J M L

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

Financial Services Regulatory Update
金融服务监管资讯

2017.8.4

Irregularities in Private Funds and Discretionary Accounts identified by SFC

The Securities and Futures Commission (SFC) issued a circular on July 31, 2017 expressing its concerns about the management of some private funds and discretionary accounts.

The SFC expects the board and other senior management (including the Managers-In-Charge of Core Functions) of all asset managers to maintain adequate oversight of their firm's business activities and bear primary responsibility for ensuring the maintenance of appropriate standards of conduct.

Below are some of the irregularities pinpointed in the circular.

ACTING IN THE BEST INTERESTS OF THE INTEGRITY OF THE MARKET

- discretionary account holders having sizeable concentrated stock positions in their accounts and asset managers acting solely at the direction of their clients without exercising investment discretion;
- related-party acquisition or disposal of listed company shares by bought and sold notes, such as, a substantial shareholder of a listed company selling the company's shares to a fund managed by an asset manager by bought and sold notes, and the substantial shareholder in turn investing in the fund through a discretionary account;
- fund investors or discretionary account holders being related to the listed companies invested by the funds or the discretionary accounts; and
- a director of an asset manager was also a director or chief executive officer of listed companies in which funds under the management of the asset manager were invested.

RISK MANAGEMENT

The holdings of some asset managers' funds and discretionary accounts accounted for nearly 5% or more of the issued shares of certain listed companies. In such concentrated portfolios, losses would be amplified should there be a price drop in the underlying investments. Moreover, these asset managers did not have appropriate and effective risk management policies to address such concentration and liquidity risks. The negative impact of a drop in the price of the illiquid stocks would be exacerbated by the use of leverage.

ACTING FAIRLY AND AVOIDING CONFLICTS OF INTEREST

When a fund was unable to meet margin calls on leveraged stock trading, loans were arranged to be made from the asset manager's other funds. Investors in the

lending funds could be disadvantaged, especially if the lending funds also needed cash to meet outstanding redemption requests and the ability of the borrowing fund to repay uncollateralised loans was questionable.

A fund investor related to an asset manager was given preferential treatment and allowed to redeem his holdings before negative adjustment was applied to the fund, thereby minimising his own investment losses.

香港证监会关注在私人基金及委托账户中发现到的不寻常情况

证券及期货事务监察委员会于 2017 年 7 月 31 日发出通函，对一些私人基金及委托帐户的管理情况表示关注。

证监会要求所有资产管理公司的董事会及其他高级管理层（包括核心职能主管）对其商号的商业活动作出充分监督，以及确保遵守适当的程序及维持适当的风险管理措施方面，应承担主要责任。

以下是通函中提及的不寻常情况。.

以市场廉洁稳健的最佳利益行事

- 委托帐户持有人的帐户内有庞大而集中的股票持仓，但资产管理公司只是按客户的指示行事，而没有行使投资酌情权；
- 透过买入及卖出单据向相关人士购入或出售上市公司股份；举例说，某上市公司的主要股东透过买入及卖出单据，向某个由资产管理公司管理的基金出售该公司的股份，而该名主要股东则反过来透过委托帐户投资于该基金；
- 基金投资者或委托帐户持有人与该等基金或委托帐户所投资的上市公司有关；及
- 某资产管理公司的董事，亦是该资产管理公司所管理的基金所投资的多家上市公司的董事或行政总裁。

风险管理

资产管理公司的部分基金和委托帐户的持股量占若干上市公司已发行股份接近 5%或以上。在该等集中的投资组合中，当相关投资出现价格下跌时，损失便会扩大。此外，那些资产管理公司并没设有合适及有效的风险管理政策，以处理该等集中及流动性风险。 流动性低的股票在价格下跌时带来的不利影响会因使用杠杆而加剧。

公平地行事和避免利益冲突

当某基金在未能应付就杠杆式股票交易产生的追缴保证金通知时，便由资产管理公司的其他基金安排作出贷款。这可能损害借出基金的投资者的利益，尤其是当借出基金亦需要现金以履行尚未履行的赎回要求，而借入基金偿还无抵押贷款的能力亦成疑时。

与一家资产管理公司有关的一名基金投资者获提供优惠待遇，获允许在基金价格下跌前赎回所持有的股份，从而减少他本人的投资损失。

Hong Kong Court Ordered Insider Dealer to Pay $15,629,341 for Restoration to Investors

In March 2013, the Market Misconduct Tribunal (“MMT”) found that Ms Sun Min had engaged in insider dealing within the meaning of section 270(1)(e) of the SFO through her purchase of 3,131,500 China Huiyuan Juice Group Limited (Huiyuan) shares in August 2008.

A friend of Sun is a director of Huiyuan (“A”). In July 2008, A invited Goldman Sachs to run an auction for the shares held by major shareholders of Huiyuan. On July 24, 2008, non-binding indicative bids were submitted to Goldman Sachs. The information regarding these bids were not public until September 2008.

Sun bought Huiyuan shares in July and August 2008, and sold all of them in September 2008, making a net profit of over HK$55.1 million.

A diary kept by Sun’s secretary reveals that Sun had been tipped off with the information of a potential takeover of Huiyuan. The MMT decided that her buying of shares in August was with a view to profit from the knowledge, and was in contravention of s270(1)(e) of SFO.

In September 2015, the SFC commenced proceedings against Sun under section 213 of the SFO, seeking an order requiring Sun to restore all counterparties to her insider dealing by making financial payments.

The Court of First Instance of Hong Kong on July 17, 2017 ordered Sun to pay the restoration amount of $15,629,341 to 51 investors affected by her insider dealing in Huiyuan shares.

