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Financial Services Regulatory Update 金融服务监管资讯

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Directors' Duties to Avoid Frustrating Action During a Public Takeover

In a takeover of public company, directors of the target company face a minefield of legal traps and regulatory pitfalls at different stages. One of the obligations that the directors of the target company may overlook is the duty to avoid any frustrating action.

Duty to avoid frustrating action

The duty of the directors of the target company to avoid frustrating action arises from Rule 4 of the Hong Kong Code on Takeovers and Mergers (Takeovers Code) issued by Hong Kong Securities and Futures Commission (SFC). Rule 4 states that “[o]nce a bona fide offer has been communicated to the board of an offeree company or the board of an offeree company **has reason to believe that a bona fide offer may be imminent, no action which could effectively result in an offer being frustrated**, or in the shareholders of the offeree company being denied an opportunity to decide on the merits of an offer, shall be taken by the board of the offeree company in relation to the affairs of the company **without the approval of the shareholders of the offeree company in general meeting.**”

While there is no further guidance on the meaning of “imminent” in the Takeovers Code, an offer is usually taken to be imminent when and after an announcement on the intention to make an offer is made under Rule 3.5 of the Takeovers Code, as shown in a recent disciplinary case discussed below.

Rule 4 provides non-exhaustive examples of acts that constitute frustrating actions requiring prior approval of the shareholders, including (a) issue any shares; (b) create, issue or grant, or permit the creation, issue or grant of, any convertible securities, options or warrants in respect of shares of the offeree company; (c) sell, dispose of or acquire assets of a material amount; (d) enter into contracts, including service contracts, otherwise than in the ordinary course of business; or (e) cause the offeree company or any subsidiary or associated company to buy back, purchase or redeem any shares in the offeree company or provide financial

assistance for any such buy-back, purchase or redemption.

In the notes to Rule 4, the SFC provides further guidance that a new or amended director service contract which abnormally increase the director's emoluments or significantly improve the terms of service of the director will be regarded as (d). For “material amount” under (c), the SFC will generally apply the tests set out in the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (Stock Exchange) (Listing Rules) and see if the transaction is a “disclosable transaction.”

Underlying principle for prior shareholders' approval under Rule 4

Rule 4 is considered to be a fundamental rule which prevents an offeree company from taking any action which could result in an offer being thwarted or its shareholders being denied an opportunity to decide on the merits of an offer from the time when a bona fide offer has been communicated to the board of the offeree company or the board of the offeree company has reason to believe that a bona fide offer may be imminent.

While the directors of the offeree company should consider the interests of the shareholders taken as a whole and give recommendations on the fairness, reasonable and acceptance of the offer, the right to decide the ownership and control of a company is absolutely vested in the shareholders. Shareholders should be given reasonable and equal opportunities to consider an offer. It is also possible that a director may decide to frustrate the offer out of his/her own and conflicting interest. Rule 4 protects the shareholders' interest in a bona fide offer and serves to provide a level playing field for parties in an offer.

Recent enforcement case on breach of Rule 4

On April 7, 2022, the SFC publicly criticized two directors, Mr Gao Yunhong (Mr Gao) and Ms Feng Xuelian (Ms Feng), in connection with the disposal of material assets of the offeree company during an offer period in breach of Rule 4 of the Takeovers Code. The background and the SFC's decision of the case were

covered in details in our previous issue of Financial Services Regulatory Update on April, 8, 2022.

Facts

In summary, the offeror company in the case (Offeror) acquired some shares (Sale Shares) which represent 49% shareholding interest in the offeree company (Offeree) from a bank (Bank) upon the enforcement of a security over the Sale Shares in relation to a loan extended by the bank to Gentle Soar Limited (Gentle Soar), a company wholly-owned by Mr Gao and the controlling shareholder of the Offeree prior to the acquisition of the Sale Shares. The acquisition triggered an obligation for the Offeror to make an unconditional mandatory offer for the Offeree pursuant to Rule 26.1 of the Takeovers Code.

After the acquisition, the Offeree announced that Mr Gao had informed its board of directors that: (i) there was a dispute between Gentle Soar, the Bank and the Offeror in respect of the enforcement of the security over the Sale Shares and the transfer of the Sale Shares to the Offeror (Dispute); and (ii) legal proceedings had been instigated by Gentle Soar against (among others) the Bank and the Offeror in relation to the Dispute.

Later, the Offeror made an announcement under Rule 3.5 of the Takeovers Code and the offer period commenced on the same day. Gentle Sar's legal advisers consulted the SFC on whether a general offer obligation was in fact triggered by the Offeror in light of the Dispute. The SFC informed the legal advisers that regardless of the Dispute, since the transfer of the Sale Shares to the Offeror had completed, an obligation to make a general offer had been triggered on the part of the Offeror for the purpose of the Takeovers Code. Nonetheless, the board of the Offeree proceeded with a disposal (Disposal) of the Offeree's assets, being equity interest held by a subsidiary of the Offeree. Ms Feng was the sole director of the Offeree's subsidiary concerned. The Disposal constituted a discloseable transaction under the Listing Rules.

