HONG KONG CAPITAL MARKETS 香港资本市场业务季刊 QUARTERLY NEWS

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MORRISON FOERSTER

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EDITOR'S NOTE

Kung Hei Fat Choi to all our readers! The last quarter of 2013 and the start of 2014 saw the Hong Kong capital markets gain some traction, though the start of the New Year of the Horse witnessed a dizzying redirection of that momentum. On the regulatory side too, there has been no shortage of activity since our last issue. While sponsors and their advisers have been adjusting to life under the Exchange's new regime introduced in October, the flurry of decisions and guidance updates from the Exchange continued, and also the SFC saw some significant enforcement action. Key developments highlighted in this issue include updates on:

- Reverse takeovers and backdoor listings
- Structured contracts
- Suitability for listing
- New flexibility under Hong Kong's new Companies Ordinance
- Financial data for stub period and acquisitions
- Enforcement cases involving, among others: suspension of a sponsor's license; avoiding director liability for misleading announcements; Takeovers Code enforcement by cold shoulder order

We hope you find the articles interesting and helpful, and welcome your feedback.

编者按

首先向各位读者祝愿恭喜发财！2013年的最后一个季度以及2014年的开始我们看到香港资本市场赢得更多的关注，尽管马年开年之时出现了令人疑惑的趋势改变的情况。监管方面也是如此，自我们上一期季刊出版以来监管活动并没有减少。在保荐人与其顾问着手进行调整以适应联交所10月推出的新的监管制度的同时，联交所继续更新其上市决策及指引，证监会也有一些重大的执法举措。本期季刊重点提到的重要发展包括下列方面：

- 反向收购和借壳上市
- 结构性合同
- 上市适合性
- 香港新的公司条例所提供的新的灵活措施
- 业务纪录期后的财务数据及收购
- 执法案例，涉及包括暂时吊销保荐人的牌照，避免误导公告下的董事责任，冷淡对待令下的收购守则执法

希望这些文章令您感兴趣，并能对您有所裨益。欢迎您向我们提出任何反馈意见。

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NEW LISTING DECISIONS

Update on Structured Contracts

In November, the Exchange published an update of its listing decision regarding the required disclosures with respect to structured contracts. The new elements are as follows:

- Where restricted businesses are involved, the use of structured contracts is permitted only to address foreign ownership restrictions. For requirements other than foreign ownership restrictions, applicants should demonstrate to the Exchange's satisfaction that they have, upon advice from their legal advisers, reasonably assessed the requirements under all applicable rules and have taken all reasonable steps to comply with the rules before listing.
- In relation to any company controlled by the applicant through contractual arrangements (an "OPCO"), the registered shareholders must undertake that, subject to relevant laws and regulations, they will return to the applicant any consideration they receive in the event that the applicant requires the OPCO's shares when unwinding the structured contracts, and the undertaking must be disclosed in the listing document.
- Where the relevant laws and regulations specifically prohibit foreign investors from using any agreements or contractual arrangements to gain control of or operate a foreign restricted business, the legal adviser's opinion on the structured contracts must include a positive confirmation that the use of the structured contracts does not constitute a breach of those laws and regulations, or that the structured contracts will not be deemed invalid or ineffective under those laws and regulations. The legal opinion must be supported by appropriate regulatory assurance, where possible, to demonstrate the legality of the structured contracts.
- If the applicant generates revenue from other subsidiaries apart from OPCOs, a separate disclosure of revenue from structured contract arrangements must be included in the listing document.
- If an OPCO's operations are in the PRC, a positive confirmation from the PRC legal advisers that the structured contracts would not be deemed as "concealing illegal intentions with a lawful form" and void under the PRC contract law must be included in the listing document.

For a copy of the updated Listing Decision LD43-3, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/LD43-3.pdf

Past Business in Sanctioned Countries Did Not Render Applicants Unsuitable for Listing

In a decision published in December, the Exchange determined that the applicants' past business in countries (e.g., Iran, Cuba, Syria, and Sudan) on which certain overseas governments impose trade or economic sanctions ("Sanctioned Countries") did not render the applicants unsuitable for listing.

Company A and Company B had both entered into contracts with companies in Sanctioned Countries during the track record period. Each of Company A and Company B took the following steps to minimize sanctions risk:

- Terminated all contracts and business in the Sanctioned Countries and/or transferred them to other parties before listing.
- Undertook to the Exchange that it would not use the IPO proceeds or any other funds raised through the Exchange, directly or indirectly, to finance or facilitate any projects or businesses in the Sanctioned Countries or any sanctions-related activities, or to pay any damages required to compensate the counterparty for terminating the contracts.
- Opened and maintained separate bank accounts which would be designated for the sole purpose of holding the listing proceeds.
- Undertook to the Exchange that it would not perform any obligations under the contracts, or engage in any other activity, in the Sanctioned Countries after listing.
- Implemented internal control measures to control exposure to the risk of sanctions.
- Disclosed in its prospectus that according to opinions from legal advisers in countries which imposed sanctions on the Sanctioned Countries, the sanctions risk to the applicant, its investors, and shareholders as a result of the listing would be very low based on the above measures taken.

The Exchange required disclosure in the "Summary", "Risk Factors" and "Business" sections of the following information:

- Details of the applicants' projects/business in the Sanctioned Countries.
- Legal advisers' views, with basis, on whether there was any risk of sanctions violations.
- Termination or transfer of the projects/businesses in the Sanctioned Countries before listing, and details of any financial and operational impact on the applicants, as well as the legal consequences and maximum penalties.
- The applicants' undertakings to the Exchange, including not to use the IPO proceeds to finance any projects or

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新刊发的上市决策

关于结构性合同的更新

11月，联交所对结构性合同所需披露的上市决策进行了更新，更新内容如下：

- 若涉及限制性业务，结构性合同的采用只限于解决外资所有权限制时才会获批准。至于外资所有权限制以外的其他规定，申请人须令联交所相信其已按法律顾问的意见在上市前对所有适用规则下的规定作出合理评估，并采取一切合理步骤加以遵守。
- 对于申请人通过合同安排所控制的任何公司（“OPCO公司”），其登记股东必须承诺，在不抵触相关法律法规的前提下，假如结构性合同取消，如果申请人要求获得OPCO公司的股份，OPCO公司登记股东必须将其收到的任何对价交回申请人，并且此承诺必须在上市文件内披露。
- 若相关法律法规具体订明禁止外商投资者使用任何协议或合约安排去控制或营运个别限制外商投资业务时，法律顾问对结构性合同的意见中必须包括一项肯定性确认，确定有关结构性合同的使用并不违反该等法律及规定，或确定有关结构性合同不会在该等法律及规定下被视为失效或无效。如可能，此等法律意见须有适当监管机构作出的确认支持，以证明有关结构性合同的合法性。
- 若申请人除OPCO公司以外尚有从其他附属公司取得收入，则上市申请文件必须独立披露从结构性合同安排所产生的收入。
- 若OPCO公司的营运在中国境内，申请人须在上市文件中包括由中国法律顾问作出的肯定性确认，确定有关结构性合同不会在中国合同法下被视为“以合法形式掩盖非法目的”而被认定无效。

可通过以下链接参阅上市决策 LD43–3：

http://www.hkex.com.hk/chi/rulesreg/listrules/listdec/Documents/LD43–3–c.pdf

过往在受制裁国家开展的业务并不会导致申请人不适合上市

根据12月的一项上市决策，联交所确定申请人以往在外国政府对之施加贸易或经济制裁的国家（如：伊朗、古巴、叙利亚和苏丹）（“受制裁国家”）开展过业务不会导致其不适合上市。

