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Financial

Insider Trading Involving Non-Public Offering of Shares

Article 3 of the *Detailed Implementation Rules on Non-Public Offering of Shares by Listed Companies* ("Detailed Rules on Non-Public Offering of Shares") provides that the directors, supervisors, senior executives, sponsors and underwriters of a listed company that issue shares non-publicly; the professionals and their employers that issue special documents for such issuance of shares; as well as the controlling shareholders, de facto controllers and other insiders of such listed company; shall all comply with relevant laws, regulations and rules, act with due diligence and care, and shall not seek improper benefits by taking advantage of any non-public offering by a listed company; nor shall the foregoing personnel disclose any insider information or trade securities, or manipulate securities trading prices by taking advantage of such insider information. The China Securities Regulatory Commission (CSRC) has penalized many insider trading cases involving the non-public offering of shares by listed companies.

Pursuant to the *Administrative Measures on Issuance of Securities by Listed Companies*, the non-public offering of shares by a listed company refers to the issuance of shares to specific targets, the total number of which shall be not more than 35. According to the issuance targets and the issuance pricing method, the non-public offering by listed companies comes in two forms:

(1) *Fixed-price Issuance*: Before submitting the non-public offering application to the CSRC, the board of directors of the listed company has determined all issuance targets; the issuance price is calculated by using the announcement date of the resolution of the board of directors or the general meeting of shareholders as the pricing benchmark date; the listed company has already disclosed to the market important information regarding the non-public offering, such as issuance targets, issuance price and quantity of issued shares before announcing the relevant plan for non-public offering of shares.

(2) *Bidding-based Issuance*: The issuance targets, issuance price and number of issued shares remain uncertain when the listed company submits the non-public offering application to the CSRC; there is no detailed information regarding the issuance targets, issuance price and number of issued shares in the relevant plan for non-public offering of shares announced by the listed company or the approval documents issued by the regulator; the issuance targets, issuance price and quantity of issued shares are finally determined by inviting qualified investors to send requests for quotation (RFQ) after the

company obtains regulatory approval; after completion of the RFQ, the listed company shall prepare an issuance report so as to publicly disclose to the market detailed information on the issuance target, issuance price and quantity of shares with respect to the non-public offering.

Although the previous insider trading cases penalized by the CSRC mainly involve non-public offering by listed companies in the form of fixed-price issuance, it does *not* follow that insider trading will not occur in a bidding-based issuance.

I. Insider Information in Non-Public Offering of Shares

Articles 52 and 80 of the *Securities Law of the People's Republic of China* ("Securities Law") clearly define insider information on shares of listed companies. Specifically, Article 80, Paragraph 2, Item (9) stipulates that a company's plan for capital increase and important change in the shareholding structure of a company are both major events that may have a relatively significant impact on the trading price of the company's shares, which the company shall promptly disclose publicly to the market. In the enforcement practices of the CSRC, as we have observed, the foregoing provision is usually referred to when determining whether certain information regarding the non-public offering of a listed company shall be deemed as insider information.

In view of the features of non-public offering, the issuance targets, issuance price and number of issued shares are the key elements of a plan for non-public offering. The lack of any of the foregoing elements will render the plan for non-public offering incomplete and impossible to implement. Therefore, for information regarding the non-public offering by a listed company to be considered fully insider information, it shall contain elements such as information on the issuance targets, issuance price and number of issued shares.

Among the administrative penalties imposed by the CSRC, penalized insider trading cases normally involve a fixed-price non-public offering, and relevant trading activities occurred before the listed company announced its plan for non-public offering to the market. In other words, for insider trading cases involving a fixed-price non-public offering, the regulatory authorities mainly focus on whether the relevant party is aware that the listed company will conduct a non-public offering, without considering whether the party knows the detailed information on the issuance targets, issuance price and/or number of issued shares. And further, regardless of the above penalty cases, the CSRC still has the discretion to determine the important information of non-public offering such as issuance targets, issuance price and number of issued shares to be insider information.

The CSRC has reiterated in many penalized cases that, under the Securities Law, the CSRC has the discretion to determine whether certain information shall be deemed as insider information, and insider information shall have two basic characteristics, namely, that it is material and non-public[1]. In light of the features of a non-public offering, there is not much controversy that the issuance targets, issuance price and number of issued shares all possess materiality. Accordingly, in some cases, due to the need to crack down insider trading, the CSRC would incline to determine that information on the issuance targets, issuance price and number of issued shares with respect to non-public offering shall constitute insider information, all of which may be disclosed step by step in a bidding-based non-public offering.

