君合研究简讯

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# 资本市场法律热点问题

## 证券公司股权管理新规对外国投资者的影响

2019 年 7 月 5 日，中国证监会正式发布《证券公司股权管理规定》（以下简称“**《股权规定》**”）。相比 2018 年 3 月发布的《股权规定》征求意见稿（以下简称“**《征求意见稿》**”），正式稿继续强调对证券公司股权管理应遵循审慎监管的原则，对证券公司股权应实施“穿透式监管”和“分类监管”，并在保留《征求意见稿》主要内容外，对分类管理的要求作出了调整。

值得关注的是，中国证监会在答记者问时宣布统筹考虑对内对外开放，重启内资券商的设立审批，其重要意义还在于在加强对证券公司股权监管的同时，为内外资提供准入及展业的同等机会。

下面我们简要总结境外投资者可能会关心的若干要点。

### 一、新分类和不同类别之间的转换

根据证券公司从事业务的风险及复杂程度，《股权规定》明确将证券公司分为两类：对于从事常规传统证券业务（如证券经纪、证券投资咨询、财务顾问、证券承销与保荐、证券自营等）的证券公司（简称“**专业类证券公司**”）；和从事的业务具有显著杠杆性质且多项业务之间存在交叉风险的证券公司（简称“**综合类证券公司**”），其业务范围除传统证券业务外，还包括股票期权做市、场外衍生品、股票质押回购等复杂业务。专业类证券公司在其控股股东、主要股东具备《股权规定》明确的资质条件后，可以依法申请各类创新复杂业务，转型为综合类证券公司。综合类证券公司也可以根据自身发展战略考虑变更业务范围，转型为专业类证券公司。从上述分类可见，专业类证券公司和综合类证券公司在业务范围上有很大的差别，如为专业类证券公司，则其业务范围大大受限，基本上无法从事各类创新型业务，其证券公司牌照的含金量也大为下降。

### 二、不同类别下对控股股东的要求

与《征求意见稿》保持一致，证券公司股东分为四类：(i)持有 5%以下股权的股东； (ii)持有 5%以上股权的股东；(iii)主要股东（指持有 25%以上股权的股东或者持有 5%以上股权的第一大股东）；和(iv)控股股东。

不同于专业类证券公司的股东要求，综合类证券公司的控股股东需要**额外**满足以下条件：(i)最近三年连续盈利；(ii)长期信用保持在高水平、规模、收入、利润、市场占有率等指标居于行业前列；(iii)总资产不低于 500 亿元人民币，净资产不低于 200 亿元人民币；(iv)核心主业突出，主营业务最近 5 年持续盈利。综合类证券公司的主要股东需要满足上述(i)和(ii)项。对于控股股东或主要股东不能满足上述条件的证券公司，证监会给予五年的过渡期。

上述对控股股东和主要股东的要求对中小券商影响较大，业内分析认为，某些中小券商可能因此选择放弃这些创新复杂的业务，或选择资本实力强的股东以确保维持综合类券商的资格。

## 三、非金融企业控股证券公司

《股权规定》要求单个非金融企业实际控制证券公司股权的比例原则上不得超过 50%，相比《征求意见稿》要求不得超过 1/3 的规定略为放松。

## 四、涉及股权变更的强制要求

1、根据《股权规定》，投资者通过证券交易所购买证券公司股份达到 5%的，应当依法举牌并报中国证监会批准。获批前，投资者不得继续增持该公司股份。中国证监会不予批准的，投资者应当在自不予批准之日起 50 个交易日（不含停牌时间，持股不足 6 个月的，应当自持股满 6 个月后）内依法改正。