在业务记录期内，甲公司和乙公司均与受制裁国家的公司签署过合同。甲公司和乙公司均采取以下方式降低制裁风险：

- 在上市前终止和/或向其他方转让在受制裁国家的所有合同和业务。
- 向联交所承诺：其不会将首次公开招股收益或者通过联交所获得的任何其他资金，直接或间接的用于或为在受制裁国家的任何项目或者业务或者任何制裁相关活动提供资金或者便利，或者支付因终止合同而向交易对方进行赔偿时的任何赔偿金。
- 开立并保持仅用于持有上市收益的单独的银行账户。
- 向联交所承诺：其在上市后不会履行受制裁国家合同项下的任何义务或者在受制裁国家开展任何其他活动。
- 实施内部控制措施以控制面临的制裁风险。
- 在其招股说明书中披露：根据对受制裁国家实施制裁的国家的法律顾问出具的法律意见书，在采取上述措施的基础上，因为上市导致申请人、其投资者和股东遭受制裁的风险是比较低的。

联交所要求在招股章程的“摘要”、“风险因素”和“业务”部分披露下述信息：

- 申请人在受制裁国家的项目/业务的详细情况。
- 法律顾问针对是否存在违反制裁的任何风险的意见及出具该等意见的依据。
- 在上市前终止或转让在受制裁国家的项目/业务，和对申请人财务和运营造成的影响的详情，以及法律后果和最严重的惩罚情况。
- 申请人向联交所做出的承诺，包括承诺其不会将首次公开招股收益用于为在受制裁国家的任何项目或业务提供资金，以及其不会履行有关合同项下的任何义务。
- 如果申请人违反其向联交所做出的承诺，可能产生的除牌风险。
- 用于控制面临制裁风险的内部控制措施的详情。

可通过以下链接参阅上市决策 LD76–2013：

http://www.hkex.com.hk/chi/rulesreg/listrules/listdec/Documents/ld76–2013_c.pdf

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businesses in the Sanctioned Countries, nor perform any obligations under the relevant contracts.

- Risk of possible delisting should the applicant be in breach of its undertakings to the Exchange.
- Details of internal control measures to control exposure to sanctions risk.

For a copy of Listing Decision LD76-2013, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld76-2013.pdf

Effect of PRC Applicants' Non-compliant Overseas Loan Financing

In October, the Exchange updated its Listing Decision LD19-2011 (originally published in September 2011 and updated in September 2013) regarding how Company A's non-compliant financing would affect its listing. The updated Decision notes that some mainland companies obtain overseas loans under domestic guarantees to benefit from interest rate differentials and potential foreign exchange gain. The Decision adds that, like non-compliant bill financing arrangements, some of these overseas loans under domestic guarantees are not backed by genuine underlying transactions and are material to applicants in terms of gains from interest rate arbitrage or foreign exchange. Applicants with material non-compliant overseas loan arrangements should disclose the arrangements in their prospectuses, and demonstrate that they have effective internal controls to avoid recurrence of the non-compliance and that they could operate for a reasonable period of time in a fully compliant manner. Applicants should also disclose the amount of gains from interest rate arbitrage and foreign exchange.

For a copy of the updated Listing Decision LD19-2011, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld19-2011.pdf

Internal Controls on Hedging Activities

In a decision published in January, the Exchange addressed required internal controls, and listing document disclosure, relating to hedging.

Company A had entered into forward purchase contracts with its suppliers for hedging purposes, which were settled by physical delivery within the next 12 months and covered a majority of its production requirements. The Exchange considered that Company A's existing internal controls on hedging lacked the level of dynamic risk management that was customary for listed companies engaging in hedging activities, and there was also insufficient disclosure on the credit risk of the counterparties to the hedging activities. Company A was therefore asked to consider, and it subsequently implemented and disclosed in the prospectus, the following measures:

- Establishing a risk management committee.
- Setting position limits and counterparty limits for the forward purchases and establishing procedures for approving changes to such limits.
- Monitoring value at risk.
- Monitoring counterparty risks.

For a copy of Listing Decision LD77-2014, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listdec/Documents/ld77-2014.pdf

REGULATORY WATCH

SFC Review of the Exchange's 2012 Performance

In December, the SFC published its annual report on the Exchange's performance in its regulation of listing matters during the previous calendar year.

The main findings in the SFC report relate to the reverse takeover ("RTO") rules in Chapter 14 of the Exchange's Listing Rules, and may be summarized as follows:

- Even after conducting an enquiry into the material facts of a case and the parties concerned, it is hard for the Takeovers Executive to determine whether a concert party relationship exists without carrying out a thorough investigation; absent such a view, the Exchange cannot identify a change of control.
- Although a transaction without a change of control can be an RTO if it is an attempt to achieve a listing of the assets to be acquired, and the requirements for a new listing are being circumvented, in practice the Exchange only applies this to "extreme" cases. In assessing whether a case is "extreme", the Exchange measures the percentage ratios ascertained under the Listing Rules against a very high threshold (based on factors including relative size; suitability including trading record; pre-acquisition status of the purchaser's business and any major change afterwards; and any other events forming a series of arrangements). This has the effect of filtering out transactions from further consideration by the Exchange and its Listing Committee.
- As an example, the use of highly dilutive convertible debt securities can circumvent the control test.
- Incoming shareholders can also delay injecting assets into shell companies or raising funds until after the expiration of the 24-month "look back" period.

The SFC noted the underlying policy intention of subjecting backdoor listings to the full procedures that apply to a new listing. Therefore, the SFC recommended that the Exchange conduct a general review of the application and

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中国申请人违规海外融资对其上市的影响

10月，联交所再次更新了其关于甲公司违规融资影响其上市的上市决策LD19–2011（最初刊发于2011年9月，并于2013年9月更新）。更新过的上市决策注意到部分内地公司透过境内担保取得境外贷款，以受惠于利率差额及潜在汇兑收益。更新过的上市决策提到，与违规票据融资安排相似，部分这类透过境内担保取得的境外贷款并无真实的相关交易支持，却为申请人带来重大的利率套利收益或汇兑收益。涉及重大违规境外贷款安排的申请人应在招股章程中披露有关安排，证明其已实施有效内部监控以防再度违规，以及可于一段合理时间内全面合规地营运。申请人还应披露利率套利及汇兑收益所得的收益金额。

可通过以下链接参阅上市决策LD19–2011：

https://www.hkex.com.hk/chi/rulesreg/listrules/listdec/Documents/ld19–2011_c.pdf

对冲活动的内部监控

在1月刊发的上市决策中，联交所提出了关于对冲活动的内部控制以及上市文件的披露要求。

为进行对冲，甲公司与其供应商订立远期采购合约，约定在未来12个月以实物交付方式结算。远期采购合约涵盖大部分生产需要。联交所认为，相对于其他参与对冲活动以致承受价格波动风险的上市公司，甲公司在对冲方面的内部监控欠缺惯常应有的动态风险管理水平，有关对冲活动对手方的信贷风险披露亦不足够。联交所要求甲公司考虑以下措施，且甲公司随后执行了并在招股书中披露了以下措施：

