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Fiduciary Duty and Formation Date of Merger and Reorganization Insider Information

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The judicial interpretation is more principled in determining the formation date of insider information, and takes information fairness as the theoretical basis, resulting in different standards for determining the formation date and the risk of public power overstepping the boundaries between public and private. The theory of fiduciary duty of insider information should be regarded as the legitimate basis for controlling insider trading. Starting from the "disclosure or trading" obligation of the insider, the insider's expectation possibility should be fully considered. It is proposed that certainty, non-publicity, and materiality should be taken as the essential attributes of insider information, and greater feasibility and consistency of information disclosure time point are the substantive and formal standards of certainty. Starting from the basic element of civil legal act, meaning expression, combined with the practice of M&A and reorganization, it is proposed that reaching agreement is a general rule for the recognition of the formation date of M&A and reorganization under the dimension of multi-party meaning expression, which conforms to the standard of greater possibility of realization. Compliance with the disclosure time point requirements is a special rule for the recognition of the formation date of mergers and acquisitions under the unilateral meaning dimension, which conforms to the consistency standard of the information disclosure time point. At the same time, from the perspective of due process, it is suggested to introduce third-party identification opinions and the "safe harbor" rule as a supplementary means to accurately identify the formation date of insider information and prevent regulatory agencies from overstepping the public and private boundaries.

Keywords: insider information, formation date, fiduciary duty, theoretical meaning expression, safe harbor

Topic

M&A and reorganization is an effective way for public companies to integrate resources and realize leap development (Li, 2012). M&A and reorganization is not a normative legal concept, but a general term for a series of methods that may be used by public companies in the process of capital operation. Its transaction structure includes but is not limited to equity transaction, establishment of new companies, capital increase, and other major investment behaviors. A good M&A and reorganization environment is conducive to the healthy development of capital market. However, driven by interests, M&A and reorganization is becoming severely

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afflicted by insider trading. According to my statistics, from Jan. 1, 2019 to Feb. 28, 2022, there were 126 cases of insider trading subject to administrative punishment by China Securities Regulatory Commission (CSRC), including 104 cases involving insider information of M&A and reorganization, accounting for up to 82.5%. In this article, the "insider information of M&A and reorganization" means the insider information related to acquisition of external shares, establishment of new companies, increase of capital, acquisition or sale, disposal of assets, and other major acts of investment of public companies. The process of M&A and reorganization is usually complicated and is easy to be used by insiders. Share price is very sensitive to the process. Therefore, regulating insider trading involving such information is crucial to establish an open, fair, and just securities market and protect the legitimate rights of investors.

In practice, CSRC adopts a "two-step" mode to identify insider trading. One step is to identify how the insider information is formed and disclosed. To be specific, whether the information involved is insider information and the sensitive period (i.e., the period from the formation of insider information to disclosure) of and the scope of the persons knowing the insider information need to be identified. The other step is to identify the securities transactions conducted by the persons knowing the insider information within the sensitive period including the transmission channels of insider information and the securities transactions within the price sensitive period (basic information of accounts, sources of funds, control and use of accounts, abnormalities of transactions). Therefore, from the perspective of "two-step" identifying mode of CSRC, as long as an insider conducts a securities transaction within the sensitive period of insider information and the transaction behaviors are abnormal, the insider will be presumed to have conducted insider trading and should bear the burden of proof for the legitimacy of the securities transaction. When an insider is determined to have conducted insider trading, the insider will not only be subject to administrative punishment but also need to bear civil liabilities, and may even be held criminally liable. So, the first issue for an insider trading case is to identify its sensitive period. How to identify the sensitive period of insider M&A and reorganization trading of public companies is crucial for regulating such insider trading.

The sensitive period of insider information is the period from the formation date to the disclosure data of insider information. The judicial interpretation has clearly set forth how to determine the disclosure date, but it is more principled in determining the formation date. The preliminary analysis of administrative punishments decided by the CSRC from Jan. 2019 to Feb., 2022 shows that there were as diversified as 12 cases where the CSRC determined the formation date of insider information of M&A and reorganization and no single standard existed, resulting in adverse effect on the accurate identification of insider trading. Starting from the theory of fiduciary duty for insider trading regulation, this article clearly points out that insider information of M&A and reorganization should be "certain". It tries to clarify the substantive and formal standards for determining the formation date and suggests that the exchanges provide professional opinions about the formation time as a third-party institution. It also introduces the "safe harbor" to effectively protect the legitimate rights and interests of administrative counterparts and promote the healthy, sustainable, and stable development of the securities market, while cracking down insider trading.

