors in Hong Kong
6 Class Action Reform
8 New Listing Decisions
12 New Guidance Letters
18 Enforcement News
22 Regulatory Watch

目录

3 证监会指出上市申请文件水平欠佳
5 香港保荐人监管
7 集体诉讼改革
9 新的上市决策
13 新的指引信
19 执法新闻
23 监管观察

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SFC Notes Poor Quality Listing Applications

In July 2012, the SFC published its Dual Filing Update, which continued to note that listing application materials were not up to the expected standard.

The areas of concern noted were:

1. Assertions of critical importance were based on assumptions apparently at odds with observable facts

The SFC noted that liquidity problems and potential insolvency pose significant risks to the sustainability of a listing applicant. Where an applicant has experienced serious cash strains or continuing operating losses, the listing application materials should provide a balanced analysis of pertinent facts relating to the applicant's business and industry environment to demonstrate that the applicant and its business can continue as a going concern.

Example 1

A property developer submitted a forecast predicting strong cash flows from its property sales based on forecast average selling prices that were approximately 30% higher than the historical average.

Regulators' enquiries revealed the following:

- actual cash flows for the first two months of the forecast period were much lower than the forecast because of exceptionally poor property sales in the traditional peak season; and
- the applicant subsequently initiated a substantial price cut for one of its property projects.

Despite the material adverse changes, the applicant revised upwards the forecast cash flows without offering any plausible explanation. It was questionable whether the forecasts were prepared on reasonable grounds and after careful consideration.

Example 2

A media products distributor had never reported any operating profit despite its long operating history of over ten years and was expected to continue to have negative equity after listing. To justify its viability, the applicant asserted that it would be profitable within two years, assuming it managed to acquire and distribute more media products, but then provided no objective information to demonstrate how it would be able to turn around in practice.

Regulators' enquiries revealed the following:

- a patchy track record in acquiring commercially successful media products; and
- gross profits from some of its products could not even cover the corresponding amortization and distribution costs.

2. Listing application materials were incomplete and not ready for regulators' review

Submission of incomplete or inaccurate listing applications prolongs the vetting process at the expense of applicants. In order to facilitate efficient vetting, a listing application should comprise a substantially complete draft of the listing document and all other requisite supplementary documents under the relevant listing requirements.

Example 1

A listing application by an applicant established in a newly recognized overseas jurisdiction lacked a number of documents expressly required under the listing requirements. In the absence of further submissions, the application ultimately did not proceed.

Example 2

There were two cases where the listing applicants relied on external investment managers to manage their investment portfolios. They were required under the relevant listing eligibility requirements to demonstrate that their investment managers had the relevant investment experience.

However, the draft listing document in one case did not contain the required disclosure, whereas the draft in the other case stated that the proposed investment manager did not have any relevant experience in the field of the applicant's target investment. Both applications did not proceed after the regulators expressed concern on the qualifications of the investment managers.

Example 3

Draft listing documents were submitted which contained not only due diligence questions requesting information from the listing applicants regarding their customers or directors, but also obvious errors and inconsistencies that were attributed to "inadvertent typos" when queried.

3. Failure to provide meaningful disclosures on the risks, historical financial performance and future plans

Investors rely on disclosures related to risks, management's discussion and analysis of financial performance (MD&A) and future plans in order to understand the specific events or factors driving the changes in a listing applicant's financial performance historically and going forward. The listing document should provide sufficient information tailored to the specific circumstances of the applicant for investors to make an informed assessment of the applicant.

Risk Factors

Many draft listing documents contain only boiler-plate risk warnings, which fail to explain clearly the relevance, significance and likelihood of the risks disclosed. A common risk factor is that an applicant might not be able to obtain necessary government approvals for its development projects. However, the risk disclosures often failed to explain the risk in the context of the applicant's business, such as the

(Continued on page 4)

证监会指出上市申请文件质量欠佳

2012年7月，证监会发布了其双重存档简讯，继续关注到上市申请文件未达到预期水准。

证监会所提出的关注范围：

1. 部分上市申请文件内有关重大事项的若干声明所依据的假设明显与具体事实不符

证监会注意到资金周转不灵或潜在的资不抵债对上市申请人业务的可持续性构成重大风险。申请人如出现严重资金短缺或持续经营亏损的情况，上市申请文件应就其业务及行业环境评估各相关因素，并提供客观持平的分析，论证有关申请人及其业务可持续经营。

例子一

一个地产发展商呈交了一份现金流预测，预测物业销售将为公司带来强劲的现金流，但该预测假设未来平均售价将较历史水平高近30%。

监管机构查询后发现：

- 鉴于申请人在该年传统旺季内的物业销售情况极差，因此预测期内首两个月所录得的实际现金流远低于预期；及
- 申请人其后大幅调低其中一个物业项目的售价。

尽管有上述重大不利变动，该申请人却在未有提供任何合理解释的情况下调高其现金流预测。以上情况令人质疑该预测是否基于合理的依据及经过仔细考虑。

例子二

一个媒体产品分销商虽已营运超过十年，但期内从未赚得任何经营利润，并预期上市后会继续录得负资产净值。为证明其业务稳健性，该申请人宣称该公司假若能收购及分销更多媒体产品，其应可在两年内盈利。然而，其并未就其如何能在实际情况下扭亏为盈提供任何客观信息。

监管机构查询后发现：

- 其在收购畅销的媒体产品方面的纪录欠佳；及
- 其中某些产品的毛利甚至不能抵销相关摊销及分销成本。

2. 部分上市申请文件不完整，未达到可以就呈交监管机构审阅水平

上市申请数据不完整或不准确会延长审阅程序，并耽误申请人本身的上市计划。为确保审阅过程顺利，呈交上市申请时应附上基本完备的上市要求文件，以及相关上市规定所要求的所有其他补充文件。

例子一

一个上市申请人在一个新近获得认可的海外司法管辖区成立。有关上市申请文件初稿并未包含多份上市规定明文要求呈交的文件。在未有呈交所需文件的情况下，该宗上市最后未有继续。

例子二

有两个上市申请人倚赖外聘投资管理公司管理其投资组合。为符合有关上市规则内的上市资格要求，该等申请人须证明其所聘的投资管理公司具备相关投资经验。

然而，其中一宗个案的上市文件并未就所需的信息作出披露；另一宗个案的上市申请文件则指出，其打算委任的投资管理公司在该上市申请人的目标投资领域方面，并无任何相关经验。在监管机构就其投资管理公司的资历表示关注后，两个申请人均终止有关申请。

例子三

递交的上市申请文件内，不但包含向上市申请人索取有关其客户或董事的资料的尽职审查问题，更出现明显的错误及前后矛盾之处。经查询后，该申请人解释该等错处纯属因疏忽而造成的错别字。

3. 未能就申请人所涉及的风险、过往财务表现和未来计划提供有意义的信息披露

投资者依赖于关于风险的披露、管理层讨论及财务表现的分析和未来计划的资料，来了解什么具体事件或因素影响上市申请人在过去及未来的财务表现。上市文件应提供足够多的能确实反映申请人的具体情况的资料，让投资者可以就申请人作出有根据的评估。

风险因素

很多申请上市文件只包含"标准"风险警告程度，这些警告并没有清楚解释所披露的风险与申请人的相关程度、重大程度及其发生的可能性。一个常见的风险因素是申请人未必能就其发展项目取得所需的政府批准。然而，该等披露往往未有根据申请人的实际业务情况解释有关风险，例如在上市时该申请人尚待政府审批的项目的重要性及性质。

例子一

一份上市申请文件披露，申请人有可能会因为其对于承诺客户的极

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materiality and nature of the applicant's projects that were pending government approvals at the time of listing.

Example 1

A draft listing document disclosed that the applicant might incur significant losses because it had agreed to provide very high guaranteed rates of return to its clients. However, it failed to disclose a meaningful analysis of the possible losses, such as a comparison of the market rent trend and the guaranteed returns for the various properties under the entrustment arrangements.

Example 2

A listing applicant operated various nonprofit entities that were prohibited by law from distributing dividends. To allow for dividend distribution, the entities must be converted into for-profit enterprises, which would operate under a different business model and tax regime. However, the initial draft listing document failed to disclose clearly the risks associated with such conversion and the different business model following conversion.

Historical Financial Performance

The MD&A sections, particularly in the discussion of changes in gross profit margins and fair value gains, frequently merely recited figures from the financial statements in narrative form with little or no meaningful explanation of the events causing the fluctuations in the applicants' financial performance.

(a) Decrease in gross profit margins

Examples of unacceptable explanations for a decrease included:

- "the rate of increase in cost of sales was faster than the rate of increase in revenue"; and
- "differences in product varieties caused by changes in customer preferences".

(b) Significant fair value gains

Sufficient information must be provided for investors to understand the reasons for the significant fair value gains during the track record period and the bases and assumptions used in the estimation of the gains.

Example 1

The estimated fair value of the applicant's investment properties was said to have more than doubled over the track record period, although the applicant failed to lease out a substantial portion of the units and an industry report suggested that there was a severe over-supply of similar units in the market. There was no meaningful explanation for the significant appreciation in the estimated capital value of the applicant's properties notwithstanding the unfavorable market conditions.

"SUBMISSION OF INCOMPLETE OR INACCURATE LISTING APPLICATIONS PROLONGS THE VETTING PROCESS AT THE EXPENSE OF APPLICANTS."

Example 2

An applicant recorded a gain on certain biological assets acquired in the latest financial year but omitted the fact that some of the biological assets had been infected with disease and that the fair value was estimated based on a "constant yield" assumption, contrary to the decreasing yield of the biological assets in reality.

Example 3

The draft listing document disclosed that the fair value of the applicant's biological assets was estimated by an independent expert. The regulators' enquiries revealed that the expert had not conducted any physical count to ascertain the condition or quantity of an entire class of biological assets, which accounted for over 30% of the total fair value of the applicant's biological assets.

Future Plans

Very limited disclosures on the applicants' future plans make it difficult to understand the justifications for and the feasibility of the plans, which might use up a significant portion of the listing proceeds.

Example 1

The use of proceeds was substantially revised after the regulators enquired about the details of the future plans, which raised concern on whether the original future plans were determined after careful consideration.

Example 2

An applicant intended to use most of the listing proceeds to almost double its production capacity on the directors' belief that market demand would grow rapidly, but did not reconcile the directors' belief with the widespread media reports about weakening market demand nor provide meaningful justifications for the aggressive expansion plan given the historically low utilization rates of its production facilities and over-supply in the industry.

