

Financial

The CSRC Plans to Release Exemptions to the Short-Swing Profit Rule for Foreign Investors

The “short-swing” trading of shares in a listed company is prohibited for shareholders who own 5% or more shares of such listed company as well as the directors, supervisors, and senior management personnel of such listed company. Article 44 of the *Securities Law (amended in 2019)* (the “Securities Law”) stipulates that when a shareholder holding 5% or more of the shares of a listed company or a NEEQ-listed company or the company’s director(s), supervisor(s), and senior officer(s) sells their company shares or other equity-type securities within six months after purchasing such shares or securities, or they purchase company shares or other equity-type securities within six months after selling such shares or securities, the gains generated (if any) shall be returned to the company. It also states that the securities regulatory authority of the State Council may specify circumstances that are exempt from this rule.

It was recently reported ¹ that the China Securities Regulatory Commission (CSRC) is now formulating two new exemptions on the

short-swing profit rule for foreign investors to further facilitate their investments in the country’s A-share market. The measures will include: (1) in reference to domestic public funds, allowing qualified foreign public funds to calculate securities holdings on a product basis; and (2) exempting Hong Kong Securities Clearing Company Limited from the application of certain short-swing profit rules. The article stated that the CSRC has almost finalized the specific exemption rules and implementation measures and is currently undergoing the relevant procedures for rulemaking. These rules are expected to be officially released in due course.

Below are our observations on the relevant key points disclosed by the media.

I. Allowing Qualified Foreign Public Funds to Calculate Securities Holdings on a Product Basis in Reference to the Applicable Rules for Domestic Public Funds

When determining if the 5% shareholding is triggered under the short-swing profit rule, the CSRC has determined that shares with voting rights held by an investor and the persons acting in concert shall be calculated on an aggregated

¹ See Shanghai Securities News, *China Securities Regulatory Commission Is Formulating Short-Swing Profit Rules Specifically Applicable to Foreign Investors to Facilitate Foreign Investments in A-Share Market*, October 16, 2022, at <https://news.cnstock.com/news,yw-202210-4968198.htm>.

basis, with reference to Article 12 and Article 83 of the *Administrative Measures for Takeover of Listed Companies (amended in 2020)*. However, early in 2007, the CSRC has exempted domestic public funds from the aggregation of positions; that is, a domestic public fund manager is allowed to disaggregate the positions held by each public fund and therefore the short-swing profit rule does not apply to the 5% or more positions aggregately held by all public funds. A similar exemption has also been applied to the National Social Security Fund (NSSF). Pursuant to the *Reply to Several Issues Concerning the Entrusted Investment of the National Social Security Fund (Zheng Jian Han [2002] No. 201)* issued by the CSRC in 2002, in the event that the NSSF holds 5% of the shares of a listed company, if the investment decisions made by the NSSF and each investment manager, and the different investment managers are independent of each other, then the purchase and sale of the shares in such a listed company are not subject to the six-month holding period restriction. If the investment decisions made by the NSSF and each investment manager, or by different investment managers are not independent of each other, or if a single investment manager holds 5% or more of the shares in a listed company, then it shall perform the relevant information disclosure obligations relating to changes to equity holdings and abide by the short-swing profit rule.

It was reported that according to the authorization provided in Article 44 of the Securities Law, the CSRC plans to extend the applicability of the above-mentioned exemption to qualified foreign public funds. With reference to the current rules applicable to domestic public funds for the disaggregation of positions held by each public fund, we expect that the rules will allow qualified foreign fund managers to calculate shareholdings based on every single public fund, and not on the public fund manager level, when calculating shareholdings for the short-swing profit rule in A-shares. It remains to be seen whether the

CSRC will consider the independence of investment decision-making power as well as voting rights among investors/products when determining whether the calculation should be disaggregated, referring to the approach for the NSSF and the existing regulatory practice, or simply allow disaggregation for all foreign public funds.

Similar to the discussions regarding the short-swing profit rule, a question concerning asset managers has arisen, i.e., whether the positions held in the accounts of multiple products shall be aggregated when considering the information disclosure requirement for changes to equity holdings in a listed company, namely, to determine whether there is a shareholder whose holdings reach 5%. The existing regulatory practice is that since public funds are unable to initiate general tender offers, a domestic public fund manager may choose not to make a disclosure with respect to the fact that holdings of shares in a listed company by multiple public funds under its management have reached 5% aggregately, i.e., exempt domestic public funds from the aggregation of shareholdings. It is still unknown whether the CSRC may apply a similar regulatory approach to exempt foreign public fund managers from the aggregation of shareholdings in a scenario whereby the 5% shareholding threshold for information disclosure requirements is triggered.

