SHOULD CHINA CONCEPT STOCKS BE IDENTIFIED AS "CHINESE" OR "FOREIGN"?

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Abstract: Didi Global kept a low profile to get listed in the United States, but after a successful IPO on the New York Stock Exchange, it encountered a series of stringent regulatory sanctions in subsequent times, involving the regulatory concerns of cyber security and protection of personal information, etc. Then Didi Global announced its delisting from the United States and was considering listing on the Hong Kong Stock Exchange. The Didi Debacle reveals the trend that Chinese enterprises in specific industries and sectors, especially in those are defined as Key Information Infrastructures, are facing more and more stringent domestic compliance requirements. This trend, coupled with the regulatory movement of the United States starting to enforce the *Holding Foreign Companies Accountable Act*, increases the risks and uncertainties in offshore financing for China-Dimension Stocks. This article takes the Didi Debacle for example, reveals that the regulatory outlook and prospects for China-Dimension Stocks' overseas listings in the United States are undergoing drastic changes, and explains the reasons.

Keywords: China-Dimension Stocks, Didi, key information infrastructures, overseas listing, Holding Foreign Companies Accountable Act

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INTRODUCTION

After Didi Global's successful but low-profile listing on the New York Stock Exchange on June 30, 2021, it encountered a cybersecurity review launched by the Cybersecurity Review Office affiliated to the Cyberspace Administration of China (hereinafter referred to as the "CAC") only three days later, followed by the rectification measures imposed by the CAC on Didi, including removing the "DiDi Chuxing" app (operated by Tianjin-registered DiDi Chuxing Science and Technology Co., Ltd.) from app stores and suspending the registration of new users, due to its serious violations of laws and regulations in collecting and using personal information. Didi's stock price has fallen in response and has so far fallen below the issue price. This has triggered a round of class actions of US stock market's investors called by Wall Street law firms, and has in turn dealt a heavy blow to the sector of US-listed China Concept Stocks as a whole, thus once again pushing the crisis of China Concept Stocks, which was triggered by the astonishing accounting scandal and fraud of Luckin Coffee since April 2020, to a new critical situation (see Jing Leng, *Beyond the Audit Dispute: What's the Solution to the Crisis of China Concept Stocks?*, CHINA LAW REVIEW 179 (2021).).

On July 8, 2021, Didi was again confronted the call launched by Democratic Senator Chris Van Hollen, one of the initiators of the *Holding Foreign Companies Accountable Act*, that the SEC should initiate an investigation on Didi. On July 9, 2021, the domestic regulatory storm escalated again: also due to serious violations in the collection and use of personal information, the CAC announced to notify app stores to remove 25 apps including "Didi Enterprise Version", which were all operated by Beijing Xiaoju Technology Co., Ltd. This company was under the control of Didi's founder Wei Cheng. And the CAC ordered all websites and platforms not to provide access or download services for these removed apps. This attracted the attention of all walks of life for its intensity of regulation and wide scope of rectification.

While the issues of data security, cyber security and national security risk prevention involved in the Didi Debacle are massively discussed from the perspective of cyber law and data law, this article focuses on the equally sensitive and important issue of cross-border securities activities regulation involved in this event: a major shift in China's domestic regulatory regime for red chip listings is about to take place, which will most likely incorporate the requirements of pre-registration approval and post-registration compliance, taking information security, data security and national security into consideration, and highlight the outlook that private China Concept Stock companies involved in sensitive industries will face the situation where both the securities regulatory authority and industry competent authority assert and tighten territorial jurisdiction when they go abroad for red chip listings.

I. LEGAL RISKS, MARKET RISKS, OR POLITICAL RISKS?

The direct legal basis for the cybersecurity review of Didi is the *Measures for Cybersecurity Review* (hereinafter referred to as the "Measures"), which came into effect on June 1, 2020. The Didi case is the first case since the introduction of the Measures. It is no coincidence that after the investigation of Didi, the Internet platform enterprise Full Truck

Alliance Group (formed by the merger of Yunmanman and Huochebang) and BOSS Zhipin also received the notice from the CAC to implement the cybersecurity review in accordance with the Measures, and stopped new user registration during the review period. Similarly, Yunmanman, Huochebang, and BOSS Zhipin got listed in the US in June, 2021, whose market values exceeded 10 billion US dollars respectively. Likewise, these companies are the leading Internet platform companies, and hold a huge number of users, vehicles, and road management network data. This is additional evidence that US-listed China Concept Stock companies operating in sensitive industries are increasingly being scrutinized closely by competent industry authorities in China, and are experiencing strict domestic compliance requirements and national security red lines from the precipitously tougher regulatory measures. Compliance matters include and are not limited to the legality and appropriateness of the collection and use of domestic users’ personal information, the maintenance of national data security, and anti-monopoly considerations. Like Didi, it is with high probability that these three companies will face the US stock market investor class actions resulting from the slump in share price triggered by the domestic regulatory measures encountered by them.

From this perspective, the legal and market risks among the multiple risks of listing China Concept Stocks in the US are showing a trend of mingling with the political risks in the context of international and domestic political and economic climate. Legal risks are mainly manifested in the enforcement measures taken by the US Securities and Exchange Commission (hereinafter referred to as the “SEC”) and the US Public Company Accounting Oversight Board (hereinafter referred to as the “PCAOB”) in terms of information disclosure and financial audit irregularities, as well as securities fraud class actions filed by the investors. Market risks include short-selling institutions’ sniping, business and stock price volatility due to adjustments in industry regulatory policies and competitive landscape, as well as investor confidence ebbs and flows and valuations rise and fall in case that the conceptual core of China Concept Stocks is reconfigured. Political risks include the restrictions, sanctions and “decoupling” measures taken by the US out of bilateral competition and its national security concerns in the midst of a severe test of US-China relations, with the *Holding Foreign Companies Acco1untable Act* promulgated at the end of 2020 to strengthen the disclosure obligations of China Concept Stocks and the PCAOB’s right of access to audit working papers as milestone events, as well as adjustments of China’s domestic regulatory laws and policies driven by its national security concerns.

Taking the Didi Debacle for example, in terms of the overall features of the crisis confronted by China Concept Stocks in the US, it is no longer uncommon for legal risks to be directly triggered by political risks, and the circumstances of each case are quite complex. That is often embodied in the model that the acts in violation of regulation occurred in the domestic product and service market trigger regulatory measures, with the effects of which spilling over to the foreign capital market, thus triggering regulatory measures and investor litigation on the other side of the Pacific Ocean. The two distinct markets—the domestic product and service market and the overseas capital market—are thus linked in a unique resonant and transmissive manner.

Just observing the origins of the multiple class actions filed against China Concept Stocks in the US stock market that happened from the outbreak of the Luckin Coffee fraud event in early 2020 till the first half of 2021, the author finds that in a considerable number of cases, due to the disadvantageous information position at the beginning of the litigation, the initial source of evidence for the plaintiffs' filing is unearthed from regulatory and punitive measures taken by the domestic regulatory authorities of China, in addition to the short-selling reports of short-selling institutions (see Table I and Table II). The information in the tables proves that none of the following leading Internet companies are sued in the United States not in this way: iQIYI, Genshuixue, Baidu, Douyu, Qutoutiao, Alibaba, and Didi…

Another fairly prominent reason for the occurrence of lawsuits is that the offers to buy out US investors are allegedly to be low when China Concept Stocks choose to delist from the US market because of the high cost of maintaining listing status (especially after encountering the class actions for the first time). This type of lawsuits accounts for nearly a quarter of the cases in Tables I and II, and is a fairly mainstream category of legal risk in the US for China Concept Stocks. It can be concluded that it is "not difficult to go overseas", "but difficult to exit".

Table I: Summary of Class Actions Encountered by China Concept Stocks in the US in 2020

Data Source: Stanford Law School, Securities Class Action Clearinghouse: http://securities.stanford.edu/

No.	Filing date of the litigation	Name of China Concept Stocks	Cause of action
1	January 15, 2020	500.com Limited	500.com Limited (NYSE: WBAI) is alleged to have made false statements between April 27, 2018 and December 31, 2019, in terms of its Japanese branch's action to bribe Japanese officials in violation of the US *Foreign Corrupt Practices Act*.
2	January 22, 2020	Qudian Inc.	Qudian Inc. (NYSE:QD) is alleged to have made materially false and misleading statements about the company's business, operations and compliance policies, particularly with respect to the negative impact on its business and revenue of China's tightening on online consumer lending regulations.