- 成立正式的风险管理委员会。
- 设立远期采购的持仓限额和对手方限额，制定批准对限额的变更的程序。
- 监察风险值。
- 监察对手方风险。

可通过以下链接参阅上市决策 LD77–2014：

http://www.hkex.com.hk/chi/rulesreg/listrules/listdec/Documents/ld77–2014_c.pdf

监管动向

证监会关于联交所2012 年年度检讨报告

12月，证券及期货事务监察委员会就联交所上一个年度规管上市事宜的表现刊发了年度检讨报告。

证监会报告中关于联交所上市规则第14章反向收购（“反向收购”）的规则的主要内容总结如下：

- 即使已就有关个案的重要事实及有关人士进行查询，假如没有进行充分彻底的调查，收购执行人员仍然难以对是否存在一致行动关系作出定论。缺乏该定论意味着联交所不能确定该项交易会否出现控制权转变。
- 尽管如果意图将待收购的资产上市，没有控制权转变的交易也可以构成一个反向收购，且规避了新上市的要求，在实践中，联交所只在“极端”个案中适用该项规则。在评估某个案是否属于“极端”，联交所会将根据上市规则确定的百分比率与一极高门槛比较（基于的因素包括相对规模、是否适合上市，包括业务记录、收购方收购前的业务状态以及之后的重大变化、以及任何其他形成一系列安排的事件），这会令许多交易排除在联交所及上市委员会的进一步考虑之列。
- 作为一个例子，利用具有高度摊薄效应的可换股债券可以规避控制权测试。
- 将会成为股东的人士可以延迟向壳公司注资或进行筹资直至 24 个月的“回顾期”结束为止。

证监会注意到将借壳上市受限于新上市的全过程的政策意图。因此，证监会建议联交所对反收购行动规定的应用及监管进行一般性检讨以确保不会背离其政策原意。

另外，证监会还关注到根据框架协议订立的持续关联交易的定价条款的披露程度，概括性定价政策披露时通常没有解释独立第三方现行基准市价是如何计算的。证监会支持联交所明确和加强相关规则，要求具体披露须付款项的计算依据，并预期联交所将会就持续关联交易定价条款的披露刊发指引信。

可通过以下链接参阅证监会报告：

http://www.sfc.hk/web/files/ER/PDF/09_HKEX%20audit%202013%20report_CHN%20FINAL_2%20Dec.pdf

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administration of the reverse takeover rules to ensure that the policy intention behind those rules is preserved.

Separately, the SFC also raised concerns on the level of disclosure of pricing terms in framework agreements for continuing connected transactions, as pricing policies phrased in general terms are normally disclosed without any explanation as to how benchmark prevailing market rates charged by independent third parties are determined. The SFC will support the Exchange's efforts in clarifying and reinforcing the relevant rule requirements for specific disclosure of the basis of the calculations of payments to be made, and it is expected that the Exchange will publish a guidance letter on disclosure of pricing terms for continuing connected transactions.

For a copy of the SFC's Report, please follow this link: http://www.sfc.hk/web/files/ER/PDF/09_HKEX%20audit%202013%20report_ENG%20FINAL_2%20Dec.pdf

SFC Publishes New FAQs on Inside Information

In January, the SFC published additional FAQs on the statutory inside information disclosure regime, which came into effect one year previously. Details of the two new FAQs follow:

- ***"Unusual movement" announcements: disclosure of directors' dealings***
  If the Exchange makes an enquiry concerning unusual movements in the price or trading volume of a listed company's securities, and requires the company to make an announcement, the announcement should disclose any material dealings by the directors in the company's securities that occurred shortly before or at the time of the Exchange's enquiry, and of which the company is aware.
- ***Disclosure of SFC investigations: trumped by SFO secrecy provisions?***
  Generally, any person assisting the SFC in a statutory enquiry or an investigation concerning a corporation (and/or its offices) must preserve secrecy regarding any matter that comes to the person's knowledge in the course of assisting the SFC (section 378 SFO). However, if the mere fact of an enquiry or investigation is inside information under Part XIVA of the SFO, it must be disclosed (see our previous article at http://www.mofo.com/files/Uploads/Images/130206-Hong-Kong-Capital-Markets-Quarterly.pdf and http://www.mofo.com//files//Uploads/Images/110218-Statutory-Obligation-for-Listed-Companies.pdf). Any listed company that has decided on disclosing an SFC enquiry or investigation should inform the SFC prior to making such disclosure, and is exempt from the statutory secrecy provisions since the disclosure is required by law (section 278(2)(e) SFO). An example could be where the SFC is conducting an investigation into misconduct by the CEO of a listed company and the CEO is standing down from his position pending the investigation's conclusion.

For a copy of the FAQs, please follow this link: http://www.sfc.hk/web/EN/faqs/listings-and-takeovers/disclosure-of-inside-information.html

New Companies Ordinance

Hong Kong's new Companies Ordinance ("CO") comes into force on March 3, 2014. It will not contain prospectus and insolvency/winding up provisions, as these will remain in the existing Ordinance, which will be renamed as the "Companies (Winding Up and Miscellaneous Provisions) Ordinance." The new CO is intended to facilitate business and improve corporate governance, and its changes will generally be of more interest to lawyers than their clients. However, those involved in corporate finance will wish to note that (for Hong Kong incorporated companies):

- The 'headcount test' will be abolished for schemes of arrangement involving a general offer or takeover offer, so for a scheme to be approved in those cases the votes cast against it will need to amount to not more than 10% of all the voting rights attached to the disinterested shares.
- Capital reductions will be possible without a court order, through a new procedure involving a prescribed declaration of solvency by directors.
- Financial assistance for the acquisition of a company's own shares will be allowed for listed companies, subject to the solvency test and other procedures; and the existing exception regarding employee share schemes will be widened.
- Share repurchases out of capital will be allowed for all companies, subject to the solvency test and other procedures.

For the Companies Registry's web resources on the new CO, please follow this link: http://www.cr.gov.hk/en/companies_ordinance/companies_ordinance.htm

SFC Increases Monitoring of Listed Companies

The SFC has mounted an initiative to oversee more actively the corporate conduct of listed companies. The SFC's Chairman Carlson Tong said in December that the SFC had set up a dedicated corporate regulation team to review company announcements, circulars, and reports, and to monitor press reports and analyst research. The team will also conduct periodic reviews of companies and will focus particularly on those with a history of losses, frequent corporate restructuring, or changes of auditors.

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证监会发布了关于内幕消息的新的常见问题解答

1月，证监会公布了与在一年前生效的法定内幕消息披露制度有关的新的常见问题解答。该等新的常见问题解答的详情如下：

- ***"异常波动"通告：披露董事交易***

  如联交所对上市公司证券价格或交易量的异常波动进行查询，并要求公司发出通告，该通告应披露公司获悉的在联交所进行查询不久前或之时董事对公司证券进行的任何重大交易。

- ***披露证监会调查：输给证监会的保密规定?***

  通常而言，任何人在协助证监会进行法定查询或协助对公司进行调查时必须对其在协助证监会过程中获悉的任何事情保密（证券及期货条例第378条）。但是，如查询或调查这一事实属于证券及期货条例第XIVA部分规定的内幕消息，则必须对其进行披露（请通过此链接http://www.mofo.com/files/Uploads/Images/130206-Hong-Kong-Capital-Markets-Quarterly.pdf和http://www.mofo.com/files/Uploads/Images/110218-Statutory-Obligation-for-Listed-Companies-CHINESE.pdf获取本所先前文章）。任何已决定披露证监会查询或调查的上市公司应当在进行该等披露前通知证监会，并免于遵守法定的保密规定，因为该等披露是法律要求的（证券及期货条例第278(2)(e)条）。例如，证监会正对某上市公司首席执行官的不当行为进行调查，然后该首席执行官在调查做出结论前辞职。

可以通过以下链接参阅常见问题解答：

http://www.sfc.hk/web/TC/faqs/listings-and-takeovers/disclosure-of-inside-information.html

新《公司条例》

香港新《公司条例》（"新条例"）将于2014年3月3日起生效。新的公司条例将不再包含关于招股章程及破产/清盘的条文，该等条文将保留在现行公司条例中，并更名为《公司（清盘及杂项条文）条例》。新条例旨在方便营商和改善公司治理，所作变动律师较其客户更为需要关注。但是，从事为在香港注册的公司提供融资服务的人员需要留意以下规定：

