

Legal Commentary

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Overseas IPOs: Key Issues in the Draft Archives Rules

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On April 2, 2022, the China Securities Regulatory Commission (the “**CSRC**”) published the revised *Provisions on Strengthening Confidentiality and Archives Administration of Overseas Securities Offering and Listing by Domestic Companies (Draft for Comments)* (the “**Draft Archives Rules**”). The *Draft Archives Rules* is now open for public consultations until April 17, 2022.

This newsletter summarises the key content in the Draft Archives Rules that are relevant for overseas securities offerings and listings of domestic companies.

Background to the revision of the confidentiality and archives administration rules

The Draft Archives Rules updates and revises the *Provisions on Strengthening Confidentiality and Archives Administration for Overseas Securities Offering and Listing* (Announcement No. 29 [2009] of the CSRC, “**Current Provisions**”) jointly issued by the CSRC, the Ministry of Finance of the PRC, the National Administration of State Secrets Protection, and the National Archives Administration of the PRC.

The Draft Archives Rules are intertwined with and echo at the legislative level two key documents¹ in relation to the reform of the overseas listings record-filing system, which are still in draft form:

- *Provisions of the State Council on the Administration of Overseas Securities Offerings and Listings by Domestic Companies (Draft for Comment)* (the “**Administration Provisions on Overseas Offerings and Listings**”);
- *Administrative Measures for the Record-Filing of Overseas Securities Offerings and Listings by Domestic Companies (Draft for Comments)* (the “**Filing Measures for Overseas Offerings and Listings**”).

¹ The Administration Provisions on Overseas Offerings and Listings and the Filing Measures for Overseas Offerings and Listings are still in the legislative process and have not yet come into effect.

Analysis of the key constructs of the rules for the administration of confidentiality and archives

I Explicit expansion of the scope of application

Under the Current Provisions, the confidentiality and archives administration rules are applicable to an “overseas securities offering and listing”, including companies to be listed, as well as securities companies and securities service institutions that provide relevant securities services. The term “overseas listed company” under the Current Provisions refers to a domestic joint stock limited company that issues overseas-listed shares abroad. In other words, the Current Provisions mainly apply to “H-shares” projects where the listed entity is incorporated in the PRC.

In light of the Administration Provisions on Overseas Offerings and Listings and the Filing Measures for Overseas Offerings and Listings, the scope for the application of the Draft Archives Rules has been adjusted to be consistent with the overseas listing record-filing system that is currently underling the legislative process. In other words, the Draft Archives Rules includes both overseas direct offerings (i.e. where the listed entity is incorporated in the PRC) and overseas indirect offerings (i.e. where the listed entity is not incorporated in the PRC, but where the PRC operating company is part of the group).

II Further clarification of regulatory aims

As a result of the above expansion of scope, the Draft Archives Rules adjusts its scope from “overseas listed companies (including proposed listed companies)” under the Current Provisions to “domestic enterprises” covering both domestic joint stock companies directly listing overseas and domestic operating entities that indirectly list overseas through non-PRC incorporated listing vehicles.

At the same time, the Draft Archives Rules also clearly define “securities companies” and “securities service institutions”, both of which are subject to its supervision, to include **domestic and overseas** securities companies, securities service institutions, as well as their domestic member institutions, representative institutions, affiliated institutions, and cooperative institutions, etc. This builds on the Current Provisions, by accounting for the complexities of overseas listings (i.e. subjecting indirect listings to its jurisdiction to account for the creation of overseas structures), and by refining and filling in regulatory gaps.

In addition, the Draft Archives Rules explicitly include within the scope of its supervision overseas accounting firms that engage in auditing business related to overseas issuances and listings of domestic enterprises. Overseas accounting firms that engage in auditing business related to overseas issuances and listings of domestic enterprises are required to abide by corresponding procedures in accordance with relevant state regulations. At present, according to the *Interim Provisions on the Audits Conducted by Accounting Firms Concerning the Overseas Listings of Domestic Companies* (effective July 1, 2015) issued by the Ministry of Finance, if a PRC company retains an overseas accounting firm, such overseas accounting firm should carry out business cooperation with a PRC accounting firm and fulfil its regulatory procedures, such as making a report to the provincial finance department where the PRC company is located, with a copy to the Ministry of Finance. After these Draft Archives Rules come into effect, whether new regulatory policies will be

adjusted for the cross-border practices of overseas accounting firms will be further clarified by regulators.

