



# China refreshes the regulation on archives administration in relation to overseas listings

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Following the issuance of a new set of rules governing PRC companies listing or seeking listing overseas, the China Securities Regulatory Commission (**CSRC**), Ministry of Finance, National Administration of State Secrets Protection (**NASSP**) and National Archives Administration of China jointly issued on 24 February 2023 the revised *Provisions on Strengthening Confidentiality and Archives Administration of Overseas Securities Offering and Listing by Domestic Companies* (**Regulation 44 (2023)**), which will supersede the 2009 version (**Regulation 29 (2009)**) by the end of March 2023.

The previous Regulation 29 (2009) was one of the most important and early expressions of the PRC's approach to data generated in connection with listings by Chinese companies amid the wave of overseas listings. We are well versed in matters relating to overseas listings, and have particular expertise in respect of Regulation 29 (2009). In the past decade we have helped several leading global accounting firms navigate the compliance requirements under Regulation 29 in both the overall strategic planning as well as some major projects concerning specific listed entities.

As one of the new rules for overseas listings<sup>1</sup>, Regulation 44 (2023) revises the earlier version of the archive rules governing the storage of data generated in connection with overseas listings, which was promulgated in 2009 (**Regulation 29 (2009)**), but the basic principle remains the same in our view. Namely, data collected and

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<sup>1</sup> Notably, the *Trial Administrative Measures of Overseas Securities Offering and Listing by Domestic Companies*.

generated by securities companies and securities service providers (such as underwriters, accounting firms, and law firms) in connection with an overseas listing should generally (i) be stored in the People's Republic of China (PRC)<sup>2</sup> and (ii) not transferred outside of the PRC without approval.<sup>3</sup>

However, there are certain key developments in the new version of the rules, which suggest a broadening of PRC regulatory scrutiny for overseas listings. For example, the authorities have now clarified that the various regulations on document storage and management that concern overseas listings apply to both direct listings overseas **as well as indirect overseas listings**, including, among others, a listing via a variable interest entity (VIE) structure or comparable arrangements.

Regulation 44 (2023) also refines the dual-responsibility approach which requires both the PRC company as well as its securities companies and securities service providers to bear responsibility for safeguarding certain regulated information in connection with listing-related activities. That being said, Regulation 44 (2023) mandates that the PRC company should first assess its regulated information and then issue a written statement to the securities companies and securities service providers it has retained -- suggesting that the PRC company is to undertake a primary role in this process. We discuss this in more detail below.

## 1. Highlights of Regulation 44 (2023)

### a) Indirect Listings are now regulated

Regulation 44 (2023) applies not only to “direct overseas offerings and listings” (**Direct Listings**), as Regulation 29 expressly stipulated, but also to “indirect overseas offerings and listings” (**Indirect Listings**) of PRC companies. (Articles 1 and 2)

- Direct Listings refer to overseas offering and listing by a PRC-incorporated joint-stock company.
- Indirect Listings refer to overseas offering and listing by a company in the name of an overseas incorporated entity, whereas the company’s major business operations are located domestically and such offering and listing is based on the underlying equity, assets, earnings or other similar rights of a PRC company.<sup>4</sup> One of the most notable examples is listings with a VIE structure where the listed entity (often an offshore SPV) controls the interests of PRC operating entities through special arrangements. It is widely believed that SPAC listings would also be covered when it acquires PRC businesses.

### b) Regulated Information

Regulation 44 (2023) further specifies three categories of information in the documents and materials related to overseas listings that need to be strictly protected (**Regulated Information**). Regulated Information includes:

- State secrets (in Chinese “国家秘密”). State secrets generally refer to matters related to national security and interests as determined under statutory procedures and only accessible to a limited range of personnel within a certain period.<sup>5</sup>
- Working secrets of government agencies (in Chinese “国家机关工作秘密”). Working secrets are not clearly defined under PRC law. Some publications by NASSP indicate that it has adopted a working-level definition by including matters and information generated by government agencies during their

<sup>2</sup> For the purpose of this article, PRC refers to the Chinese mainland, excluding the Hong Kong SAR, Macau SAR and Taiwan.

<sup>3</sup> Article 6 of the *Regulation on Strengthening Confidentiality and Archives Administration of Overseas Securities Offering and Listing by Domestic Companies*, promulgated by CSRC on 20 October 2009, [2009] No.29.

<sup>4</sup> Article 2 of the *Trial Administrative Measures of Overseas Securities Offering and Listing by Domestic Companies*, promulgated by the CSRC on 17 February 2023, [2023] No.43.

