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FOREIGN INVESTMENT & CAPITAL MARKET / 外商投资暨资本市场

MOFCOM Released Draft Revising Measures Governing Foreign Strategic Investment in Listed Companies for Public Comments 商务部修改《外国投资者对上市公司战略投资管理办法》并公开征求意见

为优化外商投资环境，2018年7月30日商务部发布《关于修改<外国投资者对上市公司战略投资管理办法>的决定（征求意见稿）》（“《征求意见稿》”）向社会公开征求意见。《征求意见稿》与2018年6月29日发布的《关于修改〈外商投资企业设立及变更备案管理暂行办法〉的决定》（“《备案办法》”）紧密衔接、相互协调，进一步明确外国投资者战略投资的适用范围、审批程序、锁定期限等问题：

1. 定义适用范围：《征求意见稿》从以下方面重新定义了外国投资者战略投资A股上市公司的适用范围，以回应投资者资质、投资方式、投资比例等实务中的热点问题：(i)明确符合一定条件的外国自然人可以成为外国战略投资者；(ii)放宽以跨境换股参与战略投资的境外主体资质要求（不再仅限于境外上市公司）；以及(iii)删除外国投资者战略投资上市公司的股权比例的要求（根据现行规定首次投资完成后外国投资者持股比例不低于10%）。

2. 划分审批权限：根据《备案办法》，不涉及外资准入负面清单的外商投资企业，其设立及变更程序已经由审批改为备案。为统一法律适用，《征求意见稿》全面修改了外商战略投资的审批权限：(i)明确不涉及国家规定实施准入特别管理措施的战略投资无需商务主管部门另行审批，统一根据《备案办法》进行备案和管理（即由上市公司在证券登记结算机构证券登记后30日内完成备案手续）；以及(ii)涉及外资准入负面清单的战略投资，根据投资金额由商务部或省级商务主管部门审批。

3. 缩短锁定期限：根据现行规定，外国投资者战略投资取得A股上市公司股份后适用36个月的锁定期。近年来，尽管实践中有部分适用12个月锁定期的案例，但该等案例多隐含“投资后持股比例不到10%，不适用战略投资相关规定”的逻辑。为避免“一案一议”、规范实践操作，《征求意见稿》在取消10%持股比例要求的基础上明确将外国投资者战略投资上市公司的锁定期调整为12个月。

《征求意见稿》紧随《外商投资准入特别管理措施（负面清单）（2018年版）》（*具体分析请见我所《每月立法动态》2018年7月刊*）及《备案办法》公布，体现了我国外商投资管理体制改革对跨境并购及外国投资者参与A股市场投资的鼓励态度。我们将对相关规定的正式出台和后续实践进行持续关注。

On July 30, 2018, the Ministry of Commerce (“MOFCOM”) released for public comments the *Decision on Draft Amended Administrative Measures for Strategic Investments in Listed Companies by Foreign Investors* (the “Draft Amended Measures”) to further improve China’s foreign investment environment. The Draft Amended Measures was released just a month after the 2018 revision of the *Interim Measures for Filing Administration on the Establishment and Change of Foreign-Invested Enterprises* (the “Filing Measures”), aiming to coordinate and unify the regulatory framework for administration of foreign investment. Set forth below are some of the major changes and clarifications proposed by the Draft Amended Measures:

1. *Redefined Scope of Application*. Strategic investment in A-share listed companies concerning such hot and practical topics as investor qualification, forms of investment, and shareholding proportion has been redefined under the Draft Amended Measures so that the threshold for foreign investors to participate in PRC securities market will be lowered in the following ways: (i) qualified foreign natural persons will be entitled to make foreign strategic investment in A-share listed companies for the first time; (ii) qualifications for foreign investors using their equity in overseas company as a consideration to make strategic investment in onshore listed companies (“Equity Swap”) will be relaxed, which means that unlisted foreign companies finally get an admission ticket for Equity Swap with A-share listed companies; and (iii) the minimum 10% shareholding by foreign strategic investors as a result of their strategic investment in an A-share listed company will be completely removed and there won’t be any minimum foreign strategic ownership required going forward.