3	February 13, 2020	Luckin Coffee Inc.	Luckin Coffee Inc. (NASDAQ:LK) is suspected of falsifying transactions and committing massive financial fraud.
4	February 13, 2020	SORL Auto Parts, Inc.	SORL Auto Parts, Inc. (NASDAQ:SORL) is alleged to have omitted material information from the Proxy Statement submitted in connection with the solicitation of shareholder votes in its going private process.
5	March 4, 2020	Canaan, Inc.	Canaan, Inc. (NASDAQ:CAN) is alleged to have made false and/or misleading statements on, and/or have failed to disclose the following facts: (1) the purported “strategic cooperation” is actually a transaction with an affiliate; (2) the company’s financial condition is worse than what have been disclosed; (3) the company has recently removed a large number of distributors from its website right prior to the IPO, many of which are small or suspicious enterprises; and (4) the main business of the company’s several largest Chinese clients in previous years were not bitcoin mining, therefore they are unlikely to be long-term customers of the company.
6	March 24, 2020	DouYu International Holdings Limited	DouYu International Holdings Limited (NASDAQ:DOYU) is alleged to have made false/misleading/concealing disclosures regarding the company’s

			business, operations and compliance, specifically with respect to the compliance risks of top streamers’ live stream content, the financial costs of attracting top streamers to the site, as well as the negative financial consequences caused by the “lucky draw” event being removed due to gambling-related suspect.
7	April 9, 2020	E-House (China) Holdings Limited	E-House (China) Holdings Limited (NYSE:EJ) is alleged to have made numerous omissions, false and misleading statements with respect to its public solicitation of ADS holders’ voting rights in the going private transaction in 2016.
8	April 16, 2020	iQIYI, Inc.	iQIYI, Inc. (NASDAQ:IQ) is alleged to have made false/misleading/concealing statements when disclosing about the company’s business, operations and compliance, specifically overstating the number of subscribers, revenue and acquisition consideration, as well as misrepresenting the revenue.
9	April 17, 2020	GSX Techedu Inc.	GSX Techedu Inc. (NYSE:GSX) is alleged to have made false/misleading/concealing disclosures about the company’s business, operations and compliance, specifically misrepresenting the profits, revenue, number of enrolled students, teacher qualifications, and teacher selection procedures, with potentially negative financial consequences.
10	April 21, 2020	Jumei International Holding Limited	Jumei International Holding Limited (NYSE:JMEI) is alleged to have unfairly depressed the purchase price quoted to investors and

			undervalued the company in the going private transaction.
11	April 21, 2020	Baidu, Inc.	(NASDAQ:BIDU) is alleged to have made materially false and misleading statements about the company’s business, operations and compliance policies. The alleged undisclosed information includes that its feed services are deemed by the CAC to be “low-brow content” for failing to meet China’s regulatory standards, and it has received the order of rectification.
12	April 24, 2020	Phoenix Tree Holdings Limited	Phoenix Tree Holdings Limited (NYSE:DNK) is sued for allegedly failing to disclose poor performance due to the Covid-19 pandemic.
13	July 6, 2020	China XD Plastics Company Limited	China XD Plastics Company Limited (NASDAQ:CXDC) is sued for allegedly offering an unreasonably low price to investors in the going private transaction. The plaintiff dismissed the case voluntarily on October 16, 2020.
14	July 17, 2020	Sky Solar Holdings, Ltd.	Sky Solar Holdings, Ltd. (NASDAQ:SKYS) is alleged to have made material misrepresentation and inadequate disclosures in the going private transaction for the purpose of depressing the offer price to the investors.
15	July 24, 2020	Wins Finance Holdings Inc.	Wins Finance Holdings Inc (NASDAQ:WINS) is alleged to have made materially false and/or misleading statements, and/or have failed to disclose the following facts: (1) the loan to Guohong Asset Management Co., Ltd. in the amount

			of RMB 580 million (Guohong Loan) has a high probability of becoming a bad debt due to the high uncertainty of its ultimate repayment amount; (2) the Guohong Loan becoming a bad debt will have a material adverse impact on the financial and operating conditions of the company; (3) the company’s internal control over its financial reporting remains weak, despite its repeated assurances to investors that it is taking steps to remedy the weaknesses; and (4) it can be foreseen that the independent audit is probable to resign.
16	August 19, 2020	Baidu, Inc.	Baidu, Inc (NASDAQ: BIDU), as the controlling shareholder of iQIYI, is alleged to have made false and/or misleading statements, and/or have failed to disclose the following facts: (1) Baidu misrepresented iQIYI’s financial and operating conditions; and (2) iQIYI’s internal control over financial reporting is inadequate. This is the second round of class actions encountered by Baidu in 2020.
17	August 20, 2020	Qutoutiao Inc.	Qutoutiao Inc (NASDAQ: QTT) is alleged to have made materially false and/or misleading statements, or have failed to disclose the following material adverse facts: (1) Qutoutiao replaces the

			original advertising agent with an affiliate, thereby avoiding the third party’s overview of the content and quality of its advertisements; (2) the affiliate places advertisements on its mobile app for questionable products such as weight loss products and Viagra, which are deemed false advertisements under the relevant applicable regulations; (3) the company’s abovementioned actions will trigger increasing regulatory investigations and reputational damage; (4) the company’s advertising revenue may decline as a result; and (5) the company’s misrepresentation will cause losses to the investors due to the fall in share price when the truth should be revealed.
18	September 9, 2020	Lexinfintech Holdings, Ltd.	Lexinfintech Holdings, Ltd (NASDAQ: LX) is alleged to have made false and/or misleading statements, and/or have failed to disclose the following matters: (1) LexinFintech artificially reduced delinquency rates by providing working capital to borrowers to assist them in repayment; (2) the company’s business model caused significant losses to shareholders by prioritizing off-balance sheet lending to lenders in China and downplaying its default

			risk in its disclosures; (3) the company exaggerated the size of its user base; (4) the company facilitated P2P loans that violated Chinese law; (5) the company failed to disclose related transactions; and (6) the company lacks adequate internal controls.
19	September 29, 2020	Pintec Technology Holdings Limited	Pintec Technology Holdings Limited (NASDAQ: PT) is alleged to have filed a false and misleading IPO registration statement, omitting statements of material fact or failing to disclose the following matters: (1) the company incorrectly recorded revenue from certain technical service fees on a net basis instead of a gross basis; (2) material weaknesses exist in Pintec’s internal controls over financial reporting related to cash advance to related party, Jimu Group, outside the normal course of business, and non-conventional loan financing transaction with a third party, Plutux; (3) as a result of the aforementioned, the company’s financial statements for 2017 and 2018 were misstated, resulting in significantly lower true net income than the amounts previously disclosed; and (4) therefore, the affirmative statements made by defendant

			regarding the company’s business, operations and prospects were false and/or misleading.
20	November 13, 2020	Alibaba Group Holding Limited	Alibaba Group Holding Limited (NASDAQ: BABA), the majority shareholder of Ant Group, is alleged to have made materially false and/or misleading statements, or have failed to disclose the following matters: (1) Ant Group did not meet the qualifications for listing or disclosure requirements of the relevant market in respect of certain material matters; (2) certain upcoming changes in the fintech regulatory environment would affect Ant Group’s business; (3) the IPO of Ant Group on the SSE and HKSE was likely to be suspended due to the abovementioned reasons; and (4) as a result of the abovementioned, the defendant’s positive statements about the company’s business, operations and prospects were materially misleading and/or lacked a reasonable basis.
21	November 20, 2020	JOYY Inc.	JOYY Inc (NASDAQ: YY) is alleged to have made false and/or misleading statements, and/or have failed to disclose the following matters: (1) JOYY overstated its revenue from real-time streaming sources; (2) at any given time, the majority of users were bots;

			(3) the company utilized these bots to implement roundtripping schemes, thereby creating false revenue; (4) the company’s cash reserves were overstated; and (5) the company’s acquisition of Bigo was primarily for the benefit of the corporate insiders.
22	November 20, 2020	Berry Corporation	Berry Corporation (NASDAQ: BRY) is alleged to have included false statements of material facts in the offering documents, and have failed to make required disclosures. In addition, materially false and misleading statements were made regarding the company’s business, operations and compliance policies: (1) Berry materially overstated the efficiency and stability of its operations; (2) the company would have to make predictable improvements to its operational inefficiencies and lack of stability, which would result in productivity impacts and increased operating costs for the company; (3) the abovementioned situation would have a negative impact on the company’s revenue; and (4) therefore, the offering documents and the company’s public statements were materially false and/or misleading, and failed to disclose information that was required to be disclosed.

