

## 证券法律热点问题

### A 股上市公司相关内幕信息的认定

《证券法》和中国证监会规则对利用 A 股上市公司(以下简称“公司”或“上市公司”)内幕信息从事内幕交易的行为做出了禁止性规定。内幕信息是内幕交易的基本构成要件之一,如果没有内幕信息存在,则相关交易行为就不会构成内幕交易。判断相关信息是否构成内幕信息是基金管理人合规工作的重点之一,为了向基金管理人提供更加清晰的指引,下面我们总结了相关法律法规规定的内幕信息类型。

根据《证券法》第 52 条的规定,内幕信息是指涉及证券发行人“经营”、“财务”或者“对该发行人证券的市场价格有重大影响”且“尚未公开”的信息。《证券法》、《上市公司信息披露管理办法》以及沪深交易所业务规则对内幕信息的类型做出了详细列举。《证券法》和《上市公司信息披露管理办法》还以兜底条款的形式允许中国证监会对上市公司应当披露并且构成内幕信息的信息类型做出进一步规定。

结合中国证监会的执法实践,涉及上市公司的内幕信息主要包括以下几种类型:

#### 一、涉及上市公司的财务信息

涉及上市公司的重大财务信息是一种典型的内幕信息类型。根据《证券法》《上市公司信息披露管理办法》,沪深交易所业务规则以及中国证监会的执法实践,可能构成内幕信息的上市公司财务信息包括:

- (1) 公司年报、季报等定期报告相关财务数据;
- (2) 公司业绩预告、业绩快报、业绩预告更正相关财务数据;
- (3) 公司利润分配方案;
- (4) 公司业绩发生重大变化,特别是公司发生重大亏损或者重大损失,公司产生重大债务、大额赔偿或者未能清偿到期重大债务的违约情况等;
- (5) 涉及公司控股子公司或参股公司的重大收入或亏损,对公司业绩产生较大影响的;
- (6) 公司获得大额政府补贴等可能对公司资产、负债、权益或者经营成果产生重大影响的额外收益;
- (7) 变更会计政策、会计估计;
- (8) 已披露的财务信息存在差错、未按规定披露或者虚假记载,应当进行更正的。

#### 二、涉及上市公司增资、减资、股权激励的信息

上市公司在进行增资、减资以及股权激励的过程中也会产生内幕信息。根据《证券法》第五十二条、第八十条第二款第(九)项和《上市公司信息披露管理办法》第三十条第二款第(九)项、第(十三)项的规定,涉及上市公司增资、减资的信息为内幕信息。在中国证监会执法实践中,涉及上市公司增资事项的内幕信息主要包括公司公开发行或者非

公开发行证券的信息。其中，涉及上市公司非公开发行的内幕交易案件较为常见，在中国证监会最近十年处罚的各类内幕交易案件中，约有 8% 的案件涉及上市公司非公开发行。

此外，涉及上市公司股权激励的信息也是应当注意的内幕信息。《上市公司信息披露管理办法》将“股权激励”规定为应当以临时公告披露的重大信息。中国证监会也在多起案件中，明确将“股权激励”认定为“中国证监会认定的对证券交易价格有显著影响的其他重要信息”，确定了涉及上市公司的“股权激励”信息属于内幕信息。

### 三、涉及上市公司经营的重大信息

除财务信息外，在上市公司的经营过程中也会产生大量的内幕信息。根据法律法规、沪深交易所业务规则以及中国证监会的执法实践，在上市公司经营管理过程中产生的以下信息可能构成内幕信息：

- (1) 公司经营、业务相关的重大信息，如公司的经营方针和经营范围发生重大变化，公司生产经营外部条件发生重大变化，公司主要或者全部业务陷入停顿或者公司取得重要经营业务资格等；
- (2) 涉及公司的重大资产重组，即达到《上市公司重大资产重组管理办法》规定标准的交易；
- (3) 公司订立的重要合同或重大投资行为，即达到沪深交易所业务规则公告披露要求的交易；
- (4) 公司提供重大担保或者从事关联交易，可能对公司的资产、负债、权益和经营成果产生重要影响，即达到沪深交易所业务规则公告披露要求的担保和关联交易；
- (5) 涉及公司存续的重大信息，如公司合并、分立、解散及申请破产的决定或者依法进入破产程序、被责令关闭等；
- (6) 涉及公司的重大诉讼、仲裁，股东大会、董事会决议被依法撤销或者宣告无效。

