君合研究简讯

JUNHE

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证券法热点问题

新证券法 – 境外机构投资者若干关注要点

历时四年多的修订，继 2019 年 4 月 26 日就《证券法》三审稿(以下简称“《三审稿》”)向社会公开征求意见后，新修订的《中华人民共和国证券法》(以下简称“新法”或“《证券法》”)于 2019 年 12 月 28 日正式颁布。新法自颁布之日生效，自 2020 年 3 月 1 日之日起施行。这是《证券法》自 2005 年第一次大幅度修订以来的第二次大幅修订。除广泛报道和讨论的注册制改革、显著提高违法成本、突出中小投资者保护三条修订主线外，我们针对境外机构投资者关注的适用范围、程序化交易、禁止出借和借用账户、短线交易、百分之五持股变动等五个方面作以下简要提示：

一、适用范围

新法扩大了适用的范围。新法第二条规定：(i)在中华人民共和国境内发行和交易的股票、公司债券、存托凭证和国务院依法认定的其他证券；和(ii)上市交易的政府债券、证券投资基金份额，适用本法。同时规定，国务院将按照新法的原则分别制定有关资产支持证券和资产管理产品发行交易的管理办法。由于目前金融业实行分业监管，相同性质的金融产品适用不同的规则，受不同部门监管，新法的这一变化意味着，尽管分业监管现状不变，但各金融监管部门在监管规则的制订标准上应有所统一，即将资产支持证券、资产管理产品视作“准证券”，其相关规范的制定应当遵守证券法的原则，以强制信息披露和反欺诈作为保护投资者的主要手段。

新法删除了《三审稿》中关于国务院按照《证券法》的原则规定制定证券衍生品种发行交易的管理办法的条款。起草者认为，证券衍生品种可分为证券型(如权证)和契约型(如股指期货)，其中证券型衍生品种可作为新法第二条所指国务院依法认定的其他证券，适用《证券法》，而契约性衍生品种可适用《期货交易管理条例》或者正在起草中的《期货法》。这一表态似乎预示着《期货法》的制定有可能加速。

值得注意的是，新法第二条新增一款：“在中华人民共和国境外的证券发行和交易活动，扰乱中华人民共和国境内市场秩序，损害境内投资者合法权益的，依照本法有关规定处理并追究法律责任”。这意味着《证券法》具有了一定的域外管辖效力，即在中国境外的场内或场外市场发生的证券发行或交易行为，如扰乱境内市场秩序或损害境内投资者合法权益的，可根据《证券法》追究其责任。

二、程序化交易

与《三审稿》一致，新法第四十五条规定，通过计算机程序自动生成或者下达交易指令进行程序化交易的，应当符合国务院证券监督管理机构的规定，并向证券交易所报告，不得影响证券交易所系统安全或者正常交易秩序。

新法第一百九十条规定了相应的法律后果，即采取程序化交易影响证券交易所系统安全或者扰乱正常交易秩序的，责令改正，并处以五十万元以

上五百万元以下的罚款；对直接负责的主管人员和其他直接责任人员给予警告，并处以十万元以上一百万元以下的罚款。

本条意味着证监会有权对程序化交易做出具体的规定，各证券交易所亦可能就程序化交易制定报告的细则。相比《三审稿》建议的罚则，《新法》对罚款金额略有提高。

三、不得出借或借用账户

新法基本保留了旧法关于不得出借或借用证券账户的条款，即任何单位和个人不得违反规定，出借自己的证券账户或者借用他人的证券账户从事证券交易，但相比旧法的罚则大大减轻，即出借人和借用人将被责令改正，给予警告，并可处五十万元以下的罚款。

四、短线交易

新法第四十四条规定了持有百分之五以上股份的股东将其持有的该公司的股票或者其他具有股权性质的证券在买入后六个月内卖出，或者在卖出后六个月内又买入，由此所得收益归该公司所有，但是，证券公司因购入包销售后剩余股票而持有百分之五以上股份，以及有国务院证券监督管理机构规定的其他情形的除外。值得注意的是，证监会有权规定短线交易限制的豁免情形，我们期待证监会就此作出进一步的规定。