The Offeree changed the constitution of the board after acquisition of the Sale Shares by the Offeror and reverted such changes after the Disposal. Only Mr Gao and Ms Feng were on the board at all material times.

SFC's decision

The SFC considered that the Disposal was clearly subject to the requirements of Rule 4 of the Takeovers Code given that a Rule 3.5 announcement was published and an offer period had commenced. The Disposal was a discloseable transaction under the Listing Rules carried out during an offer period and constituted a frustrating action. However, the approval of the Offeree's shareholders was not obtained nor was

a waiver of the requirement to obtain shareholders' approval sought from the SFC. There was a clear breach of the requirements under Rule 4. As Mr Gao and Ms Feng were the directors of the Offeree throughout the relevant period and given their substantial involvement in the Disposal, the SFC decided to publicly criticized Mr Gao and Ms Feng.

Takeaways and call for stringent enforcement

Directors and professionals should be cautious about any transaction during the offer period and be heedful of the impact of such transaction. Despite of any dispute over the acquisition of shares by the offeror, an offer is treated as imminent when a general offer is triggered or at least when a Rule 3.5 announcement is made. Directors and professionals should consult the SFC in advance if there is any doubt on the application of the Takeovers Code.

Besides oversight and misinterpretation of rules, it is possible that a frustrating action is intentionally carried out by the directors on a belief that the offer is not in the best interests of the company and the shareholders as a whole or out of the directors' own personal interests. The most common disciplinary sanction imposed on directors in breach of the Takeovers Code is public criticism, sometimes accompanied by a cold shoulder order depending on the seriousness of the case. Public criticism is often regarded as having a weak deterrence effect. The SFC should consider stepping up its regulatory scrutiny and imposing higher level sanctions (e.g. disqualification order, fines) for breaches of the Takeovers Code. The SFC and the Stock Exchange may also coordinate and cooperate their disciplinary actions in this regard. With the implementation of the proposals set out in Consultation Paper on Review of Listing Rules Relating to Disciplinary Powers and Sanctions, the regulatory power and effectiveness of the Stock Exchange has been enhanced. The SFC may consider extending its enforcement powers to cover similar powers now available to the Stock Exchange. With enhanced enforcement powers, the awareness for compliance of the Takeovers Code's obligations by directors of offeree companies will likely be increased.

董事避免在公开收购期间采取阻挠行动的责任

在收购上市公司时，董事在不同阶段应注意许多不同方面的事项。目标公司董事可能忽略的其中一个义务是避免采取阻挠行动的义务。

避免采取阻挠行动的义务

目标公司董事避免采取阻挠行动的责任源自香港证券及期货事务监察委员会（证监会）颁布的《公司收购、合并及股份回购守则》（《收购守则》）规则 4。规则 4

规定，“受要约公司的董事局一旦接获真正的要约，或当受要约公司的董事局有理由相信可能即将收到真正的要约时，在未获得受要约公司股东在股东大会批准前，受要约公司的董事局在该公司事务上，不得采取任何行动，其效果足以阻挠该项要约或剥夺受要约公司股东判断该项要约利弊的机会。”

尽管《收购守则》中没有就“即将收到”的含义提供进一步的指引，但在根据《收购守则》规则 3.5 发布要约意向的公告时及之后，要约通常被视为“即将收到”，如下面讨论的最近的一个纪律案件中所示。

规则 4 提供了构成需要股东事先批准的阻挠行为的非详尽示例，包括(a) 发行任何股份；(b) 就该受要约公司股份增设、发行或授予或批准就该公司股份增设、发行或授予任何可转换证券、期权或认股权证；(c) 出售、处置或取得重大价值的资产；(d) 在日常业务过程以外订立合约，包括服务合约；或(e) 促使该受要约公司或其任何附属公司或联系公司回购、购买或赎回该受要约公司的任何股份或为任何该等回购、购买或赎回提供财政协助。

在规则 4 的注释中，证监会进一步指引，不正常地增加董事报酬或重大改善董事服务条件的新或经修订的董事服务合约将被视为(d)。就(c)项下的“重大价值”，证监会一般会采用香港联合交易所有限公司（联交所）证券上市规则（《上市规则》）所载的测试，以确认该交易是否属于“须予披露的交易”。

规则 4 事先获得股东批准要求中的基本原则

规则 4 被认为是一项基本的规定，借以防止受要约公司在其董事局接获真正的要约后，或当受要约公司的董事局有理由相信可能即将收到真正的要约时，采取任何足以阻挠该项要约或剥夺股东判断该项要约利弊的机会的行动。

