

Q3, 2023



TABLE OF CONTENTS / 本期内容

COMPANY LAW / 公司法

Third Draft Amendments to Company Law Issued for Public Comments / 《公司法》三审稿公开征求意见 2

CAPITAL MARKET / 资本市场

CSRC Further Regulated Share Reductions by Controlling Shareholders and Actual Controllers of A-Share Listed Companies / 证监会进一步规范上市公司控股股东及实际控制人的股份减持 2

DATA SECURITY / 数据安全

CAC Proposed to Facilitate Cross-Border Data Transfer / 网信办就《规范和促进数据跨境流动规定》公开征求意见 3

ANTI-MONOPOLY / 反垄断

SAMR Published Anti-Monopoly Compliance Guidelines for Business Concentrations / 国家市场监督管理总局发布《经营者集中反垄断合规指引》 4



COMPANY LAW / 公司法

Third Draft Amendments to Company Law Issued for Public Comments 《公司法》 三审稿公开征求意见

2023年9月1日，经十四届全国人大常委会审议，《公司法（修订草案三次审议稿）》（“《三审稿》”）向社会公布并公开征求意见。这是继2021年12月以及2022年12月两次修订草案后（具体分析请见我所《每月立法动态》2021年12月&2022年1月刊以及2023年1月刊），全国人大常委会第三次就《公司法》的修改向社会公开征求意见。与其前两次的草案相比，《三审稿》的若干新增条文引起了社会各界的广泛讨论，其中尤其值得关注的有：

1. **有限公司出资设5年实缴期限：**《三审稿》中新增条款要求“有限公司股东认缴的出资额应当按照公司章程的规定自公司成立之日起五年内缴足”，但未明确有限公司设立后新增注册资本的实缴期限如何计算，也未说明该要求是否适用于目前已设立的有限公司。《公司法》自2013年以来一直施行注册资本认缴制，即允许有限公司股东在章程中自行约定实缴期限。我们理解，该新增条款旨在强化股东的出资责任、保护债权人利益，但与此同时也可能会增加企业的现金流及资金管理成本。
2. **按股东持股比例进行同比例减资：**《三审稿》中新增条款要求“公司减少注册资本，应当按照股东出资或者持有股份的比例相应减少出资额或者股份”，但并未明确公司是否可以通过章程或股东会决议另行约定其他方式的减资。目前《公司法》中对于股东的减资比例并无明确要求，实践中，公司因重组、对赌等原因进行股权回购时，经常会出现股东不按照持股比例减资或一部分股东减资而其他股东不参与减资的情况。该新增条款如最终落地的，后续实践中如何适用有待立法部门的进一步解释。
3. **加强控股股东责任：**(i)增加中小股东要求回购的情形：公司的控股股东滥用股东权利，严重损害公司或者其他股东利益的，其他股东有权请求公司按照合理的价格收购其股权；(ii)明确公司的控股股东、实际控制人只要实际执行公司事务的，不论是否担任公司董事、监事或高管，均对公司负有忠实、勤勉义务。

On September 1, 2023, the third draft of *Amendments to Company Law* (the “2023 Amendments”) was issued for public comments following the review by the 14th NPC Standing Committee and after the release of the first and second draft revisions respectively in December 2021 and December 2022 (please refer to our December 2021, January 2022 and December 2022 issues of *China Regulatory Updates* for details). Compared to the previous revisions, several new provisions in the 2023 Amendments have generated wide discussions. Highlights of the 2023 Amendments include, among others:

1. **A 5-year limit on capital contribution for LLCs.** The 2023 Amendments propose to add a time limit on capital contributions for limited liability companies (LLCs) (i.e., *the registered capital of a LLC should be fully paid within five years from its incorporation by its shareholders*). However, 2023 Amendments remain unclear on whether the time limits on capital contribution also apply to any increase in capital after the establishment of an LLC and whether the limit has retrospective effect on existing LLCs. By contrast, the current PRC Company Law has adopted a capital subscription regime since 2013, allowing shareholders of LLCs to set capital contribution timelines in the articles of associations at their discretion. This new requirement aims to bolster shareholders’ accountability and safeguard interests of creditors, albeit potentially resulting in an escalation of capital management expenses for enterprises.
2. **Proportionate capital reduction.** The 2023 Amendments add a new requirement on capital reduction that all the shareholders shall reduce their capital contributions in a LLC in proportion to their shareholding ratios while failing to clarify whether the shareholders could reduce their capital contributions disproportionately upon negotiations for such reasons as reorganization, valuation adjustment, among others as what they do under the current PRC Company Law. Further legislative interpretation in this regard would be required, if this provision is finally adopted.
3. **Strengthen Controlling Shareholders’ Responsibilities.** The 2023 Amendments (i) entitle shareholders to request the company to repurchase its shares at a reasonable price in case the controlling shareholder abuses its shareholder rights and seriously damages the interests of the company or other shareholders; and (ii) clarify that controlling shareholders and actual controllers who do not serve as directors, supervisors or senior management but effectively manage the company’s operations shall be subject to fiduciary duties and diligence obligations to the company.

