

October 2018



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CAPITAL MARKET / 资本市场

Code of Corporate Governance for Listed Companies (2018 Edition) Released **2018版《上市公司治理准则》发布**

9月30日，证监会公布2018版的《上市公司治理准则》（“新《准则》”），这是2002版《准则》施行16年以来的首次修订，在保留上市公司治理主要规范的基础上，适应境内外市场变化和公司治理发展趋势，增加了一系列新要求。具体而言，新《准则》主要有以下要点值得关注：

1. 新增机构投资者参与公司治理的章节。为回应实践中资本市场投资者结构的变化，新《准则》新增第七章“机构投资者及其他相关机构”，以鼓励和规范机构投资者参与公司治理、依法行使股东权利。具体而言，机构投资者可以通过依法行使表决权、质询权、建议权等股东权利、依照法律法规和公司章程参与公司重大事项决策、推荐并监督董事、监事等方式参与公司治理。
2. 进一步突出对中小投资者合法权益的保护。新《准则》中多处强调对中小投资者的保护：如要求确保股东得到公平对待；上市公司应积极回报股东，公司章程中应当明确利润分配办法尤其是现金分红政策，具备条件而不进行现金分红的要充分披露原因。此外，新《准则》在多个方面加强了对上市公司控股股东、实际控制人的约束，以改善实践中部分控股股东、实际控制人滥用控制地位、损害中小股东合法权益的情况。
3. 规范控制权变动时的公司治理问题。针对实践中频发的上市公司控制权争夺情况，新《准则》新增了有关控制权发生变更时的公司治理相关规范，要求各方采取有效措施保证公司在过渡期内能够稳定经营，出现重大问题应及时向中国证监会、证券交易所报告。同时，为避免上市公司使用反收购措施引发争议，新《准则》还新增了上市公司不得利用章程和相关决议剥夺或限制法定权利的原则性规定。
4. 确立环境、社会责任和公司治理（ESG）信息披露的基本框架。新《准则》规定上市公司应当披露环境信息、履行社会责任相关的情况及公司治理相关信息，并定期分析公司治理状况，确立了ESG信息披露的基本框架，意图与国际资本市场中通行的ESG规则保持同步。

此次对于上市公司治理基础规范的修订解决及回应了实践中资本市场及上市公司治理领域存在的难题及新的需求。证监会表示，下一步会继续研究完善相关规章、规范性文件，指导制定、修改相关自律规则，以逐步完善上市公司治理规则体系。我们将对此保持持续关注。

The China Securities Regulatory Commission (“CSRC”) released the *Code of Corporate Governance for Listed Companies (2018 Edition)* (the “New Code”) on September 30th. This is the first revision of the Code since its debut in 2002, which adds plenty of new provisions to adapt to the changes in both domestic and foreign markets and the development trend in corporate governance, while in the meantime maintaining the core substance of the previous Code. Set forth below are some major changes adopted by the New Code:

1. Added new Chapter on institutional investors’ participation in corporate governance. In response to market changes in the structure of investors in the capital market, the New Code adds a new Chapter 7, “institutional investors and other organizations”, to encourage and regulate institutional investors to participate in corporate governance and exercise shareholders rights under applicable law. Specifically, institutional investors would be able to take part in corporate governance by exercising their rights to vote, rights to inquire, rights to submit proposals and other shareholders rights, participating in major corporate decision makings in accordance with laws, regulations and the articles of association, nominating and supervising directors and supervisors, and etc.
2. Enhanced protection for small and minority investors’ lawful interests. The New Code enhances protection for small and minority investors’ legitimate rights and interests in many ways. It stipulates that all the shareholders should be treated fairly; listed companies should actively repay and reward their shareholders, and the articles of association should specify the profit distribution method, especially the cash dividend policy, and fully disclose the reasons for not carrying out any cash dividend distribution if all other conditions are met. In addition, the New Code enhances in various aspects the restrictions for controlling shareholders and/or actual controlling parties of listed companies to improve the situations where some controlling shareholders and/or actual controlling parties could abuse their controlling position to harm the interests of minority shareholders in practice.
3. Regulated corporate governance in change of control situations. In view of the frequent competition for control rights over listed companies in practice, the New Code adds relevant provisions to specifically govern change of control situations, requiring all parties to take effective measures to ensure the stable operation of the underlying company during the transitional period, and to report to the CSRC and relevant stock exchange timely when any major problem arises. In the meantime, in order to avoid disputes arising from the use of anti-takeover measures by listed companies, the New Code further adopts general provisions stating that listed companies may not deprive or restrict the legal rights of shareholders by means of their articles of association and/or any related resolutions.
4. Established basic framework for information disclosure on environment, social responsibility and corporate governance (ESG). The New Code stipulates that listed companies should disclose information on environment, fulfillment of social responsibility and corporate governance and regularly analyze their corporate governance status, establishing the basic framework for ESG information disclosure, with an aim to keep pace with the prevailing ESG practice in the international capital market.