虽然受要约公司的董事应当在考虑股东整体利益后，就要约的公平性、合理性和接受性提出建议，但决定公司所有权和控制权的绝对权利属于股东。股东应有合理和平等的机会考虑要约。董事也可能出于自身和冲突的利益而决定阻挠要约。规则 4 保护股东在真正要约中的利益，并旨在为要约中的当事人提供一个公平的竞争环境。

近期就违反规则 4 的执行案件

2022 年 4 月 7 日，证监会对高云红先生（高先生）及冯雪莲女士（冯女士）作出公开批评，原因是他们在要约期内出售受要约公司的重大资产，违反了《收购守则》

规则 4。我们亦曾在 2022 年 4 月 8 日的往期《金融服务监管资讯》说明该案的详细背景和证监会的决定。

背景

简单概述而言，案件的要约人公司（要约人）在从一间银行（银行）收购了部分股份（销售股份），相当于受要约公司（受要约人）49%的股权。收购是在银行强制执行一项以销售股份作为抵押的保证后进行。以销售股份作为抵押的保证涉及银行向 Gentle Soar Limited (Gentle Soar)（在收购前是受要约人的控股股东并由高先生全资拥有）提供的一笔贷款。根据《收购守则》规则 26.1，收购触发了要约人须就受要约人作出无条件强制要约的责任。

收购完成后，受要约人宣布高先生告知董事会：(i)Gentle Soar、银行及要约人之间就银行强制执行以销售股份作为抵押的保证，及向要约人转让销售股份的事宜发生纠纷（纠纷）；及(ii)Gentle Soar 已就有关纠纷对（其中包括）银行及要约人展开法律程序。

其后，要约人根据《收购守则》规则 3.5 作出公告，要约期于同日开始。Gentle Soar 的法律顾问就在纠纷下要约人事实上有否触发全面要约责任而向证监会咨询。证监会告知法律顾问，不论争议如何，由于向要约人转让销售股份一事已经完成，因此就《收购守则》而言，不论有否出现该纠纷，要约人须作出全面要约的责任已被触发。尽管如此，受要约人的董事会仍继续出售（出售事项）受要约人的资产，即受要约人子公司持有的股权。冯女士为受要约人有关子公司的唯一董事。根据《上市规则》，出售事项构成须予披露交易。

受要约人于要约人收购销售股份后曾变更董事会成员，并于出售事项后恢复有关变更。只有高先生和冯女士在所有重要时间都为董事会成员。

证监会的决定

证监会认为，鉴于规则 3.5 公布已经发布，而涉及受要约人的要约期已经开始，故出售事项明显须受规则 4 的规定所约束。根据《上市规则》，出售事项是在要约期内进行的须予披露交易，构成阻挠行动。然而，出售事项未获得受要约人股东的批准，也未获得证监会对获得股东批准要求的豁免，违反规则 4 的规定。由于高先生及冯女士于相关期间均为受要约人的董事，并鉴于他们重大参与出售事项，证监会决定公开批评高先生及冯女士。

要点和呼吁严格执法

董事和专业人士应对要约期的任何交易保持谨慎，并注意该交易的影响。尽管要约人在收购股份方面存在任何争议，但在触发全面要约或至少在发布规则 3.5 公告时，要约会被视为“即将收到”。董事及专业人士如对《收购守则》的应用有任何疑问，应事先咨询证监会。

除了对规则的监督和误解外，董事亦可能认为要约不符合公司和股东的整体最佳利益或者出于董事个人的利益，故意采取阻挠行动。就违反《收购守则》的董事最常见施加的纪律处分是公开批评，有时会根据案件的严重程度而伴随冷淡对待令。公开批评通常被认为仅具有微弱的威慑作用。证监会应考虑加强监管审查，并对违反《收购守则》的行为实施更高级别的处分（例如取消资格令、罚款）。证监会及联交所亦可以就这方面的纪律处分行动进行协调及合作。随着《检讨《上市规则》有关纪律处分权力及制裁的条文》咨询文件所载建议的落实，联交所的监管权力及有效性得到提升。证监会可考虑扩大其执行权力，以涵盖联交所现时可行使的类似权力。随着执法权力的加强，受要约公司董事对遵守《收购守则》义务的意识可能会提高。

Source 来源:

<https://apps.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=22PR24>

https://www.sfc.hk/-/media/EN/files/CF/pdf/Public_censure/Executive-statement_ENG-20220407.pdf

The Financial Reporting Council of Hong Kong Concludes that a Listed Entity Failed to Properly Account for the Interests in Two Investees and its Auditor Failed to Identify the Misstatements

On April 14, 2022, the Financial Reporting Council of Hong Kong (FRC) adopted an investigation report which found that the auditor (the Auditor) of a listed entity (the Listed Entity) failed to identify material misstatements in relation to:

- (a) the accounting of the Listed Entity's equity interest in an investee (Investee A) in the consolidated financial statements for the years ended December 31, 2013 (the 2013 Financial Statements) and December 31, 2014 (the 2014 Financial Statements); and
- (b) the non-consolidation of a wholly-owned subsidiary (Investee B) which carried on a referral business (the Referral Business) in the 2014 Financial Statements.

