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State Council Agrees to Further Open Up Core Fields in Beijing's Service Sector

In 2015, the State Council approved a three-year pilot program to further open up Beijing's service sector. On June 25, 2017, the State Council approved the Comprehensive Pilot Program on Deepening Reform and Further Opening up Beijing's Service Sector (the Program)《深化改革推进北京市服务业扩大开放综合试点工作方案》, which proposes to further ease restrictions on foreign investment in several core fields in Beijing's service industry.

The Program sets forth 28 major tasks which will:

- Allow foreign investment in sales agencies for air transportation;
- Cancel the proportion requirement on foreign technician in foreign-invested construction and engineering design enterprises;
- Allow foreign investment in audio and video production in several specified publishing bases in Beijing, provided the Chinese Party takes control of business management and content inspection;
- Allow foreign investors to establish wholly foreign-owned performance venue operating companies in specified areas;
- Allow foreign investors to establish wholly foreign-owned entertainment venues in specified areas;
- Provide research on allowing newly-established or restructured wholly foreign-funded banks and Chinese-foreign joint venture banks to apply for RMB business when opening a business;
- Reduce requirements on establishing foreign-funded investment companies, including lowering foreign investors' total asset requirement to $200 million one year prior to applying for establishment and change the requirement for quantity of established foreign-funded enterprises to no less than five;

- Explore establishing new business cooperation modes and mechanisms between foreign and Chinese law firms;
- Lower investment proportion restrictions on establishing Chinese-foreign joint job intermediaries, allow foreign investment to established Chinese joint job intermediaries, and cancel the foreign investor requirement for established job intermediaries with no less than three years of business operation;
- Subject to the approval of the China Food and Drug Administration, allow clinical trials on significant medicine projects in foreign countries to be conducted in Beijing, allow medicine importation in clinical trials, and allow international multi-centered clinical trials on medicine produced by overseas enterprises in line with pharmaceutical production quality control standard.

PBC Regulates Credit Rating Business in the Interbank Bond Market

On July 1, 2017, the People's Bank of China (PBC) issued an announcement to clarify relevant matters concerning the business conducted by credit rating agencies in the interbank bond market (the Announcement) 《关于信用评级机构在银行间债券市场开展信用评级业务有关事宜的公告》. The Announcement clarifies different business requirements for domestic and foreign credit rating agencies in relation to the bond issuance in China's interbank bond market. It introduces regulations on such business, declaring credit rating agencies shall be subject to the administration of the PBC and the evaluation of the National Association of Financial Market Institutional Investors (NAFMII).

Credit rating agencies established within the territory of China are subject to the following requirements:

- Must have filed with a high-level branch set up by the People's Bank of China in the capital city of the province where the agency is established;
- Must have a certain number of credit rating analysts with experience in bond rating who are well-matched with proposed credit rating business;
- The corporate governance system must be in good standing and neither the main shareholders nor the actual controllers shall have potential conflicts of interests which may affect the independence of credit rating in terms of equity proportion and voting rights;
- Must have established a well-developed credit rating system, including a credit rating internal management system, procedures and methods for rating, rating quality control, due diligence, and a credit rating review system;
- Must have experience in bond rating with goodwill in market, with the rating results being generally recognized by qualified institutional investors;
- Must have committed no major violation of law or regulations in the past three years, and must have no criminal case or case involving an illegally operating business under investigation.

Credit rating agencies established outside the territory of China are subject to the following requirements in addition to all but the first of the above requirements for domestic credit rating agencies:

- Must have registered or certificated with and being well regulated under the local credit rating regulators;

- The credit rating regulatory system in the country or the region where the agency is located must comply with the globally recognized credit rating regulatory principles;
- Must be under the supervision of PBC on the credit rating business in the interbank bond market, or the credit rating regulator of the country where the agency is located must have a regulatory cooperation agreement on credit rating with PBC;
- Must have a branch in the territory of China, and must have filed a record with a high-level branch set up by the People's Bank of China in the capital city of the province where the branch is established.

Other requirements for and restrictions on an agency conducting credit rating business in the interbank bond market include:

- Registration and filing with authorities

A credit rating agency must apply with NAFMII to register the category of the scheduled bond rating business. A credit rating agency that has completed the registration process shall report certain systems concerning the rating business and particulars on the inspection of rating quality—including its basic information, internal control and risk management systems, rating processes, and methods—to the PBC. Such information shall be made public via the particular channel designated by the PBC for this purpose.

