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CAPITAL MARKET / 资本市场

New Rules on Overseas Listing Filings Officially Landed 境外上市备案新规正式落地

2023年2月17日，中国证券监督管理委员会（“证监会”）出台了《境内企业境外发行证券和上市管理试行办法》及5项配套监管规则适用指引（合称“境外上市新规”）。新规融合、优化了此前公布的《国务院关于境内企业境外发行证券和上市的管理规定（草案征求意见稿）》以及《境内企业境外发行证券和上市备案管理办法（征求意见稿）》（合称“《征求意见稿》”）中的主要内容（具体分析请见我所《每月立法动态》2021年12月&2022年1月刊），自2023年3月31日起实施。此外，为配合境外上市新规的落地，证监会还以《关于境内企业境外发行上市备案管理安排的通知》（“《通知》”）、《证监会有关部门负责人答记者问》（“答记者问”）的形式对一些热点问题进行了解答。相比于《征求意见稿》，境外上市新规及相关的问题解答，主要从以下方面对市场较为关注的一些问题进行了澄清，预计会对寻求境外上市的境内企业产生影响：

1. 明确境内企业间接境外上市的认定标准。境外上市新规基本延续了《征求意见稿》，将境内企业境外直接上市和间接上市统一纳入备案管理范围，对境内企业的间接上市的认定采用“实质重于形式”的原则；并进一步明确了境内企业间接上市的具体认定条件，即同时满足以下两个条件即可认定为境内企业间接上市：(i)境内企业最近一个会计年度的营业收入、利润总额、总资产或者净资产，任一指标占发行人同期经审计合并财务报表相关数据的比例超过50%；(ii)经营活动的主要环节在境内开展或者主要场所位于境内，或者负责经营管理的高级管理人员多数为中国公民或者经常居住地于境内。值得注意的是，证监会于配套指引中明确提出，对于不符合上述标准，但在境外市场按照非本国（或地区）发行人有关规定要求提交发行上市申请、且依规定披露的风险因素主要和境内相关的发行人，应当综合论证与识别是否属于备案范围。
2. 与现有法规与监管制度的衔接。境外上市新规还与目前现行或拟实施的数据与个人信息的出境、安全与合规、数据/网络安全审查、外商投资审查、档案和保密制度等规定进行了制度上的衔接。特别地，(i)对于备受市场关注的VIE架构企业境外上市的监管，证监会在答记者问中明确其将“征求有关主管部门意见，对满足合规要求的VIE架构企业境外上市予以备案”，并且境外上市新规也要求在发行人备案报告、境内法律意见书等层面对VIE相关事项进行披露及核查（例如是否属于有关法律法规明确不得采用协议或合约安排控制业务、牌照、资质等的情形，境内运营主体是否属于外商投资安全审查范围、是否涉及外商投资限制或禁止领域）。因此，对于VIE架构企业境外上市备案，证监会很可能会基于有关

On February 17, 2023, the China Securities Regulatory Commission (“CSRC”) issued the *Trial Administrative Measures of Overseas Securities Offering and Listing by Domestic Companies* and five sets of supporting guidelines (collectively, the “New Filing Rules”), which integrate the previously announced *Draft Provisions of the State Council on the Administration of Overseas Securities Offerings and Listings by Domestic Companies* and *Draft Administrative Measures on Filing Procedures for Overseas Securities Offerings and Listings by Domestic Companies* (collectively, the “Drafts”) (please refer to our *China Regulatory Updates of December 2021 & January 2022*) to optimize the supervisory system. The New Filing Rules became effective on March 31, 2023. In addition, to implement the New Filing Rules, CSRC has also provided the *Notes on the Trial Administrative Measures of Overseas Securities Offering and Listing by Domestic Companies* (“Notes”) and *CSRC Officials Answers Reporters’ Questions* (“Q&A”) in response of some controversies. Compared with the Drafts, the New Filing Rules clarified some issues of great market concerns in the following aspects, which will affect the PRC domestic companies seeking listing overseas:

1. Specify the determination standard for indirect overseas listing by domestic companies. The New Filing Rules inherits the Drafts in principle, bringing the direct and indirect overseas listing of domestic enterprises into the regulated scope by adopting the principle of “*substance over form*” for the determination of indirect listing by domestic companies, and further clarifying the following criteria to be met at the same time: (i) 50% or more of the issuer’s operating revenue, total profit, total assets or net assets as documented in its audited consolidated financial statements for the most recent accounting year is accounted for by domestic enterprises; and (ii) the main part of the issuer’s operating activities are conducted in China, or its main places of business are located in China, or the senior managers in charge of its business operation and management are mostly Chinese citizens or domiciled in China. It is noteworthy that, according to one guidance of the New Filing Rules, the CSRC has further explicitly required comprehensive demonstration and identification with regard to whether the filing requirements are applicable in the case of an issuer does not meet the above two criteria, but the risk factors disclosed in the submitted listing application are mainly related to China pursuant to the regulations of relevant overseas market.
2. Strengthen regulatory coordination. The New Filing Rules also set out some provisions in connection with existing or proposed regulations related to data and personal information cross-border transfer and compliance, data/cyber security reviews, foreign investment review, archival and confidentiality regimes, etc. In particular, (i) with respect to the widely concerned regulation of overseas listing of VIE structured enterprises, the CSRC has clarified in Q&A that it will “seek opinions from relevant regulatory authorities and approve the filing for the overseas offerings and listings of enterprises with VIE arrangements that satisfy the compliance requirements”. The supporting guidelines also request disclosure and verification statements of VIE-related matters in an issuer’s filing report and domestic legal opinions (e.g., whether there are circumstances under which controlling the business, licenses and/or qualifications through contractual arrangements is explicitly prohibited by the PRC laws or regulations, whether the domestic operating entity controlled by contractual arrangements falls within the

主管部门的意见以及企业提交的上述相关材料适用一事一议的监管原则；(ii)对于适用已生效的《网络安全审查办法》、《外商投资安全审查办法》等安全审查程序的发行人，境外上市新规明确了其应当在向境外证券监督管理机构、交易所等提交发行上市申请前完成该等安全审查程序，并在向证监会备案时提交国务院有关部门出具的安全评估审查意见；(iii)对于此前仅适用于境外直接上市的档案和保密制度规定扩展适用至境外间接上市，证监会联合财政部、国家保密局、国家档案局于2023年2月24日发布了修订后的《关于加强境内企业境外发行证券和上市相关保密和档案管理工作的规定》，与境外上市新规同步施行，以衔接境外上市新规的落地。

3. 对存量企业的过渡期安排。为保证境外上市新规平稳过渡实施，证监会在《通知》及答记者问中明确了新老划断的具体标准：在境外上市新规施行之日（即2023年3月31日）前，间接境外发行上市申请已获境外监管机构或者境外证券交易所同意（如香港市场已通过聆讯、美国市场已同意注册生效等），且无需重新履行境外监管机构或者境外证券交易所发行上市监管程序（如香港市场重新聆讯等），并在2023年9月30日前完成境外发行上市的企业为存量企业。对于存量企业，不要求立即备案，仅需在上市后涉及再融资等备案事项时备案；而对于非存量企业，均应在境外发行上市前完成备案。

境外上市新规开启了境内企业境外上市监管的新时代，对长久以来企业境外上市实践中存在的一些不明确之处进行了回应，进一步规范了企业赴境外上市融资活动。对于境外上市新规的后续落地与实践发展，我们也将持续关注。

scope of foreign investment security review, and whether any sector(s) subject to restriction or prohibition for foreign investment are involved). It seems likely that the CSRC will take a "case-by-case" principle based on the opinions of the relevant authorities and its review of application materials submitted by the domestic enterprises with VIE structure; (ii) with respect to the issuers falling into the scope of security review procedures pursuant to existing regulations such as the *Cyber Security Review Measures* and the *Foreign Investment Security Review Measures*, the New Filing Rules require the completion of such security review procedures before the submission of issuance/listing applications to overseas securities regulatory authorities or stock exchanges, etc. The CSRC also requires the submission of opinions on security assessment and review issued by the relevant departments of the State Council along with other filing materials; (iii) in terms of the archival and confidentiality regulations which previously applicable only to overseas direct listings, on February 24, 2023, the CSRC, together with Ministry of Finance of the PRC, National Administration of State Secrets Protection, and National Archives Administration of China, jointly issued the revised *Provisions on Confidentiality and Archives Administration* as supplement to the New Filing Rules to expand its application to cover both direct and indirect overseas offerings and listings.

