

JT&N's October, 2017 PRC Insurance News Alert

Recently, Getting The Deal Through (GTDT), an internationally recognized series of multi-jurisdictional overviews of the laws and regulations for different jurisdictions around the world, again selected the JT&N Insurance Practice as “national experts” to publish its China Insurance & Reinsurance summary chapter. Incorporating related developments since the prior year’s publication, JT&N’s new chapter provides information and analysis regarding the China regulatory environment, insurance claims and coverage, reinsurance disputes and reinsurance principles and practices, and is intended as a guide for corporate counsel, cross-border practitioners and business people around the world. The online version of the chapter may be viewed on JT&N’s website by clicking here: [GTDT 2017 China Insurance & Reinsurance](#), or via the GTDT website at www.gettingthedealthrough.com.

Elizabeth Lan Lan

Senior Partner

Beijing Office

Tel: (8610) 5706-8029

Email: lanlan@jtnfa.com

John Bolin

Senior Int'l Counsel

Beijing Office

Tel: (8610) 5706-8028

Email: johnbolin@jtnfa.com

George Yu

Partner

Beijing Office

Tel: (8610) 5706-8168

Email: georgeyu@jtnfa.com

Elsie Shi

Partner

Beijing Office

Tel: (8610) 5706-8163

Email: elsieshi@jtnfa.com

1. PRC State Council Promulgates Guidance to Encourage Foreign Investment in China

On August 8, 2017, the PRC State Council promulgated the “Circular Regarding the Encouragement of the Growth of Foreign Investment” (the “Foreign Investment Circular”), which provides general direction with respect to measures intended to strengthen foreign investment in China, and delegates a set of key objectives to relevant governmental authorities for implementation, each as further discussed below.

- Reduce market access barriers to foreign investment. In order to reduce restrictions on foreign investment in China and expand market openness, China is to fully implement pre-establishment national treatment and market access negative list processes governing foreign investment that have been recently tested in pilot free trade zones. In addition, the government will act to further encourage foreign investment in designated sectors, including insurance, banking, and the Internet. Relevant departments are directed to provide specific timeframes and roadmaps.
- Establish more favorable fiscal and taxation policies to benefit foreign investors. China is to further encourage foreign investment by establishing more favorable fiscal and taxation treatment for foreign investors at different governmental levels. For example, provincial governments may be permitted to issue local government bonds and to adopt other fiscal supportive policies in order to support the development of national-level development zones. Additionally, profits which are earned by foreign investors from invested enterprises in China,

Contact Us

Questions?

Contact our experts at

JTN Insurance:

jtninsurance@jtnfa.com

and which are to be re-invested in eligible encouraged investment projects in China, may be entitled to tax-deferrals and temporary exemptions from withholding tax.

- Improve the integrated investment environment in national-level development zones. China will provide preferential approval for the development of land in national-level development zones for foreign investment projects, and will support national-level development zones to enhance their capacity to provide industrial service support.
- Facilitate cross-border flow of talent. China will improve procedures applicable to foreign talent visa applications, expand the scope of related visa issuance, and relax restrictions with respect to visa validity periods.
- Enhance the general business environment in China. China will work to improve the general business environment for foreign investors by instituting improvements in the national legal system and foreign exchange control regime, and also by enhancing intellectual property protections relevant to foreign investment.

2. CIRC Issues Revised Draft Measures for Equity of Insurance Companies

On July 19, CIRC released the "Second Draft Measures for Equity of Insurance Companies" (the "Second Draft Measures"), with a public comment period that closed on August 15, 2017. CIRC released the first draft of these measures for public comment at the end of 2016. The Second Draft Measures are directly applicable to PRC-licensed insurance companies, and are applicable by reference to domestic investors in foreign-invested insurance companies.

Pursuant to the Second Draft Measures, shareholders of insurance companies are to be classified into one of the four categories: "Type I Financial Shareholders" (holding an equity interest less than 5%); "Type II Financial Shareholders" (holding an equity interest equal to or greater than 5%, but less than 15%); "Strategic Shareholders" (holding an equity interest equal to or greater than 15%, but less than 30%); and "Controlling Shareholders" (holding an equity interest equal to or greater than 30% and/or exerting "major" influence through voting rights with respect to resolutions decided at insurance company shareholder meetings.) The Draft Measures also prescribe differing qualification requirements for each shareholder category with respect to reputation, financial status, business performance, tax payment records, and compliance status.

