

资本市场法律热点问题

“中国式”监管执法——从何处来，往何处去？

在中国这样的不成熟市场，对资本市场的监管执法过去似乎总在“弱监管”与“强监管”两个极端之间频繁地循环往复，这次似乎也不例外。“弱监管”的形成自然是迫于极其有限的监管手段和资源投入，而“强监管”则通常以“运动式执法”的形式表现。在此过程中，监管执法的发展走向往往与顶层政策制定和市场发展现状密切相关。

自2015年股市异常波动以来，在中国证券监督管理委员会（以下简称“证监会”）主导下的“依法全面从严监管”行动已经进入第三个年头。尽管各界对证监会主导的“强监管”颇有微词，但目前看来证监会仍顶住压力，继续推进原定的“依法全面从严监管”路线。无论未来对此轮“运动式”执法如何评价，在互联网时代，监管机构至少已经通过及时披露监管动态做到了一定程度的信息透明和响应舆情。

无论是境内还是境外投资者，对监管环境变化的深刻洞察都是实现成功投资的重要前提条件。本文试图参考2018年7月20日证监会在其官网上公布的《证监会上半年稽查执法工作情况通报》¹（以下简称《通报》）²分析这一场“中国式”监管执法运动的特征和可能的走向。

一、监管执法的“尚方宝剑”

此轮监管执法行动有明确的政策导向，这一点在《通报》中有清晰的表述。“依法全面从严监管”是党中央国务院决策部署的金融工作方针。证监会作为执行部门之一必须确保执行的力度和效果。从2017年证监会公开披露的监管执法情况看，2017年的行政处罚数量及金额、市场禁入人数均创历史新高。2017年，证监会全年新增立案调查312起，作出行政处罚237件，针对44人作出市场禁入25件。²而2018年上半年持续了这一趋势，上半年共启动各类调查307件，新增立案108件。上半年调查部门办结各类立案案件的平均调查周期是133天，同比下降22%。³

值得注意的是，此次《通报》中再次申明“依法全面从严监管”必须紧扣“打好防范化解金融风险攻坚战”。我们的观察是，监管者实际上借此明确表达立场，即“依法全面从严监管”是手段，而“打好防范化解金融风险攻坚战”才是目的，前者应服务于后者，这是监管者必须遵循的逻辑。透过这番表示，不难看出监管者不希望强监管行动触发或加重任何系统性风险。

二、有选择的执法——不断地“划重点”

¹请参见 http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwdd/201807/t20180720_341672.html。

²请参见

http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwdd/201805/t20180511_338037.html。

³请参见

http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwdd/201807/t20180720_341672.html。

在中国金融市场浸淫的人士都了解，由于监管资源有限，监管机构不得不“有选择”地采取执法行动，在某些情况下，是否以及如何采取监管行动取决于是否属于监管者划定的“重点领域”，监管者选择向市场传递何种信号，以及监管行动是否能产生立竿见影的效果。这就有效地解释了《通报》为何有意识地划出重点执法领域，并提出了“紧盯重点领域、关键环节违法违规”和“严密防控违法行为衍生风险”两项指导原则。

根据《通报》，2018年上半年执法行动的重点为：一是利用金融创新工具扰乱交易秩序或积聚市场风险的行为，比如以P2P平台理财产品非法集资操纵市场、利用场外期权实施内幕交易。二是破坏债券市场秩序、损害债券持有人利益的行为。三是利用私募基金实施互联互通机制下的跨境操纵市场行为。从《通报》划出的上述三类重点领域可以看出，某些与当前互联网金融频频涉及非法集资密切相关，某些则针对新型的犯罪手段，例如互联互通下的操纵行为。由此可见，如何根据市场形势的发展划出重点执法的领域是监管者一直在思考的问

题，而下半年执法行动的重点仍可能根据市场形势的发展而变化。

三、以运动式执法清理市场乱象

在中国，运动式执法的典型做法有三：一是同时查处多个具有同一性质的违法行为；二是对于重大的案件查处迅速而严厉；三是对某些特殊案件开展全面调查。《通报》一方面列举了三类采取“集中打击”监管行动所针对的“市场乱象”：一是严重扰乱资本市场信息传播秩序；二是屡查屡犯的违法主体；三是定期报告不按时披露；另一方面，点名了若干重大案件和特殊案件，体现了监管者对这些案件采取严厉执法行动的决心。

结论

这场“强监管”运动带有明显的中国特色，市场还在密切地关注其走向。我们希望通过不断地梳理监管政策、监控执法环境，让众多外国投资者更了解中国资本市场监管执法行动的内在逻辑，从而更好地适应中国市场。

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Capital Market

“Chinese-style” Regulatory Enforcement – Essence and Trajectory

In China’s immature capital markets, regulatory enforcement has typically oscillated between two extremes, which we can refer to as “weak regulation” and “strong regulation”, and this continues to be the case. Times of “weak regulation” have generally occurred due to an absence of regulatory measures and resources, while “strong regulation” has tended to be implemented in the form of “campaign-style law enforcement”. To understand the general direction in which regulatory enforcement has been moving requires insight into recent considerations of top-level policy formulation and of the general status of market development in China.