Regulation of Sponsors in Hong Kong

Against a background where Hong Kong has been the world's leading IPO center for the third year in a row, the SFC has published its much-anticipated consultation paper on the regulation of sponsors. Aimed at improving the quality of listings in Hong Kong, the SFC's proposals concern the conduct of sponsors in connection with new listings and seek to provide a regulatory basis for defining the expected quality of sponsor work.

The first part of the consultation paper relates to the SFC's licensing regime for sponsors, with the SFC proposing to

(Continued on page 6)

高回报率可能招致重大亏损。 然而，该初稿并没有就可能出现的损失作出有意义的分析，例如对市场的租金趋势及其对于托管下物业的保证回报作出比较。

例子二

一上市申请人营运多个法律禁止分派股息的非盈利机构。为了分派股息，该等机构必须转型为盈利企业，并以不同的业务模式及在不同的税制下营运。然而，该上市申请文件并没有清楚披露转型所涉及的风险，以及转型后所依循的不同业务模式所面对的风险。

过往财务表现

管理层讨论及分析部分（尤其是在讨论毛利率变动和公平价值收益时）仅仅复述财务报表内的数字，而甚少或没有对导致申请人财务表现波动的事件作出有意义的解释。

(a) 毛利率下跌

不可接受的解释下跌原因的例子：

- "销售成本上升的速度快于收入增长速度"
- "顾客喜好变化导致产品种类变化"

(b) 重大的公平价值收益

必须提供足够信息让投资者了解公司在过往纪录期内取得重大公平价值收益的原因，以及评估该等收益时所采用的基准和假设。

例子一

尽管申请人未能租出很大一部分投资物业单位，而且有行业报告指市场上同类单位的供应严重过剩，但申请人声称其投资物业的估计公平价值在过往纪录期内增加了一倍以上，但该申请人并没有提供任何有意义的解释来说明为何在市况不景下，申请人物业的估计资本价值仍有大幅增长。

例子二

一个申请人就若干在最近期财政年度买入的生物资产录得公平价值收益，但对于部分生物资产曾被感染，以及生物资产的公平价值是以"固定收益率"的假设为估计基准的事实则只字不提，而实际上该类生物资产的收益率正逐渐下跌。

「提交欠完整或不准确的上市申请会延长审阅程序，上市申请人难免要付代价。」

例子三

上市文件披露，申请人生物资产的公平价值是由一名独立专家估算的。经监管机构查询后，才发现该专家对其中一类占申请人生物资产的总公平价值超过30%的生物资产并未进行任何实物盘点，以确定该类生物资产的状况及数量。

未来计划

只就申请人的未来计划提供非常有限的披露，令人难以理解这些可能用去大部分上市所得款项的计划的理据及可行性。

例子一

在监管机构就未来计划的细节提出疑问后，申请人对所集资款项的用途作出重大修订，令人质疑原先的计划是否经过深思熟虑。

例子二

一个申请人拟利用大部分上市所得款项将其生产能力扩大接近一倍，理据为公司董事相信市场需求会快速增长。但未有清楚解释董事对市场的看法为何与媒体就市场需求减弱的广泛报道明显不符，或虽然申请人的生产设施使用率向来偏低，及该行业已存在供应过剩的情况，也没有就其进取的扩展计划提供充分理据。

香港保荐人监管

在香港连续三年保持世界领先IPO中心地位的背景下，证监会就保荐人监管事宜公布了颇受期待的有关保荐人监管的咨询文件。为提高在香港上市项目的质量，证监会的建议涉及保荐人与新上市项目有关的行为，并寻求为确定预期的保荐人工作行为质量提供监管依据。

咨询文件第一部分是关于证监会的保荐人许可制度，证监会建议将保荐人的全部主要义务均包括在《证券及期货事务监察委员会持牌人或注册人操守准则》（操守准则）新添加的第17条中。咨询文件的第二部分是关于保荐人在《公司条例》项下的法律责任。

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consolidate all key sponsor obligations in a new paragraph 17 in the Code of Conduct for Persons Licensed by or Registered with the SFC (Code of Conduct). The second part of the consultation paper relates to the legal liability of sponsors under the Companies Ordinance.

For a summary of the key proposals in the consultation paper, see follow the link to our Client Alert: http://www.mofo.com/files/Uploads/Images/120510-Regulation-of-Sponsors.pdf.

The consultation period ends on July 31, 2012, and interested parties are encouraged to submit their comments in writing to the SFC. The SFC has stated that there is no definite timetable in place for implementing the proposed regulatory changes should they be adopted. In addition, any revisions to the prospectus liability provisions of the Companies Ordinance would be subject to further consultation with the Hong Kong government and would need to go through the normal legislative process, so they would be on a slower timetable than potential revisions to the Code of Conduct and the Listing Rules.

For a copy of the consultation paper, please visit the link: http://www.sfc.hk/sfc/doc/EN/speeches/public/consult/06/conclusions_prospectus_060922.pdf.

For a copy of our Sponsors' Milestones guide, please follow the link: http://www.mofo.com/files/Uploads/Images/120507-IPO-Milestones.pdf.

Class Action Reform

In May 2012, the Law Reform Commission published a report proposing that a mechanism for class actions should be adopted in Hong Kong.

Current Law

Under the existing law, the sole machinery for dealing with multi-party proceedings in Hong Kong is a rule on representative proceedings under the Rules of the High Court, which was criticized as restrictive and inadequate by the Chief Justice's Working Party on Civil Justice Reform in its Final Report in 2004.

What is a Class Action?

In a class action, a representative plaintiff sues on behalf of himself and all other persons ("the class") who have a claim in respect of the same (or a similar) alleged wrong and whose claims raise the same questions of law or fact. The need for such a mechanism typically arises where a large number of persons have been adversely affected by another's conduct, but each individual's loss is too small to make undertaking individual litigation economically viable. Such circumstances may arise in cases relating to, for example, consumer protection (such as product liability and consumer fraud), investor protection (such as securities fraud) or personal injury (such as food poisoning).

Key Recommendations

The Law Reform Commission made the following recommendations in its report:

Certification by the court

- Class actions would only be allowed to continue as class actions if they have been so certified by the court.

"Opt-out" approach for Hong Kong plaintiffs

- Members of the class from Hong Kong, as defined in the court order, would be automatically bound by the class action unless they "opt out" within the time limits and in the manner prescribed by the court order.

"Opt-in" approach for non-Hong Kong plaintiffs

- Parties from outside Hong Kong would not be included in the class action unless they take active steps to "opt in" to the action.

Phased implementation

- The regime would begin with tortious and contractual claims made by consumers in relation to goods, services and immovable property ("consumer cases"), and in light of the experience gained, the regime may be extended to other cases.
- The extension of the District Court jurisdiction to hear class actions should be deferred for a period of at least five years until a body of case law of the Court of First Instance on the new procedures has been established.

Contingency fees

- There was no change to the recommendation, as set out in the 2007 Law Reform Commission Report on Conditional Fees, that contingency fee arrangements should not be adopted in Hong Kong.

Safeguards

- The court would be empowered to order security for costs in appropriate cases to avoid abuse of the process of the court and an impecunious plaintiff acting as the class representative.
- The court's criteria for certifying the case based on the "adequacy of the representative" would include, *inter alia*, the representative claimant's financial standing and its ability to fund the action and meet any adverse costs award.

Next Steps

The Hong Kong government has said that it will take six months to assess the report; hence it is likely that the class action regime will not be established for some time. The proposed regime, if adopted, is likely to have a significant effect on resolving product liability disputes. Securities fraud will not be covered within its scope but instead will continue to be pursued by the SFC.

For a copy of the report, please follow the link: http://www.hkreform.gov.hk/en/docs/rclassactions_e.pdf.

(Continued on page 8)

欲知关于咨询文件中主要意见的概述，请点击以下连结：http://www.mofo.com/files/Uploads/Images/120510-Regulation-of-Sponsors.pdf

咨询期的截止日期是2012年7月31日，有关方可以书面形式向证监会提交其意见。证监会已经表明，对于如被采纳何时实施提议的监管变更规定并没有明确的时间表。此外， 对《公司条例》中招股章程责任条款的任何修订需进一步咨询香港政府而且需履行正式的立法程序，因此与对《操守准则》和《上市规则》拟进行的修订相比，所需的时间可能会更长。

欲知关于咨询文件的拷贝，请点击以下连结（英文版）：http://www.sfc.hk/sfc/doc/EN/speeches/public/consult/06/conclusions_prospectus_060922.pdf

欲知关于《保荐人里程碑指南》的拷贝，请点击以下连结(英文版)：http://www.mofo.com/files/Uploads/Images/120507-IPO-Milestones.pdf

集体诉讼改革

2012年5月，法律改革委员会发表了一份报告书，建议香港应采纳集体诉讼机制。

现行法律

根据现有法律，在香港处理涉及多方的法律诲诉讼的唯一方法是《高等法院规则》下的代表訴訟程序。終審法院首席法官轄下民事司法制度改革工作小組在其2004年的最終報告中批評该程序有所局限和不足。

什么是集体诉讼？

在集体诉讼中，一个原告代表人代表自己及所有基于与原告代表人所指称过失相同（或相似的）过失而申索补救的其他人（该集体）提出诉讼，且这些人的申索或原告代表人的申索涉及相同的法律问题或事实问题。需要引入集体诉讼机制通常典型是由于有很多人因他人的行为而受到不利影响，但每一名受影响者的损失又太小而不足以令他以个人名义提起的诉讼。该等情况可在例如保护消费者（例如产品责任及欺诈消费者行为）、保障投资者（例如证券欺诈案）或人身伤害（例如食物中毒）等案件中发生。

主要建议

法律改革委员会在上述报告中作出以下建议：

经法庭认证

- 集体诉讼程序除非获法庭认证，否则不会获准以集体诉讼程序的方式继续进行

香港原告人的“退出”模式

- 集体中的香港成员（如法庭命令所定义）将自动受集体诉讼约束，除非他们于法庭命令规定的选择退出期限内按规定的方式“退出”

非香港原告人的“加入”模式

- 香港境外的各方不会被纳入集体诉讼内，除非其采取积极步骤“加入”诉讼

分阶段实施

- 机制将先适用于开始于消费者就货品、服务和不动产而基于合约与基于侵权所提出的申索(消费者案件)，而随着经验的积累，可将该机制的适用范围扩及至其他案件。
- 应暂缓将聆讯集体诉讼的司法管辖权延伸至区域法院，为期最少五年，直至高等法院原讼法庭的案例对新程序所衍生的法律已予确立为止。

按判决金额收费

- 对香港法律改革委员会的2007年《按判决金额收费报告书》所提建议不变，即不应在香港采纳按判决金额收费安排。

保障

- 法庭获赋权可在适当的个案中命令提供讼费保证；避免滥用法院程序及财力紧缺的原告人担任集体代表。
- 法院基于“申索代表人的代表足够性”认证准则将包括申索代表人的财务状况、其为诉讼出资及应付任何不利讼费裁决的能力。

后续步骤

香港政府提出需要六个月的时间去评估该报告，因此，集体诉讼机制可能在一段时间内不会成立。该机制如被采纳则可能对解决产品责任争议有重大影响。证券欺诈不在此范围，但证监会将继续进行跟进。欲查阅报告的中文本，请点击：http://www.hkreform.gov.hk/tc/docs/rclassactions_c.pdf

（第9页继续）

New Listing Decisions

Waiver from the Accountants' Report Requirement for an Acquisition Circular

Company A proposed to acquire all of the shares in a target company (Target Company), and the acquisition would constitute a major transaction. As such, Rule 14.67(6)(a)(i) would require the inclusion of an accountants' report on the Target Company in Company A's circular for the acquisition.