Under the transitional provisions of the amended FRC Ordinance, since the relevant audits were completed before October 1, 2019, the investigation report has been referred to the Hong Kong Institute of Certified

Public Accountants to determine if any disciplinary actions are warranted. Names of the relevant parties are being withheld at this time to avoid prejudicing any related disciplinary proceedings.

The FRC had previously adopted, on January 16, 2019, an enquiry report in relation to the material misstatements of the Group's interests in Investee A and Investee B in the 2013 Financial Statements and the 2014 Financial Statements. We did not issue a press release at that time to avoid prejudicing the related ongoing investigation. In light of the findings of the enquiry, on January 21, 2019, the FRC required the Listed Entity to remedy the misstatements by retrospectively adjusting the opening balances and the comparative figures of the Listed Entity in the latest consolidated financial statements to be issued. The Listed Entity was subsequently delisted and has not since published any financial statements.

The investigation and the enquiry were initiated in September 2016, following a referral by a regulator in April 2016.

Accounting for an interest in an investee

Hong Kong Financial Reporting Standard 10 Consolidated Financial Statements (HKFRS 10) sets out the principles in identifying whether an investor controls an investee and therefore must consolidate the investee in its financial statements. HKFRS 10 specifies that an investor controls an investee if the investor has, among 2 others, power over the investee, i.e. the investor has existing rights that give it the current ability to direct the activities that significantly affect the investee's returns (defined as "relevant activities" in HKFRS 10).

Under HKFRS 10, the control analysis requires an understanding of all arrangements which govern the way decisions about the relevant activities are made, for example, appointment of the key management personnel of the investee.

Hong Kong Accounting Standard 28 Investments in Associates and Joint Ventures (HKAS 28) prescribes the accounting for investments in associates and sets out the requirements for the application of the equity method when accounting for investments in associates.

Under HKAS 28, an associate is an entity over which the investor has significant influence. The existence of significant influence by an entity is usually evidenced by having representation on the board of directors of the investee or participating in the investee's financial and operating policy decision-making.

Accounting for the equity interest in Investee A

The Listed Entity established Investee A with a third party (Shareholder A). The Listed Entity injected its internet business and cash into Investee A in exchange for a 60% equity interest in Investee A.

The Listed Entity accounted for Investee A as its subsidiary and the results of Investee A were consolidated into the 2013 Financial Statements on the ground that it held the majority shareholding in Investee A and there was a mutual understanding between the Listed Entity and Shareholder A that the management of Investee A was left to the management team nominated by the Listed Entity.

In 2014, the management team of Investee A no longer acted in accordance with the instructions of the Listed Entity. The Listed Entity considered that it had lost control over Investee A. Therefore, Investee A ceased to be treated as a subsidiary in the 2014 Financial Statements.

However, according to the Articles of Association of Investee A, Shareholder A had the majority votes in Investee A's board meetings in which significant operating decisions were made. In addition, there was no confirmation from Shareholder A in respect of the mutual understanding or the surrender of their rights set out in the Articles of Association. Based on the facts and circumstances, the Listed Entity did not have unilateral ability to direct Investee A's relevant activities. Therefore, the Listed Entity did not control Investee A and Investee A should not have been accounted for as a subsidiary in the 2013 Financial Statements and the 2014 Financial Statements.

The Listed Entity had the right to appoint two out of five members of the board of Investee A which evidenced its significant influence over Investee A. Even when the management team of Investee A who were the Listed Entity's representatives on the board were not cooperating, the Listed Entity had substantive voting rights to remove its old representatives and appoint new ones to the board of Investee A, so as to allow the Listed Entity to exercise its power to participate in the financial and operating policy decisions of Investee A. Accordingly, Investee A should have been accounted for as an associate of the Listed Entity since its establishment.

Accounting for the equity interest in Investee B

Investee B started the Referral Business in 2014. The Listed Entity did not consolidate the assets, liabilities and results of Investee B in the 2014 Financial Statements, on the ground that it did not have the practical ability to direct the operations of the Referral Business due to the non-cooperation of the management team who was responsible for the daily operation of the Referral Business.

