

China Newsletter | Fall 2018/Issue No. 40



In this Issue:

**Foreign Direct Investment | Outbound Investment | Tax |
Capital Markets | IP and Compliance**

Foreign Direct Investment

PBoC Clarifies Policies for Foreign Investors to Access Payment Service Industry

中国人民银行发布关于外商投资支付机构准入及监管政策的公告

On March 19, 2018, the People's Bank of China (PBoC) released the *Announcement on Matters Relating to Foreign-Funded Payment Institutions [2018] No.7* (Announcement No.7), clarifying certain issues in relation to market access and compliance with existing laws for foreign-invested payment institutions.

Key provisions of Announcement No.7:

- First, where an overseas institution intends to offer electronic payment services within China for domestic and cross-border transactions, it shall establish a foreign-invested enterprise within China and obtain the payment business license pursuant to the *Administrative Measures for Payment Services of Non-Financial Institutions (Order of the PBoC [2010] No. 2)*, promulgated by the PBoC on June 14, 2010 (Administrative Measures).
- Second, a foreign-invested payment institution shall have in place a sufficiently secure and standardized business system that can process payment business independently. It shall also have a disaster recovery system within China.

- Third, the personal and financial information collected and generated by a foreign-invested payment institution within China shall be stored, processed, and analyzed within China's territory. Where it is necessary to transmit such information overseas for processing cross-border transactions, the payment institution shall comply with the provisions of laws, administrative regulations, and relevant regulatory rules; require the overseas entities to perform the corresponding information-confidentiality obligations; and obtain consent of the owners of the personal information.
- Fourth, the corporate governance, routine operations, risk management, capital disposal, deposit of provisions, and emergency response arrangements of a foreign-invested payment institution shall comply with PBoC's regulatory requirements for non-banking payment institutions.

Foreign investors have been long prohibited from entering the payment service industry in China. Pursuant to the Administrative Measures, the business scope of foreign-invested payment institutions and the qualifications of foreign investors are subject to a separate stipulation of the PBoC. However, no such separate stipulation has been published to date. Announcement No.7, by providing more clarity to the license and qualifications applicable to a foreign-invested payment institution, is viewed as a significant step towards opening the payment industry to foreign investors.

Public Comment Sought on Revised Draft of Regulations on Promotion of Private Schools

民办教育促进法实施条例草案修订公开征求意见

In April 2018, the Chinese Ministry of Education issued its revised draft of the *Implementing Regulations of the Law on the Promotion of Private Schools* (Revised Draft) and sought public comments. The Revised Draft sets forth detailed measures to implement the Law on the Promotion of Private Schools and the State Council's opinions. It seeks the "marketization" of the education industry, which has been strictly controlled by government, while reinforcing the separation of for-profit and not-for-profit schools.

Highlights of the Revised Draft:

- The Revised Draft explicitly allows sponsors of private schools to raise funds for establishing private schools, provided that the use of funds be reported to the government. Private schools can now finance themselves with future revenue, intellectual property, or the sponsor's assets.
- Notably, following the 2018 *Catalogue for the Guidance of Foreign Investment Industries*, the Revised Draft reiterates that foreign-invested enterprises in China and social organizations controlled by foreigners shall not establish private compulsory education schools in China. It could be viewed as prohibition of the so-called VIE (variable interest entity) structure widely adopted by many foreign investors, where the foreign investors control the Chinese operating entity through contracts.
- The Revised Draft introduces supportive policies for both for-profit and nonprofit schools, such as government reimbursement, tax benefits, and government-funded social insurance for school employees. Further, nonprofit private schools are eligible for the same preferential treatment as public schools in terms of land-use fees and taxes.
- Public schools shall not participate in or sponsor for-profit private schools; they may only do so after securing approval from the government. If approved by the government, public schools shall have a separate school campus, teaching staff, and accounting system, and issue certificates separately, to ensure public school education quality is not affected.

The Revised Draft furthers private school reform in China and does not require draconian barriers to investment. The Revised Draft is not yet finalized, and foreign investors should pay close attention to the draft submitted to the State Council for approval.

