

March 2021



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CAPITAL MARKET / 资本市场

CSRC Issued New Guidelines on Information Disclosure by IPO Shareholders 证监会发布IPO股东信息披露新指引

证监会于2021年2月5日发布了《监管规则适用指引——关于申请首发上市企业股东信息披露》（“《指引》”）。《指引》适用于各板块发行上市审核工作，旨在加强拟上市企业股东信息披露监管，重点约束了股权代持、突击入股、入股价格异常等市场反映集中的问题。

引发市场最广泛关注的当属IPO申报前特定期限内入股（即突击入股）锁定期的有关规定。根据此前证监会和沪深证券交易所的审核问答等规定（“审核问答”），突击入股的时点为IPO申报前6个月内，并根据股份取得方式区分锁定期：通过增资扩股取得新增股份的，需自发行人完成增资扩股工商变更登记之日起锁定36个月；从控股股东、实际控制人处受让股份的，需自IPO之日起锁定36个月；从其他股东处受让股份的，一般为IPO之日起锁定12个月。而《指引》延长了突击入股的时点，对于发行人申报前12个月内的“新增股东”不区分股份取得方式是增资扩股还是老股转让，均应承诺自“取得之日”起36个月内不得转让。该等锁定期新规中值得注意的是：(i)“新增股东”是否包括公司老股东在IPO申报前12个月内追加投资取得股份的情况；(ii)“取得之日”是否以工商登记为准仍有待进一步明确；以及(iii)对于新增股东从控股股东、实际控制人处受让股份的，根据沪深证券交易所关于《指引》的答记者问，仍需遵循审核问答中的锁定要求（即6个月内突击入股应自IPO之日起锁定36个月）。

除关于“突击入股”锁定期的重新定义以外，《指引》还主要通过规范以下几个方面进一步再次强调了发行人的信息披露主体责任和中介机构的核查把关责任：一是严格规范股权代持行为，存在代持情形的，需依法解除并充分披露；二是明确要求发行人出具专项承诺说明股东适格；三是加强对入股交易价格明显异常的自然人股东和多层嵌套机构股东的信息披露及穿透核查。

On February 5, 2021, the China Securities Regulatory Commission (“CSRC”) promulgated the *Guidance on Application of Regulatory Rules: Information Disclosure by Shareholders of Enterprises Applying for Initial Public Offerings* (the “Guidance”). With the goal to beef up supervision of information disclosure by shareholders of companies to be listed, the Guidance applies to share offerings on all different boards and is focused on regulating such widely concerned issues as entrusted shareholdings, introduction of new shareholders shortly before submitting an IPO application, and abnormal investment prices, among others.

Change in the lock-up period for shares acquired shortly before submitting an IPO application has provoked widespread public discussions. According to the previous rules in the form of certain questions and answers released by CSRC, Shanghai and Shenzhen Stock Exchanges (the “Q&A”), shares acquired within 6 months before submitting an IPO application should be subject to the following lock-up period requirements based on the source of the acquired shares: (a) shares acquired through capital increase should be locked up for 36 months upon completion of share registration with competent local office of the State Administration for Market Regulation (“SAMR”); (b) shares transferred by controlling shareholders or effective controlling parties should be locked up for 36 months from the IPO date; and (c) shares transferred from other shareholders should generally be locked up for 12 months from the IPO date. The Guidance requires all new shareholders who acquire shares within 12 months before the IPO application date be subject to a 36-month lock-up period from the acquisition date of such shares regardless of the source of shares acquired. It is noteworthy that: (i) it is still not clear under the Guidance whether the extended lock-up period under the Guidance for “new shareholders” also applies to the existing shareholders who have acquired additional shares within 12 months before the IPO application date; (ii) whether the “acquisition date” refers to the share registration date with local SAMR offices; and (iii) according to the Q&A, for shares transferred by controlling shareholders or effective controlling parties within 6 months before the IPO application date, such shares should still be subject to a lock-up period of 36 months from the IPO date.