However, it was found that Investee B was a wholly-owned subsidiary of the Listed Entity. Through its power to appoint directors of Investee B, the Listed Entity had the current ability to direct the relevant activities of Investee B, including the Referral Business. In the circumstances, there was a non-compliance with HKFRS 10 in respect of the non-consolidation of Investee B in the 2014 Financial Statements.

The audit quality failure of the Auditor The investigation revealed that the Auditor failed to:

- (a) obtain sufficient appropriate audit evidence, e.g. the Articles of Association of Investee A, on which to base its conclusion on the accounting treatment of the Group's interest in Investee A;
- (b) evaluate management representations with sufficient professional skepticism;
- (c) properly apply the applicable financial reporting standards in evaluating the accounting treatment of the Group's interests in Investee A and Investee B; and
- (d) communicate the accounting treatment of the Group's interests in Investee A and Investee B with those charged with governance as the determination of the treatment involved significant management judgment.

As a result of the above failures, the Auditor issued an inappropriate unmodified audit opinion on each of the 2013 Financial Statements and the 2014 Financial Statements.

The engagement quality control reviewer also failed to adequately perform an objective evaluation of the judgement made in relation to the accounting treatment of the Group's interests in Investee A and Investee B and the conclusion reached by the engagement team on the matters.

Accordingly, the engagement partner and the engagement quality control reviewers failed or neglected to observe, maintain or otherwise apply the fundamental principle of professional competence and due care in the Code of Ethics for Professional Accountants.

The FRC's purpose in reporting publicly

The FRC announces the adoption of reports on audit investigations and enquiries into financial reporting of listed entities:

- (a) to promote continuous improvement in the quality of auditing and financial reporting by all our regulatees;

(b) to encourage audit committee members to consider the implications of the FRC's findings for the financial reporting and audits of their own listed entities; and

(c) to maintain public confidence in the system for independent auditor regulation.

Communication with management of companies is an important part of accounting that should not be neglected as only the insiders should have access to all the information about the company. Management of reporting object may sometimes risk providing false information or omitting some information in order to facilitate the completion of a transaction or attract more investors. Professionals should therefore be extra careful and cross check the information provided with the evidence to ensure accurate reporting.

香港财务汇报局发现一家上市实体未能就两家被投资方的权益作恰当会计处理，其核数师亦未能识别错报

2022年4月14日，香港财务汇报局（财汇局）采纳了一份调查报告，指出一家上市实体（以下称上市实体）的核数师（以下称核数师）于以下方面未能识别重大错报：

- (a) 在截至2013年12月31日止年度的综合财务报表（以下称2013年财务报表）和2014年12月31日止年度的综合财务报表（以下称2014年财务报表）中，上市实体就一家被投资方（以下称被投资方A）的股本权益的会计处理；以及
- (b) 在2014年财务报表中，未有合并一家从事转介业务（以下称转介业务）的全资子公司（以下称被投资方B）。

根据经修订的财务汇报局条例的过渡性条文，由于相关审计于2019年10月1日前完成，财汇局已将该调查报告转介香港会计师公会，以决定是否采取任何纪律处分。为免影响纪律处分程序，相关人士之名称将不会于此时公开。

财汇局已于2019年1月16日采纳了一份查讯报告，指出该上市实体在2013年财务报表和2014年财务报表中有关被投资方A和被投资方B股权的重大错报。本局当时没有发布新闻稿，以免影响彼时正在进行的相关调查。鉴于查讯结果，本局于2019年1月21日要求上市实体通过追溯，调整其即将发布的最新综合财务报表中的期初余额和比较数据来纠正错报。该上市实体随后被除牌，此后未发布任何财务报表。

有关个案由监管机构于2016年4月转介至财汇局，财汇局随后于2016年9月展开调查及查讯。

对被投资方权益的会计处理

香港财务报告准则第10号 Consolidated Financial Statements（以下称HKFRS 10）就识别投资者是否控制被投资方并因此必须在其财务报表中合并被投资方，订明了原则。HKFRS 10规定，如果投资者对被投资方拥有权力，即投资者拥有现有权利，使其当前有能力主导对被投资方回报产生重大影响的活动（在HKIFRS 10中定义为「相关活动」），该投资者拥有对该被投资方的控制权。

根据HKIFRS 10，分析投资者是否控制被投资方时，需要了解所有监督相关活动决策方式的安排，例如被投资方主要管理层的任命。

香港会计准则第28号 Investments in Associates and Joint Ventures（以下称HKAS 28）规定了投资联营公司的会计处理，并订明了在对联营公司投资进行会计处理时应应用权益法的要求。

根据HKAS 28，投资者对被投资方施加重大影响的，该被投资方为其联营公司。重大影响通常是透过投资者在被投资方董事会中有代表，或其参与被投资方财务和营运政策决策来证明的。