Foreign Investors Allowed to Hold up to 51 Percent of Securities Companies

On April 28, 2018, the China Securities Regulatory Commission issued the *Administrative Measures of Foreign-Invested Securities Companies* (the Measures). The Measures replace the *Rules on the Establishment of Foreign-Invested Securities Companies* (the Rules), relax market-access restrictions for foreign investors, and provide a standardized regulatory framework for foreign-invested securities companies. The Measures took immediate effect.

There are two notable changes under the Measures in relation to foreign-invested securities companies:

1. Foreign shareholding cap in securities companies increase to 51 percent

According to the Rules, the foreign shareholding ratio in securities companies were not to exceed 49 percent. In the Measures, foreign investors may hold at most 51 percent of securities companies. Further, the Measures remove the restriction that the Chinese investors owning the remaining interest must be a securities company.

2. Foreign-invested securities companies are permitted to do broader business

Under the Rules, foreign-invested securities companies could engage in a specified range of businesses, including underwriting and custody of stocks and bonds, brokerage of stocks denominated in a foreign currency, and brokerage and proprietary trading of bonds. Under the Measures, such specification is removed, and foreign-invested securities companies may engage in any securities business if they are consistent with the controlling shareholder's experience, meaning that the Chinese subsidiary's business line should be consistent with its foreign controlling shareholder's business line.

The Measures were warmly welcomed by the market, and after the Measures were published, UBS Securities submitted the first application to increase to 51 percent its shareholding in its China joint venture.

China Issues New Version of 'Negative List' for Foreign Investors

外商投资准入负面清单更新

On June 28, 2018, the State Development and Reform Commission and the Ministry of Commerce jointly issued the 2018 *Version of the Special Administrative Measures for Access of Foreign Investment*, the so-called "Negative List," updating access restrictions and conditions for foreign investors. On the surface, the new list relaxes constraints on certain industries that have long been restricted or inaccessible for foreign investors.

In the 2018 Negative List, foreign investors are permitted to hold at most 51 percent of securities companies, securities investment fund management companies, futures companies, and insurance

companies, which means foreign investors can control and consolidate such business in China. The 2018 Negative List further clarifies that such 51 percent restriction will be removed in 2021, at which time foreign investors should be able to wholly control such businesses.

The 2018 Negative List also removes restrictions for foreign investors to enter the agriculture, natural resources, and transportation industries. Details are as follows:

- Except for wheat and corn, businesses engaged in selection and cultivation of new varieties of seeds of crops can now be wholly owned by foreign investors.
- Businesses engaged in smelting and separation of rare earth can now be wholly owned by foreign investors.
- Foreign investors may now control more than 30 petroleum stations and sell petroleum products of different varieties and brands from multiple suppliers. This change has led to media estimates that 10,000 new petroleum stations will be built in China in the coming years.
- Foreign investors are now permitted to wholly own businesses engaged in vessel design, manufacturing and repair, and international water transportation.
- Foreign investors can now wholly own a shipping agency company. However, domestic shipping agencies must remain under the control of Chinese investors.

Outbound Investment

China Issues Interim Measures on Reporting of Outbound Investments Projects

国务院七部门出台《对外投资备案（核准）报告暂行办法》

On Jan. 18, 2018, the Ministry of Commerce (MOFCOM), the People's Bank of China, the state-owned Assets Supervision and Administration Commission, the China Banking Regulatory Commission, the China Securities Regulatory Commission, the China Insurance Regulatory Commission, and the State Administration of Foreign Exchange (collectively, the Seven Authorities) jointly issued the *Interim Measures on the Reporting of Outbound Investments Projects Subject to Filing or Approval* (the Measures), which took immediate effect.

Under the Measures, “outbound investments subject to filing or approval” refers to the establishment of enterprises (through merger, acquisition, and other means of investment) overseas by domestic investors, for which it is required before such establishment to submit the relevant information and materials to the proper authorities for filing/approval. According to the Measures, the domestic investors who conduct outbound investments subject to filing or approval shall report the details of the investments and provide relevant information to the authorities as required. In turn, based on such report and information provided, the relevant departments shall formulate policies on outbound investments and perform supervision, administration, and other services with respect to outbound investments.