23	December 8, 2020	Changyou.com Limited	Changyou.com Limited (NASDAQ: CYOU) is alleged to have made in its 13E-3 trading statement filed for the going-private delisting transaction led by its majority shareholder, Sohu, false and misleading statements regarding dissenters’ rights (also known as appraisal rights) under the laws of the Cayman Islands, where it is domiciled. In particular, the notifications regarding certain important minority shareholder rights were overpassed.
24	December 10, 2020	Semiconductor Manufacturing International Corporation	Semiconductor Manufacturing International Corporation (OTC-BB: SMICY) is alleged to have made false and/or misleading statements, and/or have failed to disclose: (1) the existence of “unacceptable risk” that the equipment provided to SMIC would be used for military purposes; (2) foreseeable risk of facing legal restrictions from the US; (3) some of SMIC’s suppliers will have “difficulty obtaining” individual export licenses due to restrictions imposed by the US Department of Commerce; and (4) therefore, the company’s public statements were materially false and/or misleading.

Table II: Summary of Class Actions Encountered by China Concept Stocks in the US in 2021

No.	Filing date of the litigation	Name of China Concept Stocks	Cause of action
1	January 20, 2021	Lizhi Inc.	Lizhi Inc. (NASDAQ: LIZI) is alleged to have made false and/or misleading statements in a confidential registration statement on Form F-1 filed with the SEC on August 6, 2019, and/or have failed to disclose: at the time of the IPO, the coronavirus was already raging in China, affecting the company’s headquarters, major markets and key hubs, its employees and customers; Coronavirus-related complications have negatively impacted Lizhi’s business, as employees and customers have contracted the virus, lost their jobs, or experienced difficulties in producing and publishing content critical to the Lizhi platform; the complaints against the company by its employees and customers even before the IPO, have damaged the company’s reputation and financial position and prospects; and (4) therefore, the company’s registration statement was materially false and/or misleading.
2	January 20, 2021	9F Inc.	9F Inc. (NASDAQ: JFU) is alleged to have made false and/or misleading statements regarding the listing materials, and/or have failed to disclose: (1) in light of 9F’s ongoing contractual disputes with PICC Insurance Company of China (hereinafter referred to as the “PICC”) over the payment of service fees under the Cooperation

			Agreement, the value, benefits claimed by the company’s financial partners and its three-way cooperation business model did not actually exist, and/or were grossly exaggerated; (2) the recoverability of the service fees owed to 9F by PICC under the Cooperation Agreement was in doubt and there was a serious risk of rejection of payment; (3) there was a significant risk that PICC would no longer provide credit insurance and guarantee protection for the investors and institutional capital partners; (4) due to the abovementioned reasons, the company’s platform, business model, reputation and financial performance were materially damaged; and (5) therefore, the company’s statements regarding its business, operations and prospects were materially false and misleading, and/or lacked a reasonable basis.
3	February 17, 2021	Jianpu Technology Inc.	Jianpu Technology Inc. (NYSE: JT) is alleged to have made materially false and/or misleading statements, and have failed to disclose material adverse facts about the company’s business, operations and prospects, specifically: (1) some of the transactions conducted by the company’s Credit Card Recommendation Business Unit involved undisclosed relationships or lacked business substance; (2) as a result of the above, the

			company’s revenues and costs for fiscal years 2018 and 2019 were overstated; (3) significant deficiencies existed in internal controls over financial reporting; and (4) therefore, the company’s 2018 Financial Form 20-F could be reasonably required to be restated.
4	February 17, 2021	EHang Holdings Limited	EHang Holdings Limited (NASDAQ: EH) is alleged to have misled investors by misrepresenting and/or failing to disclose the following facts: the company claimed that the regulatory approvals obtained by EH216 in Europe and North America were actually for the purpose of drones rather than carrying passengers; the company’s relationship with its purported primary client was bogus; since its ADS began trading on Nasdaq in December 2019, EHang has actually collected only a small percentage of its reported sales; the company’s manufacturing facilities were barely unoccupied and lacked evidence of the presence of advanced manufacturing equipment or employees; and therefore, the company’s public statements were materially false and misleading.
5	March 1, 2021	MoneyGram International,	MoneyGram International, Inc. (NASDAQ: MGI) is alleged to have made false and/or misleading statements,

		Inc.	and/or have failed to disclose: (1) XRP, the cryptocurrency that MoneyGram used as part of its Ripple partnership, was considered unregistered, and therefore illegal under the SEC regulation; (2) if the SEC decided to enforce law and regulation against Ripple, MoneyGram could lose lucrative market development fees, which are critical to its financial performance; and (3) therefore, the company’s public statements were materially false and/or misleading.
6	April 8, 2021	Ebang International Holdings Inc.	Ebang International Holdings Inc. (NASDAQ: EBON) is alleged to have made materially false and/or misleading statements, and have failed to disclose material adverse facts about the company’s business, operations and prospects, specifically: (1) proceeds from the public offering of Ebang were used to repay low-yielding long-term bonds to an underwriter and related parties, but not to develop the company’s business; (2) Ebang’s sales were declining and the company inflated reported sales by including sales of defective products; (3) Ebang failed to go public in Hong Kong due to alleged embezzlement of investor funds and inflated sales figures; (4) so-called cryptocurrency transactions were simply cryptocurrency transactions purchased out of the box;

			and (5) therefore, positive statements about the company’s business, operations and prospects were materially misleading, and/or lacked a reasonable basis.
7	April 15, 2021	Canaan Inc.	Canaan Inc. (NASDAQ: CAN) is alleged to have issued materially false and misleading statements and omitting material facts, thus artificially inflating the prices: Canaan concealed that due to ongoing supply chain disruptions and the launch of the company’s next-generation A12 series of bitcoin mining machines, Canaan’s fourth quarter sales declined by more than 93% year-over-year compared to the sales of the fourth quarter of 2019, and by more than 93% year-over-year, compared to sales of the third quarter of 2020.
8	June 9, 2021	RLX Technology Inc.	In its F-1 registration statement (including all amendments thereto) and prospectus, RLX Technology Inc. (NYSE: RLX) is alleged to have made misrepresentation and/or have omitted the company’s then existing facts: Namely, the company was at the background of China’s ongoing efforts to establish national standards for e-cigarettes, which would align the e-cigarette regulations with the regular cigarette regulations. And the company’s reported financial performance was not as strong as projected in the offering materials. Therefore, investors allege that it artificially inflated the stock price.

9	June 22, 2021	Tarena International, Inc.	Tarena International, Inc. (NASDAQ: TEDU) is alleged to have made false and/or misleading statements, and/or have failed to disclose: (1) certain employees have interfered with the external auditing of financial statements during certain periods; (2) the company’s revenues and expenses were inaccurate; (3) the company entered into business transactions with organizations owned, invested in, or controlled by its employees or their family members, which was not properly disclosed by the company; (4) as a result of the abovementioned, the company’s financial statements since from 2014 were inaccurate; and (5) therefore, statements about the company’s business, operations and prospects were materially false and misleading, and/or lacked a reasonable basis.
10	To be determined	Didi	On July 4, 2021, Didi issued a press release announcing the “application removal in China”, which stated that “it is confirmed that the ‘Didi Chuxing’ application has the problem of collecting personal information in violation of the relevant laws and regulations of the People’s Republic of China.” Subsequently, a number of US law firms began scrambling to release information about the call for investors to file class actions.

			According to the law firms’ class litigation solicitation survey, the false and misleading statements made by the issuer or the accused company to the market are as follows: Didi might have “collected personal information in violation of relevant Chinese laws and regulations”. The company’s application will be subject to cybersecurity review by the CAC, and its applications has been removed from all app stores nationwide. Based on the abovementioned facts, the company’s public statements were misrepresented and materially misleading during the period of the IPO. The deadline for the call for investor information was September 7, 2021. On July 6, 2021 the class actions were filed with the Southern District of New York, captioned *Espinal v. DiDi Global Inc. f/k/a Xiaoju Kuaizhi Inc.*, No. 21-cv-05807, and the Central District of California, captioned *Franklin v. DiDi Global Inc.*, No. 21-cv-05486.

