

Key Developments in the Laws and Regulations of China in 2023

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This newsletter selects and briefs key developments in the laws and regulations of China in relation to foreign investment until August 2023 for your reference.

Contents

- Foreign Investment
 - The State Council Issued Opinions to Optimize the Environment for Foreign Investment
 - The State Administration of Foreign Exchange Published Draft Regulation on Promoting Facilitation for Cross-border Trade and Investment
 - Policies on the Five-Year Transition Period After the Implementation of the Foreign Investment Law
- Cyber Security and Data Compliance
 - The Cyberspace Administration of China Released Standard Contract for Outbound Transfer of Personal Information and its Relevant Measures
 - The CAC Published Draft Measures for Compliance Auditing of Personal Information Protection
 - The CAC Promulgated Measures for the Administration of Generative Artificial Intelligence Services
- Anti-monopoly
 - The State AMR Promulgated New Supporting Rules for Anti-monopoly Law
- Life Science
 - The Ministry of Science and Technology Released Detailed Rules for the Implementation of Human Genetic Resources Administration
 - The National Health Commission Released New Measures to Expand the Scope of Application of Ethics Review
- Other Laws and Regulations
 - The State AMR Issued New Measures for the Administration of Proficiency Testing of Inspection and Testing Agencies
 - The Ministry of Finance and the State Taxation Administration Issued Policies to Reduce Burdens on Taxpayers

Foreign Investment

- **The State Council Issued Opinions to Optimize the Environment for Foreign Investment**

On August 13, 2023, the State Council issued the Opinions on Further Optimizing the Environment for Foreign Investment and Increasing Efforts to Attract Foreign Investment (“**Opinions**”). The Opinions propose incentive measures in six aspects, including improving the quality of utilizing foreign capital, ensuring the national treatment to FIEs, improving the level of facilitation for foreign investment and business operations, increasing the fiscal and taxation support, etc.

Specifically, the Opinions propose twenty-four measures, which mainly include: (a) supporting foreign investors in establishing R&D centers in China, speeding up the launch of foreign-invested projects in the field of biomedicine, encouraging FIEs to carry out clinical trials of overseas-marketed cell and gene therapy drugs in China, and optimizing the application procedure for registration of drugs that have been marketed overseas and are to be transferred to domestically produced; (b) encouraging financing through pledging portfolios of intellectual property, equity and relevant physical assets, supporting the exploration of intellectual property securitization in a regulated manner, increasing in an orderly manner the participating regions of the pilot program for the transfer of fund shares of equity investment and venture capital investment, and steadily increasing the participating regions of the pilot program for the opening-up of value-added telecommunication services, such as domestic Internet virtual private network business (with the proportion of foreign investment not exceeding 50%), information service business (limited to application stores and excluding online publishing services) and Internet access service business (limited to the provision of Internet access service to users); (c) establishing green channels for qualified FIEs in order for efficient performance of security assessment for outbound transfer of important data and personal information, and encouraging regions such as Beijing, Tianjin, Shanghai, and the Guangdong-Hong Kong-Macau Greater Bay Area to explore the development of, on a pilot basis, a white list of general data that can be allowed to flow freely.

It is expected that relevant authorities will promulgate specific provisions to implement said measures in the future.

- **The State Administration of Foreign Exchange Published Draft Regulation on Promoting Facilitation for Cross-border Trade and Investment**

On July 24, 2023, the State Administration of Foreign Exchange (“**SAFE**”) published the Notice on Further Deepening Reform and Promoting Facilitation for Cross-border Trade and Investment (Draft for Comment) (“**Draft**”), soliciting comments from the public.

The Draft proposes to extend the application of ten policies from certain pilot areas to nationwide. The ten policies include four policies under current accounts and six policies under capital accounts. For capital accounts, the facilitation policies mainly include: (a) promoting nationwide the cross-border financing facilitation pilot policies, under which eligible small and medium-sized technology enterprises may borrow foreign debt within a special limit,¹ which is different from the limitation generally applicable to other enterprises;

¹ The limit for pilot areas (Beijing, Shanghai, Zhejiang and other provinces and cities) is up to the equivalent of USD 10 million, while the limit for other areas is up to the equivalent of USD 5 million.