Key focuses of the Measures:

- Coordinate actions among various governmental authorities. According to the Measures, the reporting of outbound investments subject to filing or approval shall be a work of collaboration among the

authorities. Each of the governmental authorities shall perform its responsibilities under a coordinated administrative model. The relevant information relating to outbound investment activities shall be centralized, and different authorities shall jointly act against any violation of laws and regulations under the model.

- Establish the administrative “negative list” model. According to the Measures, the relevant authorities shall establish and improve their respective administrative measures for the filing or approval of outbound investments based on the “negative list” model, which contains the restricted and prohibited industries or areas for outbound investment. This model was initially mentioned in the *Circular of the General Office of the State Council on Forwarding the Guiding Opinions of the National Development and Reform Commission, the Ministry of Commerce, the People’s Bank of China and the Ministry of Foreign Affairs on Further Guiding and Regulating the Outbound Investment Direction* (Guo Ban Fa [2017] No. 74) (Circular 74), and it is expected that the government will further clarify what industries are included in the negative list.

In addition, the Measures give examples of outbound investment projects that will be focus of regulatory review: (a) outbound investments with capital contributions by Chinese investors equivalent to US\$300 million or above; (b) outbound investments in a sensitive country (region) or a sensitive industry; and (c) outbound investments sustaining substantial losses.

- Clarify the post-investment reporting obligations. As required by the Measures, the domestic investor shall report to the relevant authority on a regular basis information on the key stages of its outbound investment according to the principle that “any item that has been filed or approved must be reported.” The information to be reported by domestic investors shall include but not be limited to monthly and annual information; matters leading to an outbound merger or acquisition; progress of an ongoing project overseas funded by an outbound investment; major problems encountered in an outbound investment; compliance with local laws and regulations; protection of resources and the environment; labor rights protection; performance of social responsibilities; and implementation of safety or security protection systems; etc.

The Measures provide more specific and stringent rules on the ongoing reporting obligations for investors engaged in outbound investment activities. According to MOFCOM, MOFCOM and other relevant authorities may formulate and implement ancillary rules to fulfill the purpose of the Measures.

NDRC Publishes the Sensitive Industries Catalogue for Outbound Investment

国家发改委发布关于境外投资敏感行业目录

On Jan. 31, 2018, the National Development and Reform Commission of China (NDRC) published the *Sensitive Industry Catalogue for Outbound Investment* (the Catalogue), in effect as of March 1. The Catalogue sets forth all “sensitive industries” for outbound investments, and according to the NDRC’s recently updated *Administrative Measures for Enterprises’ Outbound Investment* (the ODI Measures) (also in effect as of March 1), investors proposing to invest in any such “sensitive industries” outside of China shall obtain “approval” from NDRC in advance of completing the investment, instead of a simpler reporting or filing procedure for outbound investments in non-sensitive industries.

The Catalogue sets forth the following four categories of sensitive industries:

- research, manufacture, maintenance of weaponry;
- development and exploitation of cross-border water resources;
- media;
- the industries subject to restrictions for outbound investment pursuant to Circular 74, including: (a) real estate; (b) hotels; (c) cinemas; (d) entertainment industry; (e) sports clubs; and (f) equity investment funds or investment flat forms established offshore without specific industry projects.

The Catalogue is no surprise to investors considering that investment in all aforementioned industries has been practically prohibited or limited since 2017. Nevertheless, when publishing the Catalogue, NDRC referred to Circular 74, which is a multi-department (including with the Ministry of Commerce, the People's Bank of China, and the Ministry of Foreign Affairs) initiative coordinated by the State Council, and incorporated the list of "restricted industries" from Circular 74. NDRC probably will not modify the Catalogue unless and until such departments take further coordinated action to update Circular 74.

Tax

China Clarifies Concept of 'Beneficial Owners' for Tax Treaty Purposes

国家税务总局进一步澄清税收协定中“受益所有人”的认定方法

On Feb. 3, 2018, China's State Administration of Taxation (SAT) issued a *Bulletin on Several Issues Regarding "Beneficial Owners" Under Tax Treaties* (Bulletin 9) to further clarify the approach to determine "beneficial ownership" in relation to dividend, interest, and royalty payment under tax treaties. Bulletin 9 took effect April 1, 2018.