3. Set out transitional arrangement for existing issuers. To smooth the regulatory transition to the New Filing Rules, the CSRC has set out transitional arrangement for existing issuers. According to the Notes and the Q&A, if (i) the indirect listing application by a domestic company has been approved by overseas regulators or overseas stock exchanges before the date of implementation of the New Filing Rules or March 31, 2023 (e.g., it has passed the hearing of Hong Kong Stock Exchange or obtained approval of U.S. stock exchanges for effective registration etc.), (ii) it is not required to re-perform the regulatory procedures with the relevant foreign regulators or overseas stock exchange (e.g., Hong Kong market re-hearing, etc.), and (iii) it could complete its overseas listing before September 30, 2023, such enterprise will be deemed as an existing issuers and are not required to make an immediate listing filing procedure, but only required to make a filing in the case of refinancing or is involved in other circumstances that require filing with CSRC. For enterprises do not meet the above-mentioned criteria, all filings should be completed before the overseas issuance and listing.

The New Filing Rules unfold a new era of filing-based regulatory system for the overseas listings by domestic enterprise and clear up certain long-standing uncertainty facing by the PRC issuers and professionals involved in overseas offerings and listings in an effort to foster a sound regulatory environment in support of overseas listings by domestic enterprises. We will continue to monitor the regulatory and practical development in this regard.

ANTI-MONOPOLY / 反垄断

Provisions on Review of Concentration of Operators and Other Four Anti-Monopoly Rules Released **《经营者集中审查规定》等四部反垄断法配套规则发布**

为配合新修订的《反垄断法》的实施，2023年3月24日，国家市场监督管理总局（“市场监管总局”）发布了《经营者集中审查规定》《禁止垄断协议规定》《禁止滥用市场支配地位行为规定》《制止滥用行政权力排除、限制竞争行为规定》四部反垄断规则，该等规则将于2023年4月15日起施行。其中，《经营者

In order to implement recently amended Anti-Monopoly Law, on March 24, 2023, the State Administration for Market Regulation ("SAMR") released four pieces of anti-monopoly related regulations, namely *Provisions on Review of Concentration of Operators*, *Provisions on Prohibition of Monopoly Agreements*, *Provisions on Prohibition of Abuse of Market Dominance*, *Provisions on Suppression of Abuse of Administrative Power to Exclude or Restrict Competition*, which will come into effect on

集中审查规定》（“《规定》”）作为规范经营者集中反垄断申报和审查的配套规则，将取代现行有效的《经营者集中审查暂行规定》（“《暂行规定》”）。《规定》的以下修订要点尤其值得关注：

1. **更新“控制权”认定标准。**《规定》更新了《暂行规定》中的“控制权”认定标准，包括(i)新增董事会会议或管理机构的历史出席率和表决情况作为考量因素，不再将监事会的组成及表决机制作为考量因素；(ii)明确“共同控制”的含义，即两个以上经营者对其他经营者均构成控制时才会被认定为“共同控制”。虽然与2022年6月27日市场监管总局发布的《经营者集中审查规定（征求意见稿）》相比，正式出台的《规定》删除了判断控制权时应考虑“对其他经营者高级管理人员任免、财务预算、经营计划等经营决策和管理的影响”，但鉴于《规定》中保留了对“控制权”宽泛的认定标准，市场普遍认为被删除的事项在反垄断执法实践中仍会是关注重点，经营者应注意防范相关风险。
2. **新增“实施集中”的判断因素。**《规定》进一步明确了判断“实施集中”这个关键时间点的因素，除通常的“市场主体登记”以外，还列举了“权利变更登记、委派高级管理人员、实际参与经营决策和管理、与其他经营者交换敏感信息、实质性整合业务”等情形。判断因素的明确，有助于经营者更好地防范构成“抢跑”的风险。
3. **细化对于未达申报标准交易的处理规定。**《反垄断法》规定了在未达到申报标准、但有证据证明具有或可能具有排除、限制竞争效果的经营者集中情形下，国务院反垄断执法机构可以要求经营者申报。经营者进行申报的，国务院反垄断执法机构应当依法进行调查。在此基础上，《规定》针对届时是否已经实施集中、以及经营者是否按要求申报的处理程序分别作出细化规定，并进一步新增了第三方举报机制，允许任何单位和个人发现前述经营者集中情形时向市场监管总局反映，经核查后处理。因此对于未达到申报标准的交易，经营者在判断申报的必要性时也更需谨慎。

此外，《规定》在健全分级分类审查制度、优化营业额计算规则、细化审查期限“停钟”的适用规则、提高处罚力度等方面，根据新《反垄断法》以及相关执法实践经验，进一步修订完善了现有规则。我们将对后续的立法和执法动态保持关注，同时建议企业在监管规则进一步明确的情况下，增强反垄断合规意识，防范相关法律风险。

April 15, 2023. Among them, the *Provisions on Review of Concentration of Operators* (the “Provisions”) will replace the existing *Interim Provisions on Review of Concentration of Operators* (the “Interim Provisions”), as an implementation guidance rule to further regulate merger control filings and reviews. Highlights of the amendments include, among others:

1. **Update criteria for determination of “control”.** The Provisions updated the criteria for determining “control” in the Interim Provisions, including: (i) historical attendance rates and voting status at board meetings or management bodies will be taken into account, while removing the composition and voting mechanism of the supervisory board; (ii) clarifying the definition of “joint control”, i.e., two or more operators have respective control over the other operators. The Provisions have also deleted “influence on other operators’ business decisions and management, such as the appointment and removal of senior management, financial budgets and business plans” as a criterion compared to the draft Provisions issued on June 27, 2022. Given that the high-level list of factors to consider to determine “controlling” is still in place in the Provisions, it is believed that the removed items still should be taken into consideration by operators.
2. **Add new criteria for determining “implementation of concentration”.** In addition to the common criterion – “shareholders change registration at local AMR”, the Provisions further listed out more criteria for determining “implementation of concentration” to avoid risk of gun-jumping, including “change of rights registration at local AMR, appointment of senior management, participation in business operation and management, exchange of sensitive information with other business operators, and substantial business integration”.
3. **Refine the regulation for transactions below the filing threshold.** The *Anti-Monopoly Law* allows the SAMR (China’s antitrust agency) to initiate a review when a business concentration does not reach the relevant filing thresholds yet evidence indicates that it nonetheless has or may have the effect of eliminating or restricting competition. On this basis, the Provisions further set out detailed procedures for handling whether a concentration has been implemented at that time and whether the operator has made a filing as required. The Provisions also introduced a third-party reporting mechanism to allow any entity or individual who discovers the aforementioned concentration of operators to report to the SAMR for handling after verification. As a result, operators need to be more cautious about transactions below the filing threshold in determining whether the filing obligation is triggered.

In addition, the Provisions have further revised and improved the existing rules in accordance with the new *Anti-Monopoly Law* and relevant enforcement practices, in terms of improving the classification and grading review system, optimizing the turnover calculation methods, refining the “stop-the-clock” mechanism for time period of review, and increasing the penalties. We will continue to monitor and update on the regulatory developments and practices. We also suggest relevant enterprises refer to these regulations and enhance their anti-monopoly compliance to reduce related legal risks.

CROSS-BORDER FINANCING / 跨境融资

NDRC Updated Regulations on Mid-to-Long Term Foreign Debt 发改委更新企业中长期外债管理规定

2023年1月10日，国家发展和改革委员会（“发改委”）发布了《企业中长期外债审核登记管理办法》

On January 10, 2023, the National Development and Reform Commission (“NDRC”) issued the *Administrative Measures for the Review and Registration of Mid-to-Long Term Foreign Debt of*

（“56号令”），同时废止了《关于推进企业发行外债备案登记制管理改革的通知》（“2044号文”），新规自2023年2月10日起施行。2023年2月，发改委更新了“企业发行外债备案登记办事指南”及“常见问题解答”，作为56号令实施的配套规则。56号令及其配套规则进一步加强了对企业借用中长期外债的监管，并细化了登记的要求和流程。其中，以下变化尤其值得关注：

1. 外债管理模式由“备案登记制”变更为“审核登记制”。56号令明确规定企业应当在借用外债前（即，境外债券完成交割或商业贷款首次提款前）完成审核登记手续，取得《企业借用外债审核登记证明》。此外，新规将发改委的审核时限从2044号文项下的受理之日起7个工作日延长至受理之日起3个月内。对于该等变化，建议相关交易方根据交易时间表合理规划申请外债审核登记的时间。
2. 明确将“间接借用外债”纳入监管范围。2044号文项下仅明确规定了境内企业及其控制的境外企业或分支机构直接向境外举借外债的情形。虽然2044号文配套的常见问题解答将红筹架构的企业借用外债等特殊情形也纳入了管理范畴，但并未明确具体认定标准，导致在适用时存在一定争议。此次56号令明确将“主要经营活动在境内的企业，以注册在境外的企业的名义，基于境内企业的股权、资产、收益或其他类似权益，在境外发行债券或借用商业贷款等”定义为间接借用外债的情形，并纳入外债审核登记范围。此外，56号令配套的常见问题解答对“主要经营活动在境内的企业”进行了界定，要求遵循“实质重于形式”的原则，从财务指标、经营情况等方面进行判断（与《境内企业境外发行证券和上市管理试行办法》规定的“间接上市”认定标准类似）。至于如何界定“基于境内企业的股权、资产、收益或其他类似权益”，目前尚缺乏明确指引，有待发改委及后续实践进一步说明。

Enterprises” (“Order 56”), which came into effect on February 10, 2023 and replaced the *Circular on Promoting the Reform of the Filing and Registration Regime for Issuance of Foreign Debt by Enterprises* (“Circular 2044”). In February 2023, the NDRC further updated the *Guidelines for the Filing and Registration of the Issuance of Foreign Debt by Enterprises* and a series of FAQs to implement Order 56, to further strengthen the regulation of borrowing mid-to-long term foreign debt and refine the registration requirements and processes. Order 56 made the following major changes, among others:

1. Change “filing and registration” to “approval and registration” regime. Order 56 specifies that enterprises should obtain the *Certificate for Approval and Registration of the Borrowing of Foreign Debt by Enterprises* before closing (in case of offshore debt issuance) and the first utilization (in case of borrowing of offshore commercial loans). In addition, the time required to accept and review the NDRC registration has been extended from 7 working days from the date of acceptance under Circular 2044 to 3 months, which should be taken into account in a transaction timetable.
2. Bring “indirect borrowing” in scope. Circular 2044 only covered direct borrowing of foreign debt by any PRC enterprise or any non-PRC enterprise or branch controlled by a PRC enterprise. Although the FAQs of Circular 2044 covered special circumstances such as the borrowing of foreign debt by red-chip structure enterprises, the definition of “red-chip structure” was not further clarified and caused controversies in the application. In contrast, Order 56 elaborated that a PRC enterprise would be considered as indirectly borrowing foreign debt and thus subject to the approval and registration if (i) its primary business activities are within the PRC, and (ii) it incurs debt outside of the PRC through an overseas enterprise based on the equity interests, assets, revenue or other similar rights of that PRC enterprise. The FAQs of Order 56 further adopted the *substance over form* approach when defining “primary business activities” (similar to the criteria for determining “indirect listing” under the *Trial Administrative Measures of Overseas Securities Offering and Listing by Domestic Companies*). However, Order 56 and its supporting documents were still unclear how “based on the equity interests, assets, revenue or other similar interests of a domestic enterprise” would be interpreted, which is pending further clarification from the NDRC and future practice.