### 四、涉及上市公司股权结构、控制权变动的重大信息

涉及上市公司股权变更的信息也可能构成内幕信息。根据《证券法》、《上市公司信息披露管理办法》的相关规定，以及中国证监会执法实践，以下涉及上市公司股权结构变化的信息构成内幕信息：

- (1) 上市公司收购的有关方案，包括以协议收购、要约收购或者其他合法方式收购公司股权；
- (2) 持有公司百分之五以上股份的股东或者实际控制人变化，或者其持有股份或者控制公司的情况发生较大变化；
- (3) 法院裁决禁止控股股东转让其所持股份，或者任一股东所持公司 5% 以上股份被质押、冻结、司法拍卖、托管、设定信托或者被依法限制表决权。

### 五、涉及上市公司董事、监事、高级管理人员的重大信息

除与上市公司股权结构、控制权、财务、业务相关的重大信息外，以下涉及上市公司董事、监事、高级管理人员的信息也可能构成内幕信息。

- (1) 公司的董事、三分之一以上监事或者经理发生变动；
- (2) 董事长或者经理无法履行职责；
- (3) 董事、监事、高级管理人员涉嫌违法、违纪、犯罪，被有权机关调查或者采取强制措施。

### 六、涉及上市公司的违法违规行为的重大信息

除董事、监事、高管涉嫌违法、违纪、犯罪受到调查或被采取强制措施的信息可能构成内幕信息外，涉及公司或者公司实际控制人的违法违规信息也可能构成内幕信息。

- (1) 公司涉嫌违法违规或犯罪被有权机关调查；
- (2) 公司受到刑事处罚、重大行政处罚；
- (3) 公司的控股股东、实际控制人涉嫌犯罪被依法采取强制措施。

### 七、涉及上市公司实际控制人的重大信息

根据《证券法》、《上市公司信息披露管理办法》

的规定，涉及上市公司实际控制人的以下信息构成内幕信息：

- (1) 实际控制人变更，或者其持有股份或者控制公司的情况发生较大变化(参见第四条第(2)项)；
- (2) 公司的实际控制人及其控制的其他企业从事与公司相同或者相似业务的情况发生较大变化。

## 八、涉及上市公司控股子公司、参股公司的重大信息

根据《上市公司信息披露管理办法》的规定，上市公司的控股子公司、参股公司发生对公司证券及其衍生品价格产生较大影响的事件时，上市公司应当履行信息披露义务。在中国证监会的执法实践中，也出现过多起利用上市公司控股子公司、参股公司重大信息的内幕交易案件。

虽然现行法律法规对上市公司控股子公司、参股公司的内幕信息类型没有做出明确规定，但根据《证券法》、《上市公司信息披露管理办法》以及沪深交易所业务规则的信息披露要求，并结合中国证监会的执法实践，可以参考以下标准判断涉及控股子公司、参股公司的重大信息是否构成内幕信息：

- (1) 对控股子公司适用上市公司内幕信息的认定标准，即适用于上市公司的内幕信息类型也同样适用于控股子公司；特别是涉及控股子公司财务、业务的重大信息，并且该信息可能对上市公司合并报表后的财务数据或者上市公司的业务、业绩造成重大影响的；
- (2) 对参股公司重点关注财务、业务方面的重大信息，特别是该信息可能对上市公司的业务、业绩造成重大影响的。