Under most bilateral tax treaties that China has concluded with other countries, the beneficial owners of dividends, interest, and royalties derived from China are eligible to claim a reduced rate of withholding tax. In 2009 and 2012, SAT issued two bulletins, the first providing a substance-over-form approach to determine beneficial ownership, and the second offering a "safe harbor" that treated any publicly listed companies or their subsidiaries as beneficial owners, even if they did not follow the proper approach. Incorporating certain results from the 2015 Organisation for Economic Co-operation and Development (OECD)/G20 base erosion and profit-shifting report on preventing tax treaty abuse, Bulletin 9 further clarifies the anti-abuse rule applicable to the substance-over-form approach and expands the "safe harbor."

Highlights of Bulletin 9:

- The expanded "safe harbor" under Bulletin 9 includes: (a) the government of another country with which China has an active tax treaty (Contracting State); (b) a public company that is listed in and is a resident of a Contracting State; (c) an individual resident of a Contracting State; and (d) entities 100 percent directly or indirectly owned by one or more of the aforementioned entities (and in case of indirect holding, the intermediate entities must be either a Chinese resident or a resident of the other Contracting State). If an applicant falls within any of the aforementioned categories, it can claim a tax benefit directly, without going through the substance-over-form analysis.

- Bulletin 9 reiterates that tax authorities must conduct a “substance-over-form” analysis to determine “beneficial ownership.” Bulletin 9 refines the list of factors that may work against the determination: (a) if the resident is obligated to pay or has actually paid 50 percent or more of the received fund to a resident of a third state within the previous 12 months; (b) the activities of the resident fail to constitute a “substantial business operation,” including manufacturing, trading, and management; (c) the Contracting State does not levy tax or levy minimal tax on the fund received; and (d) the existence of a back-to-back loan or royalties agreement between the resident and a third party with similar amount of principal, interest rate, or with regards to the same subject matter technology. SAT clarified that the list of factors is non-exhaustive, and the review of “beneficial ownership” must be upon the totality of circumstances.
- Bulletin 9 introduces the concept of “derivative interests,” by which a resident applying for the tax treaty benefit who is not a qualified beneficial owner may still be eligible to receive the benefit if (i) it is 100 percent owned, directly or indirectly, by a qualified beneficial owner; and (ii) the resident applicant and the qualified beneficial owner are residents of the same country, or the qualified beneficial owner and any intermediate entities are of the same country where the withholding tax rates for dividend payment under applicable tax treaties are no less favorable than those under the treaty between China and the country of the resident applicant.

Capital Markets

China Introduces Depository Receipts to Encourage Domestic Financing for Chinese Tech Firms

国务院开展创新企业境内发行存托凭证试点

On March 22, 2018, the State Council of China recirculated the *Several Opinions on Issuance of Shares or Depository Receipts by Innovative Enterprises in China* (the Opinions), originally issued by the China Securities Regulatory Commission (CSRC). The Opinions introduced “China depository receipts” (CDRs) and aimed to enable Chinese investors to access the profits of China-based tech firms publicly listed in Hong Kong and the United States. On June 6, 2018, CSRC published the *Administrative Measures on Issuance and Trading of Depository Receipts* and certain related guidance (collectively, the CSRC Guidance) to facilitate the pilot program on CDRs.

Due to the technical rigidity of China’s securities market, China’s tech firms traditionally opted to have their offerings in an offshore jurisdiction, i.e., to set up an offshore holding company and get its shares or depository receipts listed and traded in a Hong Kong or U.S. exchange. Chinese investors, due to the foreign exchange control, are largely unable to purchase and trade interest in such tech firms. The Opinions aimed to lure such firms to secondary offerings back in China via issuance of CDRs to grant Chinese investors access to their business profits.