China’s change of the regulatory caliber after the Didi Debacle indicates that the regulatory picture of China Concept Stocks going public in the US will be dominated by several parallel scenarios as follows: first, it will be “difficult to go overseas” (the “travel permit” or “no objection letter” system for pre-registration approval of red chip listings may be reintroduced); second, it will be “difficult to stay” (the compliance cost of maintaining listed in the US exchange market is high, in particular, the compliance risks increase substantially in terms of the disclosure and audit working papers review under the *Holding Foreign Companies Accountable Act*); third, it is also “difficult to exit” (going private transactions are not easy). If this is the case, what will happen to China Concept Stocks as they do not only have an immediate need for industrial financing, but also contractual obligations to assist venture capitalists to exit for achieving reasonable financial returns in accordance with international

business and investment practices?

II. THE FOCUS SHIFT OF COMPLIANCE CONCERNS FOR CHINA CONCEPT STOCKS GOING PUBLIC OVERSEAS: FROM THE US EXTRATERRITORIAL ENFORCEMENT JURISDICTION TO CHINA'S TERRITORIAL JURISDICTION

The current round of China Concept Stocks turmoil triggered by the Didi Debacle has demonstrated new features: the hot legal and policy issues involved in the US listing of China Concept Stocks have evolved from the previously highlighted impediments to the US SEC's intention of extraterritorial jurisdiction enforcement and the impasse in cross-border securities regulatory collaboration between the US and China (especially embodied in cross-border audit disputes) (Jing Leng, *Beyond the Audit Dispute: What's the Solution to the Crisis of China Concept Stocks?*, CHINA LAW REVIEW 179 (2021).), into the question of whether the territorial jurisdiction of China's regulatory authorities to conduct qualification and compliance reviews on the overseas listing of China Concept Stocks is about to be fully activated and strengthened. Some commentators have even inferred that the "red chip listing travel permit" (the "no objection letter" issued by the China Securities Regulatory Commission (hereinafter referred to as the "CSRC") to approve the private companies to go public in overseas markets indirectly by means of small red chip listing), which has been suspended for 17 years, will soon return to the center of the domestic regulatory landscape. This is not alarmism: after the Didi Debacle, the General Office of the CPC Central Committee and the General Office of the State Council jointly issued the *Opinions on Strictly Cracking Down on Illegal Securities Activities in Accordance with the Law* (hereinafter referred to as the "Opinions") on July 6, 2021. This signals the irresistible trend of tightening the domestic approval and regulatory calibers for overseas listings of China Concept Stocks, with considerable urgency in the task of regulatory revision and institutional strengthening.

At the same time, in order to help China Concept Stocks to cope with the unprecedented and converging political, market and legal risks encountered in the overseas markets, (with the political risks being the most prominent and intractable one to deal with), it is not enough to only gatekeep or even lift the threshold of their overseas financing. It is necessary to start with strongly activating and expanding the financing function of domestic capital market and the Hong Kong stock market, so as to respond to the corporate financing needs of the industries involved in China Concept Stocks, and open up exit channels for domestic and foreign investors to obtain reasonable financial returns. This should effect a permanent cure. Otherwise, the measures taken for domestic regulation of China Concept Stocks' overseas financing would be not effective enough.

As to the listing of Didi, from submitting the Form-1 secretly to the SEC on April 9, 2021 to the listing on the NYSE on June 30, 2021, it took just over two months, setting a new record for the speed of listing China Concept Stocks in the US—the registration and approval process for Alibaba's listing on the NYSE in 2014 took a total of four and a half months, which was already astonishingly fast at the time. This terrifies from the other side that Didi's compliance with the US stock market regulatory authority and the exchange in terms of the registration application and listing application respectively is quite rigorous and standardized,

as evidenced by the fact that Didi has only amended its registration form twice at the request of the SEC (Alibaba's listing on the NYSE in August 2014 went through seven times of changes to its registration form). The total capital raised of more than 4 billion US dollars was fully subscribed on the first day of Didi's Bookkeeping. This also proved that in addition to the rigorous and standardized prospectus, the roadshow content presented by Didi to investors was also quite exciting and extremely convincing. For example, in the 17-minute roadshow video, Didi's founder Wei Cheng, President Qing Liu and Vice President and Head of International Business Jingshi Zhu (all three founders are the "partners" who will enjoy super voting rights in the post-IPO corporate governance structure to maintain their control right) appear in successive scenes. At the background of the interaction between real-life scenes and animated images, they introduced Didi's business model, corporate culture and development vision in fluent Chinese and English, in particular mentioning the future scenario of popularization of intelligent cars and self-driving travel ecology supported by artificial intelligence (AI) technology and massive traffic data, which was quite impressive to investors. Meanwhile, before the IPO, the official website of DiDi Science and Technology Co., Ltd., the operating entity of the domestic online car app "DiDi Chuxing", was upgraded from http://didichuxing.com to https://www.didiglobal.com/ with a bilingual interface.[1] In other words, the communication between Didi and the intermediary service institutions that assisted its listing and the regulatory authorities, exchanges and investors in the US stock market should be considered quite adequate and effective.

To step further, accompanying with the smooth communication with overseas regulatory authorities and investors, and strict compliance with overseas laws, how were Didi's communication with domestic regulatory authorities and its domestic compliance measures, as well as their effects, in the process of Didi's going public in the US? Two questions are involved

[1] According to a commentator, Didi adopted a business model that continues to burn money and is slow to turn a profit, relied on more than 20 rounds of equity capital raisings before listing, and raised more than 20 billion US dollars. The company has nearly 100 institutional shareholders, including Apple, Toyota, Alibaba, Foxconn and other well-known enterprises, along with Hillhouse, Sequoia and other venture capital organizations. The Softbank Vision Fund has been involved in several rounds of financing, investing 10.8 billion US dollars and owning 21.5% of the company's shares; while Uber has acquired 12.8% of Didi's shares through the sale of its Chinese operations; and Tencent also holds 6.8% of the company's shares. Such a large-scale financing process greatly diluted the shareholding percent of Didi founders. Wei Cheng, Chairman of the Board & CEO of Didi, owns 7% of the company's shares, while President Qing Liu owns 1.7%. Before the listing, the aggregate shareholding percent of the Directors and the Management was only 10.5%, and the 20.1% voting rights were nowhere near enough to balance out the external major shareholders. As to the post-IPO control issues, Didi intends to endure the Management's control in two ways. First, to endow Didi's Management more than 50% of the voting rights through the design of dual-class share structure with weighted voting rights, with Wei Cheng and Qing Liu holding more than 48% of the voting rights. Second, to establish the Didi Partnership with Wei Cheng, Qing Liu and Jingshi Zhu as Founding Limited Partners to exercise control over the company. A Partner in Didi is entitles to appoint or remove an Executive Director and has the right to nominate and recommend candidates for senior management positions. See Xin Chen, *The Value Game of Didi's IPO*, CAPITAL WEEK, 2021.

here. First, did Didi need to obtain permit and approval from China’s domestic securities regulatory authorities—mainly the CSRC—to go public in the US? This could be reflected in the form of a “hello” type of formal filing (after the listing) and a “getting permit” type of substantive review (before the listing). Second, before going public in the US, does Didi need to obtain the going-public-abroad approval from the competent authorities of its domestic business operators—such as the CAC, the State Administration for Market Regulation, and the Ministry of Transport—with the preconditions of meeting the legal compliance requirements of industry operations, make certain compliance commitments, and reflect those in the legal opinion issued by the issuer’s law firm? This can be reflected in compliance commitments at various stages of before, during and after the IPO.

An issue of more general significance for China Concept Stocks is that: if the Internet platform companies such as Didi, which may have the attribute of “key information infrastructure operator” under China’s *Measures for Cybersecurity Review*, and the companies operating in other sensitive industries, are characterized as “real foreign-owned” China Concept Stocks whose listed entity is domiciled outside of China and with foreign capital accounting for major proportion of its shareholding structure (classified as “foreign companies” under the Company Law of China and “overseas enterprises” under the Securities Law of China respectively), then do they need to report to the domestic regulatory authorities for approval of their overseas listing and to obtain approval as a pre-condition for overseas listing?

