CHINA
REGULATORY UPDATES

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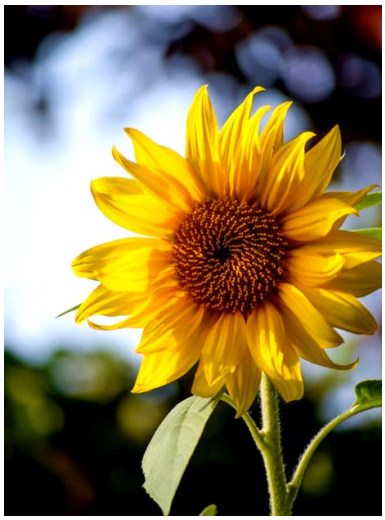
TABLE OF CONTENTS / 本期内容



CAPITAL MARKET / 资本市场

China Depositary Receipts/CDR Scheme to Be Launched Soon 中国存托凭证/CDR制度加速落地

自国务院于2018年3月30日转发证监会《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》（“《试点意见》”，*具体分析请见我所《每月立法动态》2018年3月&4月刊*）以来，CDR相关的配套政策陆续出炉。5月4日，证监会就《存托凭证发行与管理办法》（“《管理办法》”）公开征求意见；5月11日，为配合CDR落地，证监会修订了《证券发行与承销管理办法》的部分条款，将CDR发行纳入其适用范围；5月21日，中国证券登记结算有限公司发布《存托凭证登记结算业务细则（公开征求意见稿）》，对CDR相关的登记结算业务给予明确规范。

《管理办法》落实与细化了《试点意见》中的要求，对存托凭证的定义、发行交易、信息披露、存托与托管、投资者保护及法律责任等作出具体规定，划定了CDR发行过程中各参与主体的权利义务，进而明确了CDR这一新兴证券品种在中国发行、上市与交易等方面的基本制度安排。根据《管理办法》，发行CDR应符合《证券法》关于股票公开发行的基本条件。值得注意的是，《试点意见》与《管理办法》均未对CDR发行公司的盈利指标提出要求，这意味着创新型企业发行CDR上市将不受盈利门槛限制。

CDR的发行公司在股权结构、公司治理等方面主要按照境外证券市场的法规运行，使得保留其特殊公司结构（*包括同股不同权、VIE架构*）成为可能，但为保护境内投资者的合法权益，《管理办法》设置了较为全面的投资者保护措施，明确了境内外投资者应享有相当的权益。就信息披露而言，发行公司除应按照现行上市公司信息披露制度履行信息披露义务外，还须在发行文件和定期报告中对投票权差异、VIE架构或类似特殊安排进行详细披露，以充分揭示风险。值得注意的是，《管理办法》要求VIE或者红筹架构下的境内实体运营企业，也要承担信息披露的法律责任，以避免只有境外控股公司或控制主体承担责任而导致对境内投资者保护不力或维权不便的情况。

虽然CDR的定价申购细则、与境外基础证券的转换机制，以及募集资金的汇兑出境等外汇问题仍有待后续规则的进一步明确与落实，但可预见的是，在各大证券交易所纷纷进行制度改革以吸引新经济企业的国际背景之下，CDR制度的落地将有助于增加A股市场的竞争力，推动符合条件的创新企业实现在境内资本市场的直接融资，同时也在一定程度上可能影响未来VC/PE投资者对创新企业进行投资的估值与退出渠道安排。

China has introduced a slew of rules implementing China Depositary Receipts (the “CDR”) since the State Council has publicized the *Notice on Forwarding Several Opinions of the China Securities Regulatory Commission (the “CSRC”) on Pilot Programs of Issuance of Shares or Depository Receipts by Innovative Enterprises in China* (the “Pilot Plan”, *please refer to our March &April 2018 issue of China Regulatory Updates for details*) on March 30, 2018. The CSRC released the *Administrative Measures for the Issuance and Trading of Depository Receipts (Draft for Comment)* (the “Measures”) for public consultation on May 4 and subsequently amended *the Administrative Measures for Securities Issuance and Underwriting* (the "Decision") on May 11 to apply it to the issuance of depository receipts by pilot enterprises. The China Securities Depository and Clearing Co., Ltd released the *Detailed Rules for the Registration and Settlement of Depository Receipts* (Draft for Public Comment) on May 21, with detailed rules on CDR registration, depository and clearing operations.