Key points of the Opinions and CSRC Guidance:

1. Who is eligible to issue CDRs? According to the Opinions, companies in one of the seven high-tech industries: internet, big data, cloud computing, artificial intelligence, software and integrated circuits, high-end equipment manufacturing, and bio-tech and pharmaceuticals. For those companies that have already listed in an offshore stock exchange, their market float must be no less than 200 billion renminbi, and for those companies that have not yet been listed offshore, one

of the two following criteria must be satisfied: (a) the previous year's operating income must be no less than three billion renminbi with a market valuation of no less than 20 billion renminbi; or (b) the operating income shows rapid growth and self-developed technology with a competitive advantage. In addition, CSRC requires that issuers of CDRs satisfy the following conditions, including, among others: (i) the beneficial owner of the issuer has not changed within the previous three years, and there is no substantial dispute as to the holdings of the beneficial owner and the controlling shareholder; and (ii) the issuer and its controlling shareholder and beneficial owner have not engaged in any illegal conduct injuring investors' interest or social welfare within the previous three years.

2. What is the information disclosure requirement for the issuer? CSRC requires that any issuers of CDRs prepare and publish a prospectus, a public announcement for issuance, and the deposit agreement and custody agreement. In the prospectus, CSRC requires the issuer to elucidate the difference between the applicable laws of the issuer's jurisdiction of incorporation and Chinese laws, and the potential impact of such differences on the issuance and trading of CDRs and investor protection. Notably, both the Opinions and the CSRC Guidance have clarified that if the issuer has differentiated voting scheme or variable interest entity structure, it must disclose those arrangements with sufficient detail in the prospectus with a special chapter setting forth the proposed measures to protect investors.
3. What are the necessary agreements for CDR issuance? Like those of American Depository Receipts, an issuer of CDRs must have the following two agreements signed and filed with CSRC: (a) the deposit agreement to be entered into among the issuer, the depository bank, and the CDR holders (i.e., the investors); and (b) the custody agreement between the depository bank and the custodian. The deposit agreement must set forth mechanisms for exercise of dividend rights, voting rights, and other shareholder rights. Under the CSRC Guidance, an issuer may select any of the following entities to be its depository bank: (i) commercial banks approved by the China Banking Regulatory Commission; (ii) securities companies; and (iii) China Securities Depository and Clearing Company Limited or its subsidiaries. The governing law of the deposit agreement must be Chinese law, and the parties to the deposit agreement must agree to resolve disputes related to the agreement in a Chinese court.
4. With the Opinions and CSRC Guidance in place, many technical issues in relation to the CDR regime remain unanswered, including whether China will permit the issuer to transfer the proceeds from CDR offering out of China (e.g., for repurchase of shares in Hong Kong or the United States), and what restrictions CSRC will impose on the conversion between CDR and the equity securities of the issuer. It is still unclear who will be the issuer and when the first issuance will take place.

IP and Compliance

China Tightens Review for Outbound Tech Transfer for National Security Purposes

国务院出台《知识产权对外转让有关工作办法（试行）》

On March 18, 2018, the State Council issued *Tentative Working Measures on Outbound Transfer of Intellectual Property* (the Working Measures) to all departments and commissions of the central government and all local governments, calling for tightened review when certain intellectual property is

transferred or exclusively licensed to foreign enterprises or individuals, i.e., the outbound IP transfer. The Working Measures took effect on the same date.

The Working Measures do not create a new regime but reiterate the importance of IP review for national security as relates to both technology export and foreign investors' mergers and acquisitions of Chinese enterprises. If the proposed export involves a technology that falls within the category of prohibited or limited exports, or if the proposed M&A is subject to national security review, the review under the Working Measures will be triggered. The Working Measures indicate that the focus is to assess "whether the outbound IP transfer will impact China's innovation and development of core technologies in key industries." However, the Working Measures do not make clear what such core technologies or key industries are, nor do they identify the review procedure for outbound IP transfer.

The Working Measures clarify that if the intellectual property involved is a patent, the case must be submitted to the appropriate patent office for review; if software is involved, the case must be submitted to the appropriate copyright authority; and if a new plant variety is involved, the case must be submitted to the appropriate agriculture authority. The Working Measures also state that only when the review is completed will registration for title transfer be permitted.

It remains unclear how the Working Measures will impact the technology export and national security review for M&A activity. The enhanced review under the Working Measures will likely prolong or even substantially obstruct the process if an outbound IP transfer is involved.