Current Status of the Determination of Formation Date of Sensitive Period of Insider Trading of M&A and Reorganization and the Causes

Data Statistics and Brief Analysis of the Determination of "Formation Date" in the Cases of Insider Trading of M&A and Reorganization Subject to Administrative Punishment From Jan. 2019 to Feb. 2022

According to the author's statistics, from Jan. 1, 2019 to Feb. 28, 2022, there were 126 cases of insider trading subject to administrative punishment by the CSRC, including 104 cases involving insider information of M&A and reorganization, accounting for up to 82.5%, which sufficiently proves that M&A and reorganization has become severely afflicted by insider trading. Among the 104 cases, only one case involves bearish insider trading and other cases involve bullish insider trading. In these cases, the CSRC clearly determined the disclosure date of sensitive period of insider information while holding different opinions on how to determine the formation date in different cases. There are as many as 12 methods of determining the formation date of insider information in these cases (refer to Figure 1 and Table 1). In some cases, the formation date was determined as the date when the parties reached the cooperation intention. In other cases, the formation date was determined as the date when one party made the decision. Even in some cases, the formation date was determined as the date when one party started to study the plan or looked for the object or reached an agreement on negotiation via phone. In these cases, the formation date is determined in diversified manners and no unified logical relationship existed. These cases reflect, to a certain degree, "zero tolerance" of the CSRC to insider trading. But under the guidance of the policy of cracking down on violations and crimes in the securities market, there is a possibility that the scope of transactions identified as insider transactions may become enlarged due to inaccurate determination of the formation date. Insider trading is conducted mainly to acquire illegal interests. But in the 104 cases above, the insiders in 57 cases, i.e. 55%, acquired interests, while in 47 cases, i.e. 45%, the insiders suffered final losses. The number of the cases where the insiders acquired interests was slightly higher than that of the cases where the insiders suffered losses, namely, nearly half of the insiders in the cases suffered losses, which deviated from what is normally perceived. This is caused by the contingency of the cases investigated by the CSRC and may also be caused by the diversified methods of determining the formation date.

Table 1

Specific Types of Formation Date of Inside Information

Time point determined as formation date	Meaning
Time point 1	When one party started to study the plan or looked for the object
Time point 2	When internal discussion or conference was commenced with respect to the matters involved in insider information
Time point 3	When invitation was made on phone to face-to-face negotiation
Time point 4	When the parties initially expressed their intention of cooperation
Time point 5	When the parties started to draft the plan of cooperation
Time point 6	When the due diligence was initiated
Time point 7	When the senior leaders of the parties initially signed the intention of cooperation
Time point 8	When the parties reached consensus with respect to major matters or key contents
Time point 9	When the non-disclosure agreement was signed or the insiders were registered
Time point 10	When approval or consent was obtained from the controlling shareholders or the relevant departments
Time point 11	When substantive actions were taken to implement of sale of substantial assets
Time point 12	When the reorganization or merger and acquisition was finally decided to be terminated