(b) allowing Chinese domestic equity transferors to use settlement accounts under capital accounts (originally, the asset realization accounts) to receive the equity transfer price paid by FIE transferees in foreign currency, and the funds in settlement accounts under capital accounts may be settled and used independently by Chinese domestic equity transferors; (c) allowing non-financial enterprises with reasonable needs to open foreign debt accounts in areas other than their places of incorporation.

- **Policies on the Five-Year Transition Period After the Implementation of the Foreign Investment Law**

Before the current Foreign Investment Law came into effect on January 1, 2020, the laws applicable to foreign-invested enterprises (“**FIEs**”) in China were the Law on Sino-Foreign Equity Joint Ventures, the Law on Wholly Foreign-owned Enterprises, and the Law on Sino-Foreign Cooperative Joint Ventures (the “**FIE Laws**”), which were different from the laws applicable to Chinese domestic enterprises, including the Company Law, the Partnership Enterprise Law, etc. The FIE Laws set forth provisions on the organization form and structure,² the measures of share and equity transfer, the measures of profit distribution, etc. for FIEs that are different from those applicable to the Chinese domestic enterprises.³ After the Foreign Investment Law came into effect, the FIE Laws were abolished, and the organization form and structure and the operating rules of FIEs are uniformly governed by the same laws as applicable laws to Chinese domestic enterprises. As such, relevant regulations set forth a five-year transition period for FIEs established prior to January 1, 2020. Namely, such FIEs need to adjust their organization form, organization structure, etc. in accordance with the Company Law, the Partnership Enterprise Law, and other relevant laws prior to the end of 2024 and go through the corresponding registration and filing formalities. The measures for share and equity transfer, profit distribution and residual property distribution, etc. originally stipulated in the joint-venture contracts or similar agreements of said FIEs could be either retained or amended in accordance with the Company Law, the Partnership Enterprise Law, and other relevant laws.

Considering that the end of 2024 is approaching, we suggest that FIEs established prior to January 1, 2020 should start to review their articles of association and joint venture contracts with provisions in relation to the organization form and structure, measures for share and equity transfer, profit distribution, etc. and make proper amendments. Please note that, starting from January 1, 2025, the Administration for Market Regulation (“**AMR**”) will not handle other registration applications for FIEs that have not adjusted their organization form and organization structure as required, and will publicize the relevant circumstances.

Cyber Security and Data Compliance

- **The Cyberspace Administration of China Released Standard Contract for Outbound Transfer of Personal Information and its Relevant Measures**

² Mainly relating to the highest authority of the enterprise and its voting system, the method for selecting the legal representative and directors and relevant deliberation and voting mechanism.

³ Such different provisions mainly apply to the Sino-foreign equity joint ventures and Sino-foreign cooperative joint ventures. There are relatively few different provisions for wholly foreign-owned enterprises.

The Personal Information Protection Law stipulates three main compliance routes for providing personal information to overseas recipients, including (a) the security assessment organized by the cyberspace authority; (b) the certification conducted by a professional institution, and (c) the standard contract to be signed with the overseas recipients. The regulatory intensity of these three routes decreases in descending order.

On February 24, 2023, the Cyberspace Administration of China (“**CAC**”) released the Measures for the Standard Contract for Outbound Transfer of Personal Information (“**Measures**”) and the corresponding standard contract, which became effective from June 1, 2023. The Measures specify the requirements of concluding and filing the standard contract under the standard contract route. In general, any institution or enterprise that conducts outbound transfer of personal information and intends to continue the transfer due to business needs should pay attention to the standard contract route, as long as it does not meet the standards of the security assessment route.⁴ The Measures provide a six-month transition period for rectification of outbound transfer activities carried out before the Measures came into effect. During such transition period, the relevant personal information processors should conduct the impact assessment on personal information protection, enter into the standard contracts with the overseas recipients of personal information and file the standard contracts with the cyberspace authority within ten business days after the contracts take effect.