## 九、其他涉及上市公司的重大信息

现行《证券法》(2019年修订)对内幕信息的定义进行了调整。在原《证券法》(2005年修订)第七十五条的规定下，除上市公司按照《证券法》规定应当以临时公告披露的重大信息构成内幕信息外，中国证监会有权认定“对证券交易价格有显著影响的其他重要信息”为内幕信息。即在原《证券法》(2005年修订)的规定下，涉及上市公司的内幕信息包括法律法规明确列举内幕信息，以及中国证监会认定的其他重大信息。因此在光大证券内幕交易案中(2013-59号)，中国证监会行使了裁量权，以“重大性”和“未公开性”的标准，认定光大证券错单交易的信息为内幕信息。

而现行《证券法》(2019年修订)的相关条文取消了对中国证监会可以认定“对证券交易价格有显著影响的其他重要信息”为内幕信息的规定，并以“国务院证券监督管理机构规定的其他事项”作为认定内幕信息的兜底条款。因此有观点认为，根据现行法律法规，内幕信息的类型只能由法律法规明确规定，中国证监会不再具有认定内幕信息的裁量权。

值得注意的是，《证券法》以及《上市公司信息披露管理办法》对所列举的内幕信息类型规定的较为概括，而法律法规以及沪深交易所业务规则对上市公司应当公告披露的重大事项做出了大量、细致的规定。尽管存在明确规定的纷繁复杂的披露要求和披露事项，亦不排除在特殊案件中，中国证监会仍可能适用“重大性”和“未公开性”的标准，认定未明确的信息亦属于内幕信息的范畴。

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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## Financial

### Determination on Insider Information Relating to A-share Listed Company

The Securities Law and the CSRC regulations stipulate prohibitions on activities utilizing insider information of an A-share listed company (“Company” or “Listed Company”) for insider trading. Insider information is one of the fundamental elements of insider trading, without which the relevant trading activities should not constitute insider trading. To provide fund managers with clearer guidance and assist fund managers’ compliance team to identify insider information, below we summarize the major categories of insider information prescribed by laws and regulations.

Pursuant to Article 52 of the Securities Law, insider information shall refer to non-public information that involves “operating” and “finance” of the issuer or having significant impact on the market price of the issuer’s securities. The *Securities Law*, the *Administrative Measures for Information Disclosure of Listed Companies* (“Administrative Measures”) and the rules of both the Shanghai Stock Exchange (SSE) and the Shenzhen Stock Exchange (SZSE) enumerate the categories of insider information in detail. The Securities Law and the Administrative Measures also authorize, in the form of miscellaneous clauses, the CSRC to further specify the categories of information which shall be disclosed by a Listed Company and therefore shall

constitute insider information before it is disclosed to public.

Based on our observations of the law enforcement practices of the CSRC, insider information relating to a Listed Company shall mainly include the following categories:

#### **I. Financial Information Relating to a Listed Company**

Major financial information relating to a Listed Company shall constitute a typical category of insider information. According to the Securities Law, the Administrative Measures, the rules of both SSE and SZSE and the law enforcement practices of the CSRC, financial information relating to a Listed Company that may constitute insider information shall include:

- (1) Relevant financial data in the annual report, quarterly report and other periodic reports of the Company;
- (2) Relevant financial data in performance preannouncement, performance bulletin and the restatement of the performance preannouncement of the Company;
- (3) Profit distribution plan of the Company;



- (4) Major changes in the Company's performance, especially incurrence of serious deficits or serious losses, or incurrence of major debts or large claims and defaults on repayment of large debts which are due;
- (5) Major revenue or losses of the Company's controlling subsidiaries or equity participation companies, which cast significant impact on the performance of the Company;
- (6) Receiving additional revenue such as large government subsidies that may have a significant impact on the Company's assets, liabilities, equity interests or operational achievements;
- (7) Changes in accounting policies and accounting estimates;
- (8) Any false or untrue statement in the disclosed financial information, or any failure to disclose in accordance with regulations, which shall be corrected.

## **II. Information Relating to Capital Increase, Capital Reduction and Stock Incentive of a Listed Company**

Insider information may be generated in a capital increase, capital reduction or stock incentive of a Listed Company. Pursuant to Article 52 and Article 80, Paragraph 2, Item (9) of the Securities Law and Article 30, Paragraph 2, Item (9) and (13) of the Administrative Measures, information relating to capital increase and capital reduction of a Listed Company shall constitute insider information. In the law enforcement practices of the CSRC, insider information relating to capital increase of a Listed Company mainly includes information of public offering of shares or non-public offering of shares. Insider trading cases involving non-public offering of Listed Company are relatively common. Among all types of insider trading cases penalized by the CSRC in

the past ten years, approximately 8% of such cases arise from non-public offering of Listed Companies.

In addition, information relating to stock incentive of a Listed Company may also constitute insider information. The Administrative Measures stipulates that "stock incentive" of a Listed Company shall constitute major information that shall be disclosed in an interim public announcement. The CSRC, in a couple of sanctioned cases determined that "stock incentive" shall be considered inside information for falling into the scope of "other major information that the CSRC deems as having a significant impact on the trading price of shares."

## **III. Major Information Relating to Operation of a Listed Company**

In addition to financial information, a large amount of insider information may be generated in the operation of a Listed Company. According to laws, regulations, the rules of both SSE and SZSE and the law enforcement practices of the CSRC, the following information generated in the operation and management of a Listed Company may constitute insider information:

- (1) Major information in relation to operation or business of a Company, i.e. significant change in the operational guidelines and business scope of the Company; significant change in external conditions of the Company's business operations; the suspension of the primary business or all business of the Company or the Company's acquisition of important business qualifications, etc.;
- (2) Transactions relating to a Company's major asset restructuring, meeting the standards prescribed in the *Administrative Measures for Major Asset Restructuring of Listed Companies*;

- (3) Entering into significant contracts or making significant investments, namely, transactions which trigger the public disclosure requirements stipulated by the rules of both SSE and SZSE;
- (4) Providing a major guarantee or engaging in related-party transactions which may have significant impact on the Company's assets, liabilities, equity interests and operational achievements, namely, guarantee and related-party transactions that trigger the public disclosure requirements stipulated by the rules of both SSE and SZSE;
- (5) Major information relating to the Company's existence, such as decisions on mergers, divisions, dissolutions and applications for bankruptcy, or being in bankruptcy proceedings or ordered to close down pursuant to laws, etc.;
- (6) Major litigation or arbitration involving the Company, or resolution of the general meeting of shareholders or the board of directors is revoked or declared to be invalid in accordance with laws.

#### **IV. Major Information Relating to Changes in Shareholding Structure or Controlling Ownership of a Listed Company**

Information relating to change in shareholding of Listed Company may also constitute insider information. According to the Securities Law, the Administrative Measures and the law enforcement practices of the CSRC, the following information relating to change in the shareholding structure of a Listed Company shall constitute insider information:

- (1) Relevant plans for acquisition of a listed company, regardless the method of acquisition such as acquisition by agreement, tender offer or other lawful means;

- (2) Changes of de facto controller or shareholder who holds more than 5% of the company's shares, or any significant change in their shareholding or controlling ownership;
- (3) Receiving any order from the court that prohibits the Company's controlling shareholder from transferring shares; or 5% or more of the Company's shares held by any shareholder are pledged, frozen, judicially auctioned, placed in custody, held under trust or the voting rights attached to such shares are restricted for exercise in accordance with laws;

#### **V. Major Information Relating to Director, Supervisor or Senior Executive of a Listed Company**

Besides the relevant major information relating to shareholding structure, controlling ownership, finance and operation of a Listed Company, the following information relating to Listed Companies' directors, supervisors and senior executives may also constitute insider information:

- (1) Change of director, one-third or more of supervisors or managers;
- (2) Chairman of board of directors or general manager being incapable of performing his/her duties;
- (3) A director, supervisor or senior executive is under investigation or subject to enforcement measures imposed by a competent authority for a suspected violation of laws or disciplines or crime.

#### **VI. Major Information Relating to Violation of Law or Regulation by a Listed Company**

Besides the information regarding investigation or enforcement measures imposed on directors, supervisors or senior executives for their

suspected violation of laws and disciplinary rules or suspected crimes that may constitute insider information, the information relating to violation of laws and regulations by the Company or its de facto controller may also constitute insider information.

- (1) The Company is under investigation by a competent authority for a suspected violation of laws and regulations or crime;
- (2) The Company is subject to criminal penalty or severe administrative penalty;
- (3) The Company's controlling shareholder or de facto controller is subject to enforcement measures for a suspected crime.

## **VII. Major Information Relating to De Facto Controller of a Listed Company**

According to the Securities Law and the Administrative Measures, the following information regarding a Listed Company's de facto controller shall constitute insider information:

- (1) Change of de facto controller, or significant change of its shareholding or controlling stake (see Article 4, item (2));
- (2) Significant changes in business undertaken by the Company's de facto controller or other enterprises it controls, which is identical or similar to the Company's business.

## **VIII. Major Information Relating to a Listed Company' Controlling Subsidiary or Equity Participation Company**

According to the Administrative Measures, where an event occurs in a Listed Company's controlling subsidiaries or equity participation companies, which may have significant impact on the prices of the Company's securities and securities derivatives, the Listed Company shall perform its information disclosure obligation. In the past law

enforcement of the CSRC, the CSRC has penalized several insider trading cases concerning major information of the Listed Company's controlling subsidiaries or equity participation companies.

The current laws and regulations do not stipulate detailed circumstances of insider information related to a Listed Company's controlling subsidiaries or equity participation companies. However, according to the Securities Law, the Administrative Measures, the rules of both SSE and SZSE and according to past law enforcement practices of the CSRC as we have observed, the following criteria can be referred to in determining whether major information involving the Listed Company's controlling subsidiaries or equity participation companies constitutes insider information:

- (1) Applying the same standard for determining insider information for the Listed Company to its subsidiaries. That is, the categorization of insider information applicable to the Listed Company shall apply to its subsidiaries, especially for the major information involving the finance and business of the subsidiaries, which may have significant impact on the financial data in consolidated financial statements or business and performance of the Listed Company;
- (2) As for a company invested but not controlled by a Listed Company, focusing on the major information relating to the finance or business of such equity participation company, especially the information that may have significant impact on the business and performance of the Listed Company.

## **IX. Other Major Information Relating to a Listed Company**

The current Securities Law (amended in 2019) introduced certain changes to the definition of "insider information" under the old Securities Law.

Under Article 75 of the old Securities Law (amended in 2005), the CSRC was given the discretion to determine “other major information that has significant impact on trading prices of securities” as insider information, beyond the major information disclosed in the interim public announcement by Listed Companies defined as insider information by the old Securities Law. That means, under the provisions of the old Securities Law (amended in 2005), insider information shall include both (i) the insider information explicitly prescribed by laws and regulations and (ii) other major information identified by the CSRC as insider information. Consequently, in the Everbright Securities insider trading case (Case No. 2013-59) sanctioned according to the old Securities Law, the CSRC exercised its discretion to determine the information related to “fat finger” orders by Everbright Securities as insider information based on the criteria of “materiality” and “non-disclosure”.

The relevant provisions of the current Securities Law (amended in 2019), however, changed the provision that the CSRC has the discretion to determine “other major information that has a significant impact on the securities trading price” as insider information while providing “other matters stipulated by the securities regulatory

authority under the State Council” as the miscellaneous clause for identifying insider information. Some may argue that under the current laws and regulations, only the laws and regulations can specify the categories of insider information while the CSRC no longer has any discretion to identify insider information.

It is worth noting that the provisions enumerating the categories of insider information in the Securities Law and the Administrative Measures are relatively general, and the laws, regulations and the rules of both SSE and SZSE provide a large number of detailed provisions on the major circumstances and events which shall be publicly disclosed by a Listed Company. Despite of all given complicated circumstances and events stipulated under the laws and regulations, the possibility cannot be ruled out that the CSRC may still, in certain cases, apply the standards of “materiality” and “non-disclosure” to determine the relevant information that is not explicitly stipulated as falling into the scope of insider information.

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

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