- Prohibited Acts:
  - Conducting business without registration or filing, as well as submitting false materials or concealing the truth when applying for registration;
  - Conducting business in a manner against legal procedure or relevant rules;
  - Violating the principle of independence or participating in shady dealings with rating business parties to accept or offer undue interests;
  - Failing to disclose information as required or disclosing false information;
  - Refusing or obstructing inspections by regulators or self-regulatory institutions, or failing to provide authentic materials;
  - Causing material damages to investors, clients, or rating targets out of intention or gross negligence; and
  - Other acts against interbank bond market regulations.

MIIT Issues the Revised Measures for the Administration of Telecom Business Licensing

The Ministry of Industry and Information Technology (MIIT) has issued Revised Measures for the Administration of Telecom Business Licensing (the Revised Measures) 《电信业务经营许可管理办法》, which came into force Sept. 1, 2017.

Main Changes of the Measures

- Cancels the filing system for the basic telecom business permit and the trans-regional value-added telecom business permit;
- Reduces application paperwork: the financial statements, the report on capital verification, and the notice of pre-approval of the enterprise name are no longer needed;

- Replaces the annual inspection system with an annual reporting and disclosure system for telecom business permits;
- Establishes a disciplinary system and a list to keep track of "dishonest" companies that are punished by authorities or that fail to complete annual reporting on time;
- Establishes a random inspection system. The authorities may randomly inspect daily operation and annual reporting of companies;
- Optimizes or cancels some restrictive provisions regarding shareholder approval of changes, calculation of the shareholding proportion, and authorized value-added telecom business.

The following is a list of conditions for applying for a telecom business permit. Details on the application procedure can be found in the Measures.

Application for an Operating License

Conditions for applying for a basic telecommunication business license:

- The company must specialize in basic telecommunications, and at least 51 percent of the company's equity or shares must be state owned;
- The company must have completed business development research reports and network technical solutions;
- The company must have funds and professionals fit for the business;
- The company must have the premises, facilities, and corresponding resources for conducting business activities;
- The company must have the goodwill and capacity for providing users with long-term services;
- The company may conduct business within a province with minimum registered capital of CNY 100 million, and may conduct business nationwide with minimum registered capital of CNY 1 billion;
- The main investors and chief business personnel of the company must not be on the list of dishonest operators of telecommunications businesses;
- Other conditions as prescribed by the state.

Conditions for applying for a value-added telecommunication business license:

- The company must be legally established and in good standing;
- The company must have funds and professionals fit for the business;
- The company must have the goodwill and capacity for providing users with long-term services;
- The company may conduct business within a province with minimum registered capital of CNY 1 million, and may conduct business nationwide with minimum registered capital of CNY 10 million;
- The company must have the premises, facilities, and corresponding resources for conducting business activities;
- The main investors and chief business personnel of the company must not be on the list of dishonest operators of telecommunications businesses;

- Other conditions as prescribed by the state.

CAC Solicits Comments on the Regulations on the Protection of Security of Critical Information Infrastructure

In order to guarantee the security of critical information infrastructure following the effectiveness of the Cyber Security Law, the Cyberspace Administration of China (CAC) has issued the draft of the Regulations on the Protection of Security of Critical Information Infrastructure (the Draft) 《关键信息基础设施安全保护条例（征求意见稿）》in July 2017. This applies to the planning, construction, operation, maintenance, use, and protection of the security of the critical information infrastructure within the territory of the People's Republic of China.

The Draft provides that the network facilities and information systems operated or administrated by entities in specified industries should be covered under the scope of protected critical information infrastructure and the operators shall act consistently with the regulation to fulfill its obligations. According to the Draft, the scope of critical information infrastructure and security obligations of operators is as follows:

The Scope of Critical Information Infrastructure

The network facilities and information systems under the operation and administration of the following entities shall fall into the scope of protected critical information infrastructure:

- Government agencies and entities in industries such as energy, finance, transportation, water conservancy, hygiene and medical treatment, education, social security, environmental protection, and public utilities;
- Information networks such as telecom networks, broadcasting and TV networks, and the internet, as well as those providing cloud computing, big data, and other large public information network services;
- Scientific research and production entities in industries and fields such as national defense, large equipment, chemical, food, and drugs;
- News entities such as broadcasting stations, TV stations, and news agencies; and
- Other major entities.