被投资方A股权的会计处理

上市实体与第三方（以下称股东A）成立了被投资方A。上市实体将其互联网业务和现金注入被投资方A，以换取被投资方A 60%的股权。

因应上市实体持有被投资方A的多数股权，以及上市实体与股东A之间协议由上市实体指定的管理团队负责被投资方A的管理（以下称双方协议），上市实体将被投资方A列为其子公司，并将被投资方A的业绩并入2013年财务报表。

于2014年，被投资方A的管理团队不再按照上市实体的指示行事。上市实体认为其已丧失对被投资方A的控制权，因此在2014年财务报表中不再将被投资方A视为子公司。

然而，根据被投资方A的章程，股东A在被投资方A作出重大经营决策的董事局会议上拥有多数票。此外，股东A并无就双方协议或其放弃公司章程所载权利作出正式确认。基于事实情况，上市实体不具备单方面主导被投资方A相关活动的的能力。因此，上市主体对被投资方

A 不具有控制权，被投资方 A 不应在 2013 年财务报表和 2014 年财务报表中作为其子公司进行会计处理。

上市实体有权任命被投资方 A 的 5 名董事局成员当中的 2 名，这证明其对被投资方 A 具有重大影响。即使作为上市实体代表的被投资方 A 的管理团队于董事局表现不合作，上市实体仍拥有实质投票权，可以免去其旧代表并任命新代表加入被投资方 A 的董事局，从而行使其参与被投资方 A 的财务和营运决策的权力。据此，被投资方 A 应该自成立起便作为上市实体的联营公司入账。

被投资方 B 股权的会计处理

被投资方 B 于 2014 年开展转介业务。由于负责被投资方 B 转介业务日常营运的管理团队的不合作，上市实体认为其不具备主导转介业务的实际能力。因此，上市实体于 2014 年财务报表中未有合并被投资方 B 的资产、负债和业绩。

然而，经查明后，被投资方 B 实质为上市实体的全资附属公司。通过任命被投资方 B 董事的权力，上市实体有现行能力主导被投资方 B 的相关活动，包括转介业务。在此情况下，2014 年财务报表中未有合并被投资方 B 违反了 HKFRS 10 的规定。

核数师在审计质素方面的缺失

调查显示，核数师未能：

- (a) 就上市实体对被投资方 A 权益的会计处理，获取充分适当的审计证据（例如：被投资方 A 的公司章程）；
- (b) 以足够的专业怀疑态度评估管理层的陈述；
- (c) 在评估上市实体于被投资方 A 和被投资方 B 的权益的会计处理时，恰当地应用适用的财务汇报准则；以及
- (d) 针对上市实体就被投资方 A 和被投资方 B 的权益的会计处理与管治层沟通，因为相关决定牵涉重要的管理层判断。

由于上述失误，核数师对 2013 年财务报表和 2014 年财务报表发表无保留意见并不恰当。

审计项目质素控制复核人员也未能对审计项目团队就被投资方 A 和被投资方 B 权益的会计处理方面作出的判断，以及结论作出充分的客观判断。

因此，项目合伙人和审计项目质素控制复核人员未能或忽视遵守、维护或以其他方式应用《专业会计师道德守则》中有关专业能力以及谨慎态度的基本原则。

财汇局公开报告的目的

财汇局公布采纳有关上市实体的审计调查报告及财务汇报的查讯报告，以：

- (a) 推动受监管人士不断提高审计和财务汇报的质素；
- (b) 提醒审计委员会成员考虑我们的调查结果对其服务的上市实体财务汇报及审计的影响；以及
- (c) 维持公众对独立核数师监管制度的信心。

与公司管理层的沟通是会计的重要组成部分，不应忽视，因为只有内部人员才能访问有关公司的所有信息。报告对象的管理层有时可能会冒提供虚假信息或遗漏某些信息的风险，以促进交易的完成或吸引更多的投资者。因此，专业人员应格外小心，并交叉检查提供的信息与证据，以确保准确报告。

Source 来源：

https://www.frc.org.hk/en-us/FRC_PressRelease/FRC_misstatements_EN.pdf

The Financial Reporting Council of Hong Kong Finds that an Auditor Failed to Obtain the Evidence Needed to Evaluate the Measurement and Impairment Assessment of Goodwill arising from an Acquisition

On April 14, 2022, the Financial Reporting Council of Hong Kong (FRC) adopted an investigation report finding that the auditor (the Auditor) of a listed entity (Listed Entity) failed to obtain sufficient appropriate evidence to evaluate the measurement and impairment assessment of goodwill arising from an acquisition (Acquisition), which was included in the consolidated financial statements of the Listed Entity for the year ended December 31, 2016 (2016 Financial Statements). The Listed Entity fully impaired the concerned goodwill in the year ended December 31, 2017.