The Guidance has further emphasized issuer’s information disclosure responsibilities as well as various IPO service intermediaries’ review and examination responsibilities in the following major aspects: (i) all entrusted shareholding arrangements should be terminated and fully disclosed; (ii) the issuer should make special commitments on the shareholders’ eligibility; and (iii) more diligent and strict review and information disclosure are required for individual shareholders who have acquired shares at obviously abnormal investment prices and institutional shareholders structured in multi-layers.

SZSE Launches Merger of Main Board and SME Board 深交所启动合并主板与中小板工作

2021年2月5日，证监会宣布正式批复深圳证券交易所（“深交所”）合并主板与中小板。深交所随后公告称已启动相关准备工作，并发布《关于启动合并主板与中小板相关准备工作的通知》等业务通知。根据上述通知，本次合并安排遵从“两个统一、四个不变”，即统一业务规则和运行监管模式，保持发行上市条件、投资

On February 5, 2021, CSRC formally approved the merger of the main board and the SME board on the Shenzhen Stock Exchange (“SZSE”). Accordingly, SZSE released the *Circular on Launching the Relevant Preparation Works for the Merger of the Main Board and the SME Board*, pursuant to which, the merger will follow the principle of “unifying two aspects and keeping four factors unchanged”, namely, unifying business rules and

者门槛、交易机制、证券代码及简称不变；仅对部分业务规则、市场产品、技术系统等方面进行适应性调整，预计对市场运行和投资者交易产生的影响较小。

鉴于目前中小板与主板在上市条件、交易规则、市值规模等方面已不存在重大差异，合并有助于确立深交所“主板+创业板”的市场格局。

administrative modes for operations of the two boards while keeping the IPO and share issuance requirements, the thresholds for investors, trading mechanism, and securities codes and abbreviation unchanged. There will only be some adaptive adjustments to part of the business rules, market products, tech support systems and so on which seem to have very limited impact on the market operation and investor trading.

Given that there are only some minor differences between the main board and the SME board in terms of the IPO requirements, trading rules and market value and scales, the proposed merger will help establish a market pattern with the main board and the GEM as SZSE's two surviving pillars.

ANTI-TRUST / 反垄断

Anti-Trust Guidelines on E-Platform Economy Formally Unveiled 平台经济反垄断指南正式出台

2021年2月7日，国务院反垄断委员会正式发布了《关于平台经济领域的反垄断指南》（“《指南》”），自发布之日起实施。相比较2020年11月国家市场监督管理总局公布并向社会公开征求意见的《关于平台经济领域的反垄断指南（征求意见稿）》（“《征求意见稿》”；相关内容请参见本所2020年12月刊*China Regulatory Updates*），《指南》对其中一些引起较大争议的问题进行了调整和梳理，对相关条款进行了补充完善，主要有如下几点变化值得关注：

1. **相关市场界定。**《指南》进一步明确了《征求意见稿》中的相关商品市场界定规则，强调可以根据平台一边的商品界定相关商品市场，也可以根据平台所涉及的多边商品，分别界定多个相关商品市场，并考虑各相关商品市场之间的相互关系和影响。此外，《指南》删除了《征求意见稿》关于在特定类型或特定情况的案件中“可以不界定相关市场”而直接认定垄断行为的条款，但同时保留“坚持个案分析原则，不同类型垄断案件对于相关市场界定的实际需求不同”的原则性表述，为平台经济领域反垄断执法时的灵活性留下制度空间。
2. **垄断协议的认定。**(a)对于垄断协议类型之一的“其他协同行为”，《征求意见稿》将其定义为“经营者虽未明确订立协议或者决定，但实质上存在协调一致的行为”，《指南》在此基础上进一步明确协调一致的具体行为方式包括“通过数据、算法、平台规则或者其他方式”，同时增加了“有关经营者基于独立意思表示所作出的价格跟随等平行行为除外”的限制，但经营者如何证明自身具备“独立意思表示”仍有待进一步说明和解释；(b)对于《征求意见稿》规定的可能构成纵向垄断协议的“最惠国待遇条款”，《指南》未直接使用等概括性表述，而是对行为内容进行了具体描述，即“平台经营者要求平台内经营者在商品价格、数量等方面向其提供等于或者优于其他竞争性平台的交易条件的行为”，并明确该等行为除可能构成垄断协议外，还可能构成滥用市场支配地位行为。