<sup>5</sup> Article 2 of the *Law of the People's Republic of China on Guarding State Secrets*, promulgated by Standing Committee of the National People's Congress on 29 April 2010 and effective since 1 October 2010, Order No.28 of the President of the People's Republic of China.

official activities and internal management, which would affect the normal exercise of their administrative functions and directly disrupt the work order of the agencies once leaked.<sup>6</sup>

- Information that may be detrimental to national security or public interest once leaked (in Chinese “其他泄露后会对国家安全或者公共利益造成不利影响的文件、资料”). This is also an undefined term within Chinese law. The term itself reminds of the definition of another term “important data” under the PRC data law regime – data that “once tampered with, destroyed, leaked, or illegally acquired or used, may endanger national security, economic operations, social stability, public health and safety”.<sup>7</sup> It is unclear how these two terms will interrelate with each other in practice.

### c) Primary responsibilities of PRC companies listing or seeking listing overseas

Regulation 44 (2023) adopts a dual-responsibility approach when it comes to various stakeholders’ responsibilities to safeguard Regulated Information in the context of overseas listings. A PRC company listing or seeking listing overseas and the securities companies and securities service providers retained by it are both required to comply with Regulation 44 (2023), while the PRC company appears to bear the primary obligation to identify Regulated Information. The PRC company is required to take the following steps:

#### i) Identify Regulated Information

Before handing documents or materials to any other parties, including to the securities companies and securities service providers retained by it and/or foreign regulators, a PRC company listing or seeking listing overseas should decide whether such documents or materials contain Regulated Information. If there is any, proper governmental approvals should be obtained. (Articles 3 and 4)

- State secrets. The PRC company shall first obtain approval from the NASSP or its local counterparts and/or the regulator overseeing the industries in which the company operates. The PRC company should seek the opinion of the NASSP or its local counterparts when there is any doubt over whether a piece of information is a state secret.
- Working secrets of governmental agencies. Pending further clarification, it is less clear which authority the PRC company should turn to. In practice, the PRC company typically consults with the agency that generates the implicated information.
- Information that may be detrimental to national security or public interest once leaked. It is unclear yet which governmental authorities would be responsible to grant such approvals.

Based on our experience, the process of obtaining such approvals could be complex and time-consuming. The actual approval procedure may vary from case to case, depending on the nature of the company as well as the information involved. It is advisable to seek professional opinion as soon as possible when such a need arises.

#### ii) Issue a written statement to securities companies and securities service providers

When providing documents or materials to the securities companies and securities service providers retained by it, the PRC company is required to produce a written statement outlining its compliance with the above identification requirements. In return, the securities companies and securities service providers should sign a non-disclosure agreement with the PRC company, which will be discussed in the following section. (Article 5)

<sup>6</sup> See e.g., <http://www.gjbmj.gov.cn/n1/2019/0509/c420077-31076032.html>. A few government agencies such as the Ministry of Public Security have issued normative documents illustrating working secrets with regard to their respective administrative areas.

<sup>7</sup> Article 19 of the *Measures for the Security Assessment of Outbound Data Transfer*, Order No. 11 of the Cyberspace Administration of China.

### iii) Special requirement for accounting archives

When it comes to providing accounting archives or copies thereof to other parties, the PRC company should also comply with applicable national regulations. From a textual reading, this rule is applicable whenever accounting files are to be provided, regardless of whether such files may contain Regulated Information or not. (Article 8).

The language in Regulation 44 (2023) is silent on what these national regulations may refer to. It may be at least partly related to the licensing requirements for non-PRC accounting firms – under PRC law, non-PRC accounting firms need to obtain a temporary licence when conducting auditing work onshore; and an earlier draft of Regulation 44 (2023) circulated for public comments had required that PRC companies should not provide accounting archives to non-PRC accounting firms failing to secure a temporary licence.<sup>8</sup> This proposed language, however, is not seen in the promulgated version.

