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## CAPITAL MARKET / 资本市场

### CSRC Seeks Public Comments on Draft Rules for Governing Overseas Listings 证监会就境内企业境外上市备案规则公开征求意见

2021年12月24日，中国证券监督管理委员会（“证监会”）发布了《国务院关于境内企业境外发行证券和上市的管理规定（草案征求意见稿）》和《境内企业境外发行证券和上市备案管理办法（征求意见稿）》（合称为“境外上市备案草案”）并公开征求意见，境内企业境外上市监管制度将迎来重大变化（关于该草案更详细的评述请参见于2021年12月26日刊发于本所主页的《证监会境外上市新规（草案）——对红筹企业境外首发上市影响的简要分析》）。

现有的境外上市监管制度主要是指针对境内企业直接上市（如H股）和大红筹适用的证监会核准制度，而境内私营企业境外间接上市（通常指小红筹模式）的监管则相对处于模糊地带。为优化境外上市监管制度，境外上市备案草案将境内企业境外直接和间接上市统一纳入证监会备案管理制度，并全面适用各类境外证券（包括股票、存托凭证、可转债等）发行上市的行为（包括IPO、多地上市、分拆上市、借壳、SPAC上市等首发性质的上市行为，以及再融资、发行股份购买资产、股权激励、H股全流通等上市后行为）。除明确了适用范围外，境外上市备案草案还对境外上市备案的主体、条件、流程、时限、监管红线、重大事项报告制度等问题进行了具体规定。

值得注意的是，对于VIE架构企业如何适用境外上市备案草案的问题，证监会有关负责人在答记者问中明确指出“在遵守境内法律法规的前提下，满足合规要求的VIE架构企业备案后可以赴境外上市”。但至于何为VIE架构企业赴境外上市须满足的具体的“合规要求”，以及境外上市备案草案中提到的准予豁免一般备案要求的“存量企业”的范围界定及过渡期安排、境外上市备案流程与外商投资安全审查、网络安全审查等制度如何衔接等问题，仍有待监管部门的进一步明确。

On December 24, 2021, the China Securities Regulatory Commission (or CSRC) issued *Draft Provisions on Administration of Overseas Securities Offerings and Listings by Domestic Companies and Draft Administrative Measures on Filing Procedures for Overseas Securities Offerings and Listings by Domestic Companies* (collectively, the "Draft Rules") for public comments, pursuant to which substantial changes to the current regulatory regime for overseas listings by domestic PRC companies will be introduced.

The current regulatory regime for overseas listings mainly refers to the CSRC review and approval system applicable to direct listings by domestic PRC enterprises (e.g., H-share listings) and indirect listings by PRC state-owned enterprises through red chip structure, while regulation on indirect listings by private domestic enterprises with red-chip structure is relatively vague. In order to streamline the regulatory framework for direct and indirect overseas listings of PRC companies, the Draft Rules adopted a uniform filing procedure for virtually all forms of overseas (direct and indirect) securities offerings and listings by domestic PRC companies, and also spelt out relatively clearly such filing details as the filing entity, conditions, steps, time limit, regulatory red line, and major event reporting system, among others.

It is noteworthy that, the general filing requirement will be exempt under the Draft Rules for certain qualified existing PRC companies/存量企业 (which will almost for sure include those already listed offshore). CSRC will further provide a transitional period for such companies to complete a special filing procedure, details of which are yet to be formulated. In addition, CSRC for the first time officially indicated that VIE-structured companies "meeting relevant compliance requirements" can legally effect an offshore listing after completing the required filing procedures, subject of course to compliance with applicable PRC laws and regulations. Since VIE structures are predominantly used by market participants that involve restricted or prohibited foreign investment areas as periodically updated by China's foreign investment Negative List, it will be strategically important to see to what extent China is prepared to effectively relax or even restructure its foreign investment law restrictions in order to harmonize corporate China's offshore financing efforts and maximize its returns, both in short and long terms.