2. *Clarified Approval Authority*. To unify the application of law and be consistent with the Filing Measures, the Draft Amended Measures clarified MOFCOM’s approval authority so that (i) all foreign strategic investments not related to any industry on the Negative List will only need to be filed by the underlying A-share listed company with competent MOFCOM offices within 30 days after the relevant transactions have been registered; and (ii) foreign strategic investments involving any industry on the Negative List will still need to go through an advance approval and review procedure with the central or provincial level MOFCOM office depending on the amount of proposed investment.

3. *Shortened Lock-up Period*. Current regulations provide that shares of an A-share listed company obtained by foreign strategic investors shall be subject to a 3-year lock-up period during which time such shares are not tradable. There have been a few cases in recent years in which a 1-year lock-up period has been applied, mainly on the rationale that the effective foreign investment in each of those cases has been less than 10% thus not a qualified “foreign strategic investment”. It is evident that such cases and the underlying reasoning are the results of a case by case analysis which should be unified and standardized. The Draft Amended Measures has therefore shortened the lock-up period to one year for all foreign strategic investments in A-share listed companies and in the meantime removed the 10% minimum shareholding requirement so that a more fair and just market order could be established for all foreign investors in China’s securities market.

Following the publication of the *Special Administrative Measures (Negative List) for Foreign Investment Access (2018 Edition)* (*please refer to our July 2018 issue of China Regulatory Updates for details*) and the Filing Measures, the Draft Amended Measures represents China's another major step forward to further open up its market and to encourage foreign participation in its A-share securities market whether through Equity Swap or otherwise. We will continue to monitor and report the regulatory developments and the corresponding PRC practice in this connection.

CIVIL LAW / 民法

Supreme Court Released Interpretation on Statute of Limitation 最高人民法院颁布关于诉讼时效的司法解释

2018年7月18日，为明确《民法总则》与《中华人民共和国民法通则》（“《民法通则》”）关于诉讼时效制度的衔接适用问题，最高人民法院发布《关于适用〈中华人民共和国民法总则〉诉讼时效制度若干问题的解释》（“《诉讼时效司法解释》”），自2018年7月23日起施行。

根据《诉讼时效司法解释》，《民法通则》中二年的普通诉讼时效与一年的短期诉讼时效不再适用，原则上适用三年的诉讼时效期间。仅为保护义务人已经获得的诉讼时效抗辩权（指诉讼时效期间届满后，义务人取得了不履行义务的抗辩权）之考虑，《民法总则》施行前权利人根据《民法通则》所享有诉讼时效期间已经届满的，不再延长适用三年诉讼时效期间。

需要注意的是，根据《诉讼时效司法解释》等法律规定，人民法院不主动适用或延长适用三年的诉讼时效。因此，诉讼时效期间在《民法总则》施行之时（2017年10月1日）已经开始计算但尚未届满的情况下，权利人需要主动、积极向法庭主张适用三年的诉讼时效以对抗义务人的诉讼时效抗辩。

On July 18, 2018, the *Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Statute of Limitation Rules in the General Provisions of the PRC Civil Law* (the "Judicial Interpretation") was released, which has already taken effect from July 23, 2018.

Pursuant to the Judicial Interpretation, (i) the two-year general and the one-year shorter statute of limitation stipulated in the *General Principles of the Civil Law* will all be replaced the 3-year statute of limitation; and (ii) solely for the protection of the defense rights already obtained by obligators (i.e., after the expiration of the applicable statute of limitation, obligators may get a defense right not to fulfill obligations), the statute of limitation shall however not be extended if it has expired before the effective date of the General Provisions of the PRC Civil Law (i.e., October 1, 2017).

It is noteworthy that, according to the Judicial Interpretation as well as other applicable PRC laws and regulations, courts are not allowed to actively apply (or extend the existing statute of limitation in order to apply) the 3-year statute of limitation. Therefore, if a 2-year or 1-year statute of limitation has currently started to run but hasn't expired before October 1, 2017, the relevant obligee should instead actively apply to the court for an extension of the statute of limitation to 3 years in order to defend against obligator.