Following the abnormal fluctuations of the stock market of 2015, it has now been three years since the China Security Regulatory Commission (the “**CSRC**”) took the lead with its regulatory actions to “enforce the law thoroughly, stringently and lawfully”. Despite some criticism of its “strong regulation”, the CSRC appears to have been able to withstand external pressure and has proceeded determinedly with its approach. Regardless of how the current round of “campaign-style” law enforcement is ultimately evaluated, regulators have at least provided a degree of transparency appropriate in the current internet era, and has

responded to public opinion with the timely disclosure of their regulatory activities.

Successful investment, whether on the part of domestic or foreign investors, requires a thorough understanding of the ongoing changes in the regulatory environment. This article seeks to provide an analysis on the features and possible future trends of the “Chinese-style” regulatory enforcement by reference to the CSRC’s *Bulletin on Inspection and Law Enforcement in the First Half of the Year* (the “**Bulletin**”), published by the CSRC on its official website on 20 July 2018.¹

I. The “Imperial Sword” of Regulatory Enforcement

The most recent round of regulatory enforcement has a clear policy orientation that is explicitly articulated in the Bulletin. In their stated objective relating to financial policy, the Party Central Committee and State Council have indicated the need to “enforce the law thoroughly, stringently and lawfully”. As one of the executive departments, it is the CSRC’s responsibility to ensure the strength and effectiveness of enforcement. On the basis of regulatory enforcement information published by the CSRC, 2017 witnessed record

¹ Source: http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwdd/201807/t20180720_34

[1672.html](#).

highs in the number and total value of administrative penalties and in the number of people banned from the market. In that year, the CSRC undertook 312 investigative decisions and issued 237 administrative penalties and 25 market ban orders on 44 people.² This level of activity has continued on through the first half of 2018, with 307 investigations initiated and 108 cases newly put on file. The average case handling time in the first half of this year has been 133 days, a year-on-year reduction of 22%.³

It is worth noting that the Bulletin reaffirms that “enforcing the law thoroughly, stringently and lawfully” must be closely tied to “fighting the tough battle to prevent and resolve financial risks.” It is our observation that by using these specific terms, the regulator is declaring its position that, “enforcing the law thoroughly, stringently and lawfully” is the means while “fighting the tough battle to prevent and resolve financial risks” is the purpose, with the implication that the former must serve the latter. Regulators will be expected to follow this logic and should try to avert triggering or aggravating any threats to the financial system when imposing tough regulatory actions.

II. “Selective” Law Enforcement — Constantly “Focusing”

People familiar with China's financial markets are likely to understand that, with only limited regulatory resources, regulators need to be “selective” in how they go about carrying out enforcement actions. There are circumstances in which the decision about whether and how to take regulatory action could depend on a variety of factors, including: whether it involves a “key area” as defined by regulators; what type of signals the regulators wish to convey to the market; and whether their regulatory actions will produce

immediate results. This goes some way to explain why the Bulletin intentionally outlines various key areas for law enforcement and proposes two guiding principles for actions, namely to “focus on key areas violations” and to “cautiously monitor any risks that could eventuate from illegal behaviors.”

According to the Bulletin, during the first half of 2018, there have been three areas of focus for law enforcement actions. The first has been the use of so called “financial innovation” tools to disrupt market order or to accumulate market risks, such as using funds raised illegally through wealth management products on P2P platforms to manipulate the market, or the use of OTC options to carry out insider trading. The second is activity that causes a disruption to the order of the bond market and damages the interests of bondholders. The third is the use of privately raised funds to implement cross-border market manipulation under cross-border Connect Programs. Some of the activities highlighted in the Bulletin follow on from recent bursts of illegal online fundraising, and have the intention of regulating new areas that might be targeted by violations, such as market manipulation related to Connect Programs. From this, we can conclude that the CSRC is keeping a watchful eye on the development of the market, in order to make its determinations about future key areas for regulatory enforcement. Hence, decisions about areas for enforcement in the second half of this year may shift depending on how the market evolves.

III. Providing order to Chaotic Markets through Campaign-style Law Enforcement

In China, there are three approaches typically used in campaign-style law enforcement:

² Source: http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwdd/201805/t20180511_338037.html.

³ Source: http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwdd/201807/t20180720_341672.html.

investigating and punishing multiple similar illegal activities at the same time; investigating and severely punishing any major infringement; and conducting deep and thorough investigations into “special cases.”

The Bulletin lists three potential sources of chaos in the market that the regulators are aiming to eliminate through the targeted use of their resources: serious breaches in the orderly dissemination of information to capital markets; repeatedly committing offences; and late disclosure of regular reports. The CSRC also names several major and special cases, in doing so reflecting the regulator’s determination to take a tough line in those cases.

Conclusion

This round of “strong regulation” activity takes an approach that is distinctively Chinese, and the market should pay close attention to its further development. By continuing to review regulatory policies and to monitor the enforcement of relevant laws, we hope that foreign investors will ultimately be able to better understand the inherent logic of China’s capital market supervision and enforcement actions, putting them in a position where they are able to adapt to the specific characteristics of the Chinese market.

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