The Exchange agreed to waive the accountants' report requirement in consideration of the following factors:

1. the Target Company was listed on the Toronto Stock Exchange and had published financial information, including audited accounts, to the market on a regular basis;
2. the Target Company's accounts were audited/reviewed by auditors; and
3. alternative disclosures would be made by Company A, including:

- a reconciliation of the Target Company's financial information for the differences between its accounting policies under Canadian GAAP and Company A's accounting policies under HKFRS, with an explanation of the differences and a reconciliation review by the auditors under Hong Kong Standard on Assurance Engagements 3000; and
- additional disclosures in the circular to bridge the gap between the Target Company's accounts and the requirements under the Listing Rules.

For a copy of the Listing Decision LD28-2012, please follow the link: http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld28-2012.pdf.

Definition of Reverse Takeover

Company A, listed on the Exchange, proposed to acquire a fellow subsidiary (Target) from Company B, its controlling shareholder, as part of a reorganization within Company B's group.

The Exchange ruled that the proposed acquisition was a reverse takeover for Company A under Rule 14.06(6)(b) because:

1. it was a very substantial acquisition for Company A; and
2. the Target was to be acquired from Company B within 24 months after it gained control of Company A.

"[T]HERE IS NO BRIGHT LINE TEST TO DETERMINE WHETHER AN APPLICANT'S RELIANCE ON A SINGLE MAJOR SUPPLIER OR CUSTOMER IS AN EXTREME CASE WHICH IMPACTS ON SUITABILITY FOR LISTING."

The transaction, together with the change in control of Company A, was a means to list the Target's business.

For a copy of the Listing Decision LD29-2012, please follow the link: http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld29-2012.pdf.

Reliance on Parent Company

In April 2012, the Exchange issued a listing decision on whether a listing applicant's operational and financial reliance on its parent company rendered it not suitable for listing. The Exchange focused on the following facts in the decision:

1. Operational reliance

- The group's sales to its parent company did not show a decreasing trend.
- Expected sales to the parent company would remain significant after listing.
- Sales volume to independent customers was comparatively insignificant.
- The group's product was experiencing a rapidly declining average selling price.

2. Financial reliance

- Advance payments from the parent company were significantly larger than advances from independent customers. As such, the Exchange considered that, in substance, the advance payments were financial assistance.
- The parent company's financial performance had been adversely impacted by the market downturn, and the group's future financial performance would be adversely affected if its parent company continued to perform poorly.

On this basis, the Exchange considered that:

(i) The listing applicant had been very reliant on sales to its parent company during the track record period. Although this reliance was expected to decline, it would still be significant after listing;

(ii) The group had received substantial advances from its parent company for sales of its product;

(iii) The parent company's financial results had been adversely impacted by the continued downturn in the industry in which it operated; and

(iv) The group therefore was financially and operationally dependent on its parent company, a company that had been adversely impacted in recent financial periods. Consequently, the sustainability of the group's business was significantly dependent on a company whose sustainability was currently very uncertain.

The Exchange determined that the listing applicant had not yet demonstrated its operational and financial independence

(Continued on page 10)

新的上市决策

豁免遵守须于收购通函内载有会计师报告的规定

甲公司拟收购目标公司(目标公司)的所有股份，而该收购事项会构成一项主要交易。因此，《上市规则》第14.67(6)(a)(i)条规定甲公司需在关于该收购事项的通函中包括目标公司的会计师报告。

考虑到下列因素，联交所同意豁免有关会计师报告的规定：

1. 目标公司在多伦多证券交易所上市，且定期发布其财务信息，包括经审计账目；
2. 目标公司的账目已由审计师审计/审阅；
3. 甲公司将进行的其他选择性披露，包括：

- 对于目标公司按加拿大的通用会计原则与甲公司按《香港财务报告准则》制定的会计政策之间的财务信息差异的对账，亦会根据《香港审验聘用服务准则3000》(Hong Kong Standard of Assurance Engagements 3000) 审阅有关对照；及
- 于通函中披露其他资料以弥补目标公司的账目与《上市规则》的规定的资料差异。

如欲查阅上市决策LD28-2012的中文本，请点击以下连结：http://www.hkex.com.hk/chi/rulesreg/listrules/listdec/Documents/ld28-2012_c.pdf

「反收购行动」的定义

在联交所上市的甲公司建议向其控股股东乙公司收购同样作为其子公司的公司(目标公司)，作为乙公司的集团内进行重组的一部分。

联交所裁定，根据《上市规则》第14.06(6)(b)条，建议的收购对于甲公司而言属一项「反收购行动」，因为：

1. 该交易对于甲公司而言属一项非常重大的收购事项；及
2. 甲公司在乙公司取得甲公司控制权后的24个月，从乙公司收购目标公司。

> 「目前并无明确界线可断定申请人是否极倚赖个别的单一主要供货商或客户以致适合上市。」

交易连同甲公司的控制权变更是将目标公司物业业务上市的一个途径。

如欲查阅上市决策LD29-2012的中文本，请点击以下连结：http://www.hkex.com.hk/chi/rulesreg/listrules/listdec/documents/ld29-2012_c.pdf

对母公司的依赖

2012年4月，联交所出具新的上市决策，内容是关于上市申请人在营运和财政上对其母公司的依赖会否令其不适合上市。

1. 营运上的依赖

- 集团向其母公司作出的销售并无下降趋势。
- 预期上市后向其母公司的销售额仍将较大。
- 售与独立客户的销售量相对并不大。
- 集团的产品平均售价正急剧下跌。

2. 财政上的依赖

- 母公司支付的预付款远较独立客户的预付款多，因此，联交所认为母公司支付的预付款实际上是财政援助。
- 母公司的财务表现受到市场的低潮的负面影响，倘其母公司的财务表现持续恶化，集团日后的财务表现可能受到不利影响。

据此，联交所认为：

(i) 甲公司于营业纪录期内非常依赖向其母公司作出的销售。尽管预期此依赖情况会减少，但于上市后仍属重大；

(ii) 集团就销售其产品收到其母公司预付垫款；

(iii) 母公司的财务业绩受到本身行业的持续疲弱打击；及

(iv) 集团在财政及营运上均需依赖其母公司，而母公司于最近的财务期间均受到不利影响。集团业务可否持续因而其实非常依赖一家目前本身持续性也非常不确定的公司。

(第11页继续)

from its parent company and that its significant reliance on its parent company also raised the issue of the sustainability of its business and suitability for listing under Rule 8.04.

For a copy of the Listing Decision LD30-2012, please follow the link: http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld30-2012.pdf.

Disclosure of Allegations and Rule 18.04 Waiver

In May 2012, the Exchange published a listing decision on:

1. whether a waiver of Rule 8.05(1) under Rule 18.04 should be granted to Company A in view of the lack of a clear path to commercial production; and
2. whether adequate disclosure had been made regarding allegations of illegal sale and price manipulation of an unrelated company on an overseas exchange, such allegations having been made against certain persons whose surnames were identical to those of Company A's previous management members.

Issue 1

The Exchange concluded that the waiver of Rule 8.05(1) should not be granted, as Company A had not demonstrated to the Exchange's satisfaction that it had a clear path to commercial production based on:

- the Company's limited trial production;
- the lack of a detailed mine plan with a detailed production schedule;
- the lack of a geotechnical study and use of preliminary grade study; and
- vague framework agreements which appeared to be little more than undertakings to negotiate on the amounts and quantities to be purchased, the price and other terms.

Accordingly, Company A would not be able to satisfy the eligibility requirements under Rule 8.05(1).

Issue 2

There was an anonymous letter alleging that members of Company A's management with a certain surname were involved in a legal action filed by an overseas regulator relating to the illegal sale and price manipulation of an unrelated company listed on an overseas exchange.

Mr. X, the former controlling shareholder of Company A who had the same surname as the persons in the complaint, later sold his entire equity interest in Company A to Company B and Company C, who then became Company A's new controlling shareholders. Mr. X and Mr. X's cousin with the same surname also resigned as directors of Company A. Based on the total investment cost paid by Company B and Company C to Mr. X, the investment cost represented a discount of over 70% to the proposed offer price.

The Exchange considered that the disclosures relating to the allegations were unclear and limited and questioned Mr. X's willingness to sell his interest in Company A for a large discount and whether Mr. X and his cousin were associated with Company B and Company C.

The Exchange directed that certain disclosures be made, including:

- a statement by the directors that Mr. X and his cousin retained no economic or other interests in Company A and that the current controlling shareholders and Company A were independent of Mr. X and his cousin, and a discussion of their due diligence regarding the acquisition of Company A;
- the steps taken by the sponsors to satisfy themselves that Mr. X and his cousin retained no economic or other interest in Company A and that the current controlling shareholders, Company A and their respective associates were independent of Mr. X and his cousin and their respective associates; and
- the steps taken by the current controlling shareholders to satisfy themselves that there were no other issues arising from the allegations that should be addressed.

Subsequent developments

Company A progressed to commercial production and resubmitted a new listing application with enhanced disclosures addressing all of the Exchange's concerns regarding the change in controlling shareholders. Company A also began preparing a mining plan with a detailed production schedule and updated its independent technical report.

Based on the revised disclosures, the Exchange agreed to grant a waiver of Rule 8.05(1) under Rule 18.04 to Company A, and the listing was permitted to proceed.