五、百分之五持股变动

新法第六十三条第一款规定，通过证券交易所的证券交易，投资者持有或者通过协议、其他安排与他人共同持有一个上市公司已发行的有表决权股份达到百分之五时，应当在该事实发生之日起三日内，向国务院证券监督管理机构、证券交易所作出书面报告，通知该上市公司，并予公告，在上述期限内不得再行买卖该上市公司的股票，但国务院证券监督管理机构规定的情形除外。第二款规定，投资者持有或者通过协议、其他安排与他人共同持有一个上市公司已发行的有表决权股份达到百分之五后，其所持该上市公司已发行的有表决权股份比例每增加或者减少百分之五，应当依照前款规定进行报告和公告，在该事实发生之日起至公告后三日内，不得再行买卖该上市公司的股票，但国务院证券监督管理机构规定的情形除外。

就上述第一款和第二款，新法均允许证监会规定豁免情形，并进一步规定：(1)违反上述第一款或第二款规定买入上市公司有表决权的股份的，在买入后的三十六个月内，对该超过规定比例部分的股份不得行使表决权；(2)如投资者持有或者通过协议、其他安排与他人共同持有一个上市公司已发行的有表决权股份达到百分之五后，其所持该上市公司已发行的有表决权股份比例每增加或者减少百分之一，应当在该事实发生的次日通知该上市公司，并予公告。

我们将持续关注并及时与我们的客户分享最新的进展。

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JUNHE BULLETIN

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Financial

New Securities Law – Highlights for Foreign Institutional Investors

After four years of amendments and following the release of the third draft for deliberation of the *Securities Law* ("Third Draft for Deliberation") on April 26, 2019, the newly amended *Securities Law of the People's Republic of China* ("New Law" or "Securities Law") was officially promulgated on December 28, 2019. The New Law came into effect on the date of its promulgation and will be implemented on March 1, 2020. This is the second major set of amendments of the *Securities Law* since the first major revision in 2005. Three main changes have been widely reported and discussed, namely, (i) the reform of the registration-based IPO system, (ii) the imposition of more severe punishments for violations, and (iii) the enhancement of protection for retail investors. Apart from these revisions, this article is intended to briefly introduce the following five aspects that are highlighted for foreign institutional investors, namely, (i) scope of application, (ii) program trading, (iii) prohibition on account lending and borrowing, (iv) short swing profit, and (v) changes in regard to 5% shareholding.

I. Scope of Application

The New Law further expands its scope of application. Article 2 of the New Law stipulates that the Securities Law concerns both (i) shares, corporate bonds, depositary receipts and other securities recognized by the State Council that are issued and traded within the territory of the People's Republic of China (PRC) and (ii) listed treasury bonds and securities investment fund units. Meanwhile, the New Law provides that the State Council will formulate administrative measures on the issuance and trading of asset-backed securities (ABS) and asset management products (AMP) respectively, in accordance with the principles of the Securities Law. Due to the separate regulation of the financial industry, financial products of the same nature may be subject to different regulations and regulated by different regulatory authorities. The proposed expansion to ABS and AMP means that, while separate regulation remains unchanged, the rules and regulations promulgated by different financial regulators are likely to be unified to follow the same or similar criteria. That is to say, ABS and AMP should be regarded as "quasi-securities" and therefore the formulation of their respective rules and regulations shall abide by the principles of the Securities Law focusing on the information disclosure and anti-fraud being the core of investor protection.

The New Law removes the provision in the Third Draft for Deliberation which stipulates that the State Council shall formulate administrative

measures on the issuance and trading of securities derivatives in accordance with the principles of the *Securities Law*. The drafters classify securities derivatives into securities-type (e.g. warrants) and contractual-type (e.g. stock index futures). Between the two, securities-type derivatives can be regarded as “other securities recognized by the State Council” referred to in Article 2 thereof and thus subject to the Securities Law, while the contractual-type derivatives may be subject to the *Administrative Regulations on Futures Trading* or the *Futures Law* that is currently being formulated. This statement seems to herald a possible acceleration of the promulgation of the *Futures Law.*

It is worth noting that a new paragraph has been added to Article 2 of the New Law, which provides that "issuance or trading activities of securities outside the territory of PRC that disrupt the order of the market within the territory of the PRC or damage the legitimate rights and interests of the investors within the territory of the PRC shall be regulated and relevant legal responsibilities shall be pursued in accordance with this Law." This indicates that the *Securities Law* has certain extraterritorial jurisdiction, which based on our understanding would mean that the issuance or trading behavior occurred in an exchange or over the counter outside of the territory of PRC may be held liable under the Securities Law, if it disrupts the market order of the PRC or damages the legitimate rights and interests of investors of the PRC.