This year’s revisions have responded to new challenges and

market demands in the area of capital market practice and corporate governance concerning listed companies. The CSRC indicates that they will continue to study and improve the relevant rules and regulations and guide the formulation and revision of relevant self-disciplinary rules to gradually improve the corporate governance system and structure for listed companies. We will continue to monitor the regulatory developments in this connection.

COMPANY LAW / 公司法

Draft Amendments to the Company Law Amended Provisions on Share Repurchase 《公司法修正案》草案修改股份回购相关规定

9月6日，证监会会同多部门发布了《中华人民共和国公司法修正案（草案征求意见稿）》（“《修正案》草案”）并向社会公开征求意见。

《修正案》草案对现行《公司法》第142条规定的四种股份回购情形进行了扩充，并完善了相关的决策程序。在原本规定的基础上，《修正案》草案修改一种、新增三种公司可以进行股份回购的情形：(i)用于员工持股计划或股权激励的（替代“将股份奖励给本公司职工”的旧规定）；(ii)上市公司为配合可转债、认股权证的发行用于股权转换的；(iii)上市公司为维持公司信用及股东权益所必需的；及(iv)法律、行政法规规定的其他情形。在上述前三种情形下，董事会可以依照公司章程或股东大会授权做出股份回购的决议，回购的上限为公司已发行股份总额的百分之十。相关股份可以转让、注销或以库存方式持有（以库存方式持有的，持有期限不超过三年）。

本次《修正案》草案的起草主要是为了解决目前对上市公司股份回购限制较多的现实情况，即，股份回购情形有限且决策程序不够简便，导致实践中上市公司回购股份的积极性不高，股份回购制度的应有功能作用没有得到充分发挥。我们会对《修正案》草案的后续修改及正式发布保持持续关注。

On September 6, 2018, the CSRC, together with several other central government ministries, issued the *Draft Amendments to the Company Law* (the “Draft”) to solicit public comments.

The Draft extends the four share repurchase situations currently provided under Article 142 of the Company Law and improves the relevant decision-making procedures. On the basis of the original provisions, the Draft amends one and adds three situations in which companies may repurchase their shares: (i) for employee stock ownership plans or equity incentives (to substitute the old rule on share rewards to employees), (ii) for equity conversion of convertible bonds and warrants issued by listed companies, (iii) as a necessity for listed companies to maintain company credit and shareholders’ equity, and (iv) other situations provided by the laws and regulations. Under the first three situations, the board of directors of the company may adopt such resolutions on share repurchase in accordance with the company’s articles of association or the authorization by the general meeting of shareholders. The maximum repurchase limit is 10% of the total issued shares of the company. Relevant shares may be transferred, canceled or held in stock as treasury shares (if held in stock as treasury shares, the holding period shall however not exceed three years).

The Draft mainly targets to improve the current situation where the share repurchase of listed companies is rather limited in practice and the decision-making procedure is not streamlined enough, which leads to the low incentive for listed companies to repurchase their shares and inadequate use of the share repurchase function under the current legal framework. We will continue to monitor and update on this revision process.