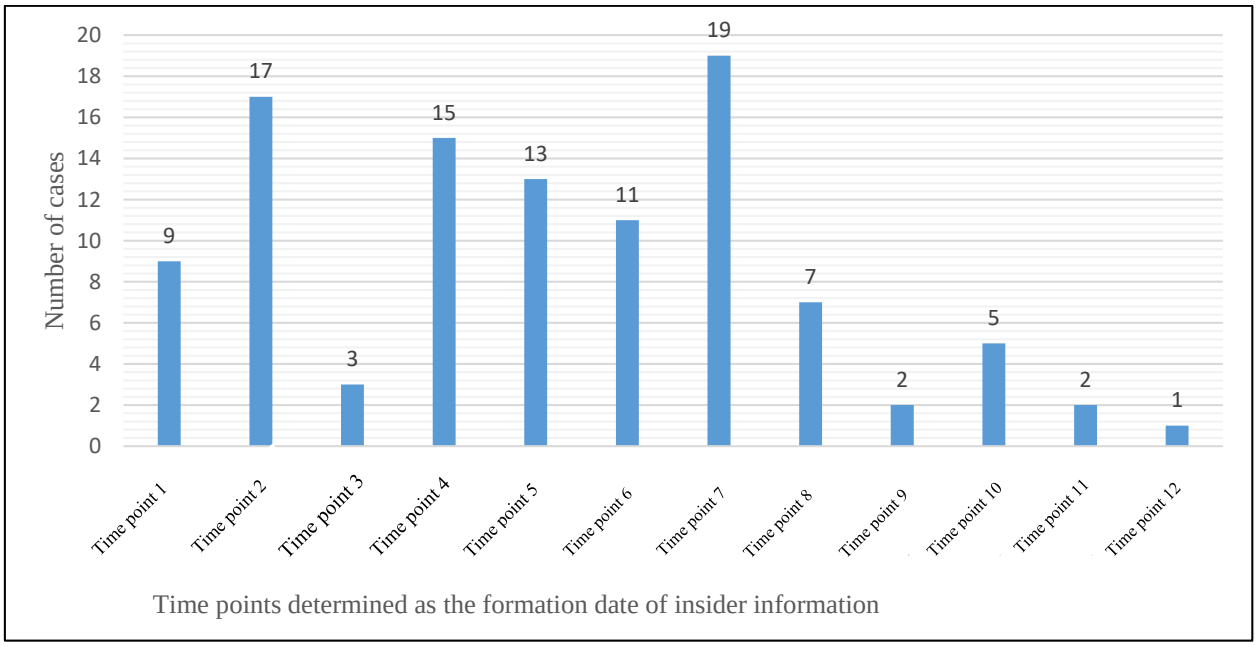

Figure 1. Statistics of the identified time points of the formation date of inside information.

Causes of Diversified Methods of Determining the Formation Date of Insider Information of M&A and Reorganization

Conflict between autonomy of will and public power. The investigation of insider trading by the CSRC is essentially the interference of public power in securities trading. The question about the relationship between government regulation representing public power and the market is everlasting. As the relationship experienced a change from physiocracy to mercantilism, the government's regulation of the market changed from tight regulation to night watchman and to appropriate regulation. Autonomy of will, as the core value of civil society, has been proved by theory and practice. Autonomy of will is the legal requirement of civil society. However, when the exercise of individual rights harms the rights of others or social or collective public interests, public power should intervene in time. As for the relationship between private rights and public power, private law generally upholds freedom of decision without reason, while in contrast decisions under public law are constrained (Zhu, 2016). Exercise of public power should be modest (Zhang, 2017). The author believes that the modesty of public power can be reflected in the following aspects: First, relevant standards are set forth to limit the exercise of public power; second, the rules of "due process" should be followed to restrain the damage caused by excessive exercise of public power to individual private rights. Both foreign experience and domestic practices indicate that insider trading not only prejudices the rights of other participants in the securities market, but also seriously endangers the healthy development of our market economic order. There exists necessity for public power to intervene. Cracking down on violations in the securities market is consistently required by the CPC Central Committee and the State Council, and also is an important means for regulatory authorities to protect the interests of investors and maintain the order of the capital market. If the exercise of public power by regulatory authorities is not modest, the regulatory authorities will be possible to overstep the boundary between public power and private rights. Specific to insider trading of M&A and reorganization, the CSRC has no unified

standard for determining the formation date of insider information of M&A and reorganization. In practice, there is a tendency to advance the identification point of the formation date, which may be contrary to the requirement of modesty, and may classify normal securities trading that is not insider trading as insider trading. Besides, it may also cause public companies to disclose information before it meets the disclosure standards, which does not meet the requirements of timely, accurate, and complete information disclosure and may send wrong signals to the securities market, and is not conducive to the smooth completion of M&A and reorganization of public companies.

Principled provisions in relevant laws and judicial interpretation. As an act of transaction prohibited by the *Securities Law of the People's Republic of China* (2019 revision) ("Securities Law"), insider trading is mainly stipulated in Articles 50-53 of the Securities Law which respectively specify the definition and scope of insider transaction, insider, and insider information. Article 52 clearly defines the material events affecting securities price that are set out in the second paragraph of Article 80 and Article 81 of the Securities Law as insider information. The insider information of M&A and reorganization mentioned in this article is the information related to "material acts of transaction" as set out in the second paragraph of Article 81. There are clear rules for identifying such information which are not discussed in this article. When determining whether an act of transaction constitutes an insider transaction, the relevant provisions concerning sensitive period, formation date, and disclosure date of insider information are mainly found in the *Interpretation on Several Issues Concerning the Specific Application of Law in Criminal Cases Involving Insider Trading and Disclosure of Insider Information* ("Judicial Interpretation"). Although this Judicial Interpretation is mainly applicable to criminal cases, it has a significant effect on the identification of insider transactions in practice and has become the main basis for determining whether an act of transaction constitutes an insider transaction. The *Guidelines on the Identification of Acts of Insider Trading (Trial)* ("Guidelines") formulated by the CSRC provides the same definition of sensitive period of insider information as in the Judicial Interpretation, but the Guidelines did not further clarify how to determine the formation date and disclosure date. Besides, the Guidelines was abolished in 2020. Therefore, the Guidelines are not discussed in this article.

Article 5 of the Judicial Interpretation has defined the sensitive period of insider information as the period from the formation date to the disclosure date and also specified how to determine the formation date and the disclosure date. The Judicial Interpretation was enacted by the Supreme People's Court and Supreme People's Procuratorate in 2012 when the *Securities Law of the People's Republic of China* ("Securities Law") (effective since 1998) was being implemented. Although the sequence and contents of articles thereof are not fully consistent with those of the Securities Law, the substantive contents of the provisions concerning insider trading are not significantly different. The main provisions of the Judicial Interpretation concerning the formation date of sensitive period of insider information of M&A and reorganization are as below: (1) M&A and reorganization is a material event that can cause changes in stock prices. Therefore, the formation date shall be the occurrence date of the event. (2) Where the formation of insider information is affected by a motion, plan, decision, or executor, the insider information shall be deemed to have been formed when the motion, planning, decision, or execution is initiated. The Judicial Interpretation holds that the date of occurrence of M&A and reorganization should be treated as the formation date, but there is no clear definition of the "date of occurrence" and no

consistent definition is applied in practice. In addition, according to said Judicial Interpretation, insider information should also be deemed to have been formed when the M&A and reorganization are initially proposed, planned, decided, or executed. But there is no definite basis upon which the question when M&A and reorganization are initially proposed, planned, decided, or executed should be determined. Whether it refers to the date when a party to the arrangement initially proposes, planes, decides, or executes the arrangement or the date when the parties to the arrangement initially propose, plane, decide, or execute the arrangement? Besides, said date and the "occurring date" are confusing. If the time when M&A and reorganization is initially proposed, planned, decided, or executed and the "occurring date" are the same, then it will be unnecessary to make special provisions for the former. But the two could not be considered to be two different concepts since there is no specific provision as to the association and difference between them. For this reason, there have been diversified determinations as to the time when insider information is formed in practice. And said provisions also show the intention to advance the time when insider information is formed, and in practice, there is a tendency that in a determination concerning such question, the time would be advanced (Zhang, 2015).

Combined impact from the policy of cracking down on illegal acts of securities trading and the difficulty of obtaining evidence for insider trading of M&A and reorganization. Cracking down on violations in the securities market is consistently required by the CPC Central Committee and the State Council, and also is an important means for regulatory authorities to protect the interests of investors and maintain the order of the capital market. As an effective way for public companies to integrate resources and realize leap development, M&A and reorganization usually involves high transaction amounts and complicated transaction structure and process, and has a great impact on stock price. M&A and reorganization is not a normative legal concept, but a general term for a series of methods that may be used by public companies in the process of capital operation. Its transaction structure includes but is not limited to equity transaction, establishment of new companies, capital increase, and other major investment behaviors. The series of acts mainly include civil legal acts of two parties (e.g., equity transfer, capital increase, etc.) and civil legal acts of multiple parties (e.g., joint establishment of a company, etc.). In M&A and reorganization, the relevant information is objectively known to the core personnel of public companies. Once an insider transaction occurs, objective evidences are difficult to be obtained. The consideration is crucial to the final conclusion of M&A and reorganization. Early leakage of relevant information may cause intervention from other competitors, affecting the consideration and the possibility of the final conclusion of the transaction. Therefore, the parties to the transaction keep the relevant transaction information confidential from the beginning of the transaction, which makes it more difficult for the regulatory authorities to collect relevant evidences after the transaction. On one hand, regulatory authorities need to strictly implement the policy of cracking down on violations and crimes in the securities market. On the other hand, they are faced with the objective reality that evidences for insider trading in M&A and reorganization are hard to be obtained. In the absence of express provisions concerning the formation date of insider information, there is the possibility of overstepping the boundary between public power and private rights, resulting in diversified methods of determining the formation date.