- 涉及全面收购或要约的安排将会废除 "人数验证"，因此，在该等情况下审批有关安排时对该等交易的反对票须不超过所有无利害关系股份所附的表决权的10%。
- 通过董事就偿付能力作出声明的新程序，公司可能无需经过法庭程序减少公司股本。
- 上市公司经偿付能力测试及其他程序可被允许就购入自身的股份提供财政协助；而关于员工持股计划的例外将被拓宽。
- 经偿付能力测试及其他程序所有公司均可从资本中拨款以回购公司股份。

参阅公司登记机构网站资源中的新条例的链接：

http://www.cr.gov.hk/tc/companies_ordinance/companies_ordinance.htm

证监会加强了对上市公司的监督

证监会已经采取行动更为积极地监管上市公司的企业行为。证监会主席唐家成12月表示证监会已经设立了一个专门的企业监管小组审阅公司公告、通函及报告，并监控新闻报道和分析研究。该小组还将对公司进行定期审核，特别会关注发生过亏损、频繁企业重组或变更核数师的公司。

上市海外公司：20国别指南

根据证监会与联交所9月联合发布的全新修订的《有关海外公司上市的联合政策声明》（"经修订的联合政策声明"），联交所于12月刊发了被上市委员会正式确认接受为发行人注册成立地点的20个海外管辖地的国别指南。指南就联交所处理来自相关管辖地的海外发行人的上市申请给出了指导意见，包括联交所的期望、惯例、程序和标准。

可以通过以下链接参考本所上一期香港证券市场季刊关于经修订的联合政策声明的相关部分：

http://www.mofo.com/files/Uploads/Images/131031-Hong-Kong-Capital-Markets-Quarterly.pdf

新刊发的指引信

招股章程"概要及摘要"一节：披露自营业记录期以来的发展情况

联交所于11月和1月刊发了关于招股章程"概要及摘要"一节的指引信GL27-12（最初刊发于2012年1月、更新于 2013年7月）的进一步更新。该更新建议该章

（第9页继续）

Listing Overseas Companies: 20 Country Guides

As signaled in the revised Joint Policy Statement Regarding the Listing of Overseas Companies jointly published by the SFC and the Exchange in September ("revised JPS"), the Exchange published in December country guides for 20 of the overseas jurisdictions that the Listing Committee has formally ruled to be acceptable as an issuer's place of incorporation. These give guidance on the Exchange's treatment of listing applications from overseas issuers incorporated in the relevant jurisdiction, including the Exchange's expectations, practices, procedures, and criteria.

See also our related commentary on the revised JPS in the previous issue of this newsletter: http://www.mofo.com/files/Uploads/Images/131031-Hong-Kong-Capital-Markets-Quarterly.pdf

NEW GUIDANCE LETTERS

Prospectus "Summary and Highlights" Section: Disclosure of Developments Since Trading Record Period

In November and January, the Exchange published further updates of its Guidance Letter GL27-12 (originally issued in January 2012 and updated in June and July 2013) regarding the "Summary and Highlights" section of prospectuses. The updates recommend that this section should typically provide information on recent developments regarding the applicant's operations and financial position since the latest audited financial period, including qualitative or quantitative information (with commentary) relating to its financial performance and profitability such as revenue, gross profit/loss, gross profit/loss margin, and/or operating data such as average selling price and sales volume. Where an applicant discloses quantitative information relating to its financial performance after the track record period other than net profit/loss, that information must be reviewed by the reporting accountants, and a statement must be included in the listing document that it has been so reviewed. The update also recommends a breakdown of the amounts of listing expenses that have been charged to the income statement/equity during the trading record period or will be charged afterwards.

For a copy of the updated Guidance Letter GL27-12, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/Documents/gl27-12.pdf

The Exchange similarly updated its Guidance Letter GL41-12 (originally issued in August 2012) regarding cases where an applicant's financial performance deteriorates after the trading record period. In such cases, the updated key financial data as described above are required, not just recommended, and also disclosure (with commentary) on how the adverse changes affect the financial, operational, and/or trading position after the trading record period.

For a copy of the updated Guidance Letter GL41-12, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/Documents/gl41-12.pdf

The Exchange also updated its FAQ series 23 to reflect these updates. For a copy of the FAQs, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listrulesfaq/Documents/FAQ_23.pdf

Guidance on Suitability for Listing

In December, the Exchange published guidance (based on previous listing decisions and rejection letters) on factors that the Exchange takes into consideration when assessing whether an applicant and its business are suitable for listing, including the following:

1. ***Suitability of directors and controlling shareholders***
   Where the past record or conviction of an individual raises serious concern on his or her integrity, and the individual is likely to exert substantial influence on the applicant after listing, there may be concern as to the applicant's suitability for listing. A controlling shareholder is highly likely to be able to exert such influence over the applicant's operation and management through voting on the appointment of directors, and therefore may be a "shadow director" even if not formally appointed as such. Thus, the applicant's suitability may not be assured by that person refraining from acting as the applicant's director.
2. ***Non-compliance***
   Systematic, intentional, and/or repeated breaches of laws and regulations by an applicant may affect its suitability for listing. Factors affecting this determination include:
   - The nature, extent, and seriousness of the breaches.
   - Whether the breaches were fraudulent, intentional or due to recklessness or negligence.
   - Any impact on the applicant's operation and financial performance.
   - Rectification measures adopted.
   - Precautionary measures put in place to avoid future breaches.

   In cases where the non-compliance did not have a direct impact on the financial position of the applicant, but was serious, listing will only be approved after the applicant has demonstrated continued compliance for a reasonable period of time. Where it is determined that the non-compliance incidents can be addressed by way of disclosure, the Exchange expects applicants to follow its Guidance Letter GL63-13 (described in our previous issue

(Continued on page 10)

节一般应提供自最近一个审计财政期间以来申请人的营运及财务状况的最新进展，包括有关其财务情况及盈利能力（如收入、毛利/亏损、毛利/亏损比率、及/或经营数据诸如平均售价及销量）的定性或定量资料以及相关解释。若申请人披露营业纪录期后其在纯利/净亏损以外的其他有关财务表现的定量资料，此等资料须经申报会计师审阅，上市文件内亦须说明该资料已经申报会计师审阅。联交所并建议分项列出在营业纪录期内计入或将于营业纪录期后计入收益表/股本权益的上市支出的明细。

可通过以下链接参阅更新后的指引信GL27–12：

http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/iporq/Documents/gl27–12_c.pdf

联交所同样刊发了关于营业纪录期后申请人财务状况恶化的情况的指引信GL41–12（最初刊发于2012年8月）的进一步更新。在该等情况下，需要提供（而非推荐提供）以上所述的更新后的关键财务数据，以及披露不利变化如何影响营业记录期后的财务、运营和/或交易情况。

可通过以下链接参阅更新后的指引信GL41–12：

http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/iporq/Documents/gl41–12_c.pdf

联交所亦更新了其“常见问题解答系列之二十三”以反映上述更新。跟新后的“常见问题解答系列之二十三” 请参阅以下链接：

http://www.hkex.com.hk/chi/rulesreg/listrules/listrulesfaq/Documents/FAQ_23_c.pdf

关于是否适合上市的指引

联交所于12月（基于以往的上市决策及退回申请的函件）就其在评估申请人及其业务是否适合上市时所考虑的因素刊发了指引信，包括以下要点：

1．***董事及控股股东的适宜性***

若个别人士的诚信因过往纪录或定罪令人严重质疑，而该人士可能对上市后的申请人产生重大影响，则可能会有申请人是否适合上市的顾虑。因为控股股东很有可能通过投票委派董事对申请人的业务及管理造成重大影响，所以该控股股东可能是一位“影子董事”，即便其并未被正式委任为该角色。因此，申请人的上市适宜性不会因该人士不出任申请人董事而获得确认。