[1] E.g., the insider trading case of EverBright Securities, CSRC Administrative Penalty Decision [2013] No. 59.

II. Disclosure of Insider Information in Non-Public Offering of Shares

Pursuant to laws, regulations and the enforcement practices of the CSRC, the method for determining whether insider information is publicized is relatively simple. According to Article 85 of the Securities Law, only insider information that has been announced by the listed companies via the website of the stock exchanges or other media that meets the conditions prescribed by the securities regulatory authority of the State Council shall be deemed as having been publicly disclosed to the market, and thereby no longer insider information. If a listed company and other entities aware of insider information notify certain investors of relevant insider information before the listed company announces such information in accordance with law, this information may still be considered non-public and the foregoing entities may be suspected of divulging insider information.

In addition, according to the Detailed Rules on Non-Public Offering of Shares, listed companies shall disclose the plan for non-public offering of shares and the issuance report during the process of non-public offering. In terms of a bidding-based issuance, important information, such as issuance targets, issuance price and number of issued shares, are only disclosed to the market by the listed company in the issuance report after the RFQ is over. Therefore, it is a highly contentious view and may be hard for a law enforcement agency to accept that, for a bidding-based issuance, given that the plan for non-public offering of shares and relevant regulatory approvals announced by the listed company do not contain important information on non-public offering, such as issuance targets, issuance price and number of issued shares, and the important information of non-public offering has been fully disclosed to the market when the listed company announces the plan for non-public offering of shares and regulatory approvals, thus, any subsequent trading of shares of such listed company shall not constitute insider trading.

It is also worth noting that when the Securities Law was amended in 2019, it incorporated a new Article 83 regarding the principle of fair disclosure, which provides that information disclosure obligors shall disclose information to all investors at the same time, and shall not divulge such information to any entity or individual in advance. Article 83 further requires that no entity or individual shall illegally require an information disclosure obligor to provide information that is required to be disclosed according to law but has not yet been disclosed; any entity or individual aware of the foregoing information in advance shall keep such information confidential before the information is disclosed pursuant to law. Therefore, in the process of a bidding-based issuance, before the listed company discloses the issuance targets, issuance price and number of issued shares in the issuance report, if any of the listed company, underwriters, or investors qualified to participate in the RFQ, notifies other investors of such information in advance, it may be suspected of violating the principle of fair disclosure and thus subject to administrative penalties.

III. Determination of Insider Trading in Non-Public Offering of Shares

According to the Securities Law, there are two types of parties that are prohibited from trading relevant stock after they become aware of insider information: (1) insiders aware of insider information; (2) persons obtaining insider information by illegal means. Between the two, insiders aware of insider information mainly refer to (i) listed companies and their directors, supervisors and senior executives, (ii) shareholders of listed companies and their directors, supervisors and senior executives, (iii)

counterparties to transactions regarding the acquisition of listed companies or major asset restructuring of listed companies, and (iv) persons who participate in the formation of insider information or otherwise associated with listed companies. Persons obtaining insider information by illegal means, on the other hand, refer to persons who obtain insider information by means of eavesdropping, theft, fraud, or other illegal methods, or persons who have a close relationship or contact with persons knowing the insider information, that is, insider information has been transmitted from one party to another.

In practice, the CSRC, when determining whether there is any transmission of insider information, may make relevant determination by reference to objective evidence, such as the trading activities of relevant parties and whether there has been any contact between such parties and persons knowing the insider information. Among the insider trading cases penalized by the CSRC, more than half of such cases are determined by presumption[2]. In addition, when determining the trading period related to insider information, the CSRC views the formation of insider information as a whole, rather than dividing the trading period into several parts.

It can be observed that in the process of bidding-based issuance, important information, such as the issuance targets, issuance price and number of issued shares, is formed in the course of RFQ. When the regulatory authorities investigate whether insider information has been transmitted, they view the formation of insider information as a complete process, including (i) the listed company and the underwriter issue subscription invitations to qualified investors, (ii) investors submit subscription quotations, and (iii) issuance targets, issuance price and number of issued shares are finally determined. For any large volume of securities trading that occurs over such period, if a party has contact with various RFQ participants, especially investors who have received the subscription invitations, and the foregoing investors finally obtain the share placement, the regulator may presume according to law that insider information has been transmitted between the party and the investors participating in the RFQ, thereby determining that the party engages in insider trading.