Theoretical Reflections on and Construction of Rules for the Determination of Formation Date of Insider Information of M&A and Reorganization

Theoretical Basis of and Reflections on Insider Trading Regulation—From the Theory of Information Equality to the Theory of Fiduciary Duty

Theory guides action. The theoretical basis for the legitimacy of insider trading regulation mainly includes the theory of information equality adopted by EU countries and the theory of fiduciary duty adopted by the United States. The mainstream view in China is that the theory of information equality can become a legitimate basis for regulating insider trading (Zhang & Zuo, 2022). The theory of information equality mainly holds that all subjects in the securities market have equal access to information, while insider trading damages legal fairness and justice (Zeng, 2014). The theory of information equality focuses on the healthy development of the securities market at the macro level and holds that investors have equal access to information and that any improper application of inside information that may pose a threat to market equality should be considered insider trading. There are three problems in the theory of information equality: First, in the securities market, information inequality is usually seen. Complete information equality is impossible. The information disclosure system is adopted by public companies to minimize information inequality between investors and public companies. Second, the securities market itself acknowledges the existence of information inequality and the value of such existence. For example, securities analysts analyze market information using their professional knowledge and obviously have an information advantage over ordinary investors. The securities market does not deny such information advantage but uses it as a means of promoting the healthy development of the securities market. Third, the theory of information equality provides a broad meaning of fairness and justice instead of a specific meaning. It does not consider the behaviors of the trading parties in securities trading from the perspective of private rights, and neglects the protection of the private rights of public companies and trading parties. It can be appropriately used as the purpose or value of establishing a theory rather than the theoretical basis for the legitimacy of insider trading.

The author believes that from the policy orientation based on the two theories above, the theory of information equality emphasizes the intervention of public power with the private acts of securities trading which constitute insider trading. On the moral principle of protecting the market and establishing information equality, the exercise of public power may not sufficiently consider autonomy of will of securities trading parties, which is not conducive to the protection of the parties' private rights. The application of presumption of fact and reversion of burden of proof is more likely to expand the scope of intervention of public power, which goes against the requirement that the exercise of public power should be modest. The theory of fiduciary duty starts from the trading behaviors of the trading parties to establish the scope of obligation. In this way, it can fully consider the subjective state of the trading parties and their expectation possibility under specific obligations and accordingly limits the intervention from public power, which is conducive to protecting the private rights of trading parties and limiting the exercise of public power. The theory of fiduciary duty associates the acts of insider trading with the specific fiduciary relationship of the trading parties. Only the act of using insider information for securities trading in violation of the fiduciary duty arising from the fiduciary relationship constitutes insider trading. There is no insider trading if no fiduciary relationship exists. To be specific, there is a fiduciary

relationship between insider trading parties and public companies. The insider trading parties have the obligation to stop trading when they are required to keep confidential insider information or to disclose insider information. If they violate such obligation and use insider information for securities trading, they will be deemed to have conducted insider trading. From the micro perspective of corporate interests, the theory of fiduciary duty identifies and punishes insider trading based on the breach of fiduciary duty to the company by directors, supervisors, senior executives, controlling shareholders, and other stakeholders. The development of this system is a history of increasingly extending the scope of fiduciary obligor's boundary and judging the subjective state of transaction (Fu & Cao, 2011). One of the basic preconditions for the operation of market economy is to recognize the scarcity of resources. Information, as a factor affecting securities prices, should also be deemed to be scarce. It is impossible for the securities market participants to obtain or enjoy relevant information at the same time. In market economy, to prohibit investors from making profits by utilizing legally acquired information goes against the development of the economy and also does not comply with the law of market development. Putting aside the question whether or not the absolute equality in information alleged in the theory of information equality really exists, the theory does not distinguish utilizing insider information lawfully from utilizing such information unlawfully, nor does it take into account of the subjective state of a party to securities trading, as well as the expectation possibility. Instead, according to the theory, the use of insider information should be controlled as long as any adverse consequence would arise from therefrom. But in fact, only illegal acquisition or use of insider should be prohibited, while legal and legitimate use of favorable information should be encouraged (Jiao, 2003). To distinguish whether the information is legally or illegally obtained by a trading party, the focus should be placed on the specific obligations undertaken by the party in the relevant legal relationship. If the party has violated such obligations, the information can be determined to have been obtained illegally. Accordingly, the use of such information for securities trading should be subject to legal regulation. The theory of fiduciary duty starts from the specific legal relationships involved in insider trading. As a result, the information acquired legally and illegally can be distinguished. The study of the legislative and judicial history related to insider trading in the US where the securities law is the most developed shows that the US has undergone a transformation from the "expansion era" based on the theory of information equality to the "contraction era" based on the theory of fiduciary duty. With respect to the problem raised by the opponents of the theory of fiduciary duty that the scope of individuals' subject to fiduciary duty is too narrow, the theory of illegal misappropriation has been further developed, i.e., anyone who has acquired material non-public information through illegal means should be obliged to disclose information or not to use relevant information for trading as if they are internal personnel of the company (Jiao, 2003). To sum up, the combination of the theory of fiduciary duty and the theory of illegal misappropriation starts with the specific fiduciary relationship between the trading parties and the public company, focuses on the specific legal acts of the trading parties in securities trading, and limits the intervention of public power to the acts in securities trading that violate the fiduciary duty, which can not only crack down on insider trading, but also limit the excessive interference with the trading parties' autonomy of will arising from the expansion of administrative power. Compared with the theory of information equality, the theory of fiduciary duty can be more suitably used as the legitimate basis for regulating insider trading.