2．***违规***

申请人有计划地、故意及/或重复违反法律法规可能影响其上市的适宜性。影响该判断的因素包括：

- 违规的性质、程度及严重性；
- 违规是否因欺诈、故意或由于疏忽大意造成；
- 对申请人业务及财务表现的任何影响；
- 所采取的纠正措施；及
- 所设置避免日后再度违规的防范措施。

如果违规对申请人财务状况并无直接影响，但情况严重，则上市将仅在申请人已经证明其在一段合理时间内持续合规后方可获批。若违规事件被确定为可通过披露解决，则联交所希望申请人遵循联交所引信 GL63–13的要求（请参考本所之前的香港资本市场业务季刊 http://www.mofo.com/files/Uploads/Images/131031-Hong-Kong-Capital-Markets-Quarterly.pdf）。

3．***财务表现恶化***

即使申请人于营业纪录期内符合上市适宜性的要求，营业纪录期后任何财务表现恶化也可能表明其稳定性的重大恶化而使得申请人不适合上市。申请人集团的预测溢利大幅下跌及收购新业务也可能致使申请人不适合上市，因为营业纪录期结果可能不能反映申请人的业务前景。

4．***对母公司集团/关连人士/主要客户的依赖***

可能导致质疑是否适合上市的依赖个案例子包括：

- 财务或营运上依赖申请人的母公司，或在销售和采购等若干重要功能上依赖母公司集团。
- 申请人过于倚赖母公司，与母公司董事重叠、两者属同一行业，又没有充分的措施管理利益冲突及分隔业务。
- 申请人大部分营业额及纯　均源自与密切关联方及关连人士的交　。
- 当申请人极度倚赖单一主要客户，若申请人失去该客户，或若该业务关系有 变，申请人可能会蒙受重大不利的财务影响。
- 受制约的业务模式，即申请人主要原材料的采购及其主要客户渠道均受制于同一方。

（第11页继续）

at http://www.mofo.com/files/Uploads/Images/131031-Hong-Kong-Capital-Markets-Quarterly.pdf)

3. ***Deteriorating financial performance***
   Even if an applicant can meet the relevant requirements on suitability for listing during the track record period, any deteriorating financial performance after the track record period may indicate a fundamental deterioration of viability and render the applicant unsuitable for listing. A significant decline in the applicant group's forecast profit combined with acquisition of a new business may also render the applicant unsuitable for listing, as the track record results may not be indicative of the applicant's future business.

4. ***Reliance on parent group/connected persons / major customer***
   Examples of reliance causing concern as to suitability include:

   - Financial or operational reliance on the applicant's parent group, or reliance on the parent group for important functions such as sales and procurement functions.
   - Dependence on the parent where there are overlapping directors, the applicant and its parent are in the same industry sector, and there are inadequate arrangements to manage conflicts of interest and delineation of businesses.
   - Transactions with closely related parties and connected persons that provide a significant portion of the applicant's turnover and net profit.
   - Extreme reliance on a major customer, where the applicant may suffer a material financial impact if the applicant loses that customer or there is a change in the business relationship.
   - A captive business model, e.g., where the sourcing of the applicant's principal raw materials and its principal customer channel are dominated by the same party.

5. ***Gambling***
   Applicants that engage in gambling business will be considered unsuitable for listing unless they satisfy the requirements in the Exchange's announcement on "Gambling Activities Undertaken by Listing Applicants and/or Listed Issuers" (now reproduced as a new guidance letter GL71-14 – see below in this section) and the Listing Committee Report 2006, a copy of which can be found at this link: http://www.hkex.com.hk/eng/listing/listcomrpt/documents/annualrpt_2006.pdf

6. ***Contractual arrangements (VIEs)***
   Applicants adopting VIE arrangements may not be considered suitable for listing unless they satisfy the conditions set out in Listing Decision HKEx-LD-43-3 (see our first article above), including closely tailoring the use of such arrangement to the applicant's needs.

7. ***Reliance on unrealized fair value gains to meet profit requirement***
   Even if an applicant is able to satisfy the profit test by relying on unrealized fair value gains of its investment properties, if the applicant is loss-making after such gains are excluded and it did not have a substantive business during its track record period, the applicant would have to demonstrate that it has a sustainable business to be considered suitable for listing.

For a copy of Guidance Letter GL68-13, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/Documents/gl68-13.pdf

Guidance to Issuers Contemplating Spin-off or Reverse Takeover

In December, the Exchange published guidance to issuers contemplating (i) a spin-off and separate listing of businesses or assets on the Exchange or (ii) a reverse takeover where the issuer is deemed a new listing applicant, in the context of the listing requirements applicable to new applicants under the Listing Rules.

The Guidance notes that in a spin-off, the issuer must submit its spin-off proposal to the Exchange for approval pursuant to Practice Note 15, and where necessary, the company to be spun-off ("Newco") should make a pre-IPO enquiry to address its position on compliance with the requirements applicable to new applicants under the Listing Rules. Where there are continuing relationships or transactions between the issuer and Newco, issues may arise regarding potential conflicts between the interests of the two groups of shareholders (e.g., competition, reasons for exclusion of overlapping business, corporate governance measures to manage such conflicts, independent operation of Newco), which must be resolved before the application proof prospectus is submitted to the Exchange.

Similarly, in relation to reverse takeovers, the Guidance notes that the enlarged group must be able to meet the track record and all other requirements for a new listing under the Listing Rules, and that here too the issuer should make pre-IPO enquiries on any issues relating to its compliance with the requirements applicable to new applicants under the Listing Rules before submission of the application proof prospectus to the Exchange.

For a copy of Guidance Letter GL69-13, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/Documents/gl69-13.pdf

(Continued on page 12)

5．***赌博***

从事赌博业务的申请人不会获接纳上市，除非他们符合联交所有关《涉及经营赌博业务的上市申请人及/或上市发行人》的公告（现重新刊发为指引信GL71–14。请参阅本季刊以下内容）及《2006年上市委员会报告》所载的规定。上市委员会的报告请参阅链接：

https://www.hkex.com.hk/chi/listing/list–comrpt/documents/annualrpt_2006_c.pdf

6．***合约安排（可变权益实体）***

采纳可变权益实体的合约安排可被视为不适合上市，除非有关申请人可符合上市决策LD–43–3所载条件（请参见本季刊以上相关内容），包括使用该安排时严限于应付申请人的需要。

7．***依赖未变现公平值收益以满足盈利要求***

申请人假如依赖其投资物业的未变现公平值收益以满足盈利测试，倘若申请人在营业纪录期内扣除该等收益后处于亏损状态，而且没有实质性的业务，则该申请人需要向联交所证明其有可持续的业务以便联交所考虑其是否适合上市。

可通过以下链接参阅指引信GL68–13：

http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/iporq/Documents/gl68–13_c.pdf

发行人拟通过分拆或进行反向收购而上市的相关事宜的指引

12月，联交所就下列事项发布了指引信：(i) 发行人拟将业务或资产分拆而作独立地在联交所上市；或(ii) 根据上市规则项下适用于新申请人的要求，发行人拟进行反收购行动而被视作为新上市申请人。

