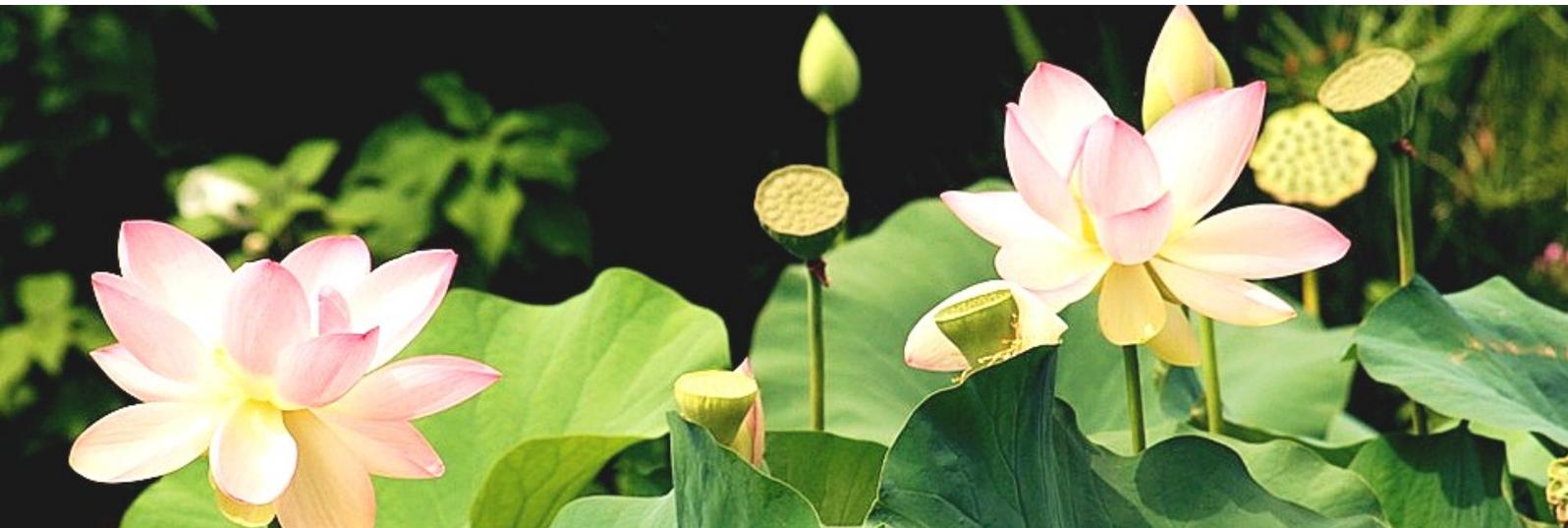


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## TABLE OF CONTENTS / 本期内容

### CAPITAL MARKET / 资本市场

China Depositary Receipts / CDR Scheme Formally Launched / 中国存托凭证/CDR制度正式落地 2

CSRC Issued New Regulations on ESOP and Stock Option Incentives for Pilot Innovative Enterprises / 证监会发布试点创新企业员工持股计划和期权激励新规 3

### FOREIGN INVESTMENTS / 外商投资

Negative List of Foreign Investment (2018 Edition) Released / 2018年版外商投资准入负面清单下发 4



CAPITAL MARKET / 资本市场

China Depository Receipts / CDR Scheme Formally Launched 中国存托凭证/CDR制度正式落地

2018年6月，证监会接连发布了《存托凭证发行与交易管理办法（试行）》（“《管理办法》”）及《试点创新企业境内发行股票或存托凭证并上市监管工作实施办法》（“《监管办法》”）等一系列配套规范性文件。上海证券交易所及深圳证券交易所也于6月15日分别发布了《上海证券交易所试点创新企业股票或存托凭证上市交易实施办法》（“《上交所办法》”）和《深圳证券交易所试点创新企业股票或存托凭证上市交易实施办法》（“《深交所办法》”）等配套业务规则。上述一系列文件的发布标志着CDR制度在中国的正式落地。

与证监会于2018年5月4日公布的《存托凭证发行与交易管理办法（征求意见稿）》（“《征求意见稿》”），具体分析请见我所《每月立法动态》2018年6月刊相比，《管理办法》的内容变动不大，结合相关配套规则，主要有如下几点重要修订或补充值得关注：