Construction of the Rules for Determining the Formation Date of Insider Information of M&A and Reorganization

The regulation of insider trading reflects the conflict between autonomy of will and public power. The balancing between autonomy of will and public power should start with the theory of fiduciary duty. The reality of M&A and reorganization of public companies should be considered to establish the requirement of "certainty" for insider information of M&A and reorganization. The rules for determining the formation date of insider information of M&A and reorganization should be improved from the perspective of clarifying specific standards and establishing due process.

Necessity of establishing the requirement of certainty for insider information. When identifying insider information in in M&A and reorganization and other types of insider trading, it has become a consensus that insider information should be non-disclosed and material. Non-disclosure emphasizes the secrecy of insider information. In practice, only when certain information has an important impact on investors' judgment or stock prices can it constitute insider information, and only when a trading party uses such information for trading can the party be deemed to have conducted insider trading. Materiality has become the theoretical basis for presuming causality between acts in securities trading and damage (Jiang, 2008). The theory and practices in China concerning insider information focuses on materiality. For example, the Securities Law defines the material events affecting stock prices stipulated in Paragraph 2 of Article 80 and the material events affecting securities prices stipulated in Article 81 as insider information, which reflects that insider information should be material.

The author believes that, in addition to materiality and non-disclosure, the requirement of "certainty" should also be established for the identification of insider information according to the fundamental realities and practices of China. The reasons are as follows: (1) The theory of fiduciary duty is the basis for the legitimacy of regulating insider trading. This theory starts with the specific fiduciary relationship between the trading parties and the public company, focuses on the specific legal acts of the trading parties in securities trading, and limits the intervention from public power to the acts in the securities trading that violate the fiduciary duty. The premise is the violation of the corresponding fiduciary duty by the trading party. The premise of the application of this theory is to determine when the parties have the fudiciary duty. "Certainty" of insider information is the inevitable requirement for the specification of fiduciary duty. In addition, the investigation of insider trading by CSRC is essentially the interference of public power in securities trading. The exercise of public power should be modest to limit the excessive expansion of public power and should be especially limited in the identification of insider trading by way of clarifying substantive standard and observing the due process. The essence is to establish the requirement of "certainty" for insider information. (2) Both the rule of thumb and the basic logic indicate that "certainty" should be one of the premises of "materiality" and an integral component of insider information. Only when the insider information is certain may it affect stock prices and be material. (3) Establishing the requirement of "certainty" is also a specific requirement of the judicial practice of insider trading in China. The practice of identifying insider trading in China is different from that in foreign countries. The concept of sensitive period is characteristic in China (Wu, 2017). American scholar Nicholas C. Howson questioned the concept of "sensitive period" adopted in China. In his opinion, the creation and use of this concept have caused law enforcement by the CSRC to exceed the authorities granted by the Securities Law, resulting in a broad scope of law enforcement. He held that the concept of sensitive period abandoned the components specified by the Securities Law and

separately set up a set of rules and principles (Howson, 2014). In the author's opinion, the regulation of insider trading in China has undergone years of development and formed its unique characteristics. Practices have proved that the existing insider trading system has a positive effect on the improvement of China's securities market and should be maintained. The problem of broad scope of law enforcement power can be solved by strengthening the requirement of "certainty" for insider information to continuously improve China's legal system related to insider trading. The determination of formation date is directly related to "certainty". But the Securities Law and the Judicial Interpretation only include principled provisions concerning formation date and do not emphasize the requirement of "certainty". It is the lack of attention on the requirement of "certainty" of insider information at the theoretical level that leads to the principled provision concerning formation date. In practice, the formation date is determined in diversified manners.