香港法庭颁令内幕交易者向投资者支付回复金额 $15,629,341

市场失当行为审裁处（审裁处）于 2013 年 3 月裁定，孙敏女士于 2008 年买入 3,131,500 股中国汇源果汁集团有限公司（汇源）股份进行了《证券及期货条例》第 270(1)(e)条所指的内幕交易。

孙是汇源的一名董事(A)的朋友。2008 年 7 月，A 邀请高盛为汇源大股东持有的股份进行拍卖。 2008 年 7 月 24 日，A 向高盛提交了无约束力的投标。这些投标的资料在 2008 年 9 月前并非公开。

孙于 2008 年 7 月及 8 月份收购汇源股份，并于二零零八年九月出售股份，净利润超过 5510 万港元。

孙的秘书的日记显示，孙被告知汇源的潜在收购资料。审裁处决定，孙在 8 月份购买股份的行为是为了从知识中获益，并违反《证券及期货条例》第 270(1)(e)条。

证监会于 2015 年 9 月根据《证券及期货条例》第 213 条对孙展开法律程序，寻求法庭颁令孙支付款项，让其内幕交易的所有对手回复原状。

香港原讼法庭于 2017 年 7 月 17 日颁令孙向其就汇源股份进行的内幕交易而受影响的 51 名投资者支付回复金额 15,629,341 元。

Commencement of the new Resolution Regime for Financial Institutions

The resolution regime established under the Financial Institutions (Resolution) Ordinance (Cap. 628) ("FIRO") has come into operation on July 7, 2017.

To safeguard the stability of Hong Kong's financial systems upon possible failure of a non-viable systemically important financial institution, the Monetary Authority, the Insurance Authority and the Securities and Futures Commission, being the Resolution Authorities ("RAs") are, under the new Financial Institutions (Resolution) Ordinance ("FIRO") regime, vested with a range of necessary powers to undertake resolution planning to prepare for any possible future application of stabilization options to relevant FIs to apply those options as appropriate in the event of non-viability.

The stabilization options are: (i) transfer to a purchaser; (ii) transfer to a bridge institution; (iii) transfer to an asset management vehicle; (iv) bail-in; and (v) transfer to a temporary public ownership company.

The Financial Institutions (Resolution) (Protected Arrangements) Regulation ("PAR"). sets out how an RA should treat each type of "protected arrangement" in resolution. It also identifies some limited and clearly specified exclusions of rights and liabilities from the scope of certain "protected arrangements".

The regime outlines the consequences should an RA inadvertently act in a manner inconsistent with the objectives of the PAR.

There are key implications to financial institutions (and their shareholders and creditors) during a resolution. It is important to note that even where rights and liabilities are carved out from the PAR, affected pre-resolution shareholders/creditors would still be safeguarded by the "no creditor worse off than in liquidation" ("NCWOL") compensation mechanism under the new FIRO regime. The NCWOL compensation mechanism provides that pre-resolution shareholders / creditors of an entity in resolution should receive no less favorable a treatment in the resolution of an entity than would have been the case in a winding. Affected shareholders and creditors can seek remedies accordingly.

There are also consequential changes to Hong Kong's securities regulatory regime, such as the Codes on Takeovers and Mergers and Share Buy-backs. Section 153(7) under Part 9 of the FIRO exempts all persons from any obligation arising in relation to a listed entity under the Codes after the resolution authority has applied the bail-in resolution option to that listed entity or its group company and the bail-in is ongoing. This includes the obligations to make an offer for shares, to enter into a takeover or merger transaction, to make an announcement of an offer or to disclose information of any kind. When the bail-in is completed, the provisions of the Codes will once again apply to the relevant person(s).

新的《金融机构处置机制》已经生效

根据《金融机构(处置机制)条例》（第 628 章）（《处置条例》）设立的处置机制已于 2017 年 7 月 7 日起生效。

在新的《金融机构处置机制》下，为维护香港金融制度在面对对系统重要的金融机构可能出现问题时的稳定性，香港金融管理专员、保险业监督和证券及期货事务监察委员会作为处置机制当局，获授予一系列所需的权力，以进行处置规划，为或须向相关金融机构施行稳定措施作出准备，以及在相关金融机构不可持续经营时施行有关措施。

有关稳定措施为： (i)转让予买家；(ii)转让予过渡机构；(iii)转让予资产管理工具；(iv)内部财务重整； 以及(v)转让予暂时公有公司。

《受保障安排规例》订明在处置程序中，处置机制当局应如何处理每种“受保障安排”，也清晰识别某些可获豁除于“受保障安排”的范围以外的权利及负债。

《受保障安排规例》亦订明若处置机制当局在非故意的情况下，没有按照《受保障安排规例》的目标行事的后果。

该机制对在处置程序中的相关金融机构（及其股东与债权人）有相当影响。值得留意的是，即使从《受保障安排规例》所提供的保障豁除某些权利及负债，受影响的处置前股东及处置前债权人仍会受《处置条例》下的“任何债权人所得不会逊于清盘程序”赔偿机制所保障。该赔偿机制订明，被处置实体的处置前股东及处置前债权人在处置程序中所得的，不会逊于在清盘程序中所得的。

该机制亦对香港的证券监管制度带来影响，包括公司收购合并及股份回购守则。根据《处置条例》第 9 部第 153(7)条，在某上市实体或其集团公司已被处置机制当局施加内部财务重整处置措施后，而内部财务重整正持续进行的话，则所有人都可获免除根据两份守则而就有关该上市实体所产生的任何义务，当中包括提出股份要约、进行收购或合并交易、作出要约公告或披露各种类消息的义务。当内部财务重整完成时，两份守则的条文将再次适用于有关人士。