For a copy of the Listing Decision LD31-2012, please follow the link: http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld31-2012.pdf.

Competent Person's Report for Mining Interests to be Acquired/Developed

In June 2012, the Exchange published a listing decision in relation to whether a listing applicant must prepare a competent person's report (CPR) for mining interests it intended to acquire or develop.

The listing applicant had the following assets (see chart below):

Description	Nature of Interests
Mine W	Mining right
Mine X	Exploration right
Mine Y	A conditional agreement to purchase the majority equity interests in an entity which held the exploration right for Mine Y
Mine Z	An option to purchase the majority equity interests in an entity which held the mining right for Mine Z

(Continued on page 12)

联交所认为甲公司未有证明其可在营运及财政上独立于其母公司，而甲公司严重依赖其母公司亦令人忧虑其业务的可持续性以及其是否符合第8.04条所指的适合上市问题。

如欲查阅上市决策LD30-2012的中文本，请点击以下连结：http://www.hkex.com.hk/chi/rulesreg/listrules/listdec/documents/ld30-2012_c.pdf

指控的披露及根据第18.04条的豁免

2012年5月，联交所发布了下列上市决策：

1. 鉴于甲公司未能向联交所证明其有一条清晰路径达至商业生产，是否应批准甲公司根据《上市规则》第18.04条获得第8.05(1)条规定豁免；及
2. 是否已对于针对若干名与甲公司前管理层成员姓氏相同的人士的非法出售一家在海外交易所上市的非关连公司及操控其股价的指控进行足够披露。

问题一

由于甲公司未能向联交所足够证明其有一条清晰路径根据下列各项达至商业生产，联交所决定不批准甲公司豁免遵守《上市规则》第8.05(1)条：

- 公司的有限试产；
- 缺乏有包含详细生产进度的详细采矿计划；
- 缺乏岩土研究及使用初步品位研究；及
- 模糊的框架协议，因为其似乎只是同意磋商采购金额和数量、价格及其他条款的承诺。

因此，甲公司未能符合《上市规则》第8.05(1)条的规定。

问题二

一封匿名信指称甲公司管理层中有若干名姓「X」的成员涉及一宗海外监管机构提出的法律诉讼，涉嫌非法出售一家在海外交易所上市的非关连公司及操控其股价。

X先生（甲公司的前控股股东，与投诉涉及的人士的姓氏相同）其后出售其在甲公司的全部股权给乙公司及丙公司，该两家公司随之成为甲公司的新控股股东。X先生及一位与X先生同姓亲属亦辞去甲公司董事职务。按乙公司及丙公司向X先生支付的总投资额计算，该投资额较建议发售价折让逾70%。

联交所认为有关投诉指控的披露不清晰及不足，并质疑X先生为何愿以大幅折让价出售其于甲公司的权益，以及X先生与其亲属是否为乙公司及丙公司的联系人。

联交所指示需作出若干披露，包括：

- 董事的声明，表明X先生及其亲属在甲公司并未持有任何经济或其他权益，且现有控股股东及甲公司均独立于X先生及其亲属；
- 论述为确保可对甲公司放心收购进行过的尽职审查；
- 保荐人所采取的步骤，令其确信X先生及其亲属并无持有甲公司的任何经济或其他权益，以及现有控股股东、甲公司及其各自的联系人均独立于X先生及其亲属及其各自的联系人；及
- 现有控股股东所采取的步骤，令其确信没有因有关指控而产生任何需处理的其他事宜。

后续进展

甲公司已进入商业生产阶段，并再次提交新上市申请，当中加强了披露内容，也解决了联交所对于控股股东变动是否为避免公司因指控而损害声誉的所有关注的问题。甲公司另外开始编制采矿计划及详细生产进度表并更新其独立技术报告。

根据经修订的披露内容，联交所同意授予甲公司《上市规则》第18.04条下第8.05(1)条的豁免，亦批准其上市。

如欲查阅上市决策LD31-2012的中文本，请点击以下连结：http://www.hkex.com.hk/chi/rulesreg/listrules/listdec/documents/ld31-2012_c.pdf

关于潜在矿业权益的合资格人士报告

2012年6月，联交所发布了一个新的上市决策，内容是关于上市申请人是否必须就其有意购入或开发的矿业权益准备合资格人士报告。

（上市申请人具有以下资产，请见以下图表）

联交所相信：

- 要求申请人在上市前就矿场X、矿场Y及矿场Z编制合资格人士

名称	权益性质
矿场W	采矿权利
矿场X	勘探权利
矿场Y	一项有条件协议，甲公司据此可购入拥有矿场Y勘探权利之公司的多数股本权益
矿场Z	一项购入选择权，甲公司据此可购入拥有矿场Z采矿权利之公司的多数股本权益

（第13页继续）

The Exchange was satisfied that:

- the preparation of a CPR for mines X, Y and Z was not practicable before listing (see listing decision for the reasons) and the prospectus would not include any estimated resource or reserve information of mines X, Y and Z; and
- the listing applicant did not rely on the contribution of mines X, Y and Z to justify obtaining a listing.

As a result, the Exchange allowed the listing applicant to omit from the listing document a full CPR for each of mines X, Y and Z, on condition that it must:

- disclose in the prospectus material information regarding mines X, Y and Z and the proposed terms and likely benefit of acquisitions, for investors' assessment of their potential;
- undertake to issue a CPR for each of these mines when the necessary information is available; and
- undertake to report in the annual reports on the status of these mines' and management's intentions regarding them.

For a copy of the Listing Decision LD32-2012, please follow the link: http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld32-2012.pdf.

New Guidance Letters

Use of Proceeds

In April 2012, the Exchange published a guidance letter on the disclosure in prospectuses of the intended use of proceeds by new applicants.

1. Proceeds for general working capital

- If an applicant has no current or specific plans for the use of a material portion (generally 10% or more) of the proceeds, the prospectus must include a statement to that effect and discuss the principal reasons for the offering.
- "Working capital" or "general corporate purposes" do not constitute current or specific plans for the proceeds, unless there is a reasonably detailed explanation.

Case 1: Allocation of all net proceeds as "working capital" was acceptable, as the applicant provided a detailed explanation that the proceeds were to be used to increase its capital base in order to enable it to meet certain statutory capital requirements for business expansion.

ANY MATERIAL CHANGE OF USE OF PROCEEDS IS GENERALLY PRICE SENSITIVE IF NOT PREVIOUSLY DISCLOSED IN PROSPECTUS.

Case 2: Allocation of 25% of net proceeds as "working capital" for expansion of sales/operations teams required a clear explanation.

2. Proceeds for acquisition of properties from connected persons or associates

- An applicant must disclose the basis for determining the cost of the acquisitions.

3. Proceeds for acquisition of businesses

- An applicant must disclose the identity of the businesses, terms of the proposed acquisition and identity of the parties; or
- If not yet identified, an applicant must disclose the nature and a brief description of the business types, acquisition strategy and status of negotiations.

4. Proceeds for discharge of indebtedness

- An applicant must disclose the interest rate and maturity of debt.
- If debt was incurred within one year before the A1 application, the listing applicant must disclose how the borrowing was used (unless it was for working capital).

5. Disclosure in prospectus

- Details of proposed capital expenditures normally would be included in different prospectus sections, *e.g.*, "Financial Information".
- If any material amounts of other funds are necessary for the specified purposes for which the proceeds are to be used, the listing applicant must disclose the amounts of those other funds needed for each specified purpose and the source of funding.

6. Order of priority of the proceeds

- An applicant must disclose the intended order of priority of use in the "Use of Proceeds" section if the amount to be raised is variable *(e.g.*, over-allotment option, price range).

7. Change of use of proceeds

- Any material change of use is generally price sensitive if not previously disclosed in the prospectus.
- An applicant may change the use due to contingencies if these are discussed specifically and alternatives clearly described in the prospectus.

For a copy of the Guidance Letter GL33-12, please follow the link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl33-12.pdf.

Hard Underwriting

In April 2012, the Exchange published a guidance letter on the disclosure requirements in relation to hard underwriting. (See chart on page 14.)

(Continued on page 14)

报告不切实际(原因请见上市决策),因此招股章程不会载有矿场X、矿场Y及矿场Z的估量资源或储量资料;及

- 上市申请人的上市资格并不倚赖矿场X、矿场Y和矿场Z。

因此,联交所批准上市申请人的上市文件毋须就矿场X、矿场Y和矿场Z逐个提供合资格人士报告,但前题是上市申请人必须:

- 在招股章程披露矿场X、矿场Y和矿场Z的重要中信息,及建议的收购条款和收购建议可能带来的好处,以供投资者评估这些矿场的潜力;
- 承诺在获得所需资料后,对上述每个矿场发布合资格人士报告;及
- 承诺在年报内描述上述矿场的现状及管理层对这些矿场的发展计划。

如欲查阅上市决策LD32-2012的中文本,请点击以下连结:http://www.hkex.com.hk/chi/rulesreg/listrules/listdec/Documents/ld32-2012_c.pdf

新的指引信

所得款项用途

2012年4月,联交所发布了新申请人在上市文件中披露所得款项拟定用途的指引。

1. 所得款项用作一般营运资金

- 如申请人并无使用募集资金或其中一定部分(一般指10%或以上)的当前或具体计划,上市文件中必须如实说明,并解释该次发售的主要原因。
- "营运资金"或者"一般企业用途"并不属于所得款项的当前或具体计划,除非附有合理详细的解释。

个案一: 如果申请人详细解释所得款项将会用作增加资本基础以满足扩充业务所涉及的若干法定资本要求,那么将全部所得款项净额作为营运资金是可以接受的。

个案二: 将所得款项净额25%分配为扩充销售/营运团队需要作出清楚详尽的解释。

如果未曾在招股章程中披露,所得款项用途的任何重大改变一般属于价格敏感资料。

2. 所得款项用作向任何关连人士或其联系人收购物业

- 上市申请人必须披露确定收购成本的基准。

3. 所得款项用作收购业务

- 上市申请人必须披露业务的名称、拟议收购的条款、有关方的名称;或
- 如尚未确定,上市申请人必须披露收购业务的类型、性质和简介、收购策略及谈判进展。

4. 所得款项用作解除负债

- 上市申请人必须披露负债的利率及到期日。
- 如果负债是A1申请日期前一年内才出现,上市申请人必须披露借款的用途(用作营运资金的除外)。

5. 上市文件的披露

- 建议中的资本开支详情一般须于上市文件不同的章节内作详细披露,例如:"财务资料"。
- 如所得款项拟定的特定用途尚须动用大笔的其他资金,上市申请人必须披露各特定用途所需的其他资金数额及来源。

6. 所得款项用途的优先次序

- 如募集资金数额有可能变化,上市申请人必须在"所得款项用途"一节披露拟定优先用途次序(如:超额配售权、价格区间)

7. 更改所得款项用途

- 所得款项用途的任何重大变更如果之前未在上市文件中披露,一般属股价敏感资料。
- 申请人可在若干紧急情况下更改所得款项用途,条件是具体讨论各情况,并在招股章程中清楚说明其他替代方案。

如欲查阅指引信GL33-12的中文本,请点击以下连结:http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/documents/gl33-12_c.pdf

硬包销

2012年4月,联交所发布了关于硬包销披露规定的指引信。*(请见以下图表)*

有关硬包销的披露规定

倘硬包销协议于超股章程刊登前订立,按照《上市规则》第2.13(2)条(即所有重要资料的披露)的原则,超

(第15页继续)

Differences Between Soft and Hard Underwriting	
Soft underwriting	**Hard underwriting**
• Underwriters are entitled to terminate the underwriting agreements with immediate effect if any stipulated events occur prior to 8:00 am on the listing date.	• Underwriters are committed to purchase a fixed value of shares not taken up on the condition that the offer price is fixed at the low end of the price range; • Extra fees are payable, in addition to the normal soft underwriting fees; and • Usually occurs when the demand for offer shares is expected not to be strong.