Under the transitional provisions of the amended FRC Ordinance, since the relevant audit was completed before October 1, 2019, the investigation report has been referred to the Hong Kong Institute of Certified Public Accountants to determine if any disciplinary actions are warranted. Names of the relevant parties are being withheld at this time to avoid prejudicing any related disciplinary proceedings.

The investigation was initiated on July 12, 2018, following referrals by other regulators in December 2017 and May 2019.

Fair value measurement of identifiable assets acquired and liabilities assumed in the Acquisition HKFRS 3 requires an entity to recognize:

- the identifiable assets, liabilities and non-controlling interests of the acquiree at their acquisition-date fair values; and
- the goodwill as at the acquisition date as the excess of the aggregate of the consideration and non-controlling interests, over the aggregate of the acquisition date fair values of the identifiable net assets acquired.

The Listed Entity measured the fair values of two buildings owned by the acquiree (Buildings) for the accounting of the Acquisition but did not measure the acquisition date fair values (defined by HKFRS 13) of other identifiable assets acquired and liabilities assumed in the Acquisition, which would have had a consequential effect on the measurement of the goodwill and the non-controlling interests at the acquisition date.

Impairment assessment of goodwill

HKAS 36 requires a reporting entity to conduct an annual impairment assessment of goodwill.

The Listed Entity disclosed in the 2016 Financial Statements that it had determined that the acquiree was a cash-generating unit (CGU). Since the management of the Company considered that the recoverable amount was higher than the carrying amount of the net assets of the acquiree, no impairment of goodwill was needed. The Listed Entity appointed a valuer to estimate the fair value of the equity interest in the acquiree (Acquiree's Fair Value) for the purpose of the impairment assessment.

The Investigation found that:

- (a) The Acquiree's Fair Value was overstated as it included both the fair value of the Buildings (as non-operating assets) and the projected cash flows from continuous use of the Buildings (for the planned business of the acquiree in the projection period);
- (b) Certain key parameters in relation to the acquiree's planned business that were adopted in the estimation of the Acquiree's Fair Value, including but not limited to, the projected revenue, profit margin, costs, working capital and capital expenditures, were not reasonable nor supported; and

- (c) The impairment assessment did not take into account the goodwill attributable to the non-controlling interests as required by HKAS 36.

The above issues led to a material misstatement in the measurement of the goodwill as at December 31, 2016.

The audit quality failure of the Auditor

The Auditor appointed a valuer (Auditor's Expert) to conduct a review of the Acquiree's Fair Value. The investigation found that there was no written agreement for such review and the Auditor's Expert did not address the aforesaid issues regarding the impairment assessment of goodwill in its review. The Auditor also did not identify these deficiencies in the work of the Auditor's Expert.

The Auditor did not obtain evidence about the fair value less costs of disposal and value in use of the CGU, the higher amount of which is the CGU's recoverable amount for the purpose of the impairment assessment under HKAS 36.

The Auditor failed to identify the aforesaid issues that led to a material misstatement and therefore issued an inappropriate unmodified audit opinion. This occurred because the Auditor failed to:

- (a) properly interpret or apply the applicable financial reporting standard; and
- (b) exercise appropriate professional skepticism in evaluating the recoverable amount of the CGU.

The engagement quality control reviewer failed to adequately perform an objective evaluation of the engagement team's decisions on the extent and nature of work performed and the evidence obtained and the conclusion reached by the engagement team on this matter. As a result, the engagement quality control reviewer also did not identify the material misstatement.

Accordingly, the engagement partner and the engagement quality control reviewer failed or neglected to observe, maintain or otherwise apply the fundamental principle of professional competence and due care in the Code of Ethics for Professional Accountants.

FRC's purpose in reporting publicly

The FRC announces the adoption of reports on audit investigations and enquiries into financial reporting of listed entities:

- (a) to promote continuous improvement in the quality of auditing and financial reporting by all FRC's regulatees;

(b) to encourage audit committee members to consider the implications of the FRC's findings for the financial reporting and audits of their own listed entities; and

(c) to maintain public confidence in the system for independent auditor regulation.

Full and proper understanding of the applicable rules or standards by relevant professionals is important to maintain investors' confidence in the financial reports of listed companies as the professionals are the only party that is relied on in performing the duty to assure accurateness in advance. Professionals should also adhere to its ethical standards, stand fast to the principles and maintain an appropriate level of suspicion to identify unusual circumstances.

Most of the affairs in relation to securities and behavior of listed companies in Hong Kong are regulated by The Stock Exchange of Hong Kong Limited and the Securities and Futures Commission. Yet, the FRC reinforces the regulation from the perspective of financial reporting and provides an extra surveillance over the accountants, which is crucial to the maintenance of a fair market and protection of investors' rights as the presentation of financial performance of a company would be an investor's priority in consideration of a selection of stock.

