

# Legal Commentary

February 27, 2023

## Filing-based System for Overseas Listing (IV) – Legal Verification

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In the process of overseas offering and listing of domestic enterprises so far, it is necessary for the listing intermediaries (the “**Intermediaries**”) to conduct due diligence on all aspects of the issuer. In particular, PRC lawyers are required to issue the PRC legal opinions on the history, corporate governance, business operation, major assets, tax, employment, and other aspects of the domestic enterprises. The New Filing Rules not only unify the domestic regulatory procedures between direct (e.g. H-shares listing)<sup>1</sup> and indirect (e.g. red-chip listing) overseas offering and listing of domestic enterprises, but also maintain basically the same scope and standard for domestic legal verification<sup>2</sup>, clarifying the legal verification requirements under the domestic regulation for the overseas offering and listing of domestic enterprises.

As the fourth episode of the series of *New Era of Filing-based System for Overseas Offering and Listing*<sup>3</sup>, this article begins with the scope of the PRC legal opinions issued by the PRC lawyers of the issuers and the items subject to the legal verification in connection with overseas offering and listing of domestic enterprises under the New Filing Rules. From the perspective of the issuers, we will summarize the requirements for the scope and standard of the legal verification for domestic enterprises under the New Filing Rules as well as the key points therein for your reference.

### Circumstances and scope of verification

#### I. Circumstances of verification

With the implementation of the New Filing Rules, the following filing or reporting requirements to the CSRC at different stages or circumstances of overseas offering and listing of domestic enterprises are clarified:

<sup>1</sup> For the convenience of elaboration, this article discusses the direct overseas listing of domestic enterprises prior to the implementation of the New Filing Rules mainly from the perspective of H-shares listing.

<sup>2</sup> Due to the differences in the legal framework and legal entities between direct and indirect overseas listing, the New Filing Rules make different requirements for the PRC legal opinions based on such differences.

<sup>3</sup> Terms or attributes used in this article but not defined herein shall have the meaning given to them in the series of *New Era of Filing-based System for Overseas Offering and Listing*.

Stages or circumstances of overseas offering and listing for domestic enterprises		Corresponding key filing/reporting materials
Overseas initial public offering or listing (except where otherwise indicated, including other circumstances that require the filing procedures in accordance with the relevant provisions on issuers' overseas initial public offering or listing <sup>4</sup> )		<ul style="list-style-type: none"> <li>■ Filing report</li> <li>■ Legal opinion</li> <li>■ Special legal opinion (hereinafter referred to as “<b>Special Legal Opinion</b>”)</li> <li>■ Report on overseas offering and listing (applicable to overseas initial public offering or listing)</li> <li>■ Prospectus (applicable to overseas initial public offering or listing)</li> </ul>
Overseas Securities Offering after Overseas Listing		
Full Circulation		
Occurrence of Material Events after Listing	Change of control	<ul style="list-style-type: none"> <li>■ Report on change of control after overseas offering and listing</li> </ul>
	Being investigated or punished by overseas securities regulatory authorities or relevant competent authorities	<ul style="list-style-type: none"> <li>■ Report on other material events after overseas offering and listing</li> </ul>
	Change of the listing status or listing board	
	Voluntary or compulsory termination of listing	
	Significant changes in the main business operations that no longer fall within the scope of filing thereafter	<ul style="list-style-type: none"> <li>■ Special report</li> <li>■ Legal opinion</li> </ul>

## II. Scope of verification

### 1. General verification

Prior to the implementation of the New Filing Rules, issuers and Intermediaries have been following a relatively fixed scope of legal verification for domestic enterprises within different corporate structures for listing in accordance with the approval requirements and practice of the CSRC, foreign securities regulatory authorities and/or stock exchanges and other corresponding regulatory/review authorities. In terms of H-shares structures and small red-chip structures that are common in overseas listing, compared with H-shares listing, during which it is required to submit application materials to the CSRC and foreign stock exchanges respectively within their respective scope of supervision and review, listing with small red-chip structures is subject to less direct domestic supervision and is generally required to meet the requirements set by the foreign stock exchanges. Therefore, the scope of legal verification for listing with small red-chip structures is more flexible than that of H-shares listing.

Under the New Filing Rules, the Guideline No. 2, in the form of guideline for the content and format of

<sup>4</sup> Including subsequent listing in another overseas market after being listed, reverse takeover, listing through De-SPAC transaction, re-listing overseas after being delisted from overseas market, etc. Please refer to the Trial Measures and the Guideline No.1 for more details.

the filing materials, has refined and clarified the general filing and verification requirements for main issues of overseas offering and listing from the perspective of domestic regulation. The scope of filing materials covers the basic information, business operation and corporate governance, the offering plan and other important aspects of the issuer. Some contents of the filing materials, such as the determination and basis of the issuer’s controlling shareholder and actual controller and the associated relationship or concert party arrangement among existing shareholders, are made with reference to the regulatory requirements for domestic listing. Since the overseas offering and listing rules might not cover such concepts as actual controller, and there are differences in the definition and scope of certain concepts (such as “associated” relationship in the domestic listing rules and “connected” relationship in the Hong Kong listing rules), the standard for determining such matters in the context of filing with or reporting to the CSRC remains to be further clarified.

So far, the New Filing Rules only set forth the scope of general verification of legal matters, but there are no further interpretations regarding the depth of information disclosure in the filing materials and attitude towards the non-compliance of the issuer. The key concerns and verification criteria of domestic regulatory authorities during the process of reviewing filing materials remain to be further observed after the implementation of the New Filing Rules.

## 2. Special verification

In addition to the general matters above, before the implementation of the New Filing Rules, since an approval by the CSRC is necessary under the H-shares structure, a special legal opinion is required to be issued by PRC lawyers based on the key points for verification<sup>5</sup> (hereinafter referred to as “**Key Points for Verification**”) promulgated by the CSRC. Similarly, the Guideline No. 2 of New Filing Rules also provides that a Special Legal Opinion issued by the PRC lawyers of issuer based on the points for verification (hereinafter referred to as “**Special Verification Points**”) shall be one of the filing materials. The main content of the Special Legal Opinion is briefly summarized as follows:

Category	Summary of verification matters
Current offering and listing	<ul style="list-style-type: none"> <li>■ Whether there is a circumstance in which overseas offering and listing are prohibited in accordance with the Trial Measures</li> <li>■ Where security review is involved, whether the relevant procedures have been completed</li> <li>■ Whether the internal and external decision-making and approval procedures for the offering and listing have been performed</li> <li>■ Whether domestic or overseas fund-raising and investment projects have undergone the corresponding procedures or comply with the corresponding national policies</li> </ul>
Confidentiality and archive management	<ul style="list-style-type: none"> <li>■ Whether the confidentiality and archive management systems comply with the relevant regulations</li> </ul>

<sup>5</sup> For details, please refer to the relevant information in the *Key Points for Review of The Overseas Public Offering and Listing of Shares (Including Additional Issuance of Shares) By Companies Limited by Shares* and the *Key Points for Review of the Application by H-share Companies for “Full Circulation” of Unlisted Shares* issued by the CSRC.

Category	Summary of verification matters
Equity structure and control structure	<ul style="list-style-type: none"> <li>■ Detailed verification requirements for shareholding entrustment, newly-added shareholders, ESOP, equity incentives, number of shareholders and VIE structures</li> </ul>
Applicable matters in specific circumstances	<ul style="list-style-type: none"> <li>■ Whether the market access requirements for foreign investment are met</li> <li>■ Whether the real estate business is involved</li> <li>■ Whether the previous filing commitments have been fulfilled</li> <li>■ Special verification requirements for spin-off of a domestic listed company for overseas listing, domestic enterprises' asset transactions, overseas issuance of convertible bonds, exchangeable bonds and Full Circulation</li> </ul>

Compared with the Key Points for Verification, the Special Verification Points replace the relevant provisions under H-shares structures which are to be repealed with the relevant criteria of overseas offering and listing in the New Filing Rules, while, covering the special verification requirements for specific overseas listing and refinancing in accordance with the changes in the definition of overseas offering and listing. It is worth mentioning that the Guideline No. 2 has further detailed the verification requirements for the section of “Equity Structure and Control Structure” in the Special Verification Points, which indicates that such matters, in addition to the existing approval of/disclosure to the securities regulatory authorities and/or stock exchanges in the place of listing, may also be the focus of domestic regulatory authorities.

### 3. Report of occurrence of material events after listing

The completion of the overseas initial offering and listing does not mean the domestic legal verification is completely finished. Upon occurrence of any of the following specific events, issuers shall conduct self-review and report to the CSRC in accordance with the requirements of the Guideline No. 3:

Material events occurred after listing	Summary of reporting matters
Change of control	<ul style="list-style-type: none"> <li>■ Basic information of the change of control</li> <li>■ Basic information of the actual controller after the change of control and the method by which the control is obtained</li> <li>■ If there is no actual controller after the change of control, the basis of determination shall be provided</li> </ul>
Being investigated or punished by overseas securities regulatory authorities or relevant competent authorities	<ul style="list-style-type: none"> <li>■ Time of the occurrence of such events and the specific details of such events</li> </ul>
Change of listing status or listing board	
Voluntary or compulsory termination of listing	
Significant changes in the main	<ul style="list-style-type: none"> <li>■ Explanation of such events (Note 1)</li> </ul>

Material events occurred after listing	Summary of reporting matters
business operations that no longer fall within the scope of filing thereafter	

Note 1: In particular, under such circumstance, the issuer, in addition to submitting a special report, shall also engage a PRC law firm to issue the legal opinion to explain the relevant situations.

It can be seen that after overseas offering and listing, the issuer shall pay special attention to the occurrence and progress of the aforementioned material events and shall timely fulfill the reporting requirements under the New Filing Rules in addition to the existing approval of/disclosure to the securities regulatory authorities and/or stock exchanges of the listing place.

## Key matters

Taking into account the refinement and consideration of the verification requirements imposed by the domestic regulatory authorities on the H-shares listing prior to the implementation of the New Filing Rules, we understand that the verification requirements on the following matters under the New Filing Rules deserve special attention<sup>6</sup>.

### I. Matters of control

Before the implementation of the New Filing Rules, in the case of H-shares listing, although the listing entity is a domestic enterprise, the CSRC has only proposed a few special verification requirements on the controlling shareholder and actual controller in the Key Points for Verification during the review process for offering and listing and in the feedback opinions provided by the CSRC to some issuers; in the case of listing with small red-chip structures, since the listing entity is an overseas entity, verification and disclosure on the controlling shareholder and control shall be mainly based on the laws of the domicile of the listing entity and the rules and approval requirements of the foreign securities regulatory authorities and/or stock exchanges<sup>7</sup>.

After the H-shares listing and listing with red-chip structure have been incorporated into a unified filing-based system under the New Filing Rules, the controlling shareholder, actual controller and control of the domestic enterprises shall be elaborated in the filing/reporting materials submitted to the CSRC. The summary is as follows:

<sup>6</sup> Before the implementation of the New Filing Rules, the common overseas listing structures include small red-chip structures and H-shares structures. Under the small red-chip structures, there are no corresponding verification requirements as there are no regulatory requirements for the pre-approval from the CSRC. Due to space limitation, we mainly compare the relevant requirements of the New Filing Rules with the domestic verification standards for H-shares listing in the approval-based system in this article.

<sup>7</sup> As this article mainly discusses the impact of the New Filing Rules on domestic legal verification, we will not make specific listing or comparison of the verification requirements under the laws of the domicile of the listing entity and the rules and approval requirements of the foreign securities regulatory authorities and/or stock exchanges.

#	Relevant provisions under the New Filing Rules	Comments
Control	<p>The concept of “determination of control” in Article 6 of Guideline No.1:</p> <p>It refers to the actual control over an enterprise separately or jointly, directly or indirectly through equity, voting rights, trusts, agreements, other arrangements, etc.</p>	<p>As the overseas listed domestic enterprises may, in accordance with the requirements of the listing place, adopt flexible financing methods and corporate governance methods, it may lead to a greater complexity of the post-listing shareholding structures.</p> <p>Determination of control under the New Filing Rules adapts to the current situation of the overseas listing market, and provides basis for the following reporting requirements for change of control</p>
Offering conditions (circumstances where overseas offering and listing are prohibited)	<ul style="list-style-type: none"> <li>■ The controlling shareholder or actual controller has committed a specific kind of criminal offence in the last three years;</li> <li>■ The equity held by the controlling shareholder or the shareholders controlled by the controlling shareholder or the actual controller has a major ownership dispute</li> </ul>	<p>The New Filing Rules have made reference to the provisions on domestic A-shares listing and include the compliance and major ownership dispute of equity of the controlling shareholder and actual controller in the “negative list”<sup>8</sup> of overseas offering and listing, which will be one of the key contents in the filing materials submitted to the CSRC after the implementation of the New Filing Rules.</p>
Disclosure requirements for filing materials	<ul style="list-style-type: none"> <li>■ Basic information of the controlling shareholder and actual controller and the basis for determination thereof;</li> <li>■ If there is no controlling shareholder or actual controller, the information of the largest</li> </ul>	<p>The disclosure requirements in the filing materials are still focused on control.</p> <p>In addition, when there is no controlling shareholder (s) or</p>

<sup>8</sup> The circumstances under which overseas offering and listing are prohibited under Article 8 of the Trial Measures, include “(1) where such securities offering and listing is explicitly prohibited by provisions in laws, administrative regulations and relevant state rules; (2) where the intended securities offering and listing may endanger national security as reviewed and determined by competent authorities under the State Council in accordance with law; (3) where the domestic company intending to make the securities offering and listing, or its controlling shareholders and the actual controller, have committed crimes such as corruption, bribery, embezzlement, misappropriation of property or undermining the order of the socialist market economy during the latest three years; (4) where the domestic company intending to make the securities offering and listing is suspected of committing crimes or major violations of laws and regulations, and is under investigation according to law, and no conclusion has yet been made thereof; (5) where there are material ownership disputes over equity held by the domestic company’s controlling shareholder or by other shareholders that are controlled by the controlling shareholder and/or actual controller.”

#	Relevant provisions under the New Filing Rules	Comments
	<p>shareholder and shareholders who have significant impact on the issuer shall be disclosed with reference to the requirements for controlling shareholder and actual controller;</p> <ul style="list-style-type: none"> <li>■ Special shareholder rights arrangements or special agreements involving shares;</li> <li>■ Pledge, freezing, litigation, arbitration or other disputed situations of shares held by the controlling shareholder or the shareholders controlled by the controlling shareholder or the actual controller</li> </ul>	<p>actual controller (s), whether the inclusion of the largest shareholder and shareholders who have significant impact on the issuer within the scope of the disclosure means that the CSRC may impose further disclosure requirements on these shareholders in the form of a supplementary feedback during the filing process remains to be seen.</p>
Reporting requirements of material events after listing	<ul style="list-style-type: none"> <li>■ Where there is a change of control, the report for change of control shall be submitted</li> </ul>	<p>In addition to the existing approval by/ disclosure to the securities regulatory authorities and/or stock exchanges of the listing place, the situation of the change of control of the controlling shareholder and actual controller will become an on-going reporting obligation of the issuer to the CSRC.</p>

The abovementioned requirements of the New Filing Rules reflect the concern of the domestic regulatory authorities on the control of overseas-listed enterprises and the changes thereof. In addition, in consideration of the complex control relationships of overseas-listed enterprises, the New Filing Rules impose reporting requirements on the control of domestic enterprises after overseas listing, and implement more detailed reporting obligations on the controlling shareholders and actual controllers of domestic enterprises under the domestic regulatory rules.

## II. Shareholder verification

Prior to the implementation of New Filing Rules, relevant legal verification and information disclosure on shareholders shall mainly comply with the rules and approval requirements of foreign securities regulatory authorities and/or stock exchanges. Meanwhile, the CSRC's Key Points for Verification of shareholders of a listing entity under the H-shares structure mainly refer to whether the relevant shareholders are associated or acting in concert with each other and whether the number of shareholders exceeds 200, and does not set out requirements for penetrating verification of shareholders or verification of newly-added shareholders.

Under the New Filing Rules, in addition to the rules and approval requirements of foreign securities regulatory authorities and/or stock exchanges, there are unified shareholder verification requirements for both direct and indirect overseas listings of domestic enterprises. Details are listed as follows:

#	Approval-based system (H shares) <sup>9</sup>	Filing-based system (applicable to both direct and indirect overseas listing of domestic enterprises)	Comments
Penetrating verification of shareholders	No specific requirements (except necessary penetrating verification where the number of shareholders does not exceed 200)	<ul style="list-style-type: none"> <li data-bbox="612 344 1115 645">■ Actual controller: penetrating verification until it reaches the level of the ultimate state-controlled or management entity (including public institutions, industry funds controlled by state-owned entities, etc., the same below), collective organization or natural person.</li> <li data-bbox="612 663 1115 922">■ The largest shareholder and shareholder (s) who have significant impact on the issuer (without controlling shareholder or actual controller): refer to the provisions on controlling shareholder or actual controller.</li> <li data-bbox="612 940 1115 1429">■ Major shareholders: penetrating verification until it reaches natural persons, listed companies, public companies including companies listed on the NEEQ, state-controlled or managed entities, collective organizations, foreign government investment funds (including sovereign wealth funds), university endowment funds, pension funds, public welfare funds, and publicly offered asset management products<sup>10</sup>.</li> </ul>	The explicit requirement for penetrating verification of shareholders under the filing-based system is to some extent a reference to the penetrating verification of shareholders of A shares. Although the current penetration standards are relatively clear, it remains to be seen whether the specific verification items and standards shall be formulated in accordance with the provisions for A shares.

<sup>9</sup> Since the CSRC does not explicitly set out the legal verification and disclosure requirements for shareholders under the small red-chip structure, here we only set out the relevant requirements under the H-shares structure before the implementation of the New Filing Rules.

<sup>10</sup> According to the filing report provided for in the Guideline No.2, where a major shareholder is an overseas private equity fund, if it is not a shareholder or platform solely for the purpose of shareholding, and its purchase price is not obviously abnormal, the filing-based system may choose not to apply for penetrating verification. However, where one of the investors, executive partners or actual controllers is a domestic entity (including legal persons, natural persons and unincorporated organizations with Chinese nationality), the relevant situation shall be stated through penetrating verification.

#	Approval-based system (H shares) <sup>9</sup>	Filing-based system (applicable to both direct and indirect overseas listing of domestic enterprises)	Comments
Associated relationship among shareholders	Whether there is associated relationship or concert party arrangement between the issuer's existing shareholders and the offering participant (if applicable); and the shareholding relationship between the major shareholders holding more than 5% of shares and the offering participant (if applicable)	<ul style="list-style-type: none"> <li>■ State the associated relationship and concert party arrangement among the shareholders holding more than 5% of the issuer's shares or voting rights; if the offering participant is specific, the associated relationship among the offering participant, the issuer as well as the issuer's shareholders shall be stated.</li> <li>■ State the associated relationship and concert party arrangement among the existing shareholders.</li> </ul>	The requirements of the approval-based system and the filing-based system are basically the same regarding verification requirements for associated relationship among shareholders.
Verification of newly-added shareholders	No specific requirements	<ul style="list-style-type: none"> <li>■ The number of shares held by the newly-added shareholders in the most recent year, changes in shareholding, the time when the new shareholders obtained the shares, the price of the shares and the pricing basis (applicable to IPO or listing) shall be stated.</li> <li>■ If new shareholder(s) join within 12 months before the issuer submits the filing application for overseas offering and listing, the basic information, reason for entry, share purchase price and pricing basis of the new shareholder(s), whether the new shareholder(s) are associated with other shareholders, directors, supervisors and senior executives of the issuer, whether the new shareholder(s) are associated with the intermediary(s) of the current offering and its person-in-charge, senior executives and handling personnel, and whether there is any</li> </ul>	Among previous red-chip or H-shares projects, the pre-IPO series of financing within 12 months before the submission of listing application is common. The verification standard for new shareholders (not limited to major shareholders) under the filing-based system on the left column provides higher requirements of information disclosure on the issuers, Intermediaries and shareholders to some extent.  It should be noted that the requirements above shall apply for

#	Approval-based system (H shares) <sup>9</sup>	Filing-based system (applicable to both direct and indirect overseas listing of domestic enterprises)	Comments
		<p>direct or indirect holding of shares in the issuer by participants whose shareholding is prohibited by laws and regulations shall be verified. The requirements above shall apply as reference for any shareholder change after the filing application is submitted.</p>	<p>any shareholder change (not limited to the addition of shareholders) after the filing application is submitted.</p>
Number of shareholders	Whether the number of shareholders of the issuer, its controlling shareholder, actual controller and important holding subsidiary exceeds 200 (applicable to domestic enterprises that are not listed in China)	<ul style="list-style-type: none"> <li>■ <u>Only applicable to direct overseas offering and listing of domestic enterprises</u>: The PRC lawyer of the issuer shall, in accordance with the Securities Law and the relevant regulations on supervision and administration of non-listed public companies, verify whether the number of the issuer’s shareholders exceeds 200 and issue a clear conclusive opinion.</li> <li>A. The calculation principles of ESOP: ESOP implemented in accordance with the law by shareholding platforms such as corporate enterprises, partnership enterprises and asset management plans shall be counted as one shareholder; persons who were employees when participating in ESOP and still hold interests of ESOP after leaving office in accordance with the articles of association or agreement of the ESOP may be deemed as internal personnel; the external personnel in ESOP shall be calculated by penetrating verification based on the actual number of persons.</li> <li>B. Private equity funds, asset management plans, and other financial plans which are subject to regulation by domestic financial supervision and regulation authorities shall be counted as one shareholder.</li> </ul>	Both the approval-based system and the filing-based system require to verify whether the number of shareholders of the direct overseas offering and listing of domestic enterprises exceeds 200. The New Filing Rules have further specified the calculation standard of 200 shareholders, which is basically the same as that for A shares.

It can be seen from the above that the Guidance No. 2 specifically sets out a chapter titled “Verification Requirements for Shareholding Structure and Control Structure”, which reflects the importance the CSRC attaches to shareholder verification when filing or reporting for overseas listing of domestic enterprises. Based on the focus on control in the aforesaid New Filing Rules, the penetrating verification requirements of the actual controller are more stringent than those of other shareholders.

### III. Nominee holding

In the current practice, where there is any nominee holding of an issuer or its domestic equity company, legal verification will be conducted with respect to the formation, evolution, clearing, and other details of such holding with reference to the rules and approval requirements of foreign securities regulatory authorities and/or stock exchanges. However, in terms of rules of domestic regulation, the CSRC’s Key Points for Verification under the H-shares structure include whether there is any nominee holding for an issuer (applicable to financial enterprises) and whether the holding of the shares of the shareholder of relevant domestically unlisted shares (under full circulation) involves any nominee holding.

The New Filing Rules impose clearer legal verification requirements on nominee holding of shares in terms of domestic regulation. That is, where there is nominee holding of shares in an issuer, the PRC lawyer of the issuer shall verify the reason for formation, evolution and compliance of such nominee holding of shares, whether there are existing or potential disputes, and whether there is existing direct or indirect holding of share in the issuer by participants whose shareholding is prohibited by laws and regulations, and shall issue a clear and conclusive opinion thereon.

### IV. Employee incentives

Before the implementation of the New Filing Rules, Intermediaries will, in accordance with the laws and regulations of the domicile of the listing entity and rules and approval requirements of foreign securities regulatory authorities and/or stock exchanges, verify and disclose the employee incentive implemented previously and/or to be implemented at the time of listing. For domestic regulation, as demonstrated in *Filing-based System for Overseas Listings (III)-Direct Listings*, in the review process of H-shares structure, since the issuer’s shareholding structure is required to be clear and stable, most of the equity incentive plans have been exercised or have been cancelled with respect to the portion that has not been exercised prior to listing. Meanwhile, the approval requirements on shareholding structure and corporate governance do not explicitly stipulate the regulatory requirements on employee incentive plans implemented prior to listing (except for the specific approval requirements for financial enterprises, which are set out in the table below). In contrast, under the New Filing Rules, higher and more detailed verification requirements are imposed on the PRC lawyers of the issuer for the employee incentive plans implemented prior to listing. The details are as follows:

#	Approval-based system (H shares) <sup>11</sup>	Filing-based system	Comments
Employee incentives	<p>Only with respect to specific enterprises (financial enterprises), verification is required for whether there is direct shareholding by employees, and if so, whether such enterprises violate relevant regulations including the Notice on Regulating the Shareholding by Employees of Financial Enterprises (Cai Jin [2010] No. 97); the senior officers of the issuer and other individuals holding more than 50,000 internal employee shares shall make special undertakings regarding the lock-up period and sale limit of share transfer according to the relevant regulations.</p>	<ul style="list-style-type: none"> <li>■ Where an issuer implements an ESOP before the filing of IPO, the PRC lawyer of the issuer shall fully verify the background regarding the establishment of the ESOP, composition of the specific personnel, fairness of price, provisions of articles of association or relevant agreements of the ESOP, performance of decision-making procedures, and standard operation of the ESOP.</li> <li>■ In principle, all of the ESOP shall be held by the employees of the company; where the participants of the ESOP established prior to the effective date of the Securities Law of the People’s Republic of China (i.e. prior to March 1, 2020) include a small number of external personnel, the PRC lawyer of the issuer shall verify the shareholding reason and background of the relevant personnel, share purchase price, pricing basis, source of funds, and where the share purchase price is the same or similar to that of the employee, whether there is any benefit transfer shall be explained.</li> <li>■ For persons who still hold interests in the ESOP after resignation, the PRC lawyer of the issuer shall verify whether the relevant persons are employees of the company at the time of participation in the ESOP, and whether they currently hold interests in the ESOP under the articles of association or relevant agreements of the ESOP. Where the relevant persons participate in the ESOP in the capacity of advisors of the issuer, the PRC lawyer of the issuer shall verify</li> </ul>	<p>The key points of the verification of employee incentives under the New Filing System, to a certain extent, refer to the verification provisions of A shares, which are also more extensive and detailed. Whether the verification requirements on the foreign exchange and tax compliance for employees who exercise their rights prior to overseas listing under the small red-chip structure and the relevant foreign exchange regulations relating to the employees’ exercise of rights will be subject to adjustment following the implementation of the New Filing Rules remains to be closely watched.</p>

<sup>11</sup> Since the CSRC does not explicitly set out the legal verification and disclosure requirements for employee incentives under the small red-chip structure, here we only set out the relevant requirements under the H-shares structure before the implementation of the New Filing Rules.

#	Approval-based system (H shares) <sup>11</sup>	Filing-based system	Comments
		whether the relevant persons have signed a consulting contract with the company, and whether such contract specifies the specific duties and term of advisors as well as the way to participate in the operation and management of the company.	

In addition, the New Filing Rules also contain more detailed verification points relating to the Stock Option Incentive Plan formulated before IPO filing and to be implemented after listing by the issuers as compared with the previous H-shares structure. The New Filing Rules also contain provisions relating to the issuance of securities to specific domestic targets for the purpose of implementing equity incentives by domestic enterprises which completed direct overseas offering and listing. For details, please refer to the *Filing-based System for Overseas Listings (III)-Direct Listings*.

## V. VIE structure

After the implementation of the New Filing Rules, the overseas offering and listing of domestic enterprises with the VIE structures will be subject to the supervision and administration of the CSRC. The *Filing-based System for Overseas Listing (II) – Indirect Listing* briefly introduced that under the New Filing Rules, it was allowed for the filing of overseas listing of enterprises with VIE Structures that satisfied the compliance requirements and the issuer’s lawyer shall conduct special verification of the VIE Structure<sup>12</sup>. In addition, from the issuer’s perspective, if the issuer has any VIE structure, it shall also specify the following information in the filing report: (1) the reasons for and the specific arrangements for the establishment of the VIE structure, including the basic conditions of the parties involved in the VIE structure, the core terms of the main contract and the transaction arrangements; (2) risks that may be caused by the VIE structure in respect of control, breach of contract by relevant parties and tax; and (3) the arrangements for risk response measures.

On the whole, the New Filing Rules and the CSRC’s response to the reporters’ questions<sup>13</sup> sent another positive signal to the overseas listing of enterprises with VIE structures. However, whether the filing for overseas listing with VIE structure can be ultimately completed is subject to the fulfillment of verification requirements stipulated in the Guideline No. 2 under the premise of meeting compliance requirements. Such arrangements, to some extent, respond to the discussion triggered by the content of the Negative Lists for Foreign Investment Access in 2021<sup>14</sup> (the “**Foreign Investment Access Negative Lists**”) on overseas offering and listing of shares by domestic enterprises. On the

<sup>12</sup> For more details, please refer to *Filing-based System for Overseas Listing (II) – Indirect Listing*.

<sup>13</sup> For overseas listing of VIE structured enterprises, filing administration will adhere to the market-oriented and rule-of-law principles, and regulatory coordination will be strengthened. The CSRC will seek opinions from relevant authorities and file the overseas listing of VIE structure enterprises that satisfy the compliance requirements to support enterprises to take advantage of two markets and two resources for development.

<sup>14</sup> They refer to the Special Administrative Measures (Negative List) for Foreign Investment Access (2021 Version) and the Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2021 Version).

one hand, this arrangement maintains internal consistency with the NDRC's statement in a press conference in December 2021 when the Foreign Investment Access Negative List was first released, which states that "after a domestic enterprise submits the application materials for overseas listing to the CSRC, if the application involves any industries prohibited by the Foreign Investment Access Negative List, the CSRC will seek opinions from the industrial or related competent authorities, and carry out relevant regulatory procedures in accordance with the relevant provisions." On the other hand, this arrangement, to a certain extent, may echo that the application scope of Article 6<sup>15</sup> of the Foreign Investment Access Negative List is limited to direct overseas listing by domestic enterprises engaging in industries prohibited by the Foreign Investment Access Negative List and regarding the indirect overseas listing of domestic enterprises, the CSRC is seeking opinions from the public on relevant rules and regulations, and relevant authorities will handle the matter in accordance with such rules once the relevant documents are officially released, which was referred to in the NDRC's response to the hot-button issues in January 2022. However, the standards for judgment by competent authorities of different industries and other relevant government departments on the compliance of VIE structures remain to be further observed in practice and paid attention to.

## Summary

Just like the CSRC's intention of streamlining administration, delegating power, strengthening regulation and improving services for filing-based administration of overseas listing, the CSRC will focus more on the compliance of the filing materials, and the filing-based administration will also strengthen the coordination of domestic and overseas supervision, severely crack down on fraudulent offering and other serious illegal acts, and specify the liabilities of issuers and Intermediaries. Therefore, it is more necessary for issuers to understand in advance the scope and standards of the matters to be verified before preparing filing materials, and take the relevant regulatory measures and strengthen the communication with Intermediaries, shareholders and other relevant parties. With respect to the existing or potential compliance problems of an issuer, the problems that it is impossible to judge the compliance because the regulatory requirements are unclear or the practice has not become customary, and the problems that the issuer has a VIE structure, the issuer and Intermediaries shall communicate and discuss the solutions as soon as possible, determine whether to use the communication mechanism specified in the New Filing Rules to communicate in advance<sup>16</sup> according to the issuer's own circumstances so as to complete the filing process in a smooth and efficient manner.

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<sup>15</sup> Where a domestic enterprise engaging in industries prohibited by the Negative List for Foreign Investment Access/Negative List for Pilot Free Trade Zones intends to offer shares and list such shares for trading overseas, the offering and trading of shares shall be subject to the examination and approval of the relevant authorities. Foreign investors shall not participate in the operation and management of the enterprises, and their shareholding percentage shall be determined with reference to the relevant provisions on the administration of domestic securities investments by foreign investors.

<sup>16</sup> Article 3 of Guideline No. 4 provides: Prior to the submission of filing materials, an issuer may submit an application for communication in respect of the regulatory policies and control structure of the issuer's industry.

## ***Important Announcement***

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