Disclosure requirements in relation to hard underwriting

Where a hard underwriting agreement is entered into before the issue of the prospectus, disclosure of the salient terms of the agreement should be made in the prospectus applying the principles of Rule 2.13(2) (*i.e.*, disclosure of all material information). In general, the disclosure should include:

- the date of the hard underwriting agreement;
- the amount underwritten;
- any conditions;
- the grounds for termination; and
- the fees.

If the hard underwriting agreement is entered into after the issue of the prospectus, the issuer is required to issue a supplemental prospectus to disclose the above information to the public.

For a copy of the Guidance Letter GL34-12, please follow the link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl34-12.pdf.

Profit Forecasts

In May 2012, the Exchange published a guidance letter to clarify the following:

1. the difference between a profit forecast and a profit estimate;
2. when applicants need to include a profit forecast or a profit estimate in a listing document; and
3. the need to submit a profit forecast memorandum despite the repeal of Rule 8.21B.

Difference between profit forecast and profit estimate

- A profit forecast means any forecast of profits or losses, whereas a profit estimate is an estimate of profits or losses for a financial period which has ended but for which the results have not yet been audited or published.
- Rule 11.07 requires the principal assumptions on which a profit forecast is based to be stated in a listing document. However, the requirement to state assumptions is not applicable to a profit estimate as a profit estimate is related to a financial period which has already ended.

When to include a profit forecast or a profit estimate in a listing document

- Inclusion of a profit forecost or profit estimate in a listing document is purely voluntary.
- However, where a Rule 4.04(1) waiver is applied for, a profit estimate is required (see GL25-11).

Requirement to submit profit and cash flow forecast memorandum

- Rule 9.11(10) requires the submission of the profit and cash flow forecast memorandum to the Exchange to demonstrate an applicant's sustainability. This remains a requirement despite the repeal of Rule 8.21B.

Differences between Rules 9.11(10)(a) and 9.11(10)(b)

Rule 9.11(10)(a): prospectus contains a profit forecast

- The profit forecast memorandum should cover the same period of the profit forecast, and the cash flow forecast memorandum should cover at least 12 months from the expected date of publication of the listing. document with principal assumptions, accounting policies and calculations.

Rule 9.11(10)(b): prospectus does not contain a profit forecast

- The profit forecast memorandum should cover the period up to the forthcoming financial year-end date after the date of listing, and the cash flow forecast memorandum should cover at least 12 months from the expected date of publication of the listing document with principal assumptions, accounting policies and calculations.

For a copy of the Guidance Letter GL35-12, please follow the link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl35-12.pdf.

Distributorship Business Model

In May 2012, the Exchange issued a guidance letter on the distributorship business model, setting out various areas of concern and how disclosure should be made in the prospectus.

1. Inventory risk remains with applicant

A sharp increase in sales during the track record period may indicate a risk that these are artificially pumped-up sales unsustainable by an actual rise in demand from ultimate end-users. Similarly, a minimum purchase condition in the applicant's distribution agreement with its

(Continued on page 16)

软包销与硬包销的分别	
软包销	硬包销
• 如在上市日期上午8点前发生协议所述任何事件，包销商有权即时终止包销协议	• 包销商同意购买未被认购的固定股份数额，条件是最终发售价定于发售价范围的下限 • 除软包销协议的一般包销费用外，须另外支付费用 • 一般在预期对发售股份需求不大的时候出现

股章程须披露该协议的重大条款。一般而言，披露应包括：

- 硬包销协议的日期；
- 包销数额；
- 任何条件；
- 终止理由；及
- 费用。

倘硬包销协议于上市文件刊登之后订立，发行人需刊发补充上市文件，向公众披露上述资料。

如欲查阅指引信GL34-12，请点击以下链接：http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/documents/gl34-12_c.pdf

盈利预测

2012年5月，联交所发布了一份指引信以澄清下列各点：

1. 盈利预测与盈利估计之间的分别；
2. 申请人何时须于上市文件中加入盈利预测或盈利估计；及
3. 递交盈利预测备忘录的需要，即使《主板规则》第8.21B条经已删除。

盈利预测与盈利估计之间的分别

- 盈利预测指任何有关盈亏的预测，而盈利估计指对一个已结束会计期间作出的盈亏估计，而有关的会计期间虽已结束，但上市发行人尚未审计或公布有关的业绩。
- 第11.07条规定上市文件应包含盈利预测所用的主要假设。但是，该规定不适用于盈利估计，因为盈利估计所涉及的是已结束的会计期间。

何时须于上市文件中加入盈利预测或盈利估计

- 在上市文件内加入盈利预测或盈利估计纯属自愿性质。
- 但是，只有在申请豁免遵守第4.04(1)条的规定时，方须加入盈利估计（见指引信GL25-11）。

递交盈利及现金流量预测备忘录的规定

- 第9.11(10)条要求向联交所递交盈利及现金流量预测备忘录的规定，是要证明申请人业务的可持续性，因此，虽然《主板规则》第8.21B条经已删除，但该规定仍然适用。

第9.11(10)(a)条与第9.11(10)(b)条的分别

第9.11(10)(a)条－招股章程中包含盈利预测

- 盈利预测备忘录所涵盖的期间应与盈利预测相同，而现金流量预测备忘录应涵盖由上市文件预计发布日期起计至少12个月，两份备忘录均须包括主要假设、会计政策及计算方法。

第9.11(10)(b)条－招股章程中不包含盈利预测

- 盈利预测备忘录所涵盖的期间应直至上市日期后紧接的财政年度完结日止，而现金流量预测备忘录应涵盖由上市文件预计发布日期起计至少12个月，两份备忘录均须包括主要假设、会计政策及计算方法。

如欲查阅指引信GL35-12，请点击以下连结：http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/Documents/gl35-12_c.pdf

分销业务模式

2012年5月，联交所发出了关于分销业务模式的指引信，载列引起关注的各方面及应该如何在招股章程中进行披露。

1. 申请人保留存货风险

业绩记录期的销售额大量增加可能涉及人为推高销售额的风险，没有最终用户实际需求增长的支持。同样地，申请人与其分销商订立的分销协议的最低采购条件，可能导致堆积存货的风险。

出现以下一项或多项特征可能需要延迟收入确认：

（第17页继续）

distributors may be translated into a risk of inventory accumulation.

The presence of one or more of features may require delay in revenue recognition:

- the applicant retains significant risks of ownership, although legal title has been passed to the distributors;
- sales to distributors on a "right of return" basis and payment is delayed or otherwise different from typical sales agreements;
- the applicant is required to repurchase the product at a price with adjustment that covers the distributor's cost of holding the product, including financing cost; and
- the applicant guarantees a minimum resale value.

The sponsors and the reporting accountants must reasonably believe that the revenue recognition is appropriate in the applicant's case. When making the assessment, the returned goods policy and the amount of returned goods must be examined.

2. Cannibalization

Profits arising from royalty payments from distributors may not be sustainable if there are too many distributors in the market.

Accordingly, the sponsors must reasonably believe that the applicant's revenue is not the result of cannibalization among distributors (which is often associated with a high turnover of distributors, each of which makes a royalty payment on establishment). The turnover of distributors during the track record period, including the reasons for their termination or replacement, must be carefully assessed and stated in the listing document to enable investors to appreciate the sustainability of the business.

3. Recoverability of accounts receivable

If there has been a persistent increase in accounts receivable and debtors' turnover days in the track record period, the directors and the sponsors are required to provide their views on whether the applicant's credit management policy is appropriate and the provisions for trade receivables are adequate.

Disclosure in the prospectus should include:

- a commentary on the recoverability of accounts receivable and the subsequent settlement of the balance as at the latest practicable date; and
- the impact of the increase in accounts receivable and debtors' turnover days on liquidity and cash flow.

4. Independence of distributors

Goods may be sold to (i) distributors or sales representatives who were previously employees of the applicant or (ii) sales partners who trade under the applicant's name. This gives rise to uncertainty as to the independence of customers and the authenticity of sales.

In one case, the applicant distributed its products either directly through its own sales representatives who were part-time employees or indirectly through its sales partners that were corporate entities using the applicant's name in their trading. Some of the applicant's sales representatives or their associates also held equity interests in the sales partners. The Exchange suggested that the applicant should clearly delineate its sales between the sales representatives and the sales partners.

Additional disclosures were required, including:

- the terms of the agreement with the sales partners, including conditions of use of the applicant's name;
- measures to address the potential conflict of interests between the sales representatives and the sales partners;
- internal controls and corporate governance measures to monitor the applicant's sales activities to detect potential abuses; and
- management of the sales partners using the applicant's trading name and the associated risks to the applicant's overall business from improper use of the applicant's name by the sales partners.

5. General disclosure in prospectus

The Exchange expects sponsors to have performed sufficient due diligence work in relation to the fairness and reasonableness of sales to distributors recorded during the track record period and to disclose the following in the prospectus:

- distribution channels and their total revenue contribution;
- the degree of control over distributors (especially pricing policy, sales and avoidance of competition between different levels of distributors);
- the benefits of using the particular distributorship model and whether it is an industry norm;
- the nature of the relationship with the distributors (seller/buyer or principal/agent);
- the turnover rate of distributors and movements in the number of distributors and reasons for the major changes;
- the amounts of sales to and goods returned from distributors;
- a discussion of revenue recognition and unsold goods return policies; and
- the principal terms of the distribution/consignment/franchise agreements.