The reason why these companies are considered to be “real foreign-owned” rather than “sham foreign-owned” lies with their source of capital and equity structure. For instance, after several rounds of venture financing before listing, when Alibaba and Didi went public, the shareholding ratio of foreign investors in their shareholding structure far exceeded that of the management team. And the shareholding ratio of the management team was further reduced after the listing. This is also an important reason why both companies have adopted a “partnership” system distinguished from the dual-class share structure to maintain management team’s control right after the listing. Moreover, in the mechanism design of Didi, it even nests an extra dual-class share structure with weighted voting rights, which can be regarded as “double insurance”. However, as all of the critical main business, profit sources, consumers and product and service markets are located in the territory of China and are mastered by China’s domestically incorporated entities, do all such China Concept Stocks need to report to the domestic regulatory authorities for their overseas financing practices and to be approved as

a pre-condition for going public in the US?[2]

The second question is relatively simple. Because the competent authorities of the domestic entities in charge of China Concept Stocks like Didi actually hold the decisive power of industrial regulation, with Didi's attributes of being in the sensitive industry, it must proactively seek dialogue and communication with regulatory authorities such as the CAC before going public in the US, in order to reach consensus and obtain regulatory clearance (either explicitly or implicitly) as a prerequisite for laying out the operational aspects of the listing. Therefore, foreign medias such as the Wall Street Journal has carried reports that domestic regulatory authorities "want Didi to delay its listing." In this sense, it is not difficult to understand that industry regulatory authorities require commitments from domestic entities of issuers on compliance matters. Of course, such authority has not been clearly confirmed and sorted out in the current main securities laws and regulations, and is expected to be effectively integrated with the relevant system of securities law in the future based on the Opinions issued by the two general offices. If that system is established, the disclosure of information in the issuer's prospectus (including the legal opinion) must respond to this.

As to the first question, i.e., the jurisdiction issue of domestic securities regulatory authorities in terms of giving permit, the answer given by the relevant domestic securities laws and regulations and their applicable practices is relatively lenient, but at the same time relatively lacks clear guidelines. In practice, issuers and their listing service intermediary institutions mainly conduct case studies and make judgments referring to the leniency and strictness of the regulatory policies applicable at that time.

Be it the listing of Alibaba in the US during the effectiveness of the old Securities Law or the listing of Didi in the US during the effectiveness of the revised new Securities Law, the relevant provisions of neither Securities Law explicitly provide for pre-registration approval procedure with the CSRC for private China Concept Stock companies registered outside China to raise capital abroad in the red chip model. In contrast, the indirect listing of state-owned enterprises in the "big red chip" model has long been subject to the pre-registration approval jurisdiction of the Department of International Affairs at the CSRC. Indirect listing is a relative concept to direct listing (i.e., H-share listing). Table III presents a comparison of the characteristics of the H-share model for direct listing and the red chip model for indirect listing,

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[2] As to whether Didi is a "key information infrastructure operator" under the Measures for Cybersecurity Review, there are differentiated claims in practice and the regulatory authorities have yet delivered official replies. The measures simply state that "key information infrastructure operators who procure network products and services that affect or may affect national security" should be subject to a cyber security review under the measures. However, the launch of a review case does not necessarily involve procurement by the operator of the key information infrastructure. If a common product has a significant security risk, when used with the potential to seriously compromise national security, the product may fall under the jurisdiction of a cyber security review, even if it is not part of the procurement process described above. See Huanhuan Luo, *Zuo Xiaodong of China Information Security Research Institute: The Focus of the Censorship on Didi is on the Outbound Security Risks of Important Data*, SOUTHERN WEEKLY, July 4, 2021, http://www.infzm.com/content/209140.

reflecting the relative advantages and disadvantages of the two models for issuers.

Table III Comparison of the characteristics of direct and indirect listings

Comparative Aspects	H-Share Model	Red Chip Model
Offering Method	Operating assets and business as a joint-stock company established in Mainland China and applying for listing in overseas markets.	Taking control of the operating assets and business in Mainland China by way of direct establishment or return acquisition by companies established outside of China (Hong Kong, Bermuda, Cayman Islands, British Virgin Islands) and applying for listing in overseas markets.
Advantages	Not necessary to set up a company abroad for a return acquisition; free of tax burdens associated with inbound and outbound restructuring.	Existing major shareholders’ lock-up period is short (6-12 months), after which they are free to transfer, making it easy to exit; easy follow-up financing, the board of directors has the general authorization to issue a certain percentage of the total equity capital annually, and the flexibility of capital market operations such as share allotments and rights issues is relatively high; the approval process is relatively simple.
Disadvantages	The CSRC may require the company’s major shareholders to make a lock-up commitment of more than one year, which is not conducive to exit; the H-share full flow pilot bring in considerable risks for future exit of major shareholders in the short term; subsequent financing requires	For mainland shareholders, they need to set up a red chip structure that is not subject to the restriction of “Circular No. 10”; the approval and restructuring procedures for return acquisitions are cumbersome; and relatively high taxes and fees may occur upon restructuring.

	CSRC’s approval, which increases the difficulty and uncertainty of the offering.	
Domestic Approval Process and Requirements	Applications can be submitted directly to the CSRC, which has also simplified the requirements for application documents in recent years; approved documents are valid for 12 months.	According to the provisions of “Circular No. 10”, the return acquisition in the restructuring is subject to the approval of the Ministry of Commerce and the CSRC, and needs to meet the requirements of the permitted red chip structure.
Post-Listing Liquidity	Only H shares are circulating shares, the others are non-circulating A shares, until April 2018 when the H share full circulation pilot officially opened the gate.	All old and new shares are circulating shares, and major shareholders are free to buy and sell shares after expiration of the lock-up period.

With respect to the CSRC’s jurisdictional authority to approve the overseas red chip listing of private China Concept Stock companies, specifically, Article 238 of the old Securities Law, applicable at the point of Alibaba’s listing, provides that “domestic enterprises that directly or indirectly go abroad to issue securities or list their securities for trading abroad must be approved by the securities regulatory authorities of the State Council in accordance with the provisions of the State Council.” In other words, “overseas enterprises”—such as Alibaba Group Holding Limited and DiDi Global Inc., both registered in the Cayman Islands—as issuers, do not fall into the jurisdiction of this provision. At least in the literal sense of the provision, they are not required to file with the CSRC for approval of their IPO activities abroad. In contrast, Article 224 of the new Securities Law, applicable at the point of the Didi’s listing, provides that “domestic enterprises that directly or indirectly go abroad to issue securities or list their securities for trading abroad shall comply with the relevant provisions of the State Council.” This article is a delegative provision, which clarifies that the regulatory rules for the overseas financing activities of domestic enterprises in China are formulated by the State Council. Currently, the bodies of promulgating such rules include the State Council and its competent industry departments, mainly including the Ministry of Commerce, the State Administration of Foreign Exchange, National Development and Reform Commission, the State-owned Assets Supervision and Administration Commission of the State Council and the CSRC. Of course, whether the normative documents issued by the departments under the State

Council can be interpreted as “relevant provisions of the State Council” is disputable. But in practice, it is common that the principle and general regulations of the State Council would be detailed in the ministerial rules and norms, which are also important bases for securities regulation and law enforcement.

Article 224 of the new law has significantly loosened the control of cross-border financing activities of domestic enterprises—from “must be approved by the securities regulatory authorities of the State Council in accordance with the provisions of the State Council” under the old law to “shall comply with the relevant provisions of the State Council” under the new law. Despite the subtle textual change, it only deleting the word “must be approved” by the CSRC, the change is profound at the systematic reform level. On the one hand, Article 224 of the new law continues to confirm the institutional arrangement that cross-border financing activities of domestic enterprises should be subject to domestic supervision, with the State Council as the competent authority to promulgate the provisions as the basis for supervision. In other words, while Article 224 removes the word “must be approved” by the CSRC, it does not negate that the approval process still needs to be performed in accordance with the State Council’s provisions, involving various steps of submission, review and approval, as well as foreign exchange administration, taxation administration, state-owned equity administration, industry supervision, foreign capital M&A supervision, etc. On the other hand, this article lightens the compulsory color of the prior substantive review as the main method of domestic supervision (“must” is changed to “shall”), echoing the reform trend in practice of gradually shifting to ex post filing and ex ante reporting system. The purpose of the amendment of this article is to serve the goal of government reform and State Council’s institutional reform to streamline administration and delegate powers to lower levels, minimizing administrative licensing matters, or simplifying administrative licensing procedures as much as possible, so as to improve the business environment in the country, and at the same time encourage and facilitate domestic enterprises to carry out financing activities abroad, attracting abundant international capital for the development of China’s substantial economy and industrial structure transformation.

