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OUTBOUND INVESTMENTS / 境外投资

MOFCOM Solicits Public Comments on Updated Draft Rules Governing Report of Outbound Investments 商务部就对外投资报告制度细则征求公众意见

2019年4月8日，商务部发布了《对外投资备案（核准）报告实施细则》（征求意见稿）（“《征求意见稿》”）并向社会公开征求意见。《征求意见稿》乃根据2018年1月七部门联合发布的《对外投资备案（核准）报告暂行办法》（详情请见我所《每月立法动态》2018年2月刊）制定，进一步细化了企业境外投资的报告事项、报送时间以及未履行报告义务的责任后果。

根据《征求意见稿》，所有取得境外投资备案（核准）的投资主体均应履行对外投资报告义务，对于返程投资情形，《征求意见稿》给予了报告义务的部分豁免，即投资主体仅需报告每月投向境外第一层级企业的实际投资额，无需履行《征求意见稿》中的其他报告义务。在处罚措施方面，商务主管部门可视情况对未按规定履行报告义务的投资主体采取一定措施，包括暂停为其办理对外投资备案（核准）手续等。

总体而言，《征求意见稿》较为全面地规定了对外投资在商务部门层面的报告要求及操作细则，根据现行规定，投资主体还需另行向发改委及外汇管理部门报送对外投资项目信息，对于各部门之间如何进行信息共享与联合监管、是否会开展联合报告等问题，《征求意见稿》暂未明确。对此，我们将保持持续关注。

On April 8, 2019, the Ministry of Commerce (“MOFCOM”) released a new draft of the *Detailed Rules on Reporting of Outbound Investments Subject to Filing or Approval Requirements* (the “Draft Rules”) for public comments. In accordance with the *Interim Measures on Reporting of Outbound Investments Subject to Filing or Approval* (please refer to our January 2018 issue of *China Regulatory Updates* for details) issued in January 2018, the Draft Rules has refined guidance and regulations on the matters subject to reporting, the reporting time limits and the liabilities for failure to report or failure of a timely report.

It is further clarified in the Draft Rules that any investor who has obtained filing or approval with respect to its overseas investment has an obligation to report to MOFCOM or its local counterpart. For round-trip investments, the domestic investors will be exempted from all the other overseas reporting obligations associated with such investments as provided in the Draft Rules except for the obligation to monthly report the actual investment amount made by the domestic investors in the first layer offshore entity. In terms of punitive measures, the Draft Rules has authorized competent authorities to take certain measures against the investors who fail to fulfill their reporting obligations, including among others, suspending the filing or approval procedure for existing or future outbound investments.

In general, with respect to the reporting system administered by MOFCOM, the Draft Rules has provided detailed procedures and requirements in all major aspects. According to applicable laws and regulations, investors shall also report to competent foreign exchange regulators and the National Development and Reform Commission regarding their outbound investments. But it remains unclear under the Draft Rules as to whether and when a unified reporting system will be launched to facilitate information sharing and joint supervision among various departments. We will continue to monitor and timely update major developments in this connection.

COMPANY LAW / 公司法

Judicial Interpretations (V) of Company Law Issued 最高院发布《公司法》司法解释（五）

2019年4月28日，最高人民法院（“最高院”）公布《关于适用〈中华人民共和国公司法〉若干问题的规定（五）》（“《公司法解释五》”），自2019年4月29日起施行，以进一步落实《公司法》对中小股东权益的保护。以下为我们对《公司法解释五》主要内容的解读：

1. **规范关联交易：**从“实质重于形式”原则出发，《公司法解释五》明确了对于实质违反公平原则、损害公司利益的关联交易，控股股东等相关责任人将无法以程序合法为由免除损害赔偿；
2. **明确董事职务无因解除：**根据《公司法解释五》及最高院的相关解读，除职工董事外，公司与其董事之间的关系应认定为委托关系，且双方对此均享有任意解除权，无论董事任期是否届满，公司均可以经股东会或股东大会决议

On April 28, 2019, the Supreme People’s Court of China (the “Supreme Court”) issued the *Provisions on Several Issues Concerning Application of Company Law (V)* (the “Part V Interpretations”), which has taken into effect on April 29, 2019. The Part V Interpretations represent a step forward to further protect lawful rights and interests of minority shareholders. Set forth below are our general observations of some highlights in the Part V Interpretations for your easy reference:

1. **Regulation on Related-Party Transactions.** Based on the substance-over-form principle, the Part V Interpretations state clearly that no controlling shareholder or other responsible party of a company may get exempted from the liabilities for related-party transactions in violation of the fair-market principle and against company interests merely based on the defense of due process;
2. **Adoption of Director Dismissal without Cause.** According to the Part V Interpretations and some further explanations from the Supreme Court, the relationship between a company and its directors except for employee directors, shall be regarded as being established based on entrustment under which both parties have arbitrary rights to terminate such relationship. Therefore, a company is

随时解除董事职务，但应视情况对董事进行合理补偿；以及

3. **提出利润分配时限：**《公司法解释五》明确，公司作出利润分配决议后，应在该决议或公司章程规定的时限内（以孰早为准）完成利润分配，但利润分配的完成时间最长不得超过决议作出之日起一年。

除上述内容之外，《公司法解释五》还进一步完善了股东代表诉讼权的行使机制，并鼓励有限公司股东协商解决公司僵局，引导企业实现持续稳定的合规经营。

entitled to dismiss its director at any time by resolution of (general) shareholders meeting regardless of whether the tenure of such director expires or not, though the dismissed director shall be reasonably compensated, as appropriate, by the company; and

3. **Clarification of Time Limits for Profit Allocation.** When a company made the resolution to allocate profits, it is required under the Part V Interpretations to complete the allocation within the time period settled in the resolution or its articles of associations, whichever is earlier; and in no case shall the maximum time period exceed one year from the date on which the resolution is made.

In addition, the Part V Interpretations have also refined implementation process of lawsuits initiated by shareholders on behalf of a company and encouraged shareholders of a limited liability company to resolve deadlock situations through negotiations in order to secure a sustainable operation of the company.

CAPITAL MARKET / 资本市场

CSRC Updated Guidelines on Articles of Association of Listed Companies 证监会修订《上市公司章程指引》

2019年4月16日，证监会发布了对《上市公司章程指引》的修订，自公布之日起施行。本次修订主要新增了对存在特别表决权上市公司章程的规范要求，以配合科创板特别表决权制度，并落实了《公司法》关于上市公司股份回购的最新规定。此外，本次修订还进一步明确股东大会的召开形式、董事职务的解除程序、董事会专门委员会的设置等事项，完善了上市公司治理规则，有利于促进上市公司规范运作。

On April 16, 2019, the China Securities Regulatory Commission (the "CSRC") issued *Decisions on Amending Guidelines on Articles of Association of Listed Companies* (the "Amended Guidelines"), immediately effective upon release. The Amended Guidelines set forth regulatory requirements for listed companies with special voting rights for certain shareholders so as to accommodate the special voting rights system applicable to potential issuers on Sci-Tech Innovation Board, and also reflect new revisions in the amended Company Law concerning qualified share repurchase situations of listed companies. Besides, the Amended Guidelines revise provisions on the form of general shareholder meeting, procedures for dismissing directors, the special committees set up by the board of directors and among others, taking a step forward to improve the governance structures and the compliance operation of listed companies.

SHSE Released Guidelines for Offering and Underwriting of Stocks on Sci-Tech Innovation Board 上交所发布科创板股票发行与承销业务指引

2019年4月16日，上海证券交易所（“上交所”）发布《上海证券交易所科创板股票发行与承销业务指引》（“《指引》”），主要对科创板的战略投资者及战略配售、超额配售选择权等制度进行了规定。

根据现行的《证券发行与承销管理办法》（“《管理办法》”），适用于主板、中小板及创业板发行人），仅首次公开发行股票数量（“股票发行量”）在4亿股以上的发行人才有权向战略投资者进行战略配售并选择适用超额配售选择权（即境外市场俗称的“绿鞋机制”），而《指引》在这两方面均未对发行人的股票发行量提出特别要求。就战略配售而言，科创板发行人的重要合作方、高管及核心员工设立的专项资产管理计划、以及机构投资者等均可作为战略投资者参与。对于超额配售选择权，除了没有股票发行量的要求，《指引》在其他方面基本沿用了《管理办法》中的相关规定。

On April 16, 2019, Shanghai Stock Exchange (the "SHSE") released *Guidelines for Offering and Underwriting of Stocks on Sci-Tech Innovation Board* (the "Guidelines"), with the effort to regulate such key aspects of offering and underwriting of stocks on Sci-Tech Innovation Board as qualification of strategic investors, strategic allotment system, the over-allotment option and among others.