For a copy of the Guidance Letter GL36-12, please follow the link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl36-12.pdf.

Indebtedness, Liquidity, Financial Resources and Capital Structure Disclosure

In June 2012, the Exchange issued a guidance letter to assist new applicants and their advisers to prepare certain liquidity disclosures, such as the statement of

(Continued on page 18)

- 申请人保留重大的持有权风险，即使法定持有权已转移予分销商；
- 售予分销商的货品附带「退回权利」，以致出现延迟付款或其他有别一般销售协议的情况；
- 申请人须按已作出涵盖分销商持有产品的成本(包括融资成本)之调整的价格购回产品，该价格包含分销商持有产品的成本；及
- 申请人就转售金额作出最低保证。

保荐人及申报会计师必须合理相信所选的收入确认方法适合申请人的个案。评估时，必须检查申请人的退回货品政策及退回货品数量。

2. 自相蚕食

来自分销的专利权付款所得溢利或会因为市场上分销商过多而不可持续。

据此，保荐人必须合理相信申请人的收入并非源自分销商之间的「自相蚕食」(通常涉及分销商数目大幅增加，他们在初次加盟时支付专利权付款)。营业纪录期内分销商的转换率(包括其终止或替换理由)必须审慎评估并载于上市文件，以使投资者评估业务的可持续性。

3. 收回应收账款的能力

若营业纪录期内应收账款及债务人周转日数持续上升，董事及保荐人须就申请人的信贷管理政策是否恰当及应收贸易款项的拨备金是否充足发表意见。

招股章程中的披露应包括：

- 有关截至最后可行日期应收账款的收回可能及之后结清结余的意见；及
- 应收账款及债务人周转日数增加对申请人资金流动性及现金流量的影响。

4. 分销商的独立性

货品可能售予(i)本身为申请人前雇员的分销商或销售代表，或(ii)以申请人名义进行交易的销售伙伴，以致难以确定客户的独立性及销售的真实性。

在一个案中，申请人直接透过同时为其兼职雇员的销售代表或间接透过其销售伙伴（公司实体以申请人的名义进行买卖）分销产品。申请人的部分销售代表或其联系人亦持有销售伙伴的股权。联交所建议申请人清楚分开其涉及销售代表与销售伙伴的销售数字。

所要求的额外披露包括：

- 与销售伙伴的协议条款，包括使用申请人名义的条件；
- 处理销售代表与销售伙伴之间的潜在利益冲突的措施；
- 监察申请人销售活动以侦察潜在滥用情况的内部监控及企业管治措施；及
- 对使用申请人贸易名称的销售伙伴的管理，以及申请人整体业务因销售伙伴不当使用其名义的相关风险。

招股章程的一般披露

期望保荐人就所纪录营业纪录期内向分销商进行的销售是否公平合理履行足够的尽职调查工作，并在招股章程中披露：

- 不同的分销渠道及其总收入；
- 对分销商的控制程度(尤其是定价政策、销售额及如何避免与不同层面的分销商竞争等)；
- 使用个别分销模式的好处，以及业内是否常见；
- 申请人与分销商的关系(卖家/买家抑或委托人/代理)；
- 分销商的转换率及分销商数目的变动，以及主要变动的原因；
- 营业纪录期内销售予分销商及分销商退回货品的数额；
- 讨论申请人关于收入确认及退回未售货品的政策；及
- 分销/托卖/特许经销协议的主要条款。

如欲查阅指引信GL36-12的中文本，请点击以下连结：http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/documents/gl36-12_c.pdf

负债、资金流动性、财务资源及资本结构的披露

2012年6月，联交所发布了一份协助新申请人及其顾问预备若干资金流动性披露，例如营运资金充足性的声明及若干资料，包括有关新申请人的负债、资金流动性、财务资源及资本结构的评论的指引信。此指引信取代之前的指引信并考虑到联交所现时采纳的常规。

一般预期新的上市申请人在上市申请文件中披露下列内容：

- 申请人于最近实际可行日期的流动资产(负债)净额及构成这净额的资产及负债，以及管理层对流动资产(负债)净额的讨论；

(第19页继续)

sufficiency of working capital and certain information, including a commentary regarding a new applicant's indebtedness, liquidity, financial resources and capital structure. This supersedes previous guidance letters and has taken into account the current practices adopted by the Exchange.

A new listing applicant is ordinarily expected to disclose the following in its listing document:

- net current assets (liabilities) position of the applicant stating the composite assets and liabilities as at the most recent practicable date, and a management discussion on the position;
- an analysis and explanation of the sources and uses of cash and an analysis of the material changes in the underlying drivers;
- an analysis and information on factors that would have a material impact on the new listing applicant's liquidity;
- a discussion and an analysis of any external financing plans (or a negative statement) and their impact on the new listing applicant's cash position and liquidity;
- a discussion and an analysis of material covenants (or a negative statement)related to outstanding debt and the impact of debt covenants on the new listing applicant's ability to undertake additional debt or equity financing; and
- any other information on the new listing applicant's indebtedness, liquidity, financial resources and capital structure that would be material to an investor to make a properly informed assessment of the financial position and prospects of the new listing applicant.

For a copy of the Guidance Letter GL37-12, please follow the link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl37-12.pdf.

Latest Practicable Date and Latest Date for Liquidity Disclosure[1]

In June 2012, the Exchange published a guidance letter on the latest practicable date for ascertaining information in a prospectus and the latest date for liquidity disclosure in a prospectus. (Please see the chart below.)

Latest practicable date	No more than 10 days before the prospectus date
Latest date for the Liquidity Disclosure	No more than two months before the prospectus date
Confirmation of no adverse change in the "Summary" and "Financial Information" sections	Up to the date of the prospectus (previously, up to latest practicable date)

For a copy of the Guidance Letter GL38-12, please follow the link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl38-12.pdf.

'NO ADVERSE CHANGE' CONFIRMATION: NOW STATED AS OF PROSPECTUS DATE

Enforcement News

Hontex Ordered to Make HK$1 Billion Buy-Back Offer Over Untrue IPO Prospectus

In June 2012, the Court of First Instance granted orders sought by the SFC in its proceedings against Hontex International Holdings Company Limited (Hontex) to make a repurchase offer to investors who subscribed for shares in the initial public offering or purchased the company's shares in the secondary market. This is the first order of this kind under section 213 of the SFO.

The orders require Hontex to pay a further sum of HK$197,755,503 into the Court within 28 days, adding to the amount of HK$832,244,497 already frozen under the interim orders, to convene a shareholders' meeting to approve a resolution and then, upon approval, to take steps to repurchase the shares allotted to or purchased by approximately 7,700 public shareholders who are currently holding Hontex shares.

The repurchase price will be HK$2.06 per share, being the closing price of the shares when trading was suspended by the Exchange on March 30, 2010 at the direction of the SFC. The repurchase scheme will be managed by administrators appointed by the Court. The repurchase offer will not be made to the controlling shareholders who have agreed to abstain from voting upon the repurchase resolution.

Hontex has acknowledged that the amounts stated in its IPO prospectus in respect of its turnover for the three years ended December 31, 2008 were materially false and misleading, as were its profit before tax, the value of its cash and cash equivalents and the number of franchise stores.

License of Mega Capital's Responsible Officer Revoked

Mega Capital was the sole sponsor for the listing application of Hontex, and Hong was one of the two responsible officers and sponsor principals in charge of the supervision of Mega Capital's transaction

1 Paragraph 32 of Part A of Appendix 1 requires the listing document to include a statement as at the most recent practicable date (which must be stated) of the new applicant's indebtedness (or an appropriate negative statement), liquidity, financial resources and capital structure, if material (Liquidity Disclosure).

(Continued on page 20)

- 现金来源及用途的分析及解释，及背后相关因素的重大变动分析；
- 对新上市申请人资金流动性有重大影响的因素的分析及资料；
- 讨论及分析外部融资计划(或一项否定声明)，以及其对新上市申请人现金状况及资金流动性的影响；
- 讨论及分析未偿还债项所牵涉的重要条款(或一项否定声明)，以及债项条款对新上市申请人进行额外债项或股本融资的能力的影响；及
- 投资者对新上市申请人的财政状况及前景作出适当及有根据的评估所需的有关新上市申请人负债、资金流动性、财务资源及资本结构的任何其他重要资料。

如欲查阅指引信GL37-12的中文本，请点击以下连结：http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/documents/gl37-12_c.pdf

最近实际可行日期及资金流动性的披露最近日期[1]

2012年6月，联交所发布了一份关于在招股章程中资料披露的最近实际可行日期及资金流动性的披露的最近日期的指引信。(*请见以上图表*)

如欲查阅指引信GL38-12的中文本，请点击以下连结：

http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/documents/gl38-12_c.pdf

最近实际可行日期	招股章程日期之前10天内
资金流动性的披露的最近日期	招股章程日期之前两个月内
在「摘要」及「财务资料」章节确认无任何不利变化	至招股章程日期(以前至最近实际可行日期)

无任何不利变化确认现为截至招股章程日期

执法新闻

洪良因招股章程中载入失实资料被法院命令提出10亿港元的回购建议

2012年6月，原讼法庭应证监会的申请，在其对洪良国际控股有限公司(洪良)进行的法律程序中命令，洪良向之前在首次公开招股中认购洪良股份或在二手市场买入洪良股份的投资者，提出回购建议。这是首次根据《证券及期货条例》第213条颁布该类命令。

有关命令要求洪良在28天内向法庭另外缴存197,755,503港元(之前已根据临时命令冻结了832,244,497港元款项)，并召开股东大会通过一项决议案，以及在该决议案通过后采取步骤，向大约7,700名现时持有洪良股份的公众股东回购他们获配发或已买入的股份。

回购价将为每股2.06港元，即洪良股份在2010年3月30日按证监会指示被联交所停牌时的收市价。回购计划将由法庭委任的管理人管理。回购计划不会向已同意放弃就回购决议案表决的控股股东提出。

洪良承认，其招股章程所载有关其截至2008年12月31日止三年的营业额的数字，以及其除税前溢利、现金及现金等价物的价值及特许经营店数目，具有重大属虚假及误导性。

兆丰资本负责人员的牌照被撤销

兆丰资本是洪良国际上市申请的唯一保荐人，当时负责监督兆丰资本内处理洪良上市事宜的交易小组的负责人员及保荐人主要人员共有两名，而康是其中一人。兆丰资本的保荐人牌照于2012年4月被撤销。关于证监会对兆丰资本的主要调查结果以及迄今证监会的其他主要执法行动，请查阅本所五月的香港资本市场业务季刊。

证监会的调查发现，康未能履行其作为保荐人主要人员及负责人员的职责。

证监会的主要调查结果如下：

1. 拒绝承认责任

康否认他负责监督兆丰资本处理洪良上市申请的交易小组，并试图将责任推卸给兆丰资本的另一名负责人员及保荐人主要人员X先生。

[1] 附录1第A部分第32段规定，上市文件须列明于实际可行的最近日期（必须列明）新申请人的负债（或适当的否定声明）、资金流动性、财务资源及资本结构（资金流动性的披露）(如属重大)。

(第21页继续)

team on Hontex's listing. Mega Capital's sponsor license was revoked in April 2012. For the SFC's main findings on Mega Capital and other key SFO enforcement actions to date, see our previous Quarterly News here.