However, Article 224 of the new law has limitations, which are found by comparing it with Article 238 of the old law: it still inherits the structure of the old law (no separate chapter has been set up on cross-border securities regulatory matters, while relevant provisions exist mainly in the chapter of “Supplemental Provisions”) and the content of the old law (only covering cross-border and foreign-related securities activities of domestic enterprises, but not touching the securities offering, listing and trading activities of overseas enterprises in either domestic or foreign markets). In this regard, it is possible to provide in an interpretive sense that Article 2(4) of the new Securities Law for the first time incorporates provisions on the extraterritorial application in the field of securities law, providing a legal basis for domestic regulatory institutions, including the CSRC, to establish, assert and exercise jurisdiction over securities activities occurring in foreign markets, regardless of whether the relevant subject is registered in or outside China. As long as the application prerequisites of “disturbing” the order of the domestic market, and “damaging” the legitimate rights and interests of domestic investors are met, jurisdiction can be initiated, i.e., to be “handled” and “held liable” in

accordance with the relevant provisions of the securities law. However, Article 2(4) clearly configures the territorial jurisdiction of domestic institutions targeting at the ex post facto scenario where the fact of overseas listing has occurred—otherwise there would be no talk of the application prerequisites of "disturbing" and "damaging". This term is more suitable for the application in the factual scenario like Luckin coffee's fraud event which brought about negative consequences of the domestic market, but with no direct application of meaning for case like prior Didi's listing in the US, with regard to determining whether pre-registration approval jurisdiction is necessary out of national security and other regulatory considerations.

Similarly, the two concepts of "domestic enterprises" and "overseas" appear again in Article 224 of the new Securities Law, as they did in the old law. As with the old law, the new law still does not provide a clear definition of these two terms. To understand through the interpretation and application of the relevant provisions of the Supplemental Provisions before the amendment, the "domestic enterprises" in Article 224 mainly refer to the enterprises registered with the administrative department for industry and commerce according to the provisions of the laws of mainland China, and does not distinguish between state-owned enterprises and private enterprises. The question is whether those red chip enterprises which are not registered in Mainland China but whose core assets, main business profit sources and key senior management are located in Mainland China, even with the aforementioned "real foreign-owned" shareholding structure, should be considered as "domestic enterprises" under the securities law, and thus come under the scope of Article 224? If the legislative intent of Article 224 is not to extend the regulation to the overseas listing of these part of China Concept Stocks, should the "extraterritorial application provision" in Article 224 (which can hardly be interpreted as granting the CSRC pre-registration approval authority for overseas red chip listings) be supplemented by amendment to the Securities Law to incorporate provisions governing the domestic approval of the overseas listing of these China Concept Stocks?

III. SHOULD CHINA CONCEPT STOCKS BE IDENTIFIED AS "CHINESE" OR "FOREIGN": "FOREIGN COMPANIES" IN COMPANY LAW VS "DOMESTIC ENTERPRISES" IN SECURITIES LAW

In this article, the author believes that in terms of the red chip enterprises such as Didi, which are recognized as overseas legal entities or foreign enterprises in the sense of company law based on their place of registration, to identify them, or to identify them mutatis mutandis as "domestic enterprises" in the context of Article 224 of the Securities Law, and thus to subject their overseas listings to domestic territorial jurisdiction (approval and regulation) is a recommendable approach that takes into account the international experience in defining the true identity of issuers and the cost and fairness of regulating the domestic securities market. The major purpose is to prevent China-Dimension Stocks that are registered in offshore markets, under the effective control of Chinese legal or natural persons, and any of total assets, net assets, operating revenues, or profits of domestic entities exceed the critical ratio (some practical experts suggest 50%), especially those enterprises in the sensitive industries, such as the "key information infrastructure operator", "critical financial infrastructure operator", etc., from touching the red line of data security and national security in the process of going public

abroad under the situation of increasingly complex and severe international competition and geopolitical battle. In addition, it can also help such enterprises to understand the content, scope, standards and remedy channels of domestic compliance matters, so as to enhance the ability to prevent risks and respond to unexpected situations. In other words, "regulating" the overseas listings of such enterprises is not only a kind of restriction and supervision but also a kind of protection and help.

Therefore, given the difference in scope and effect of application, the manner in which "domestic enterprises" is defined in the context of Article 224 of the Securities Law should differ, in terms of criteria, from the manner in which "foreign companies" is defined in Article 191 of the current Company Law (i.e., "companies established outside of China according to foreign law"). In other words, the "domestic enterprises" in Article 224 shall include, in addition to the companies established in Mainland China according to the law of China, red chip enterprises with over 50% of their total assets, net assets, operating revenues and profit sources (as long as any of them meets the ratio requirement) located in or from Mainland China. If such criteria are adopted, then even if Didi's listing entity adopts a shareholding structure with foreign capital accounting for a major proportion, which qualifies the "real foreign-owned" standard, it can still be regarded as a "domestic enterprise" under the securities law and fall into the jurisdiction of overseas listing regulation.

Although Didi Debacle's facts have yet to be ascertained, it is difficult to imagine that enterprises would be reckless in their approach to the major issues of outbound data transfer security and national security. A more likely and realistic concern for regulatory authorities is the risk that the information and data related to national security may be leaked when the enterprises disclose relevant operational and financial information (e.g., supplier lists) under the requirements of the US securities laws and regulations, particularly the *Holding Foreign Companies Accountable Act*'s requirements for disclosure and audit working papers review, and in the chains of procuring key information infrastructure products and services from domestic and foreign suppliers. For example, it is not fictitious fear that an overseas supplier of a key component of Didi's internal data storage may, in some extreme cases, "open a back door" for accessing data related to China's national security at the request of overseas regulatory authorities. In other words, if Didi did not go public, it would not have the obligation to disclose information on relevant matters. Thus, overseas regulatory authorities would have no way to obtain the list of its suppliers, transaction entries or even details of financial transactions, much less possible to use them as a grip to gain access to Didi's data stored in China.

In fact, the legal opinion issued by lawyers attached to the Didi's prospectus also states that there is no illegality or non-compliance within the meaning of Chinese law in relation to the offering. It notes in particular that: (1) the CSRC has not yet issued any final rule or interpretation as to whether the offering is in compliance with the *Provisions on Mergers and Acquisitions of a Domestic Enterprise by Foreign Investors* (i.e., the "Circular No. 10" mentioned below in "Table III"); (2) According to *Provisions on Mergers and Acquisitions of a Domestic Enterprise by Foreign Investors*, this offering does not need to obtain pre-

registration approval from the CSRC; (3) there is still uncertainty as to how to interpret and implement the *Provisions on Mergers and Acquisitions of a Domestic Enterprise by Foreign Investors*, and the above opinions are subject to any new laws, rules and regulations or any form of detailed implementing rules and interpretations relating to the M&A Rules.

Following the ferment of Didi Debacle, the debate is expected to heat up again on how to interpret the pre-registration approval provisions under the *Provisions on Mergers and Acquisitions of a Domestic Enterprise by Foreign Investors* ("Circular No. 10") and whether such provisions urgently need revising to accommodate the reality that is undergoing rapid and complex changes.

IV. FOUR STAGES OF DOMESTIC APPROVAL AND REGULATORY POLICIES ON RED CHIP LISTINGS

The regulatory authorities of the Ministry of Commerce, the State Administration of Foreign Exchange, National Development and Reform Commission and the CSRC, etc., have in different times imposed varying strictness and leniency scaled and dynamically adjusting regulatory rules for private enterprises going overseas to raise capital, or for China Concept Stocks to achieve overseas red chip listings through domestic return investments. To sum up, the attitude of the domestic competent authorities towards the indirect overseas listing of private enterprises (including private China-Dimension Stocks) in the red chip model (commonly known as the "small red chip" model, distinguished from the "large red chip" model of state-owned enterprises) has evolved through four stages, from almost complete permissiveness, to attempted strict regulation, to supporting for relaxation, and to expected tightening again after the Didi Debacle.

