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CAPITAL MARKET / 资本市场

CSRC Relaxed Restrictions on Refinancing by Listed Companies 证监会发布上市公司再融资新规

2020年2月14日，中国证券监督管理委员会（“证监会”）发布了《关于修改〈上市公司证券发行管理办法〉的决定》、《关于修改〈创业板上市公司证券发行管理暂行办法〉的决定》、《关于修改〈上市公司非公开发行股票实施细则〉的决定》以及修订后的《发行监管问答——关于引导规范上市公司融资行为的监管要求》（合称“再融资新规”），自发布之日起施行。再融资新规主要通过以下几个方面的重大变更，显著放宽了对主板(包括中小板)、创业板上市公司发行股票的监管要求（有关再融资新规的修订细节及实务影响分析，请见我所2020年2月16日发布的《证监会发布再融资新规、多举措鼓励PIPE》）：

1. 提高发行数量及认购对象人数限额。再融资新规适当放松了非公开发行股票的数量限制，由不超过此次交易前上市公司总股本的20%，改为不超过此次交易前上市公司总股本的30%；并将主板和创业板非公开发行股票的认购对象数量由分别不超过10名和5名，统一调整为不超过35名。
2. 简化创业板再融资发行条件。再融资新规取消了创业板公开发行证券最近一期末资产负债率高于45%的条件，以及创业板非公开发行股票连续2年盈利的条件；并将创业板前次募集资金基本使用完毕，且使用进度和效果与披露情况基本一致由发行条件调整为信息披露要求。
3. 优化非公开制度安排。再融资新规(i)放宽了非公开发行定价和锁定机制，将主板和创业板非公开发行股票的价格由不低于定价基准日前20个交易日公司股票均价的90%调低到80%，将一般发行对象的锁定期由12个月缩减到6个月，将控股股东、实际控制人及其控制的企业作为发行对象的锁定期由36个月缩减到18个月，且不适用减持规则的相关限制；且(ii)支持上市公司引入战略投资者，对于上市公司董事会决议提前确定全部发行对象且为战略投资者等的，定价基准日可以为关于本次非公开发行股票的董事会决议公告日、股东大会决议公告日或者发行期首日。

此外，再融资新规还在加强对“明股实债”行为的监管、延长再融资批文有效期（从6个月延长至12个月）、“新老划断”规则适用等方面作出了具体规定。值得注意的是，虽然新《证券法》规定证券发行实施注册制，但再融资新规中依然保留了“证监会核准”的要求，证监会对此作出的解释是“预计创业板尤其是主板（中小板）实施注册制尚需一定的时间，新《证券法》施行后，这些板块仍将在一段时间内继续实施核准制，核准制和注册制并行与新《证券法》的相关规定并不矛盾”。我们理解，实践中，不排除证监会可能会加快再融资核准的时间的可能性，以实现向注册制

On February 14, 2020, the China Securities Regulatory Commission (or CSRC) issued the revised versions of the *Administrative Measures for the Issuance of Securities by Listed Companies*, the *Interim Administrative Measures for the Issuance of Securities by Listed Companies on the Growth Enterprise Market* and the *Implementing Rules for Private Placement of Shares by Listed Companies* as well as the amended *Questions and Answers to the Regulatory Requirements for Guiding and Regulating Financing Activities by Listed Companies* (collectively, the “New Refinancing Rules”), which all have taken effect from the date of issuance. The New Refinancing Rules have significantly eased the regulatory requirements for refinancing on the Main Board (including the Small and Medium-Sized Enterprise Board or SME) and the Growth Enterprise Market (or GEM), by introducing major revisions as we highlighted below (please also refer to our *Memo on the New Refinancing Rules and How it May Promote Private Investments in Public Equities* published on February 16, 2020 for detailed analyses):

1. Relaxing restrictions on scales of issuance and targeted parties. According to the New Refinancing Rules, the total number of privately placed shares by a listed company in refinancing could reach up to 30% of its total shares before refinancing, increasing 10% from 20% as stipulated before. In addition, the upper limit on numbers of targeted investors in such a private placement is also increased to 35 universally on the Main Board and GEM, from the previous limit of 10 and 5 respectively.
2. Simplifying qualifications for refinancing on GEM. For refinancing on GEM, the New Refinancing Rules have (i) removed the requirement that the candidate company in a public offering shall have an asset-liability ratio above 45 percent; and (ii) canceled the precondition requirement that the candidate company in a private placement shall be profitable for the past two consecutive years. Further, a GEM-listed company is now allowed to take refinancing with appropriate information disclosure before its proceeds raised from last round of financing have substantially been used up in accordance with disclosed schedule and purposes.
3. Optimizing private placement mechanism. Under the New Refinancing Rules, (i) companies are given more flexibility in pricing through private placements - the issuing price can be as low as 80% (compared to 90% previously) of the average price of their stocks in the previous 20 trading days. Meanwhile, the lock-up period for privately placed shares are also shortened - for general investors, it is shortened from 12 months to 6 months, while for controlling shareholders, the ultimate controlling parties and other entities under their control, it is shortened from 36 months to 18 months with no more restrictions on shareholding reduction; and (ii) to facilitate strategic investments, the base date for pricing in a private placement towards strategic investors can be the date when the resolutions of the board of directors or shareholders' meeting is announced or the first day of the relevant placement period.