MOJ Seeks Public Opinion on Amendment to Regulations on Supervision and Administration of Medical Devices

司法部对《医疗器械监督管理条例修正案（草案送审稿）》征求意见

Seeking public opinion, on June 25, 2018, the Ministry of Justice (MOJ) published *The Amendment to the Regulations on the Supervision and Administration of Medical Devices (Draft for Review)*.

The Draft for Review makes the following major revisions to the Regulations:

- introduces the marketing authorization holder (MAH) system for medical devices, defined as the entity that obtains from the competent drug supervision authority a medical device filing receipt or registration certificate for sale of the medical device into markets. The MAH is obligated to, among things, establish and maintain the effective operation of quality control systems in line with products, implement plans for post-marketing study and risk control, establish a medical device adverse event monitoring system, and assume responsibility for recalling defective products;
- differentiates the requirements for clinical evaluations as to each category of medical device;
- removes the requirement for provision of a sales certificate in foreign countries by foreign applicants when applying for a list of innovative medical devices;
- prohibits the importation and distribution of used medical devices;
- establishes the specialized inspector system; and
- imposes personal liability on the legal representative, quality manager, and person in charge of a MAH, as well as a manufacturer or distributor in cases of serious noncompliance.

The Draft for Review is legislative feedback to the *Deepening the Reform of the Evaluation and Approval System and Inspiring Innovation of Drugs and Medical Devices*, issued by the central government on Aug. 8, 2017, which set the tone for the reform of the medical device industry.

MPS Seeks Public Opinion on Regulations on the Graded Protection of Cyber Security

公安部对《网络安全等级保护条例》征求意见

Seeking public opinion, on June 26, 2018, the Ministry of Public Security (MPS) published the *Regulations on the Graded Protection of Cyber Security* (Draft for Comments). The Draft for Comments elaborates on the graded cybersecurity protection system, which was established by the Cyber Security Law. Network operators, which are broadly defined as “owners, administrators of the network and network service providers,” are required to comply with different levels of cybersecurity requirements based on the level of risk assigned to their networks.

Depending on the importance of the cyber space, networks operating in China are graded based on the following five levels for the purpose of security protection:

- Grade I refers to ordinary networks, the disruption of which may cause harm to certain individuals or entities, but will not undermine national security, public order, or interests;
- Grade II refers to ordinary networks, the disruption of which may cause serious harm to certain individuals or entities and general damage to public order or interests, but will not undermine national security;
- Grade III refers to important networks, the disruption of which may cause extremely serious harm to certain individuals or entities, or serious harm to public order or interests, but will not undermine national security;
- Grade IV refers to particularly important networks, the disruption of which may cause extremely serious harm to public order and interests, or cause serious harm to national security;
- Grade V refers to extremely important networks, the disruption of which may cause particularly serious harm to national security.

In addition to the Cyber Security Law, the Draft for Comments imposes additional obligations on all grades of network operators, such as retaining network operating records; lawfully collecting, using, and processing personal information; and reporting cybersecurity incidents to the local public security authority within 24 hours.

Network operators classified at or above Grade III bear the following additional obligations:

- Designating the cyber security management body and forming a level-by-level review system for operational matters;
- Preparing and having the security protection plan approved by professional technicians;
- Conducting a background investigation on the person in charge of the cyber security management body;

- Real-time monitoring and detection of cyber security trends, development of a cyber security protection management platform, and regular reporting to the local public security authority;
- Implementing backup and recovery measures for important network equipment, communications links, and systems;
- Setting up the cyber security grade assessment system and conducting regular assessments.

The Draft for Comments also set forth in detail liabilities for violations of security protection, technical maintenance, and data security. The liabilities range from rectification orders and fines to suspension of business/website, and in the worst case, revocation of business licenses.

Authors

This GT Newsletter was prepared by **George Qi**, **Dawn Zhang**, and **Calvin Ding**[◊]. Questions about this information can be directed to:

- **George Qi** | +86 (0) 21.6391.6633 | qiq@gtlaw.com
- **Dawn Zhang** | +86 (0) 21.6391.6633 | zhangd@gtlaw.com
- **Calvin Ding** [◊] | +86 (0) 21.6391.6633 | dingc@gtlaw.com
- Or your **Greenberg Traurig attorney**

[◊] Has not taken the Chinese national PRC judicial qualification examination.

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