- **The CAC Published Draft Measures for Compliance Auditing of Personal Information Protection**

On August 3, 2023, the CAC published the Administrative Measures for Personal Information Protection Compliance Auditing (Draft for Comment) (“**Draft Measures**”). The Draft Measures intend to implement the relevant requirements of the Personal Information Protection Law on the compliance audit of personal information protection. Under the Personal Information Protection Law, personal information processors are required to conduct personal information protection compliance audits, both on a regular basis and in circumstances as required by the regulatory authorities. The Draft Measures provide detailed requirements on the two types of audits in terms of their time limits, audit procedures and forms. Further, the Draft Measures provide a list of key auditing considerations as specific guidance and reference for relevant enterprises.

- **The CAC Promulgated Measures for the Administration of Generative Artificial Intelligence Services**

On July 13, 2023, the CAC and six other departments jointly promulgated the Interim Administrative Measures for Generative Artificial Intelligence Services (“**Interim Measures**”), which became effective from August 15, 2023. The Interim Measures are the first formally adopted regulations on generative artificial intelligence (“**GAI**”) services in the world.

The Interim Measures apply where GAI technologies are used to provide text, image, audio, video and other content-generated services to the public within the territory of China. The Interim Measures propose a principle of “tolerance, prudence, classification

⁴ The outbound transfer includes the circumstances where the personal information processor transmits and stores abroad the personal information collected and generated in domestic operations, and where the personal information collected and generated by the personal information processor is stored in China but can be searched, acquired, downloaded and exported by overseas institutions, organizations or individuals.

and grading” for the regulation of GAI services. Specifically, the Interim Measures establish obligations for service providers in relation to algorithmic training, content management, users and administration. In addition, the Interim Measures suggest a series of rules encouraging the R&D and application of GAI.

In terms of administrative licensing and access of foreign investment, currently, the Chinese laws and regulations have not set any licensing requirement or restriction on foreign investment for the provision of GAI services itself. However, if GAI services would be applied in specific areas where there are licensing requirements or restrictions on foreign investment, such as value-added telecommunications services, online audio-visual program services, etc., GAI service providers may need to comply with relevant administrative licensing requirements and restrictions on foreign investment in said areas.

Anti-monopoly

▪ **The State AMR Promulgated New Supporting Rules for Anti-monopoly Law**

On March 24, 2023, the State AMR promulgated new supporting rules for the Anti-monopoly Law, including the Provisions on the Prohibition of Monopoly Agreements (“**Order No. 65**”), the Provisions on the Prohibition of Abusing the Dominant Market Position (“**Order No. 66**”), the Provisions on the Review of Concentration of Undertakings (“**Order No. 67**”), etc. Compared with the relevant supporting rules previously effective, highlights of said three new rules are as follows:

- a. Order No. 65 (a) improve the relevant provisions on vertical monopoly agreements, add a safe harbor system in general, but without detailed application standards; (b) refine the relevant provisions on organizing business operators to reach monopoly agreements and providing substantive assistance; (c) improve the relevant provisions on the enforcement procedures of administrative cases and relevant legal liabilities.
- b. Order No. 66 (a) focus on improving the antitrust provisions in the field of platform economy based on recent enforcement experience; (b) clarify the factors to be considered for determining the "relevant market"; (c) improve the enforcement procedures for cases of abusing the dominant market position.
- c. Order No. 67 (a) clarify the factors for determining “obtain control” and “implement the concentration;” (b) optimize the method of calculating the turnover for undertakings participating in the concentration; (c) refine the implementation rules for suspension of the review period of a concentration of undertakings; (d) increase the penalties for illegal implementation of concentration of undertakings and refine the provisions on legal liabilities.

Life Science

- **The Ministry of Science and Technology Released Detailed Rules for the Implementation of Human Genetic Resources Administration**

On June 1, 2023, the Ministry of Science and Technology promulgated the Implementation Rules for the Regulations on the Administration of Human Genetic Resources (“**Implementation Rules**”), summarizing practical experience and clarifying relevant questions arising from the implementation of the Regulations on the Management of Human Genetic Resources (“**Regulations**”) promulgated in 2019.