E-COMMERCE / 电子商务

PRC E-Commerce Law Officially Released

在经历了四次审议后，《电子商务法》（“《电商法》”）于2018年8月31日正式出台，并将于2019年1月1日起施行，除互联网金融、通过互联网提供音视频、出版及文化产品等少数类别服务外，其他通过互联网等信息网络进行商品或服务交易的经营行为都将纳入电商法的调整范围。《电商法》主要具有如下亮点：

1. 将电子商务经营者区分为电子商务平台经营者、平台内经营者、通过自建网站销售商品或者提供服务的电子商务经营者及通过其他网络服务销售商品或者提供服务的电子商务经营者四类，并对电子商务经营者提出了工商登记、

《电子商务法》正式出台

After four rounds of deliberations, the *E-Commerce Law* was formally released on August 31, 2018 and will come into force on January 1, 2019. Except for certain services such as Internet finance and provision of audio and video services, publication and cultural products through the Internet, all other business activities involving provision of commodities and services through information networks will fall under the jurisdiction of the *E-Commerce Law*. We have summarized below some highlights of this new law:

1. E-commerce operators are divided by this new law into four categories: platform operators, in-platform operators, operators through self-built websites, and other operators. General provisions on registrations with industry and commerce authorities, tax payments and maintenance of valid licenses (if applicable) have been set out clearly. In principle, e-commerce operators are all required to be properly registered with competent industry and commerce

依法纳税、依法取得牌照（如需）的原则性要求。电子商务经营者原则上均需进行工商登记并纳税，以解决实践中大量个人网店处于工商和税务机关监管范围之外的情况。

2. 规定电子商务平台经营者的特殊义务。鉴于电商平台涉及到平台经营者、平台内经营者（即第三方商家）及消费者等多方主体，《电商法》对平台经营者附加了特殊的义务和责任，主要包括审核平台内经营者的资质及对其日常经营行为进行一定的管控。若电子商务平台经营者知道或应当知道平台内经营者提供的商品或服务侵害消费者权益而不采取必要措施，应和平台内经营者承担连带责任。此外，电商平台在用户实名制、市场主体登记、税收征管、网络安全、知识产权保护等环节应对有关主管部门的工作予以一定配合。
3. 确立电商行业反垄断规则。在现有反垄断立法基础上，《电商法》原则性规定了，电子商务经营者的“技术优势、用户数量、对相关行业的控制能力以及其他经营者对该电子商务经营者在交易上的依赖程度”等因素可以作为认定其市场支配地位的考虑要素，这一反垄断规则也是对我国电子商务行业巨头高度集中的现实情况的回应。

《电商法》作为我国电子商务领域的基本法，回应了近年来电子商务领域中存在的热点问题与规范需求，为电子商务行业的发展和电子商务平台的运行提供了指引与规范。

authorities and to pay taxes applicable to them, which hopefully could help deal with the current situation where a large number of individual online stores are still operating outside the scope of effective government supervisions.

2. Platform operators will bear special obligations according to this new law. In view of the fact that e-commerce platforms normally would involve platform operators, in-platform operators (i.e., third-party merchants) and consumers and other parties, the E-Commerce Law attaches special obligations and responsibilities to the platform operators, mainly including the duty to examine the qualifications of the in-platform operators and to monitor and control their daily operations. If a platform operator knows (or should have known) that the goods or services provided by any in-platform operator have infringed the rights and interests of consumers but fails to take necessary measures, such platform operator will need to bear joint liabilities with the in-platform operator concerned. In addition, the e-commerce platform should cooperate with relevant government authorities in such areas as true identity rule, market participant registration, tax collection and management, network security, intellectual property protection and so on.
3. The new law establishes antitrust rules for the e-commerce industry. Based on the existing PRC antitrust legislation, the E-Commerce Law stipulates in principle that the factors such as the technological advantages, the number of users, the ability to control the relevant industry sectors and the dependence of other operators on the transactions of any specific e-commerce operator can all be taken into consideration when determining whether a dominant market position by such an e-commerce operator has been constituted. This antitrust rule is a response to the high concentration reality by a few e-commerce industry giants in China.

As a basic law in the field of e-commerce in China, the E-Commerce Law has responded to some of the hottest issues and regulation requirements in the industry, and provided guidance for the further development of the e-commerce industry and the orderly operation of various e-commerce platforms.

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