

# 新三板对关联交易与同业竞争的监管 New Third Board oversight of connected transactions and horizontal competition



胡晓华  
Cindy Hu  
天达共和律师事务所  
合伙人  
Partner  
East & Concord Partners



谷秋桦  
Gu Qihua  
天达共和律师事务所  
律师  
Associate  
East & Concord Partners

自2014年以来,随着新三板扩容至全国、交易结算系统上线、做市商制度落地以及做市商扩容,新三板持续升温并到如今的火爆程度。与此相伴,拟挂牌新三板企业亦成为各大投资机构争相追捧的投资对象。

如投资方拟并购一家企业,除谋求企业未来长足的发展外,近期亦旨在使该企业具备于新三板挂牌交易的主体资格,从而提高并购投资价值,相应地,投资方在进行投资或并购该企业前,会对该企业进行尽职调查。

与投资拟上市企业相同,投资或并购拟挂牌新三板企业,在法律尽职调查中企业的关联交易与同业竞争问题仍为投资者所关注。笔者现结合近期承办的几起新三板挂牌业务中存在的关联交易及同业竞争问题,就投资者关注的新三板对拟挂牌公司关联交易与同业竞争问题的监管要求进行分析和探讨。

## 关联交易

### 新三板对关联交易的认定

根据《全国中小企业股份转让系统挂牌公司信息披露细则(试行)》第31条、第32条的相关规定,挂牌公司的关联交易,是指挂牌公司与关联方之间发生的转移资源或者义务的事项;挂牌公司的关联方及关联关系包括《企业会计准则第36号——关联方披露》规定的情形,以及挂牌公司、主办券商或监管部门根据实质重于形式原则认定的情形。

### 监管部门的要求

《全国中小企业股份转让系统业务规则

(试行)》(《业务规则》)、《全国中小企业股份转让系统股票挂牌条件适用基本标准指引(试行)》(《标准指引》)中规定的挂牌公司应符合的条件及基本标准中对关联交易事项并未做具体说明,形式上可能会给人一种“新三板对拟挂牌公司关联交易没有监管要求或监管不严”的错觉。

实际上,由于关联交易不仅直接关系和影响挂牌公司的利润和价值,而且往往与公司治理机制、公司的规范运行、独立性等监管要求直接关联,因此,新三板对挂牌公司的关联交易是有监管要求的。根据目前公开披露的文件来看,关联交易在符合一定条件的情形下,是允许存在的,且新三板对关联交易的审核标准没有IPO那么严格。

目前,全国股份转让系统公司(转股公司)对于挂牌公司关联交易的审核基本态度是规范和减少。

所谓规范即是应符合市场化的定价和运作要求,做到关联交易价格和条件公允,不存在利用关联交易转移利润的情形;程序上须履行公司章程和相应制度的规定;在交易额及具体交易性质上不应影响到挂牌公司的独立性;对关联交易应履行信息披露义务。

## 同业竞争

### 新三板对同业竞争的认定

中国目前就同业竞争的具体认定标准尚未出台专门的法规或规范性文件。从审核实践来看,监管部门在判断公司与竞争方之间是否存在同业竞争时,通常会从以下几方面来考察:(1)产品或者服务的销售区域或销售对象;(2)如存在细分产品,

**天達共和律師事務所**  
East & Concord Partners

北京市朝阳区东三环北路8号  
亮马河大厦写字楼1座20层  
20/F Landmark Building Tower 1  
8 Dongsanhuan Beilu, Chaoyang District  
Beijing, China  
邮编 Postal code: 100004

电话 Tel: +86 10 65906639  
传真 Fax: +86 10 65906639-9

电子信箱 E-mail:  
cindyhu@east-concord.com  
guqihua@east-concord.com  
www.east-concord.com

可考察产品生产工艺是否存在重大差异;  
(3)公司所在行业的特点和业务方式。新三板对同业竞争的认定与IPO没有实质区别。

### 监管部门要求

新三板挂牌条件和要求中对同业竞争问题并未做明确规定。但《首次公开发行股票并上市管理办法》、《首次公开发行股票并在创业板上市管理办法》(以下统称“IPO规则”)中均明确规定,公司应与控股股东、实际控制人及其控制的其他企业间不存在同业竞争。

受前述IPO规则要求的影响,有人认为新三板挂牌企业在挂牌前必须消除同业竞争,否则无法挂牌。根据目前公开披露的信息及笔者因近期承办的项目与有关审核监管部门的咨询、了解情况,实务操作中,转股公司对于同业竞争的审核要求没有IPO审核标准那么严格,并不要求企业挂牌前必须消除同业竞争,企业只要充分披露,股东作出解决同业竞争问题的切实可行的承诺,就可以挂牌。比如已挂牌的普华科技就属于此种情形。

需要提请企业及投资者注意的是,新三板只是不强制要求挂牌前解决同业竞争问题,但同业竞争问题最终是需要解决的,因此企业应尽可能在挂牌前解决同业竞争问题,以避免因此影响挂牌进度以及后续IPO计划实施。■

“企业应尽可能在挂牌前解决同业竞争问题”

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Activity on the New Third Board has continued to warm to its current red-hot state since 2014. This is due to the board expanding country-wide, the transaction settlement system going online, and the implementation and expansion of the market-maker system. Parallel with this, major investment firms have been closely pursuing companies proposing a listing on the New Third Board.