A. Differential Treatment, Preferential Treatment, "Barrier-Free Period" (1998-2005)

During this period, the documents related to overseas listings were only targeted at state-owned enterprises, and the regulation of overseas listings of private enterprises in red chip model was not clear, leaving room for manipulation. Therefore, from 1999 to 2005, there was a wave of private enterprises got listed overseas in red chip model, from Sina and Sohu in the earlier stage to Baidu and New Oriental in the later stage.[3]

It is noteworthy that during this period of light-touch regulation, the CSRC had issued the *Circular on Issues Concerning Stock Issuance and Public Offering Abroad of Overseas Companies Which Involve Domestic Equity* on June 9, 2000. This document regulates issuer's compliance in the process of issuing shares and listing on overseas markets such as the Hong Kong GEM and NASDAQ in the United States, by overseas companies involving domestic equity. It requires domestic lawyers to specify important matters concerning the issuer when making inquiries or filing legal opinions with the CSRC on such stock issuing and listing, and

[3] Yingmao Tang, *Why Private Companies Go Public Overseas--Regulation on the Red-Chip Model of Overseas Listing in Chinese Law*, 28 TRIBUNE OF POLITICAL SCIENCE AND LAW 163 (2019).

provides for a 15-day period for CSRC to issue "no objection letter" (i.e., approval for overseas listings).

However, with the introduction of the *Administrative License Law* in 2002, it provides that without the authorization of laws and administrative regulations, items for administrative licenses cannot be established. Therefore, the "no objection letter" was canceled, and the abovementioned circular was also abolished.[4] With the expiration of this circular, even after the introduction of the new Securities Law in 2019, the *Special Provisions of the State Council on the Overseas Offering of Shares and Listing of Joint Stock Companies* promulgated in 1997 remains the key domestic law and regulation effectively applicable in the cases of overseas issuance and listing of China-Dimension Stocks like Alibaba and Didi. It is also the law that needs major amendment according to the Opinions jointly issued by the General Office of the CPC Central Committee and the General Office of the State Council on strengthening the regulation of China Concept Stocks on July 6, 2021.

To conclude, the regulatory stance during this period can be summarized as the shift from the friendly implementation of the "no objection letter" system to the arrival of the "barrier-free period" when the "no objection letter" is completely abolished. During the barrier-free period, the overseas red chip listings of private enterprises were not subject to the approval of any domestic securities' regulatory authorities.[5]

B. Restrictions (2006-2013)

The regulatory stance during this period was marked by the *Provisions on Mergers and Acquisitions of a Domestic Enterprise by Foreign Investors* (hereinafter referred to as the "Circular No. 10") jointly issued by six ministries and commissions under the State Council in 2006. It required the approval of the CSRC (i.e., pre-registration approval) for overseas listings of special purpose companies. In this period, Article 238 of the Securities Law that came into effect in January 2006, assigned power to the CSRC to review the overseas listings; in September of the same year, with its promulgation, the Circular No. 10 became the operational measures for the CSRC to exercise this power: the core purpose of a domestic private enterprise to establish or control an offshore company is to purchase the equity of the shareholders of the domestic company or the additional shares issued by the domestic company so as to achieve the listing of the offshore company. Such operations shall company with the requirements of the Circular No. 10, as well as obtain the approval of the CSRC. In other words, logically speaking, under the requirements of Circular No. 10, Alibaba Group Holding Limited and DiDi Global Inc., both established in Cayman, would have to obtain the approval of the CSRC, if they were to list in the US as listing entities in that period. In fact, the Circular No. 10 has never

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[4] Yingmao Tang, *Why Private Companies Go Public Overseas--Regulation on the Red-Chip Model of Overseas Listing in Chinese Law*, 28 TRIBUNE OF POLITICAL SCIENCE AND LAW 163 (2019).

[5] Yingmao Tang, *Unicorn and Legal Cycle Theory in the Construction of Nation-State: A Preliminary Study on the Chinese Depositary Receipts System of Red-Chip Enterprises*, PEKING UNIVERSITY LAW JOURNAL 504 (2019).

been implemented since introduction, and there is no precedent of the CSRC approving the overseas listing of any Chinese company following this document to date. However, the lack of real implementation and no existing precedent of approval do not mean that this document is invalid. In a strict sense, the CSRC would have exercised its legitimate jurisdiction if it had exercised its pre-registration approval under the Circular No. 10 prior to Didi's listing in the US in June 2021.

C. Relaxing and Supporting Again (2014—June 2021)

There are two representative events in this period. One is the relaxation of control of the indirect listings of Chinese enterprises as reflected in the process revising the Securities Law. The Draft Revisions (First Deliberation Draft) released in April 2015 provided for a system of filing and reporting to the CSRC in Chapter IV "Cross-border Securities Issuance and Trading" in case of overseas listings of domestic enterprises, replacing the approval system. The other is that during the revision process of the *Foreign Investment Law*, the legislators tried to create the concept of "controlled by Chinese persons" in the draft—providing that the overseas entities controlled by Chinese persons, including "special purpose vehicles" (SPVs) such as Alibaba, Baidu and Didi, should be identified as "Chinese companies" rather than "foreign-owned enterprises" to facilitate their return acquisition of domestic Chinese companies. However, the *Foreign Investment Law* formally promulgated in March 2019 does not incorporate this attempt in the draft and still leaves the issue of the legality of the VIE structure blank, sustaining the uncertainty at the legislative level. This is an area of practice that is not easily grasped by intermediaries assisting in the overseas listings of China Concept Stocks when reviewing the compliance matters of the issuer.

Meanwhile, it is noteworthy of the policy-level trend. During this period, the State Administration of Foreign Exchange released the *2014 Monitoring Report on China's Cross-Border Capital Flows* (hereinafter referred to as "the Report") on February 15, 2015. it classifies China concept stock companies like Alibaba as "foreign-owned enterprises". In the column entitled "Alibaba is not Counted in the Statistics of Overseas Listings of China's Domestic Enterprises", the State Administration of Foreign Exchange states that 14 enterprises got listed in the US in 2014, including Alibaba, JD, MOMO, etc. While in terms of statistical caliber, they fall into the category of overseas enterprises rather than domestic enterprises, and therefore are not included in the category of overseas listings of domestic enterprises. The reason why Alibaba is recognized by the State Administration of Foreign Exchange as an overseas enterprise is that the entity listed on the New York Stock Exchange is "Alibaba Group Holding Ltd", which is registered in the Cayman Islands and serves as a Special Purpose Vehicle (SPV). In terms of statistical caliber, this company is an overseas enterprise rather than a domestic enterprise. Therefore, it does not belong to the category of overseas listings of domestic enterprise. The Report further states that, "The statistical object of overseas listings of domestic enterprises refers to the legal entities registered in mainland China, rather than companies with Chinese background." In other words, the Report emphasizes again that China Concept Stock companies like Alibaba are not "domestic enterprises".

It is clear that there is a subtle difference in their understanding of what constitutes "domestic enterprises" between the State Administration of Foreign Exchange, as the regulatory authority of foreign exchange matters in the process of overseas listings of domestic enterprises, and the CSRC, as the approving authority for overseas listings.

Regardless of the definition of "domestic enterprises", the CSRC has been regulating the indirect overseas listings in red chip model in recent years, but the leniency and strictness scale of enforcement has fluctuated over the years. As to Alibaba's NYSE listing in 2014, its business decision not to file with the CSRC for approval coincided with the liberalization policy of overseas listings of private companies. It was at the stage of "light-touch regulation" at the time, although "whether or not necessary to report for approval" is still an open question. However, when it comes to Didi's listing on the NYSE in 2021, its same business decision not to file with the CSRC for approval, was questioned in the post-IPO domestic regulatory storm, which signaled the next phase of drastic changes in regulatory policy and law. The CSRC has not yet taken a clearcut stand in the Didi case. Also, the Chairman of the CSRC, Huiman Yi, in an interview with Xinhua News Agency on July 6, 2021 regarding the Opinions jointly issued by the two general offices, focused mainly on "zero tolerance" for violations in the domestic securities market, without specifically mentioning the regulation of China Concept Stocks. However, it is fully predictable that in the next phase of regulation, the CSRC would devote more regulatory resources to the domestic jurisdiction and cross-border regulatory cooperation for overseas listings of China Concept Stocks in response to the Opinions of the two general offices.

D. Overall Tightening (After the Listing of Didi in the US on June 30, 2021)

As mentioned above, both the national security review by the CAC and the later Opinions jointly issued by the two general offices on strengthening the regulation of China Concept Stocks, reflect the trend of policy adjustments to restrict the phenomenon that overseas listings of China Concept Stocks in sensitive industries bypass the domestic approval and regulatory process. This time, the Opinions jointly issued by the General Office of the CPC Central Committee and the General Office of the State Council propose to strengthen the regulation of China Concept Stocks, take practical measures to respond to the risks and emergencies of China Concept Stock companies, promote the construction of relevant regulatory systems, and amend the *Special Provisions of the State Council on the Overseas Offering of Shares and Listing of Joint Stock Companies* to clarify the responsibilities of domestic competent industry authorities and regulatory authorities and strengthen cross-sectoral regulatory synergy.

