

金融法律热点问题

香港机构“港股通”投资咨询业务开闸

2018年6月29日,中国证券监督管理委员会(“**中国证监会**”)正式发布《证券投资基金经营机构使用香港机构证券投资咨询服务暂行规定》(“**《暂行规定》**”),该规定已于2018年7月1日实施。《暂行规定》旨在允许港股通下内地证券公司和从事公开募集证券投资基金业务的基金管理人(以下统称“**证券基金经营机构**”)使用香港机构提供的证券投资咨询服务,实质是允许香港持牌机构间接向中国内地投资者提供证券投资咨询服务,代表着我国跨境资产管理业务监管规范的完善迈出了重要一步。以下我们对《暂行规定》做一简要总结。

一. 适用范围

《暂行规定》仅限于港股通范围内的香港股票(“**港股通股票**”)。而就港股通股票以外的证券,《暂行规定》明确禁止香港机构向内地证券公司提供的港股研究报告形成证券估值、投资评级等投资分析意见,除非是对港股通股票进行行业可比分析所需或中国证监会另有规定。

相比征求意见稿,最终稿增加一条,规定证券基金经营机构使用境外机构就境内存托凭证的基础证券提供的证券投资咨询服务应参照适用《暂行规定》。

二. 法律依据

《暂行规定》的上位法除《证券法》和《证券投资基金法》外还包括《证券、期货投资咨询管理

暂行办法》和《内地与香港股票市场交易互联互通机制若干规定》等法律法规和证监会的规定。

三. 业务类型

《暂行规定》规范两类业务活动,一类是“港股研究报告业务”,即香港机构授权内地证券公司或其子公司转发其发布的港股研究报告;另一类是“港股投资顾问服务”,即内地证券基金经营机构委托香港机构为该内地证券基金经营机构管理的参与港股通的证券投资基金(应包括该机构管理的公募基金或私募产品)提供的投资建议服务。

四. 资质要求和备案

《暂行规定》规定了相关机构的资质要求:(i)有资格从事发布证券研究报告的业务的内地证券公司可以向客户转发港股研究报告,但最近3年因发布证券研究报告业务违法违规受到行政处罚或者被采取重大行政监管措施的除外。(ii)提供港股研究报告的香港机构必须经香港证监会批准取得就证券提供意见牌照,并具有发布证券研究报告业务经验。(iii)从事港股投资顾问服务的香港机构必须经香港证监会批准取得就证券提供意见和资产管理牌照,并具有资产管理业务经验。

《暂行规定》通过规定何种情形仅需备案以及何种情形不仅需要备案还需要专项报告和评估的办法客观上将资质提供港股投资咨询服务的香港机构限定在一定范围。根据《暂行规定》,香港

机构有以下情形之一的，证券基金经营机构仅需向其住所地或经营地的证监会派出机构备案即可：1. 与证券基金经营机构存在控制关系或者受同一金融机构控制；2. 提供港股研究报告的香港机构从事发布证券研究报告业务3年以上，且有20名以上经香港证监会批准取得就证券提供意见牌照的持牌代表；3. 提供港股投资顾问服务的香港机构从事资产管理业务5年以上，且最近一个会计年度管理的证券资产不少于100亿港元或者等值货币。如香港机构不具有任一上述情形，则需要向该证券基金经营机构的住所地或经营地中国证监会派出机构报送说明选择该香港机构理由的专项报告，并经证监会派出机构审慎评估风险情况以决定是否提出异议，同时相关派出机构还需要在相关协议签订之日起1个月内对该证券基金经营机构使用相关香港机构证券投资咨询服务的情况进行专项现场检查。

五. 港股研究报告业务下双方的义务

《暂行规定》规定了授权方和被授权方的合规义务，即被授权方内地证券公司应当建立港股研究报告转发审查机制，并符合相关监管要求，而授权方香港机构应当确保其行为符合香港证监会的规定。同时，内地证券公司有义务告知香港机构内地发布证券研究报告有关规定，而香港机构应确保港股研究报告的信息来源、研究方法、分析结论等符合该等规定。

《暂行规定》还明确要求内地证券公司应当在发布对象公平对待、利益冲突防范、信息披露、跨越隔离墙行为管理、静默期安排、留痕管理等方面符合内地发布证券研究报告有关规定。香港机构就

港股研究报告的内容和发布行为仅对内地证券公司承担责任，而内地证券公司对客户承担直接责任。

此外，《暂行规定》允许香港机构取得就证券提供意见牌照的持牌代表通过电话会议等方式就港股研究报告的内容与证券公司的客户交流的，但作为被授权方的内地证券公司必须陪同参加，确保交流方式与内容符合内地有关规定，并记录交流情况。除上述允许的情形外，《暂行规定》禁止香港机构的持牌代表和销售人员就港股研究报告的内容与内地证券公司的客户进行交流。