Moreover, the New Refinancing Rules have also addressed issues including, among others, the reinforced regulations on private placements with guaranteed returns, the extended term of validity of government approvals over refinancing from 6 months to 12 months, and the application of the new rules in the transitional period. It is also noteworthy that although the New Securities Law has explicitly promoted the establishment of the registration-based securities issuance system, the New Refinancing Rules still require the issuance of shares by listed

的过渡。

companies to be subject to approvals from CSRC, claiming that the implementation of a registration-based system is a gradual process and the current approval-based system will still apply in the Main Board and GEM for a period of time. Nonetheless, CSRC is expected to shorten the approval process of refinancing by listed companies to expedite the transition to the registration-based securities issuance system.

Supporting Rules Launched to Implement New Securities Law 新《证券法》正式施行，配套规则相继出台

2020年3月1日，新《证券法》正式实施。为稳步落实新规要求，国务院、证监会、沪深交易所等在新《证券法》正式施行前后相继颁布了一系列配套规则，主要从以下几个方面为《证券法》新旧衔接及后续工作安排提供了指引：

1. 分步推进股票公开发行注册制改革。作为此次《证券法》修订的一大要点，新《证券法》规定证券公开发行实施注册制，并授权国务院对注册制的具体范围、实施步骤进行规定。国务院办公厅于2月29日印发了《关于贯彻实施修订后的证券法有关工作的通知》，其中就分步实施股票公开发行注册制改革主要提出以下工作部署：证监会要会同有关方面，进一步完善科创板相关制度规则，提高注册审核透明度，优化工作程序；研究制定在创业板试点注册制的总体方案，并适时提出在其他板块和国务院批准的其他全国性证券交易场所实行注册制的方案，报经国务院批准后实施，在此之前将继续实行核准制。

3月1日，沪深交易所纷纷发布公告，深圳证券交易所（“深交所”）表示要推进创业板改革并试点注册制，充分借鉴科创板成功经验，推动制定在创业板试点股票公开发行注册制总体方案。上海证券交易所也提出，将根据新《证券法》的精神和注册制改革要求，进一步完善科创板发行上市审核标准，细化科创板定位把握标准、优化科创属性论证程序。

2. 全面实施公司债券公开发行注册制。根据新《证券法》要求，公开发行公司债券应当依法经证监会或者国家发展改革委注册。证监会发布的《关于公开发行公司债券实施注册制有关事项的通知》进一步明确，自3月1日起，公司债券公开发行实行注册制，由证券交易所负责受理、审核，沪深交易所也相继发布《公开发行公司债券实施注册制相关业务安排的通知》，进一步明确公开发行公司债券实施注册制的相关安排。

3. 其他配套制度建设。为贯彻执行新《证券法》关于上市公司信息披露等相关规定，沪深交易所于2月28日分别发布了做好上市公司信息披露相关工作的通知，从董监高职责、重大事件披露、权益变动披露等十个方面强调做好上市公司信息披露工作。此外，为贯彻落实新《证券法》，深交所还于同日修订发布了《深圳证券交易所上市公司规范运作指引》，同时适用于

In order to fully implement the New Securities Law which takes effect on March 1, 2020, the State Council, CSRC, the Shanghai Stock Exchange (or SSE) and the Shenzhen Stock Exchange (or SZSE) have issued a batch of supporting rules recently, providing guidance for a smooth transition as well as subsequent work arrangements. We have summarized a few key aspects as follows:

1. Phase-in application of registration-based public stock offerings. As one of the major revisions to the previous regulations, the New Securities Law has set out the legal basis for a phase-in registration-based reform across the entire capital market. The State Council is authorized to determine the scope and schedule of this reform. On February 29, the General Office of the State Council issued the *Notice on Works Related to Implementation of the New Securities Law*, making it clear that the registration-based reform for publicly issued stocks will be carried out by following the next key steps: in addition to optimizing work procedures, improving transparency and regulation of stock registrations on the Science and Technology Innovation Board (or STAR Market), CSRC shall also study and formulate pilot plans to apply the registration-based system on GEM and other national stock exchanges approved by the State Council. Subject to such approvals from the State Council, the existing approval-based system shall still apply.

On March 1, both SSE and SZSE published notices in relation to the above work arrangements. SZSE expressly stated that it will make effort to promote the reform of GEM and the formulation of pilot plans to apply the registration-based system in GEM based on the successful experience of the STAR Market, while SSE also announced that it will further improve the examination and approval criteria of stocks on the STAR Market pursuant to the New Securities Law and the requirements of the registration-based reform.