2、《股权规定》新增证券公司发生股权变更情形下证券公司、股权转让方应承担的法定义务，即：**一是**证券公司应当制定工作方案和股东筛选标准；**二是**证券公司、股权转让方应履行对意向参与方的事先披露义务，披露内容包括告知证券公司股东条件、须履行的程序以及证券公司的经营情况和潜在风险等信息；**三是**证券公司、股权转让方应当对意向参与方做好尽职调查；**四是**证券公司应当与相关主体事先约定在变更注册资本或者股权过程中发生可能出现的违反规定或者承诺的行为的处理措施以及对责任人的责任追究机制。

《股权规定》进一步规定，投资者通过证券交易所、股份转让系统公开交易转让证券公司股份，且所涉股权变更事项不需审批或备案的，豁免上述四项法定义务。例如，某一境外投资者通过 QFII/RQFII 和/或股票通出售某一证券公司股份，如该出售不涉及证券公司 5%以上股权的变更的，则豁免上述义务，但如该出售涉及 5%以上股权变更的，则仍需要履行上述义务。

## 五、对于股权质押的限制

《股权规定》强调维持股权的稳定性，要求股东除在股权锁定期内不得质押所持股权外，即使是在锁定期满，证券公司股东质押其持有的证券公司股权比例也不得超过其持有的全部证券公司股权的 50%。

## 六、禁止让渡对股权的控制权

相比《征求意见稿》，《股权规定》对有关证券公司股权变更的禁止性行为作了更为严格的规定。例如，《征求意见稿》第五十六条第(三)款和第(四)款规定，证券公司应当在章程中约定，未经中国证监会批准委托他人持有或管理证券公司股权或通过接受表决权委托或接受收益权等方式变相控制证券公司相关股权的，相关股东及其提名董事不得行使表决权。而《股权规定》第三十条第(六)款则将该类行为明确列为证券公司股东及其实际控制人的禁止性行为，而非仅限制证券公司股东行使其表决权，即，证券公司股东或其实际控制人未经批准不得委托他人或接受他人委托持有或管理证券公司的股权，不得变相接受或让渡证券公司股权的控制权。

结合《征求意见稿》相关规定的字义理解，以“接受收益权等方式变相控制证券公司相关股权”也应属于“未经批准让渡控制权”。对这一条可能产生的疑义是，基于证券公司股权这一底层资产而达成的间接转移股权相关经济利益的总收益互换安排是否会被认为是“变相让渡证券公司相关股权的控制权”。我们理解，证券公司的股东，无论是持有 5%以上或以下，均不得让渡对该股权的管理权、处置权和控制权。至于间接转移相关经济利益的安排是否被认为实质上让渡了对该股权的管理权、处置权和控制权仍需要按照“实质重于形式”的原则针对具体情形具体分析判断。

## 结论

我们建议境外投资者密切关注新规的上述变化。我们认为，对于拟在中国境内全资或控股设立证券公司的海外大型金融机构而言，获得综合类券商的资质是必然的目标，在《股权规定》实施过程

中，中小券商的整合可能给海外金融机构提供新的并购机会；而对于通过公开市场直接或间接受让或出售证券公司股份的境外投资者而言，建议研究《股权规定》新增的合规义务，评估其影响并准确地理解和把握监管精神和原则的变化。

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# Financial

## New Regulation on the Administration of Equity Ownership in Securities Companies —— Implications for Foreign Investors

On July 5, 2019, the China Securities Regulatory Commission (CSRC) promulgated the *Provisions for the Administration of Equity Ownership in Securities Companies* ("Provisions"). As was the case for the earlier consultation paper issued in March, 2018 ("Consultation Paper"), the Provisions continues to emphasize the need for prudential regulation, but additionally provides for the implementation of "see-through regulation" and "classification management" in the equity ownership in securities companies. The Provisions retains the main content of the Consultation Paper, while introducing substantial adjustments to the requirements for classification management.

In a Q&A session about the Provisions, the CSRC announced its plan to resume issuing new securities business licenses to domestic investors, given that it has committed to offer the same to foreign investors. It is of some significance that the mindset of the regulator is to provide equal market access to domestic and foreign investors, while increasing the overall supervision of equity ownership of securities companies.

