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Interpretation of the New Regulatory Move on Non-listed Public Companies

By Calista Huang and Patrick Chen

The China Securities Regulatory Commission (CSRC) publicized the "*Measures on the Supervision and Administration of Non-listed Public Companies (Consultative Draft)*" (the "Measures") on 15 June 2012 to solicit public opinions. As the first fundamental regulation proposed to be promulgated after the "*Securities Law*" amended in 2005 brought non-listed public companies into the regulatory scope of the CSRC, the Measures make specific provisions on corporate governance, information disclosure, share transfer and private placement rules. This article briefly interprets the noteworthy contents of the Measures.

Scope of Non-Listed Public Companies Clarified

According to the Measures, a non-listed public company refers to a joint-share company which falls under any of the following types of companies and whose shares are not listed and traded on a stock exchange: (i) a company whose accumulated number of shareholders exceeds 200 as a result of private placement or transfer of its shares to specific parties; or (ii) a company whose shares are openly transferred to the general public. The Measures provide that the shares of non-listed companies shall be subject to the centralized registration and deposited with the China Securities Depository and Clearing Corporation Limited, and any public transfer of shares shall be conducted on a stock exchange.

Corporate Governance and Information Disclosure Requirements Regulated

The Measures do not set requirements for financial indicators and profitability of a non-listed public company in respect of access requirements or require the establishment of an organization similar to the issuance examination committee or a sponsorship system in respect of access procedures. They emphasize that a non-listed public company shall improve its corporate governance mechanism and standardize its information disclosure to strengthen its self-governance and regulate operations. The Measures lay down principle provisions

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on the corporate governance of a non-listed public company, requiring it to formulate its articles of association, establish the system of general meeting of shareholders, board of directors and board of supervisors, strengthen its internal management and protect the legitimate interests of its shareholders. The Measures provide that the documents subject to information disclosure of a non-listed public company mainly include its public transfer statements, private transfer statements, private placement plans, private placement reports, and periodic and interim reports. The company shall disclose the aforesaid documents or information on the information disclosure platform specified by the CSRC.

Hierarchical Regulatory System for Share Transfer Established

The hierarchical regulatory arrangement under the Measures apply to companies which have become non-listed public companies through share transfers, and different approval procedures are provided as follows: (i) where a company proposes to transfer shares to the general public in an open manner, the proposal shall be passed by the general meeting of shareholders of the company as a special resolution, and the company shall apply for CSRC approval by presenting the application documents and disclosing its public transfer statement prior to the share transfer; (ii) where a company conducts private share transfer to specific parties, resulting in the accumulated number of its shareholders exceeding 200, the company shall apply for CSRC approval by presenting the application documents within three months of the private share transfer; if the number of shareholders decreases to less than 200 within the said three months, the company shall be exempted from filing for approval with the CSRC; the Measures explicitly provide that such share transfers are limited only to share transfers in a non-public way and in accordance with the relevant share transfer agreement.

Private Placement Rules Established

According to the Measures, only private placements are permitted for non-listed public companies. The Measures establish private placement rules suitable to the characteristics of financing of non-listed public companies, which shall apply to circumstances where the accumulated number of shareholders exceeds 200 as a result of issuance of shares to specific parties and where a company whose number of shareholders exceeds 200 issues shares to specific parties. In addition, the Measures place restrictions on the parties to which shares are issued and the number of such parties, and the parties to which the shares of a non-listed public company are issued shall include: (i) the shareholders of the company; (ii) the directors, supervisors and senior managers of the company; and (iii) investors who are natural persons, legal persons and other economic organizations meeting the provisions on the eligibility administration of investors. Where a non-listed public company issues shares to investors of the type (iii) as specified above, the total number of such investors shall not exceed 35. Proposals in relation to private placement shall be passed as special resolutions by the meeting of shareholders of a non-listed public company, and such company shall then file with the CSRC for approval by presenting the relevant application documents.

Furthermore, in view of the investment characteristics at different stages of projects in some enterprises, the private placement rules are flexible according to which a non-listed public company may only need to file one single application for private placement that will be completed by installments. A non-listed public company shall complete its first installment of private placement within three months from the date of CSRC approval and the amount of the first installment shall be no less than 50% of the total. The remainder shall be completed within 12 months of CSRC approval and the amount of each installment for the remaining amount of the private placement may be determined at the company's own discretion. The company is required to file the private placement information with the CSRC after each installment of the private placement. Where the accumulated number of shareholders of a company does not exceed 200 after the placement or the accumulated amount of funds raised by a company from issuance of shares within 12 months is less than RMB10 million, the company shall be exempted from seeking CRSC approval and is only required to file issuance information with the CSRC after completing each issuance.

In conclusion, the promulgation and implementation of the Measures will enable small and medium-sized enterprises who are temporarily unqualified for public listing to fully utilize the capital markets for their development and expansion, allow the capital markets to better serve the real economy, promote the construction of the over-the-counter market, and play a significant role in improving the multi-level capital market system.

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