III Confidentiality and management system implementation requirements

1. Confidentiality and archives system

The Draft Archives Rules require that, in relation to the overseas listing activities of domestic enterprises (which as stated above also includes indirect listings), such domestic enterprises, as well as securities companies and securities service institutions providing relevant securities services, are required to strictly comply with the relevant requirements on confidentiality and archives management, **establish a sound confidentiality and archives system**, and take necessary measures to implement their confidentiality and archives management responsibilities.

It should be noted that “whether a sound and complete, standardized confidentiality and archives management system has been established and put in place” is currently a key point of review by the CSRC in H-share listings (the listed entity is incorporated in the PRC), and legal advisors are required to comment on this when filing an H-share listing application with the CSRC.

We understand that in the context of the Administration Provisions on Overseas Offerings and Listings, which sets out clear requirements for the establishment of confidentiality and archives management, companies proposing to submit record-filing applications to the CSRC under the Administration Provisions on Overseas Offerings and Listings should have established and implemented the relevant confidentiality and archives management systems prior to the filing. This will apply after the Administration Provisions on Overseas Offerings and Listings and the Filing Measures for Overseas Offerings and Listings take effect.

2. Regulatory procedures for materials involving state secrets or archives with a sensitive impact

According to the Draft Archives Rules, if during the course of an overseas offering and listing (whether listed directly or indirectly), if a PRC company needs to publicly disclose or provide to securities companies, accounting firms or other securities service providers and overseas regulators, any materials that contain relevant state secrets or that have a sensitive impact (i.e. be detrimental to national security or the public interest if divulged), the PRC company should complete the relevant approval/filing and other regulatory procedures.

Compared to the Current Provisions, where materials containing “state secrets” are subject to approval from competent authorities and a filing with state secrecy departments, the Draft Archives Rules expand such scope to include materials containing “state secrets and government work secrets”. Unlike state secrets, the definition of which is relatively clear (i.e. bearing the “state secret” mark by the holder), “government work secrets” are determined respectively by responsible government organs and units without any uniform standard or marking requirement. Accordingly, “government work secrets” may include (but are not limited to), government documents and materials marked as “internal document”, “internal matter”, “internal material”, and the like. Therefore, prospective listed companies should closely monitor secrecy or sensitive impact issues when providing service institutions and overseas regulators with documents and materials obtained from government departments (including

communications and correspondences with those departments).

The Draft Archives Rules also require a PRC company to complete relevant procedures stipulated by applicable national regulations if it plans to publicly disclose or provide documents and materials that, if divulged, would jeopardize national security or the public interest. This revision is consistent with the set of laws and regulations on national security, cybersecurity, and data security issued in recent years, stressing the need to stay compliant with relevant regulatory policies when disclosing listing-related documents and materials to service institutions and overseas regulators.

3. Divulgence reporting system

The Draft Archives Rules also require domestic companies, securities companies and securities service providers that discover the divulgence or possible divulgence of state secrets, to take immediate remedial measures and timely report the same to relevant organs and departments.

4. Archives administration requirements

- The Draft Archives Rules retain the requirement in the Current Provisions that archives such as **working papers produced in the PRC** by securities companies and securities service institutions, which provide PRC companies with securities services during its overseas issuance and listing, **should be stored in the PRC**. Furthermore, under the Draft Archives Rules, **the transmission of all such working papers to recipients outside of the PRC is required to be approved by competent authorities of the PRC**. This approval requirement no longer just applies to state secrets, national security or the vital interests of the state as stipulated by the Current Provisions;
- Article 8 of the Draft Archives Rules states, “Domestic companies that provide securities companies, securities service providers and overseas regulators with accounting archives [including working papers] or copies thereof, which have important preservation value to the nation and the public shall complete due procedures in compliance with applicable national regulations”;
- Article 9 of the Draft Archives Rules also states, “Where archives [including working papers] or copies of archives, which have important preservation value to the nation and the public needs to be transmitted to recipients outside the PRC, due approval procedures shall be followed in accordance with applicable national regulations”. Although the term “important preservation value to the nation and the public” is consistent with the terminology in the Archives Law of the PRC, neither has elaborated on the specific meaning of such expression. Also, the Archives Law prohibits “selling or gifting” such archives “to non-PRC or non-PRC organizations”, which does not appear to be consistent to this Article 9. The specific requirements still need to be clarified in subsequent implementation rules.

IV Regulatory coordination mechanisms

1. Domestic regulatory coordination mechanism

On the basis of the regulatory coordination mechanism established between PRC regulators under the Current Provisions, the Draft Archives Rules adds the Ministry of Finance as another PRC regulatory authority (being the primary regulator of accounting firms), which reflects the overall content of the

Draft Archives Rules.