Highlights of the Implementation Rules include: (a) specifying the definition of “human genetic resource (“**HGR**”) information”, which includes information of human gene and genome data generated from HGR materials,⁵ but excludes clinical data, imaging data, protein data, and metabolic data; (b) further clarifying the criteria for determining “foreign entities.” In contrast with Chinese entities, foreign entities are subject to certain regulatory restrictions on the collection, preservation, utilization, and outbound provision of HGR. According to the Regulations, foreign entities include foreign organizations and institutions established or actually controlled by foreign organizations and individuals. The Implementation Rules further explain that “established or actually controlled” means holding 50% or more of the equity interests, holding less than 50% equity interests but may control or exert material influence, or being able to control or exert material influence through investment relationships, agreements, or other arrangements; (c) narrowing the scope of HGR collection activities that are subject to approval. Specifically, the collection of HGR involved in clinical trials for obtaining drug and medical device marketing permits in China are not subject to administrative approval;⁶ (d) other aspects, including detailing the conditions, procedures and reporting requirements for the approval and filing requirements for international cooperation in scientific research utilizing HGR from China, detailing requirements for ethical review, clarifying the circumstances where provision of HGR information or making HGR information available to foreign entities are subject to security review and proposing the review procedures.

- **The National Health Commission Released New Measures to Expand the Scope of Application of Ethics Review**

On February 27, 2023, the National Health Commission, the Ministry of Education, the Ministry of Science and Technology and the National Administration of Traditional Chinese Medicine jointly released the Measures for the Ethics Review of Human-related Life Science and Medical Research (“**Measures**”). On the ground of the Measures for the Ethics Review of Human-related Biomedical Research (“**Order No. 11**”) issued in 2016, the Measures further expand the scope where ethics review is applicable by requiring that institutions where human-related life science and medical research is conducted, including medical institutions of or above Level II, any health institutions of or above the districted city level, higher learning institutions, scientific research institutes, etc., shall set up ethics review committees or entrust competent ethics review committees to conduct ethics review. The Measures further optimize the methods of ethics review and clarify the building of regional ethics review committees. After the release of the Measures, the Order No. 11 continues to be effective and would be applicable in parallel with the Measures.

⁵ The HGR materials refer to organs, tissues, cells and other genetic materials that contain human genome, genes and other genetic substances.

⁶ This exception only applies to the circumstance where collection of HGR for a large-scale population study involving more than 3,000 people. If the circumstance involves collecting HGR of important genetic lineage, HGR of specific regions, or prescribed types of HGR, the administrative approval will still be required.

Other Laws and Regulations

- **The State AMR Issued New Measures for the Administration of Proficiency Testing of Inspection and Testing Agencies**

On March 27, 2023, the State AMR issued Administrative Measures for the Proficiency Testing of Inspection and Testing Agencies (“**Administrative Measures**”), replacing the Implementing Measures for Laboratory Proficiency Testing (“**Implementing Measures**”) promulgated in 2006.

The Administrative Measures apply to proficiency testing performed by the AMR on inspection and testing agencies in order to assess whether their technical capacities continue to meet the conditions and requirements of qualification certifications. Compared with the Implementing Measures, the Administrative Measures supplement relevant provisions on the organization, implementation, acceptance and supervision of proficiency testing and specify relevant measures for the processing of proficiency testing results.

- **The Ministry of Finance and the State Taxation Administration Issued Policies to Reduce Burdens on Taxpayers**

To further reduce burdens on taxpayers, the Ministry of Finance and the State Taxation Administration issued the Announcement on Continuing the Individual Income Tax Policy Regarding Allowances and Subsidies for Foreign Individuals (“**Announcement No. 29**”) and the Announcement on Continuing the Individual Income Tax Policy for One-time Annual Bonuses (“**Announcement No. 30**”) on August 18, 2023, which would remain in effect until December 31, 2027. The main contents of these two announcements are as follows:

- a. The Announcement No. 29 specifies that foreign individuals eligible as resident individuals may choose to benefit from either the special additional deductions for individual income tax, or, according to relevant regulations, the preferential tax exemption policies for housing subsidies, language training fees, children’s education fees and other allowances and subsidies received. However, the foreign individuals cannot benefit from both at the same time. Once they chose the benefit, it cannot be changed within a tax year.
- b. The Announcement No. 30 specifies that resident individuals who receive one-time annual bonuses may choose to include these bonuses in their comprehensive income of the year for tax calculation purpose, or, subject to the satisfaction of relevant regulations, to exclude these bonuses from the comprehensive income of the year and to tax them separately by dividing them into 12 months and applying the calculation method stipulated in the Announcement No. 30.

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