Security Protection of the Operators

Operators' obligations to protect critical information infrastructure in accordance with the classified protection system for cybersecurity:

- Formulating internal security management systems and operating procedures, as well as conducting strict identity authentication management;
- Taking technical measures to prevent viruses and network attacks;
- Taking technical measures to monitor and record network operating status and keeping relevant logs for at least six months;
- Taking measures such as data classification, backup of important data, and data authentication.

Operators' obligations to protect critical information infrastructure in accordance with relevant laws and mandatory standards:

- Establishing cybersecurity management organizations and appointing the person in charge of the organization. Background checks shall be conducted on personnel in key positions;
- Regular technical training and assessment shall be provided to personnel thereof;
- Conducting disaster recovery backup for important systems and databases;
- Working out emergency plans for cybersecurity accidents and conducting regular drills;
- Other obligations prescribed in laws and regulations.

Persons in charge of the cybersecurity management organizations shall be responsible for formulating and implementing internal rules on cybersecurity; assessing personnel in key positions; formulating and implementing education and training; cybersecurity examination, and emergency drills; and reporting to relevant authorities in case of important cybersecurity matters. The specialized technicians in key positions shall be subject to relevant license.

The individual information and important data collected and generated by operators during operation within the territory of the People's Republic of China shall be stored within the territory. The information and data shall be evaluated as per the evaluation measures for exit security before being providing overseas.

Security of Products and Services

- Where network products or services used by operators may influence the state of safety, network safety review shall be conducted in accordance with relevant review regulations, and a security confidentiality agreement shall be concluded between the operator and the provider.
- The critical information infrastructure shall be maintained within the territory of China, and remote maintenance can only be conducted after reporting to relevant authorities.

CIRC Issues the Interim Measures for the Regulation of Credit Guarantee Insurances

The China Insurance Regulatory Commission (CIRC) has issued the Interim Measures for the Regulation of Credit Guarantee Insurances《信用保证保险业务监管暂行办法》 in July 2017. CIRC intends to define the business scope and to regulate the market behaviors for credit guarantee insurance, and will remain in force for a period of three years.

Prohibited businesses

Under the Measures, insurance companies are prohibited from providing credit guarantees for the following:

- Asset securitization of similar businesses and assignment of debt;
- Privately offered bonds business and publicly offered bonds by companies rated below AA+;
- Financing behaviors by controlling shareholders, subsidiaries, and affiliated companies.

Prohibited Behaviors

While operating a credit guarantee insurance business, insurance companies shall not take actions including but not limited to: providing insurance on impossible losses or losses existed; materially changing the approved or filed insurance by amendment agreement; and providing insurance on loan contracts which involve interest rates higher than the maximum criteria specified by the state.

Restrictions for Credit Guarantee Insurance Businesses on Online Lending Platforms

The Measures aim to regulate credit guarantee insurance businesses on online lending platforms by requiring insurance companies to set up strict requirements on the qualifications of P2P lending companies and by prohibiting insurance companies from cooperating with any P2P lending platforms which do not comply with relevant provisions on internet finance, or which underwrite credit guarantee insurance businesses for P2P lending platforms beyond the stipulated quota.

Furthermore, the Measures require insurance companies to strengthen risk management and control and to further lay down explicit provisions from the perspective of the financial accounting, withdrawal of reserves, credit examination, paths for repayments, and management of pledges. In addition, the Measures propose to set up the reporting system and to specify the regulatory authorities and circumstances requiring punishment.

MOFCOM Introduces Amendments to the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises

In 2016, the Ministry of Commerce (MOFCOM) issued the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises (the Measures)《外商投资企业设立及变更备案管理暂行办法》, which has simplified China's foreign direct investment regulatory system by replacing the approved regime with a filing system related to the establishment, certain changes, and dissolution of the foreign invested companies. Under the Measures, foreign-invested enterprises that are not subject to special administration measures on access as prescribed by the state don't need to go through formalities for examination and approval, but can complete formalities for incorporation and change only by filing a record.