According to the Second Draft Measures (and subject to a few exceptions specified therein):

- neither an investor nor any investor affiliate may be a Controlling Shareholder with respect to more than one insurance company engaging in similar business;
- neither an investor nor any investor affiliate may be a Controlling Shareholder or a Strategic Shareholder with respect to more than two insurance companies; and
- no single shareholder may hold an equity interest percentage in an insurance company that exceeds one third of such company's total equity.

About JT&N:

JT&N is a leading full-service PRC law firm, top-ranked by Chambers & Partners, Legal 500, and IFLR1000, among others.

In addition, insurance company equity ownership by Type I Financial Shareholders, Type II Financial Shareholders, Strategic Shareholders, and Controlling Shareholders are respectively subject to lock-up periods of one year, two years, three years, and five years, calculated from the qualification date for such ownership category.

3. CIRC Strengthens Oversight of Credit Guarantee Insurance

On July 11, 2017, CIRC promulgated the “Temporary Measures for Credit Guarantee Insurance Business” (the “Temporary Measures”), which became effective on July 11, 2017, and are intended to remain valid for a period of three years.

The Temporary Measures define what constitute credit insurance and guarantee insurance (collectively, “Credit Guarantee Insurance”) and provide heightened entry barriers for the Credit Guarantee Insurance business. Pursuant to the Temporary Measures, only P&C insurance companies demonstrating a core solvency ratio of at least 75% during the previous quarter, together with a comprehensive solvency ratio of at least 150%, may be permitted to engage in the credit insurance or guarantee insurance business. The Temporary Measures also identify excluded business activities wherein insurer involvement is prohibited. For example, an insurer may not provide credit or guarantee insurance for securitized assets or debt transfer instruments, and an insurer may not provide credit or guarantee coverage for the fundraising activities of its parent company, any subsidiary, or any other affiliate.

Pursuant to the Temporary Measures, insurance companies engaging in the Credit Guarantee Insurance business are required to enhance internal control and compliance systems with respect to organizational structure, personnel management, and auditing systems. Moreover, an insurance company intending to engage in the Credit Guarantee Insurance business must provide a business operational assessment to CIRC prior to May 1. Among other things, such report must specify the condition of internal control and compliance system and associated personnel. In some circumstances, local CIRC branch reporting may also be required. CIRC also requires that an insurance company must establish and maintain a standardized process for major risk event reporting.

In addition to general requirements regarding involvement in the Credit Guarantee Insurance business, the Temporary Measures also establish specific requirements with respect to cooperation between an insurance company and an on-line lending platform (“Online Platform”). For example, the self-retained amount must be limited when cooperating with an Online Platform. When an insurance company wishes to cooperate with an Online Platform, the insurance company must establish criteria to verify the qualifications of such platform. Additionally, the insurance company must require that the Online Platform disclose material information regarding any insurance product that has been designed or authorized by the insurance company.

JT&N's Insurance Practice

*JT&N's Insurance Practice –
Winner of the China Law &
Practice “2016 China Insurance
Law Firm of the Year” Award and
ranked by Chambers & Partners
as one of the top insurance law
practices in China.*

4. Supreme People's Court Promulgates Judicial Interpretation IV of the PRC Company Law

On August 25, 2017, the Supreme People's Court promulgated the "Provisions on Several Issues Concerning the Application of the Company Law of the People's Republic of China (IV)" (the "Judicial Interpretation"), which became effective on September 1, 2017. The Judicial Interpretation further supplements rules concerning issues relating to (i) the effectiveness of corporate resolutions; (ii) a shareholder's "right to know" (i.e., a shareholder's right to inspect and copy corporate documents and materials); (iii) a shareholder's right to a distribution of profits; (iv) a shareholder's preemptive rights, and (v) shareholder derivative suits, each as further discussed below.