We will continue to monitor the situation and keep our clients apprised of any important developments.

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[2] Statistics based on administrative penalty decisions of the CSRC from 2013 to 2019 as published on the CSRC website (http://www.csrc.gov.cn/pub/zjhpublic/index.htm?channel=3300/3313).

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证券法热点问题

股票非公开发行中的内幕交易

《上市公司非公开发行股票实施细则》(以下简称“**《非公开发行细则》**”)第 3 条规定，“上市公司董事、监事、高级管理人员、保荐人和承销商、为本次发行出具专项文件的专业人员及其所在机构，以及上市公司控股股东、实际控制人及其知情人员，应当遵守有关法律法规和规章，勤勉尽责，不得利用上市公司非公开发行股票谋取不正当利益，禁止泄露内幕信息和利用内幕信息进行证券交易或者操纵证券交易价格”。中国证监会在执法中曾处罚多起发生在上市公司非公开发行过程中的内幕交易案件。

根据《上市公司证券发行管理办法》的规定，上市公司非公开发行指向特定对象发行，并且发行对象不超过 35 名的发行方式。根据发行对象和发行价格的确定方式，上市公司非公开发行有以下两种方式：

(1) “锁价发行”：在作出非公开发行申报前，上市公司董事会决议已经确定非公开发行的全部发行对象；以董事会决议或股东大会决议公告日作为定价基准日计算发行价格；公司在公告《非公开发行股票预案》时就已经向市场公开披露该次非公开发行的发行对象、发行价格和发行数量等重要信息。

(2) “竞价发行”：发行对象、发行价格和发行数量在上市公司提起非公开发行申报时并不确定；在上市公司公告的《非公开发行股票预案》以及监管部门批准文件中也没有关于发行对象、发行价格和发行数量的具体信息；发行对象、发行价格和发行数量是在公司取得监管部门批准后，通过邀请符合条件的投资者参与询价来最终确定的；询价过程结束后，上市公司通过《发行情况报告书》向市场公告披露该次非公开发行的发行对象、发行价格、发行数量的具体信息。

虽然此前中国证监会处罚的发生在上市公司非公开发行的内幕交易案件主要集中在锁价发行中，但这并不意味着在竞价发行中就不会出现内幕交易。

一、股票非公开发行中的内幕信息

《证券法》第 52 条和第 80 条对涉及上市公司股票的内幕信息做出了明确规定。其中第 80 条第 2 款第(9)项规定，公司的增资计划和股权结构的重要变化是可能对公司股票交易价格产生较大影响的重大事件，上市公司应当及时向市场进行公告。在中国证监会的执法实践中，通常适用前述条款认定与上市公司非公开发行相关的信息为内幕信息。

从非公开发行交易的特征来看，发行对象、发行价格和发行数量是非公开发行方案的关键要素，缺乏任何一项都会导致非公开发行方案是不完整的，并且无法执行。因此，一个关于上市公司非公开发行的完整的内幕信息应当包括发行对象、发行价格和发行数量的要素。

在中国证监会以往作出的行政处罚中，虽然被处罚的非公开发行中的内幕交易主要发生在锁价发行中，并且相关交易行为发生在上市公司向市场公告非公开发行方案之前。换言之，在锁价发行内幕交易中，监管部门主要关注交易人是否知悉上市公司将要进行非公开发行，未追究交易人是否知悉发行对象、发行价格、发行数量的具体信息。但这并不妨碍中国证监会认定发行对象、发行价格、发行数量等非公开发行的关键信息构成内幕信息。

中国证监会曾在多起行政处罚案件中重申，根据《证券法》的规定，"中国证监会有权就具体信息是否属于内幕信息进行认定"，以及"内幕信息有两个基本特征，包括重大性和未公开性[1]。从非公开发行交易特征来看，非公开发行的发行对象、发行价格和发行数量等信息具有"重大性"不存在太大争议。因此，在某些案件中，出于严格处罚内幕交易的需要，中国证监会很可能进一步认定非公开发行的发行对象、发行价格和发行数量构成内幕信息，且在竞价发行方式中这些信息可以分步进行披露。