### d) Responsibilities of securities companies and securities service providers

Regulation 44 (2023) clarifies the obligations of securities companies and securities service providers in respect of receiving Regulated Information to facilitate overseas listing, which are more detailed than those provided in the previous Regulation 29 (2009). Specifically, the receiving securities company and securities service provider must take following steps to ensure compliance:

- For receiving any documents or materials containing Regulated Information, signing a non-disclosure agreement outlining confidentiality obligations of the parties with the PRC company providing such documents or materials. (Article 6)
- Ensuring the in-house information infrastructure used is in compliance with relevant PRC regulations on storing, processing and transmitting such Regulated Information. (Article 6)
- Obtaining appropriate approvals if the Regulated Information is to be further disclosed by the receiving securities company and securities service provider to any other parties such as an overseas regulator. (Article 6)
- Promptly taking remedies and notifying authorities in the event of a leak or possible leak. (Article 7)

In addition to the above clarifications, Article 9 reiterates that all working papers produced in the Chinese mainland by securities companies and securities service providers should be stored in the Chinese mainland, and should not be transferred outside of the Chinese mainland without approval. This follows the approach articulated in the earlier Regulation 29 (2009).

### e) Relaxed position on cross-border enforcement cooperation

Under Regulation 29 (2009), it was stressed that any onsite inspection “must be led by CSRC”, or that overseas regulators “must rely on the results obtained by CSRC”.<sup>9</sup> The current Regulation 44 (2023) removes such an express requirement. Instead, it provides that CSRC will provide necessary assistance pursuant to relevant mechanisms for bilateral and/or international cooperation. (Article 11) This echoes the latest development in the China-U.S. securities regulatory enforcement cooperation, through which the Public Company Accounting Oversight Board (**PCAOB**) in the U.S. is allowed to inspect accounting firms providing services to China-related U.S.-listed stocks on site.

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<sup>8</sup> Article 8, draft Regulation 44 (2023) circulated for public comments (“overseas accounting firms that engage in auditing services in respect of the overseas offering and listing of a PRC company shall complete the relevant procedures in accordance with relevant national regulations. PRC companies shall not provide accounting archives to an overseas accounting firm that have not fulfilled the procedures.”)

<sup>9</sup> Article 8, Regulation 29 (2009) (“The conduct of onsite inspection shall be led by the regulatory authorities of the PRC, or the results obtained by the regulatory authorities of the PRC shall be relied upon.”)

One thing that does not change is the requirement for prior approval. Similar to Regulation 29 (2009), Regulation 44 (2023) continues to require PRC companies, securities companies, and securities service providers to obtain approvals from PRC authorities before cooperating with, or providing documents to, the overseas regulators. (Article 11)

## 2. Key Implications

The revised rules, coming into effect on 31 March 2023, will likely reshape how the procedure for overseas offerings or listings by a PRC company should proceed. We highlight below some of the key implications, especially for securities companies and securities service providers.

### a) All overseas listings will be regulated

As mentioned above, Regulation 44 (2023) expressly covers both Direct Listings and Indirect Listings. The broadly-defined term “indirect offering and listing” effectively allows Chinese regulators to oversee almost all forms of overseas listings of PRC companies, including those under a VIE structure or other non-equity arrangements. This sweeping breadth of application might give rise to the need to revisit work procedures within securities companies and securities service providers and to factor in various compliance elements.

### b) Every stakeholder needs to pay attention to the protection of Regulated Information

Regulation 44 (2023) provides a helpful clarification on the primary obligor to identify Regulated Information: the PRC company listing or seeking listing overseas should in the first place follow the relevant steps to identify Regulated Information, and produce a written statement addressed to the securities companies and securities service providers it has retained.

To some extent, this may provide some comfort to securities companies and securities service providers, and such statements should be carefully reviewed and safely kept. However, it remains to be seen to what extent the receiving party may rely on the written statement to exonerate itself in the event of an enforcement action.

### c) Interplay with data laws

For transferring documents out of the PRC for the purpose of overseas listings, various PRC data laws, such as the Cybersecurity Law, the Data Security Law, and the Personal Information Protection Law may also be triggered. Regulation 44 (2023) does not specify how it interrelates with these laws and regulations, or whether there will be a coordination mechanism or streamlined procedure implemented among the competent authorities for securing approvals. It is possible that various approvals or filings may need to be obtained through separate proceedings, which would increase the complexity, uncertainty, and cost of an overseas listing.

### d) Will enforcement activities become more expansive?

In the past decade, the regulators in practice have mainly focused on accounting firms, although Regulation 29 (2009) technically applies to all securities companies and securities service providers, including underwriters and sponsors. Now as the newly promulgated Regulation 44 (2023) rolls out, it is possible that the authorities will expand their target coverage and include securities companies and securities service providers as enforcement priorities. All service provider stakeholders should remain vigilant of the developments in this area and re-examine their internal compliance procedures for such matters as soon as possible.

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