香港财务汇报局发现核数师未能获得充分适当的证据来评估因收购产生的商誉计量和减值估算

2022年4月14日，香港财务汇报局（财汇局）采纳了一份调查报告，指出一家上市实体（以下称上市实体）的核数师（以下称核数师）未能获得充分适当的证据来评估因上市实体的一项收购（收购）而产生的商誉的计量和减值估算，该商誉已包括在上市实体截至2016年12月31日止年度的合并财务报表（2016年财务报表）。上市实体于截至2017年12月31日止年度就该商誉进行了全面减值。

根据经修订的财务汇报局条例的过渡性条文，由于相关审计已于2019年10月1日前完成，财汇局已将该调查报告转介香港会计师公会，以决定是否需要采取任何纪律处分。为免影响纪律处分程序，相关人士之名称将不会于此时公开。

有关个案由两间监管机构于2017年12月及2019年5月转介至财汇局，财汇局随后于2018年7月12日展开调查。

收购中取得的可辨认资产及承担负债的公允价值计量

HKFRS 3 规定上市实体确认以下项目：

- 被收购方的可辨认资产、负债和非控制权益于收购日的公允价值；及
- 收购日的商誉为代价和非控制权益的总和与收购日可辨认净资产公允价值总和的差额。

上市实体就被收购方拥有的两座建筑物（建筑物）的公允价值进行计量，但并未计量收购事项中取得的其他可识别资产和承担负债的收购日公允价值（基于 HKFRS 13），此做法会对收购日商誉和非控制权益的计量产生影响。

商誉减值评估 HKAS 36 规定实体就商誉进行年度减值评估。上市实体在 2016 年财务报表中披露，已被收购方视为一个现金产生单位。上市实体管理层认为被收购方的可收回金额高于其净资产的账面价值，故无需对因收购产生的商誉进行减值。上市实体已委任估值师评估被收购方股权的公允价值（被收购方公允价值）以进行减值评估。

调查发现：

- 被收购方公允价值被夸大，因其包括了建筑物的公允价值（作为非营运资产）和持续使用建筑物产生的预计现金流量（用于被收购方在预测期内的业务计划）；
- 在估计被收购方公允价值时，所采用与被收购方业务计划相关的某些关键指标并不合理，亦缺乏理据支持，包括但不限于预计收入、利润率、成本、营运资金和资本开支；以及
- 减值评估并未根据 HKAS 36 的规定考虑归属于非控股权益的商誉。上述事项导致截至 2016 年 12 月 31 日的商誉计量存在重大错报。

核数师在审计质素方面的缺失

核数师任命了一名估值师（核数师专家）就被收购方的公允价值进行审查。调查发现，该审查并无书面协议，核数师专家在审查中亦未处理上述商誉减值评估的问题。核数师亦没有在核数师专家的工作中识别出这些缺失。

核数师并无就现金产生单位之公允价值减去弃置成本，以及其使用价值取得证据。根据 HKAS 36，这两个金额中较高者为用作减值评估的可收回金额。

核数师未能识别导致重大错报的上述事项，故发出了不适当的无保留意见。这全因核数师未能：

- (a) 恰当理解或应用适用的财务汇报准则；以及
- (b) 在评估现金产生单位的可收回金额时采取适当的专业怀疑态度。

项目质素控制复核人员未能就项目团队就工作范围和性质所作出的决定以及其获得的证据和所作出的结论，充分作出客观的评价。因此，项目质素控制复核人员亦未能发现重大错报。

因此，项目合伙人和质素控制复核人员未能或忽视遵守、维护或以其他方式应用《专业会计师道德守则》中有关专业能力以及尽职审查的基本原则。

财汇局公开报告的目的

财汇局公布采纳有关上市实体的审计调查报告及财务汇报的查讯报告，以：

- (a) 推动受监管人士不断提高审计和财务汇报的质素；
- (b) 提醒审计委员会成员考虑财汇局的调查结果对其服务的上市实体财务汇报及审计的影响；以及
- (c) 维持公众对独立核数师监管制度的信心。

相关专业人士对适用的规则或标准的充分和正确理解对于保持投资者对上市公司财务报告的信心非常重要，因为专业人士是履行保证准确性义务唯一可以在事先被依赖的一方。专业人士还应遵守其道德标准，坚守原则并保持适当的怀疑水平，以识别异常情况。

香港上市公司的大部分证券事务和行为均受香港联合交易所有限公司和证券及期货事务监察委员会监管。然而，财汇局从财务报告的角度加强了监管，并对会计师进行了额外的监督，这对于维护公平市场和保护投资者权利至关重要，因为公司财务业绩的列报将是投资者的优先考虑股票的选择。

Source 来源：

https://www.frc.org.hk/en-us/FRC_PressRelease/FRC_investigation_goodwill_EN.pdf

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