二、股票非公开发行中内幕信息的披露

根据法律法规的规定和中国证监会的执法实践，认定内幕信息是否公开的方式较为单一，即根据《证券法》第 85 条规定，只有上市公司将内幕信息通过"证券交易所的网站和符合国务院证券监督管理机构规定条件的媒体发布"的，才构成对市场的公开披露，相关信息也不再被认定为内幕信息。上市公司及其他知悉内幕信息的主体在上市公司按照法律规定公告前，将内幕信息提前告知个别投资者的，并不导致内幕信息丧失"非公开性"，还可能涉嫌泄露内幕信息。

此外，根据《非公开发行细则》的规定，上市公司在非公开发行过程中，应当披露《非公开发行股票预案》和《发行情况报告书》。对于竞价发行而言，发行对象、发行价格和发行数量等重要信息是在询价过程结束后，上市公司通过《发行情况报告书》才向市场披露的。在竞价发行中，由于上市公司公告《非公开发行股票预案》以及监管部门批文时，并不包括发行对象、发行价格和发行数量等非公开发行的关键信息，因此认为有关上市公司非公开发行的内幕信息在上市公司公告《非公开发行股票预案》和监管批文时就已经向市场完全公开，此后任何交易上市公司股票的行为都不可能构成内幕交易的观点存在较大争议且较难得到执法者的采纳。

还需要注意的是，《证券法》在 2019 年修订时，新增第 83 条"公平披露原则"，要求"信息披露义务人披露的信息应当同时向所有投资者披露，不得提前向任何单位和个人泄露"，同时"任何单位和个人不得非法要求信息披露义务人提供依法需要披露但尚未披露的信息。任何单位和个人提前获知的前述信息，在依法披露前应当保密"。因此，在竞价发行过程中，上市公司、承销商或符合条件参与询价过程的投资人，在上市公司通过《发行情况报告书》披露发行对象、发行价格和发行数量等信息前，提前告知其他投资者的，还可能涉嫌违反公平披露原则，从而导致行政处罚。

三、股票非公开发行中内幕交易的认定

根据《证券法》的规定，有两类主体在知悉内幕信息后不得进行相关股票交易：(1)内幕信息知情人；(2)非法获取内幕信息的人员。其中，"内幕信息知情人"主要指上市公司及其董监高，上市公司股东及其董监高，上市公司收购、重大资产重组交易对手方，以及参与内幕信息形成的人员或者与上市公司存在关联的主体。"非法获取内幕信息的人员"是指以偷听、窃取、骗取等非法方式取得内幕信息的人员，或者与知悉内幕信息的人员存在密切关系、接触联络的人员。对于与知悉内幕信息的人员存在密切关系的人，监管机关重点关注的是内幕信息是否在不同主体之间发生了传递。

在执法实践中，中国证监会在认定是否发生了内幕信息的传递时，可以通过当事人的交易行为、与知悉内幕信息的人员是否存在接触联络等客观证据作出认定。在中国证监会处罚的内幕交易案件中，有超过一半的案件是通过"推定"的方式作出认定[2]

[1] 例如光大证券内幕交易案，中国证监会行政处罚决定书【2013】59 号。

[2] 根据 2013 年至 2019 年中国证监会行政处罚决定统计。详见中国证监会网站：http://www.csrc.gov.cn/pub/zjhpublic/index.htm?channel=3300/3313

此外，在认定与内幕信息相关的交易时间段时，是将内幕信息的形成过程看为一个整体，而不是分割为几个时间段进行判断。

由此可见，在竞价发行过程中，非公开发行的发行对象、发行价格和发行数量等重要信息是在询价过程中形成的。监管部门在调查内幕信息是否发生传递时，是将上市公司和承销商向符合条件的投资者发出认购邀请、投资者提交申购报价直到最终发行对象、发行价格和发行数量的确定，作为完整的内幕信息的形成过程来看待的。对于任何在此期间发生的大额股票交易，如果交易人与各询价参与方存在接触联络的，特别是与收到认购邀请的投资者存在接触联络，并且这些投资者最终获得股份配售的，监管机构有权依据法律规定推定内幕信息在交易人和参与询价的投资者之间发生了传递，从而认定交易人构成内幕交易。

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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