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CAPITAL MARKET / 资本市场

CSRC Publicly Solicits Comments on Amended Confidentiality Regulations for Overseas Listings Involving PRC Companies 证监会拟修改上市保密相关规定

为支持境内企业依法赴境外上市，提高境外发行证券与上市过程中相关保密和档案管理工作的规范化水平，推动深化跨境监管合作，2022年4月2日，中国证券监督管理委员会（“证监会”）发布了《关于加强境内企业境外发行证券和上市相关保密和档案管理工作的规定（征求意见稿）》（“《征求意见稿》”），并向公众征求意见。

《征求意见稿》主要拟在以下方面对现行2009年的规定进行修改：(i)将适用范围扩展至境内企业间接境外上市的情形（关于证监会企业境外上市新规的具体分析，请见我所《每月立法动态》2021年12月&2022年1月合刊）；(ii)加强上市主体向中介机构或境外监管机构等境外主体提供或公开披露重要信息（包括：国家秘密、机关单位工作秘密以及对国家安全及公共利益有重要影响的信息）的保密管理及事前审查要求，以减少不必要的涉密敏感信息进入工作底稿；以及(iii)允许境外证券监督管理机构及其他监管机关通过跨境监管合作机制，在中国监管部门的协助下对境内企业境外发行上市活动进行调查、检查和取证。这一修改意味着近年来中美之间有关中概股审计工作底稿能否接受美国检查的核心问题，有望取得实质性突破。

In order to support domestic companies to offer and list securities in overseas markets, to strengthen the confidentiality and archives administration concerning such overseas listing, and to enhance cross-border regulatory cooperation in this regard, the China Securities Regulatory Commission (or CSRC) promulgated the amended *Regulations on Strengthening the Confidentiality and Management of Archives Related to Overseas Issuance and Listing of Securities by Domestic Companies* (the “Amended Regulations”) for public comments on April 2, 2022.

The Amended Regulations proposed to make the following major changes to the currently effective 2009 version of rules: (i) expanding application scope from direct overseas listing to include indirect overseas listing by domestic company (please refer to our December 2021 & January 2022 issue of *China Regulatory Updates* for details of CSRC’s latest draft rules on overseas listings); (ii) strengthening confidentiality obligations and pre-approval requirements on domestic company’s public disclosure or provision of material information (including state secrets, work secrets of governmental sectors and other information which has significant influence on national security or public interest) to listing agencies or foreign institutions such as regulatory authorities to reduce entrance of unnecessary state secrets and sensitive information into working papers; and (iii) allowing foreign securities regulatory institutions and other competent authorities to carry out inspection, investigation and evidence collection in respect of the overseas listing activities by domestic companies through a cross-border regulatory cooperation mechanism, with Chinese government assistance. The modification demonstrates that the core issue between China and the United States on whether the audit working papers of the US-listed China companies can be inspected by US regulatory authorities is expected to achieve a substantial breakthrough.

CSRC to Expand Depository Receipts Business under Stock Connect Scheme 证监会扩大互联互通存托凭证业务范围

2022年2月11日，中国证券监督管理委员会（“证监会”）发布《境内外证券交易所互联互通存托凭证业务监管规定》（“《互联互通规定》”），该规定自发布之日起生效，同时取代并废止了2018年10月出台的《关于上海证券交易所与伦敦证券交易所互联互通存托凭证业务的监管规定（试行）》（“《沪伦通规定》”）；关于《沪伦通规定》的具体分析，请见我所《每月立法动态》2018年11月刊）。

结合证监会答记者问中披露的信息，我们注意到，《互联互通规定》相较于《沪伦通规定》而言进一步扩大了发行人主体范围，允许在上海证券交易所（“上交所”）、深圳证券交易所（“深交所”）或英国、瑞士、德国等地交易所的上市企业通过互联互通机制发行境外存托凭证（GDR）或中国存托凭证（CDR）。但需要注意的是，境外上市的红筹企业（即注册地和上市地在境外、主要经营地在境内的企业）发行CDR不适用《互联互通规定》，而应适用并符合2018年3月发布的《关于开展创新企业境内发行股票或存托凭证试点的若干意见》的相关要求（关于该

On February 11, 2022, CSRC issued the revised *Rules for Depository Receipts Business under Stock Connect Scheme between Domestic and Overseas Stock Exchanges* (the “Revised Rules”), which came into effect and replaced the *Trial Rules for Depository Receipts Business under Shanghai-London Stock Connect Scheme* (the “Trial Rules”; please refer to our November 2018 issue of *China Regulatory Updates* for details) issued in October 2018 immediately on the day of issuance.