PRIVATE FUND / 私募基金

AMAC Released New Measures for Registration and Filing of Private Investment Funds 中基协发布 私募投资基金登记备案新规

2023年2月24日，中国证券投资基金业协会（“中基协”）发布《私募投资基金登记备案办法》（“《办法》”）及配套指引，将于2023年5月1日起施行，同时废止《私募投资基金管理人登记和基金备案办法（试行）》等现行规定（统称“旧规定”）。

《办法》对旧规定下较为碎片化的私募基金自律规则进行了整合与完善，进一步提高了私募基金管理人及其出资人、实际控制人、高管人员等关键主体的从业门槛，并从募、投、管、退等关键环节对基金的合规运作提出了更高要求。其中，主要有以下内容值得关注：(i) 提高管理人实缴资本要求。此前在旧规定下，中基协仅对实缴出资低于人民币200万元的情况在私募

On February 24, 2023, the Asset Management Association of China (“AMAC”) released the *Measures for Registration and Filing of Private Investment Funds* (“Measures”) and the ancillary guidelines, which will take effect on May 1, 2023. The Measures will replace some existing regulations such as the *Measures for the Registration of Private Investment Fund Managers and Filing of Funds (for Trial Implementation)* (collectively, the “Old Rules”).

The Measures consolidated and improved fragmented self-regulatory rules for private equity funds and managers under the Old Rules, further raised the threshold for key participants such as fund managers and their investors, actual controllers and senior management personnel, and imposed higher requirements on the compliance of funds operation in such key aspects as fund raising, investment, management and exit. Among them, highlights of the Measures include:

- (i) Raising the paid-in capital threshold for private fund

基金管理人公示信息中予以特别提示,《办法》则明确要求管理人最低实缴资本不低于人民币1,000万元,大大提高了管理人资质门槛;同时,对于私募创业投资基金管理人则进行差异化管理,明确另有规定的从其规定;(ii)新增管理人登记时限及转让的管理规模要求。《办法》要求私募基金管理人应当自工商登记之日起12个月内提请办理管理人登记,并且管理人的实际控制权发生变更的,变更之日前12个月的管理规模应当持续不低于人民币3,000万元。该等规定将直接限制在过往实践中并不少见的买卖管理人“壳”资源的操作,进一步规范相关市场;(iii)新增基金备案最低规模要求。《办法》要求,股权基金初始实缴募集规模不低于人民币1,000万元;创业投资基金首期应缴纳至少人民币500万元募集资金,剩余资金备案后6个月内完成缴纳;对于专项基金则提出了人民币2,000万元的较高实缴门槛。

managers. Under the Old Rules, private fund managers with less than RMB2 million paid-in capital would only be marked with a reminder on their publicity system; while the Measures significantly raised the qualification threshold by explicitly requiring the minimum RMB10 million paid-in capital. On the other hand, the Measures differentiated the requirements for venture capital fund managers by specifying that the regulations shall apply if otherwise provided;

- (ii) *New time limits for manager registration and requirements for fund transfer.* The Measures required that a private fund manager should apply for registration within 12 months from the date of registration at local AMR. In the case of change of actual control, the Measures further required continuous management of assets no less than RMB30 million for the 12 months prior to the date of the change. These provisions will directly restrict the common practice of buying and selling “shell” resources of managers and further regulate the private fund market; and
- (iii) *New fundraising threshold for fund filing.* The Measures added initial minimum paid-in capital for private funds: RMB10 million for private securities fund; RMB5 million for the first installment and RMB10 million in total within 6 months after the fund filing for venture capital funds; and RMB20 million paid-in capital threshold for single-target private funds.

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For further information, please write us at inquiry@hanyilaw.com.

CONTACT US

上海市中山西路2020号
华宜大厦1座1801室
邮编: 200235
电话: (86-21) 6083-9800



Suite 1801, Tower I, Huayi Plaza
2020 West Zhongshan Road
Shanghai 200235, China
Tel: (86-21) 6083-9800