

CSRC Adopts Final Rules on Provision of Information in Relation to Overseas Listings

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To pave the way for Chinese companies to continue seeking offerings and listings overseas, a methodology must be found to enable these companies to continue providing data and information required under overseas laws and potentially subjecting themselves to investigations by overseas regulators, without compromising national secrets and other sensitive information. On April 2, 2022, the China Securities Regulatory Commission (the “CSRC”), together with the Ministry of Finance, the State Secrecy Administration, and the State Archives Administration, issued the “Provisions on Strengthening Confidentiality and Archives Administration in Overseas Issuance and Listing of Securities by Domestic Enterprises (the “Archive Provisions”) (Draft for Comment)”, and proposed a solution. This is part of the CSRC’s initiative of commencing supervision on overseas offerings and listings by Chinese companies. On February 24, 2023, one week after the final main rules on filing for overseas offerings and listings were published, the Archive Provisions were also officially adopted. The main rules and the Archive Provisions are both scheduled to take effect on March 31, 2023.

In short, the Archive Provisions require that a gatekeeping mechanism be installed at the time of provision of information by domestic enterprises to securities service agencies, overseas institutions, and individuals, so as to prevent sensitive information from entering the audit working papers, and prescribe protective protocols for any residual sensitive information that still has to be provided. By frontloading the gatekeeping exercise, Chinese companies would no longer need to worry about turning over their working papers to overseas regulators such as the US Public Company Accounting Oversight Board (the “PCAOB”) for potential inspection, as any state secret or other sensitive information would have already been filtered out and protected. More specifically, the methodology set out in the Archive Provisions comprises of three main dimensions:

First, the Archive Provisions stipulate a filtering exercise to be conducted by domestic enterprises before provision of information, which requires these companies to perform different approval, filing, or other corresponding procedures for the provision of different types of information:

- provision of documents and materials involving state secrets and work secrets of state departments and units should be reported to the competent authority for approval, and should

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be filed with the secrecy administrative department at the same level for the record (Article 3); and

- for provision of other documents and materials the leakage of which may adversely affect national security or public interests, the corresponding procedures should be strictly followed in accordance with relevant state regulations (Article 4). From the text of the Archive Provisions it is unclear what these “corresponding procedures” would entail, and other laws and regulations that may be relevant depending on the specific nature of the information would need to be referred to.

The securities companies and securities service agencies are also required to comply with the same requirements when they provide similar information to overseas regulators, other relevant institutions and individuals.

Second, the Archive Provisions set out the protocols over the provision of information. Firstly, domestic enterprises should make written explanations to securities service agencies regarding the above-mentioned confidentiality and archives administration requirements, which explanation should be properly kept on file by the securities service agencies. This is a step that we understand will help both parties reach a common understanding of the scope and method of information provision to avoid future disputes. Secondly, if it turns out that after the filtering exercise domestic enterprises still need to provide certain secrecy related information, they should sign a non-disclosure agreement with securities service agencies in accordance with the applicable laws on national secret and the Archive Provisions, and the securities service agencies should properly store and protect the information provided. Thirdly, domestic enterprises and securities services agencies are required to take remedial measures and report to relevant government agencies when state secrets are leaked or may be leaked.

Third, the Archive Provisions provide that working papers formed within China should be stored within China, and any transfer of them outside China should be subject to required approvals. The provisions also reiterate that any investigation by overseas regulators on domestic enterprises should be conducted via the cross-border supervision mechanism whereby the CSRC and other PRC regulators will provide necessary assistance, and that any provision of information in response to such investigation should be subject to the consent from the CSRC or the other PRC regulators

These three dimensions provide a systematic guidance over the provision of information and safeguarding of national secrets in association with overseas IPOs. As noted by the CSRC in its press release, practice shows that only in very rare cases do the information provided to securities companies and agencies by domestic enterprises for the purpose of overseas IPOs involve secret related or sensitive information. Therefore, the protocol is not expected to hinder the provision of information in most IPO cases. And even in the rare cases where such sensitive information does need to be provided, the Archive Provisions do not impose a total ban, but just require applicable consents be sought, due procedure be followed and proper records be maintained in

connection therewith, which the CSRC does not expect would result in a prohibitively high compliance cost for the domestic enterprises. Having said that, the setup of a robust confidentiality and archive system and an effective filtering procedure over the provision of information has now become a critical part of an overseas IPO exercise for all Chinese companies.

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice.