

资本市场法律热点问题

证监会发布H股“全流通”指引

中国证券监督管理委员会(以下简称“证监会”)于2019年11月15日发布了《H股公司境内未上市股份申请“全流通”业务指引》(以下简称“**业务指引**”),即符合条件的H股公司和拟申请H股首发上市的公司,可依法依规申请“全流通”。该业务指引引起境内外资本市场的广泛关注,本文旨在通过解读业务指引主要内容及所反映的监管部门的态度,简要分析H股“全流通”对中国资本市场的影响。

一、“全流通”的发展历程

H股“全流通”系指在香港上市的内地企业所持有的法人股及国有股等内资股,转化为H股发行并流通。此前,1993年青岛啤酒成为第一支H股上市股票时,A股和H股分为发起人股(国家股、法人股和外资股)和上市流通股。其中,发起人股不能上市流通,需以转让非上市企业股权的程序进行。2008年,A股进行了股权分置改革,此后,A股发起人股经过12个月或者36个月锁定期后即可上市交易,但对于H股上市公司发起人股的转让一直存在障碍,从而导致H股存在上市流通股和非上市发起人股两个完全割裂的市场。

由于发起人股不能上市流通,国内企业尤其是民营企业选择H股上市的意愿不高,而是倾向选择搭建红筹架构的方式。在此背景下,证监会积极探索H股上市公司股票“全流通”问题,自联想控股、中航科工、威高股份三家公司试点的顺利完成,直

至本业务指引的出台,终于全面实现“全流通”。

二、“全流通”的主要内容及变化

本次改革主要内容包括:(i)未上市的境内股份有限公司可在申请境外首次公开发行时一并提出“全流通”申请;(ii)境内未上市股份到香港联交所上市流通后,不得再转回境内;(iii)境内未上市股份股东可根据相关业务规则减持和增持本公司在香港联交所流通的股份(目前增持功能因技术原因暂未开通);(iv)“全流通”对A股市场运行无直接影响。此外,业务指引还规定了相关程序性审批及登记结算等事项。

在此前试点基础之上,本次改革的主要变化体现以下方面:(i)形成了规则制度,并以业务指引的形式加以明确;(ii)不再对公司规模、行业等设置限制条件;(iii)在满足外资准入等管理规定的情形下,公司和股东可自主决策,依法依规申请实施“全流通”;(iv)不设家数限制和完成时限,按照“成熟一家,推出一家”的原则有序推进。

三、我们的观察

本次H股“全流通”改革放开了发起人股的上市流通,民营企业的主要顾虑不复存在,提高了企业H股上市的动力,增强了市场高水平开放的活力。但值得注意的是,H股上市公司的再融资仍需审批,相较于红筹架构下的H股上市公司按照联交所规则发行总股本20%以内的新股仅需董事会批

准即可而言，更为繁琐，民营企业对此仍有顾虑。

同时，由于证监会审批“窗口指导”政策的不确定性，例如房地产、类金融企业，以及为实行股权激励预留股份等，实践中仍存在监管部门不予批准“全流通”申请的可能性。此外，“全流通”改

革之后，发起人内资股通过香港交易所公开市场出售转为H股后的外汇收入结汇、纳税申报等后续问题尚待明确。监管部门规则制度的完善以及企业的实践情况如何发展我们也将拭目以待。

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Financial

CSRC Issues Guidelines for Full Tradability of H-shares

On November 15, 2019 the China Securities Regulatory Commission (CSRC) issued the *Guidelines on Applying for the Full Tradability of Unlisted Domestic Shares of H-share Companies* (i.e. those incorporated in Mainland China and listed on the Hong Kong Stock Exchange) (“Guidelines”). Under the Guidelines, qualified companies listed or planning initial public offerings on the H-share market may apply for a full tradability of their shares in accordance with the applicable laws and regulations (“full tradability”), an initiative receiving increased awareness from both domestic and overseas capital markets. This article intends to introduce the main content of the Guidelines and the regulatory spirit reflected therefrom, briefly analyzing the impact of the full tradability of the H-shares on the Chinese capital market.