GENERAL CORPORATE / 公司法

Supreme Court Invalidated Another Nominee Shareholding Agreement 最高人民法院裁定上市公司股权代持协议无效

2018年7月，最高人民法院（“最高法”）发布杨金国与林金坤、常州亚玛顿股份有限公司（“亚玛顿公司”）股权转让纠纷一案（“亚玛顿案”）的再审审查裁定书，认定杨金国与林金坤之间签订的代持亚玛顿公司股权的相关协议（“股权代持协议”）属于《合同法》所规定的合同无效情形中的“损害公共利益”之情形，指令江苏省高院再审该案。而在不久前，最高法第三巡回法庭在福建伟杰投资有限公司、福州天策实业有限公司营业信托纠纷二审案（“信托纠纷案”）中也根据相似的裁判逻辑裁定保险公司股权代持协议无效（*具体分析请见我所《每月立法动态》2018年5月刊*）。

亚玛顿案中，股权代持协议签订于亚玛顿公司上市前，但公司在IPO过程中并未对相关代持事实进行披

In July 2018, a ruling on *Jinguo Yang v. Jinkun Lin & Changzhou Almaden Co., Ltd.* ("Almaden") by the Supreme People's Court of the PRC (the "Supreme Court") was disclosed on *China Judgments Online* (the "Almaden Case"). The Supreme Court ruled invalidity of the relevant nominee shareholding (or entrustment) agreement regarding the shares of Almaden (a PRC listed company) held by Mr. Lin in the interest of Mr. Yang (the "Nominee Shareholding Agreement") and directed Jiangsu Higher People's Court to rehear the case, reasoning that such agreement harms "public interests". Not long ago, the Third Circuit Court of Supreme Court issued a similar ruling on *Fujian Weijie Investment Co., Ltd. v. Fuzhou Tiance Industry Co., Ltd.* (the "Weijie Case", *please refer to our May 2018 issue of China Regulatory Updates for details*), ruled invalidity of a nominee shareholding agreement regarding an insurance company based on the aforesaid reasoning.

In Almaden Case, the Nominee Shareholding Agreement was executed before Almaden's application for IPO. However, Almaden failed to disclose such facts during its IPO process.

露。基于此，最高法认为股权代持协议的效力应当结合上市公司监管相关法律法规以及《合同法》进行综合判定。若上市公司真实股东不清晰，则上市公司的信息披露、关联交易审查、高管人员任职回避等监管措施将流于形式，进而损害广大非特定投资者的合法权益并最终损害社会公共利益。因此，在信托纠纷案之后，最高法再一次以“损害公共利益”为由认定股权代持协议无效。同时，最高法也在亚玛顿案中明确了股权代持协议无效的后果：隐名股东无法获得上市公司股份，但可以根据被代持的股权数量获得相关委托投资利益。

结合前述两个案例，对于上市公司以及金融等可能涉及公共利益的特殊行业，尽管隐名股东的投资利益仍然受到保护，但由于股权代持行为天然地存在规避监管之嫌，法院对于相关代持协议效力的认定正逐步趋严，当事人需要特别关注股权代持协议被认定无效可能引发的法律风险，拟上市公司也需提前关注并处理股权代持情况，以免导致不符合“股权清晰”的上市要求。

The Supreme Court held the view that the validity of such agreement should be judged not only pursuant to Contract Law but also with a reference to regulations and rules on listed companies. The Supreme Court further reasoned that such agreement concealed the actual shareholders of listed companies, causing regulatory measures governing information disclosure, review of related party transactions, and mandatory avoidance of senior executives virtually meaningless, damaging the legitimate rights and interests of a wide range of unspecified investors and ultimately harming the public interest. Base on the afore-mentioned, the Supreme Court invalidated the nominee shareholding agreement under “public interests” principle stipulated in Contract Law just like in the Weijie Case. Meanwhile, although the actual shareholder is not granted the ownership right to the entrusted shares of the listed company, the Supreme Court confirmed in Almaden Case that the actual shareholder is however still entitled to the relevant investment returns realized through the nominee or entrustment arrangement.

Despite of the limited protection of actual shareholders’ entrustment interests, we can find from the above two cases that, since nominee shareholding arrangement can be easily deployed to evade government supervisions, there is a tendency for courts to restrict the validity of nominee shareholding arrangements especially when they involve listed companies and sensitive industries (e.g., the financial service industry) that would closely relate to public interests. Investors should as a result be more alert to legal risks associated with the declared invalidity of these nominee shareholding agreements and all IPO candidates should carefully deal with any entrusted shareholding arrangement to achieve a “clear shareholding structure” before they submit their IPO applications.

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