The SFC investigation found that Hong failed to discharge his duties as a sponsor principal and a responsible officer.

The SFC's main findings were as follows:

1. Refusal to accept responsibilities

Hong denied that he was in charge of the supervision of Mega Capital's transaction team on Hontex's listing application and tried to shift the responsibility to another responsible officer and sponsor principal of Mega Capital, Mr. X.

Hong claimed that he was the managing director overseeing different departments of Mega Capital and it was Mr. X who was in charge of Hontex's listing application.

Hong did not seem to realize that he and Mr. X were jointly and severally liable in discharging their roles as sponsor principals.

2. Supervisory failures

Although members of Mega Capital's transaction team confirmed that Hong was involved in Mega Capital's sponsorship work on Hontex's listing application and gave instructions to them from time to time, the evidence revealed that Hong failed to properly and adequately supervise the transaction team.

For example, while Hong was in a position to review the work of the transaction team and oversee the progress of the listing through emails that were copied to him, he admitted that he did not read most of the emails relating to Hontex's listing application.

Furthermore, Hong did not review the due diligence questionnaires completed by the transaction team with Hontex's major customers and suppliers. Consequently, Hong did not realize that material information (like transaction figures with Hontex) was missing from most of the due diligence questionnaires, and he failed to instruct the transaction team to follow up on the missing information.

3. Breach of sponsor's undertaking and filing untrue declaration with the Exchange

As sponsor principals for Hontex's listing application, Hong and Mr. X jointly signed and submitted the sponsor's undertaking and declaration to the Exchange, respectively, confirming that Mega Capital had made reasonable due diligence inquiries, that all information provided to the Exchange was true in all material respects and that no material information was omitted.

However, Hong did not take reasonable steps to ensure that the transaction team had conducted due diligence in accordance with the requirements of Practice Note 21; instead, he simply relied on Mr. X and the transaction team to ensure the quality of the due diligence work without performing any quality assurance role himself.

The SFC found that Hong had failed to supervise the execution and ensure the adequacy of the due diligence inquiries performed by the transaction team of Mega Capital.

THE CFA AGREED THAT THE APPROPRIATE SENTENCE FOR INSIDER DEALING SHOULD BE IMMEDIATE IMPRISONMENT COUPLED WITH A FINE WHICH, AT THE VERY LEAST, REMOVES A DEFENDANT'S UNJUST PROFITS

False or Misleading Announcements

In June, the SFC commenced criminal proceedings against PME Group Ltd (PME), a Hong Kong-listed company, and its director in relation to allegations that PME made false or misleading stock exchange announcements.

Each was charged with three counts under section 384 of the SFO, which makes it an offence for a person to provide false or misleading information to the Exchange. The maximum penalties under section 384 of the SFO are three years jail and/or a HK$1 million fine.

Between February 11 and 28, 2008, PME's closing share price rose by approximately 136% with increased turnover. Following queries made by the Exchange, PME made three announcements which said that it knew of no negotiations or agreements which were disclosable to the market nor were its directors aware of any price-sensitive matter.

The SFC alleges that:

1. these announcements were false and misleading because PME was simultaneously taking steps to acquire control of a private entity holding approximately 50% of another Hong Kong-listed company, with a market value of about HK$145 million; and
2. this was a material acquisition for PME and ought to have been disclosed in response to the inquiries made by the Exchange in light of the substantial movement in the share price of PME.

Jailed and Fined for Insider Dealing

In June 2012, the Court of Final Appeal (CFA) reinstated, in part, the original jail sentence and fine against Mr. Pablo Chan Pak Hoe who was convicted of one count of insider dealing.

Chan was found guilty of insider dealing in shares of Universe International Holdings Ltd (Universe) between

(Continued on page 22)

康声称他是董事总经理，其工作是监督兆丰资本不同部门，而负责洪良上市申请的人是X先生。

康未意识到，他与X先生须一起就履行其身为保荐人主要人员的职责承担连带责任。

2. 监督不力

虽然兆丰资本的交易小组成员确认，康有份参与兆丰资本就洪良上市申请所进行的保荐人工作，并不时向小组成员发出指示，但有证据显示，康没有对交易小组予以妥善及充分监督。举例而言，康虽可以透过获抄送的电邮，审阅交易小组的工作及监察上市项目的进度，但他承认未有阅读大部分与洪良上市申请有关的电邮。

此外，康未有审阅交易小组在向洪良的主要客户及供应商作出查询时所填写的尽职调查问卷，因而没有发现信息，多数尽职调查问卷都遗漏了与洪良相关的交易数据等重要信息，而康亦没有指示交易小组跟进遗漏信息。

3. 违反保荐人承诺及向联交所申报不实声明

康及X先生作为洪良上市申请的保荐人主要人员，曾一同签署并向联交所分别呈交承诺及声明，确认兆丰资本已经进行合理尽职调查的查询，以及向联交所提供的所有资料在各重要方面均属真实，且并无遗漏任何重要信息。

不过，康并没有采取合理步骤以确保交易小组已按照《第21项应用指引》的规定进行尽职审查；他只是倚赖X先生及交易小组来确保尽职审查工作的质量，自己却没有履行保证质量的职责。

证监会认为，康没有监督由兆丰资本的交易小组所执行的尽职审查的查询，亦没有确保尽职调查查询的充足性。

> **终审法院同意就内幕交易判处的适当刑罚为即时入狱及罚款，罚款须至少为被告人的不当得利金额。**

虚假或具误导性的公告

2012年6月，证监会已向香港上市公司必美宜集团有限公司(必美宜)及其董事开刑事法律程序，指必美宜向联交所发出虚假或具误导性的公告。

该董事及必美宜各自被控以三项《证券及期货条例》第384条下的罪行。该条文订明，任何人如向联交所提供虚假或具误导性的资料，即属犯罪。《证券及期货条例》第384条下的最高惩罚为入狱三年及/或罚款100万元。

于2008年2月11日至2008年2月28日期间，必美宜的股份收市价上升了约136%，成交量亦同时上升。必美宜于联交所作出查询后，发出了三份公告。在该三份公告中，必美宜均表示不知道有任何须向市场披露的商谈或协议，而其董事亦不知悉任何价格敏感事宜。

证监会指出：

1. 该等公告属虚假及具误导性，因为必美宜在发出该等公告的同时，正着手收购一家私人公司的控制权，而该私人公司持有另一家市值约为1.45亿元的香港上市公司约50%权益；及
2. 鉴于这对必美宜来说是重大的收购，而必美宜的股价发生重大变动，理应在回应联交所因必美宜的股价大幅波动而提出查询时予以披露。

因内幕交易而被判监禁和罚款

2012年6月，终审法院就陈柏浩被裁定一项内幕交易罪成一案，维持原先对陈做出的监禁及罚款判决。

陈于2008年5月2日至6月 19日期间以寰宇国际控股有限公司(寰宇)的控股股东代表的身分与另一公司商讨收购寰宇的计划时，就寰宇的股份进行内幕交易。陈当时掌握了该收购计划的内幕消息并买入寰宇股份，该股的股价于有关计划公布后上升40%，陈随即出售股份。

终审法院恢复了120,000港元罚款(相当于陈透过内幕交易获取的利润)及原来监禁四个月的判决，但考虑到陈已完成其240小时社会服务令，故减刑一个月。

终审法院同意，除非情况特殊，否则内幕交易的适当惩罚应为即时监禁，并处以最低限度应与被告取得的不法利润相抵的罚款。

(第23页继续)

May 2 and June 19, 2008, when he acted as a representative of the controlling shareholder in a proposed takeover of Universe by another company. Chan used inside information about the takeover negotiations to buy Universe shares. He sold the shares at a 40% higher price once the negotiations were announced.

The CFA reinstated the HK$120,000 fine (which represented the profit from insider dealing) and the original four-month jail sentence with a reduction of one month after taking into account that Chan had already completed 240 hours of community service.

The CFA agreed that, save for exceptional circumstances, the appropriate sentence for insider dealing should be immediate imprisonment coupled with a fine which, at the very least, removes a defendant's unjust profits.

Failure to Make General Offer under the Takeovers Code

In May 2012, the SFC took disciplinary action against Capital VC Limited (Capital VC) and Mr. Yau Chung Hong in relation to their breach of Rule 26.1 of the Takeovers Code. Yau was an executive director, a substantial shareholder and a member of the investment committee of Capital VC.

Yau and Capital VC failed to make a general offer in respect of Longlife Group Holdings Limited (Longlife), a company listed on the Growth Enterprise Market, after having increased their collective shareholding in Longlife to 30.19% on June 10, 2011, thereby triggering a mandatory general offer obligation under Rule 26.1 of the Takeovers Code.

At all material times Yau managed two investment accounts, one for Capital VC and one for his personal investments. He was the sole decision-maker in executing trades in Longlife shares for Capital VC's and for his own account. He claimed that he had acquired excessive Longlife shares because of wrong calculations. While he was aware of the need to keep the collective shareholding of Capital VC and himself in Longlife below 30%, there was no evidence that he had made any serious efforts to put in place effective compliance procedures. Yau's actions directly led to the breach of Rule 26.1 of the Takeovers Code.

Capital VC and its investment committee relied solely on Yau to monitor his and Capital VC's relevant holdings in Longlife. Without adequate internal policies and procedures to ensure compliance with applicable regulatory requirements, including the Takeovers Code, Capital VC also bore responsibility for Yau's action and the consequent breach of the Takeovers Code.