指引信要求在分拆上市的个案中，发行人必须依照第15项应用指引的要求呈交分拆上市建议供联交所审批，如有需要，拟分拆出的公司（“新公司”）应针对其遵守上市规则对新上市申请人规定的事宜而向联交所作出首次公开招股前查询。若发行人与新公司之间有持续关系或交易，两家实体的股东之间可能会出现潜在利益冲突的问题（例如，竞争问题，不包括母公司所持有重迭业务的原因，为处理日后冲突而采取的企业管治措施，新公司独立运营等问题），均需于呈交申请版本前解决相关事宜。

同样，在反收购行动个案中，扩大了的集团必须能够符合上市规则中关于营业记录期及所有其他新的上市规定。新申请人应于呈交申请版本前就任何有关其遵守上市规则对新上市申请人规定的事宜进行首次公开招股前查询。

可通过以下链接参阅指引信GL69–13：

http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/Documents/gl69–13_c.pdf

“董事、监事及高层管理人员”一节的披露

1月，联交所就此主题发布了经更新的指引信GL62–13（最初发布于2013年7月），指出会计师报告中的董事薪酬表不应包括在往绩记录期未获得委任的董事。经更新的指引信还提及了由公司注册处发布的“董事责任指引”（“该指引”），并规定上市申请人的董事必须遵守该指引的要求，不符合该指引的董事可能会被认为违反上市规则。

可通过以下链接参阅指引信GL62–13：

http://www.hkex.com.hk/chi/rulesreg/listrules/listarchive/listarc_listguid/Documents/gl62–13(201307)_c.pdf

第一稿上市文件规定的财务资料

1月，联交所就此主题发布了经更新的指引信GL6–09A（最初发布于2013年7月），指出就汇报期末段的财务数字而言，符合以下要求的简明财务报表或完整财务报表均可被接受：

- 汇报期末段的财务数字及比较期间的财务数字必须至少要由申报会计师根据《香港审阅应聘服务准则》第2410号“实体的独立核数师对中期财务资料的审阅”进行审阅。
- 汇报期末段的财务数字必须至少包含上市规则对于中期报告要求的信息。
- 上述经审核财务数字及经审阅的汇报期末段的财务数字亦须于申请版本“财务信息”一节中呈列于同一表内（连同相关的管理层讨论及分析），以便比较及审阅。

可通过以下链接参阅指引信GL6–09A：

https://www.hkex.com.hk/chi/rulesreg/listrules/listguid/iporq/Documents/gl6–09a_c.pdf

（第13页继续）

Disclosure in the "Directors, Supervisors and Senior Management" Section

In January, the Exchange published an update of its Guidance Letter GL62-13 (originally issued in July 2013) on this topic, noting that the table of directors' remuneration in the accountants' report should not contain any references to directors who were not appointed (meaning 'in office') during the track record period. The update also refers to the "Guide on Directors' Duties" published by the Companies Registry (the "Guide"), and stipulates that directors of listing applicants must comply with the requirements of the Guide, and directors who do not may be considered in breach of the Listing Rules.

For a copy of the updated Guidance Letter GL62-13, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/Documents/gl62-13.pdf

Financial Information Required in First Draft Listing Documents

In January, the Exchange published an update of its Guidance Letter GL6-09A on this topic (originally issued in July 2013), noting that in relation to stub period financial information, either condensed or complete financial statements are acceptable as long as they comply with the following requirements:

- The stub financial information and comparative information must be at least reviewed by reporting accountants in accordance with the Hong Kong Standards on Review Engagements 2410 "Review of Interim Financial Information Performed by the Independent Auditor of the Entity".
- The stub financial information must at least include the information required by the Listing Rules for interim reports.
- The audited financial information and the reviewed stub period financial information must be presented in the same table together with the related MD&A in the "Financial Information" section of the Application Proof for easy comparison and review.

For a copy of the updated Guidance Letter GL6-09A, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/Documents/gl6-09a.pdf

Sponsor's Confirmations on Working Capital Sufficiency Statement

In January, the Exchange published an update of its Guidance Letter GL37-12 on this topic (originally issued in June 2012 and updated in July and September 2013). The updated Guidance states that, although sponsors are required on submission of a listing application to provide a final or advanced draft confirmation that the working capital sufficiency statement in the Application Proof has been made by the directors after due and careful enquiry, sponsors are not required to confirm then that the persons providing finance have stated in writing that such facilities exist.

In addition to disclosing the directors' view that the applicant can meet its working capital requirements for at least the next 12 months from the listing date, certain applicants (i.e., those with net current liabilities/negative operating cash flows for most of the track record period; significant capital commitments; high gearing ratios; and/or significant reclassification of long-term debt to short-term debt) must now disclose not only the basis for the directors' view but also (with basis) whether the sponsors (but no longer the reporting accountants) concur with the directors' view.

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

Acquisitions During or After Trading Record Period and Stub Period Comparatives

In January, the Exchange published an update of its Guidance Letter GL32-12 (originally issued in March 2012) on this topic. The update provides guidance on pro forma financial information relating to acquisition of major businesses or subsidiaries, and clarifies that where any of the percentage ratios established by the Listing Rules represents 5% or more but less than 100%, an applicant should disclose at least a pro forma statement of assets and liabilities of the enlarged group. Where any of the percentage ratios is 100% or more, an applicant should disclose at least a pro forma balance sheet, income statement, and cash flow statement of the enlarged group.

The updated guidance also clarifies that stub period comparatives may be audited, but where they are unaudited, at least a review opinion regarding them must be included in accountants' reports and the unaudited financial information must be clearly identified as unaudited.

For a copy of the updated Guidance Letter GL32-12, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/Documents/gl32-12.pdf

Gambling Activities Undertaken by Listing Applicants and/or Listed Issuers

In January, the Exchange published Guidance Letter GL71-14, which reproduces its news release dated March 2003, to provide guidance regarding gambling activities undertaken by listing applicants and/or listed issuers. The letter states that it is not contrary to the public interest for a listing applicant or listed issuer to be involved in the operation of a gambling activity that is not unlawful under the Gambling Ordinance,

(Continued on page 14)

保荐人对充足营运资金声明的确认

1月，联交所就此主题发布了经更新的指引信GL37–12（最初发布于2012年6月，并于2013年7月和9月更新）。经更新的指引表示，尽管保荐人须在提交上市申请时提供定稿或接近定稿的确认书，以确认董事是经过适当及仔细查询后始在申请版本中做出充足营运资金声明的，但保荐人毋须确认提供融资的人士或机构已书面声明备用信贷存在。

除了披露其董事认为申请人有能力满足其在从上市日期起计至少12个月的营运资本要求的意见外，某些申请人（即在业绩记录期大部分时间有净流动负债/负运营现金流；重大资本承诺；高资本负债比率及/或大量长期负债重新分类为流动负债的那些申请人）现在还必须披露该董事意见的依据及保荐人（但不再是申报会计师）是否认同该董事意见（及其依据）。

可通过以下链接参阅指引信GL37–12：

http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/iporq/Documents/gl37–12_c.pdf

交易记录期期间或期后收购及末段财务期间比较数字

1月，联交所发布了对关于该事宜的指引信GL32–12（最初发布于2012年5月）的更新。更新对与收购主要业务或附属公司有关的备考财务数据提供了指引，并明确如果根据《上市规则》规定计算所得的任何百分比率为5%或以上但少于100%，则申请人须至少披露扩大后集团的备考资产及负债表。如果任何百分比率是100%或以上，则申请人须至少披露扩大后集团的备考资产负债表、备考收益表和备考现金流量表。

更新后的指引还明确汇报期末段的比较数字可予以审计，但若未经审计，则至少会计师对汇报期末段的比较数字的审阅意见必须包括在会计师报告内，而未经审计的财务数据必须清楚列明为未经审计的数据。

可通过以下链接参阅指引信GL32–12：

https://www.hkex.com.hk/chi/rulesreg/listrules/listguid/iporq/Documents/gl32–12_c.pdf