CAPITAL MARKET / 资本市场

CSRC Further Regulated Share Reductions by Controlling Shareholders and Actual Controllers of A-Share Listed Companies 证监会进一步规范上市公司控股股东及实际控制人的股份减持

2023年8月27日，中国证券监督管理委员会（“证监会”）发布《进一步规范股份减持行为》的通知（“《减持通知》”），规定若A股上市公司存在破发、破净情形，或者最近三年未进行现金分红，或者累计现金分红金额低于最近三年年均净利润30%的，上市公司的控股股东、实际控制人及其一致行动人不

On August 27, 2023, the China Securities Regulatory Commission (the “CSRC”) issued the *Notice on Further Regulations of Share Reductions* (the “Notice”). According to the Notice, when a A-share listed company’s stock price is lower than its IPO price or net asset value per share, or if a A-share listed company has not made any cash dividend or its accumulated cash dividends are less than 30% of the average annual net profits during the latest three fiscal years, the

得通过二级市场减持公司股份，若上市公司无控股股东或实际控制人的，该规定适用于其第一大股东及其实际控制人。

2023年9月26日，沪深两市及北京证券交易所分别发布进一步通知，明确《减持通知》中所称的“二级市场减持”是指通过交易所集中竞价交易或者大宗交易减持股份，即协议转让等其他形式的股份交易不受《减持通知》的限制，并对破发、破净以及分红不达标等情形的认定标准、减持计划的披露要求等进行了规定。同日，北交所也修订了减持相关的监管指引，其中对于控股股东、实际控制人不得减持的情形，除破发、破净情形外，新增了公司最近一期经审计财务报告存在亏损的情形。

DATA SECURITY / 数据安全

CAC Proposed to Facilitate Cross-Border Data Transfer 网信办就《规范和促进数据跨境流动规定》公开征求意见

2023年9月28日，国家互联网信息办公室（“网信办”）发布了《规范和促进数据跨境流动规定（征求意见稿）》（“《数据跨境规定》”）并向社会公开征求意见，该规定减轻了跨国公司等企业数据出境的合规负担，有利于促进数据依法有序自由流动。如《数据跨境规定》正式通过，预计将会对数据出境产生以下重要影响：

1. **数据出境的“安全港”情形：**根据《数据跨境规定》，以下情形的数据出境不需要申报安全评估、订立个人信息出境标准合同或通过个人信息保护认证：**(i)**国际贸易、学术合作、跨国生产制造和市场营销等活动中产生的、不包含个人信息或者重要数据的数据出境；**(ii)**向境外提供不是在境内收集产生的个人信息；**(iii)**为订立、履行个人作为一方当事人的合同所必需（如跨境购物、跨境汇款、机票酒店预订、签证办理等）向境外提供个人信息的；**(iv)**按照依法制定的劳动规章制度和依法签订的集体合同实施人力资源管理，必须向境外提供内部员工个人信息的；**(v)**紧急情况下为保护自然人的生命健康和财产安全等，必须向境外提供个人信息的；**(vi)**预计一年内向境外提供不满1万人个人信息的（但应取得个人信息主体同意）；以及**(vii)**自由贸易试验区负面清单外的数据出境。此外，《数据跨境规定》还明确，未被相关部门、地区告知或者公开发布为重要数据的，数据处理者不需要作为重要数据申报数据出境安全评估。
2. **减轻数据出境审查要求：**《数据跨境规定》明确一年内向境外提供1万人以上、不满100万人个人信息的个人信息出境标准合同并向省级网信部门备案或者通过个人信息保护认证后，可以不申报数据出境安全评估；向境外提供100万人以上个人信息的，应当申报数据出境安全评估。

controlling shareholders and actual controllers of such listed company, together with their concerted parties, shall not sell down shares and reduce their shareholdings in the company via the secondary market. If the listed company does not have a controlling shareholder or actual controller, the Notice shall be applicable to the largest shareholder and its actual controller.

On September 26, 2023, the stock exchanges in Shanghai, Shenzhen and Beijing all released detailed rules in connection with the Notice, clarifying that the “secondary market reduction” refers to selling down shares through centralized bidding system or bulk trading in the stock exchange; thus, other forms of share trading such as transfer by private agreement are not subject to the restrictions of the Notice. The rules also clarify such other key factors specified under the Notice as determination of current stock price, net asset value per share, insufficient dividends, among others, as well as the disclosure requirements for the share reduction plans by controlling shareholders. The Beijing Stock Exchange further added that, in addition to the aforesaid circumstances, shareholding reduction by the controlling shareholders and actual controllers of a listed company is also prohibited if the company reported a loss in its most recent audited financial report.