Yau was imposed a Cold Shoulder Order denying him direct or indirect access to the Hong Kong securities markets for 18 months until November 2013. The SFC also publicly censured Yau and Capital VC in relation to their conduct in the matter.

IN JUNE 2012, TAKEOVERS CODE RULE 3.8 ANNOUNCEMENTS WERE ADDED TO THE POST-VET LIST

Regulatory Watch

Additions to the Takeovers Code Post-Vet List

In June 2012, Rule 3.8 announcements were added to the Post-Vet List, in view of the factual and straight-forward nature of information routinely required to be disclosed under the rule. The Takeovers Code Post-Vet List sets out the types of routine announcements that will not be subject to the SFC's prior comment under Rule 12.1.

When an offer period begins, Rule 3.8 requires an offeree company to announce, as soon as possible, details of all classes of relevant securities issued by it, together with the number of such securities in issue. An offeror or a potential named offeror also must announce the same details of its relevant securities unless it is stated that the offer is likely to be solely in cash. Rule 3.8 further requires that if any previously announced information changes during an offer period, a revised announcement must be made as soon as possible.

The revised Post-Vet List now contains the following types of announcements:

- announcements of the appointment of independent financial advisers under Rule 2.1;
- announcements of the dispatch of circulars under Rule 8 or Rule 25;
- announcements of delay in the dispatch of circulars under Rule 8.2 or Rule 8.4;
- announcements of the appointment and resignation of directors of the offeree company under Rule 26.4 and Rule 7;
- announcements of placing and top-up transactions under Note 6 on dispensations from Rule 26; and
- announcements of numbers of relevant securities in issue under Rule 3.8.

Parties and their advisers must consult the SFC at the earliest opportunity if there is any doubt as to whether an announcement qualifies for post-vetting.

Short Position Reporting Rules

The Securities and Futures (Short Position Reporting) Rules came into effect on June 18, 2012, except for publication of the aggregated short positions data under Rule 6 which, subject to negative vetting, will be effective September 7, 2012.

The SFC has published a FAQ and guidance note in relation to the short position reporting rules. Please follow the link: http://www.sfc.hk/sfc/html/EN/research/short-position-reporting/index.html.

(Continued on page 24)

未有提出《收购守则》下的全面要约

2012年5月，证监会对首都创投有限公司（首都创投）及丘忠航采取纪律处分行动，指其违反了《收购守则》规则26.1 。丘当时是首都创投的执行董事、大股东兼投资委员会成员。

于2011年6月10日，丘及首都创投增持创业板上市公司朗力福集团控股有限公司（朗力福）的股份至合共持有30.19%，因而触发《收购守则》规则26.1下的强制全面要约责任，但丘及首都创投却未有就朗力福提出全面要约。

于所有关键时间，丘管理两个投资帐户，一个属於首都创投，另一个属於他的个人投资。在为首都创投及其本人执行朗力福股份的交易时，丘是唯一的决策者。他声称是因为计算错误才会买入过多的朗力福股份。虽然他知道需要将首都创投及其本人於朗力福的共同持股量保持在低於30%的水平，但并无证据显示他已认真地实施有效的合规程序。丘的行动直接导致违反《收购守则》规则26.1。

首都创投及其投资委员会仅依赖丘监察其本人及首都创投於朗力福的相关持股状况。首都创投用以确保符合适用监管规定（包括《收购守则》）的内部政策及程序并不足够，因此亦须对丘的行动及结果导致违反《收购守则》一事负责。

丘被施加冷淡对待令，禁止他直接或间接使用香港证券市场设施，为期18个月，至2013年11月止。证监会亦公开谴责丘及首都创投在此事上的行为。

监管观察

《收购守则》事后审阅清单的新增内容

2012年6月，鉴于根据规则3.8须例行披露的资料直截明确且属报道事实性质，执行人员决定将该规则纳入事后审阅清单。《收购守则》事后审阅清单载列不受证监会《收购守则》规则12.1的预先审阅规定约束的例行公布类别。

2012年6月，事后审阅清单加入《收购守则》第3.8条的公告内。

要约期开始后，规则3.8规定受要约公司必须尽快公布由该公司发行的各类有关证券的详情及已发行的数目。此外，要约人或具名的有意要约人亦须公布涉及其有关证券的相同详情，除非要约人或具名的有意要约人已表明其要约很可能纯粹是现金要约，则作别论。规则3.8进一步规定，如过往公布的资料在要约期内有变，便须尽快发表修订公布。

经修订后的事后审阅清单目前载有以下类别的公布：

- 关于根据规则2.1委任独立财务顾问的公布；
- 关于根据规则8或规则25寄发通告的公布；
- 关于根据规则8.2或规则8.4延迟寄发通告的公布；
- 关于根据规则26.4及规则7受要约公司董事委任及辞任的公布；
- 关于根据规则26的豁免注释6进行配售及增补交易的公布；及
- 关于根据规则3.8就已发行的有关证券数目的公布。

各方及其顾问如有任何关于公告是否可作事后审阅的疑问，必须尽快咨询证监会。

淡仓申报规则

《证券及期货(淡仓申报）规则》(《规则》)将于2012年6月18日生效，除规则第6条下有关公布合计淡仓量资料的规定则须进行先订立后审议的程序后于2012年9月7日生效。

证监会就上述淡仓申报规则发布了常见问答及指引摘要。

详见以下连结：http://www.sfc.hk/sfc/html/TC/research/short-position-reporting/index.html

金融纠纷调解中心

《证监会持牌人或注册人操守准则》修订版于2012年6月19日生效。修订涉及成立金融纠纷调解中心(调解中心)(网站：www.fdrc.org.hk)。

调解中心以担保有限公司形式成立，负责管理一个独立公正的解决争议计划，以“先调解、后仲裁”的方式解决金融机构与个人客户之间的金钱纠纷（申索金额最高500,000港元)。

修订摘要：

1. 所有持牌人或注册人自动成为且始终是调解中心计划的成员，并受根据该计划制定的纠纷解决程序制约。

(第25页继续)

Financial Dispute Resolution Centre

The revised version of the Code of Conduct for Persons Licensed by or Registered with the SFC took effect on June 19, 2012. The amendments were in relation to the establishment of the Financial Dispute Resolution Centre Ltd (FDRC) (website: www.fdrc.org.hk).

The FDRC was incorporated as a limited company by guarantee to administer an independent and impartial dispute resolution scheme to resolve monetary disputes (not exceeding HK$500,000) between individuals and financial institutions through "mediation first, arbitration next".

Summary of amendments:

1. All licensed/registered persons automatically become and remain members of the FDRC scheme and are bound by the dispute resolution processes established by the scheme.
2. All licensed/registered persons must seek to resolve complaints internally, and failing resolution, inform clients of their right to make a complaint to the FDRC.
3. All licensed/registered persons must provide the SFC with details of the outcome, including the terms of settlement, if requested.
4. All licensed/registered persons are required to make full and frank disclosure before mediators/arbitrators and to assist the FDRC process.

Link to revised Code: http://www.sfc.hk/sfcRegulatoryHandbook/EN/displayFileServlet?docno=H691.

SFC PSI Guidelines Finalized

In June 2012, the SFC published the final Guidelines on Disclosure of Inside Information. The statutory disclosure regime will become effective on January 1, 2013.

The following sections have been newly added into the Guidelines:

- officers' liabilities;
- obligations of non-executive directors (NEDs);
- examples of reasonable measures which should be considered when establishing systems and procedures;
- clarifications on how to deal with media speculation, market rumors and analysts' reports; and
- examples of relevant facts and key aspects which were viewed by tribunals as constituting "material" information in certain insider dealing cases.

Briefly, the key elements comprising the concept of inside information are:

- specific information about a particular listed corporation, a shareholder/officer or its listed shares/their derivatives;
- the information is not generally known to those who are accustomed or would be likely to deal in the corporation's securities; and
- if known, the information would be likely to have a material effect on the price of the listed securities.

For details of how these elements are applied, see our recent client alert (which has a useful flowchart): http://www.mofo.com/files/Uploads/Images/120601-Price-Sensitive-Information.pdf.

For a copy of the Final Guidelines, please follow the link: http://www.sfc.hk/sfc/doc/EN/speeches/public/consult/psi_guidelines_final_eng_clean.pdf.

Because of the generality of this newsletter, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. The views expressed herein shall not be attributed to Morrison & Foerster, its attorneys or its clients. If you wish to obtain a free subscription to our Hong Kong Capital Markets Quarterly News, please send an email to info@mofo.com.

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2. 所有持牌人或注册人必须寻求在内部解决投诉，如内部无法解决，则通知客户有权向调解中心提交投诉。
3. 如经要求，所有持牌人或注册人必须向证监会提供有关结果的细节，包括和解条款；及
4. 所有持牌人或注册人须向调解员/仲裁员做出完整和坦诚的披露并就调解中心程序提供协助。

欲了解经修订的准则，请点击以下连结：http://www.sfc.hk/sfcRegulatoryHandbook/TC/displayFileServlet?docno=H691

证监会落实股价敏感信息的指引

2012年6月，证监会公布了《内幕消息披露指引》的最终稿。法定披露机制将于2013年1月1日生效。

指引内增加了下列各项内容：

- 高级人员的责任；
- 非执行董事的责任；
- 制订有关系统和程序时须考虑的合理措施的例子；
- 澄清如何处理传媒揣测、市场谣传或分析员报告；及
- 审裁处视为若干内幕交易个案例子中构成"重大"信息的相关事实和主要因素。

简单而言，包括内幕消息概念的主要因素为：

(i) 关于某一特定上市法团、股东/高级人员或其上市证券/其衍生工具的特定消息；

(ii) 普遍为惯常或相当可能会进行该法团上市证券交易的人所知的消息；及

(iii) 如普遍为他们所知，该等消息相当可能会对该等证券的价格造成重大影响。

关于此等因素如何应用的详情，请看本所最近的法律快讯（含有流程图表）：http://www.mofo.com/files/Uploads/Images/120601-Price-Sensitive-Information.pdf

如欲查阅指引最终稿的中文本，请点击以下连结：http://www.sfc.hk/sfc/doc/TC/speeches/public/consult/psi_guidelines_final_chi_clean.pdf

本信息更新提供的是一般性的信息，不适用于所有的情况，在没有对特定情况提供特定的法律意见的情况下，不应根据该等信息行事。如果您希望收到本所以电邮传送的法律快讯，敬请通过电子邮件（info@mofo.com）与我们联系。

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