2. Cross-border regulatory cooperation mechanism

The Draft Archives Rules establishes a cross-border regulatory cooperation mechanism as prescribed in Article 177 of the PRC's Securities Law and strengthens cross-border regulatory cooperation under the principles of reciprocity and mutual benefit as prescribed in the Administrative Provisions Regarding Overseas Issuance and Listing. It shifts the overall direction of cross-border supervision of overseas listings from a "PRC dominant" approach under the Current Provisions to a "cross-border regulatory cooperation mechanism". Specifically,

(1) There is no differentiation between an "on-site inspection" and an "off-site inspection"

Under the Current Provisions, overseas securities regulators and other relevant bodies may conduct an on-site inspection or an off-site inspection on companies that have listed (or intend to list) overseas, as well as securities companies and institutions providing services for the overseas issuance and listing of securities (including accounting firms). An on-site inspection had to be conducted at the relevant site in the PRC, required prior approval from competent PRC authorities, and had to be carried out mainly by PRC regulators or had to have relied on the inspection results of PRC regulators. With respect to an off-site inspection, companies that have listed (or intend to list) overseas, securities companies and securities service providers (including accounting firms) had to obtain prior approval from competent PRC regulators only if the relevant case involved state secrets, archives (including working papers) administration and other matters subject to such prior approval.

In light of the extended jurisdiction under the Draft Archives Rules, regulating both direct and indirect overseas issuances and listings by domestic enterprises, and considering international cross-border audit supervision practices, the Draft Archives Rules no longer differentiate inspections by overseas bodies on geographical or methodological grounds, but rather places them under unified regulation of a common cross-border cooperation mechanism. This also addresses and consolidates Article 177 of the PRC's Securities Law, which provides that "overseas securities regulatory authorities shall not carry out investigation, evidence collection, etc. directly in the PRC", by enabling the cross-border cooperation mechanism to regulate investigations, inspections and evidence collection by overseas securities regulators and relevant authorities with respect to the overseas issuances and listings by domestic enterprises.

In addition, the Draft Archives Rules require relevant domestic enterprises, securities companies and securities service institutions to report to the CSRC or relevant authorities before cooperating with overseas regulators or relevant authorities in their investigations and inspections or providing materials to them. We tend to believe that this reporting obligation arises where those overseas regulators or authorities carry out an investigation or inspection under the cross-border regulatory cooperation mechanism, with the assistance from the CSRC or competent PRC authorities pursuant to relevant mechanisms. To some extent, it means the burden of obtaining the CSRC's prior approval for an investigation or inspection is shifted to overseas securities regulators or relevant overseas authorities pursuant to the cooperation mechanism. It is also consistent with Article 177 of the PRC's Securities Law, the enabling law of the Draft Archives Rules, in terms of the principle that "no organization or

individual is allowed to provide the documents and materials relating to securities business activities to overseas parties without the consent of the securities regulatory authority of the State Council and the relevant State Council department(s).” Where a cross-border regulatory cooperation mechanism is not established between the PRC and certain countries and organizations, Article 177 of the Securities Law will directly apply.

(2) Submission of the overseas listing application is separate from the provision of materials under the cross-border regulatory cooperation mechanism

After the promulgation of the PRC’s Securities Law, the question of whether prior consent from the CSRC and relevant State Council department(s) was required prior to submitting overseas listing applications to securities exchanges and regulators outside of the PRC was a hotly debated and constantly inquired issue. As Article 177 is under Chapter 12 (Securities Regulatory Authorities) of the PRC’s Securities Law, Paragraph 1 of Article 177 focuses on establishing a cross-border regulatory cooperation mechanism, and the first sentence of Paragraph 2 stresses that overseas securities regulators should not carry out evidence collection for an investigation directly in the PRC, the common belief in practice was that the provision of securities business related documents and materials under Paragraph 2 of Article 177 tended to exclude the submission of listing applications to overseas securities exchanges and regulators.

The Administrative Provisions Regarding Overseas Issuance and Listing of Securities and the Measures for the Overseas Issuance of Securities and Listing Record-Filings set forth record-filing requirements for domestic enterprises that intend to list and issue securities overseas, while the Draft Archives Rules establish a reporting system for relevant investigations, inspections and the provision of materials under a cross-border regulatory cooperation mechanism. These rules and regulations viewed together form the basis for regulating the overseas issuance and listing of securities by domestic enterprises.

We hope the above policy adjustments will positively promote a consensus to be reached soon between PRC regulators and overseas regulators on cross-border audit supervision, which will create a favourable regulatory environment for the development of PRC issuers listed overseas.

Important Announcement

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