In July 2017, to further promote the reform of foreign investment management system and to streamline administration, MOFCOM adopted Amendments to the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises (the Amendment). The Amendment applies the filing system to the takeover of domestic non-foreign-invested enterprises by foreign investors and the strategic investment in listed companies by foreign investors. In addition, the Amendment states that, as for strategic investment in a non-foreign-invested listed company, the Incorporation Application shall be submitted prior to or within 30 days after security registration with the competent securities registration and settlement institution.

Supreme People's Court Issues its Fourth Judicial Interpretation on Company Law

The Supreme People's Court issued its fourth judicial interpretation (Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Company Law of the People's Republic of China [IV], 最高人民法院关于适用《中华人民共和国公司法》若干问题的规定（四） or the Interpretation) on Company Law Aug. 25, 2017. It came into effect Sept. 1, 2017. The Interpretation specifies certain details regarding effectiveness of corporate resolutions (either shareholder resolutions or board resolutions);

shareholders' right to know; distribution of profits, right of first refusal in the event a shareholder intends to transfer equity interests to a party other than the current shareholder(s); and shareholder representative litigation.

Effectiveness of Corporate Resolutions

Under company law, shareholders may ask the court to declare corporate resolutions null and void, provided it has been proven that the content of such resolutions violates laws or regulations. They may also ask the court to revoke such resolutions, provided it has been proven that the voting method or the procedure for convening the shareholder or board meetings violates any law, regulation, or the company's articles of association, or where the content violates the company's articles of association.

Article 5 of the Interpretation states that shareholders, directors, and supervisors may ask the court to declare the corporate resolutions "non-existent" if any of the following flaws exist:

Where the resolution is adopted without convening a meeting, unless the meeting is not convened in compliance with Article 37 of Company Law:

- The resolution is adopted at the meeting without being voted on;
- The quorum of attendees is not met, or the voting rights held by present shareholders do not comply with provisions of the company law or the company's articles of association;
- The votes for the resolution at the meeting do not reach the proportion stipulated by the company law or specified in the company's articles of association; or
- Other circumstances resulting in the non-existence of the resolution.

The aforementioned flaws are mainly procedural problems and may overlap with Article 22 of Company Law in that Article 22 provides that shareholders may also ask the court to revoke corporate resolutions due to procedural flaws. Under Article 22 of Company Law, shareholders can only exercise such rights within 60 days of the date the resolution is made, yet there seems to be no time-bar to shareholders' rights under Article 5 of the Interpretation. In the case that a major shareholder conceals certain resolutions from minor shareholders, a 60-day period may be too short. However, the absence of any time-bar does not seem ideal, either. We shall wait for further judicial practice to clarify.

Shareholders' Right to Know

The Interpretation provides that shareholders may inspect the company's documents with the assistance of agencies such as accountants or lawyers.

Furthermore, if company documents are not properly kept by the directors and senior management, and shareholders suffer losses therefrom, the shareholders may even claim damages from responsible directors or senior management. However, the losses may be difficult for shareholders to prove.

Distribution of Profits

In practice, major shareholders, directors, or senior management may refuse to distribute any profit for quite a long period, which may frustrate minor shareholders. Under the traditional system of company law, courts generally refuse to uphold minor shareholders' requests for profit distribution, as Article 74 has confirmed that shareholders may ask the company to repurchase their equity interests if the company has not distributed any profits to the shareholders for five consecutive years, but has made profits during

that period. This may serve as a resolution, but not a satisfactory one, since shareholders tend to be hesitant to withdraw from such promising companies.

Article 15 of the Interpretation has made some difference. It holds that shareholders may succeed in requesting profit distribution if they can prove that the failure to distribute the company's profits is attributable to any shareholder's abuse of shareholder rights, and that other shareholders have suffered losses therefrom.

Right of First Refusal

Shareholders of a limited liability company may exercise the right of first refusal in case any shareholder intends to transfer equity interests to a party other than the current shareholders. This means the shareholder, under the same conditions, shall have a preemptive right to purchase the equity interests to be transferred.

- "Same Conditions"

  In practice, a shareholder may transfer equity interests in exchange for cash, while sometimes a shareholder may transfer the equity interests in exchange for equity interests in other companies. In the latter case, the current shareholder intending to exercise right of first refusal is probably not able to meet exactly the "same conditions" by offering the equity interests to other companies. However, the Interpretation has clarified that in determining the "same conditions", the court shall take numerous factors into consideration, including the quantity of equities to be transferred, the equity transfer price, the payment method, and the time limit for payment.