1. 关于CDR与基础证券之间的转换，《监管办法》、《上交所办法》及《深交所办法》明确规定试点红筹企业不得在境内公开发发行与在外存量基础股份对应的CDR，意味着CDR对应的基础证券来源应为公司新增股份，持有存量基础股份的股东无法通过CDR发行实现减持套现；此外，CDR发行之后不得与境外基础证券进行相互转换，CDR持有人不得将其持有的CDR转换为所对应的境外基础证券，这一限制也符合目前我国原则上不允许境内个人直接投资境外证券市场的政策。
2. 关于CDR及对应基础证券的减持，一方面，CDR持有人在减持CDR时应遵守境内相关法律法规和证券交易所规则，特别地，试点红筹企业的董事、监事、高级管理人员和所聘任的信息披露境内代表还需遵守关于董监高人员减持的相关规定。对于试点红筹企业的实际控制人，要求其承诺上市后3年内不主动放弃实际控制人地位，而不再适用上市后3年锁定期的规定；另一方面，CDR发行人的控股股东、实际控制人、董事、高级管理人员在公司实现盈利前不得减持上市前持有的股票。
3. 关于试点企业的信息披露，《管理办法》要求发行人及其他信息披露义务人应根据现行的上市公司信息披露制度履行信息披露义务。此外，除了保留了《征求意见稿》中的在发行文件中详细披露股东投票权差异、企业协议控制架构或者类似特殊安排及相应的投资者保护措施的规定，《管理办法》还增加了对上述特殊安排作出重大调整时的及时披露要求。但需要注意的是，《管理办法》删除了《征求意见稿》中要求红筹架构下的境内实体运营企业承担信

In June, 2018, the China Securities Regulatory Commission (the “CSRC”) issued the *Administrative Measures for the Issuance and Trading of Depository Receipts (for Trial Implementation)* (the “Administrative Measures”) and a series of supporting normative documents, such as the *Implementing Measures for the Regulation over the Domestic Offering and Listing of Stocks or Depository Receipts of Pilot Innovative Enterprises* (the “Regulatory Measures”) and etc. On June 15, the Shanghai Stock Exchange and the Shenzhen Stock Exchange also released relevant rules respectively, including the *Implementing Measures of the Shanghai Stock Exchange for the Listing and Trading of Stocks or Depository Receipts Offered by Pilot Innovative Enterprises* (the “Shanghai Measures”) and the *Implementing Measures of the Shenzhen Stock Exchange for the Listing and Trading of Stocks or Depository Receipts Offered by Pilot Innovative Enterprises* (the “Shenzhen Measures”). The issuance of such regulations and rules provides operating guidelines and marks the formal launch of the China Depository Receipts (the “CDR”) scheme in China.

Compared with the *Administrative Measures for the Issuance and Trading of Depository Receipts (Draft for Comments)* (the “Draft”, please refer to our June issue of *China Regulatory Updates for details*) introduced by the CSRC on May 4, 2018, the Administrative Measures only has minor changes. Highlights of the Administrative Measures and other supporting rules include, among others:

1. Convertibility between CDR and Underlying Stocks. According to the Administrative Measures, the Shanghai Measures and the Shenzhen Measures, qualified “red-chip” companies could only publicly issue CDR based on newly issued overseas stocks rather than existing ones, which prevents holders of existing overseas stocks from cashing out through CDR issuance. Besides, mutual swaps between CDR and overseas securities is not permitted, under which limitation CDR holders will not be able to convert CDR into underlying overseas stocks they represent, a consequence of China’s current policy that generally prohibits domestic individuals from direct investment in overseas securities market.
2. Sale of CDR and Underlying Stocks. The sale of CDR shall be governed by the currently applicable PRC laws, regulations and rules of stock exchanges, among which, directors, supervisors, senior managers of qualified “red-chip” enterprises, as well as their domestic representatives in charge of information disclosure shall abide by relevant regulations governing the stock sale of directors, supervisors and senior managers. Actual controllers of “red-chip” enterprises are required to undertake not to proactively give up their position of actual controllers within 3 years after the listing of the enterprise, while the 3-year lock-up period is not applicable to them anymore. In addition, controlling shareholders, actual controllers, directors and senior managers of a CDR issuer are prohibited from selling stocks held by them before listing until such enterprise becomes profitable.
3. Information Disclosure for Pilot Enterprises. Under the Administrative Measures, the issuer and other obligors of information disclosure shall meet current information disclosure requirements for listed companies. The Administrative Measures retain the provisions stipulated in the Draft ordering full disclosure of weighted voting rights, VIE structures or similar special arrangements and relevant protective measures for investors, and add requirements of timely disclosure of major adjustments to the aforesaid