六. 港股投资顾问业务下双方的义务

《暂行规定》要求香港机构为证券基金经营机构提供港股投资顾问服务应当同时符合内地和香港的相关规定，并按照中国证券投资基金业协会的规定备案基本信息。《暂行规定》澄清港股投资顾问服务不包括香港机构直接执行投资指令。香港机构应当承诺配合中国证监会及其派出机构的监管工作，按照要求提供有关业务资料和信息。

七. 档案保存

《暂行规定》要求证券基金经营机构对使用港股通投资顾问服务相关业务档案的保存期限自相关协议终止之日起不少于5年。

八. 跨境监管合作

《暂行规定》规定了中国证监会与香港证监会将通过跨境监管合作机制对违反规定的香港机构及责任人进行调查处理。

谢青 合伙人 电话：86 21 2208 6238 邮箱地址：xieq@junhe.com
秦天宇 律师 电话：86 21 2208 6140 邮箱地址：qinty@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”。



Financial

Hong Kong Domiciled Institutions Allowed to Advise Mainland Institutions on Southbound Stock Trading

On June 29, 2018, the China Securities Regulatory Commission (“**CSRC**”) promulgated the *Interim Provisions on Securities and Fund Operation Institutions’ Engagement of Hong Kong Domiciled Institutions to Provide Securities Investment Advisory Services* (the “**Interim Provisions**”), which were subsequently implemented from July 1, 2018.

The Interim Provisions aim to allow those domestic securities companies and fund managers that carry out public securities investment fund businesses (collectively “**Domestic Securities and Fund Operation Institutions**”) to engage Hong Kong domiciled institutions (“**Hong Kong Institutions**”) to provide securities investment advisory services for southbound trading of the Stock Connect (“**Southbound Trading**”). The Interim Provisions allow licensed Hong Kong Institutions to indirectly provide securities investment advisory services to domestic investors, marking a significant step in the improvement of China’s cross-border asset management regulations.

Below is a summary of the Interim Provisions.

I. Scope of Application

The Interim Provisions only apply to those stocks

listed on the Hong Kong Stock Exchange and traded through the Southbound Trading (“**Southbound Stocks**”). For any securities other than the Southbound Stocks, the Interim Provisions expressly prohibit Hong Kong Institutions from providing research reports with investment analysis advice such as the valuation of securities or investment ratings to domestic securities companies, unless such advice is required in order to conduct comparable industry analysis for any Southbound Stock or otherwise stipulated by the CSRC.

One of the key differences when compared with the earlier Consultation Paper on the Interim Provisions is that the final version includes a new paragraph stipulating that a Domestic Securities and Fund Operation Institution that engages an overseas institution to provide investment advisory services for the underlying securities of Chinese depository receipts shall be regulated by reference to the Interim Provisions.

II. Legal basis

The higher-level laws and regulations of the Interim Provisions are listed to include the *Securities Law*, the *Securities Investment Fund Law*, the *Interim Measures on Administration of Securities and Futures Investment Consultancy*

and *Certain Provisions on Stock Connect between Mainland China and Hong Kong Stock Markets* and other provisions of the CSRC.

III. Type of Business

The Interim Provisions list two business categories:

- “**Southbound Stock Research Report Business**” refers to a Hong Kong Institution that authorizes a domestic securities company or its subsidiary to distribute any Southbound Stock research report it has issued;
- “**Southbound Stock Investment Advisory Business**” refers to a Domestic Securities and Fund Operation Institution that entrusts a Hong Kong Institution to provide investment recommendations to securities investment funds under its management that invest in Southbound Stocks (which can be either public funds or private products under its management).

IV. Qualification Requirements and Filing

The Interim Provisions provide details of the qualification requirements for relevant institutions:

- (i) Domestic securities companies that are qualified to issue securities research reports may forward Southbound Stock research reports to their clients. There is an exclusion on those domestic securities companies that have received any administrative punishment for illegally issuing securities research report or material administrative regulatory measures in the preceding three years.
- (ii) Hong Kong Institutions that have been granted a securities advisory license by the Securities and Futures Commission of Hong Kong (“SFC”) and have experience in the business of issuing securities research

reports are qualified to provide Southbound Stock research reports.

- (iii) Hong Kong Institutions that have been granted a securities advisory license by the SFC and have experience in asset management business are qualified to engage in Southbound Stock Investment Advisory Business.