The Measures details the requirements of the Pilot Plan and lays down a fundamental regulatory regime for CDR by setting out specific rules on the definition of CDR, issuance and trading, information disclosure, deposit and custody, investor protection and legal liabilities concerning this new type of securities, among others, as well as providing clarity on the rights and obligations of each participant involved in the CDR scheme. According to the Measures, the CDR issuers shall meet the basic conditions on public offering of stocks as required by the Securities Law. It is noteworthy that, neither the Measures nor the Pilot Plan raises any mandatory requirements on CDR issuers’ profitability which makes innovative enterprises’ return to the domestic capital market easier.

The Measures enables CDR issuers to land on the domestic market without removing special corporate structures (*including, the dual-class share structure, VIE structure, among others*) as CDR issuers mainly apply the regulations of the overseas capital markets on matters concerning equity structure, corporate governance, etc.. In the interest of enhancing investor protection and tackling risks tied to exotic corporate structures, the Measures set out various investor protection safeguards, making it clear that there shall be no cross-border discrimination on the rights and interests enjoyed by domestic investors and overseas basic securities holders. In addition to compliance with current guidelines on information disclosure by listed companies, issuers with weighted voting rights, VIE structures or similar particular arrangements must fully disclose potential risks to domestic investors in the public offering documents and periodic reports. The Measures also requires domestic operating enterprises controlled by overseas issuers through VIE structure or red chip arrangements to assume information disclosure liabilities, in order to enhance the protection of domestic investors’ rights and to facilitate and secure the fulfillment of such rights.

Although the detailed rules on CDR pricing and purchasing, the converting of CDR to overseas basic securities, the outward remittance of funds raised and other issues concerning foreign exchange administration have yet to be addressed further or otherwise specified through subsequent implementing rules, it is anticipated that the CDR scheme will improve the competitiveness of the A-share market under the current wave of competition around major stock exchanges to attract new economy enterprises and create conditions for eligible innovative firms to raise funds directly on domestic capital market via the issuance of CDR. It may also influence PE/VC investors’ arrangements on company valuation and exit channels in future investments.

STATE-OWNED ASSET MANAGEMENT / 国有资产管理

Three Authorities Jointly Released Administrative Measures for the Supervision and Administration of State-Owned Equity of Listed Companies 三部委联合发布《上市公司国有股权监督管理办法》

2018年5月16日，国务院国有资产监督管理委员会（“国资委”）、财政部与证监会联合发布了《上市公司国有股权监督管理办法》（“36号令”），并将于2018年7月1日起正式实施。2007年印发的《国有股东转让所持上市公司股份管理暂行办法》（“19号令”）将于36号令施行之日起废止。36号令主要从以下方面对上市公司国有股权变动的监管规则进行整合集中及补充细化，形成上市公司国有股权监管的统一规范：

1. 明确国有股东界定：36号令中定义的国有股东包括，(i)政府部门、机构、事业单位、境内国有独资或全资企业；(ii)第一款中所述单位或企业独家持股比例超过50%，或合计持股比例超过50%，且其中之一为第一大股东的境内企业；以及(iii)第二款中所述企业直接或间接持股的各级境内独资或全资企业。国有主体通过投资关系、协议或者其他安排能够实际支配其行为的境内外企业需参照适用36号令。此前，相关法规对国有出资有限合伙企业的身份认定并不统一和明确，导致实践中监管机构对于该等主体是否属于国有股东从而需要履行国有股转（减）持、审计评估等相应程序一直未能统一判断。36号令首次明确提出了国有出资的有限合伙企业不作国有股东认定，其所持上市公司股份的监督管理将另行规定。此种身份界定是否可以扩展适用于非上市公司，有待后续配套规则的进一步澄清，但三部委联合出台的36号令至少在一定程度上能够体现主管机关对该问题的倾向性意见。

2. 全面覆盖股权变动行为：36号令规制的上市公司国有股权变动（*即持股主体、数量或比例变动*），具体包括国有股东增持、减持上市公司股份、国有股东所控股上市公司吸收合并、发行证券及资产重组的行为。此前国资委、证监会就上述各类行为曾出台数个规范性文件，36号令将该等分散的各类国有股权变动监管规范进行了系统整合。此外，36号令还吸收了《企业国有资产交易监督管理办法》中的相关规定，进一步明确上市公司股份受让方为境外投资者的，应符合外商投资的政策要求，审核机关应就转让行为是否符合外商投资政策向同级商务部门征求意见。

3. 调整审批监管权限：一方面，明确了监管主体层级。在36号令出台之前，根据19号令的规定，国有股东转让所持上市公司股份，原则上均由国务院国资委负责审核。而36号令统一规定了上市公司国有股权变动的监督管理将全部

On May 16, 2018, the State-Owned Assets Supervision and Administration Commission (the “SASAC”), the Ministry of Finance and the CSRC jointly issued the *Administrative Measures for the Supervision and Administration of State-Owned Equity of Listed Companies* (the “Decree No. 36”), which will become effective on July 1, 2018 while the *Interim Measures for the Administration of State-Owned Shareholders’ Transfer of Their Shares of Listed Companies* (the “Decree No. 19”, effective from 2007) will be simultaneously repealed. The Decree No. 36 outlines a unified regulatory framework for the administration of state-owned equities of listed companies through unifying and supplementing the regulations on changes of state-owned equities from the following perspectives, among others:

1. Defining the scope of state-owned shareholders. The state-owned shareholders defined by the Decree No. 36 include: (i) government departments, institutions, public institutions, solely or wholly state-owned domestic enterprises; (ii) domestic enterprises in which entities or enterprises as specified in (i) solely or jointly hold a total of more than 50% equity interests and one of them holds the largest equity interest; and (iii) subsidiary enterprises at all levels to which any enterprise as specified in (ii) directly or indirectly hold 100% equity interests. Domestic or overseas enterprises which the state-owned entities are able to actually control through investment relationship, agreements or any other arrangements shall implement Decree No. 36 by reference. Under previous rules and regulations, it was not crystal clear as to how to identify the nature of state-funded partnerships and in practice, the regulatory authorities could not give consistent answers on whether such entities shall be considered as state-owned shareholders and shall therefore fulfill the state-owned equity allocation obligation, audit and appraisal procedures, among others. The Decree No.36 specifies for the first time that state-funded partnerships shall not be subject to the governance scope of state-owned shareholders and rules thereof will be formulated separately. A clearer guidance on whether this definition could apply to non-listed companies is yet to be spelt out by subsequent implementing rules, but the Decree No. 36 is still expected to give some suggestions on regulatory authorities’ attitude on this issue in general.

2. Full coverage of equity-change matters. The Decree No. 36 regulates changes of the state-owned equities in listed companies (*i.e., changes in shareholders, number of shares and shareholding ratio*), including the increase and reduction in shareholdings by state-owned shareholders, as well as the mergers and acquisitions, issuance of securities and reorganization of assets by listed companies controlled by state-owned shareholders. The SASAC and the CSRC had issued several regulatory guidelines on the above-mentioned matters, and the Decree No. 36 has therefore systematically integrated such decentralized regulations on changes of state-owned equities. In addition, the relevant provisions in the *Measures for the Supervision and Administration of the Transaction of State-Owned Assets of Enterprises* have also been incorporated into the Decree No. 36 which helped to further clarify that if the transferee of the listed company’s shares is a foreign investor, such transaction should comply with foreign investment policies and the approval authorities shall seek opinions from the foreign investment authorities at the same level in this regard.

3. Clear allocation of administrative authority. The Decree No. 36 adjusts relevant administration authority on equity change matters in the following two ways:

由省级国资监管机构负责，且经批准后，省级国资监管机构可将其监管权限下放至地市级国资监管机构。另一方面，划分了审批权限。36号令明确了由国家出资企业负责审批的事项并首次提出了“合理持股比例”概念，以作为划分国资监管机构与国家出资企业审批权限的重要界限。具体的合理持股比例将由国家出资企业研究确定，报国资监管机构备案。在国有股东的股权变动未导致其持股比例低于“合理持股比例”的前提下，大部分股权变动事项将由国家出资企业自行审批并通过管理信息系统备案即可，但大额转让股份、间接转让、上市公司吸收合并等事项的审批权限仍保留在国资监管机构。“合理持股比例”原则的提出，将赋予国家出资企业更多自主权，能够按照其发展战略灵活处理股权变动事项。

- Adjusting the levels of the regulatory authorities. Prior to the issuance of the Decree No.36 and according to the Decree No. 19, the transfer of shares of listed companies held by state-owned shareholders is subject to the review and approval of the State SASAC. The Measures changed this authority to the provincial state-owned assets supervision and administration departments, and with the consent of the State SASAC, the provincial state-owned assets supervision and administration departments may delegate the authority to its prefecture-level departments.
- Reallocating the approval authority to facilitate the state-funded enterprises. The Decree No. 36 clarifies matters subject to the approval of state-funded enterprises and introduces the new concept of “reasonable shareholding ratio”, which is an important boundary for allocating the authority among state-owned asset supervision and administrative departments and state-funded enterprises. The specific reasonable shareholding ratio will be determined by state-funded enterprises and be reported to the state-owned assets supervision and administrative authorities for record. If the changes in the shareholdings of the state-owned shareholders do not result in their shareholding ratio being lower than the “reasonable shareholding ratio”, most of these changes will be decided by the state-funded enterprises themselves and be filed in the information management system, while matters such as large-scale transfer of shares, indirect transfer of shares, mergers and acquisitions of listed companies still remain to the approval of state-owned assets supervision and administrative departments. The “reasonable shareholding ratio” principle will grant the state-funded enterprises a more autonomous right to flexibly deal with equity changes made according to their development strategies.