We note that, according to the Revised Rules and a press conference held by CSRC, compared to the Trial Rules, the Revised Rules further expanded the scope of eligible issuers, allowing companies listed on the Shanghai Stock Exchange (or SSE), the Shenzhen Stock Exchange (or SZSE) or stock exchanges in the UK, Switzerland and Germany to offer global depository receipts (GDRs) or Chinese depository receipts (CDRs) (as the case may be) under the stock connect scheme. It is worth noting that, the Revised Rules are not applicable to CDR offerings on SSE or SZSE by overseas-listed red-chip companies (i.e., companies based in mainland China but incorporated and listed overseas), whose activities shall instead be subject to and in accordance with the *Serval Opinions on Pilot Programs of Issuance of Shares or Depository Receipts by Innovative Enterprises in China* (please refer to our March & April 2018 issue of *China Regulatory Updates* for CDR issuance

规定及创新企业CDR发行要求的具体分析，请见我所《每月立法动态》2018年3月&4月合刊)。《互联互通规定》的另一亮点是引入了融资型CDR，允许境外发行人通过发行CDR在境内融资。

为进一步落实《互联互通规定》，2022年3月25日，上交所和深交所分别发布了存托凭证上市交易的暂行办法及相关配套指引，在境内外发行人的发行要求、合格投资者门槛、信息披露和终止上市等方面做出了更为全面、详细的规定。

总体而言，《互联互通规定》《暂行办法》及相关配套政策的出台将有利于进一步加强境内外市场的互通，提高中国资本市场服务实体经济的能力和 international 竞争力，我们也将持续关注相关监管动态和市场实践。

requirements for red-chip companies and other details) issued in March 2018. Another highlight of the Revised Rules is that it allows overseas issuers to offer CDRs on domestic stock exchanges based on newly issued underlying shares to raise capital in onshore capital market.

On March 25, 2022, both SSE and SZSE issued interim measures and relevant guidelines for implementation of the Revised Rules, providing details on issuance requirements, threshold for qualified investors, information disclosure requirements and procedures for termination of listing, among others.

In general, the Revised Rules and relevant measures are expected to further deepen the connectivity between domestic and overseas markets and improve the domestic market's ability and international competitiveness of serving real economy. We will continue to monitor and update on the regulatory developments and corresponding PRC practice in this connection.

LIFE SCIENCE / 生命科学

MOST Seeks Public Comments on Draft Detailed Administrative Measures on Human Genetic Resources 科技部就人类遗传资源管理条例实施细则公开征求意见

2022年3月22日，科技部发布《人类遗传资源管理条例实施细则》（征求意见稿）（“征求意见稿”）并向社会公开征求意见。在此之前，2019年7月起施行的《人类遗传资源管理条例》（“717号文”）已经以行政法规的形式对人类遗传资源的采集、保藏、利用和对外提供行为进行了全面规范。征求意见稿在此基础上，进一步细化了监管要求，其中尤其值得关注的有：

1. 明确“外方单位”的定义，拟加强对VIE架构企业的监管：根据717号文规定，外国组织、个人及其设立或者实际控制的机构（“外方单位”）不得在采集、保藏或对外提供中国人类遗传资源，但并未就何为“实际控制”做出进一步解释。因此，过去两年内实践中对于涉及VIE结构的境内企业是否应被认定为外方单位一直存在争议。作为回应，征求意见稿拟规定“实际控制”包括：(i)境外组织、个人持有或者间接持有机构50%以上的股份、股权、表决权、财产份额或者其他类似权益；(ii)境外组织、个人所享有的决策机构表决权或其他权益足以对该机构的决议或对该机构的决策、内部管理产生重大影响；或(iii)境外组织、个人通过协议或者其他安排，足以对机构的决策、经营管理等重大事项施加重大影响等情形。根据前述规定，通过VIE架构被外资控制的境内企业将被认定为外方单位，并被禁止从事人类遗传资源采集、保藏以及对外提供的行为，且其涉及人类遗传资源使用的相关科研行为也需要根据717号文进行事前审批或备案。需要注意的是，717号文及征求意见稿均明确其不适用于为临床诊疗、采供血服务、查处违法犯罪、兴奋剂检测和殡葬等业务需要，采集、保藏人类遗传资源相关活动，因此外方单位认定范围的扩大不太可能对外资设立或控制的相关机构从事前述业务产生重大不利影响。

On March 22, 2022, the Ministry of Science and Technology (or MOST) promulgated the *Draft Implementation Measures of the Administrative Regulations on Human Genetic Resources* (the “Draft Measures”) for public comments, setting out comprehensive administrative requirements on the collection, storage, utilization and overseas provision of human genetic resources (the “HGR”) in accordance with current regulatory regime as provided in the *Administrative Regulations on Human Genetic Resources* (the “HGR Regulation”) that has already been effective since July 2019. Highlights of the Draft Measures include, among others:

1. Clarify the definition of “Foreign Entity” to strengthen the administration on foreign investment through VIE structure. Under the HGR Regulation, foreign entities (defined as foreign institutions or individuals or entities established or actually controlled thereby) are prohibited to collect or preserve the Chinese HGR or provide the HGR abroad. Absent clear definition of “actual control”, controversy exists as to whether an onshore entity operated under VIE structure would be deemed a foreign entity in previous practice. In response, the Draft Measures provided guidance on what constitutes “actual control”: (i) foreign institutions or individuals directly or indirectly hold more than 50% of shares, equity interests, voting rights, property shares or other similar rights or interests of an onshore entity, (ii) foreign institutions or individuals enjoy voting rights in the decision-making bodies or other rights or interests sufficient to impose significant influence on an onshore entity's decision-making or internal management, or (iii) foreign institutions or individuals are able to exert significant influence on an onshore entity's decision-making, operating management or other major events through contracts or other arrangements. Pursuant to the Draft Measures, an onshore entity actually controlled by foreign investors through VIE structure would be regarded as a foreign entity, and thus subject to prohibition, restrictions or pre-approval requirements on collection, preservation, utilization and provision of the Chinese HGR abroad. Nevertheless, both the HGR Regulation and the Draft Measures have made it clear that they are not applicable to collection, preservation, overseas provision and other HGR related activities for the purposes of clinical diagnosis and treatment, blood collection and supplying services, criminal investigation, doping detection and funeral and interment services. Therefore, it is unlikely that the proposed expansion of the scope of foreign entities under the Draft Measures will have significant impact on the onshore entities established or controlled by foreign capital

2. **修改部分审批要求，减轻企业合规负担：**征求意见稿首次明确：(i)以教学为目的、在实验室检测后依法或依临床研究方案约定的临时存储行为不属于717号文下的保藏行为，亦无需取得保藏许可；(ii)申请人取得临床试验备案或保藏许可后，无需就其中前述项目中涉及的人类遗传资源采集活动另行取得采集许可；以及(iii)国际合作许可中增加外方伦理审查豁免规则，并且允许非重大事项变更可通过备案告知，无需申请变更许可。

除以上提及的内容外，征求意见稿还包括了知识产权、安全审查以及执法程序等方面的规定，为监管部门后续的日常监管及执法提供了法律依据。但对于正在开展相关科研项目的医疗机构、药械生产/研发企业而言，征求意见稿正式实施后是否会对相关项目设置新老划段或过渡期、是否会对相关企业的内外资属性进行重新认定等问题目前暂未明确，对此我们将持续关注相关立法动态和进展。

engaged in the above-mentioned activities.

2. **Loosen application requirements to reduce compliance burden.** The Draft Measures specified for the first time that: (i) temporary storage of HGR for the purpose of teaching or clinical testing pursuant to applicable laws or relevant clinical scientific research projects is not regarded as “preservation” and thus not subject to preservation approval under the HGR Regulation; (ii) after completion of clinical research filing or obtainment of preservation approval (as the case may be), an applicant is no longer required to obtain collection approval from MOST for the same project; and (iii) foreign entities may be conditionally exempt from ethical review in a Sino-foreign cooperative project and immaterial changes will be eligible for a recordation filing instead of a prior approval procedure.