上市申请人和/或上市发行人开展赌博活动

1月，联交所公布了指引信GL71–14（系对2003年3月发布的新闻稿的重述），为上市申请人和/或上市发行人开展赌博活动提供了指引。指引信表明：上市申请人或上市发行人涉及经营赌博的活动，如在《赌博条例》下不属违法，并且赌博活动是在香港境外进行，并且收受赌注的交易和交易双方均在香港境外，则该等赌博活动并未违反公众利益。此外，赌博活动不得触犯其开展经营活动所在的适用法律。但是，上市申请人或上市发行人须在其招股章程、公告或者有关通告中作出附加的相关披露，包括所涉及的赌博活动的类别、适用的监管或持牌规定以及与经营该等活动有关的特定风险。

上市申请人和上市发行人需尽其最大努力确保所经营赌博活动在其上市期间（或者其股份某上市发行人收购持有的投资期间内）（i）符合其开展该等运营所在地区的适用法律，和（ii）不会违反《赌博条例》。未遵守该等规定，发行人或其业务可能被视为不适合上市，而且联交所可能指示发行人采取补救措施，和/或可能暂停交易或取消其证券上市资格。

上市申请人必须在其招股章程的风险因素部分强调，如果其赌博活动的运营未能符合上述法律要求，则存在其上市资格被取消的风险。就上市发行人而言，关于投资任何经营赌博活动之发出的公告和/或通函中必须确认，该活动是合法的，而且必须强调如果经营活动不符合上述法定要求，则存在暂停交易和取消其上市资格的风险。

可通过以下链接参阅指引信GL71–14：

http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/iporq/Documents/gl71–14_c.pdf

有关关联交易规则的指引

1月，联交所公布了《指引信》GL70–14，该指引信再现了其2012年4月的，包含了有关关联交易规则的指引的新闻发布。

可通过以下链接参阅上市决策 LD70–14：

http://www.hkex.com.hk/chi/rulesreg/listrules/listguid/iporq/Documents/gl70–14_c.pdf

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where such gambling activity takes place outside Hong Kong and the bookmaking transactions and the parties to them are outside Hong Kong. In addition, the gambling activity should not violate any applicable laws in the areas where it operates. However, additional relevant disclosure would be required in the prospectus, announcement, or circular concerned, including the type(s) of gambling activities involved, the applicable regulatory or licensing requirements, and the specific risks in relation to operation of such activities.

Listing applicants and listed issuers will be required to use their best endeavors to ensure that the operation of the gambling activities, while they remain listed (or throughout the holding of the relevant investment, where acquired by a listed issuer), will (i) comply with the applicable laws where such activities operate, and (ii) not contravene the Gambling Ordinance. Failing compliance, the issuer or its business may be considered unsuitable for listing, and the Exchange may direct the issuer to take remedial action and/or may suspend dealings in or cancel the listing of its securities.

A listing applicant must highlight in the Risk Factors section of its prospectus the risk of its listing being revoked if the operation of its gambling activities fails to meet the above legality requirement. In respect of listed issuers, the announcement and/or circular on any investment in relation to the operation of gambling activities must confirm that the activities are lawful, and highlight the risk of suspension and cancellation of listing if the operation of the activities fails to meet the above legality requirement.

For a copy of Guidance Letter GL71-14, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/Documents/gl71-14.pdf

Guide on Connected Transaction Rules

In January, the Exchange published Guidance Letter GL70-14, which reproduces its news release dated April 2012 comprising a guide on connected transaction rules.

For a copy of Guidance Letter GL70-14, please follow this link: http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/Documents/gl70-14.pdf

ENFORCEMENT NEWS

IPO Sponsor Failures: SFAT Affirms Suspension of License for SHK International

In January, the Securities and Futures Appeals Tribunal (SFAT) affirmed the SFC's decision to reprimand Sun Hung Kai International Limited (SHK), fine it $12 million, and suspend its Type 6 license to advise on corporate finance for one year after finding serious deficiencies in the sponsor work relating to the listing of Sino-Life Group Limited (Sino-Life) on the Exchange's GEM Board.

SHK was the sole sponsor for Sino-Life's listing in 2009, which raised HK$124.2 million. The SFC's investigation showed that SHK had failed to:

- Assess the accuracy and the completeness of the information submitted by Sino-Life to show it met the financial requirements to list on the GEM Board.
- Discover various encumbrances on the title of a property that was central to a major business deal of Sino-Life in Taiwan.
- Assess properly the business of Sino-Life's wholly-owned subsidiary in Taiwan.
- Ensure true, accurate, and complete disclosure was made to the Exchange and in Sino-Life's prospectus, and ensure SHK's sponsor declaration to the Exchange was true so as to avoid breaching its sponsor undertaking.
- Keep proper books and records in relation to the sponsor work conducted.

In deciding the penalty, the SFC took into account that material failings by sponsors have serious consequences for the investing public.

PME Group: Director Acquitted of Complicity in Company's False or Misleading Announcements

PME Group Ltd (PME), a Hong Kong listed company, pleaded guilty in August 2013 to making false or misleading announcements, in breach of Section 384 of the SFO. The SFC had alleged that in 2008 PME provided false or misleading information to the Exchange when, in response to queries about a price increase of 139%, PME stated that it knew of no negotiations or agreements that were discloseable to the market and nor were its directors aware of any price sensitive matter. The SFC alleged that, at the time, PME was negotiating to purchase 50% of another company listed on the Exchange.

If a company's offense under the SFO is committed with the consent or connivance of a director, or is attributable to any recklessness on his/her part, that director is guilty of the same offense (section 390 of the SFO). However, in November, a director of PME, Ms. Ivy Chan, was acquitted by the Eastern Magistrates' Court of the same charges in respect of the offenses of PME. The court determined that the director did not possess the required criminal intent, and had relied on the company secretary to decide whether the acquisition was discloseable or not. The SFC reported that it was considering whether to appeal.

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执法新闻

首次公开发行保荐人挫败：审裁处证实暂停新鸿基国际有限公司的执业牌照

1月，证券及期货事务上诉审裁处（审裁处）确认了证监会对新鸿基国际有限公司（新鸿基）做出处罚的决定，证监会对其罚款1200万美元，并暂停其第6类为企业融资提供建议的执业牌照，暂停期为一年。做出处罚的原因是发现保荐人针对中国人寿集团有限公司（中国人寿）在联交所创业板上市所进行的工作存在严重缺陷。

新鸿基是中国人寿2009年上市项目的唯一保荐人，在此次上市中，中国人寿融资额达1.242亿美元。证监会的调查结果表明新鸿基未能：

- 评估中国人寿提交的信息的准确性和完整性，以表明其符合在创业板上市的财务要求；
- 发现对财产的所有权设立的各类产权负担，而该等财产对中国人寿在台湾的一宗主要业务交易十分重要。
- 适当评估中国人寿在台湾的全资子公司的业务；
- 确保向联交所及在中国人寿的招股章程中做出真实、准确及完整的披露，并且未能确保向联交所提供的新鸿基保荐人声明是真实的，以避免违反其保荐人承诺；以及
- 针对所开展的保荐人工作保持适当的账簿和记录。

在决定处罚时，证监会考虑了保荐人的严重缺陷已对投资大众造成了严重的后果。

必美宜集团：董事被判未共谋做出公司虚假或具有误导性声明

必美宜集团有限公司（必美宜），一家在香港上市的公司，在2013年8月承认违反《证券及期货条例》第384条做出虚假或具有误导性声明的检控。证监会指控，2008年必美宜股价上升了139%，联交所就此向其做出质询，但必美宜向联交所提供虚假或具有误导性的信息，表示其不知道有需要向市场进行披露的磋商或协议而且其董事也不知道任何价格敏感事宜。证监会指出，必美宜其实当时正在洽购另一家于联交所上市的公司的50%权益。