Among them, how to design and implement the mechanisms and processes for strengthening "cross-sectoral regulatory synergy" between the CSRC, as the frontline regulatory authority of cross-border securities matters, and other "competent industry authorities and regulatory authorities" in China is also an urgent issue to be studied. For example, in the case of Didi, if the CAC, as the competent industry authority, has already started regulatory communication with the issuer before the listing of Didi in the US and has made clear compliance requirements on important matters related to outbound data transfer security

and national security, should it inform the CSRC, which has been empowered to approve the overseas listings of China Concept Stocks? How shall the CSRC exercise its related authority to review, guard a pass, and give the green light? Does the issuer need to disclose the above facts in the prospectus and related disclosure documents when being reviewed by the SEC for registration filing and during the period of official listing?

CONCLUSION: THE REGULATORY OUTLOOK AND PROSPECTS FOR OVERSEAS LISTINGS—OVERALL TIGHTENING OF DOMESTIC JURISDICTION FOR OVERSEAS LISTINGS OF CHINA CONCEPT STOCKS IN SENSITIVE INDUSTRIES

According to the Opinions, under the entry of cross-border securities regulatory collaboration, the General Office of the CPC Central Committee and the General Office of the State Council proposed that "the laws and regulations related to data security, cross-border data flow and management of confidential information shall be improved. The revision of regulations on strengthening confidentiality and archives management related to overseas issuance and listing of securities shall be accelerated, and the primary responsibility for information security of overseas listed companies must be fulfilled. The standardized management of cross-border information provision mechanism and process shall be strengthened. It is necessary to adhere to the principles of law and reciprocity, and further deepen cross-border audit and regulatory cooperation."[6]

In particular, the concept of "primary responsibility for information security" for overseas issuers is the first time to be introduced in the context of cross-border listing regulation, compared with the commonly seen concept of "primary responsibility for information disclosure". Moreover, this concept can be further interpreted to mean that issuers in certain sensitive industries—such as key financial infrastructures and key information infrastructures—assume greater responsibilities than the issuers in general industries, i.e., "primary responsibility for information security".

It is foreseeable that China's regulatory regime for cross-border securities activities will undergo a major shift after the Didi Debacle: private China Concept Stock companies involved in sensitive industries will soon face an overall tightening of domestic approval and regulation when they go abroad for red chip listings. As for how to tighten it, one of the ideas suggested by practical experts for consideration is the "negative list + post-IPO filing" model. For example, Shoushuang Li, a columnist for Caixin.com and expert in the practice of overseas listings of China Concept Stocks, suggests that it is not advisable to equate or compare the overseas listing review and approval mechanism for the China Concept Stocks of "real foreign-

[6] The General Office of the CPC Central Committee and the General Office of the State Council: "The Opinions on Strictly Cracking Down on Illegal Securities Activities in Accordance with the Law," July 6, 2021, http://www.gov.cn/zhengce/2021-07/06/content_5622763.htm.

owned” equity structure with that for H shares, so as to incorporate the former into the working scope of the Department of International Affairs at the CSRC. Instead, he calls for the establishment of a categorized and graded negative list by the competent industry authorities (such as the CAC and the Ministry of Education) and the securities regulatory authorities, so that entities with prohibited matters (e.g., schools in compulsory education) and entities with restricted matters (e.g., operators of key information infrastructure related to data security and national security) can only get listed after obtaining the consent of the competent authorities and securities regulatory authorities. This is similar to the current practice for offshore H-share listings, i.e., the competent authorities have power to decide whether to issue “outbound travel permit” or not, and sets up clear provisions on the review time frame and process, to break away from the situation of “tighter control ending the transformation efforts”, which would result in the conservative regulatory tendency of closing the door completely. For those China concept stock issuers that do not have negative list matters, no special review is required. Shoushuang Li also mentions that certain prohibitive requirements can be set for the domestic entities of issuers from the perspective of industry regulation and regulation of special matters, such as restrictions on outbound data transfer and restrictions on outbound transfer of audit working papers, etc., and that the domestic entities should make post-IPO filings with the CSRC and agree to accept the jurisdiction of the CSRC on certain matters under specific circumstances, so as to gradually establish the systems that enhance the regulation of China Concept Stocks, prevent risks of China Concept Stock companies and respond to emergencies as emphasized in the Opinions issued by the General Office of the CPC Central Committee and the General Office of the State Council. In this article, the author believes that the abovementioned idea takes the dual practical needs into consideration, balancing between safeguarding the red line of national security and taking care of the needs of China Concept Stock companies in critical industries to obtain financing support for their long-term development by accessing both international and domestic markets, which is worthy of attention as it provides a reasonable strategy for the continued exploration of institutional space.

While the directly revised matter in the Draft Revisions for Soliciting Comments of the *Measures for Cybersecurity Review* released by the CAC on July 10, 2021 is to bring in the national security review on the matter of overseas listings of China Concept Stocks, which can be considered as major regulatory adjustments contributed by Didi Debacle. In particular, Article 6 of the Draft Revisions for Soliciting Comments requires that “if operators with personal information of more than one million users purport to get listed abroad, they must file a cybersecurity review with the Cybersecurity Review Office.” And Article 4 specifies more than ten authorities that work jointly with the CAC to perform the national network security review mechanism, in which the CSRC is specially added. The other authorities refer to the National Development and Reform Commission, the Ministry of Industry and Information Technology, the Ministry of Public Security, the Ministry of State Security, the Ministry of Finance, the Ministry of Commerce, the People’s Bank of China, the State Administration for Market Administration, the National Radio and Television Administration, the National Administration of State Secrets Protection and National Archives Administration. Article 10 provides the factors to be considered in the review of national security risks arising from overseas listings, in which it specifically adds “the risk of key information infrastructure,

core data, important data or a large amount of personal information being influenced, controlled or maliciously utilized by foreign governments after being listed overseas”. This fully reveals that the regulators’ clear awareness of the risks that the current severe international political situation may jeopardise China’s national security through the transmission of regulatory mechanism in overseas capital markets, such as the additional information disclosure and audit working papers access requirements under the *Holding Foreign Companies Accountable Act*.

It is evident that to tighten domestic regulation and strengthen territorial jurisdiction for overseas listings of China Concept Stocks in sensitive industries with the attributes of “key information infrastructure operators” is an irresistible trend. The domestic compliance measures and due diligence of intermediaries for overseas listings of China Concept Stocks will definitely become a new industry concern and market focus. It will be a big test for China Concept Stocks to make prudent business decisions and legal judgments in this regard.

Supplementary Comments from the Author:

This article was completed on July 10, 2021. The author sincerely extends gratitude to Nuofang Wang and Hui Li, both graduate students at the International School of Law and Finance, East China University of Political Science and Law, for their research assistance. On July 21, 2022, Jing Leng adds her comments on Didi’s being fined after the cybersecurity review on Didi is settled as follows:

[Didi is fined] The cybersecurity review on Didi beginning from July 2021 finally is settled. The Cyberspace Administration of China imposes a fine of RMB 8.026 billion Yuan on DiDi Global Inc., and RMB 1 million each on its Chairman of the Board & CEO Wei Cheng, and President Qing Liu, in accordance with the Cybersecurity Law, the Data Security Law, the Personal Information Protection Law, the Law on Administrative Penalty, and other laws and regulations.

In addition, the wording is harsh and the characterization is severe:

“The facts of…violations are clear, the evidence is conclusive, the circumstances are serious and grave, the features are despicable, and should be punished severely and seriously.”

“…has handled data processing that seriously affect national security, as well as refused to fulfill the clear requirements of the regulatory authorities, and has other illegal and unlawful issues such as overtly agreeing but covertly opposing and malicious evasion of supervision. The illegal and unlawful operation of Didi brings serious security risks and hidden dangers to the national key information infrastructure security and data security. Because it involves national security, it is not disclosed in accordance with the law.”

In this light, I may still be too naive when I wrote this article on this matter last July: “Although Didi Debacle’s facts have yet to be ascertained, it is difficult to imagine that enterprises would be reckless in their approach to the major issues of outbound data transfer security and national security.”

Keep learning and keep comprehending!