- Unilateral Cancellation of the Transfer by the Transferor

  In the case that a shareholder exercises the right of first refusal, is the transferor compulsorily obliged to sell the equity interests to the shareholder? It may be theoretically arguable, but the Interpretation provides that the transferor may cancel the transfer after other shareholders have exercised right of first refusal. The transferor shall compensate reasonable losses suffered by the shareholder.

Four Departments Restrict Outbound Investment in Real Estate and Certain Other Industries

Policy Background

In July 2017, the Ministry of Commerce announced in a news release that the outbound investment amount in foreign real estates from January to July of 2017 has reduced by 82.1 percent, accounting for merely two percent of that period's total outbound investments. Outbound investments in the culture and entertainment industry have undergone a similar slump. Such dramatic reduction, according to the Ministry of Commerce, is attributed to increased scrutiny of authenticity and compliance in "irrational outbound investment." It is inferred that the Ministry of Commerce is suggesting that outbound investment in foreign real estate and in the culture and entertainment industry is regarded as irrational outbound investment.

The Guiding Opinion Issued by Four Departments

On Aug. 4, 2017, the National Development and Reform Commission (NDRC), Ministry of Commerce (MOC), People's Bank of China, and Ministry of Foreign Affairs have jointly issued the Guiding Opinions on Further Guiding and Regulating Outbound Investment Direction (关于进一步引导和规范境外投资方向

指导意见的通知, the Opinion), which classifies outbound investment as "encouraged," "limited," and "prohibited" according to the industry of the outbound investment. Real estate investment falls within the "limited" type under the Opinion. Though the Opinion is not called a law or regulation, it is nevertheless issued by important departments of the State Council, and all provincial governments and departments of the State Councils are required to implement and execute the Opinion. We may expect that outbound investment in real estate will be subject to increased scrutiny by the Chinese government in the future.

Encouraged, Restricted, and Prohibited Categories

Encouraged categories of outbound investment mainly comprise categories favorable to the "One Belt, One Road" Initiative, as well as related infrastructure construction, advanced technology, and energy industries such as oil, gas, and mineral.

Restricted categories include:

- Investment projects in sensitive countries or regions;
- Investment in real estate, hotel, cinemas, entertainment, or sports clubs;
- Equity investment funds or investment platforms established outside of China with no actual industrial project;
- Investment projects involving backward production equipment;
- Investment projects not conforming to standards of environmental protection, energy consumption, and security of the host countries.

The outbound investment projects falling under the first three restricted categories shall acquire approval from the competent authority of outbound investment.

Prohibited categories mainly include certain illegal industries and projects.

Conclusion

In fact, neither Administrative Measures for Approval and Record-filing on Overseas Investment Projects issued by NDRC nor Administrative Measures for Outbound Investment issued by MOC (both promulgated in 2014) requires any approval for outbound investment in the real estate, culture, and entertainment industries. Neither do they require approval for equity investment funds or investment platforms. However, the atmosphere has changed as outbound investment in the real estate and culture and entertainment industries has become both practically and legally restricted by the Chinese government.

Public Comments Sought on the Fourth Judicial Interpretations on the Insurance Law

The Supreme People's Court issued its draft of the fourth judicial interpretation (Interpretations of Several Issues concerning the Application of the Insurance Law of the People's Republic of China [IV], 最高人民法院《关于适用〈中华人民共和国保险法〉若干问题的解释（四）》（征求意见稿）, (Draft Interpretation) on Insurance Law in September 2017.

Prior to the Draft Interpretation, the Supreme People's Court had already promulgated three judicial interpretations which mainly dealt with the application of new and old versions of Insurance Law, general

provisions of insurance policy, and personal insurance. The Draft Interpretation aims to clarify a wide range of rules applicable to property insurance. Some important articles of the Draft Interpretation are analyzed as follows:

Insurer's Obligation to Re-remind the Standard Terms of Liability Exemption

Under the Insurance Law, the insurer is obliged to explicitly remind the applicant of any standard terms of liability exemption which are contained in an insurance contract entered into by the insurer and the applicant. The insurer may remind the applicant either in writing or orally. Failure to give this reminder will result in the voidance of the standard terms.