- Effectiveness of corporate resolutions. Supplemental to provisions regarding voidable and void corporate decisions already included in Article 22 of the Company Law, the Judicial Interpretation recognizes suits for affirming "the non-existence of a resolution," meaning that the resolution of a shareholders' meeting or of a board meeting may be deemed to have never been made. The Judicial Interpretation also clarifies plaintiff eligibility requirements, and confirms that the legal relationship between the corporation and a bona fide counterparty will be unaffected if a resolution is subsequently voided.
- Shareholder "right to know." The Judicial Interpretation clarifies plaintiff eligibility requirements, constrains the right to exclude "unjustified purposes" (e.g., any purpose other than in the interests of the corporation), and provides that the shareholder's right to know cannot be deprived or excluded by the company's articles of association, or by any agreement among shareholders.
- Shareholder preemptive rights. The Judicial Interpretation provides detailed judicial guidance regarding procedures for exercising preemptive rights, clarifies that a transferring shareholder shall be liable for infringement of another shareholder's preemptive rights and specifies the Judicial Interpretation's applicability in transfers of limited liability company equity interests via auction.
- Shareholder rights to profit distribution. The Judicial Interpretation provides that a shareholder requesting a profit distribution must furnish evidence of an effective resolution authorizing the distribution plan that was adopted at a shareholders' meeting. The Judicial Interpretation also affirms that in a shareholder lawsuit, the defendant is to be the company.
- Derivative suits. The Judicial Interpretation confirms that the company will be the plaintiff in any derivative suit initiated by the company's board of directors or board of supervisors, and that the shareholder will be the plaintiff in any derivative suit initiated by the shareholder. Any damages awarded in a shareholder derivative suit initiated by a shareholder will be paid to the company (vice the shareholder); however, such shareholder may recover reasonable costs of litigation.

Our Offices

*JTN has offices in
Beijing, Shanghai,
Shenzhen, Chengdu,
Hefei, Jinan, Shenyang
and Xi'an*

5. CIRC Promulgates Circular re Affiliate Transaction Management

On June 30, 2017, CIRC promulgated the “Circular to Further Enhance Affiliate Transaction Management of Insurance Companies” (the “Circular”), which became effective on June 23, 2017 and which is applicable to insurance companies, insurance asset management companies and mutual insurance companies (collectively and for purpose of this article, the “Insurance Companies”).

Compared with pre-existing affiliate transaction regulation, the Circular provides two major changes:

- CIRC will apply the principle of “substance over form” in the analysis of party affiliation, as well as in its determination as to whether or not a given transaction constitutes an “affiliate transaction;” and
- internal review, report, and disclosure of “unified affiliate transaction agreements” (defined by CIRC as agreements prescribing long-term and ongoing affiliate transactions between an insurance company and its affiliates) by an insurance company may apply the standard with respect to material affiliate transactions by reference, and the term of a unified transaction agreement generally should not exceed 3 years.

Pursuant to the Circular, Insurance Companies must fulfill certain significant obligations with respect to affiliate transactions, including:

- establishing an affiliate transaction control committee (or authorizing the audit committee) to provide internal oversight over affiliate transaction processes, including (i) affiliate party identification, (ii) review and approval of affiliate transactions, and (iii) identification and implementation of effective risk management measures in connection with such transactions;
- enhancement of affiliate transaction internal control systems regarding management procedures, ensuring proper and clear preservation of affiliate transaction control committee comments in respect of compliance, business and finance; and
- monitoring funds flow and maintenance of a comprehensive awareness of the status of underlying base assets following the “look-through supervision approach” for insurance funds.

6. CIRC Issues Temporary Measures Governing Insurance Sales Practices

On June 28, 2017, CIRC issued the “Temporary Measures for Retrospective Insurance Sales Practices” (the “Temporary Measures”), which are to become effective on November 1, 2017.

Pursuant to the Temporary Measures, insurance companies and insurance intermediaries must record and preserve the key points of each insurance sales transaction with a private individual through relevant data collection, including audio and video recording and other technical means, in order to capture sales practices, to preserve relevant important information for future access, to better identify sales process problems, and to ascertain liability in the event of a dispute or other issue arising from such transaction.

7. CIRC Releases Guidance re Second-Phase of C-ROSS Implementation

On September 18, 2017, CIRC promulgated the “Guidelines for the Second Phase of the China Risk Oriented Solvency System (C-ROSS)” (the “Guidelines”).

C-ROSS, the new risk-oriented regulatory framework for the Chinese insurance industry, was originally implemented at the beginning of 2016, having been established by CIRC in order to enhance solvency supervision and to improve the existing risk-control system governing the China insurance industry. On May 5, 2017, CIRC promulgated the “Circular on Strengthening Regulatory Areas of Weakness and Building a Thorough and Effective Insurance Regulatory System,” in which CIRC announced its plan for the second phase of C-ROSS implementation. On May 16, 2017, CIRC promulgated the “Circular regarding Research on the C-ROSS and Its Implementation,” seeking comments from the insurance sector regarding future development of C-ROSS. On July 31, 2017, CIRC released draft Guidelines with a public comment period that closed on August 8, 2017.

