

Concrete Rules Guiding Non - public Offerings by Listed Companies

By Christophe Han and Baker Chen

Since the implementation of the Measures for the Administration of the Issuance of Securities by Listed Companies (**Issuance Measures**) on 8 May 2006, non-public offerings have become a popular refinancing method for Chinese listed companies. Moreover, under China's new M&A regulations, particularly the Measures for the Administration of the Takeover of Listed Companies, implemented on 1 September 2006, and The Measures for Strategic Investment in Listed Companies by Foreign Investors, implemented on 31 January 2006, non-public offering has proven to be an effective weapon during the course of foreign strategic investment into Chinese listed companies and major asset restructuring of Chinese listed companies. More concrete and operational rules regarding non-public offerings are expected to be formulated by the China Securities Regulatory Commission (**CSRC**). After a long period of consideration, the CSRC issued the Detailed Implementation Rules for the Non-public Issuance of Stocks by Listed Companies (**Detailed Rules**) on 17 September 2007.

Pricing Reference Date

According to Article 38(i) of the Issuance Measures, the issuing price for non-public offerings shall not be less than 90% of the average price (**average price**) of the shares of the targeted listed company during the 20 trading days prior to the pricing reference date. However, the definition of a pricing reference date is not explained in the Issuance Measures. To clarify, the Detailed Rules define the pricing reference date as the date when the listed company announces the approval of the non-public offering by its board of directors, the date when the listed company announces the approval of the offering by its general shareholders meeting, or the date which is the initial day of the issuing period for the offering. The Detailed Rules designate the formula for calculating average price as: average price = total trading sum of shares for 20 trading days before the pricing reference date / total trading quantity of shares for 20 trading days before the pricing reference date.

如果您需要本出版物的中文本，请与下列人员联系：

韩东红: (86 21) 6881 8100 - 6609
Publication@llinkslaw.com

If you would like other Llinks publications, please contact:

Lily Han: (86 21) 6881 8100 - 6609
Publication@llinkslaw.com

Llinks Law Offices
www.llinkslaw.com

Concrete Rules Guiding Non - public Offerings by Listed Companies

Pricing Mechanism

The Detailed Rules have adopted two different pricing mechanisms based on the different aims of the non-public offering. Where an issuing target is (a) the controlling shareholder or actual controller of the listed company or the related party of the said controlling shareholder or actual controller; (b) the investor which obtains the actual controlling right of the listed company through subscribing the shares presently issued; or (c) the domestic or foreign strategic investor introduced by the board of directors, the specific issuing target and its subscription price or pricing principle shall be determined by the board of directors of the listed company and approved by the general shareholders meeting. That is to say, if a listed company aims to conduct major asset restructuring or absorbing of domestic or foreign strategic investment, it can independently decide the issuing target and the issuing price, as this type of offering is usually helpful in improving asset quality, corporate governance and the like. The lock-up period for the shares subscribed by the above three types of issuing targets shall be 36 months.

When an issuing target is simply a financial investor and the major goal of the non-public offering is to raise capital for the listed company, the issuing targets and the issuing price shall be rationally determined in the principle of price priority through price competition, and the shares issued shall not be transferred within 12 months upon completion of the issuance. To ensure the adequacy and fairness of price competition, the Detailed Rules require that the subscription invitation shall be sent to no fewer than 20 securities investment fund management companies, 10 securities companies and five insurance institutional investors in addition to the investors which have submitted the letter of intent for subscription of shares and the first 20 shareholders of the listed company.

Resolutions of the Board of Directors

The Detailed Rules elaborate on the specific contents of the resolutions of the board of directors regarding non-public offerings and state that such contents should include information on the choice of pricing reference date, the issuing targets or the scope and qualification of the issuing targets, the issuing price or pricing principle, the lock-up period, the quantity range of shares to be issued, the upper limit of the amount of funds to be raised, the total amount of funds required for the investment project, and similar information. The Detailed Rules further stipulate that when the board of directors needs to convene again due to reasons including but not limited to the expired validity term of the resolution of the general shareholders meeting, or to present issuance scheme changes, the board of directors shall again determine the pricing reference date.

Information Disclosure

To regulate information disclosure activities in the process of non-public offerings, the CSRC also published The No. 25 Guidelines on the Contents and Formats of Information Disclosure by the Companies That Make Public Offering of Securities Advance Schemes and Issuance Reports on the Non-public Offering by Listed Companies (**The No. 25 Guidelines**). The No.25 Guidelines require that the advanced scheme should be announced at the same time as the resolutions of the board of directors. It is hopeful that these measures will enhance and promote the accuracy, completeness and timeliness of the information disclosed relating to non-public offerings of listed companies.

Concrete Rules Guiding Non - public Offerings by Listed Companies

Contact Details

If you would like to know more information about the subjects covered in this publication, please feel free to contact the following people or your usual Llinks contact.

Shanghai	Beijing
Christophe Han Tel: (86 21) 6881 8100 - 6618 Christophe.Han@llinkslaw.com	Wayne Chen Tel: (86 10) 6655 5050 - 1022 Way.Chen@llinkslaw.com
Grant Chen Tel: (86 21) 6881 8100 - 6613 Grant.Chen@llinkslaw.com	

This article was first published in *China Law & Practice*, November 2007, Volume 21, Number 9.