II. Program Trading

Consistent with the Third Draft for Deliberation, Article 45 of the New Law provides that program trading conducted through automatic generation and delivery of trading orders by the computer programming shall comply with the rules prescribed by the securities regulatory authority of the State Council, and shall be reported to the stock exchanges and shall not impact the security of the trading systems or the normal trading order of the stock exchanges.

Article 190 of the New Law prescribes the legal consequences of violating Article 45. Namely, where the adoption of program trading affects the security of the trading systems of the stock exchanges or disrupts their normal trading order, it shall be ordered to correct and shall, in addition, be issued a fine of no less than RMB 500,000 but no more than RMB 5 million. The person directly in charge and the other persons directly responsible shall be given a warning and shall, in addition, each be issued a fine of no less than RMB 100,000 but no more than RMB 1,000,000.

This article means that the China Securities Regulatory Commission (CSRC) has the right to make specific rules on program trading, and each stock exchange may also formulate detailed rules for the reporting of program trading. Compared with the penalties stipulated in the Third Draft for Deliberation, the New Law slightly increases the fines.

III. Prohibition on Account Lending and Borrowing

The New Law basically retains the provisions of the previous version in regard to the prohibition on lending and borrowing of securities accounts. No entity or individual shall lend the securities accounts of its own to others or use the securities accounts of others to trade securities in violation of certain provisions. However, compared with the previous version, the New Law imposes a substantially lighter penalty with regard to any violation of the foregoing provision. Namely, each of the lender and the borrower of a securities account shall be ordered to correct or be given a warning, and may also be issued a fine of no more than RMB 500,000.

IV. Short Swing Profit

Article 44 of the New Law stipulates that where a shareholder holding 5% or more of the shares of a company sells its shares of either the company or other securities with the nature of equity within six months after purchasing such shares or securities, or repurchases such shares or securities within six months after selling such shares or securities, the gains therefrom, if any, shall belong to the company. However, this requirement shall not apply to a securities company which comes to hold 5% or more of the shares as a result of absorbing the unsold shares under the terms of an underwriting agreement on a principal basis or other circumstances as prescribed by the securities regulatory authority under the State Council. It is noteworthy that the CSRC would have the authority to grant exemption and therefore we are looking forward to further clarification by the CSRC about any exemptions of short swing profit.

V. Changes in Regard to 5% Shareholding

Paragraph 1 of Article 63 provides that when, through securities trading on a stock exchange, the shareholding of an investor, or the joint shareholding of an investor and others in virtue of agreements or other arrangements, reaches 5% of the issued shares with voting rights of a listed company, the investor shall, within three days from the date on which the shareholding reaches 5%, report in writing to the securities regulatory authority of the State Council and the stock exchange, as well as inform the aforesaid listed company of the 5% shareholding and make an announcement thereof. The investor shall not continue to purchase or sell the shares of the listed company during this period of time, unless under the circumstances prescribed by the securities regulatory authority of the State Council. Paragraph 2 of Article 63 states that when the shareholding of an investor, or the joint shareholding of an investor and others in virtue of agreements or other arrangements, has reached 5% of the issued shares with voting rights of a listed company, with every 5% increase or decrease in such shareholding thereafter shall be reported and announced in accordance with the foregoing provision, and the investor shall not further purchase or sell the shares of the listed company in the period from the date on which the shareholding change occurs through three days after the announcement is made, unless under the circumstances prescribed by the securities regulatory authority of the State Council.

The New Law allows exemptions as determined by the CSRC for each of the above two scenarios, and further stipulates that (i) if an investor purchases the shares with voting rights of a listed company in violation of the above Section 1 or 2 of Article 63, such investor is prohibited from exercising its voting rights of the shares which are in excess of the prescribed proportion within 36 months after purchasing such shares; and (ii) when the shareholding of an investor, or the joint shareholding of an investor and others in virtue of agreements or other arrangements, has reached 5% of the issued shares with voting rights of a listed company, every 1% increase or decrease in such shareholding thereafter shall be reported and announced on the day following such increase or decrease.

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