2. Full implementation of registration-based system for public offerings of corporate bonds. As stipulated by the New Securities Law, public offerings of corporate bonds should be registered with CSRC or the National Development and Reform Commission wherever applicable. The *Notice on Matters Concerning the Implementation of the Registration System for Public Offering of Corporate Bonds* circulated by CSRC on March 1, 2020 with immediate effect has further specified that public offerings of corporate bonds will be subject to the registration system. The applications will be submitted to and examined by the applicable securities exchange with reports to CSRC. In addition, SSE and SZSE also published work plans to launch this registration-based system.

3. Promulgation of supporting rules. To implement the information disclosure requirements for listed companies stipulated by the New Securities Law, SSE and SZSE have released notices respectively to emphasize the responsibilities of board of directors, supervisors and senior management team members, the disclosure requirements of major events and ownership changes, among others. Moreover, SZSE has published its amended *Guidelines for Standardized Operation of Listed Companies*, consolidating guidelines respectively applied

在深交所主板、中小企业板上市的公司，将原主板和中小板两件规范运作指引“合二为一”。

to companies listed on the Main Board and on SME in the past.

CIVIL LAW / 民法

Various Measures Adopted to Tackle Coronavirus Epidemic 国家出台一系列新冠疫情应对政策

为应对新型冠状病毒感染肺炎疫情（“新冠疫情”）的爆发，我国政府近期发布了一系列相关法规政策，涉及推动在线医疗行业发展（例如，将符合条件的在线医疗服务费用纳入医保支付）、加速再融资新规的落地、阶段性减免企业社会保险费、制定税收优惠政策等多个方面，旨在做好疫情防控工作，并最大限度减少疫情对经济、企业及居民的不利影响。

值得注意的是，新冠疫情的爆发及国家为此采取的防控措施对一些主体履行合同（包括股权投资合同、跨境投资项目等）造成了困难，并可能导致延期履行、履行不能等违约风险(关于新冠疫情对股权投资合同影响的具体分析，请见我所2020年2月12日发布的《新冠疫情对股权投资合同履行影响的初步探讨》)。根据现行法律法规，如新冠疫情被认定为不可抗力（即“不能预见、不能避免并不能克服的客观情况”），则相关合同主体一般可以部分或全部免除违约责任，当因不可抗力的影响导致合同目的不能实现时，可以解除合同。与此相关，上海市高级人民法院近期发布的一系列《关于涉新冠肺炎疫情案件法律适用问题的系列问答》对涉及新冠肺炎疫情的合同适用不可抗力的问题作出了法律指引，明确了对因此不能履行合同或不能及时行使权利的，新冠肺炎疫情发生宜认定属于不能预见、不能避免并不能克服的不可抗力，但主张按不可抗力要求解除合同的难度相对较高，鼓励当事人按约履行或变更合同。此外，商务部印发的《关于应对新冠肺炎疫情做好稳外贸稳外资促消费工作的通知》明确提出支持相关机构为外贸企业和境外项目实施主体出具因疫情导致未能按时履约的不可抗力事实性证明。

Since the outbreak of the Novel Coronavirus (or COVID-19) (the “Coronavirus Epidemic”), the Chinese government authorities have issued a series of regulations and policies on such aspects as promotion of online medical services (e.g., eligible expenses on online medical services may be covered by payments from medical insurance funds), provisional reduction or exemption of social insurance funds to be contributed by employers, accelerated promulgation of the New Refinancing Rules, formulation of preferential tax policies and etc., to mitigate impacts of the Coronavirus Epidemic on the economy, employers and employees.

It is further noteworthy that the Coronavirus Epidemic and the relevant measures taken by the government authorities to prevent and control this disease may obstruct performance of certain contracts including equity investments and cross-border transactions and therefor may result in delays or failures to fulfill contractual obligations (please refer to our Memo issued on February 12, 2020 for detailed analyses on the impacts of the Coronavirus Epidemic on performance of equity transaction agreements). Under the current law, if the Coronavirus Epidemic is deemed as an event of *Force Majeure*, namely an objective situation that is unforeseeable, unavoidable and insurmountable, in general, the parties involved may be exempted, partially or wholly, from the liabilities for the breach of contract. The underlying contract may also be terminated if the purpose of the contract can no longer be fulfilled. A series of *Questions and Answers on Legal Application Issues of Cases Involving Coronavirus Epidemic* (the “Q&A”) recently published by the Shanghai High People’s Court has provided some clarifications on the applicability of *Force Majeure* in contracts involving the Coronavirus Epidemic. According to the Q&A, when the performance of contracts or exercise of contract rights are undermined, the Coronavirus Epidemic could generally be deemed as a *Force Majeure* event, however, unilateral termination of such a contract may not be easily upheld by the courts in practice. In addition, according to the *Notice on Effectively Stabilizing Foreign Trade and Investments and Boosting Consumptions in Response to Coronavirus Epidemic* recently issued by the Ministry of Commerce, the relevant institutions will be supported to provide *de facto* proofs for the Chinese parties failing to perform contracts on schedule involving foreign trades or overseas projects due to the Coronavirus Epidemic when they claim the existence of the *Force Majeure*.

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