The Draft Interpretation further provides that, in case the insurance subject is assigned, the insurer is not obliged to re-remind the standard terms of liability exemption to the assignee, provided the insurer has already clearly explained the standard terms to the original applicant in accordance with the Insurance Law.

It appears that the Supreme People's Court does not wish to impose additional obligations on the insurer, but rather puts the onus on the assignee to exercise due care when accepting the assignment of the insurance contract.

Insured's Obligation to Notify the Significant Increase of Risks

Under the Insurance Law, the insured is obliged to notify the insurer of a significant increase of risks, the failure of which will exempt the insurer from the liability of paying the insurance indemnity in case any insurance accidents were incurred due to the increase of risks.

According to the Draft Interpretation, an increase of risks is "significant" if the risks have exceeded the foreseeable scope by the insurer, and are enough to affect the insurer's decision whether to continue to underwrite the insurance or raise the insurance rate.

There are seven factors the court will take into consideration in determining the significant increase:

- Changes to the purpose of the insurance subject;
- Changes to areas where the insurance subject is used;
- Changes to conditions where the insurance subject is kept;
- Changes to the insurance subject itself;
- Changes to the owner, user, or manager of the insurance subject;
- Duration of increasing risks; and
- Other factors.

Property Damage Insurance Taken out by the Carrier for Goods

The Draft Interpretation provides that, if a carrier, in the capacity of the insured party, takes out property damage insurance for goods to deliver, the court shall uphold the insurer's refusal to pay insurance indemnity after the occurrence of the insured accident. This is based upon the defense that the insured party (i.e., the carrier itself) does not have insurable benefits.

It is the basic principle of insurance law that the insured should enjoy certain insurable benefits if an insurance accident happens. Otherwise, the insurer is not obliged to pay any insurance indemnity. In the case of property damage insurance, the insured should enjoy certain rights to the insured property. The carrier typically enters into a transportation contract and is contractually obliged to carry the designated goods to the agreed destination according to the schedule provided in the contract. In such a contract relationship, the carrier does not enjoy any property rights to the insured property—namely the delivered goods—and only the owner, mortgagee or pledgee of the goods enjoys different types of property rights. Without insurable benefits, the insurer shall not be obliged to pay the insurance indemnity.

In practice, some carriers do apply for property damage insurance against the goods to be delivered, and insurance companies frequently accept such applications. This article may affect the insurance market of freight transport by denying property damage insurance to carriers.

Furthermore, the same rationale is theoretically applicable to custodians, warehouse keepers, and lessees who apply for property damage insurance for the property they occupy temporarily due to contractual obligations. However, the Supreme People's Court has not incorporated these cases into the Draft Interpretation. We will wait for the official version of the judicial interpretation to expand the application of this article accordingly.

Summary

The above paragraphs deal with several important articles of the Draft Interpretations. It is apparent that the general orientation of the Draft Interpretation is pro-insurer, and the articles all aim to lessen the obligations and liabilities of the insurer while imposing more obligations on the other parties to the insurance.

Comments Sought on Information Security Technology—Guidelines for Security Assessment of Data Cross-border Transfer and Other Five National Standards

In late August, the Secretariat of the National Information Security Standardization Technical Committee (NISSTC) has issued drafts of six national standards to solicit public opinions. These include the Information Security Technology—Guidelines for Security Assessment of Data Cross-border Transfer (信息安全技术 数据出境安全评估指南（征求意见稿） (the Draft for Comment) and the Information Security Technology—General Requirements for the Security of Network Products and Services. Here we will analyze the Draft for Comment, as some foreign invested enterprises are concerned about the cross-border transfer of data.

Background of the Draft for Comment

The years 2016 and 2017 witnessed the promulgation of a series of laws and regulations intended to tighten the supervision on cyberspace and information security, including Cybersecurity Law and a draft of Measures for Evaluating the Security of Transmitting Personal Information and Important Data Overseas (Evaluating Measures). The Evaluating Measures specifically deal with the cross-border transfer of data. Under the Evaluating Measures, all network operators are required to conduct self-security evaluations before cross-border transfer of data. If the data to be transferred will have certain degree of impact on society, competent authorities or a regulatory department shall oversee the security evaluation. However, the Evaluation Measures did not address the details of self-security evaluations and evaluations by industry authorities. It should be noted that, though the Draft for Comment (along with five other national standards) is not law but merely a recommended national standard, its provisions and

interpretations of certain concepts that were not addressed by Cybersecurity Law and the Evaluating Measures will provide important reference and enhance the practicality of evaluation. The Evaluating Measures refer to national standards to determine "important information."