息披露的法律责任的相关规定，这一修改可能会增加CDR投资者在维权时的障碍。

规范CDR发行与交易的一系列法规、实施细则及业务指引的出台为试点创新企业在境内发行CDR提供了具体操作依据，尽管小米发行CDR的计划暂缓，但其从报送申请材料至上会用时不到两周，结合CDR相关规则密集出台的背景，监管层对创新企业通过CDR实现境内上市的鼓励态度可见一斑，我们会对相关规定和实践保持持续关注。

arrangements. But it is noteworthy that the Administrative Measures deletes the information disclosure liabilities of domestic operating enterprises under “red-chip” structures as set forth in the Draft, which may bring obstacles to the protection of CDR investors’ rights and interests in respect of information disclosure.

The efforts of competent regulatory authorities to encourage the domestic listing of innovative enterprises through the CDR scheme is well demonstrated by a slew of relevant regulations rolled out lately and the quite short review procedure of Xiaomi’s CDR issuance application (*less than two weeks*), although its planned CDR insurance has been postponed temporarily. We will continue to closely monitor the regulatory developments and PRC practice in this connection.

## CSRC Issued New Regulations on ESOP and Stock Option Incentives for Pilot Innovative Enterprises 证监会发布试点创新企业员工持股计划和期权激励新规

2018年6月6日，证监会发布了《关于试点创新企业实施员工持股计划和期权激励的指引》（“《指引》”），对于试点创新企业在上市前实施的员工持股计划和上市前制定、上市后实施的期权激励计划分别进行了规范，并自公布之日起施行。以下为我们对《指引》主要的突破性规定的解读：

首先，对于上市前实施的员工持股计划，《指引》明确了符合以下情形之一的员工持股计划，在计算公司股东人数时按一名股东计算，使得试点创新企业实施超过200名员工的员工持股计划成为可能：(i) 遵循“闭环原则”的员工持股计划（即员工持股计划不在公司IPO时转让股份，并承诺自上市之日起至少36个月的锁定期。公司上市前及上市后锁定期内，员工只能向持股计划内员工或其他符合条件的员工转让相关权益）；或(ii) 由公司员工组成且在基金业协会备案的员工持股计划。不符合上述两种情形的员工持股计划，仍需按现行规定穿透计算股东人数。

其次，基于对上市公司股权明晰要求的考虑，证监会在2014年6月前对拟IPO公司的股权激励计划一直持否定态度，要求其必须在IPO前实施完毕或者终止股权激励计划；在2014年6月之后也仅对申请创业板上市的公司放宽该等要求。因此，在《指引》发布之前，拟在主板和中小板上市的企业仍需在IPO申报前实施完毕或终止其股权激励计划，而《指引》则允许试点创新企业突破上述限制，在激励计划所对应股权总量占上市前总股本比例不超过15%并满足行权的最低价格、保持实际控制人稳定、减持限制等其他具体要求的前提下，允许试点企业在上市前制定、上市后实施期权激励计划。

《指引》在很大程度上解决了员工持股计划的人数上限、上市前期权激励计划的清理等困扰未上市企业实施股权/期权激励计划的难题，此外，需注意的是，《指引》虽然明确了其适用主体为“纳入试点的创新企业”，但并未对其进行界定。从《指引》发布的时间及背景来看，我们理解其所规范的试点创新企业可能与境内发行股票或存托凭证的试点创新企业范围一致，但这点有待证监会的进一步确认。

On June 6, 2018, the CSRC issued the *Guidelines on the Implementation of Employee Stock Ownership Plans and Stock Option Incentives by Pilot Innovative Enterprises* (the “Guideline”), effective upon release, to regulate the Employee Stock Ownership Plans (“ESOP”) and stock option incentives implemented by Pilot Innovative Enterprises before and across listing. Set forth below are our observations and analyses of major breakthrough provisions of the Guideline:

First, with respect to ESOP implemented before listing, the Guideline makes it possible for Pilot Innovative Enterprises to implement an ESOP for over 200 employees by specifying that the ESOP shall be calculated as one single shareholder if (i) such ESOP follows the “Closed-Loop Principle” (*i.e., the ESOP shall not transfer any shares upon IPO and thereafter for a lock-up period of at least 36 months from the listing day. Before listing of the company and within the lock-up period, transaction of relevant interests should only take place between employees under the ESOP or other qualified employees*), or (ii) such ESOP comprised of employees should be filed with the Asset Management Association of China. Any other ESOP falls outside the aforesaid circumstances shall follow the current “penetrating” rules in shareholder number calculation.