The Interim Provisions draw a distinction between the circumstances in which only filing is required compared with those in which, in addition to the filing, a special report needs to be filed with and an assessment be conducted by the CSRC’s local office. By imposing further regulatory burden on reporting for those institutions that fail to meet certain criteria, the Interim Provisions actually limit the extent of Hong Kong Institutions that are potentially qualified.

Pursuant to the Interim Provisions, a Domestic Securities and Fund Operation Institution would only need to file with the CSRC’s local office if the Hong Kong Institution selected by the Domestic Securities and Fund Operation Institution falls into at least one of the following circumstances:

- (i) The Hong Kong Institution controls or is controlled by the Domestic Securities and Fund Operation Institution, or is under the control of the same financial institution as the Domestic Securities and Fund Operation Institution;
- (ii) The Hong Kong Institution has engaged in providing securities research reports for more than three years and has more than twenty licensed representatives approved by the SFC to advise on securities; or
- (iii) The Hong Kong Institution has engaged in the asset management business for more than five years and the securities assets under its management in the most recent

fiscal year is no less than HKD 10 billion or equivalent.

If a Hong Kong Institution does not fall into any of the aforementioned three circumstances, the Domestic Securities and Fund Operation Institution selecting the Hong Kong Institution is required to submit a special report that provides the reasons for choosing such Hong Kong Institution to the CSRC's local office in which it is domiciled or operates. The CSRC local office will make the decision about whether to raise an objection by carefully assessing the risks and, within one month of the execution of a relevant agreement, CSRC officials will conduct an onsite inspection to observe how the Domestic Securities and Fund Operation Institution uses the investment advisory services provided by the Hong Kong Institution.

V. Obligations of Both Parties Involved in the Southbound Stock Research Report Business

The Interim Provisions impose regulatory obligations on both parties. A domestic securities company, being the licensee, shall establish a review mechanism and shall comply with the relevant regulatory requirements for forwarding research reports on Southbound Stocks; a Hong Kong Institution, being the licensor, shall ensure that its activities are in compliance with the rules of the SFC. Meanwhile, a domestic securities company is obliged to inform the Hong Kong Institutions with relevant rules regarding the release of research reports in Mainland China, while a Hong Kong Institution shall make sure that the information sources, research methods, and results of analysis of its research reports on Southbound Stocks are in compliance with such rules.

The Interim Provisions also explicitly require domestic securities companies to comply with

any relevant rules on the release of research reports in Mainland China in aspects including, among others, treating the recipients of the research reports fairly, preventing conflicts of interest, information disclosure, managing crossing the firewall, the arrangements for the "quiet period" and record-keeping. A Hong Kong Institution shall only be responsible to the domestic securities companies for the contents of its research reports on Southbound Stocks and the release of such reports, while a domestic securities company shall bear direct responsibilities to its clients.

Moreover, where the Interim Measures allow a representative of a Hong Kong Institution licensed to provide advice on securities to communicate with the client of a domestic securities company on the contents of the research reports on Southbound Stocks by means of conference calls or in other indirect ways, such securities company shall ensure the means and content of the communication are in compliance with the relevant rules of Mainland China and maintain appropriate records of the communication. Unless falling within any of the aforementioned permissible situations, the Interim Provisions prohibit licensed representatives of Hong Kong Institutions from communicating with the clients of domestic securities companies on the contents of any Southbound Stock research reports.

VI. Obligations of Both Parties Involved in the Southbound Stock Investment Advisory Business

The Interim Provisions require Hong Kong Institutions to comply with the relevant regulations of both Mainland China and Hong Kong, and to file basic information in accordance with the rules of the Asset Management Association of China. The Interim Provisions provide the clarification that Hong Kong Institutions shall not directly execute investment orders since these would fall

outside the scope of Southbound Stock Investment Advisory Business that is permitted to undertake. Moreover, Hong Kong Institutions are required to cooperate with any regulatory requirements of CSRC and its local offices and to provide business related materials and information as requested.

VII. Record-keeping

The Interim Provisions require Domestic Securities and Fund Operation Institutions to

keep files of the relevant business for at least five years following the termination of any relevant agreements.

VIII. Cross-border Regulatory Cooperation

The Interim Measures stipulate that in the case of any violation by a Hong Kong Institution or responsible person, the CSRC and the SFC may conduct investigations and enforce laws through the cross-border regulatory cooperation mechanism.

Natasha XIE Partner Tel: 86 21 2208 6238 Email: xieq@junhe.com
Tianyu QIN Associate Tel: 86 21 2208 6140 Email: qinty@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”.