We briefly summarize below the key points that may be of particular interest to foreign investors.

### I. New Classification System and Conversion between Categories

The Provisions classifies securities companies into two categories according to their risk level and their business complexity: 1) Securities companies that engage in regular securities activities ("traditional securities companies"), such as securities brokerage, securities investment consulting, financial consulting, securities underwriting and sponsorship and proprietary trading; 2) Securities companies that engage in activities involving significant use of leveraging and presenting the possibility of risk across multiple businesses ("complex securities companies"). This latter category applies to securities companies that are involved in innovative and complicated activities, such as stock option market-making, OTC derivative, and share pledge-type repo.

A traditional securities company may apply to undertake innovative and complex activities and to convert into a complex securities company, provided that its controlling shareholders and major shareholders satisfy the qualification requirements under the Provisions. Likewise, a complex securities company is also permitted to convert to a traditional securities company.

Traditional and complex securities companies differ greatly from each other in their business activities. Given that a traditional securities company may not be permitted to undertake innovative and complicated securities activity, being licensed as a traditional securities company is likely to be perceived as a less attractive option for investors than being licensed as a complex securities company.

## II. Differing Requirements for Controlling Shareholders by Category

Consistent with the Consultation Paper, the Provisions divides securities company shareholders into four main classes: (i) Any shareholder holding less than 5% equity, (ii) Any shareholder holding 5% or more equity, (iii) Any major shareholder holding 25% or more equity, or anyone holding more than 5% and less than 25%, but who is the largest shareholder, and (iv) The controlling shareholder.

In contrast to the controlling shareholder of a traditional securities company, the controlling shareholder of a complex securities company shall meet the following additional conditions: (i) It has had positive net profit for the past 3 years; (ii) It has had long-term, high-level creditworthiness, and its scale of business, revenues and profits rank it at the forefront of its industry; (iii) It has total assets of no less than RMB 50 billion, and net assets of no less than RMB 20 billion; and (iv) It has a strong and outstanding core business, which has produced positive net profits over the past 5 years.

The major shareholders of a complex securities company are only required to meet conditions (i) and (ii). The CSRC will allow a five-year grace period to any securities companies whose controlling or major shareholders fail to satisfy the above conditions.

The impact of these requirements for controlling shareholders and major shareholders is likely to fall most heavily upon small and medium-sized securities companies. For this reason, we would anticipate that small and medium-sized securities companies may choose either to forego their involvement in innovative and complex activities, or alternatively, in order to maintain their status as a complex securities company, they may be open to new shareholders with strong capital strength.

## III. Non-Financial Institutions as Controlling Shareholders

The Provisions specifically requires that the equity actually controlled by a single non-financial institutional shareholder in a securities company shall not exceed 50% of total equity in principle. This is less stringent than in the Consultation Paper, which had proposed a limit of just one-third of total equity.

## IV. Mandatory Requirements Concerning Equity Transfers of More Than 5%

Pursuant to the Provisions, if an investor acquires equity of a securities company through a stock exchange and reaches a threshold of 5%, it shall make timely disclosure in accordance with relevant laws and regulations, and apply to the CSRC for approval. The investor shall not further increase its shareholding in the securities company until it has received approval. If the application is rejected by the CSRC, the investor shall return to the previous shareholding status within 50 trading days[1] as of the date of the rejection.

For the equity transfer of a securities company, the obligations of the Provisions are greater than those of the Consultation Paper for both the

[1] The 50 days does not include trading suspension. Moreover, if the equity has been held for less than 6 months at the time of rejection, the investor shall make restoration only upon the expiry of a 6-month holding period.

securities company and equity transferor. Specifically, the Provisions requires that: (i) The securities company shall formulate a work plan and a set of criteria for the selection of shareholders; (ii) The securities company and the equity transferor shall fulfill their duty of disclosure by informing the potential transferee about the criteria for shareholders, the mandatory procedures, the securities company's business performance and potential risks, etc.; (iii) The securities company and the transferor shall conduct a due diligence check on the potential transferee; and (iv) The securities company shall reach an ex-ante agreement with the relevant parties on the accountability system and the measures that will be taken to pursue the liability of the responsible person in the event of any potential violations or breaches during the process of change of registered capital or equity ownership.