II. Exempting Hong Kong Securities Clearing Company Limited from Certain Short-Swing Profit rules

Under the Stock Connect scheme, shares purchased by investors through Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect shall be registered in the name of Hong Kong Securities Clearing Company Limited (HKSCC), and investors are legally entitled to the rights and interests in these shares. HKSCC shall open a nominee holder account with the China Securities Depository and Clearing Corporation

Limited to record the balance of all shares held under its name as a nominee holder.

Given that HKSCC, as a nominee holder, only holds the relevant shares on behalf of the investors, and does not participate in the trading and investment decision-making, nor does it enjoy the rights and interests in the shares, the Shanghai Stock Exchange and the Shenzhen Stock Exchange have specified in their implementation rules that information disclosure rules on changes of equity holdings shall not apply to HKSCC, if the threshold for changes of equity holdings is triggered; however, it is currently unclear whether the aforesaid exemption will apply *mutatis mutandis* to similar circumstances, for example, will HKSCC be exempt from the short-swing trading restrictions if it holds 5% or more of the shares nominally. It was reported that the CSRC will grant exemptions to HKSCC on certain short-swing profit rules in the new rules.

Domestic public funds and the NSSF have been exempt from short-swing trading restrictions and the aggregation of positions under certain circumstances. Now foreign institutional investors eagerly await clarification from the regulatory authorities regarding the relevant exemption rules and whether they agree to apply the same *mutatis mutandis* on foreign institutions. The CSRC's proposed exemptions would help to unify the standards applicable to both domestic and foreign institutions, which we believe is conducive to foreign investors' investments in the A-share market. We hope that the CSRC could clarify that the same exemptions will be applied to information disclosure on equity holding changes, so as to further facilitate foreign investment in the A-share market.

We will closely monitor the legislative and regulatory developments and keep our clients apprised of the latest updates.

III. Our Observations

Natasha XIE	Partner	Tel: 86 21 2208 6238	Email: xieq@junhe.com
Austin ZHANG	Partner	Tel: 86 21 2208 6177	Email: zhangchi_Austin@junhe.com
Danchen LUO	Associate	Tel: 86 21 2283 8320	Email: luodch@junhe.com

This document is provided for and only for the purposes of information sharing. Nothing contained in this document constitutes any legal advice or opinion of Jun He Law Offices. For more information, please visit our official website at www.junhe.com or our WeChat public account “君合法律评论”/WeChat account “JUNHE_LegalUpdates”.



金融法律热点问题

证监会拟出台境外投资者短线交易相关豁免规则

上市公司持股 5%以上股东或上市公司董事、监事和高级管理人员在交易其持有的该上市公司股份时不得进行短线交易。《证券法(2019年修订)》(以下简称“《证券法》”)第 44 条规定了短线交易规则,即上市公司或新三板挂牌公司持有百分之五以上股份的股东、董事、监事、高级管理人员将其持有的该公司的股票或者其他具有股权性质的证券在买入后六个月内卖出,或者在卖出后六个月内又买入,由此所得收益归该公司所有。同时,《证券法》第 44 条还授权国务院证券监督管理机构规定短线交易的除外情形。

近日,据媒体报道¹,中国证券监督管理委员会(以下简称“证监会”)正在研究制定有关外资适用短线交易规则的两项豁免政策,以进一步便利外资对 A 股市场的投资。具体措施包括:(1)允许符合条件的境外公募基金参照境内公募基金按产品计算持有证券数量;(2)豁免香港中央结算有限公司适用特定短线交易制度。相关报道称证监会已基本明确豁免政策的相关思路和措施,正在履行相关程序,具体规则将在条件成熟时予以公布实施。

以下为我们对媒体披露的相关要点的观察:

一、允许符合条件的境外公募基金参照境内公募基金按产品计算持有证券数量

我们注意到,证监会在过往执法实践中,在认定短线交易持股 5%的股东时,会根据《上市公司收购管理办法(2020年修订)》第 12 条和第 83 条的规定将投资者及其一致行动人共同持有有一个上市公司已发行的有表决权股份合并计算。对于境内公募基金而言,证监会早在 2007 年,对境内公募基金作出了豁免合并持股计算的安排,即目前境内公募基金允许按产品计算持有证券数量,对一家基金公司管理的多只公募基金合并持有同一公司的股份达到或超过 5%的,不受短线交易持有期限限制。此外,证监会对社保基金豁免短线交易限制的认定也作出了类似安排。根据中国证监会 2002 年发布的《关于全国社会保障基金委托投资若干问题的复函》(证监函[2002]201 号),社保基金合并持有上市公司 5%股份后,若社保基金理事会与各投资管理人以及各投资管理人之间的投资决策是相互独立的,则对该公司股票的买卖可以不受六个月持有期的限制;而在投资决策不是相互独立的情形下,或在单个投资管理人持有上市公司 5%以上股份的情形下,仍应履行持股权益披露义务和遵守短线交易限制规定。

根据《证券法》第 44 条的授权性条款,证监会此次拟将持股比例合并计算豁免规则推广至符合条件的境外公募基金管理人。一方面,参照境内

¹ 参见《上海证券报》:《证监会正研究制定外资适用特定短线交易制度 便利外资投资 A 股市场》(2022 年 10 月 16 日),
<https://news.cnstock.com/news.yw-202210-4968198.htm>

公募基金按产品计算持有证券数量的适用规则，我们预期相关规则出台实施后，在认定短线交易持股5%股东时，允许符合条件的境外公募基金管理人按单只公募基金产品计算持有证券数量，而无需在境外公募基金管理人层面合并计算持股；另一方面，证监会是否会参照针对社保基金的做法并借鉴既有监管实践，将“投资决策权”和“表决权”是否独立亦纳入持股合并计算的考量，而非一概允许境外公募基金持股不予合并计算，仍有待观察。

值得一提的是，与短线交易限制面临的情形类似，在认定上市公司权益变动披露规则中所述的“持股达到5%以上的股东”时，也需考虑对同一管理人管理的多个产品账户是否合并计算持股比例的问题。为此，考虑到公募基金不具备要约收购的功能，证监会已在监管实践中明确允许境内公募基金基金管理公司在持股达到5%时，可以选择不予信息披露。目前尚不清楚证监会是否将参照对境内公募基金信息披露特定情形的认定规则对境外公募基金管理人履行信息披露义务的持股合并计算予以豁免。

二、豁免香港中央结算有限公司适用特定短线交易制度

在沪深港通交易制度下，投资者通过沪股通、深股通买入的股票应当登记在香港中央结算公司（以下简称“香港结算”）名下，投资者依法享有通过沪股通、深股通买入的股票的权益。香港结算在

中国证券登记结算有限公司开立名义持有人账户，用于记录投资者通过沪股通或深股通持有的全部A股股票头寸。

根据相关登记结算安排，香港结算登记为名义持有人，仅代表投资者持有相关股票，并不参与股票交易投资决策，也不实际享有投资者所持股票权益。为此，沪深交易所已在其各自相关实施细则中明确香港结算作为名义持有人持有的股票变动达到上市公司股份权益变动标准的，不适用有关上市公司股份权益变动信息披露的规定；而对于类似情形，如认定持股5%股东适用短线交易限制时，尚不确定是否能够参照适用前述豁免规定。据媒体报道，在此次拟出台的相关规则中，证监会将会明确香港结算豁免适用特定短线交易制度。

三、我们的观察

在监管机构早已允许境内公募基金和社保基金在特定情形下豁免短线交易限制和持股合并计算要求的背景下，近年来，外资机构投资者迫切希望推动监管机构明确相关豁免规则，并统一适用于内外资机构。证监会拟出台的相关豁免规则将统一内外资的政策适用，有利于境外投资者投资A股市场。我们期待证监会在持股信批方面也能出台同样的豁免规则，促进境外投资者进一步投资A股市场。

我们将密切关注后续立法进展以及最新监管动态，并及时与我们的客户分享。

谢青 合伙人 电话：86 21 2208 6238
张弛 合伙人 电话：86 21 2208 6177
罗丹晨 律师 电话：86 21 2283 8320

邮箱地址：xieq@junhe.com
邮箱地址：zhangchi_Austin@junhe.com
邮箱地址：luodch@junhe.com

本文仅为分享信息之目的提供。本文的任何内容均不构成君合律师事务所的任何法律意见或建议。如您想获得更多讯息，敬请关注君合官方网站“www.junhe.com”或君合微信公众号“君合法律评论”/微信号“JUNHE_LegalUpdates”。