Substantive and formal standards for "certainty". The establishment of substantive and formal standards for "certainty" of insider trading starts from the theory of fiduciary duty which is the theoretical basis of insider trading regulation and fully considers the specific characteristics of the legal acts of trading parties in securities trading and their expectation possibility under the regulatory requirements of regulatory authorities for information disclosure. Especially in M&A and reorganization, sufficient attention should be paid to the complexity of such transactions. The author regards non-disclosure, certainty, and materiality as three co-existing attributes of insider information. Non-disclosure reflects the secrecy of insider information. Materiality focuses on the impact of insider information on stock prices. Certainty should focus on the significant realization possibility of specific insider information. Only when the important events related to insider information are highly possible to become reality in practice should the trading parties bear fiduciary duty for the insider information. Then there remains the question what fiduciary duty should the trading parties bear. In the Securities and Exchange Commission v. Texas Gulf Sulphur Co. case in 1965, the US court established, for the first time when applying the 10b-5 rule of the US Securities Law, that the insider trading parties should bear the obligation of "disclose or abstain" after acquiring insider trading (Klein, Ramseyer, & Bainbridge, 2016). In another word, the trading parties should either timely disclose the relevant insider information or abstain from trading the relevant securities. If the trading continues, it will constitute insider trading. This point of view has also been accepted in China's Securities Law. Article 53 of the Securities Law clearly states that the insiders and other persons who have unlawfully obtained such inside information shall not purchase or sell the securities of the company concerned, or divulge such information, or advise other persons to purchase or sell such securities before the inside information is publicized. Unfortunately, although China's Securities Law accepts the rule of "disclose or abstain", its provisions concerning the determination of formation date are not consistent with the rules concerning disclosure time point of material information. The standard for determination of formation date in the current Judicial Interpretation has been stated in the second part of this article and will not be discussed further. The domestic provisions concerning the disclosure of information of M&A and reorganization are found in Article 24 of the Measures for the Administration of Information Disclosure of Public Companies. According to the article, a public company shall timely fulfill the obligation of disclosing information of a material event at the earliest of (1) when the board of directors or the board of supervisors adopts a resolution on the material event; (2) when the parties concerned sign a letter of intent or an agreement with respect to the material event; and (3) when the directors, supervisors, or senior executives become aware of the occurrence of the material event. By

comparing with the second part of this article, it is not difficult to find that the standard for determination of formation date in the current Judicial Interpretation is not completely consistent with the rules concerning disclosure time point of material information and "the time when motion, planning, decision or execution is initiated" is broader than the time point of the disclosure. Due to the foregoing difference, information related to material events may be identified as insider information when it does not meet the information disclosure requirement. The trading parties will fall into the awkward situation where they can neither disclose information nor be engaged in securities trading. Therefore, when establishing the rules for determining the formation time point of insider information, the expectation possibility of trading parties should be fully considered and the disclosure time point of material information should be taken as the formal standard for determining the formation date of insider information so as to maintain the consistency between the two time points. To sum up, a great realization possibility is the substantive standard of certainty, while the fulfilment of requirements at the disclosure time point is the formal standard of certainty.

Rules for determining the formation date of insider information of M&A and reorganization.

Realization of agreement on expression of intention—On the basis of significant realization possibility. As stated above, a great realization possibility and the fulfilment of requirements at the disclosure time point are respectively the substantive standard and the formal standard of certainty. The current Judicial Interpretation includes express provisions concerning the disclosure date of sensitive period. The main dispute over the certainty of insider information lies in the determination of the formation date. Especially in M&A and reorganization, the rules for determining the formation date of insider information are particularly difficult to be established as the process of trading is complex. If the range is too wide, the trading parties will be excessively limited. If the range is too narrow, adverse effects will be imposed on the fighting against insider trading. In the author's opinion, the determination of formation date of insider information of M&A and reorganization should start with the substantive standard, i.e., significant realization possibility, of insider information.

As stated above, the acts of M&A and reorganization mainly include civil legal acts of two parties (e.g., equity transfer, capital increase, etc.) and civil legal acts of multiple parties (e.g., joint establishment of a company, etc.). Civil legal acts are the acts made by means of expression of intention. Expression of intention is the core of legal acts. Civil legal acts of two parties and civil legal acts of multiple parties in M&A and reorganization involve multiple expressions of intention. In case of expression of intention by only one party, it is difficult to determine that the related act of M&A and reorganization is certain. Therefore, from the perspective of significant realization possibility, the relevant legal act should be determined to have a great possibility of realization only when the parties reach an agreement. However, in practice, the negotiation before a contract is concluded may cover collection of preliminary information: the object of M&A and reorganization, internal decision-making of one party, due diligence, negotiation, signing of non-disclosure agreement, signing of letter of intent and hiring of intermediaries. The substantive standard of certainty is a great realization possibility rather than the inevitability of realization. Therefore, the specific content of the expression of intention agreed to by the parties should be understood in a broad way. It should include not only the signing of the pre-contract related to M&A and reorganization by the parties, e.g., signing of the letter of intent, but also the necessary preparatory activities conducted by the parties for the realization of an agreement on M&A and reorganization, e.g., signing of the non-