The Guidelines set out general guidance with respect to the second-phase implementation of C-ROSS to be conducted during the next three years, establishing general objectives and specific tasks, and focusing on (i) further enhancement of the C-ROSS supervisory system and establishment of a rating system for risk and solvency; (ii) integration of recent information technology developments (e.g. cloud computing, big data, and artificial intelligence) to provide support for the C-ROSS supervision system; and (iii) strengthening cooperation with other regulatory authorities.

8. CIRC Releases Draft Measures for Information Disclosure of Insurance Companies

On August 16, 2017, CIRC released the draft “Measures for Information Disclosure of Insurance Companies” (the “Draft Measures”), with a public comment period that closed on September 20, 2017.

This Draft Measures are intended to replace the “Measures for Information Disclosure of Insurance Companies” (the “2010 Measures”) which were promulgated by CIRC on May 12, 2010, and which specify the scope of information that an insurance company must publicly disclose via its official website. Compared with the 2010 Measures, the Draft Measures strengthen disclosure requirements by mandating that insurance companies must disclose additional categories of information, and by establishing additional requirements with respect to the specific content of certain existing categories. For example, insurance companies are required to disclose the identity of their actual controller, as well as the means by which such controller may realize its control, and are also required to disclose information in connection with the company reserves during the prior year. The Draft Measures also set forth specific standards for identification and disclosure of major claim payments and major litigation or arbitration.

9. Recent Developments in Cybersecurity and Data Protection Regulation

Over the course of the past year, China has promulgated or proposed several important new laws, regulations and standards relating to cybersecurity and data protection, including:

- The Cyber Security Law (published November 7, 2016 and effective June 1, 2017)
- Draft “Measures for Evaluating the Security of Transmitting Personal Information and Important Data Overseas” (published by the Cyber Space Administration of China (“CAC”) on April 11, 2017)
- Draft “Information Security Technology - Guidelines for Data Cross-Border Transfer Security Assessment” (published by the National Information Security Standardization Technical Committee (the “NISSTC”) on May 27, 2017)

In addition, within recent months, Chinese authorities have published a number of supplemental draft guidelines and standards, including:

- “Draft Regulations on Protecting the Security of Critical Information Infrastructure,” published by CAC on July 10, 2017 (the “Draft Critical Information Infrastructure Regulations”);
- “General Security Requirements for Network Products and Services” (published by the NISSTC on August 30, 2017);
- “Guide to Security Inspection and Evaluation of Critical Information Infrastructure” (published by the NISSTC on August 30, 2017);
- “Systems of Indicators for the Assurance of the Security of Critical Information Infrastructure” (published by the NISSTC on August 30, 2017);
- “Guidelines for Cross-Border Transfer Security Assessment” (published by the NISSTC on August 30, 2017); and
- “Draft Guidance for De-Identifying Personal Information” (published by the NISSTC on August 25, 2017).

With respect to data protection standards and requirements, two documents with particular relevance to the China insurance industry are: (i) the newly revised Draft Guidelines for Cross-Border Transfer Security Assessment and (ii) the Draft Guidance for De-Identifying Personal Information.

- Draft Guidelines for Cross-Border Transfer Security Assessment. Originally published in May of 2017, the newly revised Draft Guidelines clarify certain important terms, such as “domestic operations,” “cross-border data transfer” and “assessment by competent authorities,” as well as clarifying other aspects of the Draft Guidelines. For example, according to the Draft Guidelines, a network operator that is not registered in China would still be deemed to be conducting “domestic operations” if it conducts business within the territory of China, or provides products or services within the territory of China. Even if the data collected by a network operator is not stored outside of China, if an overseas entity, institution or individual

is able to access the data remotely, then a cross-border transfer of the data may be deemed to occur.

- Draft Guidance for De-Identifying Personal Information. The Draft Guidance for De-Identifying Personal Information is a proposed voluntary technical specification which provides key steps for the de-identification of personal information, including isolation of the identifiers using methods such as manual analysis, choosing models for the de-identification of personal information, verifying the security and usefulness of the data after its de-identification, and supervising the process of de-identification.

Please note: Recipients who no longer wish to receive this News Alert may reply to jtninsurance@jtnfa.com and request to be deleted from our distribution list.

Attorney Advertising. This information is offered only for general informational and educational purposes. It is not offered as and does not constitute legal advice or legal opinion. This material is intended, but not promised or guaranteed to be current, complete or up-to-date. Communication of the information is not intended to create, and the receipt does not constitute, an attorney-client relationship. You should not act or rely on any information contained in this material without first seeking the advice of a qualified attorney.

Copyright © 2017 JT&N