PE&VC / 私募股权与创业投资

Tax Incentives to Encourage Investments in Tech Startups Rolled Out Nationally 创业投资企业和天使投资个人税收优惠推广至全国

2018年5月14日，财政部、税务总局联合印发《关于创业投资企业和天使投资个人有关税收政策的通知》（“《通知》”），将目前根据2017年4月28日公布的《关于创业投资企业和天使投资个人有关税收试点政策的通知》（“《试点通知》”，*相关内容请见我所《每月立法动态》2017年5月&6月刊*）在8个全面创新改革试验地区和苏州工业园区试点的创业投资企业和天使投资个人以股权投资方式直接投资于初创科技型企业满两年后，按投资额70%抵扣应纳税所得额的优惠政策推广到全国范围实施。《通知》中适用于天使投资个人的税收政策自2018年7月1日起执行，适用于创业投资企业的税收政策自2018年1月1日起执行。此外，上述执行日期前2年内发生的投资也可适用《通知》的相关规定。

此次《通知》较《试点通知》而言，内容未有实质性变化，公司制创业投资企业、有限合伙制创业投资企业以及天使投资个人享受税收优惠政策需要符合的条件与《试点通知》的要求一致。对于合伙型创投企业，税收优惠可无障碍地适用于其第一层法人合伙人

On May 14, 2018, the Ministry of Finance and the State Administration of Taxation (the “SAT”) jointly issued the *Circular on Tax Rules for Venture Capital Enterprises and Individual Angel Investors* (the “Circular”), rolling out the pilot tax incentives in 8 comprehensive innovative and reform areas and Suzhou Industrial Park regulated in the *Circular on Pilot Tax Rules for Venture Capital Enterprises and Individual Angel Investors* (the “Pilot Circular”, *please refer to our May & June 2017 issue of China Regulatory Updates for details*) nationally. According to the Circular, qualified venture capital enterprises, venture capital partners and individual angel investors may deduct 70% of their investment amounts in Tech startups from their respective taxable incomes if the equity investments have been made for more than two years. The incentive tax rules on individual angel investors will take effect on July 1, 2018, while those on venture capital enterprises and venture capital partners have already taken effect since January 1, 2018. Additionally, the Circular can also be applied to investments made within two years prior to the above-mentioned effective dates.

The Circular has not seen substantive changes from the Pilot Circular. The qualifications for venture capital enterprises, venture capital partners and individual angel investors to apply the tax deduction are consistent with those in the Pilot Circular. According to the Circular, for venture capital partnerships, there is no doubt that tax incentives can be applied to the first-layer legal person partners and natural person partners; however, it remains unclear as to whether the look-through investors can

和自然人合伙人，但再往上层次的间接投资人能否穿透享受税收优惠，《通知》并未明确。根据《通知》的字面规定以及试点时期部分地区的国税局答复意见来看，该税收优惠仅可由直接投资人申请，不能穿透适用，但不排除实践中各地税务机关可能对此问题存在不同看法。

在主管机关此前为鼓励创业投资发展而出台的一系列税收政策基础上，《试点通知》及《通知》从被投企业及优惠适用主体两个维度进一步扩大了税收优惠的覆盖范围。此外，将可抵扣税收的投资限定为现金增资并将抵扣额度与实缴投资额直接挂钩，有助于扩大对初创科技型企业的投资规模、缓解其流动资金压力。

enjoy the tax benefits as well. According to the literal interpretation of the Circular and the opinions released by SAT offices in several pilot areas during the pilot period, the tax deduction can only be applied by direct partners, though local authorities may have different views on this issue in practice.

Based on a series of supportive tax policies introduced by competent authorities to encourage venture capital investments, the Pilot Circular and the Circular further expand the scope of tax incentives from the perspectives of the target companies and the eligible investors. Further, the tax-deductible investments are limited to capital increases by cash and the deductible amount is directly linked to the actually paid investment amounts, which will help expand investments in Tech startups and ease their liquidity pressure.

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