On February 7, 2021, the Anti-Monopoly Commission of the State Council officially promulgated the *Anti-Trust Guidelines for E-Platform Economy* (the “Guidelines”), effective from the same date. Compared to the *Anti-Trust Guidelines for E-Platform Economy (Draft for Comments)* (the “Draft”; please refer to our December 2020 issue of *China Regulatory Updates* for more details) released for public comments by SAMR in November 2020, the Guidelines clarified several controversial issues mainly in the following aspects:

1. **Definition of relevant markets.** Compared to the Draft, the Guidelines (i) further clarified that a platform could define the “relevant market” based on the commodities transacted on such platform, or define multiple relevant markets for different categories of commodities involving multiple transaction parties when considering the relationship and impact among such multiple relevant markets; and (ii) deleted the provisions that under certain circumstances an anti-competitive conduct could be directly determined without defining and analyzing the relevant market. Nevertheless, the Guidelines kept the principle that the anti-monopoly review should be conducted on a case-by-case basis and case specific dynamics and requirements should be considered while defining the relevant market, which hopefully will help provide more flexibilities during the implementation process of the Guidelines.
2. **Identification of monopoly agreements.** (i) On “the other collaborative practices”, (i.e., *substantive collaboration or actions in concert among business operators even if no written agreement or decision has been reached or made*), the Guidelines further clarified that these practices could be conducted through “data, algorithms, or platform rules, etc.” and expressly exclude such parallel practices as price following behaviors carried out by relevant operators based on their independent judgments and discretions. But how an operator can prove that its business actions are taken based on its “independent judgment and discretion” is still to be clarified. (ii) The Guidelines replaced the general description of “most-favored-nation clause” under the Draft with a more detailed explanation of relevant practices, and explicitly provided that such practices can constitute a monopoly agreement or abuse of a dominant market position.
3. **Abuse of a dominant market position.** According to the Draft, if an operator controlling necessary facilities in the field of platform economy refuses to enter into transactions with counterparts on reasonable terms, it may be considered as a refusal to deal by abusing its dominant market position. Either the relevant platform or the relevant data may constitute the aforesaid necessary facilities. The

3. **滥用市场支配地位行为。**(a)《征求意见稿》规定了控制平台经济领域必需设施的经营者拒绝与交易相对人以合理条件进行交易，可构成滥用支配地位拒绝交易的行为，且平台和数据均可能构成必需设施。而《指南》删除了数据可构成必需设施的有关条款，仅规定在认定平台是否构成必需设施时应将该平台的占有数据情况作为考虑因素之一。该等修订可能意在加强平台反垄断监管以及数据安全之间保持一定平衡；(b)对于《征求意见稿中》规定的“二选一”、“大数据杀熟”等广受关注的滥用市场支配行为，《指南》则在具体认定标准上有一定程度的放松。

对于平台经济领域的经营者集中，《指南》则基本保持了《征求意见稿》关于明确将VIE架构的经营者集中纳入反垄断审查范围，以及区分不同类型的平台经营者营业额的计算方式等方面的规定。作为我国首部专门针对平台经济领域的反垄断官方指南，《指南》为反垄断执法机构统一监管规则以及平台领域经营者加强自我合规均提供了较为明确清晰的指引，标志着平台经济领域反垄断监管时代的到来。

PRIVATE FUND / 私募基金

Shenzhen Issued New QFLP Scheme 深圳出台QFLP新办法

深圳市地方金融监督管理局于2021年1月29日发布了《深圳市外商投资股权投资企业试点办法》（“新办法”），自2021年2月8日起正式施行，有效期3年；2017年版《深圳市外商投资股权投资企业试点办法》（“原办法”）则同时废止。新办法是对深圳QFLP投资的进一步开放与完善，使得深圳QFLP试点政策与外商投资、私募投资基金管理等方面的国家最新政策保持了一致，并缩小与上海、广州等其他QFLP试点地区的政策差异。其中，主要有以下亮点值得关注：