If an investor proposes an acquisition, its short-term focus falls on whether the enterprise is qualified to list and trade on the New Third Board in addition to considering its growth potential and ability to increase its acquisition and investment value. Accordingly, an investor should conduct due diligence of the enterprise before investment or acquisition.

As when investing in an enterprise to be listed on a main board, the enterprise's connected transactions and horizontal competition remain a focus of attention for the investor when conducting the legal due diligence for an investment in, or acquisition of, an enterprise to be listed on the New Third Board. The authors have handled a number of recent listings of this type and would like to analyze and explore the regulatory requirements for connected transactions and horizontal competition on the New Third Board.

## Connected transactions

**Determination.** Pursuant to articles 31 and 32 of the Detailed Rules for the Disclosure of Information by Companies Listed on National Equities Exchange and Quotations (for trial implementation), the term “connected transaction of a listed company” refers to a transfer of resources or obligations occurring between a listed company and a connected party. The connected parties and connected relationships of a listed company include the circumstances set forth in Enterprise Accounting Standards No. 36: Disclosure of Connected Parties, as well as other circumstances determined by the listed company, sponsoring securities broker or regulator based on the principle of substance over form.

**Regulator requirements.** No specific explanation of connected transaction matters is given in the conditions and basic criteria that listed companies are required to satisfy as set out in the Business Rules of National Equities Exchange and Quotations and the Guidelines on the Basic Criteria Applicable to the Conditions for Listing Stocks on National Equities Exchange and

Quotations, both for trial implementation. Formally, this may give one the mistaken impression that the New Third Board has no regulatory requirements regarding the connected transactions of companies to be listed on the board or that its regulation of these connected transactions is not strict.

The New Third Board does in fact have regulatory requirements regarding the connected transactions of listed companies, as connected transactions do not only directly affect and influence the profit and value of a listed company, but also usually have a direct connection with such regulatory requirements as corporate governance mechanism, the company's compliant operation, independence, etc. Based on currently available documents, connected transactions are permitted to exist, provided that they satisfy certain conditions. However, the New Third Board's criteria for reviewing connected transactions are not as strict as those for IPOs.

The basic attitude of National Equities Exchange and Quotations Co., Ltd. (NEEQ) when reviewing the connected transactions of listed companies is currently compliance and minimizing. “Compliance” means that they should comply with market-determined pricing and operational requirements, such that the prices and conditions of connected transactions are fair and that such transactions are not used to divert profits. In terms of procedures, those specified in the company's articles of association and relevant rules and regulations must be performed. The transaction amount and specific nature of the transaction should not prejudice the independence of the listed company. Finally, information disclosure obligations should be performed regarding connected transactions.

## Horizontal competition

**Determination.** There are no dedicated regulations or regulatory documents to date regarding the specific criteria for determining horizontal competition on the New Third Board. From the perspective of review practice, when the regulator is determining whether horizontal competition exists between a company and a competitor, it will usually conduct its examination based on several items. First, the sales territory of, or targeted buyers for, the products or services of the two. Second, if they have niche products, the regulator can examine whether there is a significant difference in the production processes for the products. Third, the regulator will consider the

“Enterprises should endeavor to resolve any horizontal competition before listing”

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features of, and business methods in, the relevant industry. The New Third Board makes no substantive difference in how they determine horizontal competition and IPOs.

**Regulator requirements.** There are no specific provisions on horizontal competition set out in the conditions and requirements for listing on the New Third Board. However, both the Measures for the Administration of Initial Public Offerings of Stocks and Listings and the Measures for the Administration for Initial Public Offerings of Stocks and Listings on Second Boards (collectively, the IPO Rules) expressly stipulate that there may not be horizontal competition between a company and its controlling shareholder, actual controller or other enterprises that it controls.

Some, influenced by the IPO Rules' requirements, are under the impression that enterprises to be listed on the New Third Board must eliminate horizontal competition before listing, and that they cannot list if they fail to do so. Based on information currently available, as well as information gained from the authors' queries to review and regulatory authorities during recent projects, NEEQ's horizontal competition review requirements are not as strict as the criteria for IPO reviews in practice, as they do not require that companies eliminate horizontal competition before listing. Instead, an enterprise can list if it fully discloses the situation and its shareholders give a genuinely workable undertaking to resolve the horizontal competition. Shanghai Power Science & Technology, presently listed, is now in this situation, for example.

Enterprises and investors should note that, although the New Third Board does not mandatorily require that horizontal competition be resolved prior to listing, it nevertheless ultimately needs to be resolved. Accordingly, enterprises should endeavour to resolve any horizontal competition before listing so as to avoid it affecting their listing schedule and any subsequent IPO plan. ■

作者: 天达共和律师事务所合伙人胡晓华、  
律师谷秋桦  
Cindy Hu is a partner and Gu Qihua is an  
associate of East & Concord Partners