disclosure agreement and due diligence. The agreement on expression of intention can be realized in writing or orally or by data message. To sum up, the realization of agreement by the parties is the substantive requirement for the insider information of M&A and reorganization to have a great possibility of realization. The content of agreement is expanded from the act of M&A and reorganization itself to the necessary preparation.

Unilateral expression of intention—On the basis of consistency of information disclosure time point. As stated above, the realization of agreement by all parties on the act of M&A and the necessary preparations is the general rule for determining the formation date of insider information which is based on the standard that there should be a significant possibility to meet the requirement of certainty. Under certain circumstances, the unilateral expression of intention by one party may also have a significant realization possibility. For example, if a public company must undergo strategic transformation due to industry development and has determined the specific object and scope of M&A and the possible amount of payables, there is a great possibility to realize the M&A. Under this circumstance, to determine whether the unilateral expression of intention meets the requirement of certainty, the obligation of "disclose or abstain" undertaken by the trading parties and their expectation possibility should be fully considered and the formal standard for certainty should be referenced. To be specific, if the relevant information meets the requirements at the disclosure time point, the information constitutes insider information; if the relevant information does not meet the requirements at the disclosure time point, the information should not be treated as insider information. In such case, regulatory authorities may overstep the boundary between public power and private interests. Therefore, the exercise of public power can be limited from the perspective of due process.

From the perspective of due process, China has tried to limit the regulatory agencies. For example, China Securities Regulatory Commission internally separates the inspection department from the punishment department to protect the legitimate rights and interests of the administrative counterpart and handle relevant cases fairly and impartially. However, in practice, the inspection department and the punishment department belong to the leadership of the CSRC after all, and it is difficult to fully maintain their independence. The formation date of major merger and reorganization insider information is determined to be a professional and technical issue, and a third party can issue an appraisal opinion. As the information disclosure of listed companies is mainly managed by the exchange, the exchange will identify such situations, which is more objective and fair. It is suggested that the regulatory authorities apply to a third-party professional organization for opinions. As the information disclosure of public companies is mainly managed directly by exchanges, it is more objective and fair to assign such burden of proof to exchanges. Considering the obligation of "disclosure or abstain" of the trading parties and their expectation possibility, the "safe harbor" rule is suggested to be set up. In practice, the exchange supervises and provides guidance for information disclosure. If the trading parties can prove that they have reported the relevant information to the exchange and the exchange determines that the requirements at the disclosure time point have not been met, the trading parties can enter the "safe harbor" and the relevant information will not be deemed as insider information. Similarly, if the parties reach an agreement with respect to the act of M&A or the necessary preparations and can prove that they have reported the relevant information to the exchange and the requirements at the disclosure time point have not been met, they can enter the "safe harbor".

Conclusion

M&A and reorganization is severely afflicted by insider trading which materially violates the basic principles of openness, fairness, and justice of the securities market, hinders the healthy development of the securities market, and infringes on the legitimate rights and interests of small and medium-sized investors and thus should be regulated. The investigation of insider trading is in nature interference of public power in securities trading. Balance between public power and autonomy of will should be achieved. It should be fully realized that the theory of fiduciary duty is the theoretical basis for regulating insider trading. Starting from the "disclosure or abstaining" obligation of the insider, the insider's expectation possibility should be fully considered. Certainty should be treated as one of the essential requirements for insider information. Greater possibility of realization and consistency of information disclosure time point should be treated as the substantive and formal standards for certainty. Starting from the basic element of civil legal act, expression of intention, combined with the onerous and complex practice of M&A and reorganization, it is established that reaching agreement is a general rule for the determination of formation date of insider information of M&A and reorganization under the dimension of multi-party expression of intention and that compliance with the requirements at disclosure time point is a special rule for the determination of formation date of insider information of M&A and reorganization under the unilateral expression of intention. In addition, it is suggested to introduce third-party opinions and the "safe harbor" rule as a supplementary means of accurately determining the formation date of insider information and preventing regulatory authorities from overstepping the boundary between public power and private interests.

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