In addition, the Draft Measures also include provisions on intellectual property, security review and law enforcement procedures, which provide a legal basis for the regulatory authorities to conduct routine supervision. However, for the medical institutions and drug or medical devices production/R&D enterprises that are carrying out relevant scientific research projects, issues as to whether there will be any non-retroactive mechanism or transition periods for such existing projects and whether the domestic or foreign nature of relevant enterprises should be reidentified yet to be clarified. We will continue to closely monitor and update major regulatory developments in this area.

DATA SECURITY & COMPLIANCE / 数据安全与合规

China Continues to Strengthen Regulation on Data Security 中国继续推进数据安全监管

为贯彻落实《数据安全法》《网络安全法》《个人信息保护法》等上位法律法规，基于2021年9月30日发布的《工业和信息化领域数据安全管理办法（试行）》征求意见稿（“第一次意见稿”），工业和信息化部于2022年2月10日就修改完善后的该办法公开征求意见（“第二次意见稿”）。

第二次意见稿主要从以下方面对工业和信息化领域的数据处理活动提出专门的规范要求：(i)扩展适用的数据范围。在第一次意见稿中，工业和信息化领域的数据仅包括工业数据和电信数据，第二次意见稿扩充了数据范围，增加了无线电数据；(ii)细化数据分级方法与判定标准，将工业和信息化领域数据分为一般数据、重要数据和核心数据三级；(iii)建立数据全生命周期的安全管理制度。第二次意见稿明确了相关企业应参照数据分类分级结果，对数据全生命周期的不同环节与阶段（包括收集、存储、使用、加工、传输、出境等环节）实施差异化安全防护措施。值得注意的是，相比第一次意见稿，第二次意见稿取消了“核心数据不得出境”的规定，统一了核心数据和重要数据的出境监管要求，即确需向境外提供时，应当依法进行数据出境安全评估；以及(iv)强调对个人信息的单独保护。第二次意见稿新增了《个人信息保护法》作为上位法基础，从之前的纳入数据分类统一管理到强调对个人信息的单独保护。

鉴于第二次意见稿意对在中国境内开展工业和信息化领域数据处理活动的企业的数据活动设置具体的合规要求，建议相关企业及早参考该等规定，完善数据合规体系，降低数据安全风险。

On February 10, 2022, the Ministry of Industry and Information Technology published a new draft of *the Administrative Measures on Data Security in the Industrial and Information Technology Sectors (Draft for comments)* (the “Second Draft”), which incorporated public opinions on a previous draft that was first released on September 30, 2021 (the “First Draft”), for the purpose of implementing such higher-level laws and regulations as the *Data Security Law, Cybersecurity Law, Personal Information Protection Law*, among others.

Several specific requirements are set out in the Second Draft on data processing activities in the field of industry and information technology sectors as follows: (i) Expansion of scope of data - Under the First Draft, only industrial data and telecoms data are subject to regulations. The scope of data has been extended to cover radio data under the Second Draft; (ii) Refinement of data hierarchical classification framework - Based on the data classification framework established under the *Data Security Law* and the *Network Data Security Management Regulations (Draft for Comment)*, the Second Draft adjusted the data classification methods and judgment standards, classifying data in the field of industry and information technology sectors into three different risk categories: “ordinary”, “important” and “core” data; (iii) Establishment of full life-cycle security management system - The Second Draft required data processors to take differentiated measures to protect the data in the process of data collection, storage, utilization, processing and transfer according to the data security level. It is worth noting that compared to the First Draft, the Second Draft removed the outright ban on cross-border transfer of core data. Both core data and important data are allowed to be transferred overseas provided a security assessment has been made in accordance with PRC laws and regulations; and (iv) Emphasis on personal information protection - Rather than merely integrating personal information into unified data classification management system under the First Draft, the Second Draft added the *Personal Information Protection Law* as the legislative basis for this regulation to emphasize the special protection for personal information.

The promulgation of the Second Draft signals China’s intention to

set comprehensive compliance requirements for data processors in the field of industry and information technology sectors. It is suggested that relevant enterprises refer to these regulations to improve their data compliance systems to reduce data security risks.

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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