## COMPANY LAW / 公司法

### Draft Company Law Amendments Issued for Public Comments 全国人大就公司法修订草案征求意见

2021年12月24日，全国人大常委会公布了《中华人民共和国公司法（修订草案）》（“修正案”），向社会公众征求意见。修正案在现行公司法的基础上实质新增和修改70条左右，是现行公司法自2005年以来最大范围的一次修订，主要涵盖公司设立及退出制度、公司组织机构设置、公司资本制度、控股股东和经营管理人员的责任、国家出资公司特别规定等方面。其中，以下要点尤其值得关注：

1. 为股份公司引入类别股，利好PE/VC投资。由于现行公司法下股份公司“同股同权”的基本原则等限制，PE/VC等交易在为投资人设置股份公司

On December 24, 2021, China released *Draft Amendments to Company Law* (the "Draft Amendments") for public comments, representing its largest scale of amendments to the Company Law since 2005 by revising as many as 70 existing articles. The Draft Amendments are mainly intended to perfect rules on companies' establishment and exit by shareholders, improve capitalization structure, optimize organizational structures of various corporate forms, strengthen responsibilities of controlling shareholders and senior officers, and set out special regulations on PRC state-funded companies. Here is a summary of a few key proposed amendments:

1. Facilitate PE/VC transactions by relaxing restrictions on preferred shares. The Draft Amendments explicitly permitted a joint stock company (or JSC) to issue different

股东优先权时，该等条款的效力和执行力往往存在不确定性。修正案为股份公司引入了类别股的概念，允许在章程作出另行规定的情况下，这些股份可以在投票权、优先购买权、共同出售、其他转让限制、清算优先权等方面具有不同的股东权利。并且，修正案对于有限责任公司的优先购买权、知情权等股东权利的规定也有一定优化。这些变化预计将为投资人提供更稳定的立法保护（关于修正案在PE/VC投资角度的具体评述请参见本所于2021年12月29日刊发的《公司法修订草案允许类别股，为投资人拓展更大空间》）。

2. 调整股份公司的老股锁定机制。 (i) 修正案删除了“发起人持有的本公司股份，自公司成立之日起1年内不得转让”的规定，使得除控股股东、董监高外的一般股东在公司上市前的转股更加灵活；(ii) 修正案新增规定了“公司控股股东持有的公司公开发行股份前已发行的股份，自公司股票在证券交易所上市交易之日起3年内不得转让”。由于目前该等锁定期规定仅体现在境内A股上市的法律法规中，对于发行H股等境外上市的股份有限公司，适用于其控股股东的锁定期原则上仅包括现行公司法下锁定一年的限制以及境外相关法律法规的规定，修正案的上述新增规定将使该等股东面临更长的锁定期。
3. 其他修订要点。(i) 完善公司资本制度：修正案为股份公司引入授权资本制，即设立时只需发行部分股份，公司章程或者股东会可以授权董事会根据公司运营的实际需要决定发行剩余股份，并允许股份公司发行无面额股，使得股份公司的资本结构更加灵活；(ii) 优化公司治理结构：尤其是突出董事会作为公司执行机构的定位及强化其在公司治理中的作用，并允许公司在董事会中设置审计委员会履行监事会职能而不另设监事会或监事；(iii) 强化控股股东和经营管理人员的责任：修正案对控股股东及实际控制人滥用控制地位损害公司、中小股东权益的责任作出了细化规定，并进一步完善了董事、监事、高级管理人员忠实义务和勤勉义务的具体内容、维护公司资本充实的责任以及违反法律法规或者公司章程执行公司职务的民事赔偿责任。

## FOREIGN INVESTMENT / 外商投资

### China Further Shortened Its Negative List for Foreign Investments 2021年版外商投资准入负面清单正式发布

2021年12月27日，国家发改委、商务部发布了《外商投资准入特别管理措施（负面清单）（2021年版）》和《自由贸易试验区外商投资准入特别管理措施（负面清单）（2021年版）》，自2022年1月1日起施行。2021年版外资准入负面清单主要有如下变化：

1. 放宽外资准入限制。 具体而言，全国版负面清单和自贸区负面清单的条目均有如下缩减：(i) 取消了乘用车制造的外资股比限制和同一家外商仅可在国内建立两家及两家以下生产同类整车产品的

classes of shares with differentiated rights on profit distribution, liquidation preference, voting, and share transfers. Meanwhile, Draft Amendments also allowed JSC shareholders to spell out preemptive rights, rights of first refusal/offer, co-sale rights and other transfer restrictions in the JSC's articles of the association, which will provide legislative basis for such preferred shareholder rights. The Draft Amendments will also facilitate PE/VC investments in limited liability companies (or LLCs) by streamlining the first refusal mechanism and expanding the scope of shareholders' information rights (please refer to Han Yi Commentary *Different Classes of Shares Introduced by Proposed Company Law Amendments* published on December 28, 2021 on our home page as well as our firm's public WeChat account for a more detailed analysis from PE/VC investors' perspective).

2. Lockup for controlling shareholders and investors. The Draft Amendments proposed to remove the statutory post-establishment 1-year lockup period for JSC promoters, with an aim to ease the exit of investors participating in the establishment of a JSC. Instead, the Draft Amendments added a statutory post IPO 3-year lockup period for a JSC's controlling shareholders. Since the listing requirements for A-share market already contain such a restriction, this will mainly affect controlling shareholders of a JSC that intends to effect an overseas IPO.
3. Other major revisions. The Draft Amendments (i) improved the capitalization structure for companies through certain revisions such as making it possible for a JSC to adopt the authorized capital system and issue shares without par value; (ii) optimized the corporate governance structure especially by highlighting the role of the board of directors as a company's executive authority and strengthening its role in corporate governance; and (iii) beefed up the fiduciary duties of directors, supervisors and senior officers of a company through more detailed guidance on their obligations and liabilities to the company, minority shareholders and creditors.

On December 27, 2021, the National Development and Reform Commission (or NDRC) and the Ministry of Commerce (or MOFCOM) jointly issued the *Special Administrative Measures on Access by Foreign Investments (Negative List) (2021 Edition)* (the “2021 National Negative List”) and the *Special Administrative Measures on Access by Foreign Investments in Pilot Free Trade Zones (Negative List) (2021 Edition)* (the “2021 FTZ Negative List”), both of which have become effective since January 1, 2022. Compared with the current negative lists for foreign investments, major changes made by these new lists include:

- 合资企业的限制，汽车整车制造业将向外资全面开放；以及(ii)取消了外商投资卫星电视广播地面接收设施及关键件生产的限制。此外，自贸区负面清单进一步开放市场调查领域（除广播电视收听、收视调查须由中方控股外，取消外资准入限制），并将此前属于禁止类的社会调查领域调整为限制类（要求中方股比不低于67%，法定代表人具有中国国籍）。
2. 明确从事禁止投资领域业务的境内企业赴境外上市的要求。尤其引发市场关注的是，2021年版负面清单新增了如下说明，即从事负面清单禁止投资领域业务的境内企业到境外上市应当满足三个条件：(i)经国家有关主管部门审核同意；(ii)境外投资者不得参与企业经营管理；以及(iii)境外投资者持股比例需符合境外投资者境内证券投资管理的有关规定。根据国家发展改革委和商务部有关负责人的解读，本条新增规定为从事负面清单禁止投资领域业务的境内企业到境外上市提供了政策空间。但本条规定是否适用于境内企业间接境外上市（包括VIE结构企业境外上市）、以及与证监会目前正在征求意见的境外上市备案草案如何衔接等问题有待进一步澄清。此外，关于取得“国家有关主管部门审核同意”的实施细则，以及境外投资者“参与企业经营管理”的认定标准等问题目前也还没有明确结论。我们将保持对相关立法和监管动态的持续关注。

1. Further opening of certain sectors. Both the 2021 National Negative List and the 2021 FTZ Negative List have (i) further removed the cap on foreign ownership in passenger car manufacturing and the restriction that a foreign investor cannot establish more than two joint ventures in China to manufacture the same vehicle product; and (ii) lifted the restrictions on foreign investment in satellite TV broadcasting ground receiving facilities and the production of key components. In addition, the 2021 FTZ Negative List further lifted restrictions on foreign investors' access to market research field (expect that, radio and TV rating surveys should still be controlled by domestic PRC investors) and allowed foreign investors to invest in social surveys (on the premise that the Chinese shareholding should not be less than 67%, and the legal representatives must be Chinese citizens).
2. Relaxing foreign ownership restrictions on overseas listed PRC companies engaged in sectors otherwise prohibited for foreign investments. The new lists lifted restrictions on foreign investment in overseas listed companies which are engaged in sectors prohibited from foreign investment on the following conditions: (i) these companies shall obtain approvals of competent authorities from foreign investment perspective before overseas listing; (ii) foreign investors of these companies shall not get involved in their operation and management; and (iii) foreign shareholdings in these companies are subject to restrictions applicable to investments by foreign investors in domestic capital markets (i.e., the aggregate shareholding of all foreign investors in a listed company may not exceed 30% while each single foreign investor's shareholding in such company may not exceed 10%). Pursuant to interpretations of the NDRC and the MOFCOM, the aforesaid new change aimed to leave certain policy space for overseas listings by domestic PRC companies engaged in sectors otherwise prohibited for foreign investments. However, it is not yet clear as to whether such policy space will also apply to domestic companies (especially companies with VIE structure) seeking indirect overseas listings and how this policy will coordinate with the filing requirements under the Draft Rules for overseas listings as mentioned above. In addition, detailed guidelines on procedures to "obtain approvals from competent authorities" and criteria to determine whether a foreign investor is "participating in a company's operation and management" also remain to be further clarified by NDRC and MOFCOM. We will continue to closely monitor developments in this area.

## CYBER SECURITY / 网络安全

### Amended Measures for Cybersecurity Review Officially Released 修订后的《网络安全审查办法》正式发布

2022年1月4日，国家互联网信息办公室等十三部门联合发布了修订后的《网络安全审查办法》（“新《网安办法》”），自2022年2月15日起施行。

相较于2021年7月发布的《网络安全审查办法》（修订草

On January 4, 2022, the Cyberspace Administration of China (or CAC) and other competent PRC authorities jointly issued the amended *Measures for Cybersecurity Review* (the “New Measures”), which will come into effect on February 15, 2022.

On the issue whether a domestic PRC company seeking listing overseas is subject to cybersecurity review as hotly discussed by

案征求意见稿)》中,市场普遍关注的拟在境外上市的企业是否需要进行网络安全审查一事,新《网安办法》一方面沿用了赴“国外上市”的概念,另一方面,将网络安全审查适用的主体缩小到了掌握超过100万用户个人信息“网络平台运营者”(而非数据处理者)。虽然新《网安办法》并未对赴“国外上市”和“网络平台运营者”的范畴作出进一步的解释,但根据2021年11月发布并公开征求意见的《网络数据安全管理条例(征求意见稿)》以及其他相关法规的规定,目前市场普遍认为赴“国外上市”不包括香港上市,以及“网络平台运营者”的范围也大大小于之前的“数据处理者”,应主要涉及提供互联网平台服务的法人及非法人组织,以及自建网站从事销售商品或者提供服务的经营者。但仍需注意的是,除前文规定的赴国外上市时须进行的网络安全审查情形外,如监管机关认为网络平台运营者(无论其是否掌握100万以上用户的个人信息)开展处理数据的活动(包括香港上市)“影响或者可能影响国家安全的”,其仍可以依职权启动网络安全审查,因此对于掌握重要数据、核心数据或涉及数据出境等较大可能“影响或者可能影响国家安全的”网络平台运营者在寻求境外上市(包括赴香港上市)时,还需注意与监管机关保持沟通,以免影响上市进程。

the public after release of the draft measures for public comments in July 2021 (the “Draft”), the New Measures have, on the one hand, remained focused on the activity of “listing abroad” as provided in the Draft, and on the other hand limited the scope of applicable companies to internet platform operators (not the data processors as provided in the Draft) possessing more than one million people’s personal information. Though the New Measures are still silent on the definitions of “listing abroad” and “internet platform operator”, with reference to the related definitions under the *Cyber Data Security Administration Rules (Draft for Comments)* issued by CAC in November 2021 and other related rules, it is believed that “listing abroad” is unlikely to include listing in Hong Kong and the scope of “internet platform operators” would be much smaller than “data processors” and might mainly refer to operators providing internet platform services to other market players or operators providing services or commodities through self-operated internet platforms, subject of course to further explanations by competent authorities.

It is also noteworthy that, in addition to the cybersecurity review requirement for internet platform operators who process more than one million people’s personal information and seek listing abroad as introduced above, competent authorities may also initiate a cybersecurity review on internet platform operators under the circumstances where the data processing activities (including proposed listing in Hong Kong) of such operators are deemed as having or may have an impact on national security. Thus, to be prudent, it is recommended that internet platform operators possessing important data, sensitive data, core data or involved in cross-border data transmissions should proactively communicate with CAC and other competent authorities on the applicability of a cybersecurity review under the New Measures when seeking listing overseas (including listing in Hong Kong).

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