According to the effective *Measures for Administration of Offering and Underwriting of Securities* (the "Measures") applicable to issuers on main board, SEM and GEM board, only issuers whose initially offered shares are over 400 million (the "Minimum Issuing Amount") will be eligible to allot shares to strategic investors and apply the over-allotment option (the so-called "Greenshoe Option" at overseas securities markets). Unlike the Measures, the Guidelines do not have such Minimum Issuing Amount requirements in the aforesaid two situations. According to the Guidelines, the strategic investors of an issuer participating in strategic allotment can be crucial business partners of the issuer, specific asset management plans established by the issuer's senior management and core employees and institutional investors among others. As for the over-allotment option, except for the requirement on the Minimum Issuing Amount, the Guidelines basically follow all other rules in this aspect as set forth in the Measures.

INTELLECTUAL PROPERTY RIGHTS / 知识产权

Trademark Law and Anti-Unfair Competition Law Amended to Enhance Protection of Intellectual Property Rights 《商标法》和《反不正当竞争法》同时修订，加强对知识产权的保护

2019年4月23日，全国人大常委会修订通过《中华人民共和国商标法》（“2019《商标法》”）和《中华人民共和国反不正当竞争法》（“2019《反不正当竞争法》”），分别自2019年11月1日、及公布之日起施行。

2019《商标法》主要新增了对商标恶意抢注行为的禁止规定，不以使用为目的的商标注册申请将被驳回，同时也通过提高赔偿上限等方式加重商标侵权处罚力度。2019《反不正当竞争法》则加大了对商业秘密的保护力度，对商业秘密条款进行了集中修订，主要包括扩大商业秘密涵盖的范围、新增商业秘密侵权主体类型及惩罚性赔偿制度，并特别规定了侵犯商业秘密的举证责任转移，权利人仅需就是否对相关商业信息采取保密措施及是否侵权提出合理的初步证据，减轻了权利人的举证负担。

近日发布的《外商投资法》（详情请见我所《每月立法动态》2019年4月刊）即特别强调了对外国投资者及外商投资企业知识产权及商业秘密的保护，《商标法》和《反不正当竞争法》的修订亦反映了《外商投资法》中的相关原则性规定，充分体现了我国保护企业自主知识产权、持续开放吸引外资的政策导向。

On April 23, 2019, the Standing Committee of the PRC National People's Congress released amendments to the *Trademark Law* (the "2019 Trademark Law") and the *Anti-Unfair Competition Law* (the "2019 AUCL"), which will respectively take effect on November 1, 2019 and the date of promulgation.

In order to prevent trademark squatting, the 2019 Trademark Law authorizes competent authorities the right to deny bad-faith trademark registrations without genuine intent to use, meanwhile, it raises the upper limit on indemnification liabilities for malicious trademark infringements. The 2019 AUCL enhances protections for trade secrets in various aspects, including among others, expanding the scope of trade secrets to include all trade information, subjecting all entities and individuals rather than just business operators as potential trade secret infringers, and particularly reversing the burden of proof in civil trade secret cases from the relevant infringer to the infringer. Under the 2019 AUCL, the infringers' obligations to adduce proofs are only limited to reasonable *prima facie* evidence for security measures taken for trade secrets and facts of infringements, which have significantly reduced the right holder's burden of proof.

The 2019 Trademark Law and the 2019 AUCL echoed the recently issued *PRC Foreign Investment Law* (please refer to our April 2019 issue of *China Regulatory Updates* for details) which notably emphasized protection of intellectual property rights and trade secrets of foreign investors and foreign-invested enterprises, reflecting China's efforts to further protect intellectual property rights and to firmly continue with its opening-up policy for foreign investments.

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For further information, please write us at inquiry@hanyilaw.com.

CONTACT US

上海市中山西路2020号
华宜大厦1座1801室
邮编：200235
电话：(86-21) 6083-9800



Suite 1801, Tower I, Huayi Plaza
2020 West Zhongshan Road
Shanghai 200235, China
Tel: (86-21) 6083-9800