Besides, for the purpose of a clear and well-defined equity structure of listed companies, the CSRC previously required all companies applying for listing to have the ESOP fully exercised or terminated before IPO (*from June 2014, it has lifted such restriction but only for ChiNext companies*). Therefore, any companies applying for listing on the Main Board or Small and Medium Board shall follow the aforesaid requirements before the enforcement of the Guideline. The Guideline allows Pilot Innovative Enterprises to implement stock option incentives before and across listing if such arrangement follows the following requirements, among others: (i) the total amount of shares involved does not exceed 15% of the total equity of the company before IPO and the minimal exercise price will be applied; (ii) the actual controller of such company shall remain stable; (iii) certain restrictions on share reduction are applied.

The Guideline tackles problems frequently faced by companies with a listing plan, such as the cap number of employees participating in an ESOP and the compulsory exercise/termination of stock option incentives before IPO. It is noteworthy, however, that the Guideline fails to define the scope of “Pilot Innovative Enterprises” regulated thereby. Considering the time and the background of the release of the Guideline, it is likely that “Pilot Innovative Enterprises” under the Guideline may refer to the pilot innovative enterprises eligible to issue stocks or depository receipts domestically, subject of course to the clarification by the CSRC.

## FOREIGN INVESTMENTS / 外商投资

### Negative List of Foreign Investment (2018 Edition) Released 2018年版外商投资准入负面清单下发

2018年6月28日，国家发改委、商务部联合发布了《外商投资准入特别管理措施（负面清单）（2018年版）》（“2018年版负面清单”），自2018年7月28日起施行。2018年版负面清单实施后，《外商投资产业指导目录（2017年修订）》中的外商投资准入特别管理措施（“2017年版负面清单”）同时废止，鼓励外商投资产业目录继续执行。

与2017年版负面清单相比，首先，2018年版负面清单大幅精简了清单长度，将清单条目由63条减至48条，大幅放宽了金融、基础设施、交通运输、汽车船舶制造、能源、农业等诸多领域的市场准入。其次，2018年版负面清单以表格形式整合了原限制类和禁止类外商投资产业目录并根据《国民经济行业分类》进行分类，统一列出外资股比限制、高管要求等特别管理措施。此外，2018年版负面清单还对部分暂未开放的领域列出了取消或放宽准入限制的过渡期，明确了汽车、金融领域对外开放的路线图时间表，这类规定大大增强了开放的可预期性。

On June 28, 2018, the National Development and Reform Commission (the “NDRC”) and the Ministry of Commerce (the “MOFCOM”) jointly issued the *Special Administrative Measures on Access of Foreign Investment (Negative List) (2018 Edition)* (the “2018 Negative List”), which will take effect from July 28, 2018. Since the effective date of the 2018 Negative List, the *Special Administrative Measures on Access of Foreign Investment of Catalogue for the Guidance of Foreign Investment Industries (Revised in 2017)* (the “2017 Negative List”) shall be annulled, while the *Catalogue of Encouraged Foreign Investment Industries* will remain effective.

Compared with the 2017 Negative List, first, the 2018 Negative List is a significantly shortened list with the number of items cut down from 63 to 48, with an aim to further remove or loosen foreign access restrictions in several sectors including finance, infrastructure, transportation, automobile manufacturing and shipbuilding, energy, agriculture and etc. Second, the 2018 Negative List integrated the former *Catalogue of Restricted and Prohibited Industries for Foreign Investment* into a unified table with items categorized according to the *Industrial Classification of National Economic Activities* and a clear list of special administrative measures including restriction on the foreign shareholding proportion, requirement over senior executives and etc. Further, the 2018 Negative List sets a transition period for several industries to cancel or relax restrictions on access by foreign investments in the future, specifying the opening-up timetable and road map for automobile and finance sectors, to provide more predictability over the open-up policy and practice.

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