Self-Security Evaluation

The Draft for Comment provides that a self-security evaluation shall at least deal with the following issues:

- Self-evaluation conducted by the operators of key information infrastructure;
- Amount of personal information transferred overseas within a year that reaches the requirements for submission to CAC and industry authority;
- Information including nuclear facility, biochemical, national defense, and demographic health, as well as major construction events, marine environment and sensitive geographical information, or other important data;
- Cyber security information involving safety flaws in key information infrastructure and detailed safeguard measures;
- Other information that may affecting national security, economic development, and social benefits.

Evaluation by Industry Authorities

Although the Evaluating Measures have already provided several situations that will trigger evaluation by industry authorities, the Draft for Comment listed a few situations where they would be treated differently. For example:

- Where an amount of personal information that reaches the requirements for submission to CAC and industry authorities is transferred overseas within a year;
- Where there is information including nuclear facility, biochemical, national defense, and demographic health, as well as major construction events, marine environment, and sensitive geographical information, or other important data;
- Where there is cybersecurity information involving safety flaws in key information infrastructure and detailed safeguard measures;
- Where there is cross-border transfer of information possessed by operators of key information infrastructure;
- Where reports have been made by a large number of users;
- Where it is recommended by national industrial associations;
- Where it is determined by Cyber Administration of China or industry authority.

In the case of evaluation by an industry authority, the authority will first consider the legality, legitimacy and necessity of purpose of cross-border transfer of information. The information will be evaluated against standards of legality and legitimacy, which have more to do with laws and regulations. The core of legality and legitimacy is compliance with laws and regulations, and consent from individuals. However, the standard of "necessity" is much more flexible. According to the Draft for Comment, a situation constitutes necessity if it is necessary for:

- The performance of contracts;
- The business of the same organization;
- The performance of duty of the Chinese government;
- The performance of treaties or agreements between the Chinese government and other nations, regions, or international organizations;
- The protection of cyberspace sovereignty and national security, economic development, social benefits, and the legal interests of citizens.

Secondly, the industry authority will require that the scope of information transferred overseas obey the principle of "minimization," which requires:

- The personal information or important information transferred overseas shall be directly connected with the business function related to the purpose of cross-border transfer. "Directly connected" means the absence of such information will lead to the failure of relevant function;
- The frequency of personal information or important information transferred overseas should be necessary for the business function related to the purpose of cross-border transfer;
- The amount of personal information or important information transferred overseas should be necessary for the business function related to the purpose of cross-border transfer;

Furthermore, the industry authority will comprehensively consider the ability of both the sender and the recipient to protect the information, as well as the political and legal environment of the nations or regions where the recipient of the information is located.

Determination of Important Information

The Evaluating Measures, in Article 17, clearly calls on the national standards to define "important information"; therefore, the annex of Instructions to the Identification of Important Information to the Draft for Comment (Annex) should be given significant weight by foreign invested enterprises in their business compliance. The Annex defines important information in accordance with industries including oil and gas, coal, electricity, communication, steel, chemistry, finance and banking, food and drugs, etc. Certain information regarding these industries is considered important. For example, important information in the food and drugs industry includes:

- Drug experiment data submitted during drug approval which involves national strategic security, such as experiment data of pharmacology, toxicology, stability and pharmacokinetics; experiment data from clinical trial on human bodies; and experiment data related to the production process and facility of the drugs;
- Clinical experiment data/report of category ii and category iii medical devices;
- Information of food safety traceable system, including the product names and standard of implementation. Information regarding drug traceable systems, including the tracing code, product names, standard of implementation, ingredients, and production process and labels;
- Significant (emergent) information on food and drugs safety, including the time, location, current status, degree of damage, preliminary disposal, trend of development, progress of the event, subsequent measures, details of investigation, and analysis of the cause of the event;

- Sampling inspection information of staple foodstuff products, including rice and wheat flour.

In practice, a large multinational drug corporation may be likely to produce information falling in the first and second types of important information. Though the Draft for Comment has not come into effect, such a company should consider reviewing their practice and making any needed changes to come into compliance.

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