On September 28, 2023, the Cyberspace Administration of China (the “CAC”) released the Draft *Provisions on Regulating and Facilitating Cross-Border Data Transfer* (the “Draft Provisions”), seeking public comments. The Draft Provisions proposed to lighten the compliance burden for enterprises, especially multinational ones, in data export from China by providing some safe harbors, among others. If adopted, the Draft Provisions may have the following major effects:

1. **Provide safe harbors for data export.** According to the Draft Provisions, the following cross-border data transfers from China would be exempted from such presumably burdensome data-export related procedures as CAC security assessment, CAC standard contracting, and personal information protection certification: **(i)** exporting data (other than personal data or important data) generated from international trade, academic cooperation, cross-border manufacturing, and marketing; **(ii)** exporting personal data that is not collected and generated within the territory of China; **(iii)** transferring personal data necessarily used for execution or performance of a contract to which the subject of such personal data is a party, such as one concerning cross-border shopping, wire transfers, flight and hotel bookings, and visa processing, etc.; **(iv)** exporting employee personal data for purposes of implementing HR management according to legally established employment policies and collective labor contracts; **(v)** exporting personal data that is necessary to protect people’s life and property security in emergencies; **(vi)** exporting personal data of no more than 10,000 individuals within one year (*provided that the consents of such relevant individuals are obtained*); and **(vii)** exporting data from the free trade zones (FTZs) and such data is not included in the negative lists published by FTZs. The Draft Provisions also clarified that data handlers would not be required to go through the CAC security assessment procedure concerning “important data”, if the data to be transferred offshore has not been designated as “important data” by competent PRC regulators, either through public announcement or specific notice.
2. **Ease data export requirements.** Under the Draft Provisions, if the data handlers export personal data of over 10,000 but

总体来看，《数据跨境规定》为企业经营活动中的常规数据的自由流动提供了支持，我们将密切关注后续立法动态和进展。

less than one million individuals within a one-year period, then after (i) signing a standard contract and filing it with the CAC in the provincial level, or (ii) passing certain CAC ratified certification concerning personal information protection, such data handlers may not go through the CAC security assessment procedure. However, if they export personal data of more than one million individuals, the data handlers would still need to follow the CAC security assessment procedure.

In brief, the Draft Provisions purport to take initiatives to allow certain routine data exports to facilitate daily business operations and improve cross-border free data flows, the effects of which (if implemented) in practice are yet to be seen.

ANTI-MONOPOLY / 反垄断

SAMR Published Anti-Monopoly Compliance Guidelines for Business Concentrations 国家市场监督管理总局发布《经营者集中反垄断合规指引》

2023年9月11日，国家市场监督管理总局发布《经营者集中反垄断合规指引》（“《合规指引》”），是国务院反垄断委员会于2020年发布的《经营者反垄断合规指南》在经营者集中领域的专项指引。《合规指引》通过案例说明等形式进一步释明《经营者集中审查规定》等反垄断法规定的监管要求（具体分析请见我所《每月立法动态》2023年4月刊），包括对少数股权收购情况下的控制权认定、“分步走”、“抢跑”等实践中的难点问题进行了说明。此外，《合规指引》还明确了由申报义务人（即集中后取得“控制权”的经营者）承担未依法申报的法律责任，并鼓励和建议营业额达到申报标准的经营者建立经营者集中反垄断合规管理制度，市场监管总局在查处违法实施集中行为时可以将经营者集中反垄断合规管理制度的建设及实施情况作为考量因素。

虽然《合规指引》仅提供经营者集中反垄断合规的一般性指导、对经营者不具有强制性，但《合规指引》梳理了经营者集中的主要法律规定，并从实操角度提示企业在经营者集中过程中应当注意的要点，将成为企业开展经营者集中反垄断合规工作的实用操作指南。

On September 11, 2023, the State Administration for Market Regulation (the “SAMR”) published the *Anti-Monopoly Compliance Guidelines for Business Concentrations* (the “Guidelines”) as a specialized guidance in the field of merger control under the *Anti-Monopoly Compliance Guidelines for Business Operators* released in 2020. The Guidelines provided interpretation and practical suggestions concerning the application of the *Provisions on Review of Business Concentration* and other related regulations (please refer to our April 2023 issue of *China Regulatory Updates for details*), including hypothetical examples on the determination of such challenging issues as “control” in the case of minority shareholdings, appropriate filing timing for transactions carried through several steps, and actions that may trigger “gun-jumping”. In addition, the Guidelines clarified that the party with responsibility for filing (i.e., the business operators that would obtain “control” after the proposed transaction) shall be liable for the failure of merger control filing, and encourage and recommend businesses with a revenue over the filing threshold to establish a merger control compliance management system, the implementation of which will also be a consideration in the case of an SAMR investigation of an illegal concentration if so triggered.

Overall, while the merger control compliance and enforcement thereunder are not mandatory, the Guidelines set forth major compliance considerations from the merger control perspective which will provide useful practical reference to enterprises involved in merger control activities.

These updates are intended for information purpose only and are not a legal advice or a substitute for legal consultation for any particular case or circumstance. © Han Yi Law Offices All Rights Reserved.

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