Background

The full tradability of H-shares refers to a mechanism where domestic-funded shares (e.g. legal person shares or state-owned shares) held by companies incorporated in mainland China and listed on the Hong Kong Stock Exchange (HKEX) can be issued and traded in the H-share market.

Previously in 1993, when Tsingtao Brewery became the first company listed on the H-share

market, A-shares and H-shares were separated into two groups: (i) pre-IPO shares (i.e. shares issued prior to initial public offerings and therefore subject to certain restriction on tradability, which may include state-owned shares, legal person shares and foreign-owned shares); and (ii) fully-tradable listed shares. Due to the restriction on tradability, the transfer procedures for pre-IPO shares were similar to those for unlisted private equities.

In 2008, the A-share market reform on the structure for holding of shares (i.e. a reform under which A-shares that were not fully-tradable are converted into fully-tradable shares) allowed pre-IPO shares to be listed and traded upon the expiration of a 12-month or 36-month lock-up period.

By contrast, H-shares held by sponsors of companies listed on the H-share market were never made fully-tradable, resulting in the separation between fully-tradable listed H-shares and unlisted pre-IPO shares of the H-share companies.

Due to the restriction on tradability of pre-IPO shares in the H-share market, domestic companies, especially private-owned companies, were reluctant to list on the H-share market; instead, they preferred to adopt the red-chip

structure.

It is in this context that the CSRC began proactively seeking the full tradability of H-shares, and following the success of the full tradability pilot programs in Legend Holdings, AviChina and Weigao Group (“Pilot Programs”), the Guidelines was eventually issued, marking the achievement of full tradability of H-shares.

Main Changes Proposed by the Guidelines

The Guidelines mainly addresses the following issues, namely, (i) unlisted domestic companies planning initial public offerings overseas may apply for a full tradability of their shares; (ii) domestic unlisted shares, once listed and traded on the HKEX, shall not be converted into domestic listed shares anymore; (iii) shareholders of domestic unlisted shares may choose to reduce or increase their holding of H-shares in accordance with relevant rules (at the current stage, increasing holding of H-shares is not attainable due to technical reasons); and (iv) a full tradability of H-shares of a company shall have no direct impact on the corresponding A-share market.

Additionally, it stipulates the procedures for the approval of full tradability, the share registration and the clearing and settlement. Further to the Pilot Programs, the Guidelines has for the first time provided comprehensive rules on the full tradability of H-shares. It removes restrictions on the size or industry of the qualified companies by specifying that a company and its shareholders may decide, at their discretion, whether to apply for a full tradability, provided that other applicable regulatory requirements, such as foreign investment access policies, are satisfied.

Moreover, there is no limit on the total number of companies approved for full tradability, nor is there a specific timeframe for implementing the full tradability; instead, the full tradability will be carried out by application in an orderly manner, i.e.

an application for full tradability will be approved as long as it has met all relevant regulatory requirements.

Our Observations

By liberalizing the listing and trading of pre-IPO shares, the full tradability of H-shares would ease the main concerns of the private-owned companies and incentivize them to list on the H-share market, while enhancing the vitality of a highly open market.

Notably, any refinancing of companies listed on the H-share market is still subject to the regulatory approval, which is more complicated compared with companies listed on the H-share market through the red-chip structure and thus may still raise concerns for private-owned companies. In accordance with the HKEX rules, for a company listed on the HKEX using the red-chip structure, issuance of new shares, which make up no more than 20% of the total shares listed on the HKEX, only requires an approval by the board of directors of the company.

Meanwhile, given the uncertainty of the “window guidance” that may be issued by the CSRC in connection with various businesses from time to time, such as those related to real estate businesses, quasi-financial businesses, or issues such as shares reserved for equity incentive plan, practically speaking, the possibility that the competent authority would reject a company’s application for full tradability still cannot be fully ruled out.

In addition, issues concerning the full tradability, such as the foreign exchange settlement and the tax filings in regard to the sale of H-shares converted from domestic-funded pre-IPO shares, remain to be clarified.

The further development of regulatory rules and how the practice may evolve, also remains to be seen.

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