The Provisions further provides that if an investor should sell any securities company equity through a stock exchange or the NEEQ, and the equity change does not require regulatory approval or filing, the investor shall be exempted from the four abovementioned obligations. For example, if a foreign investor proposes to sell equity in a securities company through QFII/RQFII and/or Stock Connect and the sale does not result in a more than 5% equity change, then it can be exempted from the abovementioned obligations. However, if the sale will result in a change of equity of more than 5%, then it will be required to fulfill the four abovementioned obligations.

## V. Restrictions on Equity Pledges

The Provisions emphasizes the importance of there being stability in the equity holding of securities companies, and requires that shareholders of a securities company shall not pledge their equities during a lock-up period, and that, even after a lock-up period, a shareholder shall pledge no more than 50% of the equity it holds in a securities company.

## VI. Prohibiting the Transfer of Right of Control over Equity

Compared with the Consultation Paper, the Provisions imposes more stringent requirements on the prohibited behaviors concerning the change of equity ownership of a securities company. Sub-paragraphs 3 and 4 of Article 56 of the Consultation Paper indicated that the Articles of Association of a securities company shall stipulate that, without due approval from the CSRC, shareholders and their designated directors shall not be allowed to exercise their voting rights if they are involved in any of the following circumstances: (i) Entrusting others to hold or manage their equity of a securities company, or (ii) Being entrusted to hold or manage the equity of a securities company by accepting the entrustment for the voting right or the right to dividends so as to indirectly control the equity of the securities company, or in any other disguised manner. By contrast, Sub-paragraph 6, Article 30 of the Provisions goes further, and rather than just restricting the shareholders' exercise of voting rights, expressly lists such conduct as being prohibited behavior for shareholders and actual controllers of a securities company. In the Provisions, shareholders and actual controllers of a securities company shall not entrust others or be entrusted to hold or manage the equity of a securities company, or to accept or transfer the right of control over the equity in any disguised manner without due approval from the CSRC.

Interpreted literally, "obtaining the controlling right to certain equity of a securities company in a disguised form through transferring the right to proceeds of such equity or other similar means" can be understood to be the same as "transferring the right of control over the equity

without due approval from the CSRC."

The application of the Provisions raises the question as to whether a Total Return Swap arrangement, in which the equity of a securities company is used as the underlying asset and the beneficial interest of the equity of a securities company is indirectly transferred, would be regarded as "transferring the right of control over the equity in a disguised manner."

Our analysis of this issue is that, regardless of the proportion of the equity they hold, shareholders of a securities company shall be prohibited from transferring the right of management, the right of disposal and the right of control over the equity of a securities company.

It appears that the issue of whether a business arrangement which involves an indirect transfer of the beneficial interests of equity in a securities company is considered to constitute a transfer of the right of management, the right of disposal or the right of control over the equity will be determined on a case-by-case basis in accordance with the principle of "substance over form."

## Conclusion

For large foreign financial institutions intending to set up wholly-owned or majority-owned securities companies, we believe there is little doubt about whether they should apply to be a complex securities company. Meanwhile, the potential restructuring of small or medium-sized securities companies through the implementation of the Provisions is likely to result in M&A opportunities for foreign investors.

We suggest foreign investors should continue to pay close attention to the changes proposed by the new regulation. For any foreign investors intending to directly or indirectly acquire or sell shares in a securities company on the public market, we would counsel them to make sure they have full awareness of the additional compliance obligations stipulated in the Provisions and their likely implications, and to strive to understand the underlying spirit and principles of the regulations.

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