1. **发起设立方面：**新办法(a)借鉴广州等地的试点经验，取消了对外商投资股权投资管理企业（“QFLP管理人”）与外商投资股权投资企业（“QFLP基金”）大量的准入要求，包括最低注册资本、出资人与高管资质、有限合伙人与普通合伙人作为同一控制人时出资比例不能超出50%的限制等；(b)明确QFLP管理人与QFLP基金的性质与定位，即作为外商投资企业以及私募基金/管理机构，应按照《外商投资法》、《私募投资基金监督管理暂行办法》（具体请见本所《每月立法动态》2014年9月刊）等有关规定发起设立并符合中国证券投资基金业协会的登记和备案要求；(c)允许采用基金普通合伙人/与管理人分离、双GP模式等灵活的基金管理架构。
2. **运作方面：**(a)对于QFLP基金的业务范围，新办法明确允许QFLP基金参与投资上市公司非公开发行和交易的普通股，包括定向发行新股、大宗交易、协议转让等，并可以作为上市公司原股东参与配股。此外，新办法还放开了QFLP基金作为母基金（FoF）对境内私募股权、创投基金的

Guidelines, however, do not recognize data itself as a necessary facility, and only take the data occupancy status as one of the factors to be considered when determining whether a platform constitutes a necessary facility. It is said that such amendments are made with the purpose to maintain a balance between anti-trust supervision and data protection. Besides, the Guidelines slightly loosened the specific identification standards of several typical abusing practices of dominant market positions as provided under the Draft, such as “Either-or-Choice” and “Big Data Discrimination”.

With respect to the concentration of business operators in the e-platform economy field, the Guidelines clearly provided that VIE structures also fall within the scope of merger control review, and further distinguished the turnover calculation methods on the basis of different types of platform operators, which are generally consistent with the provisions under the Draft. As the first official anti-monopoly guidance specifically designed for the e-platform economy in China, the Guidelines provided streamlined regulatory rules for both anti-trust law enforcement agencies and e-platform operators and are expected to further promote fair and orderly competition in the field of e-platform economy for a better protection of consumers' rights.

On 29 January 2021, the Shenzhen Municipal Financial Regulatory Bureau released the *Measures for the Pilot Program of Foreign-invested Equity Investment Enterprises in Shenzhen* (the “New Scheme”), effective from February 8, 2021 for the next three years, and replaced the 2017 edition of the relevant measures. With an effort to further optimize and promote QFLP investment in Shenzhen, the New Scheme has adopted the latest national regulations of foreign investment and private equity investment, also narrowed the gap with other pilot cities' QFLP rules. Highlights of the New Scheme include, among others:

1. **Entry and formation.** The New Scheme (i) cancelled a series of entry requirements for foreign-invested equity investment management enterprises (“QFLP managers”) and foreign-invested equity investment enterprises (“QFLP funds”) by reference to the practice of some other pilot cities such as Guangzhou, including the minimum registered capital, qualifications of investors and senior executives, and the 50% holding cap on the actual controller who is both a GP and an LP of a QFLP fund; (ii) provided that QFLP managers and QFLP funds shall follow the formation and registration requirements under the *Foreign Investment Law, Interim Measures for Supervision and Administration of Private Investment Funds* (please refer to our *China Regulatory Updates of August 2014 for details*) and the AMAC rules, mirroring the foreign-invested and private equity nature; and (iii) introduced more flexible fund structures such as the separation between GP and management company and co-GPs structure.
2. **Management and operation.** The New Scheme (i) will allow QFLP funds to acquire ordinary shares from listed companies through non-public offerings and transactions (including private placement, block trades, negotiated transfers, etc.), participate in share allotments as existing shareholders, and invest in domestic private equity and venture capital funds as Funds of Funds or FoFs; and (ii) has specified that investments by QFLP funds should comply with the *Special Administrative Measures for*

投资；(b)对于QFLP基金的投资方向，新办法参照《外商投资法》调整相关表述，进一步明确应遵照外商投资准入负面清单实施管理。

Access of Foreign Investment (or the Negative List) applicable to foreign investors pursuant to the Foreign Investment Law.

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