如果公司所犯的《证券及期货条例》项下的罪行，经证明是在董事同意或纵容或者是因董事任何疏忽而犯的，则董事与公司所犯罪行相同（《证券及期货条例》第390条）。但是11月，东区地方法院的一名地方法官宣判必美宜的董事陈瑞常女士未与必美宜犯有同等罪行。法院判决该董事不具备所要求的刑事企图，并且其信赖公司秘书做出是否应予以披露的决定。证监会报告称其正考虑是否提出上诉。

交易员被禁止根据不具体信息进行交易

11月，证监会禁止摩根士丹利集团的前交易员和顾问隋昱女士执业三个月，原因是在其被指定担任某上市公司拟议股份配售执行团队牵头人后出售其在该上市公司的股份。

其未拥有关于交易的进一步细节，因此，尽管其拥有的信息是保密的，但该等信息并不是具体的或并不是价格敏感的，并不足以构成《证券及期货条例》项下的“内幕信息”。但是，证监会认为，通过在拥有该等保密信息期间进行交易，其存在利益冲突，违反了《行为守则》。证监会还认为因其向雇主提供的预先审批表（该表是在有关上市公司被添加到摩根士丹利禁止交易清单前提交的）上提供了错误信息，因而其未能以适当技能、注意和尽职并为客户最大利益而行事。鉴于隋女士是自首的，已被前雇主辞退、以往记录良好且出售股份的数额不大（约4万港元），因此减轻了对其的处罚。

《收购守则》：储存ENM股份

11月，证监会开始就龚如心女士（“龚女士”）和其他方之间进行的“储存”安排向收购和合并委员会提交并开始了纪律处分程序。该安排涉嫌涉及当事方积极配合获得或合并控制ENM Holdings Limited（“ENM”），并避免触发《收购守则》项下的强制全面要约责任。

证监会指控龚女士向第三方支付款项以资助在2000年至2002年期间购买ENM股份，并且该等购买使得一致行动的集团的共同持股比例由35%以下上升到44%以上，因此触发了根据《收购守则》做出强制全面要约的义务（届时35%即为触发点）。该程序正在继续。

《收购守则》：大庆乳业冷淡对待令

11月，证监会向大庆乳业控股有限公司(“大庆乳业”）及其董事实施制裁，制裁原因是尽管证监会再三要求，但大庆乳业及其董事仍未在《收购守则》第8.4条项下规定的时间内针对全面要约向其股东发出受要约公司董事会通告。

证监会对王德林实施了为期24个月的冷淡对待令，因为

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Dealer Banned for Trading on Unspecific Information

In November, the SFC banned Ms. Sui Yu, a former dealer and adviser with the J.P. Morgan group, from the industry for 3 months, for selling shares in a listed company after being assigned to lead an execution team in a proposed placement of the company's shares.

She had no further details of the deal, so although the information she possessed was confidential, it was not specific or price-sensitive enough to constitute "inside information" for SFO purposes. However, the SFC considered that, through dealing while in possession of this confidential information, she had a conflict of interest in breach of the Code of Conduct. The SFC also considered that she failed to act with due skill, care, and diligence and in best interests of clients by providing wrong information on the pre-clearance form to her employer (the form was submitted just before the company was added to J.P. Morgan's no-dealing list). The sanction was mitigated given that Ms. Sui self-reported, was dismissed by her employer, and had a clean record, and because her share sale was modest in size (at around HK$40,000).

Takeovers Code: Warehousing of Shares in ENM

In November, the SFC began disciplinary proceedings before the Takeovers and Mergers Panel regarding an alleged "warehousing" arrangement among the late Ms. Nina Kung and other parties. The arrangement allegedly involved the parties actively cooperating to obtain or consolidate control of ENM Holdings Limited ("ENM") and avoid making a mandatory general offer under the Takeovers Code.

The SFC alleged that Ms. Kung reimbursed the third parties for purchases by them of ENM shares between 2000 and 2002, and that the purchases raised the collective shareholding of the concert group from below 35% to over 44%, thereby triggering an obligation to make a mandatory general offer under the Code on Takeovers (as 35% was then the trigger point). The proceedings are continuing.

Takeovers Code: Daqing Dairy Cold Shoulder Order

In November, the SFC imposed sanctions on Daqing Dairy Holdings Limited ("Daqing") and its directors for failing to issue an offeree board circular to shareholders in respect of a general offer within the time prescribed under Rule 8.4 of the Takeovers Code, despite the SFC's repeated requests.

The SFC imposed a 24 month cold shoulder order against Mr. Wang De Lin, the only executive director at the relevant time, given his responsibility to ensure Daqing fully complied with the Takeovers Code. The order denies Mr. Wang direct or indirect access to the Hong Kong securities markets until November 2015. Daqing and its directors were also censured for their conduct.

In April, Daqing and the offeror, Radiant State Limited ("Radiant"), jointly announced that Radiant had acquired 52.16% interest in Daqing from a former controlling shareholder and that Radiant would make a general offer under Rule 26.1 of the Takeovers Code. Radiant then posted an offer document to shareholders in June. However, despite the SFC's repeated requests, Daqing and its directors failed to issue an offeree board circular to shareholders in respect of the general offer. As a result, shareholders of Daqing did not receive the latest corporate and financial information of Daqing, the board's recommendation, and the advice of an independent financial advisor on the general offer, to enable them to reach a properly informed decision.

SFC Brings MMT Proceedings Against Former Asia TeleMedia Limited Executives

In January, the SFC commenced proceedings in the Market Misconduct Tribunal (MMT) against the former chairman and three former executives of Asia TeleMedia Limited (the "Company") for alleged insider dealing in its shares during 2007. In June 2007, the Company was insolvent and was served with a winding up petition designed to enforce a large debt it owed to a third party. The SFC alleges that the officers sold shares in the Company before the enforcement action was known to the public, and avoided a total combined loss of $50.9 million. The SFC previously obtained a worldwide injunction in May 2008 under section 213 of the SFO, freezing assets of the former chairman and several of his nominees.

其在有关时间是大庆乳业的唯一执行董事，其有责任确保大庆乳业全面遵守《收购守则》。命令禁止王先生在2015年11月前直接或间接参与香港证券市场任何交易。大庆乳业及其董事也因其行为受到了谴责。

4月，大庆乳业和要约人Radiant State Limited（“Radiant”）联合宣布Radiant已从前控股股东处获得了大庆乳业52.16%的权益，而且Radiant将根据《收购守则》第26.1条做出全面要约。随后，Radiant在6月向股东公布全面要约文件。但是，尽管证监会再三要求，大庆乳业及其董事未能就全面要约向其股东发出受要约公司董事会通告。因此，大庆股东未收到大庆乳业最新公司和财务信息、董事会及独立财务顾问就全面要约分别提出的建议及意见，因而无法做出适当及有根据的决定。

证监会对Asia TeleMedia Limited前管理人员提起市场失当行为审裁处研讯程序

1月，证监会针对Asia TeleMedia Limited（“公司”）前主席和三名前管理人员在市场失当行为审裁处提起研讯程序，指四人在2007年就其股份进行了内幕交易。2007年6月，公司破产并被通知清盘，目的是强制执行其亏欠第三方的一大笔债务。证监会指控管理人员在公众获悉该等法律程序之前出售公司股份，从而避免了共5090万美元的亏损。证监会之前在2008年5月根据《证券及期货条例》第213条获得了世界范围内的禁令，冻结了该前主席及其数名代名人的资产。